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B- 400058.4, 2009 CPD P 131, 2009 WL 1874283 (Comp.Gen.)

COMPTROLLER GENERAL

1 Decision Matter of:*Public****Communications**

Services, Inc.-Costs

June 25, 2009

James J. Regan, Esq., Daniel R. Forman, Esq., John E. McCarthy, Jr., Esq., and Puja Satiani, Esq., Crowell & Moring LLP, for the protester.

Michael J. Davidson, Esq., Bureau of Immigration and Customs Enforcement, Department of Homeland Security, for the agency.

Jonathan L. Kang, Esq., Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Reimbursement of attorneys' fees sought by a successful small business protester is recommended, notwithstanding agency's argument that the fees are unreasonable because they are inconsistent with conference report language found in the legislative history of the Federal Acquisition Streamlining Act, which states that the statutory cap on hourly rates for attorneys' fees that can be reimbursed for successful large business protesters should serve as a "benchmark" for reviewing the otherwise reasonable hourly rates for attorneys' fees incurred by successful small business protesters. The benchmark is one among several factors to be considered in evaluating the reasonableness of attorney fees and does not, under the circumstances here, show that the requested fees are unreasonable.

2. Agency's argument that the attorneys' fees sought by a successful small business protester are unreasonable because the protester used a private law firm, and because, in the agency's view, billings by private law firms are inherently unreliable, does not provide a basis for our Office to deny a request that we recommend reimbursement of such costs, when the record shows that the hours incurred, and rates charged, are adequately documented and reflect customary costs for similar work.

DECISION

Public Communications Services, Inc. (PCS) requests that our Office recommend that the Department of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE) reimburse its costs of filing and pursuing its protest of the award of a contract to Value-Added Communications, Inc. (VAC) under request for proposals (RFP) No. HSCETE-08-R-00001 for detainee telephone services.

We recommend reimbursement in the amount of \$319,016.63, plus PCS's costs of pursuing this claim at our Office.

BACKGROUND

The RFP was issued on January 3, 2008, and sought proposals to provide phone services for approximately 30,000 detainees in the custody of ICE at 231 detention facilities. On March 28, 2008, ICE awarded a contract to VAC. In its protest, PSC challenged the reasonableness of the agency's evaluation of price and technical proposals, and alleged that the awardee's proposal contained material misrepresentations. In response to the protest, ICE argued that phone services for detainees are outside the scope of our bid protest jurisdiction. ICE also defended its procurement on the merits.

By decision dated July 18, our Office concluded that this contract for phone services falls within our jurisdiction, and we sustained the protest on the merits. In brief, we concluded that the agency acted unreasonably in evaluating the offerors' proposed prices, and in assessing two deficiencies in PCS's proposal under one of the technical evaluation factors. *Public Comms. Servs., Inc.*, B-400058; B-400058.3, July 18, 2008, 2009 CPD para. __ at 5-6. [FN1] We also recommended that PCS be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. sect. 21.8(d)(1) (2009).

*2 On September 16, PCS submitted to DHS a certified claim for reimbursement of the costs of pursuing the protest. In its initial cost claim, PCS sought reimbursement of \$344,440.40 in legal fees charged by PCS's outside counsel, Crowell & Moring. Initial Cost Claim, Sept. 16, 2008, Tab 1, at 1. PCS noted that it is a small business, and is therefore not subject to the \$150 per hour cap on reimbursements for attorneys' fees applicable to large business protesters. *Id.*, Tab 2, at 1; 31 U.S.C. sect. 3554(c)(1)(A), (c)(2) (2000). The hourly rates, and number of hours, at issue here are as follows:

Position	Hourly Rate	Hours
Senior Partner	\$705	126.25
Partner	\$525	23.5
Partner	\$505	215.375
Counsel	\$485	114.75
4th Year Associate	\$390	18
3rd Year Associate	\$360	129
Legal Assistant	\$215	2.25
Reference Librarian	#190	0.5
Legal Assistant	\$135	17.5

Id. Tab 4, at 1.

On October 28, the agency responded to PCS's cost claim, questioning several elements within it. The parties engaged in negotiations and, as a result, PCS agreed to withdraw a number of the costs that were disputed by the agency. Request for Reimbursement at 2.

On December 5, PCS submitted a revised cost claim that eliminated the above-mentioned disputed costs (totaling \$15,328), and sought reimbursement of \$319,111.63. Revised Cost Claim at 3. The final costs sought, by category, are as follows:

Attorneys' fees	\$314,721.88
Legal Assistant Fees	\$2,846.25
Reference Librarian Fees	\$95.00

Other Services and Costs	\$1,448.50
TOTAL	\$319,111.63

*3 On December 31, ICE advised PCS that the agency would not reimburse the claimed amount because the agency viewed the hourly rates as “excessive,” and viewed the number of hours billed as unreasonable, “given the lack of complexity of this case as well as the fact that a hearing was not held.” Agency Response to Revised Cost Claim at 2. As a result, PCS seeks a recommendation for reimbursement from our Office.

