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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Sodexho Management, Inc.--Costs

**File:** B-289605.3

**Date:** August 6, 2003

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Lars E. Anderson, Esq., Venable, Baetjer & Howard, for the protester.  
David H. Turner, Esq., Naval Supply Systems Command, for the agency.  
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Request that agency reimburse protester for the costs it incurred in pursuing an administrative appeal of the agency's cost comparison decision under Office of Management and Budget Circular No. A-76 is denied because such costs are not, as protester argues, part of its proposal preparation costs; administrative appeals costs are tantamount to agency-level protest costs, and GAO's authority to recommend reimbursement of protest costs does not extend to costs incurred by a protester in litigating in another forum.
2. Protester should not be paid costs incurred in filing and pursuing unsuccessful protest issues where those issues are readily severable from a successful protest issue, which rested upon a different set of facts and relied upon unrelated legal theories.
3. Protester claiming reimbursement of the costs of preparing its proposal and the costs of filing and pursuing its protest must submit evidence sufficient to support its claim that those costs were incurred and are reasonable and properly attributable to either proposal preparation or the filing and pursuit of the protest; GAO recommends that costs which are not adequately documented not be reimbursed, and that claimed allowable costs which are aggregated with unallowable costs in a way that does not permit segregation of allowable costs be disallowed in their entirety.
4. Request that Comptroller General recommend that an increase in the cost of living justifies a fee higher than the statutory cap of \$150 per hour for attorneys' fees is granted where the protester alleges that the cost of living has increased, as

measured by the Department of Labor's Consumer Price Index (CPI), and has presented a reasonable basis upon which the adjustment should be calculated.

## **DECISION**

Sodexho Management, Inc. requests that we determine the amount it should recover from the Department of the Navy for the costs of preparing its proposal and for the costs of filing and pursuing its protest of the Navy's determination, pursuant to Office of Management and Budget (OMB) Circular A-76, that it would be more economical to perform various community services in-house at the Pensacola Naval Regional Complex in Pensacola, Florida, rather than contract for these services with Sodexho under request for proposals (RFP) No. N00140-00-R-G513.

We recommend that Sodexho be reimbursed \$96,069.85 for the costs of preparing its proposal and \$31,943.52 for the costs of filing and pursuing its protest, for a total of \$128,013.37 out of its total claim of \$687,614.

## **BACKGROUND**

The Navy issued the RFP on February 4, 2000, as part of a Circular A-76 commercial activities study, to determine whether it would be more economical to perform various community support services in-house, using government employees, or under contract with a private-sector firm.<sup>1</sup> After a private-sector competition, the Navy concluded that Sodexho's proposal, the only acceptable private-sector proposal, represented the best value to the government among the offers received from the private sector. The contracting officer, acting as the source selection authority (SSA), ultimately concluded that the in-house management plan met the requirements established by the PWS and offered the same level of performance and

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<sup>1</sup> The process for determining whether activities should be transferred from in-house to contractor performance, or *vice versa*, is set forth in OMB Circular A-76 and that Circular's Revised Supplemental Handbook (RSH). The Department of Defense and its military departments are required, by separate regulation, to use the Circular and RSH in performing commercial activities studies. See 29 C.F.R. § 169a.15(d) (2002). The required process includes preparation of a performance work statement (PWS) outlining the task and performance requirements, preparation of a management plan for in-house performance of the PWS tasks by the agency's "most efficient organization" (MEO), and a competition among private-sector proposals. If, as here, that competition is done on a "best value" basis (that is, one contemplating a cost/technical tradeoff), the MEO's technical performance plan is compared with the winning private-sector offer to assess whether or not the same level of performance and performance quality will be achieved—and, if not, to make all changes necessary to meet the performance standards of the private-sector proposal. RSH, part I, ch. 3, ¶¶ H.3.d, e. Once the playing field is thus leveled, there is a cost comparison between the private-sector offer and the in-house cost estimate.

performance quality as did the Sodexho proposal. After adjustments, Sodexho's total cost to contract for services was \$82,641,457 as compared with the in-house plan's cost of \$54,460,369, a difference of \$26,181,108. Because the in-house plan's costs were more than \$26 million lower than Sodexho's adjusted costs, the agency made a tentative decision to perform the requirements in-house.

Sodexho filed an administrative appeal on October 9, 2001. The agency's administrative appeal authority found merit in the appeal to the extent that the MEO's pricing was found to be understated by approximately \$1.6 million, but otherwise ratified the determination to perform the requirements in-house. The appeal was denied on December 10. On December 27, Sodexho filed a protest in our Office challenging the administrative appeal decision. In view of the extensive number of protest allegations, and the challenges faced by the Navy in responding to all of them within the 30-day timeframe required by our regulations, the parties agreed to handle the protest as a timely agency-level protest pursuant to Federal Acquisition Regulation (FAR) § 33.103, and Sodexho withdrew its GAO protest. The agency provided Sodexho with additional documents, and Sodexho filed a supplemental agency-level protest on February 25, 2002. After the agency submitted its response to Sodexho's agency-level protests, in which it found that the MEO's pricing was understated by a negligible amount but otherwise rejected Sodexho's allegations, Sodexho filed its protest with GAO on April 4.

Sodexho's protest allegations fell into three categories. Sodexho first argued that the Navy's overall process was flawed and unfair because the cost comparison was based on an MEO that proposed to perform the requirements using non-appropriated funds instrumentality (NAFI) employees as 82 percent of its in-house workforce. Sodexho next argued that the MEO failed to meet numerous PWS requirements, and that the certification of the MEO was inadequately documented and "directed" by external Navy forces. Sodexho finally argued that the Navy improperly failed to adjust the in-house offer to equal the level of performance and performance quality offered by Sodexho. We sustained the protest in conjunction with Sodexho's first allegation because, although we could not conclude that the A-76 procedures prohibited the Navy from including NAFI employees in its MEO, we found that the Navy's wholesale use of NAFI employees in the MEO in the circumstances of the case resulted in an unfair competition. Sodexho Mgmt., Inc., B-289605.2, July 5, 2002, 2002 CPD ¶ 111. We denied the remainder of Sodexho's protest allegations. We recommended that Sodexho be reimbursed the costs of preparing its proposal to participate in this competition, 4 C.F.R. 21.8(d)(2) (2003), and that Sodexho be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. 21.8(d)(1). We advised Sodexho to file its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of our decision. 4 C.F.R. § 21.8(f)(1).

On August 30, Sodexho filed with the Navy what it characterized as its "initial claim" for cost reimbursement in connection with the protest. Sodexho requested reimbursement of \$396,723 for preparing its proposal, \$140,980 for filing its

administrative appeal, and \$203,203 for filing its agency/GAO protest,<sup>2</sup> for a total of \$740,906. Sodexho's Aug. 30, 2002 Initial Claim for Costs at 2, 6. The first component of the claim was direct labor for the efforts of Sodexho employees, inclusive of fringe benefits. The second component concerned the costs of subcontractors, consultants, outside counsel, and other vendors. As discussed below, Sodexho limited or "capped" its attorneys' fees by applying a cost of living adjustment (COLA) factor to the statutory cap on such fees. The third component concerned out-of-pocket expenses for such things as travel, reproduction, printing, and communications. Sodexho's claim was accompanied by two binders of supporting documentation as well as calculations and summary schedules prepared by an independent accounting firm.

On September 13, the Navy informed Sodexho of its view that the firm's initial claim included unallowable costs, provided insufficient support for numerous other costs, and included overstated costs in other areas. The Navy stated that the costs of Sodexho's administrative appeal were unallowable, that any increase in the statutory cap on attorneys' fees was dependent upon a recommendation from the Comptroller General, which the Navy would oppose,<sup>3</sup> and that the proposal preparation costs appeared to be excessive and unreasonable. Among other things, the Navy stated that the proposal preparation costs associated with consultants and out-of-pocket expenses included substantial costs without explaining the relationship between the consultants and Sodexho or their role in the proposal preparation process and were inadequately supported; the claimed amount for pursuing the protests appeared to be excessive and inadequately documented; and the explanation of various attorneys' fees was inadequate to show the reasonableness and allocability of many costs and included unallowable costs. The Navy also took the position that Sodexho was not entitled to recover the costs it incurred pursuing unsuccessful protest issues. The Navy concluded by stating that the 60-day deadline for filing a claim had passed, but extended to Sodexho an additional opportunity to remove unallowable costs and present the necessary level of documentation for the claim.

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<sup>2</sup> In agreeing to treat Sodexho's initial GAO protest as a timely agency-level protest, the Navy agreed that the costs incurred by Sodexho in preparing and filing that GAO protest, and costs incurred during the development of the agency-level protest, would be considered to be costs incurred under any subsequent GAO protest filed by Sodexho. In accordance with this agreement, the Navy has considered Sodexho's costs incurred in pursuit of the agency-level protest as if incurred in pursuit of the subsequent GAO protest. Under the unique circumstances of this case, we have done the same.

<sup>3</sup> At the Navy's prompting, Sodexho capped its daily consultant fees in accordance with Federal Acquisition Regulation (FAR) § 33.104(i) and 5 C.F.R. § 304.105.

In its September 27 response to the Navy, Sodexho took issue with most of the agency's objections, provided limited additional documentation, and made certain adjustments to its claim. Sodexho offered to accept \$605,658 as a settlement of its claim if the Navy agreed to a prompt payment of that amount. On November 21, the Navy stated that information provided by Sodexho during the course of the claim process led it to conclude that the firm's proposal should have been found technically unacceptable because it appeared that Sodexho's proposal was "largely written" by consultants and that Sodexho failed to comply with the RFP's requirement to certify whether any portion of the technical proposal was written by anyone not a bona fide employee of the firm submitting the proposal. As a result, the Navy stated, it would be proper to deny the cost claim in its entirety. Navy's Letter of Nov. 21, 2002, at 2-3. The Navy also restated its previous objections to the claim, supported by extensive analytical data, and found that Sodexho's August 30 initial claim and its September 27 supplement were inadequately documented. To facilitate settlement, however, the Navy offered to settle the claim for \$79,989. On December 30, Sodexho informed the Navy that its consultants did not write its technical proposal and that it was not required to submit the certification of concern to the Navy. Sodexho also took the position that it submitted a legally sufficient cost claim within the requisite time period, and reiterated its positions regarding the other issues in controversy. For the purposes of settlement, however, Sodexho offered to settle the claim for \$550,000. On January 28, 2003, the Navy reiterated its prior positions in their entirety and reasserted its \$79,989 settlement offer.

Sodexho filed the instant request on February 10, asking GAO to recommend that the Navy pay the firm the amount of \$687,614. This amount represents adjustments made as a result of the Navy's prior comments and objections associated with the claim, as well as the full, uncapped fees of its outside counsel. For the reasons discussed below, we recommend that Sodexho be reimbursed \$128,013.37.

## THRESHOLD ISSUES

### Entitlement to Costs

The Navy contends that Sodexho has not demonstrated entitlement to any of its costs because it failed to acknowledge and certify the role of non-employees in writing its technical proposal submissions. According to the Navy, Sodexho's failure to provide the requisite certification and description of the roles of non-employees in the proposal preparation process was an affirmative exception to the RFP's requirements that "invalidates the overall evaluated acceptability of Sodexho's proposal and, accordingly, the entire evaluation process that resulted in Sodexho's inclusion in the A-76 cost comparison." Agency Report (AR) Legal Memorandum at 53. The Navy argues that the "inclusion of Sodexho's unacceptable proposal in the cost comparison led the Navy to erroneously permit Sodexho the right to an Administrative Appeal"; the appeal decision, "to which Sodexho was not entitled, was a prerequisite to Sodexho's GAO protest"; and "Sodexho did not have proper standing to raise the issues that led GAO to recommend the protest and proposal

preparation costs that are the subject of Sodexho's cost claim." *Id.* As a result, the Navy requests that GAO deny Sodexho's cost claim in its entirety.

We view the Navy's request as a request for reconsideration of our prior decision and/or as a request for modification of the recommendation set forth in that decision. The record is clear that the request, however characterized, is untimely.

Under our Bid Protest Regulations, a request for reconsideration must be filed with our Office within 10 days after the requesting party knows or should know the basis for reconsideration. 4 C.F.R. § 21.14(b). This rule also applies to a request for modification of the recommendation. Tripp, Scott, Conklin & Smith--Claim for Costs, B-243142.4, Nov. 16, 1992, 92-2 CPD ¶ 345 at 3. Here, the Navy states that it learned the basis for its request on August 30, 2002, when Sodexho submitted its initial cost claim and supporting documentation. AR Legal Memorandum at 22, 48. As a result, the agency was required to file its request no later than 10 days after its receipt of Sodexho's initial cost claim, but failed to do so until March 12, 2003, when it filed its response to Sodexho's request that our Office determine the amount it should recover for the costs of preparing its proposal and filing and pursuing its GAO protest. We find that this delay was unreasonable and that the Navy's request is untimely.<sup>4</sup>

#### Administrative Appeal Costs

Sodexho argues that it is entitled to recover the costs it incurred in filing the administrative appeal of the agency's tentative decision to retain in-house performance of these services.<sup>5</sup> Sodexho acknowledges that we have previously

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<sup>4</sup> In any event, the record before us does not show that Sodexho failed to comply with the RFP's requirement, which was to provide appropriate certification in the event that "any portion of the technical proposal is written by anyone who is not a bona fide employee of the firm submitting the proposal." RFP § L.I (emphasis added). It is undisputed that Sodexho's consultants--one in particular--spent significant time on "proposal preparation efforts," but Sodexho's Director of Business and Development, who was responsible for the proposal's preparation, has submitted a sworn declaration in which he states that "Sodexho alone was responsible for writing [its] technical proposal," and "Sodexho's consultants did not write [its] technical proposal" but, rather, assisted Sodexho employees in "organizing and critiquing [its] cost and technical proposals." Declaration ¶¶ 11, 12.

