



GAO

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: EBSCO Publishing, Inc.--Costs

File: B-298918.4

Date: May 7, 2007

Douglas L. Patin, Esq., and Donna M. Crowe, Esq., Bradley Arant Rose & White LLP, for the protester.

Robert Schildkraut, Esq., Department of Defense Education Activity, for the agency.
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO recommends that agency reimburse protester's costs of filing and pursuing earlier protest--and recommends adjusting the \$150 per hour statutory cap on attorneys' fees at 31 U.S.C. § 3554(c)(2)(B) (2000) to reflect an increase in the cost of living as measured by the applicable consumer price index--where the agency does not oppose either the increase in the maximum rate, or the amount claimed.

DECISION

EBSCO Publishing, Inc. requests that our Office recommend that the Department of Defense Education Activity (DODEA) pay EBSCO's costs of filing and pursuing its bid protest, including reasonable attorneys' fees, after DODEA took corrective action in response to the company's earlier protest. EBSCO also asks that we recommend that DODEA reimburse attorneys' fees at a rate above the \$150 per hour statutory cap at 31 U.S.C. § 3554(c)(2)(B) (2000), to reflect increases in the cost of living.

We recommend that DODEA reimburse EBSCO \$20,945.95 for the costs of filing and pursuing its protest.

On October 2, 2006, EBSCO protested its exclusion from the competitive range, and subsequent award of two contracts, by DODEA under request for proposals (RFP) No. HE1254-06-R-0045 for online information databases to support the curriculum needs of DODEA's educators and students in grades Pre-K through 12. During the development of the protest, and after submitting its agency report, DODEA announced that it would take corrective action by terminating the challenged contracts and canceling the RFP. On November 21, 2006, our Office dismissed

EBSCO's protest as academic based on the corrective action. EBSCO Publ'g, Inc., B-298918; B-298918.2, Nov. 21, 2006.

On December 4, EBSCO requested that DODEA agree that EBSCO was generally entitled to its reasonable costs incurred in pursuit of the protest, including reasonable attorneys' fees. After DODEA conceded entitlement, our Office closed that file. EBSCO Publ'g, Inc.--Costs, B-298918.3, Dec. 19, 2006.

EBSCO then submitted a claim to the DODEA contracting officer, seeking payment of \$31,831.70 in attorneys' fees and protest costs. In response, DODEA advised EBSCO that the agency did not take issue with the amount of time claimed, but explained that it lacked authority, in its view, to reimburse EBSCO for its attorneys' fees at any rate above \$150 per hour. This request followed.

Under the Competition in Contracting Act of 1984, as amended, where the Comptroller General recommends¹ that a successful protester's costs, including reasonable attorneys' fees, be reimbursed, those fees are capped by the Act, except when the protester is a small business concern. Specifically, the cap bars reimbursement of attorneys' fees at a rate above \$150 per hour "unless the agency determines, based on the recommendation of the 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) (2000).

In Sodexho Mgmt., Inc.--Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 37-43, we discussed for the first time the section 3554 ceiling on attorneys' fees and the cost of living adjustment. We found that the statute contemplates an increase in the specified \$150 per hour rate in order to offset any decrease in the value of the rate due to increases in the cost of living, Sodexho Mgmt., Inc.--Costs, *supra*, at 41, and that the appropriate cost of living increase should be determined with reference to Department of Labor's Consumer Price Index. Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs, B-296783.4; B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72 at 2.

¹ As indicated in the narrative above, DODEA decided to cancel the underlying procurement, which led to the protest's dismissal. The agency subsequently conceded that the protester should be reimbursed its protest costs, which made it unnecessary at that time for our Office to issue a formal recommendation solely on that question. See generally 31 U.S.C. § 3554(c). We now conclude, based on our earlier review, that the underlying protest was clearly meritorious and, as a result, we recommend that the agency reimburse protest costs. Under these circumstances, this decision now proceeds directly to the only question remaining--i.e., whether the agency should reimburse attorneys' fees at a rate above the statutory cap to reflect increases in the cost of living.

Since Sodexho, we have reasoned that the justification for an upward departure from the \$150 per hour cap for attorneys' fees 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, and we have declined to impose a requirement that a claimant do more than to request an adjustment and present a basis upon which the adjustment should be calculated. Department of State--Costs, B-295352.5, Aug. 18, 2005, 2005 CPD ¶ 145 at 2; Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs, supra, at 2-3. Where the claimant meets this standard, and an agency does not articulate any objection, we will grant a claimant's request for a recommendation in favor of a cost-of-living adjustment to the fee cap. Department of State--Costs, supra, at 2.

In response to this request, our Office asked EBSCO to calculate the appropriate adjustment to the \$150 per hour cap, to reflect increases in the cost of living, as measured by the Consumer Price Index for All Urban Consumers, United States City Average for All Items (CPI-U). See Department of the Army; ITT Fed. Servs. Int'l Corp.--Costs, supra, at 2-3. EBSCO responded that, as increased by the appropriate index, the maximum rate would be \$197.00 per hour. Applying that rate, EBSCO revised its claim to \$20,945.95. DODEA answered that it had no objection to the calculation, and reiterated its view that the attorney time claimed was fair and reasonable. In addition, DODEA explained that it "has no objection to EBSCO's request that it receive attorney fees over the \$150 statutory cap." DODEA Response at 2.

Since DODEA has expressed no basis to oppose the request, we recommend that DODEA pay EBSCO its costs of filing and pursuing its protest in the amount of \$20,945.95.

Gary L. Kepplinger
General Counsel