DISCUSSION

Our Bid Protest Regulations provide that, in the event that we sustain a protest, we may recommend that the agency pay the successful protester the costs of “filing and pursuing the protest, including attorneys’ fees and counsel and expert witness fees. 4 C.F.R. sect. 21.8(d)(1). A protester seeking to recover its protest costs must submit sufficient evidence to support its monetary claim; our Office will base our decision for a cost claim upon the facts and circumstances of that claim. *CourtSmart Digital Sys., Inc.-Costs*, B-292995.7, Mar. 18, 2005, 2005 CPD para. 47 at 2. The amount claimed may be recovered to the extent that the claim is adequately documented, and is shown to be reasonable. *Id.* We will determine the reasonableness of hourly rates for legal fees by considering the customary fee for similar work in the community, as well as the experience, reputation and ability of the practitioner. *Id.*

ICE does not dispute that PCS should recover reasonable attorneys’ fees for pursuing its successful protest. The agency argues, however, that the fees at issue here are unreasonable, and raises both general and specific contentions. ICE’s general contentions—which could have been raised against any small business protester seeking reimbursement for attorneys’ fees—are that: (1) the statutory cap on hourly rates for attorneys’ fees that can be reimbursed for large business protesters should be used as a limiting factor for determining the reasonableness of the hourly rates for attorneys’ fees when reimbursing small business protesters; and, (2) since, in ICE’s view, “the legal industry is incentivized to maximize the number of hours it can bill to a client,” Agency Response to Request for Reimbursement at 9, PCS should have agreed to an “across-the-board reduction” in the number of hours billed to address the issue.

With respect to the specific fees at issue here, ICE contends that: (1) the hourly rates are unreasonable because they exceed those we have approved in prior decisions; (2) the fees are unreasonable because this was not a complex protest; (3) the hourly rates are not supported by the industry survey data submitted; and (4) one entry of 3.75 hours for an associate is unreasonable because it involves a review of PCS’s proposal “well after the protest had been filed.” Agency Response to Initial Cost Claim at 4. In addition, ICE contends that we should deny the protester’s request that it be reimbursed for the cost of pursuing this request for reimbursement. [FN2]

*4 For the reasons discussed below, we disagree with the agency on almost every front, and, with one exception, we recommend that the protester be reimbursed the costs it incurred in pursuing this protest, and this request for costs. We agree with the agency, however, that the protester did not provide survey data sufficient to support the reasonableness of the hourly rate charged by the law firm’s reference librarian, and we will not recommend reimbursement of those costs.

Legislative History of the Statutory Cap on Attorneys’ Fees

In the first of its two general challenges, ICE argues that the attorneys’ fees at issue here exceed the level of reimbursement intended by Congress. To address this contention, we set out below the statutory and legislative history of the fee-shifting provision applicable to bid protests.

The Competition in Contracting Act of 1984 (CICA) authorized our Office to recommend that agencies reimburse suc-

successful protesters the costs of filing and pursuing a protest, including reasonable attorney fees. [Pub. L. No. 98-369, 98 Stat. 494](#), sect. 2741 (1984). From the passage of the CICA until 1994, no cap on hourly rates applied to the reimbursement of attorneys' fees for successful protesters; however, such fees could only be reimbursed to the extent they were reasonable. *See id.*; *see also* [S. Rep. No. 103-258](#) (May 11, 1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, at 2568. In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended certain parts of CICA, including, as relevant here, the provisions concerning reimbursement of protest costs. [Pub. L. No. 103-355, 108 Stat. 3243](#), at 3289 (1994). Since the enactment of FASA, CICA imposes a cap on legal fees for large businesses of \$150 per hour; the cap, however, does not apply to small businesses. [31 U.S.C. sect. 3554\(c\)](#).

Although the agency acknowledges that the statutory cap on reimbursable hourly rates for attorneys' fees incurred by successful large business protesters does not apply to small business protesters, it contends that certain portions of the legislative history of the cap provision indicate that Congress intended for the cap to be a "benchmark" for reimbursing small business protesters as well. As set forth in detail below, we agree that the \$150 per hour figure is to be one benchmark for assessing the reasonableness of the fee reimbursement requests of successful small business protesters. We do not, however, view the benchmark as an additional limitation on reimbursable fees separate and apart from the rule that only reasonable fees are to be reimbursed.