<sup>5</sup> In its request to our Office, Sodexho calculates the costs of filing its administrative appeal at \$102,722. Sodexho's Feb. 10, 2003 GAO Claim, Basis of Estimate Memorandum, Table 1. Sodexho notes that its personnel spent some time in December 2001 reviewing and analyzing the administrative appeals decision, which cost has been allocated to the administrative appeal. Sodexho asserts that this time could reasonably be allocated to either the administrative appeal or to the December 27, 2001 protest, but states that "[u]nless and until it is reasonably

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held that our statutory authority to recommend reimbursement of costs does not extend to the costs associated with administrative appeals, Rice Servs., Ltd.–Costs, B-284997.2, May 18, 2001, 2001 CPD ¶ 88, but asserts that the Rice decision was limited to the question whether such costs can be considered part of the costs of filing and pursuing a GAO protest. In contrast, Sodexho argues, it claims entitlement to these costs as part of its proposal preparation costs.

Sodexho argues that the administrative appeal is an integral phase of the process before a final award decision is reached in an A-76 procurement, and that the decision as to the winner as between the MEO and the private contractor is only a “tentative decision” until after the administrative appeals process is completed. See RSH Part I, ch. 3, ¶¶ J, K. Sodexho contends that the “tentative” nature of this decision makes the administrative appeals authority the ultimate agency decisionmaker on the source selection. According to Sodexho, by pursuing its appeal rights, Sodexho was merely “supporting its proposal” to the ultimate agency decisionmaker just as it would have by participating in negotiations in a FAR Part 15 procurement. Since Sodexho views its efforts in the administrative appeals process as “supporting its proposal,” and since the FAR defines bid and proposal costs as “costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential government or non-government contracts,” FAR § 31.205-18(a), the firm argues that the costs it incurred in filing its administrative appeal are properly considered proposal costs. Sodexho asserts, without elaboration, that the administrative appeal process is not the equivalent of an agency-level protest.

The Navy correctly notes that our recommendation was that Sodexho be “reimbursed the costs of preparing its proposal to participate in this competition,” Sodexho Mgmt., Inc., *supra*, at 29, and we agree with the Navy that the proposal preparation process does not extend to the administrative appeals process. Expenses compensable as proposal costs are those in the nature of researching the requirements or specifications, examining cost or price factors, and preparing draft and actual proposals and proposal revisions. See Lion Raisins, Inc. v. U.S., 52 Fed. Cl. 629, 630-631 (June 10, 2001); Power Sys.–Claim for Costs, B-210032.2, Mar. 26, 1984, 84-1 CPD ¶ 344 at 2 (recovery is limited “only to those expenses incurred in the preparation of the [proposal] itself”). The proposal preparation process in this case ended with the submission of Sodexho’s final proposal. After that time, Sodexho was given no opportunity to amend or change—to “support”—its proposal, and

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determined that Sodexho is not entitled to recover the administrative appeal costs, it does not appear necessary to segregate and reallocate these costs.” Sodexho’s Feb. 10, 2003 GAO Claim at 28 n.8. Sodexho’s decision not to segregate and reallocate these costs leaves us with no basis to do so ourselves, and we therefore recommend disallowance of the entire amount now allocated to the administrative appeal.

Sodexho had already expended any costs it incurred in preparing its proposal to participate in this competition.

This is true even though the SSA's decision is considered to be "tentative" pending the completion of the administrative appeals process. Sodexho's attempt to draw an analogy between the administrative appeals process and the FAR Part 15 negotiations process is unpersuasive. Those negotiations are exchanges that are undertaken "with the intent of allowing the offeror to revise its proposal." FAR § 15.306(d). A private-sector appellant, such as Sodexho, is afforded no such opportunity in an administrative appeal. See RSH part I, ch. 3, ¶ K. While Sodexho "supported" its proposal during the administrative appeals process by arguing that it was cheaper to perform the services by contracting out, this is the same type of "support" any commercial contractor offers its proposal when it files an agency-level protest outside of the A-76 context. Sodexho's attempt to recharacterize the nature of the A-76 administrative appeals process cannot disguise the fact that it is simply a variant of the agency-level protest process.

Since we view administrative appeals costs as tantamount to agency-level protest costs, our decision in Rice is directly controlling. As we stated in that decision, our authority to recommend reimbursement of protest costs is based on the statutory provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1) (2000). Those provisions limit our bid protest jurisdiction as well as our corresponding authority to recommend the payment of costs to those incurred in filing and pursuing protests filed with our Office. Id.; Rice Servs., Ltd.–Costs, *supra*, at 2. We have consistently rejected assertions that our cost reimbursement authority under CICA is properly applied to litigation costs incurred in connection with matters brought in another forum, since we do not view those costs as having been incurred in filing and pursuing a protest with our Office. Rice Servs., Ltd.–Costs, *supra*, at 3; Diverco, Inc., –Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460 at 5. The administrative appeals process established by the FAR and OMB Circular A-76 is separate from GAO's bid protest process. Accordingly, our statutory authority to recommend reimbursement of costs does not extend to the costs associated with Sodexho's administrative appeal of the initial A-76 cost comparison. Sodexho's assertion that it is inequitable for it to have to absorb these costs given that the Navy conducted an unfair procurement does not alter the reach of our statutory authority.

## PROPOSAL PREPARATION COSTS

Sodexho asks to be reimbursed \$351,214 for the costs of preparing its proposal. Sodexho's Feb. 10, 2003 GAO Claim, Basis of Estimate Memorandum, Table 1. The firm has supported its claim with several inches of documentation such as employee calendars, timesheets, travel expense reports, consultant and vendor invoices, and law firm billing statements.



The Navy asserts that, the quantity of documentation notwithstanding, Sodexho has failed to provide evidence sufficient to support its claim that these costs were incurred, are properly attributable to proposal preparation, and are reasonable. The Navy's November 21, 2002 letter to Sodexho reiterating this position attached more than 55 pages of spreadsheets analyzing each expense Sodexho claimed for the costs of preparing its proposal. For the numerous line items the Navy found unallowable, the spreadsheet included one or more codes under the heading "reasons disallowed"; the key to these codes shows that the Navy's primary reasons for disallowing costs were Sodexho's failure to provide sufficient detail to show the purpose for which the expense was incurred and/or the reasonableness of the expense.

With limited exception, Sodexho has not provided additional information in support of its claim. Instead, Sodexho has accused the Navy of holding it to an "unreasonably stringent standard for documentation" of its employee costs, Sodexho's Letter of Dec. 30, 2002 at 19; imposing an "unreasonably high burden" on Sodexho to provide "extraordinary details" in regard to its consultant costs, *id.* at 10, and improperly "substituting its own legal judgment" regarding whether certain costs were warranted in regard to the billing statements of its outside counsel. Sodexho's Feb. 10, 2003 GAO Claim at 51. A review of the record shows that these standards are neither unreasonable nor unique to the Navy but are, rather, long-standing prerequisites to reimbursement that are well-known to the government contracts bar.

A recommendation from our Office that an agency reimburse a protester the costs of preparing its proposal, or filing and pursuing its protest, is not a blank check. A protester seeking to recover its proposal preparation costs must submit evidence sufficient to support its claim that those costs were incurred and are properly attributable to proposal preparation. Stocker & Yale, Inc.--Claim for Costs, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387 at 4; Patio Pools of Sierra Vista, Inc.--Claim for Costs, B-228187.4, B-228188.3, Apr. 12, 1989, 89-1 CPD ¶ 374 at 3. The amount claimed may be recovered to the extent that it is adequately documented and is shown to be reasonable; a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the preparation of his or her proposal. Patio Pools of Sierra Vista, Inc.--Claim for Costs, *supra*; see also FAR § 31.201-3(a). Where a protester has aggregated allowable and unallowable costs in a single claim, such that our Office cannot tell from the record what portion is unallowable, we will recommend that the entire amount be disallowed even though some portion of the claim may be properly payable. TRESP Assocs., Inc.--Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 at 4. 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 to 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 mere

submission of voluminous documentation in support of a claim is not enough to meet these standards.

It is our obligation, as it was the Navy's before us, to ensure that any protester seeking to recover its costs meets these minimum standards. We have conducted our own expense-by-expense review of Sodexho's claim and agree with the Navy that Sodexho did not meet these standards with respect to the majority of its claimed costs for proposal preparation. Instead of providing the additional explanations reasonably requested by the Navy, Sodexho opted to file vituperative pleadings that characterize these minimum standards as unreasonably stringent and burdensome, to disregard most of the Navy's concerns, and to bring the matter to this Office for resolution. Our review of Sodexho's claim leads us to recommend the reimbursement of \$96,069.85 for its proposal preparation costs.

### Sodexho Employees

Sodexho asks to be reimbursed \$167,014.43 in direct labor, travel expenses, and other out-of-pocket expenses incurred by 19 different employees in the preparation of its proposal.<sup>6</sup> Sodexho's Feb. 10 GAO Claim, Bid and Proposal (B&P) Cost Spreadsheets. Sodexho states that it identified all employees involved with the claim and had each one estimate his or her labor hours using detailed time reports, calendars, and/or estimates for proposal tasks. According to Sodexho, this documentation included "detailed descriptions of work performed and the amount of time spent each day or period." Sodexho's Aug. 30, 2002 Claim at 3. Along with the documentation for direct labor expenses, Sodexho included documentation of out-of-pocket expenses associated with its employees, the majority of which were related to travel. According to Sodexho, "[a]ll travel costs were verified to relate specifically to the [c]laim through a detailed examination of each invoice." *Id.* at 5.

The Navy informed Sodexho that the documentation of its employee costs was "grossly inadequate" and "extremely limited." Navy's Letter of Nov. 21, 2003 at 19, 20. The Navy asserted that the documentation either failed to explain the purpose of many employee costs or failed to show that the costs were reasonable and necessary to the proposal preparation process, and attached its analytical spreadsheets in support of its position. The Navy also stated that Sodexho had failed to explain the necessity for the "tremendous amount of travel" included in the claim. *Id.* at 20. The Navy found that Sodexho had adequately supported a total of \$26,936.91 for the expenses of its employees, inclusive of direct labor with fringe benefits, travel, and out-of-pocket expenses. Sodexho objected that the Navy was holding it to an

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<sup>6</sup> The direct labor included in this amount was unadjusted to account for Sodexho's fringe benefit rate, to which the Navy has not specifically objected. From this point in the discussion, our calculations concerning the allowable costs of Sodexho's direct labor are inclusive of the firm's fringe benefit rate.

“unreasonably stringent standard for documentation” of its employee costs, especially for those associated with the efforts of the employee who was primarily responsible for writing and preparing Sodexho’s proposal. Sodexho’s Letter of Dec. 30, 2003 at 19. Sodexho specifically challenged only a very small number of the employee expenses disallowed by the Navy; most of these were associated with this employee.

Again, although we recognize that the requirement for documentation may sometimes entail certain difficulties, we do not consider it unreasonable to require a protester to document in some manner the amount and purposes of its employees’ claimed efforts and to 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, supra. We agree with the Navy that Sodexho has failed to adequately document the purposes of most of its employees’ claimed efforts, and we therefore recommend that the firm be reimbursed \$43,766.64 for the direct labor of its employees, including Sodexho’s fringe rate, and \$11,994.21 for their travel and other out-of-pocket expenses, for a total of \$55,760.85. Our discussion begins with the expenses associated with the employee responsible for leading the proposal effort.

Sodexho asks to be reimbursed for 1,640 hours of direct labor expended by this employee over the 1999-2001 period. Sodexho’s Feb. 10, 2003 GAO Claim, B&P Costs Spreadsheets. For the years 1999 and 2001, Sodexho has supported its claim with pages from the calendar this employee used to track the proposal effort. For each day a proposal task was performed, the calendar pages include a brief description of the task(s) and the amount of time spent on the effort, for a total of 328 hours in 1999 and 392 hours in 2001.<sup>7</sup> We have considered the fact that these tasks appear in the context of a calendar used to track this proposal effort, and reviewed both the descriptions of each day’s task(s) and the calendar entries as a whole in deciding whether the documentation of this employee’s efforts meets the requisite standard. We find allowable 225.6 of the 328 hours he claimed for 1999, and 273.6 of the 392 hours he claimed for 2001.

