In the United States Court of Federal Claims

No. 04-252C
Filed March 31, 2005
NOT TO BE PUBLISHED

NAPLESYACHT.COM, INC.,	*	
	*	The Tucker Act,
Plaintiff,	*	28 U.S.C. § 1491(b)(2);
	*	Equal Access To Justice Act,
v.	*	28 U.S.C. § 2412;
	*	48 C.F.R. § 31.201-3;
THE UNITED STATES,	*	48 C.F.R. § 31.201-4;
	*	48 C.F.R. § 31.205-18.
Defendant.	*	

Jeffrey Gdanski, Scott Gdanski, and Sam Gdanski, Gdanski & Gdanski, Teaneck, New Jersey, for plaintiff.

Claudia Burke, United States Department of Justice, Washington, D.C., for defendant.
Andre Long, Associate Counsel, Naval Air Warfare Center, Weapons Division.

MEMORANDUM OPINION REGARDING BID PREPARATION, PROPOSAL COSTS, ATTORNEYS FEES, AND OTHER EXPENSES

BRADEN, *Judge*

On April 14, 2004, the court entered a memorandum opinion and final judgment in *Naplesyacht.com, Inc.* v. *United States*, 60 Fed. Cl. 459, 478 (2004), wherein the court allowed plaintiff to move for bid preparation and proposal costs, pursuant to 28 U.S.C. § 1491(b)(2), and for other costs, pursuant to 28 U.S.C. § 1920, as well as attorney's fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(b).

On July 8, 2004, plaintiff filed an Application for Bid and Proposal Costs, and Fees, and Other Expenses Under the Equal Access to Justice Act, together with four exhibits ("Pl. App."). On July 9, 2004, plaintiff filed a motion to include additional documentation to support the Application ("Pl. Supp."). On August 9, 2004, defendant ("Government") filed a Response ("Gov't Response"). On November 1, 2004, plaintiff filed a Reply ("Pl. Reply").

DISCUSSION

A. Resolution Of Plaintiff's Application For Bid Preparation And Proposal Costs.

Although the court declined to grant injunctive relief, plaintiff has met the burden to recover bid preparation and proposal costs, because the court held that the Navy abused its discretion in evaluating bids and awarding Contract No. N68936-03-R-0097. *See Naplesyacht.com, Inc.* v. *United States*, 60 Fed. Cl. 459, 462-77 (2004); *see also* 28 U.S.C. § 1491(b)(2) ("To afford relief in such an action, the court may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."); *E.W. Bliss Co.* v. *United States*, 77 F.3d 445, 447 (Fed. Cir. 1996) (quoting *CACI, Inc.-Fed.* v. *United States*, 719 F.2d 1567, 1573 (Fed. Cir. 1983)) ("The theory on which an unsuccessful bidder is awarded its bid preparation costs is that the government violated its 'implied contract to have the involved bids fairly and honestly considered.'").

Part 31.205 of the Federal Acquisition Regulation ("FAR") defines bid and proposal (B&P) costs as those:

> incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government and non-Government contracts. The Term does not include the costs of effort sponsored by grant or cooperation agreement, or required in the performance of a contract.

48 C.F.R. § 31.205-18(a). The FAR also states that costs for "B&P are allowable as indirect expenses on contracts to the extent that those costs are allocable and reasonable." 48 C.F.R. § 31.205-18(c); *see also Coflexip & Services, Inc.* v. *United States*, 961 F.2d 951, 952 (Fed. Cir. 1992) (holding that "proposal preparation costs that are reasonable and allocable may be recovered by the contractor."). A cost is allocable to a federal government contract if it is "incurred specifically for the contract[.]" 48 C.F.R. § 31.201-4. 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 conduct of competitive business. . . . No presumption of reasonableness shall be attached to the incurrence of costs by a contractor." 48 C.F.R. § 31.201-3(a);[1] *see also Lion Raisins, Inc.* v. *United States*, 52 Fed. Cl. 629, 631 (2002) ("Expenses compensable as bid preparation costs are those in the nature of researching specifications, reviewing bid forms, examining cost factors, and preparing draft and actual bids."). The FAR also sets forth factors to determine reasonableness. *See* 48 C.F.R. § 31.201-3 ("(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance; (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations; (3) The contractor's

[1] "If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." 48 C.F.R. § 31.201-3(a).

responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and (4) Any significant deviations from the contractor's established practices."); *see also Coflexip & Services, Inc.,*961 F.2d at 954 (requiring the court to determine whether a cost is reasonable, as defined by the FAR).

