STATE OF NEW YORK COURT OF CLAIMS

PHELPS DODGE REFINING CORPORATION,

Claimant,

DECISION AND ORDER

-V-

THE STATE OF NEW YORK,

Claim Nos. 121533
124695
Motion No. M-93425

Defendant.

F! LED

MAY 29 2019

STATE COURT 0 CLANS
ALBANY,Y

BEFORE: HON. DAVID A. WEINSTEIN
Judge of the Court of Claims

APPEARANCES: For Claimant:
The Hawkins Law Firm, PLLC
By: David E. Hawkins, Esq.

Kramer Levin Naftalis & Frankel, LLP
By: James Grelisheimer, Esq.

For Defendant:
Letitia James, New York State Attorney General
By: Alison Rowland, Assistant Attorney General

This case is before me on a motion by claimant Phelps Dodge Refining Corporation ("PDRC" or "Phelps Dodge"), pursuant to Eminent Domain Procedure Law ("EDPL") § 701, to recover attorney and expert fees, as well as disbursements expended in the prosecution and trial of this appropriation action. In its consolidated verified claim ("Claim"), PDRC sought damages in the amount of $40,000,000, consisting of $10,000,000 in direct damages and $30,000,000 in consequential damages (PDRC Reply Documentary Supplement ["RDS"] Ex H). The Claim alleged that three properties(denoted parcels 1A, 1C and 2) were affected by the defendant State

of New York's taking of easements in connection with the construction of a new Kosciuszko Bridge ("K-Bridge") in Queens, New York *(id.).*

Prior to the commencement of the action, the State made a total compensation offer in the amount of $4,123,785, which PDRC accepted as an advance payment in lieu of settlement, and then sued to recover what it alleged was the complete compensation to which it was entitled' (PDRC Documentary Supplement Index ["Index"] Exs A-B). Following motion practice, PDRC's claims concerning parcel 1C were dismissed, on the ground that the parcel was not contiguous with that subject to the takings at issue [2] *(Phelps Dodge v State,* UID No. 2016-049-030 [Ct Cl, Weinstein, J., June 27, 2016]). On the eve of trial, the parties agreed that parcel 1A was appropriately valued at $3,750,000, leaving for trial only the issues of direct and consequential damages for parcel 2, as well as what claimant labeled as "costs to cure" damages' *(id.,* Ex Cat 2).

Following four days of trial, in a decision filed on December 22, 2017, I found that total direct damages for the taking of parcel 2 amounted to $2,700,000 *(id.* at 33). Although PDRC dedicated a significant portion of its litigation and trial efforts to establishing consequential and cost to cure damages, I rejected each of those damages theories *(id.* at 46). As a result, the total amount recovered through the litigation and trial by Phelps Dodge was $6,450,000 before the

---

Under EDPL § 304, a property owner subject to eminent domain has the option of accepting the payment as full compensation, rejecting the offer entirely, or accepting it as an advance payment while preserving the right to sue. Phelps Dodge took the last of these options.

[2] In the same motion, PDRC also sought to obtain compensation for alleged damages to Parcel I C by obtaining leave to file a late claim under Court of Claims Act § I 0(6), and to compel the State to make an additional advance payment. I denied both those motions.

[3] "Costs to cure", according to PDRC, were expenditures it incurred mitigating certain environmental liabilities relating to its prior operation of a copper smelter and refinery on its property that affected all of the property involved in the State's appropriation, which PDRC claims it would not have incurred absent the taking (Index, Ex C at 2, 4). These costs were not limited to parcels 1 A and 2, but included costs related to parcel IC *(id.).*

addition of interest' — which is $2,326,215 more than the $4,123,785 that the State originally offered as compensation for the takings (Index, Exs A-B, D at 3). In the filings now before me, Phelps Dodge indicates that it has withdrawn a notice of appeal it had filed, and the judgment is therefore final.