Specifically, in addition to tasks the Navy found allowable, we found sufficient information in the documentation to support expenses incurred for such tasks as Pensacola operational overviews; reviews of procurement targets; discussions with

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<sup>7</sup> For the year 2000, Sodexho asks to be reimbursed for 920 hours in direct labor for this employee. There is nothing in the record that describes the purpose of these claimed efforts--Sodexho did not submit this employee’s calendar for 2000 or any other description of his tasks. Even when we looked to the descriptions in his travel expense reports for 2000, the most specific information we could find was simply, “leading proposal team for Navy/Pensacola effort.” We do not think this information is adequate to show the claimed labor was reasonably related to the proposal effort, and therefore see no basis for reimbursement of any of these 920 hours.

or about other members of the proposal team; site visits; office preparations for temporary proposal team space; discussions with or about subcontractors; activities related to project status and finance requirements; requests for proposal extensions; status updates; cost pricing rationale studies; and the development of organization charts.<sup>8</sup> B&P 1999 ref. K, B&P 2001 ref. E2. We do not share the Navy's view that the time this employee spent managing a consultant Sodexho engaged to assist it in the preparation of the proposal is unallowable. Sodexho engaged this consultant to, among other things, "utilize his knowledge, expertise and independent judgment in developing strategies and proposals for acquiring the U.S. Navy's Community Support Services Contract," and the agreement between the parties stated that this employee was to provide the consultant's day-to-day work assignments. Consulting Agreement at 1. Since these tasks would not have occurred but for Sodexho's preparation of the proposal, as long as this employee's managerial tasks can be linked to this procurement, we conclude that they were reasonably related to the preparation of the proposal.<sup>9</sup>

On the other hand, we agree with the Navy that Sodexho has failed to establish a linkage between the preparation of its proposal and numerous tasks described in this employee's calendar. For example, this employee spent time reviewing an unidentified matter with persons whose name we could not associate with the effort; identifying and reviewing the resume of a person whose name we could not

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<sup>8</sup> The Navy argues that costs incurred before the RFP was issued on February 4, 2000 are not legitimate proposal costs. However, we have never adopted a "bright line" test which necessarily renders all costs incurred prior to the issuance of a solicitation unrecoverable. Rather, we look to see whether, under the circumstances of an individual procurement, the claimed costs were incurred in anticipation of competing for the specific contract at issue. Tri Tool, Inc.—Entitlement to Costs, B-265649.4, Sept. 9, 1997, 97-2 CPD ¶ 69 at 3; see Stocker & Yale, Inc.—Claim for Costs, supra, at 4-5. Our review of the record shows that the Navy has no basis for drawing this bright line based on the date the solicitation was issued. As Sodexho points out, the notice of this procurement, which invited industry comment, was issued in July 1999, the date from which Sodexho measures its claim. Up until mid-November, the Navy briefed industry and sought advice regarding the procurement. On November 24, the draft RFP was issued and the Navy requested formal comments from industry. Sodexho states that it reviewed the draft RFP and submitted a number of comments and/or questions to the Navy. In our view, costs incurred before the final RFP was issued are recoverable provided they meet the other minimum requirements.

<sup>9</sup> However, since the record shows that this consultant's services were not limited to tasks associated with this proposal, we find unallowable the time this employee spent hiring the consultant.

associate with the effort; preparing to submit a Freedom of Information Act request whose purpose we could not associate with the effort; and performing “Gold Review” tasks whose purpose we could not associate with the effort. Despite the fact that the Navy’s spreadsheets clearly flagged each of these items as unallowable, and provided a basis for this conclusion, Sodexho failed to provide any explanation of the relationship between these and other similarly flagged tasks and the preparation of the proposal. In addition, there are tasks associated with pre-proposal submission presentations that, as the Navy has repeatedly argued, have no clear connection to the preparation of Sodexho’s proposal. Since there is evidence that Sodexho was also engaged in general business development with the Navy at this time, in the absence of an explanation of these presentations from Sodexho, we recommend that all of these expenses be disallowed. We also found numerous examples where the task description mingled allowable tasks with tasks whose purpose was either unallowable or unclear, and where Sodexho failed to segregate the costs. Where a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record what portion is unallowable, the entire amount should be disallowed even though some portion of the claim may be properly payable. TRESP Assocs., Inc.–Costs, *supra*. In cases where the calendar described the occurrence of an external event, such as the release of the draft RFP, but did not describe any tasks this employee performed, we do not recommend reimbursement of the expense. Finally, we do not recommend reimbursement for labor hours associated with travel to and from a business destination since there is no evidence that any work was performed relating to the proposal preparation process during the hours of travel. See Armour of Am., Inc.–Claim for Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 8.

Sodexho also asks to be reimbursed \$42,296.62 in travel expenses and \$1,157.38 in out-of-pocket expenses associated with this employee’s efforts. Sodexho’s Feb. 10, 2003 GAO Claim, B&P Cost Spreadsheets. We have carefully reviewed the same travel expense information analyzed by the Navy, which consists principally of travel expense reports and Sodexho’s internal company-paid “airfare reports,” and conclude that Sodexho has failed to provide adequate information to show that most of these travel expenses are both connected to the preparation of its proposal and reasonable. This employee’s travel expense reports for all 3 years contain very little information to connect the associated expenses with the preparation of the proposal—generally “Pensacola bid costs” or “Pensacola meetings” or “leading proposal team for Navy Base/Pensacola.” We have read the expense reports for 1999 and 2001 together with this employee’s calendar in an effort to ascertain the purpose of the travel.

We found a sufficient nexus between his 1999 travel expenses and allowable tasks in his calendar to allow a \$256.53 expense and a \$364.95 expense, both documented by expense reports. One component of these expenses is the cost of meals incurred during this employee’s business travel away from his normal duty station and to the Pensacola area for the purpose of proposal preparation. Under these circumstances,

we conclude that such costs, provided they are reasonable, are allowable.<sup>10</sup> Boines Constr. & Equip. Co., Inc., supra, at 6; Armour of Am., Inc.—Claim for Costs, supra, at 9. We next turned to Sodexho's internal airfare report for 1999. These reports are simply lists of airline tickets issued to various Sodexho employees, along with the date of issuance, the travel points, and the cost of the ticket. This employee's 1999 airfare report listed several flights that had no apparent connection with the preparation of the proposal, such as flights from San Francisco to Guam and to San Diego. B&P 1999 ref. J. By reviewing the information in the calendar, we could ascertain a nexus between two flights and allowable tasks this individual performed to allow the costs of those two flights, in the amount of \$2,575.82. We do not recommend the reimbursement of any of the report's remaining airfares.

We found a sufficient nexus between this employee's 2001 travel expenses and allowable tasks as described in another employee's calendar to allow \$39.69 in business meals, B&P 2001 ref. D, but disallowed other travel expenses because we could not link the purpose of the travel to any proposal preparation effort. B&P 2001 ref. A. Moreover, we disallowed the \$17,390.87 in airfare supported by a Sodexho internal airfare report because none of the flights, including those between Oakland and Las Vegas, San Francisco and Anchorage, San Francisco and Honolulu, and Honolulu and Guam, had any apparent connection to proposal preparation. We also disallowed most of this employee's travel expenses for 2000. As noted above, since Sodexho did not provide any information to substantiate the nature of his efforts in 2000, and since the information on the expense reports was too general for us to ascertain that his efforts were reasonably related to proposal preparation, the only allowable expense in the expense reports was \$44.44 in business meals that were consumed away from the employee's normal duty station and that could be linked to an allowable task based upon information in another employee's calendar. B&P 2000 refs. GG, FF2. We recommend against reimbursement of the \$11,464.98 in airfare documented by a Sodexho internal airfare report because we could not establish that the flights were related to proposal preparation.

In conclusion, we recommend reimbursement of \$23,260.01 for this employee's labor, inclusive of Sodexho's fringe benefit rate, and \$3,281.43 for his travel expenses.<sup>11</sup>

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<sup>10</sup> This same rationale applies to Sodexho's claim for the cost of other business meals incurred away from a normal duty station. To the extent that prior protest-related cost decisions of our Office can be read to impose a blanket prohibition of the reimbursement of such costs, those decisions will no longer be followed.

<sup>11</sup> We disallowed all of the out-of-pocket expenses claimed in conjunction with this employee. Most items were telephone calls listed on travel expense reports whose purpose could not be linked to allowable proposal tasks, but one was a \$1,087.80 invoice for a classified ad in a Pensacola newspaper. Despite the Navy's statement that it could not ascertain whether this ad was associated with the preparation of the  
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A second Sodexho employee claimed to have spent 212.8 labor hours performing tasks associated with proposal preparation in 1999 and 2000, and supported this claim with detailed task information in a daily calendar. Based on our review of this information, we recommend reimbursement for 8 of the 22.4 hours claimed in 1999 and for 168 of the 190.4 hours claimed in 2000, having disallowed hours associated with travel to and from business since there was no evidence that any work was performed relating to the proposal preparation process during the hours of travel. See Armour of Am., Inc.–Claim for Costs, supra. This employee’s associated travel expenses are in the form of expense reports and Sodexho’s internal airfare reports. For 1999, we found allowable a \$265.11 expense report because we could connect the travel with an allowable task in his calendar. B&P 1999 ref. I. However, our review of 1999’s airfare report showed that Sodexho had included in the claim several airfares for tickets issued to another employee not associated with the proposal and another airfare for a ticket whose travel points we could not connect with the proposal preparation process. Id. As a result, we allow only the \$806.88 airfare that can be connected with an allowable task. This employee’s 2000 travel expenses and phone expenses include several expense reports that can be linked to allowable tasks by reviewing his calendar, in the amount of \$5,992.30.<sup>12</sup> However, the claim also includes an airfare report that double-counts airfares already included in this employee’s expense reports and includes flights with no apparent relationship to the preparation of this proposal. We have disallowed all of these airfares except one for \$863.70 that can be linked to allowable tasks noted in his calendar. Accordingly, for this Sodexho employee, we recommend the reimbursement of \$6,346.22 for his labor and \$7,927.91 for his associated travel and out-of-pocket expenses.

The documentation Sodexho submitted to support the 177.6 hours associated with four employees was limited to the number of labor hours spent, with no indication of the purpose for which that labor was expended. See B&P 1999 refs. K2, B&P 2000 refs. W2, JJ2. We do not recommend reimbursement of any of these hours because they have not met the minimum standards.<sup>13</sup> One of these employees supported his

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proposal, Sodexho has provided no explanation of the purpose of this ad. Since we cannot ascertain its link to the effort or its reasonableness, we disallow this expense.

<sup>12</sup> This amount reflects our disallowance of a \$170.85 business meal as excessive, and our disallowance of a \$7 expense that is clearly associated with another Sodexho project. B&P 2000 refs. G, V.

<sup>13</sup> Another employee claimed \$3,543.73 in travel expenses supported by expense reports listing such purposes as “business meeting Gaithersburg,” “proposal meeting Towne Place Suites,” “Mobile,” and “Residence Inn, Business, Mobile AL.” B&P 2000 refs. Y, Z. Given these general descriptions, and the fact that there is no claim for

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claimed 32 hours in 1999 with no more detailed information than that found in accompanying expense reports. B&P 1999 ref. B. The e-mail message requesting information about this employee's proposal preparation efforts included a series of dates during which proposal preparation efforts were to have occurred. One of this employee's expense reports predates the date established for commencement of these efforts, *id.*, and two more are associated with pre-proposal presentations that we have determined to be unallowable. B&P 1999 ref. G. As a result, we recommend the reimbursement of neither his labor nor his travel.<sup>14</sup>

Another employee claimed 536 hours in direct labor in 2000, and supported this claim with biweekly time records listing the number of regular and overtime hours she worked. B&P 2000 refs. I, P, T, W, BB. For most of these timesheets, the only narrative information indicates that the overtime was to be split or transferred to the Pensacola Navy base, but does not indicate the purpose or nature of the work. As a result, we view all of these hours as unallowable. However, one biweekly time record noted that "all overtime transfer to SC Pensacola bid after hour layout design for bid." B&P 2000 ref. T. Since this timesheet links the amount of overtime hours to a purpose that is associated with proposal preparation, we recommend the reimbursement of these 24.5 hours of overtime<sup>15</sup> in the amount of \$427.42.

An employee who claimed 34.85 hours in 2000 supported his efforts with a typed list of tasks he performed. While a note at the top of this list states that all of the hours are for work performed for this proposal, as the Navy notes, some of the entries are so vague that we cannot ascertain their purpose. B&P 2000 ref. DD. There is no indication, for example, that such tasks as "Florida Medical Center," "Gram," "IBM," "SRCUTZ," "Safety," "Troy State," or "Nana draft," have any connection to the proposal preparation process. As a result, we have disallowed his labor for such cryptically described tasks and recommend reimbursement for only 10.35 of his hours. Given their very general described purposes, such as "Navy contract meeting Pensacola," and their proximity in time to unallowable tasks, his associated expense reports cannot be connected to any allowable tasks and we do not recommend

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any direct labor for this employee, we cannot find these expenses to be related to proposal preparation.

<sup>14</sup> We also do not recommend the reimbursement of his entry of \$900 for "office space" because there is no indication of the purpose for this office space.

<sup>15</sup> This employee also submitted two "transfer journal entries" listing a total amount for her labor with neither a purpose nor the underlying number of hours. Since these documents do not contain the requisite information, we do not recommend the reimbursement of these expenses. Moreover, in at least one case, the amount reflects a double-counting of overtime hours that are already reflected in the biweekly time sheets. B&P 2000 refs. BB and CC.



reimbursement of any of his claimed travel or telephone calls. B&P 2000 ref. N. We recommend reimbursement of \$602.48 for his labor.

