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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: SKJ & Associates, Inc.—Costs

File: B-291533.3

Date: July 24, 2003

Joseph M. Jankite for the protester.

Mike Colvin, Department of Health & Human Services, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester may not recover profit on its employee's time in filing and pursuing protests; claimed rates must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, not market rates that include profit.
 2. Hours claimed by protester's president as part of its request for reimbursement of the cost of filing and pursuing its protest are not allowed where they are excessive given the nature of the particular protest.
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DECISION

SKJ & Associates, Inc. requests that our Office recommend the amount it should recover from the Department of Health & Human Services (HHS) for the costs of filing and pursuing its protest in SKJ & Assocs., Inc., B-291533, Jan. 13, 2003, 2003 CPD ¶ 3. In that decision, we sustained the protest because the agency lacked a reasonable basis for rejecting the protester's quotation, and recommended, among other things, "that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees."

We recommend that SKJ be reimbursed \$2,643.45 for its costs of filing and pursuing its protest; we deny the remainder of the claim.

On February 14, 2003, SKJ submitted a claim for \$27,294.80 to HHS for filing and pursuing its protest. This claim primarily consisted of the costs associated with the time expended by the president of the company on the protest. The other elements

of the claim were the protester's out-of-pocket expenses and cost incurred in pursuit of the claim.

HHS determined that the president's costs associated with attending the debriefing held in conjunction with this procurement were not allowable. HHS also requested that SKJ provide documentation to support the "acceptability" of the claimed hourly rate of \$100 for SKJ's president and the number of hours worked on each task (because the number of hours for some of the tasks seemed excessive). HHS Letter to SKJ (March 3, 2003).

An attorney hired by SKJ for pursuit of this claim responded in a letter that detailed the hours claimed by the president of SKJ, for example, preparing the protest, making copies, and researching the applicable regulations. Regarding the hourly rate of \$100 for SKJ's president, the letter stated:

[SKJ's president's] standard company billing rate is \$100.00 per hour. However, a discount of 20% was offered and accepted by a recent client Based on these facts, I instructed [SKJ's president] to adjust the claim for costs to the discounted hourly rate of \$80.00.

SKJ's Letter to HHS (Mar. 7, 2003). SKJ submitted to the agency a revised claim of \$22,851.44, calculated using the \$80 hourly rate for SKJ's president, and including additional costs of pursuing this claim. Documentation supporting the revised claim was also provided.

After some discussions, the agency discovered that the president's hourly rate in a recent cost proposal was only \$44.79 per hour. The agency offered to settle SKJ's claim for \$8,913.85, based on this lower rate, and excluding the claimed costs associated with the debriefing and pursuing the claim at the agency. HHS Letter to SKJ (Apr. 2, 2003).

SKJ declined to settle the claim on this basis. Instead, SKJ requests that we recommend that it be reimbursed for \$28,301.92. This amount, calculated using the \$80 hourly rate for SKJ's president, includes the costs for the debriefing and incurred in pursuing the claim.

A protester seeking to recover the costs of pursuing a protest must submit sufficient evidence to support its monetary claim. John Peeples--Claim for Costs, B-233167.2, Aug. 5, 1991, 91-2 CPD ¶ 125 at 3. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in pursuit of the protest. JAFIT Enters., Inc.--Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 2. 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, B-236713.3, July 19, 1990, 90-2 CPD ¶ 50 at 3.

The first issue we deal with is the president's claimed hourly rate. A protester may not recover profit on its employee's time in filing and pursuing protests, and therefore claimed rates must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, and not market rates that include profit as an element. Id. Here, although SKJ did offer some documentation to support the claimed hourly rate, the record does not demonstrate that the claimed \$80 hourly rate for SKJ's president reflects the actual rate of compensation, plus reasonable overhead and fringe benefits for this individual. Rather, the record indicates that the \$80 hourly rate for SKJ's president represents a 20 percent discount of the "standard company billing rate," which presumably includes profit as an element of the rate.¹ Based on the record, we decline to recommend reimbursement to SKJ at its "discounted" "standard company billing" rate, since it appears to contain profit as an element of the rate. As noted, HHS offered to settle the claim based on a \$44.79 rate for the president that appeared in a recent SKJ cost proposal and, from the record before us, we conclude that this rate reflects SKJ's actual costs and recommend reimbursement for the president's time at this rate.

