

CLAIMING COSTS OF PURSUING PROTESTS AT THE GOVERNMENT ACCOUNTABILITY OFFICE

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A successful protester at the Government Accountability Office (“GAO”) is entitled to a GAO recommendation that the agency conducting the procurement should pay the costs of filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees; and bid and proposal preparation. 31 U.S.C. § 3554(c)(1). The law places a limit or “cap” on the fees that may be paid to attorneys of \$150 per hour, except where the protester is a small business concern. Even this hourly rate may be increased where “on a case by case basis, [GAO] 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.” 31 U.S.C. § 3554(c)(2)(B). This blog discusses a few suggestions for cost claims on GAO protests; it does not deal with bid and proposal preparation costs.

EVIDENCE AND REASONABLENESS

A successful 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. The amount claimed may be recovered to the extent that the claim is adequately documented and is 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. The claim for reimbursement must clearly identify the amount claimed for each individual expense, the purpose for which the expense was incurred, and how the expense relates to the protest. For attorneys’ fees, 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.

ON WHICH ISSUES CAN YOU RECOVER PROTEST COSTS?

As a general rule, the GAO considers 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. However, the GAO 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. *Department of the Navy--Request for Recon. and for Modification of Remedy*, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147.

With regard to the cost of protester’s in-house labor, the GAO will permit the recovery of costs incurred 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. 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.

STATUTORY CEILING ON PROTEST FEES FOR LARGE BUSINESS

The statutory cap of \$150 per hour is only applicable where the protester is not a small business. 31 U.S.C. §. 3554(c)(2)(B). Where the protester is a small business, (for example, where the protester competed on a small business set-aside) the cap does not apply.

INCREASE IN \$150 RATE FOR OTHER THAN SMALL BUSINESS

The GAO believes that the justification for an upward departure from the \$150 cap is “self-evident” if the claimant asserts that the cost of living has increased as measured by the Department of Labor (“DOL”) Consumer Price Index (“CPI”), City Average (the CPI-U). *Vencore Servs. And Solutions, Inc.-Costs*, B-412949.3, Dec. 12, 2016. GAO imposes no requirement other than that a claimant simply request an adjustment and present a basis upon which the adjustment should be calculated. It is suggested that protesters do not attempt to invoke the “special factors” test mentioned above (i.e, that limited availability of qualified attorneys for the proceedings involved, justifies a higher fee) since it is unlikely to be successful. Protesters are successful in using the CPI-U, and in particular, only that index. GAO has rejected other indexes, including the special CPI for legal costs.

The successful protester should consult with the CPI-U and adjust its monthly attorneys’ fees by increasing the \$150 per hour cap in each month where the CPI-U increased, and use that exact amount in the claim, instead of any higher costs. If your attorney charges less than \$150 per hour, you charge actual costs.