



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: E&R, Inc.--Claim for Costs

File: B-255868.2

Date: May 30, 1996

Phillip E. Johnson, Federal Contract Specialists, Inc., for the protester.
Billie Spencer, Esq., and Diane Hayden, Esq., Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A protester may be reimbursed for the costs of a non-lawyer representative of filing and pursuing the protest based upon a contingent fee agreement that provides that costs are only payable if the protester obtains the contract or if costs are awarded, to the extent that the hours and rate claimed are adequately documented and reasonable.
2. The claimed hourly rate of a protester's non-lawyer representative for filing and pursuing a sustained protest is considered excessive, where it exceeds the rates that would reasonably be charged in the representative's locale to perform similar services.
3. A protester is not entitled to reimbursement of its costs of pursuing its cost claim before the General Accounting Office where the contracting agency's handling of the protester's claim was reasonable and expeditious.

DECISION

E&R, Inc. requests that we determine the amount it is entitled to recover from the Department of the Navy for the preparation of its bid under invitation for bids (IFB) No. N62470-93-B-2366, and for filing and pursuing its protest in E&R, Inc., B-255868, Mar. 29, 1994, 94-1 CPD ¶ 218.

In our prior decision, we sustained E&R's protest that the awardee's bid was not supported by a valid power of attorney, as required by the IFB. While ordinarily we would have recommended that the Navy terminate the awardee's contract for the convenience of the government, performance of the awardee's one-year contract had continued for nearly 6 months, so termination of the contract was impracticable. Accordingly, we found that E&R was entitled to its costs of bid preparation, and of filing and pursuing the protest.

The parties have agreed that E&R should be reimbursed \$1,969.08 for its reasonable costs of bid preparation. E&R requests reimbursement of an additional \$9,905.04, consisting of \$7,205.04 for its costs of filing and pursuing the protest, and \$2,700 for its costs of pursuing the claim for costs. As explained below, we find that E&R should be reimbursed \$4,805.04 for its costs of filing and pursuing the protest.

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable, if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in pursuit of the protest. Data Based Decisions, Inc.--Claim for Costs, 69 Comp. Gen. 122 (1989), 89-2 CPD ¶ 538.

In support of its claimed costs for pursuing the protest, E&R has provided the fee agreement entered into between the protester and its non-lawyer representative (Mr. Phillip Johnson of Federal Contract Specialists, Inc.), as well as billing statements that list, by date, the work performed by Mr. Johnson and the amount of time spent. Specifically, the billing statements show that Mr. Johnson performed 32 hours of work on the protest, at a rate of \$225 per hour; the statements also show long-distance telephone charges of \$5.04. The fee agreement between E&R and its representative provided that Federal Contract Specialists would "appeal" the denial of E&R's agency-level protest to the General Accounting Office and that:

"[s]hould the appeal be upheld, we will bill your company at our customary rate of \$225 per hour for time spent by our firm pursuing the appeal on the condition you are awarded the contract and/or the Comptroller General determines that you are eligible for reimbursement of costs involving the appeal. We estimate the filing expenses not to exceed \$10,000."

The Navy objects to the payment of any protest costs to E&R that are based upon the contingency fee agreement, citing 10 U.S.C. § 2306(b) and Federal Acquisition Regulation (FAR) Subpart 3.4. The Navy also argues the claimed hourly rate of \$225 per hour is unreasonable. The Navy does not challenge the number of hours claimed by Mr. Johnson for filing and pursuing the protest.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (1988), authorizes our Office to declare that an appropriate interested party is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. The underlying purpose of CICA's provisions relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest which Congress seeks to promote. See Hydro Research Science, Inc.--Claim for Costs, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572. In this regard, the bid protest process, as mandated by CICA, "was meant to compel

greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of the way current legislation is (or is not) operating.'" Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3rd Cir. 1986). Congress believed that the prospect of successful protesters being reimbursed their bid protest costs was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong., 2nd Sess. 24-25 (1984). In essence, entitlement to bid protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation. Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257; Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201.