The present motion for fees and disbursements is supported by the affidavits of (1) David Hawkins, Esq. of Vinson & Elkins LLP ("Vinson") and the Hawkins Law Firm, condemnation counsel to PDRC; (2) Benjamin Lippard, Esq. of Vinson, environmental counsel to PDRC; (3) James Greilsheimer, Esq. of Kramer Levin Naftalis & Frankel LLP ("Kramer Levin"), condemnation counsel to PDRC; (4) E. Gail Suchman, Esq. of Strook & Strook & Lavan ("Strook"), environmental counsel to PDRC; (5) Joseph Brunner, PDRC project manager for property at issue; (6) James Puskas of GHD, Inc., environmental consultant and expert witness for PDRC; and (7) Daniel Sciannameo of Albert Valuation Group New York, Inc., expert witness for PDRC. Based on these affidavits and the accompanying two-volume Index of invoices for professional services rendered, PDRC is seeking a total reimbursement from the State in the amount of $4,503,204.41.

Although PDRC claims that it is entitled to be reimbursed for this entire amount — especially now that it has withdrawn its appeal and the action is final — it recognizes that it did not prevail on each element of its claim (Affidavit of David Hawkins, sworn to on January 8, 2019 ["Hawkins Aft1 ¶ 30). As noted, I rejected the claims for consequential and cost to cure damages for parcel 2 in their entirety, and the claims concerning parcel IC were dismissed through pre-trial motion practice *(id.)*.

---

[4] With pre- and post-judgment interest being awarded, this increased the total award in the March 12, 2018 corrected judgment to $10,158,804.02 for all damages resulting from the appropriation of premises, permanent easements, and temporary easements for claim Nos. 121533 and 124695 (Index, Ex. D at 3).

PDRC represents that it is unable to segregate those fees and costs which were associated with claims for which it did not recover, from those expended in successfully obtaining additional compensation. Because PDRC cannot parse out litigation costs for its unsuccessful efforts to recover damages for parcel 1C, it suggests a flat reduction of $200,000 in professional fees for the time period between August 2015 through February 2016 *(id.* ¶ 31). It also suggests in regard to fees and disbursements incurred for pursuing consequential damages and costs to cure for parcel 2, based on what it characterizes as counsel's best estimation, that the overall litigation expenses may have been 20% less if PDRC had not pursued such damages theories *(id.).* As a result, PDRC recommends that an appropriate, alternative reimbursement to the full amount it requested would be $3,442,563.53, which incorporates its recommended reduction of $200,000 and what it presents as a reasonable 20% discount *(id.).*

In its submission in opposition to claimant's application, the State does not dispute that the final award to PDRC of $6,450,000 is substantially in excess of the State's initial offer of $4,123,785. It nevertheless opposes granting claimant additional allowances under EDPL § 701 on the ground that many of the fees and costs claimant now seeks to recover were not necessarily incurred to achieve just and adequate compensation (Affirmation In Opposition of Alison Rowland, Esq., dated February 12, 2019 ["Rowland A n 111122-23, 25).

Further, the State contends that it is impossible to ascertain whether PDRC's claimed expenditures are supported by the affidavits from the attorneys and professionals involved, since they are insufficiently specific, and claimant failed to submit any retainer agreements with its original motion papers (Memorandum of Law in Opposition to EDPL § 701 Motion, dated February 12, 2019 ["MOL"] at 3_5). Specifically, it notes that PDRC has made no attempt to explain or quantify what portion of the two volumes of submitted invoices relate to tasks that

were undertaken to secure adequate compensation, and thus the State asserts that claimant has failed to meet its burden to establish an entitlement to additional allowances and/or the reasonableness of such claimed allowances, as required under EDPL § 701 *(id.* at 5-6).

Defendant suggests that in the event that claimant is found to be entitled to additional allowances, such allowances should be limited to attorneys' fees and appraiser services *(id,* at 6). It further argues that all fees and expenses associated with the dismissed claims for parcel 1C, as well as fees and expenses for the rejected claims for consequential and costs to cure damages for parcel 2, should be disallowed *(id.* at 7-9). In light of claimant's admission that it cannot separate out its expenditures for direct damages versus consequential and cost to cure damages, the State recommends an across the board reduction in attorneys' fees that correlates with the award that was actually achieved *(id.* at 9). Defendant also contends that the requested legal fees are excessive and unreasonable due to overstaffing and duplication of efforts between the attorneys PDRC retained *from* a Washington, D.C, law firm and those from a separate New York City law firm, further warranting reduction of the monies sought *(id.* at 12-15).

