



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Ervin & Associates, Inc.—Costs

File: B-278850.2

Date: August 1, 1999

John Ervin, Ervin & Associates, Inc., for the protester.
Gary A. Nemecek, Esq., Department of Housing & Urban Development, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office (GAO) recommends that protester be reimbursed costs of filing and pursuing protest only to the extent that such costs are sufficiently documented and are reasonable; where protester provided no support for its claimed overhead, GAO recommends that no overhead costs be reimbursed.
2. Protest costs incurred in connection with agency-level protest are not recoverable.

DECISION

Ervin & Associates, Inc. requests that we determine the amount it should recover from the Department of Housing and Urban Development (HUD) for the costs of filing and pursuing its protest in Ervin & Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89.

We recommend that Ervin be reimbursed \$1,448.19 out of its total claim of \$13,252.50.

Background

On February 17, 1995, HUD issued request for proposals No. DU100C000018424, calling for the award of multiple indefinite-quantity task order contracts to provide accounting support services. Ervin initially filed an agency-level protest alleging that a task order issued to one of the awardees improperly exceeded the contract's scope of work. After HUD denied that protest, Ervin filed essentially the same protest in our Office.

We sustained the protest based on our conclusion that the task order improperly exceeded the contract's scope of work. We recommended that HUD terminate the task order and conduct a competitive acquisition to meet its needs for the services. We also recommended that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). We advised Ervin to file its certified claim for such costs, "detailing the time expended and the costs incurred," directly with the agency. Ervin & Assocs., Inc., supra, at 9; see 4 C.F.R. § 21.8(f)(1).

By letter dated April 14, 1998, Ervin submitted its claim for costs to the agency totaling \$13,252.50. Ervin's letter contained two exhibits: a copy of our decision (exhibit No. 1), and a 1-page document entitled "ERVIN AND ASSOCIATES, INCORPORATED SCHEDULE OF GAO PROTEST COSTS B-278850" (exhibit No. 2), which listed for two individuals (Mr. B. Oleniacz and Mr. J. Ervin) the number of hours each spent in various activities in pursuit of the protest in chronological order between December 10, 1997, and February 3, 1998, as well as hourly rates and extended totals (calculated by multiplying the number of hours spent by each individual by his corresponding hourly rate) for each individual for each activity. Exhibit No. 2 listed the various tasks (e.g., "Prepare GAO Protest," "Review GAO Protest," "Review HUD Request for Dismissal and discuss strategy."), and the number of hours spent on each activity. Exhibit No. 2 indicated that Mr. Ervin spent a total of 15.5 hours at a rate of \$340 per hour and Mr. Oleniacz spent 51.5 hours at a rate of \$155 per hour, for a total of 67 hours and \$13,252.50.

After reviewing Ervin's letter, HUD concluded that Ervin had provided insufficient details to determine the reasonableness of the claim. Accordingly, on April 28, HUD requested that Ervin submit additional documentation in support of its claim. Specifically, HUD requested that Ervin explain the role and responsibilities of the two named individuals (Mr. Oleniacz and Mr. Ervin) during preparation of the protest; a detailed description of the work performed and time sheets or other documentation that supported the actual time spent by the two individuals pursuing the protest between December 10, 1997 and February 3, 1998; documentation supporting the elements of cost (i.e., documentation showing that the claimed hourly rates reflect the actual rates of compensation for Mr. Oleniacz and Mr. Ervin, plus reasonable overhead); and an itemization of the elements that comprise the hourly rates, including a breakdown of the composition of the overhead. HUD specifically requested that Ervin specify which amount was attributable to salary and which amount was attributable to each element of overhead for each of the two listed individuals.

Ervin responded to HUD's request in very general terms. For example, with respect to the request that the protester explain the specific roles and responsibilities of the two individuals, Ervin, in its letter dated May 18, 1998, stated as follows:

Mr. Oleniacz and [Mr. Ervin] consulted on a regular basis whenever the need arose to respond to HUD's filings in the course of GAO's consideration of Ervin's protest. Mr. Oleniacz was the principal writer of the protest and all follow up correspondence. . . . In addition, Mr. Oleniacz was responsible for all legal research and opinion that formed the basis for the protest. [Mr. Ervin] reviewed all documents before filing and made significant contributions and comment to the overall direction of the protest and each required response.

Letter from Ervin to HUD, Office of Procurement and Contracts at 1 (May 18, 1998).