Our review of the claim's documentation showed areas where we disagree with the Navy. First, when all of the claim's documentation is considered, the information underlying the 55 hours in labor claimed by three employees in connection with a sales tax issue, B&P 2000 ref. A, was sufficiently documented to show the amount, purpose, and reasonableness of the expense, for a total of \$953.75. Second, another employee accounted for her claimed 6.5 hours of labor with a detailed task-by-task memorandum that, with the exception of 1.5 hours providing legal comments on a subcontract we could not link to the proposal, was sufficient to show their purpose and relationship to the proposal preparation efforts. B&P 2000 ref. D. We recommend reimbursement of her labor in the amount of \$306.35. Third, another employee claimed 27 hours of labor for various bid team meetings and telephone calls. While the information he submitted to describe his tasks was limited, when viewed along with information in another employee's calendar, we found sufficient information to link all but 2 hours of undescribed telephone calls to the proposal preparation effort. B&P 2000 ref. M. We also find that his travel expense report contains sufficient information to be linked to allowable tasks based upon the calendar information of other employees. B&P 2000 ref. FF. As a result, we recommend the reimbursement of \$1,121.23 for his labor and \$735.62 for his travel expenses. Fourth, another employee claimed 30.40 hours in 2001 that was supported by his detailed daily calendar. B&P 2001 ref. E. Although the Navy found that several entries were insufficiently specific and failed to indicate that this employee had performed the listed tasks--the calendar entries are identical to those for another employee--given the fact that this employee's name is on the calendar with limited notations attributed to his effort, we find these hours allowable and recommend reimbursement in the amount of \$2,886.82.

Finally, the Navy allowed the 40 hours for an employee who worked on the housing component of the RFP, B&P 2000 ref. B, in the amount of \$1,725.41; the 2.5 hours for an employee who worked on an overview meeting, B&P 2000 ref. F, in the amount of \$133.21; the 4 hours for an employee who worked gathering past performance materials, B&P 2000 ref. AA, in the amount of \$212.10; the 40 hours for an employee who worked on various charts, B&P 2000 ref. HH, in the amount of \$1,113.74; the 56 hours for an employee who worked on Sodexho's "red team review" and other tasks, B&P 2000 ref. FF2, B&P 2001 ref. C, in the amount of \$2,400.79 for her direct labor and \$49.25 for her associated out-of-pocket expenses; and the 34 hours for an employee who worked on the firm's cost submissions, B&P 2001 ref. B, in the amount of \$2,187.11. We have reviewed Sodexho's claim and agree with the Navy's view that all of these costs are allowable.

#### Subcontractors

Sodexho asks to be reimbursed \$18,417.95 for proposal preparation costs incurred by two of its "team members," or subcontractors, that would have performed

specific contract requirements if the contract had been awarded to Sodexho. Sodexho's Feb. 10, 2003 GAO Claim, B&P Cost Spreadsheets.

We have allowed a protester to recover the proposal preparation costs incurred by its potential subcontractors in only one limited circumstance--where the costs were incurred by the contractor as part of a joint effort with the protester, participating fully in the proposal preparation process, and not limiting its role to merely providing a quotation for certain work under the solicitation. TMC, Inc.--Claim for Costs, B-230078.2, B-230079.2, Jan. 26, 1990, 90-1 CPD ¶ 111 at 2-3. Moreover, consistent with CICA, before recommending that the protester recover proposal preparation costs incurred by its potential subcontractor from the contracting agency, we will require evidence of an obligation by the protester to repay such costs regardless of whether or not they are recovered from the government. In this regard, under 31 U.S.C. § 3554(c)(1), we are authorized to recommend that the contracting agency pay proposal preparation costs to an "appropriate interested party." In our view, it is implicit in this provision that the costs to be recovered be the costs of the "interested party." Boines Constr. & Equip. Co., Inc.--Costs, B-279575.4, Apr. 5, 2000, 2000 CPD ¶ 56 at 4-5. As defined in 31 U.S.C. § 3551(2), an "interested party" is an "actual or prospective bidder or offeror." Under this definition, the interested party is the protester, not its potential subcontractor, even if it participates in preparing the protester's proposal. Accordingly, only if there is evidence of an obligation by the protester to repay the subcontractor for its proposal preparation costs regardless of whether the protester ultimately recovers those costs from the government can we conclude that the costs are those of an interested party, as required by CICA. Boines Construction & Equip. Co., Inc.--Costs, *supra*, at 5. There is no evidence of any such obligation here. Instead, the evidence shows that Sodexho did not even ask these firms for information concerning the costs of their efforts until it was preparing to file its claim for costs with the Navy. As a consequence, we do not recommend that Sodexho recover these costs.

### Consultants

Sodexho asks to be reimbursed \$114,793.86 for the services of five consultants who assisted it in preparing its proposal. Sodexho's Feb. 10, 2003 GAO Claim, B&P Cost Spreadsheets. Sodexho supported its claim with invoices from these consultants as well as, in various cases, timesheets, travel expense reports, and mileage reports.

After reviewing the information in Sodexho's August 30 claim, the Navy informed the firm that its proposal preparation costs included substantial consultant costs without adequately explaining the relationship between those consultants and Sodexho or their role in the proposal preparation process. The Navy advised Sodexho that, in order for it to determine the reasonableness, allowability, and allocability of the costs included for these consultants, Sodexho must provide its consultant agreements and detailed explanations of the specific costs and their relationship to the proposal preparation effort. Navy's Letter of Sept. 13, 2002, at 6. In its September 27 response, Sodexho provided these consultant agreements and stated

that they “further describe[d] the work performed” with respect to the proposal effort. The firm did not submit further explanation. Sodexho’s Letter of Sept. 27, 2002, at 4 n.6. The Navy conducted a detailed analysis of Sodexho’s claim, expense by expense, and advised the firm that its supplemental submission “did nothing more to explain how the specific costs claimed relate to the [proposal] preparation effort.” Navy’s Letter of Nov. 21, 2002 at 10. As a result, the Navy denied all but \$14,858.14 of Sodexho’s claimed consultant expenses. *Id.* at 20. The Navy’s decision was supported by a detailed spreadsheet analysis of each expense.

Sodexho responded by arguing that the Navy had imposed an “unreasonably high burden” on Sodexho to provide “extraordinary details” in regard to its consultant costs. Sodexho’s Letter of Dec. 30, 2002 at 10. Sodexho stated that it had adequately documented the amount and purposes of its claimed consultant effort. The firm also attached a declaration from the Sodexho employee responsible for leading the proposal effort in which he provided a general description of the efforts of each consultant. The Navy rejected Sodexho’s argument and the dispute has come for resolution to our Office. We have conducted an extensive review of the documentation submitted by Sodexho and agree that the firm has failed to submit sufficient evidence for us to determine that many of its costs were reasonably necessary to the proposal preparation effort. We recommend Sodexho be reimbursed \$29,128.29 for the efforts of its consultants in preparing its proposal.

Sodexho asks to be reimbursed \$83,110.55 for the services of the consultant who played a major role in assisting with the preparation of the firm’s proposal. Sodexho’s Feb. 10, 2003 GAO Claim, B&P Cost Spreadsheets. The documentation submitted in support of these expenses is in the form of 22 invoices over the 1999-2001 period, many of which include both labor and travel or other out-of-pocket expenses. With some exceptions, we agree with the Navy that Sodexho has provided the minimum documentation required to identify the amounts for this consultant’s services, but not to properly identify the purpose for which the expense was incurred and how that expense relates to proposal preparation. Sodexho has also done little or nothing to respond to the Navy’s concern that this consultant’s expenses, including 165 days of labor, are grossly overstated given the limited role Sodexho now ascribes to him. Our analysis shows that this consultant’s 22 invoices can be sorted into three general categories.

The first category encompasses a sequential series of invoices beginning with the period ending January 21, 2000 and ending with the period ending August 26, 2000. On the first invoice, for 9 days of labor, the listed business purpose is “Continued work towards preparation of SMS Proposal for the U.S. Navy Pensacola Community Support Services Competition. Request for Proposal (RFP) release date is scheduled for February 1, 2000.” B&P 2000 ref. LL. The purpose listed on each succeeding invoice, covering an additional 80 days of labor, begins with the same language but continues with ongoing milestones in the procurement, such as when various

amendments were issued. B&P 2000 refs. QQ, SS, VV, XX, BC, FF, HJ, MN, QR, ST. No actual task is listed as the business purpose.

The Navy argues, and we agree, that this complete lack of specificity makes it impossible to determine the nature of the consultant's effort in the proposal preparation process, whether the task or tasks were reasonably related to proposal preparation, or whether the costs were duplicative and excessive, particularly in light of the substantial amount of direct labor claimed by Sodexho employees for preparing the proposal over the same time period.

Sodexho is under the apparent, but erroneous, impression that a description such as "work towards preparation of a proposal," "preparing the proposal," or "work in support of proposal preparation" is sufficient to meet the requisite standards. Although it seems self-evident, Sodexho's attempt to support its claim that an expense was incurred for "preparation of the proposal" by describing the purpose of the expense as "preparation of the proposal" means that it has provided no description at all. At a minimum, it precludes a determination that the cost was reasonable based on a review of whether, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the preparation of a proposal. Patio Pools of Sierra Vista, Inc.--Claim for Costs, supra.

We scrutinized every piece of paper associated with these invoices to ascertain whether Sodexho had provided sufficient documentation for us to determine that any of these costs were allowable. We could not do so. While a number of these invoices contained no additional detail at all, see B&P 2000 refs. LL, BC, MN, QR, and ST, others contained hints of information that were still insufficient. One invoice included a travel expense report that listed the purpose, "Work at Sodexho's Mobile office in support of the CSS proposal preparation"; again, this is not a sufficient description of the nature of the task. The invoice also included a mileage report showing that, on a certain date, the consultant visited sites relevant to this procurement. This task is allowable but, since neither the mileage report nor any other information in the invoice associated any amount of time with this task, there was no way for us to segregate an allowable amount. Where a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record before us what portion is unallowable, the entire amount must be disallowed even though some portion of the claim may be properly payable. TRESP Assocs., Inc.--Costs, supra. Other invoices contained similarly aggregated tasks. See B&P 2000 refs. VV, SS, XX, EF. We do not recommend reimbursement of any of these invoices.

The second category encompasses invoices whose listed purposes include both allowable and unallowable costs, but provide no reasonable way to segregate the two. Again, where a protester has aggregated allowable and unallowable costs in a single claim, such that we cannot tell from the record before us what portion is unallowable, the entire amount must be disallowed even though some portion of the claim may be properly payable. TRESP Assocs., Inc.--Costs, supra. For example, the

invoice submitted for the period ending November 12, 1999 lists as its business purpose the following:

During this period I met two times with Sodexho Marriott Services Staff in Pensacola and provided information concerning Navy Pensacola Organization and forthcoming business opportunities in the local area. Assisted in developing Sodexho Services "Lessons Learned" presentation outline, reviewed the presentation and was a member of the team that gave the presentation to the U.S. Navy. Also, during this period, I met with the Navy's Outsourcing Technical Director three times, and provided information concerning Sodexho's Organization and Capabilities.

B&P 1999 ref. M; see also the aggregated tasks in B&P 1999 refs. N and O. The first task is clearly related to general business opportunities extending beyond this procurement. Moreover, the Navy argues that the solicitation process did not include any provision for a "lessons learned" presentation as part of the proposal process and asserts that this task, too, represents an unallowable cost associated with general business development. Sodexho has failed to rebut the Navy's argument, which we find reasonable.

Two additional invoices in this category are for 5 days of labor with the listed purpose, "collection of information concerning the acquisition schedule for Pensacola Community Support Services. Participated in the personnel interview process of five individuals for potential employment with SMS. Continued developing Capture Plan Procedures and Information for Navy competitions." B&P 2001 Refs. F, G. The Navy argues, without rebuttal from Sodexho, that very little time should have been needed for the first task; that it cannot ascertain that the interview process was related to this procurement; and that the third task is not limited to the capture plan for this procurement but extends to various "Navy competitions." The Navy asserts that Sodexho provided no way to segregate any allowable costs from those not associated with preparing its proposal. While Sodexho argues that the fact several days are crossed out on each invoice indicates the segregation has been accomplished, as the Navy points out, none of the tasks have been similarly crossed out. As a result, there is no way to ascertain whether this crossing out is, in fact, the proper segregation of allowable costs or whether the consultant simply revised the number of days he billed Sodexho for all of these tasks. This incomplete effort at segregating costs, if that is what it is, precludes the payment of any of the costs for either of these invoices. See also B&P 2001 ref. L.

The final category encompasses invoices that include allowable costs either in total or in ways that sufficiently segregated the allowable costs. First, the invoice for the period ending December 24, 1999, for 9 days of labor, lists as the business purpose the following:

During this period I meet with [another Sodexho consultant]. Coordinated the development of questions concerning the Draft RFP for Community Support Services (CSS) Pensacola Regional Complex. Submitted draft questions to SMS, San Ramon for finalization and submittal to the U.S. Navy. Reviewed and updated draft CSS Capture Plan in preparation of SMS management meeting held December 21, in SMS building, Mobile, AL. Scheduled and participated in Business Meetings with SMS management and representatives from . . . candidates for CSS contract work. Commenced work preparing for corporate meeting scheduled for January 5 and 6, 2000.

B&P 1999 ref. P. The invoice was accompanied by two travel expense reports, one for the trip to the consultant's facility, referenced in the first listed task, and one for the trip to Mobile.

