



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: KPMG Peat Marwick, LLP—Claim for Costs

File: B-259479.4

Date: July 25, 1996

William A. Roberts III, Esq., and Lee Curtis, Esq., Howrey & Simon, for the protester.

Diane M. Sidebottom, Esq., Advanced Research Projects Agency, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Attorneys' fees claimed by prevailing protester are reasonable, and thus allowable, where: (1) the hourly rates are within bounds of rates charged by similarly situated attorneys; (2) the hours claimed are properly documented and do not appear to be excessive; and (3) legislation which currently places a \$150 ceiling on hourly rates for attorneys' fees was not in effect at the time of the protest.

DECISION

KPMG Peat Marwick, LLP requests that our Office determine it entitled to recover \$22,927.98 in attorneys' fees associated with filing and pursuing its bid protest in KPMG Peat Marwick, LLP, B-259479.2, May 9, 1995, 95-2 CPD ¶ 13, recon. denied, B-259479.3, July 18, 1995, 95-2 CPD ¶ 26. Peat Marwick incurred \$69,305 in attorneys' fees as a result of its protest and responding to the subsequent request for reconsideration filed by the contracting agency, the Advanced Research Projects Agency (ARPA). ARPA has reimbursed Peat Marwick for \$46,425 of its incurred attorneys' fees; however, ARPA refuses to pay the remaining portion—\$22,927.98—on the ground that this amount represents a portion of the protester's attorneys' fees which exceeds the current \$150 hourly limit on attorneys' fees mandated by section 1403(b)(2) of the Federal Acquisition Streamlining Act of 1994 (FASA), 31 U.S.C. § 3554(c)(2)(B) (1994). We find that Peat Marwick is entitled to recover the disputed amount because the attorneys' fees ceiling provision of FASA was not in effect at the time of Peat Marwick's protest, and therefore is inapplicable.

In KPMG Peat Marwick, LLP, supra, we sustained the protest based on our finding that ARPA had improperly failed to perform a cost realism analysis of the awardee's proposal and had otherwise improperly permitted the awardee to modify its technical proposal after award without giving other offerors the same opportunity. As a result, we found that the protester was entitled to recover its costs of filing

and pursuing the protest, including attorneys' fees, in accordance with our Bid Protest Regulations in effect at that time. See 4 C.F.R. § 21.6(d)(1) (1995).

Peat Marwick timely submitted its claim for costs to the agency, explaining that its attorneys had expended 16.5 senior partner hours, 163.75 trial partner hours, and 123.25 associate hours in connection with its protest and the subsequent agency request for reconsideration. ARPA reviewed the attorneys' fee claim and determined that the number of attorney hours worked--309.5--was reasonable; however, because of the recent enactment of FASA, ARPA determined that it would not reimburse the protester's attorneys for hourly fees that exceeded \$150 per hour. Consequently, ARPA reimbursed Peat Marwick for \$46,425 of its expended \$69,305 attorneys' fee amount--which represents 309.5 attorney hours at an hourly compensation rate of \$150 per hour.¹

When a claim for costs is presented to our Office for resolution, we review the elements of the claim to determine whether the amounts claimed are adequately documented, and are shown to be reasonable; to that end, a protester seeking to recover its costs must submit sufficient evidence to support its monetary claim. Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. 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 pursuit of its protest. Patio Pools of Sierra Vista, Inc.--Claim for Costs, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

A breakdown of the hourly fees incurred by the three attorneys who represented Peat Marwick in the protest and the subsequent reconsideration request is as follows (a slight fee increase which was implemented by the attorneys' law firm in February 1995 resulted in the use of two hourly billing rates by each attorney):

Senior Partner	8.5 hours at \$285 per hour 8 hours at \$295 per hour (after February 1, 1995)
Partner	38.5 hours at \$248 per hour 125.25 hours at \$256 per hour (after February 1, 1995)
Associate	37.25 hours at \$171 per hour 86 hours at \$177 per hour (after February 1, 1995)

As previously noted, the agency does not take issue with the number of attorney hours worked, nor does the record suggest that the 309.5 hours of attorney services

¹ARPA reimbursed Peat Marwick for its proposal preparation and protest costs, which were not in dispute.

is unusual given the complexity of the issues in this case, as well as the fact that a lengthy hearing was held. Instead, ARPA challenges the claimed attorneys' fees on the ground that each attorney's hourly billing rate conflicts with the current provision of FASA which provides that except in special circumstances, no party (other than a small business concern) may be paid, pursuant to a recommendation by this Office, "costs for attorneys' fees that exceed \$150 per hour." 31 U.S.C. § 3554(c)(2)(B).