Ervin responded to HUD's request for documentation supporting the elements of cost by stating that the hourly rates represented the "base hourly payroll of Mr. Ervin and Mr. Oleniacz plus an approximate 300 [percent] overhead factor." Id. Ervin further stated that "[t]he overhead factor includes such normally included items as payroll taxes, benefits, rent, legal fees and so on." Id. Despite HUD's specific request for documentation supporting the elements of these costs, Ervin provided nothing further in support of its claim.

In a letter dated June 25, HUD informed Ervin that its response did not provide sufficient support for its claim, and provided detailed guidance regarding the type of documentation needed to support the claim. Specifically, HUD renewed its request that Ervin provide documentation showing that the claimed hourly rates reflect the actual rates of compensation for Mr. Ervin and Mr. Oleniacz, plus reasonable overhead. In this connection, HUD requested that Ervin provide copies of salary sheets, pay stubs, or other documentation to support the claimed rates. In addition, HUD reiterated its request for Ervin to "provide an itemization of the elements that comprise the rates [Ervin] claim[s] for [Mr. Ervin] and Mr. Oleniacz, including a breakdown of the composition of the overhead." Letter from Contracting Officer to Ervin at 2 (June 25, 1998). With respect to overhead, HUD's letter informed Ervin that "[o]verhead of 300 [percent] seems excessive and unreasonable and the general information [Ervin] provided regarding elements comprising the overhead is wholly inadequate." Id. HUD's letter concluded by advising Ervin that it had not sufficiently documented its claim, and requested that Ervin provide the additional supporting information by July 10.

In response, by letter dated July 10, Ervin explained that since it does not bill its clients for services on an hourly basis, its accounting system was not designed to track the amount of time spent on any specific function or subfunction, and that it does not account for the time spent for each letter researched, written, or reviewed. In that letter, Ervin further stated that it was not possible for it to go back to specific time records to obtain the information HUD requested. The protester explained that the amount of time Ervin claimed was a reconstructed approximation of the time spent by Mr. Ervin and Mr. Oleniacz pursuing the protest.

With respect to the claimed hourly rates, Ervin provided copies of payroll summaries showing hourly rates of \$86.54 and \$40.87 for Mr. Ervin and Mr. Oleniacz, respectively. Regarding the 300 percent overhead rate, Ervin stated that its accounting system does not separately track fringe benefits, general and administrative (G&A) costs, overhead, or fees. Ervin further stated that it relied on discussions with other firms regarding their overhead to arrive at its claimed overhead rate. Ervin then asserted that its actual overhead rate is 2,124 percent, which, if applied to the hourly rates of the two individuals listed in its original claim, would result in an increase of nearly \$60,000, for a total claim of \$73,197 for filing and pursuing the protest, and requested that HUD adjust its claim to that amount. Ervin provided no contemporaneous documentation supporting the claimed hours spent pursuing the protest and provided no documents supporting either the 300 percent or the amended 2,124 percent claimed overhead.

Ervin continued to correspond with HUD until December 1998, requesting payment of its claim. After failing to reach agreement with HUD regarding its claim, on January 11, 1999, Ervin requested that we determine the amount of protest costs which it should recover.

Discussion

A protester seeking to recover the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. McNeil Techs., Inc.—Claim for Costs, B-254909.3, Apr. 20, 1995, 95-1 CPD ¶ 207 at 5. The amount claimed may be recovered to the extent that it is adequately documented and shown to be reasonable. Patio Pools of Sierra Vista, Inc.—Claim for Costs, B-228187.4, B-228188.3, Apr. 12, 1989, 89-1 CPD ¶ 374 at 3. 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. CNA Indus. Eng'g, Inc.—Costs, B-271034.2, Nov. 20, 1997, 97-2 CPD ¶ 149 at 6. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of its employees' claimed efforts and establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.—Claim for Costs, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3.

The protester's initial claim was based entirely on reimbursement at the rates of \$155 and \$340 per hour for Mr. Oleniacz and Mr. Ervin, respectively, for their time in filing and pursuing the protest. Although it appears that Ervin calculated these rates by including approximately 300 percent overhead to the base hourly rates for Mr. Oleniacz (\$40.87/hr.) and Mr. Ervin (\$86.54/hr.), the protester did not provide any supporting documentation or explain in any detail what cost elements (e.g., direct/indirect costs, fringe benefits, overhead, G&A) are reflected in the different hourly rates calculated for each individual. Ervin has also not provided any documentation to HUD or to our Office to support its claimed overhead rates. Ervin

originally claimed an overhead rate of approximately 300 percent, with no explanation of the specific elements that comprised that rate. In fact, the protester explained that it calculated the 300 percent overhead based on its discussions with other firms, not on Ervin's overhead. Ervin subsequently claimed an increase in its overhead from 300 percent to over 2,000 percent, but provided no support for its initial or amended overhead rate.¹ Ervin's failure to submit any documentation to HUD in support of its claimed overhead effectively prevented HUD from reviewing the reasonableness of the overhead amount Ervin claimed. While Ervin argues that the information it provided to HUD is adequate, Ervin has not established that the claimed hourly rates for Mr. Oleniacz and Mr. Ervin include reasonable overhead. Accordingly, since Ervin has provided no support for its claimed overhead, we recommend that none of the amount identified as overhead be reimbursed.