We do not agree with the Navy that Sodexho's claim is insufficient to show the amount and purpose of this expense. The submissions as a whole confirm these meetings and their purposes. The "corporate meeting," for example, is identified as a multi-day Pensacola project overview meeting in the calendar of another Sodexho employee, B&P 2000 ref. E, B&P 1999 ref. K, and the remaining tasks are clearly related to proposal preparation. In addition, given the number of tasks, we have no basis to find the expense to be excessive or unreasonable. As a result, we recommend reimbursement of this expense for his 9 days of labor, as well as associated travel and out-of-pocket expenses, in the amount of \$4,687.69.

In a related invoice, also for 9 days of labor, the purpose is listed as "[c]ontinued work preparing for corporate meeting which was held January 5, 6, 2000 in Gaithersburg, MD." B&P 2000 ref. KK. While we find these expenses allowable as to the 2 days of the meeting, and to 2 days of meeting preparation based on another employee's calendar, B&P 1999 ref. K, Sodexho has failed to provide sufficient information to identify the nature of the consultant's activities in other days before and after the meeting. As a result, we find these expenses allowable to the extent of 4 days of labor (two in 1999 and two in 2000), in addition to his travel expenses, in the amount of \$2,826.37.<sup>16</sup>

Several 2001 invoices listed both allowable tasks and tasks that were not associated with proposal preparation. In our view, however, the fact that Sodexho has crossed off both days and tasks from these invoices is sufficient evidence that the allowable tasks have been segregated. As a result, we recommend the reimbursement of 6 days of labor and associated travel for "review of the final proposal" in May in the

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<sup>16</sup> We have disallowed the \$23.16 in claimed telephone expenses because we cannot ascertain that all of them were linked to the one allowable purpose we could discern from the invoice.

amount of \$4,808.21 (B&P 2001 refs. J, K); 12 days of labor and associated travel for “preparing final proposal submission” in July in the amount of \$4,268.94 (B&P 2001 refs. Q, O); and 9 days of labor and associated travel for “preparing second final proposal submission” in August in the amount of \$5,232.66 (B&P 2001 refs. W, T). We have no basis to share the Navy’s view that this amount of labor is excessive, considering the complexity of this procurement and the commensurate complexity of proposals submitted in response to the solicitation.

In sum, we recommend that Sodexho be reimbursed \$21,823.87 for the labor and associated expenses claimed for this consultant.<sup>17</sup>

Sodexho asks to be reimbursed \$18,896.30 for the services of a second consultant in the preparation of its proposal. The documentation submitted to support this claim is a series of four invoices, several of which include travel expenses. The first invoice is for 108 hours for “Proposal Services for Pensacola RFP” over 2 weeks in December 1999. The attached time sheet for the first week, showing 45 hours, contains the description, “Pensacola RFP review” and lists the names of two individuals. B&P 2000 ref. KK2. The attached time sheet for the second week, showing 63 hours, contains the description, “Meeting with [the primary consultant]” and the names of three individuals. The accompanying letter indicates that the invoice “covers the time [this consultant] spent prior to the meeting with [the primary consultant] and the three days [the primary consultant] was here at our site.” *Id.* The remaining three invoices, for 187.5 hours of “Proposal Services Pensacola RFP” and travel expenses, include only as a further purpose the name of an individual and “Pensacola Proposal.” B&P 2000 refs. NN, OO, TT.

The Navy argues that none of these services should be reimbursed because there is no explanation regarding this consultant’s role in the preparation of the proposal. In response to the Navy’s position in this regard, Sodexho provided the consulting agreement but no further detail. As the Navy points out, the agreement is very general; the firm is retained to provide “proposal and bid support services including proposal management, technical writing, and costing support for the Pensacola NAS RFP.” Agreement ¶ 1.1. Absent further detail regarding the services the consultant provided, the Navy asserts that it cannot assess the reasonableness or relevance of

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<sup>17</sup> Sodexho has also submitted three expense reports totaling \$309.31 for “office supplies,” “office supplies in support of Sodexho,” and “SMS AT&T Business telephone calls” in May and June of 2001. B&P 2001 refs. M, N, V. Since there is no purpose associated with any of these expenses, and since this consultant conducted other business for Sodexho during this timeframe, we cannot recommend their payment. Sodexho has also submitted a travel expense report in the amount of \$2,494.53 for this consultant that lists, as its purpose, a task not linked to proposal preparation. B&P 2001 ref. R. This expense is also disallowed.

these costs. Sodexho's argument that the Navy has imposed an "overly burdensome and stringent test" to determine the relevance of the firm's services is another example of the firm's unconstructive approach to pursuing this claim. Given such a general consulting agreement, the mere fact that this firm billed Sodexho more than \$18,000 to "review the RFP" and perform other unspecified tasks is insufficient to meet the required documentation standards. At a minimum, the absence of more specific information precludes a determination that the cost was reasonable based on a review of whether, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the preparation of a proposal. Patio Pools of Sierra Vista, Inc.—Claim for Costs, *supra*.

In its August 30 claim with the Navy, Sodexho submitted a \$4,972.20 invoice for a consultant for "professional services" rendered over 5 days in May and June 2001, inclusive of travel expenses. The invoice contains no information as to the purpose of these services or how they are related to the preparation of the proposal. In response to the Navy's request for more substantiation of its consultant expenses, Sodexho's September 27 letter provided its agreement with this consultant and no other details. The agreement, which does not reference this procurement, lists as its purpose the setting forth of terms and conditions upon which Sodexho retains this consultant to "assist in the government RFP response efforts and other RFP activities," and describes the particular consulting services as to "be determined by [Sodexho's] designated representative." Agreement ¶¶ 1, 7. On December 30, nearly 6 months after our decision was issued, Sodexho gave the Navy a declaration from the Sodexho employee responsible for leading the proposal effort that included a more detailed explanation of the nature of this consultant's services. The Navy objects to Sodexho's claim for these costs, arguing that Sodexho failed to file a timely, adequately supported claim and has, as a consequence, forfeited its right to recover these costs. We agree.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1), provide that when we find that an agency should reimburse a protester for its appropriate costs:

[t]he protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

Consistent with the intent of our Regulations to have protest matters resolved efficiently and quickly, the 60-day timeframe for filing claims with the contracting agency was specifically designed to avoid the piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims. That timeframe affords protesters ample opportunity to submit adequately substantiated, certified claims. HG Props. A, L.P.—Costs, B-277572.8, Sept. 9, 1998, 98-2 CPD ¶ 62 at 2; Test Sys. Assocs., Inc.—Claim for Costs, B-244007.7, May 3, 1993, 93-1 CPD ¶ 351 at 4. Failure to initially file an adequately supported claim in a timely manner results in forfeiture



of a protester's right to recover costs, irrespective of whether the parties may have continued to negotiate after the 60-day period expired. Wind Gap Knitwear, Inc.--Claim for Costs, B-251411.2, B-251413.2, Aug. 30, 1995, 95-2 CPD ¶ 94 at 3.

The record clearly shows that Sodexho failed to file a legally sufficient cost claim within the time required for this expense.<sup>18</sup> The claim initially submitted to the Navy did not identify in any way the purpose for which this expense was incurred and despite the Navy's advice to this effect, Sodexho did not submit any sufficiently detailed information until its piecemeal effort nearly 6 months after our decision was issued, well beyond the required 60-day timeframe. Sodexho has not offered any justification for its dilatory actions, and we find none. See Aalco Forwarding, Inc., et al.--Costs, B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 at 5.

As a final matter, the Navy accepted as allowable the expenses associated with the services of two consultants, one that provided technical writing services and one that provided support in pricing Sodexho's proposal. Our review of Sodexho's claim leads us to recommend the payments of these costs, in the total amount of \$7,304.42. When this amount is combined with the reimbursable costs of the first consultant discussed above, Sodexho is entitled to recover a total of \$29,128.29 for the efforts of its consultants in the preparation of its proposal.

#### Outside Counsel

Sodexho asks to be reimbursed \$19,210.27 for the costs of two outside law firms retained to assist it in its proposal preparation efforts. Sodexho's Feb. 10, 2003 GAO Claim, B&P Cost Spreadsheets. We find the firm entitled to recover \$11,469.37 for these expenses, inclusive of attorneys' fees and expenses.

The \$5,003.19 in claimed expenses for the first law firm is supported by that firm's billing statement that lists, as its purpose, "Sales/use tax; Pensacola Naval Regional Complex." B&P 2000 ref. PP. The invoice documents 34.9 hours of attorney time, as well as \$3.19 in photocopying and long-distance telephone expenses. The invoice notes that the time spent preparing the firm's opinion on the issue exceeded the agreed cap of \$5,000, and only billed the amount of \$5,000 plus expenses. The Navy has disallowed 19.2 of these hours, claiming that there is insufficient information in the billing statement to ascertain the purpose of the task or a nexus between the task and proposal preparation. We do not agree. When read as a whole, and in conjunction with other documentation in the claim, all of these hours are associated

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<sup>18</sup> The same is true for other expenses whose purpose can only be ascertained by reviewing this late declaration.

with providing legal advice on a tax issue relevant to proposal preparation. As a result, we recommend the reimbursement of this \$5,003.19 invoice.<sup>19</sup>

The \$14,207.08 in claimed expenses for the second law firm are supported by two of that firm's billing statements. The first statement groups tasks under various headings, the first of which is "Pensacola Procurement - FOCI - RFP Review - Questions." B&P 2000 ref. AB. Under this heading are tasks performed by two attorneys over 34.1 hours, with \$567.58 charged for expenses. The Navy has disallowed .2 of these hours, for a task described as "Telephone B. Fuller regarding FOCI" because it is not clear to what "FOCI" refers. The second statement grouped two tasks under the heading, "Pensacola - FOCI," B&P 2000 ref. PQ, and billed Sodexho for 6.4 hours with no further description. Sodexho has rejected the Navy's statement that it does not understand how "FOCI" relates to proposal preparation, arguing that the Navy is questioning its legal judgment. While this acronym presumably refers to issues associated with "foreign ownership, control, or influence," Sodexho's failure to clarify the matter precludes us from ascertaining whether these tasks are related to the preparation of this proposal. We therefore recommend that all hours related to these tasks be disallowed. We find that Sodexho is entitled to recover its expenses for 33.9 hours in attorneys' fees. The statutory attorneys' fee cap of \$150 per hour is applicable here but, as discussed below, we have concluded that it is appropriate to adjust that fee cap for the cost of living. Using the methodology discussed in detail below, we have established that the adjusted fee cap for these services is \$165 per hour.<sup>20</sup> Accordingly, we recommend that Sodexho be reimbursed \$5,593.50 in legal fees and expenses of \$567.58, for a total of \$6,161.08.

#### Out-of-Pocket Expenses

Sodexho asks to be reimbursed \$4,687.21 in out-of-pocket expenses to 12 vendors for such things as telecommunications services, office supplies, courier services, and publications services associated with the preparation of its proposal. The Navy concluded that Sodexho was entitled to recover only \$16.44 of the claimed amount because, for most of the claimed expenses, Sodexho failed to identify the purpose

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<sup>19</sup> The \$150 hourly statutory fee cap on attorneys' fees, discussed below, has no impact on this billing statement because the law firm billed only \$5,000 for 34.9 hours, an effective hourly rate of less than \$150 per hour.

<sup>20</sup>  $\$165 = \$150 \times 169.3/153.7$  where 153.7 is the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items," (CPI-U) for October 1995, the base date for our calculation, and 169.3 is the arithmetic mean of the CPI-U for January 2000 (168.8) and February 2000 (169.8), the months in which the legal services were rendered. A detailed discussion of the statutory fee cap, the basis for its adjustment, and the calculation of the adjustment can be found at pages 37-43 of this decision.

for which the expense was incurred and how it was related to proposal preparation. The Navy concluded that the evidence for the remaining expenses showed that they were incurred in contravention of the RFP's explicit admonition against the preparation of an unnecessarily elaborate proposal. We recommend the reimbursement of \$16.44 in out-of-pocket expenses.

Claims for out-of-pocket expenses must be supported by documentation that identifies the amount claimed, the purpose for which the expense was incurred, and how the expense relates to the proposal preparation process. See Komatsu Dresser Co.—Claim for Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112 at 8. Sodexho's support for most of its claimed out-of-pocket expenses consists of vendor invoices that contain no evidence of the purpose of the expense or how the expense was related to the proposal preparation process. For example, Sodexho has presented a \$495.95 invoice from a firm for "re-stocking & flight cancellation" with no explanation; an internal office transmittal indicating a vendor's bill of \$481.27 for unspecified office supplies; a \$485.19 invoice from Kinko's for unspecified services; and a \$281.07 invoice from a delivery service for unspecified deliveries. There is no explanation in the record for any of these invoices. Since we cannot ascertain the purpose for which any of these expenses were incurred or how, if at all, they relate to the proposal preparation process, we find that Sodexho has failed to adequately document these expenses. The only out-of-pocket expense that is adequately documented is a \$16.44 delivery on a Federal Express invoice indicating a shipment to the Navy.<sup>21</sup>

Sodexho has also submitted invoices from three vendors for various publication services. The first is a \$200 invoice for the delivery of two stock photographs, one of a laundry lady and one of a window washer, for use in Sodexho's proposal. The second is a \$322.04 invoice for seven posters, and the third set of invoices, totaling \$1,604.67, are for custom color tabs. The Navy declined to reimburse Sodexho for any of these expenses, arguing that the costs incurred unreasonably violated the RFP's prohibition against excessively elaborate proposals. We agree.