Turning to the hours claimed by the president, we find that some were for matters that cannot be said to be reasonably in pursuit of the protest. Specifically, we agree with the agency that the president's time associated with attending the debriefing is not reimbursable because these hours were not reasonably incurred in pursuit of the protest. CNA Indus. Eng'g, Inc.—Costs, B-271034.2, Nov. 20, 1997, 97-2 CPD ¶ 149 at 5. Also, the time claimed by the president for preparing congressional correspondence is also disallowed, as this is unrelated to the pursuit of a protest. Omni Analysis—Claim for Costs, B-233372.4, May 1, 1990, 90-1 CPD ¶ 436 at 3-4.

Moreover, based on our review, the president's claimed hours for this relatively straightforward protest are grossly excessive. Where our Office found that the number of hours exceeded that which a prudent person would claim, we have reduced the number of hours to reflect a reasonable work effort, given the nature of the particular protest. Ervin & Assocs., Inc.—Costs, B-278850.2, Aug. 1, 1999, 99-2 CPD ¶ 23 at 5; JAFIT Enters., Inc.—Costs, *supra*, at 3.

Specifically, SKJ's president claims 52 hours over 4 days (including two 16-hour days) to research, prepare information, and arrange delivery to our Office and to HHS through a commercial carrier for its three-page protest; based on our review, we find this excessive and recommend that only 16 hours of this time be reimbursed. SKJ's president also claims 22 hours over 5 days for confirming delivery of the

¹ SKJ has offered no evidence showing that its \$80 rate did not include profit.

protest to GAO, discussing the procedures with a GAO attorney, and reviewing the Descriptive Guide to the bid protest process at GAO; we find this excessive and recommend that only 8 of these hours should be reimbursed. Similarly, we find the claimed 13 hours over 2 days for SKJ's president to contact the GAO status line and the GAO attorney, and to review GAO's acknowledgment letter to be excessive, and recommend that only 1 hour be reimbursed. SKJ also claims 12 hours in 1 day for the president researching GAO cases on "Bid Protest and Changes to Evaluation criteria," 3 weeks prior to receiving the agency report on the protest; we fail to understand the necessity of this additional research, given the time claimed for similar research in preparing its protest and responding to the agency report, and therefore do not recommend that the costs for these hours be reimbursed. For the same reasons, we disallow SKJ's president's claim of 14 hours in 1 day to "Research Additional Issues on Bid Protest," 1 week before receipt of the agency report. SKJ's president also claims 26 hours over 4 days to review, research and respond to the agency's decision to continue performance notwithstanding the protest; while such reasonable costs are reimbursable, see Price Waterhouse--Claim for Costs, B-254492.3 July 20, 1995, 95-2 CPD ¶ 38 at 6, we find the claimed hours to be excessive and recommend that only 4 hours of this time be reimbursed. SKJ's president's claims 60 hours over 5 days (including two 16-hour days, one 14-hour day, and one 12-hour day) to review the agency report and to prepare SKJ's response, which totaled 9 pages (not including attachments); we find this amount of time to be excessive and recommend that SKJ be reimbursed for 24 hours of this time. SKJ also claims 2 hours for SKJ's president to analyze the decision sustaining SKJ's protest, including a telephone conversation with a GAO attorney; we recommend that the president be reimbursed for these hours, as time spent analyzing a decision is reimbursable. Komatsu Dresser Co.--Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112 at 7.

In sum, we recommend that the president be reimbursed for 55 hours at \$44.79 per hour for a total \$2,463.45. We also recommend that SKJ be reimbursed \$179.80 for various miscellaneous costs, such as telephone and delivery charges that are related to this protest, and are adequately documented.

SKJ's claim for the costs of pursuing its claim at the agency are not reimbursable because they are not associated with the filing or pursuing a GAO protest. ViOn Corp.--Claim for Costs, B-256363.3, Apr. 25, 1995, 95-1 CPD ¶ 219 at 7.

Finally, SKJ requests reimbursement of its costs incurred in pursuing this claim before our Office. Our Bid Protest Regulations, 4 C.F.R. § 21.6(f) (2) (2003), provide that we may declare a protester entitled to the costs of pursuing its claim before our Office. This provision was intended to encourage expeditious agreement between a successful protester and the contracting agency as to the quantum of recoverable costs. ViOn Corp.--Claim for Costs, *supra*, at 7-8. Here HHS tendered a reasonable settlement offer to SKJ within 5 weeks of the submission of SKJ's claim to the agency. Under the circumstances, there is no basis to recommend reimbursement to SKJ of its costs of pursuing the claim at our Office.

Accordingly, we recommend that SKJ be reimbursed \$2,643.45 as the reasonable costs of filing and pursuing its protest.

Anthony H. Gamboa
General Counsel