Here, consistent with the purposes of CICA, E&R brought to light the Navy's improper acceptance of a nonresponsive bid and fulfilled its obligations as a private attorney general. The record shows, and the Navy does not dispute, that the protester's representative worked the claimed time in filing and pursuing the protest on E&R's behalf. There is also no dispute that E&R is now obligated, by virtue of the fee agreement, to pay Federal Contract Specialists for the time incurred in pursuing the protest.¹ Rather, as noted above, the Navy believes that the fee agreement provides for an illegal contingency fee arrangement in violation of 10 U.S.C. § 2306(b) and FAR Subpart 3.4.

The purpose of the contingent fee prohibition of 10 U.S.C. § 2306(b), as implemented by FAR Subpart 3.4, is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system. Puma Industrial Consulting v. Daal Assocs., Inc., 808 F.2d 982 (2nd Cir. 1987); Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981); Howard Johnson Lodge--Recon., B-244302.2, Mar. 24, 1992, 92-1 CPD ¶ 305. The prohibition only applies to situations where a selling agency agrees "to solicit or obtain" a contract from a procuring agency. Id.; Bertsch Constr., B-253526, Aug. 25, 1993, 93-2 CPD ¶ 122. The fact that a selling agency's fee is contingent upon the contractor's receiving the contract award is insufficient to bring a fee agreement under the contingent fee prohibition; rather, the regulation contemplates a specific demonstration that an

¹The fee agreement provided that E&R would pay Federal Contract Specialists at the specified rate if E&R were awarded the contract and/or was determined to be eligible for reimbursement of its bid protest costs. While we did not recommend that the Navy terminate the improperly awarded contract and make award to E&R, we found that E&R was entitled to its costs of bid preparation, and filing and pursuing the protest.

agency is retained for the express purpose of contacting government officials, where such contact poses a threat of the exertion of improper influence to obtain government contracts. Convention Mktg. Servs., B-245660.3; B-246175, Feb. 4, 1992, 92-1 CPD ¶ 144.

The fee agreement here provides only for Federal Contract Specialists' representation of E&R before our Office in the filing and pursuing of the protest. We fail to see how protesting an agency's procurement actions pursuant to the authority of CICA constitutes "solicit[ing] or obtain[ing]" a contract from a contracting agency, much less posing any threat of exertion of improper influence to obtain a government contract.

We also find no other provision in law or regulation that would bar the recovery of protest costs where the costs were incurred under binding contingent fee arrangement.² CICA, pursuant to which these costs were awarded, does not prohibit the reimbursement of costs paid under such an agreement. Indeed, as discussed above, the recovery of such costs is consistent with the purposes of CICA. Federal courts interpreting fee-shifting statutes similar to CICA have uniformly found that "reasonable attorneys' fees" may be recovered, even though the underlying legal representation agreement provided for the payment of a contingent legal fee. See, e.g., City of Burlington v. Ernest Dague, Sr., et al., 505 U.S. 557 (1992) (recovery of reasonable attorneys' fees under the Solid Waste Disposal Act and Clean Water Act); United States v. General Electric Co., 41 F.3d 1032 (6th Cir. 1994) (False Claims Act); Hendrickson v. Branstad, 740 F. Supp. 636 (N.D. Iowa 1990) (The Civil Rights Attorney's Fees Awards Act of 1976); and Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442 (N.D. Ind. 1981) (Title VII, Civil Rights Act). Similarly, boards of contract appeals have found under an analogous fee-shifting statute, the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994), that a prevailing, eligible appellant in contract disputes litigation is entitled to recover attorneys' fees, subject to certain statutory limitations, even where the fees are based upon a contingent fee agreement. See, e.g., Consolidated Technologies, Inc.--App. under EAJA, ASBCA No. 33560R, Dec. 29, 1989, 90-1 BCA ¶ 22,603; Roberts Constr. Co.--App. under EAJA, ASBCA No. 32171R, Mar. 23, 1987, 87-2 BCA ¶ 19,712 ("[w]hile the statutory limit on hourly rates may preclude award of percentage-of-recovery contingent fees, there is nothing in the statute prohibiting award of actual

²The Navy cites our decision in Bush Painting, Inc.--Claim for Costs, B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159, in support of its arguments that protest costs cannot be reimbursed based upon a contingent fee agreement. Unlike Bush, however, in which there was no evidence in the record that the protester had any obligation to pay the consultant for its claimed services, the record here establishes that E&R is now obligated under the terms of the fee agreement to pay its protest representative for the time incurred filing and pursuing the protest.

fees at an hourly rate, within the specified rate limit, contingent on recovery on the merits.")