1. Plaintiff's Application For Bid Preparation And Proposal Costs.

Plaintiff's Application seeks $6,091.00 for bid preparation and proposal costs. *See* Pl. App. at 9. Plaintiff's Sworn Declaration of Charles O. Wainright III, President, Napelsyacht.com, Inc., ("Wainwright Decl."), provides the following itemization of the total amount claimed for bid preparation and proposal costs. *See* Pl. App. Exhibit 4.

DESCRIPTION	AMOUNT
Sources Sought response Dec 02 - Research and compiling and processing response - 4 hours ($55 per hour)	$220.00
FedEx overnight charges	$13.50
February site visit airline ticket one-way Nassau - Fort Myers FL	$156.00
Coordination of February factory site visit via phone calls and email correspondence with SPAWARS Norfolk and Navy Point Mugu - 3 hours ($55 per hour)	$165.00
Coordination of April 03 site visit via phone calls and email with SPAWARS and Point Mugu - 2 hours ($55 per hour)	$110.00
Response, research and examination of cost factors to Navy requests for pricing info and availability and "ball park" estimated costs of "50' footer (minus amenities)" via phone calls and e-mail – June - July 03 – 10 hours ($55 per hour)	$550.00
Research, compilation and composition of working draft version of proposal including vessel design specifications and systems required by FACT RFP – Sept 25 - Oct 28 03 – 60 hours ($55 per hour)	$3,300.00
Research and qualification of vendors systems and propulsion options for FACT proposal by vendor demonstration and sea trials at Ft. Lauderdale boat show 18 hours ($55 per hour)	$990.00
Hotels, Parking, show Admission and Transportation to and from Ft. Lauderdale boat show (expenses are discounted based on minimum government per diem guidelines for Ft. Lauderdale area and seasonal rates 3 days ($250.00 per day))	$750.00
Research, compilation and composition of final version of all four volumes of Proposal including providing and contacting previous customers to complete Past Performance Questionnaire, proof reading for compliance to RFP and subsequent printing, collating and organizing of four copies of all four volumes of Proposal Nov 1 - Nov 12 – 35 hours ($55 per hour)	$165.00
FedEx overnight charges for Proposal in 2 boxes	$48.00
Final Proposal Revision response, research, compilation and processing Dec. 03 – 2 hours ($55 per hour)	$110.00

DESCRIPTION	AMOUNT
FedEx overnight charges Final Revision	$13.50
TOTAL	$6,091.00

2. Plaintiff's Bid And Proposal Costs Are Allocable.

a. Costs Incurred Prior To Issuance Of The October 8, 2003 Solicitation.

The Government argues that the costs plaintiff claims incurred prior to the date of the October 8, 2003 Solicitation are not recoverable. *See Lions Raisins*, 52 Fed. Cl. at 631 ("Costs incurred in anticipation of or to qualify for a contract award are not recoverable bid preparation expenses."). *Lions Raisins*, however, concerned a bidder's attempt to recover costs incurred in connection with an SBA size protest as bid and proposal costs, rather than as costs to qualify for the contract. *Id.*; *see also Coflexip & Services, Inc.*, 961 F.2d at 953 ("[In a negotiated procurement] costs which do not support an initial or revised proposal are costs which a contractor incurs in an effort to better position itself to perform any contract it should be awarded. These latter costs, incurred *in anticipation of* contract award, are not proposal preparation costs."). Although costs must support an initial or revised proposal, there is no requirement that a solicitation be issued before costs may be recovered as bid and proposal costs. *Id.* (rejecting the argument that costs have to be expressly required by the solicitation to be recoverable as bid and proposal costs); *see also Sodexho Management, Inc.*, 2003 WL 21910567 (Comp. Gen. 2003) (citing *Tri Tools, Inc. – Entitlement to Costs*, 1997 WL 561351 (Comp. Gen. 1997)) ("We have never adopted a 'bright line' test which necessarily renders all costs incurred prior to the issuance of a solicitation unrecoverable. Rather, we look to see whether, under the circumstances of an individual procurement, the claimed costs were incurred in anticipation of competing for the specific contract at issue.").[2] Further, the FAR specifically defines bid and proposal costs as including those "incurred in preparing, submitting, and supporting bids and proposals, (*whether or not solicited*)[.]" 48 C.F.R. § 31.205-18(a). Therefore, the costs should not be disallowed solely because they are incurred before a solicitation is issued.