Defendant objects to PDRC's recommended 20% reduction of the overall expenditures as arbitrarily based on the opinion of claimant's counsel, which fails to accurately discount the hours PDRC spent pursuing its primary theories of consequential and cost to cure damages *(id.)*. Instead, it requests, if attorneys' fees are to be granted, that they be calculated as one third of the compensation awarded to claimant in excess of the advance payment, exclusive of interest ($2,326,215). In essence, defendant argues that any fees awarded should mirror a traditional contingency fee arrangement, under which counsel would receive one third of what was gained for the client via litigation, i.e., in this case the additional amount that PDRC obtained over what it would have been paid if it had simply accepted the advance payment as full compensation.

This measure would result in Phelps Dodge receiving attorneys' fees in the amount of $775,405 *(id.* **at 10). Defendant also contends that the appraiser's fee, which totaled $170,427.50, should be reduced to 40% of that amount because the compensation ultimately awarded PDRC ($6,450,000) was 40% of the amount claimant "sought to prove" at trial ($16,133,962)** *(id.* **at 11). Such a reduction in the amount of the appraiser's fee to be recovered by claimant would result in a recovery of $68,171** *(id.* **at 11).**

The State further argues that all fees and expenses for PDRC's environmental consultant James Puskas and environmental attorney Suchman, totaling $295,154.25, should be excluded from any award because they relate to consequential and cost to cure damages, which were rejected as meritless and, therefore, unnecessary for the claimant to obtain appropriate compensation *(id.* **at 11-12). In addition, defendant asserts that attorney travel, working meals, legal research, copying, postage and other incidents of litigation, exclusive of professional fees, are not reimbursable under EDPL § 701** *(id.* **at 16). Finally, defendant expresses the view that claimant's failure to differentiate between disbursements that relate to the actual recovery of damages (those expended to prove direct damages for parcel 2 and to negotiate a recovery for parcel 1A) and those that relate to the rejected theories of consequential and cost to cure damages, prevents the Court from determining which disbursements were a legitimate expense for PDRC to achieve just and adequate compensation** *(id.)*

In reply to the State's opposition, PDRC submitted the underlying retainer agreements it has with the attorneys and other professionals involved in this matter, and averred through its project manager, Joseph Brunner, that all reimbursements sought in its motion were actually incurred in this action (Reply Affidavit of Joseph Brunner, sworn to on March 1, 2019 ("Brunner Reply"]¶113-5; RDS Exs A-F). According to the affidavit of claimant's attorney, the use of

attorneys from three law firms (Kramer Levin, Strook and Vinson) as well as the engagement of an environmental consultant in addition to a valuation expert, was appropriate and avoided duplication of efforts (Reply Affidavit of James Greilsheimer, sworn to on March 4, 2019 ["Greilsheimer Reply"] VII 6- 8).

Counsel also contends that the reduction it has suggested in the reimbursement amount for attorneys' fees —'a $200,000 reduction relating to the 1C recovery and a further 20% discount, reducing the total bill of $4,503,204.41 to $3,442,563.53 — reflects a fair and reasonable estimate of the necessary expenses incurred to obtain $2,326,215 more than the State's initial compensation offer *(id.* ¶ 16). According to counsel, the 20% reduction fully encompasses the expenses incurred for prosecuting the unsuccessful claims for consequential and cost to cure damages, and the $200,000 represents the total attorney billable time spent addressing the parcel 1C claim *(id.).* Counsel further explains that the expenditures for environmental matters were not limited to the unsuccessful claims, but also were needed to provide the Court with the relevant history of the environmental issues affecting the subject property, which assisted the appraiser in assessing direct damages *(id.* II 17-18).