Section L.III. of the RFP informed offerors that:

Unnecessary elaboration or other presentations beyond that sufficient to present a complete and effective proposal are not desired and may be construed as an indication of the offeror's lack of understanding of cost consciousness. Elaborate art work, expensive paper or bindings, and expensive visual or other presentation aids are neither necessary nor desired.

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<sup>21</sup> One of the other shipments on this invoice, from a mortgage company to the home of the Sodexho employee responsible for preparing the proposal, is clearly not related to proposal preparation.

The Navy argues that expensive photographs, color posters, and color proposal tabs, such as those at issue here, are encompassed by this description of items that were “neither necessary nor desired.” In view of the explicit RFP admonition against the use of elaborate artwork and expensive visual aids, and in the absence of any reasonable rebuttal from Sodexho, we can only conclude that these costs are unreasonable because they exceed those which would be incurred by a prudent person in preparing a proposal. See Ervin & Assocs., Inc.--Costs, B-278850.2, Aug. 1, 1999, 99-2 CPD ¶ 23 at 4.

## PROTEST COSTS

Sodexho requests the reimbursement of \$233,678 for the costs of filing and pursuing its protest. Sodexho’s Feb. 10, 2003 GAO Claim, Basis of Estimate Memorandum, Table 1. Most of these costs are in the form of fees for outside counsel, which are supported by the law firm’s billing statements. The remaining costs are associated with the efforts of consultants and Sodexho employees, and are documented by invoices, calendars, and other information.

The Navy advised Sodexho that its initial claim was excessive and insufficiently supported, and asked for additional documentation. Among other things, the Navy stated that Sodexho’s claimed costs for outside counsel must be identified with specific tasks performed in pursuing the protest and, to the greatest extent possible, should be broken down by specific protest issues. In this regard, the Navy stated that Sodexho was only entitled to recover the costs associated with its successful protest issue, which it believed represented a relatively small portion of the overall protest submissions. In its reply, Sodexho denied that its costs were excessive and unreasonable. The firm noted that the legal fees and invoices in the claim reflected the law firm’s customary detailed account of legal services rendered to a client; stated that the record contained numerous indications as to the primary legal issues upon which attorneys, consultants, and Sodexho employees were focused at various times; and generally described the role played by its consultants and employees. Sodexho also disputed the Navy’s assertion that it was only entitled to recover the costs associated with its successful protest issue and rejected the Navy’s arguments that its efforts in this regard were minimal. In its November 21 response to Sodexho, which contained analyses of the allowability of each discrete expense, the Navy did not alter its position. The Navy stated that, even if properly documented, Sodexho was entitled to no more than 5 percent of its claimed protest costs.

As with proposal preparation costs, a protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. Innovative Refrigeration Concepts--Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD 19 at 2. 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, the costs do not exceed those that would be incurred by a prudent person in pursuit of a protest. Galen Med. Assocs., Inc.--Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 2. Our Office will recommend that protesters

recover costs attributable to hours spent in pursuit of a protest only if those costs were reasonably necessary to the protest effort. See JAFIT Enters., Inc.—Claim for Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 2-4. The claim for reimbursement must, at a minimum, identify the amount claimed for each individual expense, the purpose for which the expense was incurred, and how the expense relates to the protest. Aalco Forwarding, Inc., et al.—Costs, *supra*, at 4. Where, as here, attorneys' fees are sought to be recovered, evidence from the attorneys involved must be submitted, including, for instance, copies of bills from the attorneys listing the dates the services were performed and the hours billed to the protester. *Id.* As a threshold matter, we address the question whether Sodexho's recovery should be limited to the costs incurred with respect to its one successful protest issue.

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Price Waterhouse—Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3. Nevertheless, we will limit a successful protester's recovery of protest costs where a part of its costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. *Id.*; Department of the Navy—Request for Recon. and for Modification of Remedy, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147 at 6; Interface Flooring Sys., Inc.—Claim for Attorneys' Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106 at 3. The mere fact that all protest allegations challenge the agency's conduct of an A-76 procurement does not intertwine the issues. Issues are intertwined where they share a common core of facts, are based upon related legal theories, and are otherwise not readily severable. Price Waterhouse—Claim for Costs, *supra*, at 4.

Sodexho argues that all of its protest allegations arose from a common core of facts flowing from its basic assertion that the use of NAFI employees in the agency's MEO resulted in a flawed and unfair procurement. We agree with the Navy, however, that Sodexho's successful protest allegation relied on different sets of facts and legal theories than its unsuccessful protest allegations. Sodexho's allegation that the Navy's overall process was flawed and unfair because most of the MEO was comprised of NAFI employees focused both on the Navy's failure to so notify offerors and on the legality of including NAFI employees at all, and relied on arguments such as whether NAFI employees are federal employees and whether NAFI employees should be included in A-76 studies at all. In contrast, Sodexho's challenge to the adequacy of the review by the Navy's independent reviewing official (IRO) relied on such arguments as the alleged failure to give the IRO supporting documentation for key MEO assumptions, and alleged inadequacies in the IRO's own documentation. Each of Sodexho's two remaining protest allegations was grounded in its own distinct set of unrelated facts with different underlying legal theories to challenge the in-house cost proposal. Sodexho's argument that the MEO failed to meet all of the PWS requirements compared the details of the in-house plan with the PWS requirements, and Sodexho's argument that the agency failed to ensure that the in-house plan equaled the level of performance and performance quality offered by

Sodexho--the “leveling” argument--compared alleged strengths in Sodexho’s proposal with the contents of the in-house plan.

Sodexho’s argument that the MEO’s use of NAFI employees was intertwined in each of these allegations is unavailing. A review of Sodexho’s pleadings shows that the references to the Navy’s use of NAFI flextime employees in the context of its IRO allegation are merely illustrative of its substantive arguments; that those same references in the context of its “leveling” allegation are merely incidental to its substantive arguments; and that Sodexho’s allegation that the MEO did not meet the requirements of the PWS contain no such references at all. To the extent that there are shared facts between these allegations, we do not find them to constitute a core set of facts; moreover, we find that the legal theories underpinning each allegation are distinct and readily severable. As a result, we find that Sodexho is entitled to recover only those costs incurred in pursuit of its successful protest issue.<sup>22</sup>

The Navy maintains that Sodexho’s claim is structured in such a way that it is hard to break out the expenses associated with its successful protest issue from those associated with the unsuccessful protest issues. The Navy takes the position that, in any event, Sodexho’s costs associated with the NAFI issue are minimal. The Navy’s spreadsheets analyzing each expense in Sodexho’s claim reveal that the Navy found many of these expenses to be insufficiently detailed to show they were related to pursuing the protest; as a result, the Navy found them to be entirely unallowable.

In Interface Flooring Sys., Inc.--Claim for Attorneys’ Fees, *supra*, the first case in which we limited a firm’s recovery of bid protest costs to the issues on which the protester had prevailed, we stated that, in order for the protester to recover its costs, its attorneys were responsible for “allocating and certifying to [the agency] the time charged among the issues in the protest.” *Id.* at 3-4. We also have recognized, however, that it is not the practice of the legal profession generally to delineate the specific amount of time spent on a specific issue during the course of a legal proceeding. ViON Corp.--Claim for Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 4; Komatsu Dresser Co.--Claim for Costs, *supra*, at 5; CBIS Fed., Inc.--Claim for Costs, B-245844.5, May 18, 1993, 93-1 CPD ¶ 388 at 4. Thus, while a firm which has

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<sup>22</sup> The Navy is correct that we did not find that the Navy’s inclusion of NAFI employees in its MEO violated the A-76 procedures, Sodexho Mgmt., Inc., *supra*, at 17, but sustained the protest because “the Navy’s failure to give commercial offerors adequate notice of its intent to use NAFI employees for the great majority of its in-house workforce improperly and unfairly deprived those offerors of the ability to make an informed decision about whether, and how, to compete.” *Id.* at 20-21. While the Navy argues that Sodexho’s entitlement should be further limited solely to the costs it incurred pursuing the part of its allegation regarding the Navy’s failure to provide this notice, in our view, the entire NAFI issue shares a common set of core facts and legal theories and is not properly or readily divisible.

been given a partial award of attorneys' fees, and other costs runs the risk of a lower award than might be justified had the firm segregated its costs according to the issues presented, it will not be barred from recovery of some part of the unsegregated costs. ViON Corp.--Claim for Costs, supra.

We now turn to the question of an appropriate amount of recovery. The Navy's position that Sodexho is entitled to recover 5 percent of its protest costs--if they are otherwise properly documented--is based upon the Navy's limited definition of Sodexho's successful protest allegation. Sodexho, on the other hand, has not offered a percentage or any other method to allocate the costs of its successful protest issue other than by citing the task descriptions in its documentation and the general roles played by its attorneys, consultants, and employees. In the absence of an agreement by the parties, or even an articulated method of computing a fair amount, we will determine an amount that we think is appropriate based on consideration of the available evidence. Komatsu Dresser Co.--Claim for Costs, supra, at 5; CBIS Fed., Inc.--Claim for Costs, supra, at 4.

We think consideration of content--e.g., level of complexity--is the best starting point for reaching a fair estimate of the effort behind a protest argument. Komatsu Dresser Co.--Claim for Costs, supra, at 4. In this connection, we agree with Sodexho that the NAFI protest allegation was the most legally complex and significant issue raised in the protest, involving the research of materials not typically relevant to A-76 protests and the analysis of this first-impression issue. However, our view of the level of complexity of an issue must be considered together with the content of the pleadings, which typically illustrate the level of effort expended in supporting a protest argument.

Sodexho argues that, after the administrative appeal was filed, "[t]he vast majority of legal research effort and drafting effort by the attorneys was devoted to the NAFI-related issues." Sodexho's Letter of Sept. 27, 2002 at 7. According to Sodexho, a side-by-side comparison of its pleadings throughout this matter shows that the issue concerning alleged errors in the MEO and the "leveling" issue were presented in detail during the administrative appeal, and the protest arguments on those issues primarily repeated the arguments contained in the administrative appeal and required "little more than a logistical exercise of taking those issues from centerpiece arguments in the Administrative Appeal, to Exhibit status" as attachments. Id. at 6. Sodexho further states that, aside from the NAFI issue, the only issue during the protest that involved significant legal effort was the supplemental agency-level protest concerning the independence of the IRO. Id. at 7.

At Sodexho's suggestion, we have conducted a side-by-side comparison of all of its pleadings in this matter, beginning with its administrative appeal and ending with its response to a post-comments Navy filing. Our review confirms that the issues concerning alleged MEO errors and "leveling" are substantially similar from pleading to pleading, and that they primarily took the form of attachments after the administrative appeal. One attachment included 12 categories of alleged "leveling"

improprieties, and another attachment made detailed allegations of more than 40 alleged MEO errors. Although it took the Navy more than 180 pages of its 291-page combined contracting officer's statement and legal memorandum to address the allegations made in these two attachments, a review of Sodexho's comments confirms that it did, apparently, expend little additional effort on these issues. With limited additional argument, the firm incorporated by reference the same attachments and advised that it continued to pursue the claims therein. Sodexho's May 21, 2002 Comments at 45, 55. Consequently, we have no basis to dispute Sodexho's position that "very little additional work was devoted to [these] issues." Sodexho's Letter of Sept. 27, 2002 at 6.

However, this same side-by-side comparison of the pleadings also provides insight into the level of effort Sodexho expended on the NAFI issue. A comparison of the administrative appeal and the initial agency-level protest shows that the principal difference between the two documents with respect to the NAFI issue is a rearrangement of the existing arguments; other differences in the latter document are the addition of some factual information learned from the administrative appeals decision and brief responses to its conclusions. There is little evidence of additional legal research and analysis. Compare Sodexho's Oct. 9, 2001 Administrative Appeal, at 31-45, with Sodexho's Dec. 27, 2001 Initial Agency-Level Protest, at 10-30. A comparison of the initial agency-level protest and the GAO protest shows even more similarities. The differences in the latter document are the addition of one new argument comprising one page and supported by one legal citation, as well as some additional factual information learned from the agency-level report, brief responses to the Navy's arguments, and a reference to a newly-produced document. Compare Sodexho's Dec. 27, 2001 Agency-Level Protest, at 10-30, with Sodexho's Apr. 4, 2002 GAO Protest, at 16-40. It was not until Sodexho filed its comments on the agency's report on the GAO protest that the firm included any substantive additional legal argument and analysis on some of the NAFI issues. Compare Sodexho's Apr. 4, 2002 GAO Protest, at 16-40, with Sodexho's May 21, 2002 GAO Comments, at 13-25.

While we do not question Sodexho's assertion that the "vast majority of legal research effort and drafting effort by the attorneys was devoted to the NAFI-related issues," Sodexho's Letter of Sept. 27, 2002 at 7, the dearth of evidence of this effort in the pleadings, combined with the general descriptions of many of the firm's efforts as evidenced by its billing statements, is a counterweight to the fact that the NAFI issue was the most complex issue in the protest. Considering all of these factors together, it is our judgment that the four protest issues--and the effort Sodexho expended on them--should be given equal weight. See *Komatsu Dresser Co.--Claim for Costs*, supra, at 5-6. We conclude that 25 percent is a fair estimate of the percentage of Sodexho's effort related to the NAFI issue. As a result, while tasks that are clearly linked to the successful protest issue or to the unsuccessful protest issues will be allowed or disallowed, as appropriate, as a general matter, the remaining pool of hours will be subject to the 25 percent allocation rate.