The Government also argues that the costs incurred prior to issuance of the Solicitation "appear to be related to procurements conducted by the GSA under its supply schedule" and are unrelated to the FACT boat Solicitation. *See* Gov't Response at 31. The Wainwright Declaration, together with correspondence submitted in support of the Application, however, sufficiently detail that plaintiff's pre-solicitation charges are related to the FACT boat Solicitation. *See* Pl. App. Exhibit 4. As the Wainwright Declaration states, plaintiff began preparation of Naplesyacht.com, Inc.'s FACT boat proposal in December 2002 when it responded to a request for sources from the Navy. *See* Wainwright Decl. at 4. In addition, other correspondence establishes that the Navy conducted

[2] Comptroller General decisions, while non-binding authority on the court, "may nevertheless be considered because of the Comptroller General's experience in dealing with bid protests." *Planning Research Corp.* v. *United States*, 971 F.2d 736, 740 (Fed. Cir. 1992).

pre-solicitation activities, including site visits to plaintiff's facilities in Florida, in connection with the FACT boat Solicitation. *See* Pl. Supp. (Nov. 5, 2002 e-mail describing sources sought for a "self-propelled vessel for use in threat/target simulations in support of the Naval Air Warfare Center Weapons Division Synopsis."); *see also id*. (Dec. 9, 2002 e-mail from Mr. Jeffrey Blume, Head of the Seaborne Targets Team, NAVAIR Weapons Division concerning the address to deliver the response to the request for sources). Mr. Blume played an integral role in the Government's FACT boat post-solicitation activities. Much of the other e-mail correspondence lists Mr. Blume as a recipient, including e-mails concerning the February 2003 and April 2003 site visits to plaintiff's facilities in Florida. Although one e-mail mentions a GSA price list, the Government's representative responded that a GSA schedule probably was not required. Further, the e-mail correspondence describes the Navy's need for a 50' foot length and other requirements that later were included in the FACT boat Solicitation.

During the period December 2002 until October 8, 2003, plaintiff claims nineteen hours of pre-solicitation work as bid and proposal costs in connection with the FACT boat Solicitation. The court has determined that these bid and proposal costs are allocable.

In addition, plaintiff claims $169.50 of pre-solicitation expenses for the same period. A $13.50 FedEx charge is allocable, as related to submission of plaintiff's response to the Navy's November 2002 request for sources, and corroborated by a December 7, 2002 e-mail to Mr. Blume containing FedEx tracking information. The court does not, however, find that a $156.00 airplane one-way ticket from Nassau, Bahamas, to Fort Myers, Florida, is allocable. Although the Wainwright Declaration states that he had to purchase the ticket specifically for a February 27, 2003 Navy site visit because another flight was unavailable, other correspondence reveals that Mr. Wainwright suggested the February 27 meeting date: "We will be back from the . . . Bahamas on . . . February 27 and could meet with your group as early as that afternoon or anytime after that including that weekend or any other weekend[.]" This correspondence suggests that Mr. Wainwright was planning to return on February 27, 2003 regardless of the meeting, and thus, this $156 expense was not incurred specifically for the contract.

b. Costs Incurred After Issuance Of The October 8, 2003 Solicitation.

Plaintiff claims 83 hours of time incurred from the October 8, 2003 date of Solicitation through December 2003, when the final revision was submitted. The Government argues that plaintiff should not be compensated for costs associated with developing the technical aspects of plaintiff's proposal, since plaintiff is not a manufacturer and cannot recover costs associated "with preparing its teammates bids." *See* Gov't Response at 32 (citing *Gentex Corp.* v. *United States*, 61 Fed. Cl. 49, 52 (2004) (holding that plaintiff may not recover bid and proposal costs on behalf of its teammates, because plaintiff had no obligation to pay its teammates those costs and plaintiff had not itself incurred their costs)). The Government also argues that, since much of the information in plaintiff's proposal relates to preexisting materials owned and developed by Nor-Tech and since Nor-Tech is not a party to this suit, plaintiff cannot claim Nor-Tech's costs as its own. *See* Gov't Response at 32.