During consideration of FASA, the bill as reported to the Senate floor imposed a cap on the reimbursement of attorneys' fees for any successful protester at GAO-including small businesses-at the then-current rate established by the Equal Access to Justice Act (EAJA). *See* [S. Rep. No. 103-258](#) (May 11, 1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2568. On the floor of the Senate, Senator Paul Wellstone proposed an amendment "[t]o *continue* to permit a small business winning a bid protest before the GAO ... to be reimbursed for reasonable amounts incurred for the fees of attorneys and any consultants or expert witnesses used." 40 Cong. Rec. S6594 (daily ed. June 8, 1994) (emphasis added). The amendment was agreed to, by voice vote, on June 8, *id.*, and FASA passed the Senate including the Wellstone provision, which expressly excluded small business protesters from the bill's cap on reimbursable attorneys' fees.

*5 By the time FASA emerged from the House-Senate conference committee, the Act imposed a cap of \$150 per hour (as opposed to the bill's original EAJA cap) on the reimbursement of attorneys' fees for large business protesters. [Pub. L. No. 103-355, 108 Stat. 3243](#), 3289 (1994). The amendment added on the Senate floor, discussed above, was retained, however, and small business protesters were expressly exempted from the application of the statutory cap. *Id.* The final statutory language regarding the cap was enacted as follows:

- (2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)-
 - (A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or
 - (B) costs for attorneys' fees that exceed \$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.

[Pub. L. No. 103-355, 108 Stat. 3243](#), at 3289.

ICE correctly points out that the conference committee's report provided additional guidance on the subject of reimbursing the attorneys' fees incurred by small business protesters:

The conferees also note that this provision would entitle a small business concern to recover "reasonable attorneys' fees" in appropriate cases. The conferees expect the Comptroller General to be vigilant in reviewing attorneys' fees to ensure that they are reasonable. The cap placed on attorneys' fees for businesses other than small business consti-

tutes a benchmark as to what constitutes a “reasonable” level for attorneys' fees for small businesses.

H. Rep. No. 103–712 sect. 1403 (Aug. 21, 1994), *as reprinted in* 1994 U.S.C.C.A.N. 2607, 2621–22.

The agency also notes that the language concerning the use of the \$150 cap as a “benchmark” for reimbursement of attorneys' fees for small business protesters was then reflected in the Federal Acquisition Regulation (FAR), which provides the following guidance:

No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, “Small business concern”), costs under paragraph (h)(2) of this section-

(ii) For attorneys' fees that exceed \$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. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a “reasonable” level for attorneys' fees for small businesses.

*6 FAR sect. 33.104(h)(5).

Thus, ICE argues that the legislative history of FASA indicates that Congress intended for the \$150 cap to be a “benchmark” in deciding whether attorneys' fees for successful small business protesters are reasonable, and supports the agency's view that all of the hourly rates at issue here—especially the \$705 per hour rate of the senior partner—are unreasonable *per se*. While our Office has previously addressed the “benchmark” language in FAR sect. 33.104(h)(5), [FN3] we have not addressed the legislative history of FASA—where this language first appears. As discussed below, we conclude that the legislative history does not, as ICE argues, bar reimbursement of legal fees at the rates charged by PCS's outside counsel.

Our Office takes seriously—and in the words of the FASA conference report, is “vigilant” in fulfilling—our responsibility to evaluate the reasonableness of a successful protester's request for reimbursement of attorneys' fees. In numerous instances, our Office has agreed with agency arguments that certain costs for successful protesters are not allowable. For example, we have found that hours charged by outside counsel are excessive where the number of hours billed are “far beyond what should have been necessary to reasonably pursue the protest.” *Galen Med. Assocs., Inc.-Costs*, B–288661.6, July 22, 2002, 2002 CPD para. 114 at 2. We have denied requests for reimbursement where billing records show that multiple attorneys performed duplicative work, and did not demonstrate a need for such efforts. *Fritz Cos., Inc.-Costs*, B–246736.7, Aug. 4, 1994, 94–2 CPD para. 58 at 4–5. We have disallowed costs where the protester does not provide adequate documentation demonstrating the reasonableness of outside counsel's hourly rates. *TRS Research-Costs*, B–290644.2, June 10, 2003, 2003 CPD para. 112 at 4. We have denied requests for reimbursement of protest costs where the protester has not stated that the costs sought for reimbursement have or will be paid by the protester, regardless of our ruling on the request. *Id.* at 5. We have disallowed costs that are not reasonably related to the pursuit of the protest, including, for example, costs associated with a request for reconsideration. *Aztec Dev. Co.-Costs*, B–270275.2, Feb. 13, 1997, 97–1 CPD para. 73 at 4. Similarly, our Office has disallowed costs in their entirety where a protester has aggregated allowable and unallowable costs in a way that does not allow us to identify which costs are properly reimbursable. *Blue Rock Structures, Inc.-Costs*, B–293134.2, Oct. 26, 2005, 2005 CPD para. 190 at 5.