We also find other aspects of Ervin's claim problematic. Specifically, for the period of December 10-12, 1997, the protester claimed a total of 24 hours for Mr. Oleniacz to "Prepare GAO Protest" and 6 hours for Mr. Ervin to "Review GAO Protest." HUD points out, however, that the amount of time Ervin claimed for preparing, reviewing and filing the protest seems excessive given that Ervin's GAO protest was essentially the same as its agency-level protest. We believe that a prudent person would not have required more than a fraction of the 30 hours charged in preparing and filing the protest. In such cases, we will reduce the number of hours to reflect a reasonable work effort, given the nature of the particular protest. JAFIT Enters., Inc.—Claim for Costs, B-266326.2, B-266327.2, March 31, 1997, 97-1 CPD ¶ 125 at 3. Based on our review of the record, and in light of the fact that Ervin has failed to provide any documentation on the specific work performed by Mr. Oleniacz and Mr. Ervin in converting the agency-level protest to the GAO protest, we consider 3 hours to be a reasonable estimate of the effort that should have been employed here. The corresponding cost at the allowed hourly rates of the two individuals is \$150.01, which we recommend be reimbursed for this task.²

¹In fact, in its comments on the agency report to our Office on its claim, Ervin increased the amount of its claim to \$175,824.95, calculated by multiplying the hourly rates for Mr. Oleniacz and Mr. Ervin by approximately 5,000 percent, representing fringe benefits, overhead, and G&A. As with its original claim, Ervin has failed to provide support for its revised claim. Ervin states only that the 5,000 percent rate it now claims is derived from an analysis it provided to the Defense Contract Audit Agency for reasons unrelated to this protest.

²We calculated this amount based on the respective hourly rates of Mr. Oleniacz (\$40.87) and Mr. Ervin (\$86.54) by multiplying those rates by a share of the 3 hours to reflect the proportion of the time preparing the GAO protest that the protester states was spent by each of the two individuals (80 percent of the 3 hours equals 2.4 hours for Mr. Oleniacz; 20 percent of the 3 hours equals 0.6 hours for Mr. Ervin).

In addition, although HUD does not dispute most of the remaining amount of time Ervin claimed for pursuing the protest, we agree with HUD that the time claimed for some of the tasks Ervin listed in exhibit No. 2 of its claim seems unreasonable. In this regard, in its June 25 letter, HUD specifically questioned a total of 14.5 hours Ervin claimed on various tasks.³ We think that a prudent person would not have required more than a fraction of the hours charged to those activities. Accordingly, based on our review of the record, we recommend that Ervin be reimbursed the cost of 2 hours for those tasks, for a total of \$104.58.⁴

After deducting from its claim the costs associated with the unsupported overhead and with the 27 hours (for preparing and filing the protest in our Office) and 12.5 hours (for the various tasks detailed above) which we conclude are excessive, we recommend that Ervin be reimbursed \$1,448.19.

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³HUD noted that Ervin had claimed a total of 9.5 hours reviewing and drafting a 3-page response to a relatively simple motion to dismiss the protest based on timeliness, which seemed excessive. The agency also questioned 3.75 hours Ervin claimed it spent drafting and reviewing a reply to HUD's response to Ervin's document request, since Ervin's reply was barely more than 1 page and appeared unrelated to HUD's response to Ervin's document request. HUD further questioned 1.25 hours Ervin claimed it spent reviewing and drafting a 3-sentence letter requesting a copy of the task order at issue in the protest.

⁴Again, we calculated this amount by multiplying the respective hourly rates of Messrs. Oleniacz and Ervin by a share of the 2 hours to reflect the proportion of the time that the protester stated that each individual spent on the tasks at issue (in this case, 75.9 percent of the 2 hours equals 1.5 hours for Mr. Oleniacz; 24.1 percent of the 2 hours equals 0.5 hours for Mr. Ervin).