Unlike the solicitation and proposals in *Gentex Corp.* that involved a teaming agreement, plaintiff in this case was not a party to a teaming agreement with Nor-Tech or any other entity. Plaintiff is an authorized dealer of Nor-Tech products. *See Naplesyacht.com, Inc.*, 60 Fed. Cl. at 465. Plaintiff is not asking to recover costs for some other entity or for work performed by some other entity. *See Gentex Corp.*, 61 Fed. Cl. at 52; *see also Sodexho Management, Inc. – Costs*, 2003 WL 21910567 (Comp. Gen. 2003) (denying protester recovery of proposal preparation costs incurred by teammates and noting that "interested party [under CICA definition] is the protester, not its potential subcontractor, even if it participates in preparing the protester's proposal."). Instead, plaintiff is requesting reimbursement for the time that Naplesyacht.com, Inc.'s President took to prepare plaintiff's FACT boat proposal.

Specifically in October 2003, plaintiff spent 60 hours that are allocable, because that time was used to research and prepare Naplesyacht.com, Inc.'s FACT boat proposal. The Government disputes 18 hours of the time claimed in order to attend the Fort Lauderdale boat show since it "do[es] not appear necessarily related to this solicitation," because Naplesyacht.com, Inc. is a manufacturing sale representative that likely would have attended the show regardless of the FACT boat Solicitation. *See* Gov't Response at 32. The Wainwright Declaration, however, sufficiently details that the 18 hours at issue is allocable, because that time was used to meet with vendors of various components that were considered for use in Naplesyacht.com, Inc.'s FACT boat proposal and conduct necessary demonstrations. As plaintiff explained, meeting with these vendors maximized the use of time and minimized expenses since they were all assembled in one location.

Plaintiff also claims 35 hours of time for research, compilation and composition of the final FACT boat proposal. The court believes that the use of 35 hours instead of three hours was a mistake since the total claimed for this line item is $165.00, reflecting a total of only three hours. Since the total of all bid and proposal costs claimed by plaintiff and plaintiff's counsel is $6,091.00 and supports the three hour number, the court assumes plaintiff's request for reimbursement is for three hours, which the court has determined are allocable. In addition, two hours claimed in December 2003 to prepare the final revision response also are allocable.

In sum, the court has determined that the 83 hours after the Solicitation was issued are allocable as bid and proposal costs for the FACT boat proposal, since those hours were incurred specifically to compete for Contract No. N68936-03-R-0097.

In addition, plaintiff has claimed $811.50 of post solicitation expenses. The $48 FedEx charge to ship Naplesyacht.com, Inc.'s proposal and the $13.50 FedEx charge to ship the revised proposal are allocable, and the Government has not contested the allocability of such expenses. With respect to $750.00 of expenses incurred to attend the Fort Lauderdale boat show, the Government argues that these expenses are not allocable since plaintiff as a manufacturing sales representative would have attended the boat show in the absence of the FACT boat Solicitation. *See* Gov't Response at 31-32. The court has determined, however, that such expenses are allocable, since the Wainwright Declaration demonstrates that the time plaintiff spent at that event was to evaluate systems vendors for possible use in plaintiff's FACT boat proposal.

3. Plaintiff's Bid And Proposal Costs Are Reasonable.

The Wainwright Declaration states that "Naplesyacht spent more time researching, compiling and responding to Navy in response to the FACT RFP Proposal than any other similar vessel requests [sic] by any US government agency. . . . I personally researched every detail of each and every solicitation and request made by representatives of Navy to ensure absolute adherence to all requirements and specifications." *See* Pl. App. Exhibit 4 at 1. The Wainwright Declaration also states that "Naplesyacht spent significant effort researching all available options and possible engine manufactures [sic] to satisfy RFP specifications." *Id.* at 5. The Government argues that, if costs are awarded, the amount should be reduced because "[r]esearching all possible options and every detail to a greater extent than for any other solicitation is unnecessary and asking the Government to pay for unnecessary work is unreasonable."

As the court previously determined, the Navy warned all offerors that "[t]he failure of an offeror's proposal to meet *any given* requirement of the solicitation may result in the entire proposal being found to be unacceptable and thus eliminated from the competition. . . . [technical a]cceptability will be evaluated on a pass or fail basis. Proposals, in order to be determined acceptable, *must* demonstrate that they meet the governments' [sic] minimum requirements set forth in the solicitation, including the specifications[.]" *Naplesyacht.com, Inc.*, 60 Fed. Cl. at 464 (emphasis in original) (citing Administrative Record at 61). The Navy emphasized that: "*Taking any exceptions to the Solicitation*, including the Specification, may cause an offeror to be evaluated as unacceptable." *Id*. Given this warning regarding the importance of submitting a thorough technical proposal, the court does not find that plaintiff's efforts to comply to be unreasonable.