Accordingly, we have reviewed all of Sodexho's claimed expenses for filing and pursuing its protest using the following methodology. First, we have disallowed all hours that are clearly associated with unsuccessful protest issues; all hours related to lobbying or other legislative advocacy activities;<sup>23</sup> and all hours related to pursuing either the administrative appeal or to compiling documentation to submit in its claim to the Navy. Second, we allowed all hours that are clearly associated with effort that would have been expended whether or not the unsuccessful protest issues were raised, such as those associated with reviewing the protective order and converting the initial GAO protest to an agency-level protest. ViON Corp.--Claim for Costs, supra, at 3. Third, we allowed all hours that are clearly associated with the successful protest issue. Finally, we allowed 25 percent of all the remaining hours and 25 percent of the expenses.

### Sodexho Employees

Sodexho asks to be reimbursed \$500.65 for the efforts of two of its employees in pursuit of its protest. Sodexho's Feb. 10, 2003 GAO Claim, Protest Costs (PC) Spreadsheets. Sodexho states that its employees' assistance was associated with providing advice about the contents of its proposal and its revisions.

We permit the recovery of in-house labor costs incurred in relation to a sustained protest where the in-house labor costs directly relate to the protest. Gulf Gas Utilities Co.--Claim for Costs, B-242650.7, Feb. 13, 1997, 97-1 CPD ¶ 72 at 2. Reimbursement of costs is allowed where the protester has submitted sufficient documentary evidence to support them and where these costs, once sufficiently proven, are shown to be reasonable and necessary to or otherwise related to the actual protest. Commerce Land Title of San Antonio, Inc.--Claim for Costs, B-249969.2, Oct. 11, 1994, 94-2 CPD ¶ 131 at 2.

We agree with the Navy that the 3.5 hours of labor incurred by one employee on such generic tasks as reviewing pleadings and discussing the status of the protest are allowable, subject to the 25 percent allocation rate, or .88 hours, for a total of \$62.52. Sodexho Protest Costs (PC) ref. A. A second employee has claimed 4 hours of labors for various tasks. We find that 1.6 hours are fully reimburseable because they concern the parties' agreement to convert the initial GAO protest to an agency-level protest; .8 hours of labor are disallowed because they concerned the supplemental agency-level protest; and 1.6 hours for reviewing the initial GAO protest are

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<sup>23</sup> In its claim to our Office, Sodexho eliminated a number of hours associated with these activities, but our review of the claim showed that some had been overlooked. Such costs are, in our view, unrelated to the pursuit of a protest. See Maintenance and Repair--Claim for Costs, B-251223.4, June 24, 1994, 94-1 CPD ¶ 381 at 4.

allowable, subject to the allocation rate. These calculations yield 2 allowable hours, for a total of \$194.67.<sup>24</sup> PC ref. B.

While not included in its spreadsheets, Sodexho's documentation in support of this portion of its claim includes an additional 72.8 hours of labor for the employee responsible for preparing its proposal, and has supported this claim with this employee's daily calendar.<sup>25</sup> PC ref. B3. Our review of the calendar shows that 4 hours are fully reimbursable because they were associated with the conversion of Sodexho's initial GAO protest to an agency-level protest; 16 hours spent performing such generic tasks as reviewing the agency report and other correspondence are allowable, subject to the allocation rate; 50.4 hours are unallowable because the underlying task descriptions show that they were devoted to gathering material to file the cost claim with the Navy, and the remaining hours are unallowable because the underlying task description shows that it was associated with unsuccessful protest issues. These calculations yield 8 allowable hours, for a total of \$382.29.

In conclusion, we find that Sodexho is entitled to recover a total of \$639.48 for the efforts of its employees in filing and pursuing the protest.

#### Consultants

Sodexho requests reimbursement of \$25,898.89 for the services of two consultants who assisted with the filing and pursuit of its protest. Sodexho's Feb. 10, 2003 GAO Claim, PC Spreadsheets. Our review of the documentation submitted by the firm shows that none of these claimed expenses are allowable.

Sodexho asks to be reimbursed \$22,606.65 for the services of the first consultant. The documentation supporting this request consists of two references, an "office transmittal" whose purpose is identified as "government proposals," and a summary of invoices for the consultant's "support to Sodexho's [p]rotest to the Department of the Navy's A-76 decision for Community Support Services at Pensacola Naval

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<sup>24</sup> The parties dispute the allowability of an additional .8 hour for this individual for a certain task, but a review of the documentation shows that Sodexho has not actually included this time in its claim. PC ref. B.

<sup>25</sup> This documentation also includes another of Sodexho's internal airfare reports for this employee, in the amount of \$3,708.24. Again, Sodexho has included no explanation of the relationship, if any, these airfares have to any protest-related purpose. Moreover, we cannot discern how these trips--such as those between San Francisco and Honolulu, Honolulu and Guam, and San Francisco and Guam--are related to a protest filed by a McLean, Virginia law office on behalf of a corporation headquartered in Gaithersburg, Maryland concerning a procurement by a Pensacola, Florida naval installation.

Regional Complex, NAS, Pensacola.” PC ref. C. The only attached invoice states that the services were for review of the in-house government estimate, and Sodexho advised the Navy in its September 27, 2002 letter that this consultant’s effort involved calculating cost differentials between various categories of NAFI employees and civil service employees, analyzing cost comparisons and cost-type adjustments, and estimating MEO costs, most of which was done during the administrative appeal. Sodexho states that a small part of its time in the protest was devoted to the issues concerning whether the MEO met the PWS requirements and the “leveling” issue. Given the documentation in the record, we must conclude that all of these costs are allocable to the unsuccessful protest issues and do not recommend their reimbursement.

Sodexho also asks to be reimbursed \$3,292.24 for the costs expended by its second consultant in pursuing the protest. PC refs. D, E, G. Sodexho explains that this consultant provided information on the history of the procurement, copies of documents, and advice on the contents of the proposal, and that he reviewed the Navy’s pleadings. The documentation underlying this aspect of the claim is comprised of three invoices.

The first invoice was originally for 5 days of labor, but the “5” has been crossed off and replaced by a “2.” Sodexho P ref. D. The purpose identified for this labor was “[r]eviewed and informed area leaders concerning Sodexho’s GAO protest with regard to the Navy’s decision to retain CSS work in house”; other listed tasks have been crossed off. Absent any rebuttal from Sodexho, we agree with the Navy that this task appears to be public relations work, and not work performed in pursuit of the protest. The second invoice was originally for 15 days of labor, but the “15” has been crossed off and replaced with a “5.” The purpose cited for this labor was, “[r]eview Navy Pensacola CSS documents and assisted in the preparation of a supplemental protest which was filed on February 25, 2002 (3 days)”; other listed tasks have been crossed off. Sodexho P ref. E. We agree with the Navy that the 3 days spent working on the supplemental protest are not allowable because that protest was limited to an unsuccessful protest issue. Given the timing, and in the absence of any other explanation, we assume that the document review is associated with that task and also unallowable. Finally, the third invoice was originally for 15 days of labor, but the “15” has been crossed off and replaced with a “3.” Sodexho P. ref. G. The purpose identified for this labor was, “During this period I reviewed Sodexho’s Miramar proposal that was delivered April 10, 2002. I reviewed questions forwarded from the USA Huntsville pertaining to Sodexho’s Kwajalein proposal. Participated in conference calls related to various aspects of Sodexho’s GAO protest of the Pensacola CSS program. Met with Sodexho Director of Business Development to accept a turn over of all files concerning various programs.” *Id.* While we acknowledge that one of these tasks is related to the pursuit of the protest, Sodexho has given us no way to segregate this time from the time spent on the other, unrelated tasks. None of these unrelated tasks have been crossed out, and there is no way to ascertain whether the crossing out of the days was the proper segregation

of allowable costs or whether the consultant simply revised the number of days he billed Sodexho for all of these tasks.

### Outside Counsel

Sodexho asks to be reimbursed \$207,040.74 in legal fees and out-of-pocket expenses incurred in pursuit of its protest. Sodexho's Feb. 10, 2003 GAO Claim, PC Spreadsheets. The firm's billing statements show that these costs represent the services of seven attorneys--three partners and four associates--working a total of 767 hours, plus certain out-of-pocket expenses such as commercial messenger services, long distance telephone fees, and internal reproduction costs. After scrutinizing the task descriptions found in each billing statement, we applied the above methodology to ascertain the allowable costs.

First, we disallowed 209 hours that we viewed as clearly associated with unsuccessful protest issues. Tasks in this category included reviews of analyses of MEO "shortcomings," "problems," or "mistakes," and other analyses by the consultant who provided such data; analyses of GAO decisions in A-76 procurements since, at that time, those decisions were relevant only to Sodexho's unsuccessful protest issues; drafting protest sections regarding MEO staffing deficiencies; preparing and reviewing the attachments discussed above; efforts associated with the supplemental agency-level protest; and reviews and revisions to the leveling argument. PC refs. L, M, D2, F1, F2, G2, G3. We also disallowed 17 hours related to lobbying or other legislative advocacy activities, and .1 hour for a task associated with the administrative appeal.<sup>26</sup>

Second, we allowed all 23.7 hours that were clearly associated with effort that would have been expended whether or not the unsuccessful protest issues were raised. ViON Corp.--Claim for Costs, *supra*, at 3. These involved such tasks as reviewing the protective order and converting the initial GAO protest to an agency-level protest. Third, we allowed all 37.4 hours that were clearly associated with the successful protest issue. Tasks in this category included researching government directives pertaining to NAFIs; researching the Navy's use of NAFI personnel; and researching defenses to the Navy's position on the NAFI issue.

Finally, we allowed 25 percent of the remaining 478.1 hours, or 119.5 hours, for the remaining tasks because most are so generically described that we cannot ascribe them to a particular protest issue. These generic descriptions include such things as "conference call on Pensacola A-76 issues"; "continue review of Pensacola AAA decision to identify potential protest grounds"; "research and start drafting of Sodexho protest to GAO"; "discuss Sodexho protest tactics"; "evaluate potential Sodexho GAO protest issues"; "review documents and discuss strategy"; "discuss

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<sup>26</sup> We also disallowed 1.7 hours related to the consideration of an expert whose role is not described anywhere in the documentation supporting the claim.

status of Pensacola A-76 protest”; “review government response to Sodexho protests”; “continue analysis of the CO’s denial of Sodexho’s agency-level protests”; “conferences with [other attorneys] regarding Pensacola A-76 issues”; and “revisions to finalize comments to agency report.” See, e.g., PC refs. L, M, D2, F1, F2, G2, G3.

Based on the application of the above methodology, we recommend that Sodexho be reimbursed the costs of 180.6 hours expended by its outside counsel in filing and pursuing its protest, and 25 percent of the \$3,179.49 in out-of-pocket expenses associated with those hours, or \$794.88. Before we can determine the total amount Sodexho is entitled to recover for its attorneys’ fees, we must determine the proper hourly rate or rates to be paid.

#### Statutory Ceiling on Attorneys’ Fees

As amended by section 1403(b)(2) of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, 3289 (1994), the Competition in Contracting Act of 1984 provides that:

- (c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal Agency conducting the procurement pay to an appropriate interested party the costs of --
  - (A) filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees; and
  - (B) bid and proposal preparation.

31 U.S.C. § 3554(c)(1).

Section 1403(b)(2) of FASA also mandated a limit or “cap” on the hourly fees that could be paid to attorneys pursuant to such recommendations:<sup>27</sup>

- (c)(2) No party (other than a small business concern . . . ) may be paid, pursuant to a recommendation made under the authority of paragraph (1)--
  - . . .
  - (B) costs for attorneys’ fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the

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<sup>27</sup> Section 1403(b)(2) of FASA also mandated a limit or “cap” on the costs that could be paid for consultant and expert witness fees. 31 U.S.C. § 3554(c)(2)(A). As noted above, Sodexho has adjusted its claim to comply with the applicable regulations in this regard.

Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

31 U.S.C. § 3554(c)(2)(B).

It is undisputed that Sodexho is not a small business concern, and that the attorneys' fees it claims pursuant to our recommendation are subject to this statutory fee cap. In this regard, the Navy is correct that the statutory fee cap applies to attorneys' fees incurred in both the filing and pursuit of a protest and those incurred in the preparation of a bid or proposal. 31 U.S.C. § 3554(c)(2) (making the cap applicable to any recommendation made under the authority of 31 U.S.C. § 3554(c)(1)).

During its pursuit of the claim with the Navy, Sodexho acknowledged the statutory fee cap of \$150 per hour, but requested reimbursement of its attorneys' fees in the amount of \$180 per hour. Sodexho justified this increase on a cost of living adjustment (COLA) based on the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items" (CPI-U), stating that it is a measure commonly used to determine the COLA-adjusted hourly rate for attorneys under the Equal Access to Justice Act (EAJA). See 28 U.S.C. § 2412(d)(2)(A) (2000).<sup>28</sup> The Navy informed Sodexho that it had no independent authority to approve a rate higher than \$150 per hour for attorneys' fees because the Comptroller General's recommendation to do so is a prerequisite for exercising such authority. In any event, the Navy advised Sodexho that, "as Congress has not seen fit to increase that statutory rate, the Navy would oppose any adjustment to that rate for costs incurred in this case." Navy's Letter of Sept. 13, 2002 at 4.