*7 Here, we recognize that the FASA conference committee reiterated our Office's responsibility, imposed in 1984 by CICA, to ensure that attorneys' fees sought for reimbursement are reasonable. We see no conflict between FASA's ex-

emption of small businesses from a cap on attorneys' fees, and the conference committee's view that the "cap placed on attorneys' fees for businesses other than small business constitutes a benchmark as to what constitutes a 'reasonable' level for attorneys' fees for small businesses."H. Rep. No. 103-712 sect. 1403 (Aug. 21, 1994), *as reprinted in* 1994 U.S.C.C.A.N. 2607, 2621-22. In this regard, we think that the conference committee report language concerning a "benchmark" provides guidance as to the evaluation of the reasonableness of attorneys' fees. However, we do not view the benchmark language as imposing an additional limitation (*i.e.*, a cap) on attorneys' fees that are otherwise reasonable. Such an interpretation would be inconsistent with the plain statutory language of FASA which exempts small businesses from the specific cap imposed on large businesses-and we see no evidence that the Congress intended such a result. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) ("when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms" (internal quotation marks omitted)).

We think the benchmark language is appropriately viewed as one of a number of factors to be considered in determining whether attorneys' fees are reasonable. [FN4] Among these factors are: the legal context-CICA's creation of a fee-shifting mechanism that provides for the reimbursement of a successful protester's costs of pursuing a protest and FASA's exemption of small businesses from the \$150 per hour cap on attorney fees that applies to large businesses; the passage of time-13 years-and the concomitant changes in the cost of living and the level of fees since the enactment of FASA; the customary fees charged for similar legal work in the community where outside counsel practices; the experience, reputation and ability of the outside counsel; the specialized nature of government contracts law; and the complexity of the issues in the particular protest at issue.

In summary, we have considered the difference between the rates charged by PCS's outside counsel and the \$150 per hour cap that applies to large businesses, particularly in light of the conference committee's views, and the relevant FAR provision, concerning the cap as a benchmark for reasonableness. We nonetheless think that, on balance, the rates charged by PCS's outside counsel are reasonable. Specifically, as discussed in detail below, we find that the number of hours billed is reasonable, and that the rates charged by PCS's outside counsel are consistent with those customarily charged by comparable firms in the Washington, DC area with similar levels of government contracts experience. We also think that the issues in this protest were of a level of complexity that supports the reasonableness of the rates.

*8 ICE's General Challenge to Private Sector Billings

In its second general challenge, ICE argues that the number of hours billed by protester's outside counsel are "grossly excessive," and therefore not reasonable. Agency Response to Request for Reimbursement at 8. Rather than identify specific challenges, however, the agency asks that our Office assume that private-sector attorneys are improperly motivated to overstate their legal bills, and that the bills here contain "inefficiencies" because of the pressures on private-sector attorneys to maximize profit. In this regard, ICE contends:

It is well known within the legal community that the legal industry is incentivized to maximize the number of hours it can bill to a client and in most cases it would be nearly impossible for an agency to challenge specific hours or identify single, standout transgressions absent a legal audit or having been physically present to observe the work of protester's counsel. Inefficiencies in billing may extend throughout the entire course of the protest given the profitable practice of billable hours followed by the private bar.

Attorneys in law firms are often required to bill at least a fixed number of hours and various incentives, such as bonuses and job advancement, are offered to those who exceed that number. The pressure to maximize billable hours

incentiv[izes] attorneys to be inefficient so they can bill the maximum amount of time to a given project.

Agency Response to Request for Reimbursement at 9.

We find no merit in this argument as regarding the issue before us. Specifically, we do not accept the agency's view that attorneys' fees charged by private law firms to their clients should be viewed as inherently untrustworthy, "padded," or unreasonable. ICE's argument requires, in essence, that we assume that private law firms routinely act unethically by overbilling their clients. We will not make this assumption.

In addition, ICE's arguments fall short of meeting the legal standard for challenging the reasonableness of legal fees. Generally, our Office will examine the reasonableness of the attorney hours claimed to determine whether they exceed, in nature and amount, what a prudent person would incur in pursuit of a protest. *T Square Logistics Servs. Corp., Inc.-Costs*, B-297790.6, Jun. 7, 2007, 2007 CPD para. 108 at 9. Simply arguing in a general way, however, that the hours claimed are excessive (or, as here, contending that they reflect an inefficiency inherent in law firms), does not provide an adequate basis for our Office to deny a claim for protest costs. *Id.* Unless an agency identifies specific hours as excessive and articulates a reasoned analysis as to why payment of those hours should be disallowed, we will generally accept the number of attorney hours claimed. *Pulau Elecs. Corp.-Costs*, B-280048.11, July 31, 2000, 2000 CPD para. 122 at 6.