Plaintiff claims that 102 hours were spent over a one year period in connection with preparation for Naplesyacht.com, Inc.'s FACT boat proposal. The Government has not challenged the $55 per hour rate or that the normal local service rate for comparable services is $75-$125 per labor hour, as represented in the Wainwright Declaration. Given the technical nature of the Navy's requirements and the fact that plaintiff submitted a primary and alternate proposal, the court has determined that the preparation time claimed is reasonable and not excessive. The Wainwright Declaration details the type and amount of work performed and how hourly rates were calculated. *See Impresa Construzioni Geom. Domenico Garufi* v. *United States*, 61 Fed. Cl. 175, 183 (2004) (quoting Data *Based Decisions, Inc.*, 1989 WL 237551 (Comp. Gen. 1989)) (determining that "a document reconstructing the hours spent by a protester's president in pursuing the protest, claimed time that was corroborated by attorney billing statements, was 'sufficiently precise to determine the reasonableness of the hours claimed.'"). In light of the fact that the normal local service rate for comparable services is $75-$125 per labor hour, the court finds a $55 per hour rate reasonable.

The Government has not challenged the reasonableness of the FedEx charges claimed by plaintiff. Two of the shipments claimed were $13.50 each, which the court finds reasonable. The court also finds the $48 FedEx expense to ship plaintiff's FACT boat proposal to be reasonable, in light of the fact that plaintiff submitted two proposals constituting four volumes of material. The Government, however, has challenged $750 of expenses incurred at the Fort Lauderdale boat show,

because plaintiff did not submit adequate documentation and instead used a per diem rate. Since plaintiff failed to submit the requisite documentation, plaintiff did not meet the burden to prove the reasonableness of such charges. Accordingly, the court denies plaintiff's claim of $750 expenses incurred at the Fort Lauderdale boat show.

In sum, the court has determined that plaintiff adequately has shown that the 102 hours of Mr. Wainwright's time are allocable and reasonable to the FACT boat proposal. The court also has determined that plaintiff's $55 per hour rate is allocable and reasonable. In addition, the court has determined that $75.00 of plaintiff's expenses are allocable and reasonable to the FACT boat proposal. Therefore, the court has determined that plaintiff is entitled to $5,610.00 for time and $75.00 for expenses, for a total of $5,685.00, as bid and proposal costs in connection with preparation of the FACT boat proposal.

B. Resolution Of Plaintiff's Application For Fees And Other Expenses Under the Equal Access To Justice Act.

1. Requirements Of The Equal Access To Justice Act.

The Equal Access to Justice Act ("EAJA") authorizes an award to

> a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). In this case, the court has determined that plaintiff has satisfied each of these requirements.

a. Plaintiff Is A "Prevailing Party."

Under the EAJA, "party" is defined as a corporation whose net worth does not exceed $7,000,000 and does not have more than 500 employees at the time the civil action is filed. *See* 28 U.S.C. § 2412(d)(2)(B). Naplesyacht.com, Inc. had a combined total net worth of less than $1 million and two employees. *See* Exhibit 2 at ¶¶ 2, 3.

In *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dept. Of Health and Human Res.*, 532 U.S. 598, 610 (2001), the United States Supreme Court rejected the catalyst theory as a permissible basis for award of attorney's fees as a prevailing party under the Fair Housing and

Amendments Act and the American with Disabilities Act. *Id.* at 601.[3] Accordingly, only an enforceable judgment on the merits, where "plaintiff receive[d] at least some relief on the merits of his claim" or a court-ordered consent decree can establish prevailing party status. *Id.* at 603-04; *see Farrar* v. *Hobby*, 506 U.S. 103, 113 (1992) ("Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. . . . A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay. . . . [T]he prevailing party inquiry does not turn on the magnitude of the relief obtained."); *see also Texas State Teachers Assn.* v. *Garland Independent School District*, 489 U.S. 782 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties. . . . [T]he degree of the plaintiff's success [does not affect] eligibility for a fee award."); *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) (requiring the plaintiff to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff.").

The United States Court of Appeals for the Federal Circuit has held that *Buckhannon* applies to the EAJA. *See Brickwood Contractors, Inc.* v. *United States*, 288 F.3d 1371, 1376 (Fed. Cir. 2002) (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983)) (holding that the standards to interpret "prevailing party" for a fee-shifting statute "'are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"); *see also Vaughn* v. *Principi*, 336 F.3d 1351, 1360 (Fed. Cir. 2003) ("[A] party must receive 'at least some relief on the merits of his claim.' That relief must rise to the level of 'enforceable judgments on the merits and court ordered consent decrees [creating a] material alteration of the legal relationship of the parties.'"); *Former Employees of Motorola Ceramic Prods.* v. *United States*, 336 F.3d 1360, 1364 (Fed. Cir. 2003) (citations omitted) (holding that "to be a prevailing party, one must 'receive at least some relief on the merits,' . . . which 'alters . . . the legal relationship of the parties.'").