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<sup>28</sup> The EAJA, a federal fee-shifting statute, also imposes a cap on attorneys' fees. In this regard:

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon the prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.); . . .

28 U.S.C. § 2412(d)(2)(A).

In its request to our Office, Sodexho again acknowledges the existence and applicability of the statutory fee cap, but argues that the Comptroller General should recommend an upward adjustment in the cap to account for the increase in the cost of living that has affected the practice of government contracts law in the Washington, D.C. area in the years since FASA was enacted.<sup>29</sup> Sodexho argues that the appropriate rate, with a cost of living adjustment, is calculated by multiplying the FASA rate of \$150 by the current CPI-U measure and dividing the product by the CPI-U for the month the cap was imposed, October 1994. Sodexho has not provided its actual calculations, or the actual CPI data it utilized to make these calculations, but asserts that they reflect a 20 percent increase, making \$180 the COLA-adjusted hourly rate. See Sodexho's Feb. 10, 2003 GAO Claim at 60.

The Navy does not specifically address the issue of a cost of living adjustment, but argues that the statutory fee cap is "more than reasonable." AR Legal Memorandum at 60. The Navy's principal argument in support of this position,<sup>30</sup> that the hourly fee Sodexho paid its outside counsel for legal assistance in the proposal preparation process was approximately \$148 per hour, is inaccurate and irrelevant. As noted in our above discussion, Sodexho paid one law firm approximately \$148 per hour for 34.9 hours of services in the proposal preparation process, but most of Sodexho's legal fees were far in excess of the statutory fee cap. The Navy's only other argument is that it is "notable" that Congress has not chosen to increase the ceiling that it set for attorneys' fees. Id.

This is the first opportunity we have had to address the question whether the statutory cap on attorneys' fees should be adjusted to reflect the cost of living. In considering the question, we recognize that, while FASA plainly delegated to the Comptroller General the authority to recommend such an adjustment on a case-by-

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<sup>29</sup> Alternatively, Sodexho asks us to recommend a higher amount to reflect the customary fees for attorneys handling bid protests in the Washington, D.C. area, citing as its legal support a decision where we held that a senior partner's rate of \$300 per hour was reasonable for this practice area and recoverable as protest costs. Bay Tankers, Inc., B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. Sodexho was actually billed at rates ranging from somewhat higher than the \$150 per hour fee cap for one associate to well in excess of that hourly amount for the senior partner. As Sodexho's counsel is certainly aware, this decision and its underlying analysis of "customary fees" pre-date FASA and its mandatory fee cap. Sodexho has articulated no "special factors" that would entitle it to an adjustment to the statutory fee cap set forth by FASA.

<sup>30</sup> The Navy also argues that the statutory fee cap is "more than reasonable" because it is "significantly in excess of the rates paid even the highest graded government attorneys working on similar matters." Id. However true this may be, even considering the addition of burden to the salaries of government attorneys, such a consideration is an inappropriate apples-to-oranges comparison.

case basis, the statute itself provided little guidance as to when it would be appropriate to do so.

The legislative history of the provision makes it clear that the language is borrowed from that found in the EAJA. With respect to an earlier version of the language, the Senate noted that section 1403 “would also limit [attorneys’ fees] to the [level] established in the Equal Access to Justice Act for attorneys fees against the United States generally.” S. Rep. No. 103-258, at 8 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2568. The conference report acknowledged the Senate’s provision, and its limitation of attorneys’ fees to the level established in the EAJA, and stated:

The House recedes with an amendment that would . . . provide for a \$150 limit on attorneys’ fees, which is higher than the current EAJA rate. The amendment would allow for higher fees if such higher fees are determined by the agency, based on the Comptroller General’s recommendation, to be justified. . . .

The conferees note that the \$150 level should be considered as a maximum, not a minimum. The conferees do not intend the provision to authorize the payment of rates that are higher than charged by an attorney in other similar cases or by other attorneys of similar level of experience in bid protest cases.

H.R. Conf. Rep. No. 103-712, at 191-192 (1994), reprinted in 1994 U.S.C.C.A.N. 2607, 2621-2622.<sup>31</sup>

Lacking specific guidance as to the application of a cost of living adjustment from either the statutory language or the legislative history, we have looked to cases interpreting the provision of the EAJA from which this language was borrowed. It is axiomatic that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted in the same way. See Greenwood Trust Co. v. Massachusetts, 971 F. 2d 818, 827 (1<sup>st</sup> Cir. 1992). We have considered the rationale of courts that have interpreted the

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<sup>31</sup> Though not relevant in this case, the conferees went on to note that:

this provision would entitle a small business concern to recover ‘reasonable attorneys’ fees’ in appropriate cases. The conferees expect the Comptroller General to be vigilant in reviewing attorneys’ fees to ensure that they are reasonable. The cap placed on attorneys’ fees for businesses other than small business constitutes a benchmark as to what constitutes a reasonable level for attorneys’ fees for small businesses.

Id. Section 33.104(h) of the FAR echoes this expectation.



applicability of the cost of living adjustment to the EAJA's statutory fee cap, and conclude that their guidance is applicable here, as well.

The Navy argues that Congress itself has not chosen to increase FASA's statutory fee cap but, just as with EAJA's fee cap, the statute itself expressly provides for the possibility of a cost of living escalator to offset the decrease in the value of the \$150 rate due to inflation. Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 148, 164 (2001); see also Sullivan v. Sullivan, 958 F.2d 574, 578 (4<sup>th</sup> Cir. 1992); Baker v. Bowen, 839 F.2d 1075, 1084 (5<sup>th</sup> Cir. 1988). FASA clearly allows us to recommend an adjustment for changes in the cost of living, on a case-by-case basis, but does not require it. Sodexho is correct, however, that, in EAJA cases, courts have consistently awarded attorneys' fees in excess of the statutory cap for a cost of living adjustment. See, e.g., California Marine Cleaning Servs., Inc., v. United States, 43 Fed. Cl. 724 (1999); Dairy Maid Dairy, Inc. v. United States, 837 F. Supp. 1370 (1993); Kunz Constr. Co., Inc. v. United States, 16 Cl. Ct. 431 (1989); see also Meyer v. Sullivan, 958 F.2d 1029, 1034 (11<sup>th</sup> Cir. 1992) (noting that the Supreme Court has "implied that applying a cost of living adjustment under the EAJA is next to automatic."). As one court has found, by mentioning it in the statute, Congress intended that the cost of living be seriously considered and, "[e]xcept in unusual circumstances," if there is a significant difference in the cost of living that would justify an increase in the fee, an increase should be granted. Baker v. Bowen, supra.

Although cost of living adjustments under both the EAJA and FASA are awarded at the discretion of the court, or the Comptroller General, respectively, we think that the justification for the adjustment is self-evident if the claimant alleges that the cost of living has increased, as measured by the Department of Labor's Consumer Price Index (CPI). Id.; see also Cox Constr. Co. v. United States, 17 Cl. Ct. 29, 37 (1989). We decline to impose a requirement that a claimant do more than request an adjustment and present a basis upon which the adjustment should be calculated. See Brickwood Contractors, Inc. v. United States, supra; California Marine Cleaning Servs., Inc. v. United States, supra. Since Sodexho has met this standard, and since the Navy has not articulated any other objection to a cost of living adjustment, we grant Sodexho's request for a recommendation in favor of a cost of living adjustment to the statutory fee cap.

Sodexho did not provide the basis for its calculation that a 20-percent cost of living adjustment is warranted, and the Navy has not challenged this figure. However, it is our responsibility to ensure that it is accurate to prevent unjustified over-compensation.

To adjust the base rate of \$150 per hour for increases in the cost of living as provided by FASA, we must first set a base date from which increases in the cost of living may be calculated. We think this should be the effective date the cap was imposed. See Brickwood Contractors, Inc. v. United States, supra; California Marine Cleaning Servs., Inc. v. United States, supra; Chiu v. United States, 948 F.2d 711, 720 (Fed. Cir. 1991).

Sodexo asserts that this date is October 1994, the date of FASA's enactment. In our view, more careful analysis is required. Section 10001(a) of FASA provided that the Act and its amendments took effect on the date of enactment (October 13, 1994), except as otherwise provided. In this regard, FASA also provided that each amendment made by the statute, except as otherwise expressly enumerated at section 10001(c) of the Act,<sup>32</sup> would apply, in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment, with respect to any solicitation that was issued, any unsolicited proposal that was received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3). FASA, section 10002(b). The date referred to was the date specified in final regulations, but not later than October 1, 1995. FASA, section 10001(b)(2)(C), 41 U.S.C. § 251 note (2000). Similarly, section 10002, which set forth guidelines for promulgating final regulations to implement the Act's amendments, provided that each amendment made by the Act would apply as of October 1, 1995, or the date specified in the final regulations implementing a particular amendment of the Act, whichever was earlier. FASA, section 10002(f)(3), 41 U.S.C. § 251 note. See KPMG Peat Marwick, LLP--Claim for Costs, B-259479.4, July 26, 1996, 96-2 CPD ¶ 43 at 3, 4. On August 10, 1995, our Office published final bid protest regulations which implemented FASA--including the attorneys' fees provision--and which set October 1, 1995 as the effective date for each of the provisions. 60 Fed. Reg. 40,737 (1995).

Since, in accordance with sections 10001 and 10002 of FASA, the attorneys' fees ceiling was made effective on October 1, 1995, we establish that date as our baseline for calculating cost of living adjustments to FASA's statutory fee cap.

The second step for computing a cost of living adjustment to the statutory fee cap is establishing the appropriate end date or dates. We view the appropriate end date as the date the legal services were rendered. See California Marine Cleaning Servs., Inc. v. United States, *supra*, at 734; Chiu v. United States, *supra*, at 719; see Doty v. United States, 71 F. 3d 384, 387 (Fed. Cir. 1995). Here, Sodexo's claim seeks reimbursement for legal services rendered on the protest from November 5, 2001 through June 3, 2002. PC refs. L, G4. Theoretically, fees billed in each month from November through June should be adjusted based upon the CPI datum for each month. California Marine Cleaning Servs., Inc. v. United States, *supra*. However, because the CPI-U was relatively static for these 8 months, we will use the arithmetic mean of the CPI-U for these months to adjust its attorneys' fees. See Chiu v. United

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<sup>32</sup> Section 10001(c) enumerated specific provisions of the Act that applied immediately upon the date of enactment; section 1403(b)(2) was not one of the provisions listed.

States, supra, at 722 n.10 (citing with approval the use of a single mid-point inflation adjustment factor in Keyava Constr. Co. v. United States, 15 Cl. Ct. 135, 140 (1988)). While Sodexho has not provided the CPI figures for these months, the relevant data are readily available because the index is widely accepted as a means of calculating cost of living increases. California Marine Cleaning Servs., Inc. v. United States, supra; Kunz Constr. Co., Inc. v. United States, supra, at 438. As of October 1995, the CPI stood at 153.7.<sup>33</sup> For the November 2001-June 2002 period, the mean CPI figure was 178.4. Dividing the latter by the former yields a cost of living adjustment of 16 percent. We therefore recommend, in this case, that the adjusted cap be \$174 per hour.<sup>34</sup>

Of the 180.6 hours we have recommended be reimbursed for outside counsel, 7.4 were billed at rates lower than the \$150 cap (for a total of \$372.36), so the cap is irrelevant to those hours. Applying the statutory fee rate, as adjusted for the cost of living, to the remaining 173.2 hours, we find that Sodexho is entitled to recover \$30,136.80 for the outside counsel fees it incurred in filing and pursuing its protest, in addition to the \$794.88 in its legal out-of-pocket expense, for a total of \$31,304.04.

## CLAIM

As a final matter, Sodexho asks to be reimbursed the costs of filing and pursuing its claim. Our Bid Protest Regulations, 4 C.F.R. § 21.6(f), 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. E&R, Inc.-Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 6. The record establishes that the Navy acted reasonably promptly in negotiating Sodexho's claim before the matter was submitted to our Office, particularly in view of the volume and nature of information it had to analyze. Under the circumstances, the Navy's handling of Sodexho's claim

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<sup>33</sup> Consistent with courts, we will use the CPI for "All Urban Consumers, U.S. City Average, All Items" as the appropriate CPI index. Ideally, we would use an index tied specifically to the Washington, D.C. area, the area in which legal services were performed. However, the Department of Labor ceased compiling CPI data for the Washington metropolitan area shortly after it introduced a new index tied to the Washington-Baltimore area in November 1996. There is no 2001-2002 data for the defunct Washington metropolitan area index. See California Marine Cleaning Servs., Inc. v. United States, supra, at 734 n.8.

<sup>34</sup> \$174 = \$150 x 178.4/153.7 where 153.7 is the CPI-U for October 1995 and 178.4 is the arithmetic mean of the CPI-U for November 2001 (177.4), December 2001 (176.7), January 2002 (177.1), February 2002 (177.8), March 2002 (178.8), April 2002 (179.8), May 2002 (179.8), and June 2002 (179.9).

was reasonable and expeditious and does not provide the basis for us to recommend the reimbursement of the costs of pursuing this claim at our Office.

#### CONCLUSION

In conclusion, we recommend that Sodexo be reimbursed \$96,069.85 for the costs of preparing its proposal, and \$31,943.52 for the costs of filing and pursuing the protest, for a total of \$128,013.37 of its claimed \$687,614.00.

Anthony H. Gamboa  
General Counsel