The attorneys' fees ceiling provision of FASA relied upon by the agency to deny Peat Marwick's claim for costs was not in effect at the time of the Peat Marwick protest. Section 10001(a) of FASA provides that the Act and its amendments take effect on the date of enactment (October 13, 1994), except as otherwise provided. In this regard, FASA also provides that each amendment made by the statute, except as otherwise expressly enumerated at section 10001(c) of the Act,² applies, "to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 10002," to proceedings or actions that are ongoing as of the date specified in the final regulations, but no later than October 1, 1995. FASA, section 10001(b)(2)(C), 41 U.S.C. § 251 note (1994). Similarly, section 10002, which sets forth guidelines for promulgating final regulations to implement the Act's amendments, provides that each amendment made by the Act applies as of October 1, 1995, or the date specified in the final regulations implementing a particular amendment of the Act, whichever is earlier. FASA, section 10002(f)(3), 41 U.S.C. § 251 note.

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). Our amended regulations broadly implement the attorneys' fees provision of FASA by providing, in relevant part, that our Office "may, at the request of the protester, recommend the amount of costs the agency should pay in accordance with 31 U.S.C. § 3554(c)." See 4 C.F.R. § 21.8(f)(2) (1996).

With respect to the effective date, the preamble to our final rule states that "claims and requests for reconsideration filed on or after the effective date of this rule [October 1, 1995] which concern a protest which was considered under the previous rule" would be decided in accordance with that previous rule—or, stated another way, without regard to the amendments made by FASA. 60 Fed. Reg. 40,737. Thus, in accordance with sections 10001 and 10002 of FASA, the attorneys' fees ceiling

²Section 10001(c) enumerates specific provisions of the Act which apply immediately upon the date of enactment; section 1403(b)(2) is not one of the provisions listed.

applies only to claims associated with protests filed on or after October 1, 1995; accordingly, the ceiling does not apply to Peat Marwick's claim here.

As noted above, section 10001(b)(2) of the Act provides that an amendment made by the Act--such as the \$150 hourly attorneys' fee limitation at issue in this case--shall apply to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 10002 of the Act. Section 10002 provides for the issuance of regulations "as may be necessary to implement th[e] Act." In this case, ARPA argues that section 1403 of the Act--which sets forth the \$150 hourly attorneys' fee limitation--is self-executing and consequently no regulations are necessary to implement this provision. Because section 1403 does not, in ARPA's view, require an implementing regulation, it became effective on the date of the enactment of the Act, October 13, 1994.

We do not agree with ARPA's position. In our view, regulatory implementation of the \$150 hourly attorneys' fee limitation was necessary to establish a common understanding of the applicability of this provision. Section 10001(b)(2)(C) states that an amendment made by the Act shall apply "to the extent and in manner prescribed in the final regulations" not only to contracts in effect and offers under consideration on the date specified in the final regulations, but also to "any other proceeding or action that is ongoing on that date." Without regulatory implementation, there would have been uncertainty as to "the extent" and "manner" of the applicability of the FASA bid protest cost provisions, including the attorneys' fee limitation, to entitlement requests (4 C.F.R. § 21.6(e) (1995)) and cost claims (4 C.F.R. § 21.6(f) (1995)) that (1) were pending at this Office on the date of enactment, or (2) were not yet filed at this Office but (a) were related to protests pending here, (b) were related to protests recently decided or otherwise disposed of, or (c) were related to claims pending with the procuring agencies. In short, without the regulatory implementation, procuring agencies, protesters, and this Office likely would not have had the same understanding of the applicability of these provisions, which in turn could have led to inconsistent results in the processing and resolution of protester cost claims.