The Government argues that plaintiff is not a prevailing party, because the court issued a "judicial pronouncement . . . unaccompanied by 'judicial relief'" in *Naplesyacht.com, Inc.* v. *United States*, 60 Fed. Cl. 459 (2004). *See* Gov't Response at 7; *see also Buchhannon*, 532 U.S. at 606 (holding that attorney's fees may not be awarded when plaintiff "acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by 'judicial relief'"). The Government argues that plaintiff requested relief that would cause the Navy to cancel the contract and award a contract to plaintiff. In addition, since an injunction was at the heart of plaintiff's claim and such relief was denied, the plaintiff did not obtain the relief requested. *See* Gov't Response at 8-9. The Government also asserts that the court's directive that the Navy must notify all offerors in a timely manner of any future solicitations for a FACT boat; American Marine and Maximum Thunder are to receive no preference or advantage in any future solicitations; and any bid protests based on future FACT boat Solicitations should be filed pursuant to RCFC 40.2, were all "judicial pronouncements" that afforded plaintiff no relief. *See* Gov't Response at 9-12. To the extent that

[3] The catalyst theory is one that "achieve[s] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 601.

plaintiff argues that it is a prevailing party on the basis of the court's directive to the Navy for future FACT boat Solicitations, the plaintiff is not a prevailing party, because the United States Court of Appeals for the Federal Circuit has rejected "the catalyst theory." *See Brickwood Contractors, Inc.*, 288 F.3d at 1376.

Although the court declined to issue an injunction, the court determined that "the Navy abused its discretion in rating the awardees for [the] contracts acceptable, on a technical basis and in other respects[.]" *Naplesyacht.com, Inc.*, 60 Fed. Cl. at 462. The relief the court ordered was designed to prevent abuse on future contracts for which plaintiff may compete. The court considers this relief makes plaintiff a prevailing party. In addition, the court herein has awarded plaintiff monetary relief in the form of bid preparation and proposal costs. *Id.* at 478. The award of bid and proposal costs will result in an enforceable judgment against the Government and will alter the legal relationship between the parties. *See Neal & Company, Inc.* v. *United States*, 121 F.3d 683, 685 (Fed. Cir. 1997) ("[A] party which prevails only in part may nonetheless qualify for an award of costs under EAJA."); *see also Eastern Marine, Inc.* v. *United States*, 10 Cl. Ct. 184, 186 (1986) (holding that plaintiff was a "prevailing party" since plaintiff "was successful in obtaining at least one significant form of requested relief, *i.e.*, its bid preparation costs."). Therefore, plaintiff is a prevailing party within the meaning of the EAJA, because plaintiff was a prevailing party and received bid preparation and proposal costs as monetary relief directly related to the merits of plaintiff's bid protest.

b. The Position Of The Government Was Not "Substantially Justified" In This Case.

The EAJA allows a prevailing party to recover attorney's fees, "unless the position of the [G]overnment was substantially justified." *Bowey* v. *West*, 218 F.3d 1373, 1374 (Fed. Cir. 2000) (quoting 28 U.S.C. § 2412(d)). Prevailing party status, however, does not automatically render the Government's position not substantially justified. *See Scarborough* v. *Principi*, 124 S. Ct. 1856, 1865 (2004) (holding that "Congress did not want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case[.]"); *see also Smith* v. *Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003) ("In conducting a 'totality of the circumstances' inquiry, a fact-finder will naturally and properly focus on those circumstances that are 'relevant,' and in particular on any circumstances that may be 'determinative.'"); *Massie* v. *United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) ("As a waiver of sovereign immunity, the EAJA is interpreted narrowly. But this is not a talisman for permitting the [G]overnment to avoid liability in all cases."); *Doty* v. *United States*, 71 F.3d 384, 386 (Fed. Cir. 1995) ("The term 'position of the United States' refers to the government's position throughout the dispute, including not only its litigating position but also the agency's administrative position."); *Chiu* v. *United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) ("[T]rial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position has a reasonable basis in both law and fact."). The burden is on the Government to demonstrate that its position was substantially justified. *See Scarborough*, 124 S. Ct. at 1865 ("The burden of establishing 'that the position of the United States was substantially justified,' . . . must

be shouldered by the Government."); *see also RAMCOR Servs. Group* v. *United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999) (holding that, although the EAJA is not a mandatory fee-shifting device, the burden is on the Government to prove that the litigation and agency position was reasonable in law and fact).

