GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

TITO CONTRACTORS, INC.	)	
	)	CAB Nos. P-363 and P-366
	)	(Consolidated)
Under IFB No. 93-0030-AA-4-N-CC	)	(Claim for Costs)

For the Protestor: Joseph V. McGrail, Esquire. For the Government: Robert J. Harlan, Jr. and Nancy Hapeman, Assistants Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee, Jonathan D. Zischkau and Cynthia Hawkins-León, en banc.

OPINION AND ORDER
ON REQUEST FOR BID PREPARATION COSTS

Tito Contractors, Inc. (Tito, Protestor), requests that the Board find that its reasonable bid preparation costs are $28,695.00, and that it be awarded that amount. We cannot make such a determination, as discussed below, but will allow Tito another opportunity to prove its costs.

In our Opinion and Order on the consolidated protests issued on May 27, 1993, 6 P.D. 5168, we granted in part and denied in part Tito's protests. Further, we found that the District of Columbia had acted in an arbitrary and capricious manner, and determined that Tito could be awarded its reasonable bid preparation costs pursuant to D.C. Code § 1-1189.8(e)(2). Therefore, we directed Tito to ". . . submit documentation supporting its costs. . . ," (6 P.D. at 5176) and directed that the District respond thereto.

Tito timely submitted a one-page motion for bid and proposal preparation costs. The documentation initially submitted by Tito to support its motion consisted of a two-page computer printout. The District timely opposed the motion on three grounds: (1) the bid preparation costs submission does not define the terms it uses; (2) the bid preparation costs are inadequately documented; and (3) the bid preparation costs are not reasonable. The District cites as support the Board's decision in Pinnacle Corporation, 36 DCR 3965, November 18, 1988 (Pinnacle I). The District also cites to decisions of the Comptroller General concerning the documentation that is necessary to support a claim for bid preparation costs: John Peeples-Claim for Costs, B-233167.2, August 5, 1991, 70 Comp.

Gen. 661, 91-2 CPD ¶ 125; Consolidated Bell, Inc., B-220425.4, March 25, 1991, 91-1 CPD ¶ 325; TMC, Inc.-Claim for Costs, B-230078, 69 Comp. Gen. 153, 90-1 CPD ¶ 111.

Tito responded to the District's opposition on July 15, 1993. In its response Tito provides an explanation of some, but not all, of the computer-generated contractions that appear in its documentation. Tito also has submitted copies of ". . . representative net payments made to some of the individuals who worked on the bid and proposal preparation during the period in question." Tito further argues that the decisions of the Comptroller General which the District cites are not controlling because they consider the recovery of protest costs as well as bid preparation costs. Protestor asserts that it has met the standard set by this Board in Pinnacle Corporation, 38 DCR 2969 (September 21, 1989) (Pinnacle II).

We begin our consideration of Tito's request by setting forth the standards for review previously established and followed by the Board. Our authority to award bid or proposal preparation costs is set forth in the Procurement Practices Act of 1985 (PPA), D.C. Code § 1-1189.8(e)(2):

> The Board may, when requested, award reasonable bid or proposal preparation costs not including legal fees, if it finds that the District government's actions toward the protester or claimant were arbitrary and capricious.

This provision sets forth the requirement that the Board will only award costs that are reasonable. A cost is reasonable if it does not differ from or exceed in amount that which would be incurred by a prudent person in the conduct of a competitive business. 27 DCMR § 3307.1 (July 1988). Thus, this Board will not award costs which are excessive or otherwise unreasonable.

The PPA goes on to state that the Board shall adopt rules for exercising its authority under this section. D.C. Code § 1-1189.8(f). In that regard, the Board has adopted and published rules which provide:

314.4 If the Board finds that the District government actions were arbitrary and capricious, the Board may, when requested, award the protester's reasonable bid or proposal preparation costs, but not legal fees.

314.5 A motion for bid or proposal preparation costs shall be submitted by the protester within twenty (20) days of receipt of the Board's decision.

314.6 The motion shall be accompanied by sufficient documentation supporting the requested costs and an appropriate proposed order for the Board.

314.7 The contracting agency may, within ten (10) days after its receipt of the protester's motion, file a written response to the motion.

314.8 At the request of the protester or the District government or on its own initiative, the Board may conduct a hearing on the motion before issuing a ruling.

(emphasis added) 36 DCR 2717.

The requirement in Rule 314.6 for "sufficient documentation supporting the requested costs" means in general that a protestor must submit evidence sufficient to support its claim that its bid or proposal costs are incurred for, and are properly attributable to, preparing, submitting, and supporting the bid or proposal. The Board will not base awards on unsubstantiated claims by protestors which engage the Board in mere speculation.[1/]

These general guidelines were followed by the Board in its decision in Pinnacle II, where the Board stated at pp. 2970-2971:

> It is clear to this Board that in enacting § 1-1189.8(c)(2) [sic], the Council of the District of Columbia intended that bid or proposal preparation costs constitute a form of damages to the protester for monetary loss caused by the arbitrary and capricious action of District officials. The District appears to suggest that the extent of these damages be quantified to a mathematical certainty. We note however that the District, for reasons best known to it, failed to seek any discovery from Pinnacle concerning their cost.
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> We believe it would be manifestly unjust to deny relief, where governmental responsibility for damages is clear, simply because the damages claimed cannot be measured with exactness and precision. The ascertainment of damages is not an exact science and the lack of certainty as to the amount of damages does not preclude recovery. J.D. Hedin Construction Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235 (1961). All that we require in a claim for bid preparation costs, where responsibility for damage is clear, is that the evidence adduced be sufficient to enable us to make a fair and reasonable approximation. Specialty Assembling & Packing Co. v. United States, 174 Ct. Cl. 153, 355 F.2d 554 (1966); Lam, Inc. v. Johns-Manville Corp., 718 F.2d. 1056 (Fed. Cir. 1983); S.W. Electronic[s] & Manufacturing Corp. v. United States, 189 Ct. Cl. 237, [sic] 655 F.2d 1078 (1981).

[1/] As decisions from the Comptroller General of the United States General Accounting Office (GAO) show, sufficiency of the evidence must be considered in light of accounting and record maintenance practices. See, e.g., Stocker & Yale, Inc.-Claim for Costs, B-242568.3, May 18, 1993, 93-1 CPD ¶ 387; CBIS Federal Inc.-Claim for Costs, B-245844.5, May 18, 1993, 93-1 CPD ¶ 388.

However, for the reasons stated below, the Board will more specifically delineate (than the Board did in Pinnacle II) what is "sufficient documentation to support" a request for bid or proposal preparation costs.

In Pinnacle II the Board stated that it took an "open-minded approach with regard to the burden of proof" required to show the reasonableness of protestor's bid preparation costs. 38 DCR at 2973. In doing so, the Board rejected the District's suggestion that the contract cost principles set out in 27 DCMR Chapter 33 (July 1988) be used in determining reasonableness.[2/] Instead, the Board relied on standards used by the United States Court of Claims (now the United States Court of Appeals for the Federal Circuit) and the United States Court of Appeals for the Federal Circuit in determining damages for breach of contract cases and patent infringement cases. In J.D. Hedin, supra, the Court of Claims discussed the appropriate use of the "total cost" theory of measuring damages for breach of contract; Specialty Assembling, supra, concerned the use of a "jury verdict" to determine damages for breach of contract; Lam, Inc., supra, concerned determination of damages for patent infringement; S.W. Electronics & Manufacturing Corp. v. United States, 228 Ct. Cl. 333, 655 F.2d 1078 (1981) considered the use of the total cost and jury verdict methods for awarding damages.

We conclude that the standards relied on in Pinnacle II are not generally appropriate for determining bid or proposal preparation costs. To the extent that Pinnacle II can be read as holding that the cost principles are inapplicable for determining bid or proposal preparation costs, we reject that reading. Based on the foregoing, we overrule Pinnacle II.

In determining what documentation is appropriately required of a protestor in setting forth support for bid or proposal preparation costs, we will look to the decisions of the Comptroller General.[3/] If the United States General Accounting Office determines that

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[2/]Even though Pinnacle II states explicitly that regulations setting forth contract cost principles would not be applied in determining bid and proposal preparation costs, the Board nonetheless applied the standards of reasonableness and allocability as provided for in the regulations. The Board analyzed Pinnacle's cost submission to see whether the costs were incurred in preparing, submitting, and supporting the proposal and whether the costs were reasonable. The Board found some of the requested costs to be unreasonable and reduced the award accordingly. 38 DCR at 2971-73.

[3/]We recognize that the General Services Board of Contract Appeals expressly has not adopted the standards used by the General Accounting Office in awarding proposal preparation costs. Morton Management, Inc., GSBCA No. 9053-C, 88-2 BCA ¶ 20,777 at 104,977. The GSBCA awards bid and proposal preparation costs pursuant to the Competition in Contracting Act of 1984, 40 U.S.C. § 759(f)(5)(C)(1988). Therefore, the GSBCA has determined that it will not award proposal preparation costs where the awards of the costs are too distantly related to the private enforcement of full and open competition in government procurement, where the cause for incurring the costs was unrelated to the protest, and where the protestor has not demonstrated that the respondent caused it to incur unnecessary expenses. U.S. West Information Systems, Inc., GSBCA Nos. 9114-C (8995-P), 9225-C (9103-P), 89-2 BCA ¶ 21,774 at 109,555. Further, where a protestor is otherwise entitled to an award of at least some of its costs of preparing a proposal, no award

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a solicitation, proposed award or award does not comply with statute or regulation it may declare the protestor to be entitled to reasonable costs of bid and proposal preparation, pursuant to 4 C.F.R. § 21.6(d)(2) (1991). In that regard, the Comptroller General has determined that a protestor seeking to recover the costs of preparing a proposal or bid must submit sufficient evidence to support the monetary claim. Stocker & Yale, Inc.-Claim for Costs, 93 CPD ¶ 387, at 4; Data Based Decisions, Inc.-Claim for Costs, 69 Comp. Gen. 75 (1989), 89-2 CPD ¶ 538. Although the Comptroller General recognizes that the requirement for documentation may sometimes entail certain practical difficulties, that office does not consider it unreasonable to require a protestor to document in some detail the amount and purposes of its employees' claimed efforts and to establish that the claimed hourly rates reflect the employees' actual rates of compensation plus reasonable overhead and fringe benefits. W.S. Spotswood & Sons, Inc.-Claim for Costs, 69 Comp Gen. 622 (1990) 90-2 CPD ¶ 50 at 10,779. The burden is on the protestor to submit sufficient evidence to support its claim, and that burden is not met by unsupported statements that the costs have been incurred. Hydro Research Science, Inc.-Claim for Costs, 68 Comp Gen. 506, B-228501.3, 89-1 CPD ¶ 572 at 16,634.

In order to support a claim for direct labor costs, protestors should provide the names of employees, documentation supporting their hourly rates, the number of hours worked and a description of the tasks performed. Time cards or payroll records or other documentation certifying time or payment should be provided, if available. In addition, a breakdown of overhead costs and supporting documentation including utility and other related bills for the period involved should be submitted. Patio Pools of Sierra Vista, Inc.-Claim for Costs, 68 Comp. Gen. 383 (1989) 89-1 CPD ¶ 374. Further, we will be guided by the contract cost principles set forth in 27 DCMR Chapter 33. Thus, in order to be recoverable, a protestor's bid or proposal preparation costs must be both reasonable and allocable. See Coflexip & Services, Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

Therefore, we will require that protestors: (1) submit the names of its employees who worked on the bid or proposal, (2) identify and describe the tasks performed, (3) submit documentation supporting the hourly rates and number of hours worked, and (4) document overhead and fringe benefits. In so doing, we also require an affidavit or verified statement from one or more of the protestor's principals, which contains the explanations of costs incurred. This is so because an attorney's statements are not considered evidence upon which we can base a decision. We do not mean to indicate that we require precise mathematical certainty in order to award bid or proposal preparation costs. However, we will not base awards on unsubstantiated claims by the protestor which engage the Board in mere speculation.

[3/](...continued)
will be made where the protestor presented no documentation to support its claim that the government's violation of procurement law caused wasted effort. HSQ Technology, Inc., GSBCA No. 10054-C (9985-P), 84-3 BCA ¶ 22,047.

Tito's submissions to date do not come close to meeting this enunciated standard. However, because Tito has purportedly relied on the erroneous standard of Pinnacle II and mistakenly believed that we would not be guided by the decisions of the Comptroller General, we will not deny its request at this juncture. We will allow Tito to resubmit its request in accordance with this decision within 20 days of receipt thereof. We direct that Tito and the District attempt to resolve the claim for costs within the 20-day period. If the parties are unable to agree, then the parties shall notify the Board of what portions of the claim remain unresolved.

So **ORDERED.**

DATE: August 12, 1993

ZOE BUSH
Chief Administrative Judge

CONCUR:

TERRY HART LEE
Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge

CYNTHIA HAWKINS-LEÓN
Administrative Judge