Alternatively, ARPA argues that the clear intent in FASA to limit attorneys' fees to \$150 per hour provides a sufficient basis--in the form of "clear Congressional guidance"--for the agency to deny reimbursing Peat Marwick for any hourly attorneys' fees which exceed this amount regardless of the actual effective date of the statutory cap. We find this argument unpersuasive as ARPA is essentially arguing for a retroactive application of the statute.

It is well established that in the absence of statutory direction, retroactivity is not favored by the law. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); QAO Corp. v. Johnson, 49 F.3d 721 (Fed. Cir. 1995). In this case, FASA expressly contemplates prospective application of each of its amendments; FASA specifically

provides that "[e]xcept as otherwise provided in this Act, a law amended by this Act shall continue to be applied . . . as such law was in effect on the day before the date of the enactment of this Act" until: (1) final regulations implementing the amendment are issued; or (2) in the event no regulations are promulgated, October 1, 1995. FASA, section 10002(f)(3), 41 U.S.C. § 251 note. Given this plain language, which by its terms operates to reserve for the promulgating agency discretion to determine the effective date for amendments not otherwise enumerated as immediately effective, we think it is clear that the \$150 hourly billing rate limitation for attorneys' fees was intended to have only prospective effect, unless provided otherwise in the implementing regulations. Since this Office has promulgated regulations rendering the \$150 attorney fee provision applicable only to protests filed after October 1, 1995, there is no basis to apply the FASA ceiling to Peat Marwick's claim.

In determining the amount of allowable attorneys' fees, our Office has adopted the standard of review used in a case concerning a fee award under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1994), Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), since both that statute and the Competition in Contracting Act of 1984 provide for the award of "reasonable attorneys' fees." See Armour of Am., Inc.—Claim for Costs, 71 Comp. Gen. 293 (1992), 92-1 CPD ¶ 257. Consistent with the guidelines established by the court in Johnson v. Georgia Highway Express, Inc., *supra*, our consideration of whether an hourly attorney rate is reasonable includes consideration of the customary fee charged for similar work in the community by other attorneys, as well as the experience, reputation and ability of the attorneys—since most attorneys' fee scales reflect an experience differential, with more experienced attorneys receiving higher hourly compensation. Armour of Am., Inc.—Claim for Costs, *supra*; Bay Tankers, Inc.—Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524. The reasonableness of an hourly billing fee also may be considered in light of attorneys' fees awards made in similar proceedings. *Id.*

In this case, we think the charged hourly fees were reasonable. The protester's senior counsel has certified that the hourly rates claimed are the normal and customary rates charged for such matters, and ARPA does not challenge this assertion. We have recognized a wide variety of hourly rates charged by counsel who practice federal procurement law in the Washington area ranging from \$165 to \$400. Bay Tankers, Inc.—Claim for Bid Protest Costs, *supra*. In this regard, a recent award for fees in a similarly complex protest case involved reimbursing the protester for hourly fees of \$350 per hour for senior counsel, and \$210 per hour for associate attorneys. See Price Waterhouse—Claim for Costs, B-254492.3, July 20, 1995, 74 Comp. Gen. ____, 95-2 CPD ¶ 38. Although the attorneys' hourly rates were not disputed by the agency in that case, since the hourly fees charged by Peat Marwick's counsel are clearly within the range of this recent fee award—and in fact

are lower—we see no basis on this record to conclude that Peat Marwick's hourly attorney rates are unreasonable.

Under these circumstances, since the agency has presented no argument for denying the protester's attorneys' fees claim other than a retroactive application of a statutory provision which was not in effect at the time of the protest, we find the protester entitled to reimbursement of the disputed \$22,927.98 in attorneys' fees. We also find the protester entitled to all attorneys' fees and costs incurred in pursuing this claim for costs. 4 C.F.R. § 21.6(f)(2).

Finally, we note that the Federal Acquisition Regulation (FAR) contains a provision which states that the \$150 attorneys' fees cap set forth in FASA "applies to all recommended awards of costs which have not yet been paid." FAR § 33.104(h)(4). This provision conflicts with our Regulations. Although FAR § 33.104 provides that our interpretation governs in the case of any conflicts between the FAR and this Office's Regulations, we are recommending that the FAR be revised to eliminate the inconsistency.

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