In sum, we conclude that E&R may be reimbursed for the reasonable costs of its non-lawyer representative in filing and pursuing the protest based upon a contingent fee agreement, to the extent that the hours and rates claimed are adequately documented and reasonable. CICA's purpose of relieving successful protesters of the burdens of vindicating public interests would be frustrated if E&R were not reimbursed for the protest costs it owes its representative.

The Navy also challenges the reasonableness of Mr. Johnson's claimed rate of \$225 per hour. In this regard, the agency states that it attempted to compare Mr. Johnson's claimed rate with the rates of other government contract consultants in his locality--Garner, North Carolina--but determined that there were no other consultants engaged in similar work in Mr. Johnson's vicinity or in North Carolina. The agency states, however, that it surveyed attorneys' rates at three law firms in Raleigh, North Carolina, and found that these attorneys billed between \$100 and \$175 per hour.

E&R does not dispute that the attorneys' rates proffered by the Navy are representative of the rates billed by lawyers in North Carolina, but instead responds that its claimed hourly rates should be compared to the rates billed by government contract lawyers in Washington, D.C. as reported in our Office's cost claim decisions. See, e.g., Komatsu Dresser Co.--Claim for Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112.

We disagree with E&R that the reasonableness of Mr. Johnson's claimed rate should be compared to the rates charged by government contract lawyers in Washington, D.C. In reviewing the reasonableness of rates charged by legal counsel for filing and pursuing protests, we generally compare the claimed rates with the rates charged by other similarly situated counsel for similar work in the community. See Armour of Am., Inc.--Claim for Costs, *supra*; Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. We think that a similar rule should apply in the case of non-lawyer representatives, such as Mr. Johnson, who specialize in representing government contractors. There is no evidence in the record, however, establishing that there are other non-lawyer protest representatives in Mr. Johnson's community to whom we could look to establish an amount that would be considered a customary fee for these services. We are aware of other non-lawyer protest representatives, however, that have charged \$150 per hour to perform similar services. See, e.g., W.S. Spotswood & Sons, Inc.--Claim for Costs, 69 Comp. Gen. 622 (1990), 90-2 CPD ¶ 50. In the absence of any other evidence in the record, and given that a rate of \$150 per hour is well within the range of fees that appear to be customarily billed by lawyers in North Carolina, we

conclude that E&R should only be reimbursed for its representative's time at a rate of \$150 per hour.

Accordingly, we find that E&R is entitled to be reimbursed for 32 hours of Mr. Johnson's time at \$150 per hour and for \$5.04 for out-of-pocket expenses, for a total reimbursement of \$4,805.04 for its costs of pursuing the protest.

E&R also requests that the Navy reimburse it \$2,700 for the costs incurred in pursuing its claim before our Office. Our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2) (1995), provide that we may declare a protester entitled to reimbursement of the costs of pursuing its claim at our Office. This provision is designed to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. See ViON Corp.--Claim for Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219; Manekin Corp.--Claim for Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237.

Here, we do not find E&R entitled to reimbursement of its costs of pursuing its claim before our Office. The question of whether reasonable protest costs can be reimbursed where the underlying fee agreement provided for the payment of contingent fees has not been previously addressed by our Office. Thus, while we ultimately disagree with the agency's position, we are unable to say that the agency was not justifiably concerned that the payment of protest costs may not be allowable. In addition, the record establishes that the agency acted with reasonable promptness in negotiating E&R's claim before the matter was submitted to our Office. Under these circumstances, we think that the agency's handling of E&R's claim was reasonable and expeditious and should not provide the basis for the award of costs of pursuing this claim at our Office.

In conclusion, we find that E&R is entitled to be reimbursed a total of \$4,805.04 for its costs of filing and pursuing the protest. In addition, the parties have agreed that E&R is entitled to be reimbursed \$1,969.08 for its reasonable costs of bid preparation.

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