*9 Moreover, we disagree with ICE's proposed remedy for what it sees as the inherent inefficiencies of private law firms. In ICE's view, PCS should have offered the agency an "across-the-board reduction" on attorneys' fees to reflect presumed inefficiencies or overbilling. [FN5] Agency Response to Revised Cost Claim at 9.

In addressing ICE's contention that these fees are unreasonable, in part, because no across-the-board reduction was offered, we note first that the legal fees incurred here have been paid by the small business protester that prevailed in its challenge to ICE's procurement. Request for Reimbursement at 3. Since the fees were paid, ICE's approach would require the small business protester to absorb the difference between the fees it paid and the amount ICE will reimburse. In our view, if the charges are otherwise reasonable, we know of no reason the protester should be asked-at this juncture-to absorb an across-the-board reduction in the amount we recommend for reimbursement. We also think that asking a small business protester to absorb the difference between the fees it paid and the amount ICE is willing to reimburse is inconsistent with the plain language of the fee-shifting provision in CICA. [FN6]

The Hourly Rates Here Exceed Those Found Reasonable in Prior Decisions

Turning from ICE's general challenges to those specifically tied to the billings here, we consider first ICE's contention that the hourly rates charged by PCS's outside counsel for attorneys and staff are unreasonable because they exceed the levels previously found by our Office as reasonable.

We have held that one way to determine the reasonableness of hourly rates for legal fees is by considering the customary fee charged for similar work in the community, as well as the experience, reputation and ability of the practitioner. *KP-MG Peat Marwick, LLP-Costs*, B-259479.4, July 25, 1996, 96-2 CPD 43 at 5. In doing so, where relevant and appropriate, we will consider the fee rates found allowable by our Office in similarly complex proceedings. *See CourtSmart, supra*, at 2.

ICE points out that the highest hourly rate for an attorney previously approved by our Office was \$475 per hour, in *CourtSmart*. *See id.* at 3. In *CourtSmart*, we reviewed an article published in the January 2003 edition of *Legal Times*, a Washington, D.C. legal news publication, which listed the hourly rates for partners from 19 Washington, D.C. area law firms as ranging from \$185 to \$750. *Id.* at 3. Since the rates we were reviewing were within the range of the customary

rates charged in the Washington, DC area, we concluded that the hourly rate of \$475 per hour was reasonable for a partner in a Washington D.C. firm practicing government contract law.

***10** While we consider rates previously approved by our Office as part of our evaluation of the reasonableness of attorneys' fees, we do not think the \$475 hour rate approved in *CourtSmart* can serve as an inflexible ceiling. In this regard, the hourly rates approved in that case were billed in 2002. While we also discuss below the relationship of the hourly rates requested here with those identified in legal surveys, we note that the surveys provided in the *CourtSmart* case might also have supported the rates requested here, since the rates sought here were within the range of partner billings identified in the January 2003 publication. [FN7]

Complexity of the PCS Protest

As discussed above, we advised in *CourtSmart* that, where relevant and appropriate, we will consider the fee rates found allowable by our Office in similarly complex proceedings. *See CourtSmart, supra*, at 2. We disagree with ICE's view that the attorneys' fees at issue here should not be compared with those in *CourtSmart* because the issues raised during this protest lacked "complexity." Agency Response to Request for Reimbursement at 8.

PCS's protest challenged the agency's price and technical evaluations, and required extensive briefings by the parties. In addition, the agency argued in its report, and its supplemental report, that our Office lacked jurisdiction to hear the protest-arguments the protester was required to answer. The filings prepared by PCS's counsel included the protest, a supplemental protest, comments on the agency report, comments on the supplemental agency report, and responses to questions from our Office concerning the price evaluation issue. The protester's filings consisted of extensive legal briefing and more than a dozen original exhibits and cost calculations. Our decision resolving this protest was 24 pages long, which we also view as indicative of a reasonably high level of complexity for the protest issues and arguments advanced by the parties. In sum, we conclude that the billing rates charged by protester's outside counsel are reasonable in light of the relative complexity of the protest issues.

Survey Data Supports Most of Fees Sought Here

During our consideration of this request for a recommendation for reimbursement of PCS's protest costs, PCS submitted data on attorney billing rates, and legal assistant billing rates, charged by certain Washington, D.C. firms. With respect to attorney billings, ICE argues that the survey rates are not relevant because they pertain only to large firms, and do not specifically indicate the rates for attorneys who specialize in government contracts litigation. With respect to legal assistant billings, ICE argues that the surveys do not support the requested rates for legal assistants, and contends that the rates are higher than those approved in prior decisions. With respect to the fees sought for the services of a reference librarian, ICE points out that PCS has provided no survey data to support the claimed fees. We agree with ICE regarding the adequacy of the support provided to justify the fees charged for the reference librarian; in all other respects, we disagree with the agency.

***11** In support of the hourly rates charged by its attorneys, PCS provides a 2008 National Law Journal survey of billing rates for Washington, D.C. firms, and identifies seven firms of similar size whose primary practice is in the Washington, DC area. These rates are as follows:

Firm	Partner Rates	Associate Rates
Arent Fox	\$410–710	\$260–465
Dickstein Shapiro	\$475–895	\$250–475
Hogan & Hartson	\$375–900	\$150–550

McKenna Long & Aldridge	\$370–750	\$220–450
Patton Boggs	\$360–990	\$244–535
Steptoe & Johnson	\$350–895	\$210–685
Venable	\$380–950	\$250–425

A Nationwide Sampling of Law Firm Billing Rates, National L. J., Dec. 8, 2008.

As shown earlier in this decision, the hourly rates charged for the three Crowell & Moring partners here were \$505, \$525, and \$705; the hourly rate charged for a firm counsel was \$485; and the hourly rates charged for associates of the firm were \$360 and \$390. Initial Cost Claim, Sept. 16, 2008, Tab 4, at 1.

The agency correctly points out that this survey does not specifically address the rates charged by government contracts attorneys. However, we have accepted similar billing surveys as a reasonable indicator for billing rates of comparable firms. See *Blue Rock Structures, Inc.-Costs*, B–293134.2, Oct. 26, 2005, 2005 CPD para. 190 at 4; *CourtSmart*, *supra*, at 3. The protester represents, and the agency does not dispute, that the Washington, D.C.-based firms shown in the survey are generally comparable to Crowell & Moring in terms of overall size and reputation, and are comparable in the size and reputation of their government contracts practices. Since the hourly rates charged here are within the range of the other firms in the survey, and we think the survey supports a conclusion that these hourly rates are reasonable.

*12 We turn next to the reasonableness of the hourly rates for three support staff: two legal assistants, and a reference librarian. [FN8] In this regard, the agency argues that the rates for the legal assistants exceed the levels we have previously approved for such services, and that the protester failed to provide data supporting the reasonableness of the rate for the reference librarian. [FN9] Unlike attorneys' fees, CICA does not impose a cap on billing rates for support staff. [FN10] In evaluating the reasonableness of support staff billing rates, we follow a similar test to that used for attorneys' fees, *i.e.*, whether the amount is the customary fee charged for similar work in the community, and whether the fees are similar to those found allowable by our Office in similarly complex proceedings. See *CourtSmart*, *supra*, at 3–5.

In *Pulau Elec. Corp.-Costs*, *supra*, our Office concluded that paralegal costs are appropriate for reimbursement to the extent that they are “are documented, reasonable, and shown to be in pursuit of the protest.” The paralegal costs approved in *Pulau* as reasonable were billed at \$80 per hour. *Id.* at n.9. In *CourtSmart*, the protester sought reimbursement of paralegal fees of \$100 and \$200 per hour; we noted, however, that the protester did not provide any billing survey data regarding legal assistants, and therefore did not meet its burden to justify the rates it sought. *CourtSmart*, *supra*, at 4–5. On that basis, we limited the reimbursement to the \$80 rate previously approved in *Pulau*. *Id.*

Here, PCS cites a 2008 survey of Washington, D.C. firm billing rates for legal assistants, as follows:

Firm	Legal Assistant Rates
Venable	\$110–275
Beveridge & Diamond	\$125–175
Sughrue Mion	\$145

Annual Survey of the Nation's Largest Law Firms, Corporate Counsel, 2008.

The Crowell & Moring rates at issue here range from \$135 to \$215 per hour—an amount that, on first review, seems in line with the rates charged by the survey firms.

ICE argues that data cited for Beveridge & Diamond and Sughrue Mion are not relevant because the survey indicates that these firms do not identify government contracts as a primary practice area. *See id.* With respect to the agency's contention that the rates for Sughrue Mion are not relevant here, we agree. As the agency points out, the survey indicates that 100% of that firm's practice is in intellectual property, rather than in government contracts or related litigation. *See id.* We think, however, that the rates for Beveridge and Diamond are somewhat relevant because the survey states that litigation is one of the firm's primary practice areas. *See id.* We think the data for the Venable law firm is very relevant here because, as discussed above, that firm is generally comparable to Crowell & Moring in terms of the size and reputation of its government contracts practice. In our view, the data for the Venable and Beveridge & Diamond law firms support a conclusion that the legal assistant rates at issue here are reasonable.