In this case, the court determined that the Navy abused its discretion when it rated American Marine and Maximum Thunder as "acceptable" on a technical basis, rated Maximum Thunder as a "very low risk" in the category of Past Performance, and determined that Maximum Thunder was a "responsible party." *Naplesyacht.com, Inc.*, 60 Fed. Cl. at 470-76. In addition, the court determined that the Navy abused its discretion in awarding FACT boat contracts to American Marine and Maximum Thunder. *Id*. at 470.

The Government argues that the Navy's technical rating of American Marine was substantially justified, because American Marine's approach of extending a 45 foot hull with a 5 foot transom platform was acceptable to the technical evaluator. The Government also argues that the Navy's technical rating of Maximum Thunder was substantially justified because the determination of acceptability was discretionary. The Government, however, has not demonstrated that the Navy was substantially justified in deviating from the Solicitation's advertised specific size criteria for the FACT boat, particularly in light of the warning given to the offerors that strict adherence to the requirements in the Solicitation was mandatory and any deviations may result in a technical proposal being rated "unacceptable." *See Naplesyacht.com, Inc.*, 60 Fed. Cl. at 464. The Government also has not demonstrated that the Navy was substantially justified in not informing other offerors that the Navy had abandoned and/or waived the Solicitation's specific size criteria, despite communicating that strict adherence to the requirements in the Solicitation was mandatory. *Id*. Although the Government argues that because Maximum Thunder was able to provide a 50 foot boat for 40 percent less than Naplesyacht.com, Inc., this fact alone does not indicate that Naplesyacht.com, Inc.'s price would not have been substantially affected by prior knowledge of the Navy's relaxed criteria. Nor does it substantially justify the Navy's decision not to inform all offerors that it would accept relaxed criteria. The Navy does not know what price Naplesyacht.com, Inc. or other offerors would have bid for a technical proposal based on relaxed criteria since the Navy deprived Naplesyacht.com, Inc. and other offerors of the opportunity to submit such proposals. Further, the Contracting Officer for the Naval Air Warfare Center Weapons Division responsible for these contracts was not substantially justified in determining that he had "unlimited procurement authority." *See Naplesyacht*, 60 Fed. Cl. at 462 (quoting March 25, 2004 Declaration of Nathan Simpson).

The Government also argues that the Navy's risk evaluation of Maximum Thunder was substantially justified and that the Declaration of Nathan Simpson verified that the Navy had adequately investigated Maximum Thunder's ability to perform. *See* Gov't Response at 18. The court invited the Government to proffer documents or affidavits to establish that the contracting officer conducted financial and other relevant due diligence as to whether Maximum Thunder was a "responsible party." *Naplesyacht.com, Inc.*, 60 Fed. Cl. at 474-76. The Government declined to make that proffer. *Id*. at 475-76. Therefore, the Government's failure to submit evidence that

Maximum Thunder was a "responsible party" is highly relevant to the issue of whether the Government's position was substantially justified.

c. There Are No Special Circumstances In This Case Making The Award Unjust.

The court may not make an award if there are special circumstances making the award unjust. *See* 28 U.S.C. § 2412(d)(1)(A). The Government has not argued and the court has not identified any "special circumstances" that would make an award unjust in this case.

d. Calculation Of Applicable Bid And Proposal Costs And Fees And Other Expenses.

Section 2412(d)(1)(B) of the EAJA directs the parties to submit an itemized statement from any attorney or expert witness representing or appearing on behalf of the prevailing party to show the actual time expended and the rate at which the fees and other expenses were computed. *See* 28 U.S.C. § 2412(d)(1)(B). Plaintiff has submitted itemized statements. The Government argues that plaintiff's fees should be reduced to account for block billing. *See* Gov't Response at 18-19. The Government, however, has not explained what particular billing items should be deleted or are inappropriate and merely asks for a blanket 30 percent reduction of all of plaintiff's time. The court has reviewed plaintiff's billing statements and finds such statement sufficiently detailed. Without specific objections from the Government, the court finds no justification for a 30 percent reduction.