The application of a contingency fee arrangement to the instant matter, in counsel's opinion, would not accurately reimburse PDRC in accordance with EDPL § 701, as such an analysis would not take into account that "[c]ounsel bore neither the risk nor opportunity for reward from significantly higher or lower awards from the Court, and so charged a market rate per hour of time spent on the case to accommodate their lack of opportunity for higher than normal awards" *(id.* ¶ 23). Further, PDRC incurred such legal fees and the fees of its experts based on its belief that the fees were necessary to prosecute the case *(id.* ¶ 28). Alternatively, if a

contingency fee analysis is to be entertained by the Court, counsel believes that it should include the interest that has been paid to PDRC *(see id.* ¶ 31).

As for the appraiser's fee, counsel notes that Seiannarneo's report and testimony would not have changed, even if the claims for consequential or cost to cure damages had been removed from the case *(see id.* ¶ 32). Thus, he maintains, these fees should not be subject to any reduction (Greilsheirner Reply ¶ 32). Counsel further explains that the disbursements for which reimbursements are sought (amounting to $312,621.15 of the total $4,503,204.41 reimbursement request), are not included in the law firms' base fees, as the State erroneously suggests *(id.* ¶ 33).

Discussion

EDPL § 701 provides:

> "In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer *fees* actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred."

This statute "assures that a condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer" *(Hakes v State of New York,* 81 NY2d 392, 397 [1993]; *see also General Crushed Stone Co. v State of New York,* 93 NY2d 23, 27 [1999] [purpose of section 701 is to "provide a means of mitigating the financial damage wrought by the condemnor's low, original offer"]). As is apparent from the statutory

language, an award under section 701 turns on "two determinations: first, whether the award is `substantially in excess of the amount of the condemnor's proof, and second, whether the court deems the award necessary 'for the condemnee to achieve just and adequate compensation' " *(Hakes,* **81 NY2d at 397).**

As noted above, claimant's prosecution of this case resulted ina $3,750,000 settlement and a pre-interest trial award of $2,700,00, for a total recovery of $6,450,000 — which is $2,326,215 more than the $4,123,785 that the State initially offered PDRC. As the State concedes, this difference is "substantially in excess" of its proof under EDPL § 701 [5] *(see Matter of Gelsomino v City of New Rochelle,* **25 AD3d 554, 555 [2d Dept 2006] [plaintiff eligible to recover fees under EDPL § 701 where award was 35.5% higher than condemnor's offer]). Thus, the only issue before me is whether the $4,503,204.41 in expenditures incurred by PDRC were necessary to achieve just and adequate compensation.**

The second element is a matter for this Court's discretion *(see Hakes,* **81 NY2d at 397-398). There is "no automatic right to recover additional costs" under section 701 in an eminent domain action** *(see General crushed Stone Go.,* **93 NY2d at 28). Thus claimant must show something more than the fact that it had to secure counsel and an expert to proceed with its action — as that is true in every appropriation case, and the costs associated with such are "mere incidences of litigation", which are not typically recoverable** *(Hakes,* **81 NY2d at 398 [internal quotation and citation omitted]).**

Furthermore, where counsel fees and other litigation costs are expended to achieve an inflated value' and in advancing valuation theories that are rejected by the trial court, it is

---

[5] **For this reason, I need not decide whether interest must be considered in deciding if an award is "substantially in excess" of the condemnor's proof.**

appropriate for the court to find that such "incidences of litigation" were not necessarily incurred to achieve just and adequate compensation *(see In re Village of Port Chester,* 137 AD3d 802, 803 [2d Dept 2017] [court properly exercised discretion in granting additional allowances with substantial reduction because "a portion of the claimants' efforts and costs were used to develop and present valuation theories to support a claim for compensation substantially in excess of the condemnation award"]; *In re Village of Johnson City,* 277 AD2d 773, 775 [3d Dept 2000] [affirming denial of application for fees and costs under EDPL § 701, where "the ultimate award exceeded petitioner's initial appraisal by less than 20% and . .. a substantial part of claimant's counsel and appraisal fees were expended in an effort to achieve an inflated value and propounding valuation theories that were totally rejected by Supreme Court"]).

Here, the billings presented by claimant include extensive work on matters which did not contribute to the ultimate award, such as preparation of motion practice regarding the dismissed claim for parcel 1C. Moreover, the trial concerned three issues in regard to the taking of parcel 2: (1) direct damages — which the appraiser opined were $2,927,245; (2) consequential damages — alleged to be $3,647,097; and (3) cost to cure damages — alleged to be $1,063,748 (index, Ex C at 17). Aside from the portions of the reports and testimony of claimant's appraiser that related to direct damages (Index, Ex Cat 13-15), most of the evidence and legal arguments advanced by claimant concerned its consequential and cost to cure damages theories, which I found to lack merit (Index, Ex C at 33 -46). I find that expenditures incurred in advancing such dismissed claims during the litigation were not necessary to achieve just and adequate compensation.

While I find that some additional allowance for the attorneys' and appraiser's fee expended by PDRC is justified by its successful efforts to establish greater direct damages than the State was initially willing to concede, calculating such an award is greatly hampered because,

as claimant concedes, "it is not possible to precisely segregate the time spent on parcel I C" and the claims for consequential and cost to cure damages to parcel 2 "cannot be precisely segregated from other portions of PDRC's claim" [6] (Hawkins Affli 31). Although PDRC offers to take a $200,000 reduction, along with a 20% discount — such an estimation of the fees and disbursements actually spent on efforts to prove direct damages is premised solely on counsel's "best guess" *(id.),* and 1 find it to be both arbitrary and overstated, in light of the extensive time spent on efforts that proved unavailing. Indeed, the proof as to whether claimant's proposed fee calculation accurately represents the necessity and value of its counsel's efforts is in the pudding: by Phelps Dodge's own calculation, the attorneys' fees and costs it expended were nearly double its ultimate recovery. Such a disparity cannot reflect a reasonable relationship between expenditure and result. Therefore, the calculation suggested by claimant would not provide for just and adequate compensation of the actual costs incurred by PDRC in seeking direct damages.

This conclusion begs the question of what method of calculation *can* stand as a fair proxy for such costs. I decline to adopt the State's primary argument — that given the defects in claimant's proof, it should receive no costs and fees at all. Instead, I find that the State's alternative recommended measure of attorneys' fees through the use of a traditional contingency fee methodology to be an adequate approximation for calculating the appropriate allowances for claimant's legal fees *(see City of Long Beach v Sun NLF Ltd. Partnership,* 146 AD3d 775, 777 [2d Dept 2017] [contingency fee arrangements are an acceptable measure for determining reasonable counsel fees under EDPL § 701]). Such a calculation ensures that there is a "reasonable relationship between a fee allowance and the amount recovered" *(Meyers v State of*

[6] While this Is clearly true, it is also the case that Phelps Dodge has made no effort in this regard. There are time entries— such as those relating to the dismissal, late claim and additional advance payment motion — which clearly have nothing to do with claimant's ultimate recovery, and yet are included within the fee calculation it has presented.

New York, 166 Misc.2d 586, 588 [Ct Cl 1995] [Rossetti, J.] *citing National Fuel Gas Supply Corp. v Cunningham Natural Gas Corp.,* 191 AD2d 1003, 1004 [4th Dept 1993]; *see also in re City of New York Relative to Acquiring Title in Fee Simple Absolute in Certain Real Property,* 49 Misc 3d 1217[A], *5 [Sup Ct Richmond County 2015] [in case where court rejects some, but not all, valuation theories, difficulty in parsing out appropriate hourly rate fee arrangement favors basing award of attorney fees on a contingency fee arrangement]). Moreover, although this sets out a different mode of compensation than that set forth in the governing retainer agreements, I am not bound by the those agreements in ruling on a section 701 application *(see in re City of New York,* 52 AD3d 387, 388 [1st Dept 2008]).

I see no alternative in a case like that before me, where a significant portion of the work performed bears no relation to the amount recovered, and where counsel has not attempted — and to a large degree cannot — identify the attorney hours and costs attributable to obtaining greater compensation for PDRC. For this reason, I am unpersuaded by Phelps Dodge's argument that a use of the one-third measure is inappropriate in this case, because it reflects a risk/reward calculus that does not apply here. The reasonableness of compensation under section 701 can only be judged in relation to the actual recovery. In a case like this one, where a substantial portion of attorney resources invested by claimant did not result in any benefit, and claimant has not and (by its own admission) cannot determine what portion of its efforts fall within this category, I see no way to establish a "reasonable relationship" between the fee allowance and ultimate recovery *(National Fuel Gas Supply Corp.,* 191 AD2d at 1004), except by setting it as a percentage of the amount recovered.

Therefore, I find that PDRC should receive additional allowances for attorneys' fees in the amount of $775,405, which is one-third of the total additional recovery of $2,326,215' *(see Meyers,* 166 Misc 2d at 590-91 [claimant's unsegregated fees and costs and need for use of "guesstimation" for fee adjustment, supported use of customary one-third contingency rate, along with an even further reduction]).

As to the fee for claimant's appraiser, while I credited most of his calculations in reaching the direct damages figure, it is apparent from the record that a good deal of the appraiser's work was directed at the different — and ultimately unsuccessful — task of proving consequential and cost to cure damages *(see e.g., Phelps Dodge v Slate,* UID No. 2016-049-030 [Ct Cl, Weinstein, J., June 27, 2016] ["Sciannameo also calculated the consequential damages to the remainder of the parcel "1; *id.* ["As to the alleged 'costs to cure,' Sciannameo testified that these expenditures should be counted"]). Under these circumstances, the award of appraisal fees should reflect the limited degree to which the appraiser's efforts were successful. One manner in which this can be accomplished is to determine the percentage of the expert's time and effort that proved relevant to claimant's recovery' *(see Matter of City of New York (China Plaza Co.),* 254 AD2d 2 tO [lst Dept 1998] [when "a significant portion of claimant's efforts and costs were expended to develop

---

[7] To the extent PDRC requests that any reduction of attorneys fees take into consideration the interest on the awarded compensation, although such a calculation would not be improper if a court deemed that it would provide just compensation, I am in agreement with the *Meyers* Court that its inclusion in this case would "inject[] an improper and arguably duplicative element in a just compensation determination" (166 Misc 2d at 589; *see also In re City of New York,* 52 AD3d at 388 [declining to calculate attorney's fees as a percentage of interest on award; although this was•provided for in the retainer agreement it was not necessary to provide reasonable compensation]; *In re City of New York Relative to Acquiring Title in Fee Simple Absolute in Certain Real Properly,* 49 Misc 3d at *3 r[t]he proper test for determining attorneys fees pursuant to EDPL § 701 is what additional allowances for the costs of retaining an attorney is necessary for a claimant to be justly compensated"]). The accumulation of interest in this case was a function of the extensive time it took to litigate this complex matter, and was not tied to the specific efforts made by counsel.

[8] To be clear, this does not affect the compensation received by the appraisal expert, who was already paid. Rather, the limitation is on the amount of compensation claimant will receive from defendant for the cost of any expert services.

and present valuation theories to support a claim for compensation substantially in excess of what the court awarded," there is no reason to disturb a section 701 award that is "substantially less" than what was sought]; *see also Matter of Estate of Hayne v County of Monroe,* 278 AD2d 823, 825 [4th Dept 2000] [where expenses were largely incurred "to develop and present [claimant's] unsuccessful claim for consequential damages," the application to recover them should be denied]).

The appraiser opined on three categories of damages, but only achieved success in his efforts to establish direct damages. The affidavit he submitted in support of PDRC's motion for additional allowances does not in any way explain how much time, effort or expense can be attributed to any specific category of the three damages theories on which he testified. Although a one-third limitation on claimant's recovery of such fees might also seem appropriate in this circumstance, in light of the State's recommendation that the appraiser instead receive a 40% reduction of his firm's fee of $170,427.50, I shall adopt this methodology and award $68,171 in additional allowances' *(see Newton v State,* UID No. 2017-049-105, [Ct Cl, Nov. 2, 2017, Weinstein, *J.] citing Franjo Tramp., supra,* ["[s]ince the expert testimony proffered by the State conceded that claimant has suffered harm from his incarceration, it is appropriate to use that as a floor on damages"], *affd in relevant part, modified and remanded in part on other grounds,* 165 AD3d 421 [1" Dept 2018] ["in light of the concession of the State's economist that claimant would have sustained $250,000 in lost earnings. . . we find the award proper"]).

PDRC seeks further allowances for costs in the amount of $312,621.15 for such things as travel, working meals, legal research, copying, postage, and other incidences of trial exclusive of

[9] I decline, however, to award expenses for Puskas and Suchman, who provided testimony on environmental matters. While some of their testimony provided general factual background, its relation to the damages recovered was marginal at best.

professional fees, Section 701 specifically allows for discretionary recovery of "costs, disbursements and expenses." Defendant contends, however, that claimant is not entitled to such, because the billings it has presented are divided only into"generalized categories such as `postage' and 'computer legal research' " (MOL at 16). Moreover, they contend that the supporting affidavit by Hawkins merely "asserts" the total amount "without elaborating" (MOL at 16, citing Hawkins Aff1129).

I am not persuaded by these arguments. The billing categories are no more generalized than on a typical bill of costs, and it is unclear how much more detail the State argues should be included. As to the Hawkins Affidavit, it merely adds up the total of the claimed costs that are broken down with greater specificity on each individual bill.

Of greater concern is defendant's challenge that the costs and disbursements encompass numerous expenditures relating to arguments and claims rejected by the Court, and that there is no way to determine which payments fall within this category. This is essentially the same issue encountered above in regard to the attorneys' fees — awarding claimant the entire amount sought would permit recovery of expenses not necessary for claimant's ultimate recovery, while rejecting any recovery thereof would undercompensate claimant based on their failure to place expenditures into categories (i.e., those legal contentions accepted or rejected by the Court) that counsel could not have known would be relevant at the time the disbursements were made.

I find, again, that the appropriate way to resolve this dilemma is to allow for partial recovery, and find that an additional allowance of one third of the amount sought is appropriate.[10]

[10] While the fee allowance is calculated based on 1/3 of the net recovery, the costs and disbursements are determined on the basis of 1/3 of the amount of expenditure. This is consistent with a typical contingency arrangement, under which an attorney's fee is tied to the award, but costs and disbursements are based on actual expenditures *(see e.g. Miszko v Gress,* 4 AD3d 575 [3d Dept 2004], *lv denied* 3 NY3d 606 [2004]). Here, I have calculated fees based on the recovery, in an effort to tether the fee allowance to what counsel actually achieved. While the costs and disbursements must reflect actual out of pocket expenditures, that amount must be limited so as to exclude those costs which went to

The cases cited by the State in opposition to any recovery are inapposite. I see no reason that separately billed, out-of-pocket expenditures should be treated as "law office overhead" as was done *in A-1 Auto v State,* UID No. 2017-015-220 [Ct Cl, March 22, 2017, Collins, J.]), particularly as the statute authorizes an award of "expenses". And unlike *Meyers* (166 Misc 2d at 591 n 2), the costs and disbursements here were broken down into specific categories, and were calculated separately from the base fee.

Thus, claimant may recover one third of the $312,621 sought, or $104,207.

In sum, claimant is entitled to an additional allowance as follows:

Attorney's Fees:	$ 775,405
Expert Appraisal Fees:	$ 68,171
Disbursements:	$ 104.207
TOTAL:	$ 947,783

LET JUDGMENT BE ENTERED ACCORDINGLY.

Albany, New York
March 29, 2019

DAVID A. WEINSTEIN
Judge of the Court of Claims

meritless claims. In light of the above discussion, I find that one third appropriately represents the degree to which claimant's efforts were tied to the "successful" portion of its case.

Papers Considered:

1. **Claimant's Notice of Motion and affidavits of David Hawkins; Joseph Brunner; Benjamin Lippard; James Greilsheimer; E. Gail Suchman; Daniel Sciannameo; and James Puskas, along with Index containing Exhibits A-J.**

2. **Defendant's Affirmation in Opposition, with Exhibits A-C and Memorandum of Law.**

3. **Claimant's Reply Affidavit of James Greilsheimer, with reply affidavits from David Hawkins and Joseph Brunner, along with Reply Documentary Supplement containing Exhibits A-K.**