*13 With regard to the reference librarian, the protester did not provide any data concerning rates customarily charged for this position. While we recognize that the protester seeks reimbursement of only 0.5 hours of time, we nonetheless have no basis to conclude whether the billing rate of \$190 per hour is reasonable, and we therefore disallow the \$95 claim for the reference librarian. Moreover, in addition to failing to provide adequate documentation regarding reference librarians, we also believe this type of cost is more appropriately treated as law firm overhead, rather than a direct reimbursable cost.

ICE's Single Specific Challenge

We turn next to the only specific challenge to a billing entry raised by ICE-*i.e.*, a May 9, 2008, entry of 3.75 hours for an associate, which ICE contends was unreasonable because it involved a review of PCS's proposal "well after the protest had been filed." Agency Response to Initial Cost Claim at 4. Specifically, the entry shows that, in addition to reviewing PCS's proposal, the attorney prepared notes, conferred with another attorney regarding past performance research, and reviewed the agency report and contracting officer's statement. *See Request for Reimbursement, Tab 1, Billing Records.*

We think the billing entry sufficiently details a reasonable expenditure of effort. In addition, we note that it is often necessary to review proposals to compare them with solicitation requirements, or to compare them with the agency's evaluation findings. On this record, we find no merit to the agency's challenge to this billing entry, nor do we see any independent basis for concluding that the charge was excessive, inappropriate, or otherwise unreasonable.

Finally, and more generally, we have reviewed the billing records provided in support of this request for a recommendation that PCS be reimbursed its attorneys' fees and find that they are well documented and in good order. They provide sufficient detail to examine which attorneys performed work, and when the work was performed. The records also closely track significant events and submissions that arose during the course of our consideration of the protest. Accordingly, we think these records adequately detail the activities performed by outside counsel and staff, and we see no basis to question the number of hours billed.

Reimbursement of the Costs of Pursuing this Request

PCS also seeks the costs of pursuing this request for reimbursement at our Office. ICE argues that PCS is not entitled to reimbursement for pursuing this request for costs because the agency did not unreasonably delay in responding to the initial request.

Our Regulations, [4 C.F.R. sect. 21.8\(f\)\(2\)](#), provide that we may recommend reimbursement of the costs of pursuing a claim before our Office. This provision is intended to encourage the agency's expeditious and reasonable consideration of a protester's claim for costs. *JAFIT Enters., Inc.-Costs, B-266326.2*, Mar. 31, 1997, [97-1 CPD para. 125 at 4](#). We will not recommend reimbursement the costs of pursuing a cost claim before our Office where the agency promptly offered a reasonable settlement prior to the filing of a request with our office. *See id.*

*14 Here, we think the agency acted promptly, but not reasonably. As discussed above, the agency refused to reimburse the requested fees based, in part, on a view that reputable law firms overbill clients. In addition, the agency argued that the rates and hours in the request were unreasonable, even though the billing records were well documented and in good order, and sought reimbursement of hourly rates that were supported by survey data. Furthermore, we think the agency failed in its obligation to identify specific instances where it believed the number of hours billed were unreasonable. Because we agree with PCS that the agency's position was not well founded, we also recommend that the agency reimburse PCS its costs in pursuing this request. See *Main Building Maint. Inc.-Costs*, B-260945, B-260945.6, Dec. 15, 1997, 97-2 CPD para. 163.

RECOMMENDATION

We recommend that ICE reimburse PCS its claimed costs of \$319,016.63, as well as the reasonable costs of filing and pursuing this request for reimbursement at our Office. The protester should submit its claim for costs for pursuing this protest,

detailing and certifying the time expended and costs incurred, directly to ICE within 60 days of receipt of this decision. 4 C.F.R. sect. 21.8(f)(1).

The request is granted.

Daniel I. Gordon
Acting General Counsel

FN1. As of the date of our decision resolving this cost claim, our Office has not issued a public version of our earlier decision due to ongoing corrective action by the agency.

FN2. ICE does not challenge PCS's request for reimbursement of \$1,448.50 for other services and costs, such as duplicating and facsimile fees.

FN3. In *Blue Rock Structures, Inc.-Costs*, B-293134.2, Oct. 26, 2005, 2005 CPD para. 190 at 3-4, we noted that although the FAR states that the \$150 per hour cap "constitutes a benchmark as to a 'reasonable' level of attorneys' fees for small businesses," we had previously recommended reimbursement of attorneys' fees "significantly in excess of the benchmark" where the rates were "consistent with the customary rates charged for similar work by attorneys of similar experience in the community in which the attorney practices." *Id.* Specifically, we noted that the protester's outside counsel's rate of \$350 per hour in *Blue Rock* was below the \$475 per hour rate we approved in *CourtSmart*. In *CourtSmart*, we concluded that a rate of \$475 per hour for a Washington, D.C. law firm partner was reasonable in light of a survey of 2002 billing rates which showed that partners for 19 firms in the Washington, D.C. area charged rates between \$185 to \$750 per hour, and because the agency did not question the applicability of the survey data. *CourtSmart, supra*, at 3.