The Government also argues that plaintiff should not be reimbursed for fees incurred in connection with other unrelated proceedings and requests a deduction of $435 in connection with time charged for the GAO protest. The court finds that this time is unrelated to the bid protest and one hour of each counsel's time will be deducted from plaintiff's EAJA request.

In addition, the Government argues that plaintiff should not be reimbursed for costs associated with briefing Nor-Tech and requests a deduction for 24 hours of counsel's time, since Nor-Tech was not a party to the protest. *See* Gov't Response at 22-23. Plaintiff's counsel responds that the meeting was held primarily with their client, an authorized representative of Nor-Tech, at Nor-Tech's facilities to view the boat, mold and hull, the subject of plaintiff's FACT boat proposal and was the only face-to-face meeting with their client. *See* Pl. Reply at 13. Plaintiff has established that the 24 hours of time incurred for two of plaintiff's lawyers to travel from New York to Florida to attend this client meeting are reimbursable.

Attorney's fees may not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor justifies a higher fee. *See* 28 U.S.C. § 2412(d)(2)(A)(ii); *see also Oliveira* v. *United States*, 827 F.2d 735, 742 (Fed. Cir. 1987) (noting that trial court has discretion to increase statutory hourly rate). The itemized statement submitted by plaintiff's attorneys shows their fees to be calculated at $145 per hour. *See* Exhibit 3. Plaintiff's attorneys, however, failed to specify how to measure the cost of living increase other than citing a

GAO case applying a 20 percent increase which would allow for a higher per hour rate. *See* Pl. Mot. at 8; *see also Oliveira*, 827 F.2d at 742-43 (holding that a significant factor to consider for an increase in the statutory hourly rate is the length of time the prevailing party has been litigating the case and that a minimal delay may properly be ignored). Under these circumstances, the court has no basis for allowing plaintiff a higher rate than that provided in 28 U.S.C. § 2412(d)(2)(A)(ii).

The Government also further argues that plaintiff has not demonstrated entitlement to expert fees since an itemized statement was not included for the expert witness. *See* Gov't Response at 19-20. In plaintiff's Reply, plaintiff included an itemized statement for expert fees that details the time spent by the expert and a description of the services rendered. The court finds this statement sufficiently detailed to allow reimbursement in the amount of $1,340.25 for plaintiff's expert fees and expenses.

Finally, the Government argues that travel expenses incurred by a party should be disallowed and requests a deduction of $1,160 in plaintiff's counsel's time and a deduction of $900 in travel expenses from any award. The Government cites cases that disallow travel expenses for a party, not the party's counsel. *See Oliveira*, 827 F.2d at 744 ("We interpret 28 U.S.C. § 2412 to mean that the trial court, in its discretion, may award only those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried. The quantum and method of proof of each allowable expense is discretionary with the trial court."). The court finds that plaintiff's counsel's travel expenses in the amount of $900 are recoverable expenses under the EAJA, as those expenses customarily would be charged to a client. The court also finds that a reduction in plaintiff's time for travel time to attend the only face-to-face meeting with the client and to attend the hearing in this matter is not warranted.

With respect to plaintiff's counsel's other expenses in the amount of $400 for legal research, postage, photocopies, mail and fax, the Government has contested these expenses on the basis of insufficient proof to determine if the costs are appropriate. Therefore, the court finds that the plaintiff is not entitled to reimbursement for these expenses.

Therefore, the court awards plaintiff the following on its Application under the EAJA:

Attorney's Fees:		$ 39,062.50
112.5 hours x $125/hr.	= $14,062.50 (J. Gdanski)	
136.0 hours x $125/hr.	= $17,000.00 (S. Gdanski)	
64.0 hours x $125/hr.	= $ 8,000.00 (S. Gdanski)	
Other Fees (Expert Witness, Travel Expenses)		$ 2,240.25
TOTAL:		$ 41,302.75

CONCLUSION

The court grants plaintiff's motion to include additional documentation to support the July 8, 2004 Application. For the aforegoing reasons, the court awards plaintiff the following for bid and proposal costs and fees and expenses under the EAJA:

1.	Bid and Proposal Costs:	$	5,685.00
2.	Attorney's Fees:	$	39,062.50
3.	Other Expenses:	$	2,240.25
TOTAL:		$	46,987.75

The Clerk of the Court is directed to enter judgment in favor of Plaintiff consistent with this opinion in the amount of $5,685.00 for bid and proposal costs and $41, 302.75 for reimbursable fees and expenses under the EAJA.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge