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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Galen Medical Associates, Inc.--Costs

File: B-288661.6

Date: July 22, 2002

Terry Wallace, Esq., for the protester.

Merilee D. Rosenberg, Esq., Philip Kauffman, Esq., and Phillipa L. Anderson, Esq.,
Department of Veterans Affairs, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Where claim for bid protest costs includes amounts for time spent by company personnel, outside counsel and consultant that far exceed the amount of time that a prudent person would spend pursuing the protest and, moreover, documentation presented in support of claim is inadequate in numerous respects, the entire amount claimed for this time is disallowed.

2. Protester may be reimbursed out-of-pocket expenses to the extent that they are adequately supported by documentation reflecting the actual costs incurred.

DECISION

Galen Medical Associates, Inc. requests that we recommend that the Department of Veterans Affairs (VA) reimburse the firm \$159,195.20, representing its claimed costs of filing and pursuing its protest under request for proposals No. 586-44-01, for primary and preventive medical care and continuity of care services at a clinic affiliated with the G.V. (Sonny) Montgomery VA Medical Center in Jackson, Mississippi.

We disallow the claim in principal part and recommend that Galen be reimbursed in the amount of \$110.65.

This claim arises from a protest originally filed in our Office on August 24, 2001, in which Galen alleged that VA had improperly awarded the subject contract to Deborah Downing, M.D., PLLC. After submission of the agency report and the filing of comments by the protester, the agency advised our Office that it would take

corrective action in response to the protest; we dismissed Galen's initial protest on October 29 (B-288661) based on the agency's representations. Thereafter, the agency acknowledged that Galen was entitled to reimbursement of the costs associated with filing and pursuing its protest.¹

By letter dated March 19, 2002, Galen submitted a certified claim to VA in the amount of \$159,195.20. After consideration of the matter, VA rejected the claim by letter dated May 1, in which VA stated that it was rejecting the claim because Galen had not submitted adequate supporting documentation, and requested that Galen provide such documentation by May 10. Rather than pursue the matter further with the agency, Galen filed this claim in our Office on May 10. The claim is comprised of \$157,397.50 in labor costs and \$1,797.70 in miscellaneous cost items such as copying and postal expenses, for a total of \$159,195.20.

DISCUSSION

Excessive Hours

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. 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. Chant Eng'g Co., Inc.--Costs, B-274871.4, April 28, 1999, 99-1 CPD ¶ 79 at 2. A claim is excessive where the time expended exceeds what a prudent person familiar with the issues in the case and some knowledge of the federal procurement system should have reasonably needed to identify and research the applicable law and regulations in order to adequately respond to the agency's arguments. Id. at 3.

We find that the hours claimed by Galen are excessive. Galen's claim includes a request that it be reimbursed for a total of 938.5 hours for various individuals at various hourly rates: 346.25 hours for an outside attorney, 220 hours for a consultant and 363 hours for Galen's president. Galen's Claim Letter, May 10, 2002, exhs. II, III, IV. These claimed hours are far beyond what should have been necessary to reasonably pursue the protest. Our file in this case was only open for approximately 9 weeks (from August 24 to October 29, 2001), and yet these hours amount to 8.6 full-time (40-hour) work weeks for the attorney, 9 full-time work weeks for Galen's president and 5.5 full-time work weeks for Galen's consultant.

¹ In subsequent filings, Galen requested reconsideration of our initial dismissal of its protest, and also requested that it be declared entitled to the costs of filing and pursuing its protest. During our consideration of these requests, VA submitted a letter dated February 7, 2002, acknowledging Galen's entitlement to its protest costs. (B-288661.2, B-288661.3, dismissed Feb. 8, 2002).

The issues were relatively limited and straightforward in nature--the primary bases for protest were that the agency misevaluated proposals and engaged in activities that amounted to procurement integrity violations--there was no hearing in the matter and the documents involved were not voluminous. (Indeed, the entire agency report was comprised of only seven substantive exhibits. The core exhibit for purposes of the allegations--the evaluation materials, including all of the individual evaluator worksheets for the protester, the awardee, and a third offeror whose evaluation the protester did not challenge--amounted to only 39 pre-printed evaluation form pages with little or no additional narrative material included; 13 of those pages related to the third offeror). Moreover, the protester's submissions to our Office amounted to only 22 pages. The hours claimed equate to approximately 42 hours per page, and the cost amounts to approximately \$7,154 per page. In our view, this amount is excessive and goes well beyond what a prudent person would have expended in pursuit of this protest.²

The number of hours claimed is particularly questionable in light of the dearth of evidence that Galen's outside attorney and consultant, in fact, participated significantly in pursuing the protest. Neither the attorney nor the consultant filed a notice of appearance in our Office during the protest, and all protest filings were signed (and by all appearances prepared) solely by Galen's president; neither the consultant nor the outside attorney was even indicated as a recipient of copies of the submissions. Galen's Letters of Aug. 24, Sept. 7, Sept. 20, and Oct. 1, 2001. The sole exception is Galen's final two-page submission, which states that its outside attorney, its consultant and a third attorney (apparently Galen's corporate counsel) participated in preparation of that document. Galen Letter, Oct. 24, 2001.

Finally, the claim is replete with hours billed at times during which there was no apparent reason to expend effort on the protest. For example, the protester's comments were filed on October 3, and nothing occurred--no submissions were due or requested from either party--from that date until the agency submitted its letter of October 16 advising our Office that it intended to take corrective action. Nonetheless, the protester's claim inexplicably includes 52 hours during this interval. Galen's Claim, May 10, 2002, exh. II, at 5; exh. III, at 7; exh. IV, at 4.

Inadequate Supporting Materials

As noted, a protester seeking to recover the costs of pursuing its protest must submit sufficient documentation to support its monetary claim. Although we recognize that the requirement for such documentation may sometimes entail certain practical

² We note that these claimed hours allegedly were spent during a period when the protester's president and outside attorney were engaged in full-time employment; the protester's president was operating a private clinic and the outside attorney was employed as a city attorney for the city of Jackson, Mississippi.

difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of activities associated with the claimed effort and establish that the claimed hourly rates reflect the concerned individuals' actual rates of compensation. Ervin & Assocs.—Costs, B-278850.2, Aug. 1, 1999, 99-2 CPD ¶ 23 at 4.

Hourly Rates

Galen's documentation in support of its claimed hourly rates is inadequate. Galen claims a particular hourly rate for its president, Galen's Claim, May 10, 2002, exh. II, at 6, but has provided no documentation to substantiate that this is his actual rate of compensation. In this regard, a protester may only recover its actual direct labor costs, and may not recover profit on its own employees' time. Wylie Mech., B-228695.5, Dec. 18, 1990, 90-2 CPD ¶ 496 at 3. In order to substantiate an employee's actual rate of compensation, a protester must submit objective evidence of the rate, such as corporate payroll records, W-2 forms or tax records. Id. at 4. Galen has submitted no documentation to support its president's claimed hourly rate.

Galen claims a particular hourly rate for its outside counsel, as well as another rate for another individual working with Galen's outside counsel.³ Galen's Claim, May 10, 2002, exh. II, at 1. Both of these individuals are otherwise employed on a full-time basis, the outside counsel as an attorney for the city of Jackson, Mississippi, and the other individual as a clerk for the Mississippi Court of Appeals. Galen has not adequately supported the claimed hourly rates of compensation, such as submitting evidence to demonstrate that these individuals are ordinarily engaged in providing legal services, outside of their regular employment, at the claimed hourly rates of compensation. Galen has also submitted no evidence showing that the claimed hourly rates are the customary rates for similar work performed by attorneys and legal assistants in their community. Armour of Am. Inc.—Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 7. In the absence of such evidence, Galen has failed to support its claim for reimbursement of costs incurred at the claimed rates.⁴

³ Galen describes this second individual as someone "who has earned her Juris Doctorate degree." Galen Letter to GAO, July 7, at 4.

⁴ We note as well that, as to the outside counsel's hourly rate, the materials submitted by Galen cast further doubt on the claim that he will be paid at the hourly rate claimed because the materials submitted in support of the attorney's costs bear two different hourly rates. The materials relating to the months of July and August calculate the attorney's compensation by summing the claimed hours and multiplying those hours by the claimed rate. Galen's Claim, May 10, 2002, exh. III, at 4. For the months of September and October, however, the hours are summed and then multiplied by two different hourly rates, the rate claimed, and then a second, lower, hourly rate. Id. at 6, 8. The record contains no explanation of these
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For its consultant, as well, Galen claims a particular hourly rate. Galen's Claim, May 10, 2002, exh. IV, at 1. As with the other claimed hourly rates, the protester has submitted no evidence to demonstrate that the consultant customarily charges this rate for consulting services related to the filing of a bid protest or any other support for the claimed rate.

Nature of Galen's Obligations

The record does not establish that Galen has a firm obligation to pay for the services of its outside counsel (and his assistant) and consultant. In this regard, in order for a protester to recover such costs, there must be evidence to show that it has an obligation to pay the costs regardless of whether they are recovered from the government; an obligation to pay costs that is contingent upon recovery from the government may not properly be reimbursed. Boines Constr. & Equip. Co., Inc.--Costs, B-279575.4, Apr. 5, 2000, 2000 CPD ¶ 56 at 4-5.

In the course of addressing the claim at the agency level, VA requested that Galen provide evidence to show that the outstanding bills from the consultant and outside counsel had been paid. With respect to the consultant, the record shows that he presented what appears to be an invoice to Galen dated December 2001, for \$29,700. Galen's Claim, May 10, 2002, exh. IV, at 1. On the face of the invoice is a place for the recipient to affix a signature next to the words "Approved for payment by," and Galen's president's signature appears in the appropriate place and is dated March 18, 2002. Id. This invoice notwithstanding, there is no evidence in the record to show that payment was actually made, despite the passage of approximately 4 months since the invoice was approved.

Galen has provided copies of numerous canceled checks, but none of them appears to be payment to the consultant for services in connection with Galen's protest to our Office. While there is one check made out to the consultant in his individual capacity,⁵ that check is for only \$6,000 and is dated August 14, 2001, that is, prior to the date Galen filed its protest with GAO. Galen's Claim, May 10, 2002, exh. 4, at 31. The consultant's detailed listing of his hours and activities identifies services performed for Galen on August 3, 4, 5 and 6, 2001, id. at 2, but those services, by the consultant's own description, related solely to Galen's agency-level protest; agency-level protest costs may not properly be included in a protester's claim for

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different calculations, and there is no basis for us to assume that one rather than the other is applicable.

⁵ The invoice includes a legend that provides "make all checks payable to: Vision 2000 services." Accordingly, we would expect Galen to have issued a check payable to that company, rather than directly to the consultant.

costs generated in connection with a protest to our Office. Techniarts Eng'g--Costs, B-234434.2, Aug. 24, 1990, 90-2 CPD ¶ 152 at 4. On this record, then, there is no basis to conclude that Galen has an obligation to pay the claimed consultant's costs.

As for the costs relating to Galen's outside counsel and his assistant, the record includes an undated cover letter from the attorney to Galen transmitting what are described as his invoices for the protest.⁶ Galen's Claim, May 10, 2002, exh. III. Following the cover letter are listings for activities performed from July 31 through October 29, 2001. As with the consultant, the agency requested that Galen provide information showing that the costs had been paid. No such evidence was ever produced. Moreover, it is apparent from one of the attorney's own filings in connection with this claim that he has not been paid. That filing states as follows:

Furthermore, it is certainly understandable that [the outside counsel], who is fully aware of Galen's predicament, would be willing to await payment from VA. Likewise, since [the outside counsel] is related to [Galen's president], then certainly they can engage in business affairs with a degree of trust that payment will be made for service provided.

Galen Letter to GAO, July 7, 2002, at 4. In view of the fact that Galen's outside counsel has not been paid in the approximately 9 months since we dismissed Galen's initial protest, as well as the attorney's stated willingness "to await payment by the VA," there is no basis for finding that this is a firm obligation on the part of Galen to make payment irrespective of Galen's recovery from the VA.

In sum, we conclude that Galen's claim for the costs associated with the activities of its president, outside counsel, his assistant and Galen's consultant are excessive, given the nature and complexity of the issues involved in the protest. Additionally, to the extent that the hours at issue are not excessive, the documentation presented by Galen is wholly inadequate to support its claim. In these circumstances, we disallow these costs--which, according to Galen's documentation, amount to \$157,397.50--in their entirety. While we realize that Galen no doubt incurred some hourly costs in connection with filing and pursuing its protest, such costs may not be recovered where they are based on excessive hours, Chant Eng'g Co., Inc.--Costs, supra, at 2, or are not adequately documented. Custom Prod. Mfg., Inc.--Costs, B-235431.7, May 9, 1995, 95-1 CPD ¶ 236.

⁶ Unlike the consultant's invoice, these invoices are not presented on a regular billing form and do not otherwise reflect a regularized billing system used by the attorney in his claimed private practice of law.

Miscellaneous Costs

Galen's claim includes \$1,797.70 in miscellaneous costs. That amount includes \$1,000 for secretarial work. Galen's Claim, May 10, 2002, exh II, at 6. We disallow this amount in its entirety. Galen has proffered no evidence to document its actual cost for secretarial work (such as rates and hours worked), and thus no evidence that it actually incurred this \$1,000 (which appears to be high to prepare the short submissions to our Office). We therefore do not recommend that this item be paid.

Galen's claim includes \$347.70 for telephone calls. Galen's Claim, May 10, 2002, exh. II, at 6, exh. III, at 2. As discussed above, we find the number of hours spent by the various individuals in question to be excessive, and also find that Galen has not submitted documentation adequate to support its claim for the time in question. The record shows that a large number of those hours were spent in telephone conversations that presumably are reflected in Galen's claim for its telephone costs. Because we find the hours claimed excessive and inadequately documented, we also disallow Galen's claim for its telephone costs; Galen may not recover its telephone costs where the underlying hours spent making the calls are not supported.

Galen's claim includes \$250 for copying, which Galen's detailed cost listing shows is based on a rate of 50 cents a copy. Galen's Claim, May 10, 2002 , exh. II, at 6. Receipts furnished by Galen, however, reflect a rate of only 5.5 cents a copy. Galen's Claim, May 10, 2002, exh. IV, at 17. Accordingly, we recommend reimbursement of \$27.50 for copying.⁷

Galen's claim includes \$100 for postal and express mail costs. Galen's Claim, May 10, 2002 , exh. II, at 6. However, Galen has presented receipts for such costs totaling only \$83.15. Galen's Claim, May 10, 2002, exh. IV, at 19-21. We recommend payment for postal and express mail costs in the amount of \$83.15.

Galen's claim includes \$100 for office supplies. Galen's Claim, May 10, 2002, exh. II, at 6. Galen has presented credit card bills that include numerous charges for office supplies in excess of the claimed amount. Galen's Claim, May 10, 2002, exh. IV, at 13-15, 18. Galen does not identify which of the several charges include the office supplies used in connection with filing and pursuing its protest. In the absence of more precise evidence, we disallow this amount. McNeil Tech., Inc.—Costs, B-254909.3, Apr. 20, 1995, 95-1 CPD ¶ 207 at 7.

Finally, Galen claims \$1,440 as costs associated with its pursuit of this cost claim. Galen's Claim, May 10, 2002, at 2. Such costs are unallowable unless the protester shows that the agency unreasonably delayed consideration of the claim or otherwise

⁷ We arrive at this figure by dividing \$250 by 50 cents to arrive at 500 copies; we multiplied this number by 5.5 cents to arrive at a total cost of \$27.50.

failed to give the claim reasonable consideration. JAFIT Enterprises, Inc.--Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 4. No such showing has been made here. The agency responded to Galen's claim for costs within approximately 5-6 weeks, asking the firm to provide additional documentation. After receiving the agency's request, Galen stopped pursuing the matter with the agency and filed this claim in our Office. A 6-week delay is not unreasonable on its face and, given our conclusion that Galen's claim is inadequately documented, the VA's request for additional supporting information clearly is not a basis for a finding of unreasonable delay.

In view of the foregoing, we recommend that VA reimburse Galen in the amount of \$110.65.⁸

Anthony H. Gamboa
General Counsel

⁸ In an unrelated matter, Galen asserts that our Office engaged in improper ex parte communications with VA in the course of Galen's protests. In support of its assertion, Galen references three different communications: a facsimile transmission from one VA official to another (dated December 6, 2001), VA's agency report in a subsequent protest (dated December 21), and a letter from VA (dated February 7, 2002) to our Office acknowledging that Galen was entitled to its protest costs in connection with its original protest. None of these communications reflects an improper ex parte communication. The first two communications include references to conversations between VA and our Office, but those conversations related solely to our procedural disposition of subsequent filings on Galen's part. The third communication was simply VA's letter to our Office in which it acknowledged Galen's entitlement to its bid protest costs; VA's apparent failure to copy Galen with this letter does not render it an improper ex parte communication.