FN4. To the extent that the agency is arguing that the benchmarked amount is the only measure of reasonableness, we disagree. An assertion that the benchmarked amount must be the controlling factor in our analysis simply reinstates the cap under another name, despite the plain statutory language indicating that no cap applies to small businesses. In any event, we note that the agency itself appears to recognize that reimbursing an hourly rate hundreds of dollars above \$150 is consistent with the benchmark's standard. See Agency Response to Request for Reimbursement, at 5 ("Under this standard, the agency posits that the maximum permissible hourly attorney rate for a Washington, D.C. partner should certainly not exceed \$475....").

FN5. For the record, ICE also objects to the entries used on these legal bills, which describe tasks such as “conferring with the client,” “reviewing documents,” or “conference among attorneys.” In ICE’s view, these tasks are vague and do not “include a measurable work product.” Agency Response to Request for Costs at 9. Again, we think these general arguments fail to provide a basis to challenge the reasonableness of the hours claimed by PCS. All of the challenged activities are reasonably related to the pursuit of a protest, and ICE fails to identify specific billing entries as excessive or unnecessary. A more constructive approach for the agency might have been to compare the entries to the significant events over the course of the protest to determine whether they were driven by the need to respond to the agency’s report, supplemental report, or assertions that our Office lacked jurisdiction.

FN6. ICE notes that our Office issued a report in 1994 concerning requests for costs filed by successful protesters, and suggests that we use that report as a “benchmark” for determining whether a request for reimbursement is reasonable. See U.S. Gen. Accounting Office, GGD–95–17FS, *Attorneys’ Fees Paid to Bid Protesters By Federal Agencies* (1994). The report addressed protests at GAO and at the former General Services Administration Board of Contract Appeals (GSBCA), which at that time had jurisdiction to hear certain protests. The report stated that for fiscal years 1992 and 1993, the average request for reimbursement for outside counsel was 217 hours. *Id.* at 6. The agency contends that we should adopt 217 hours as a standard for whether a request for reimbursement is reasonable in an average protest. Agency Response to Request for Costs at 10. We disagree. Although the report cites an “average” of 217 hours per successful protest, there is no basis in the report to identify what kinds of protests comprised that average. Not only do we have no basis to determine whether an average protest before GAO and the GSBCA in 1992 and 1993 is the same as the average protest in 2008, but, as discussed below, we do not agree with the agency’s characterization of the protest issues here as lacking “complexity,” or that the protest was routine or otherwise average in nature.

FN7. We also disagree with ICE’s contention that our Office should use as a “benchmark” the so-called “Laffey Matrix” employed by the Department of Justice (DOJ) for calculating reasonable attorney and legal assistant fees for services provided in the Baltimore–Washington, D.C. area under fee-shifting statutes, such as the Civil Rights Act of 1964, and the Equal Access to Justice Act. Agency Response to Request for Costs at 6. The matrix is based on a decision by the U.S. District Court for the District of Columbia concerning a calculation of reasonable attorneys’ fees based on the experience of the attorney. See *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354, 371 (D.D.C. 1983). The matrix reflects DOJ’s view as to the reasonable hourly rates based on inflation since 1983. See DOJ Laffey Matrix, available at: http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html. We think that application of the Laffey Matrix would effectively impose a cap on fees that were incurred and paid by the successful small business here. As discussed above, we read FASA to exempt small businesses from the cap that applies to large businesses, and we see no evidence that Congress intended to impose a cap based on the rates under the Laffey Matrix, or any other cap, on fees that are otherwise shown to be reasonable—which, in our view, are fees that are customarily charged for similar work in the community, considering the experience, reputation, and ability of the practitioner. *CourtSmart Digital Sys., Inc.-Costs, supra*, at 2.

FN8. For purposes of this cost claim, we assume that the terms paralegal and legal assistant are synonymous.

FN9. The agency does not challenge the number of hours billed by the legal assistants or the reference librarian.

FN10. CICA does impose a cap for large businesses for reimbursement of consultant and expert witness fees. 31 U.S.C. sect. 3554(c)(2)(A). This cap, on its face, does not apply to paralegal or legal assistant fees.

B- 400058.4, 2009 CPD P 131, 2009 WL 1874283 (Comp.Gen.)

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