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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-216516.2 **DATE:** April 1, 1985

MATTER OF: CACI, Inc. - Federal

DIGEST:

Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must be based on the amount specified in the contract. Prior decision on this point is modified accordingly.

The Navy requests reconsideration of our decision in CACI-Inc. - Federal, B-216516, Nov. 19, 1984, 64 Comp. Gen. ___, 84-2 CPD ¶ 542, in which we sustained the protest of CACI against an award of a contract to Bechtel Operating Services Corporation under a request for proposals issued by the Naval Supply Center, Oakland, California. This cost-plus-award-fee contract, No. N00228-84-C-5005, was for warehousing and associated services for portable hospital units. As indicated below, we modify that decision on one point.

In our decision, we sustained the protest on two separate grounds. First, we held that the Navy had performed a deficient analysis of CACI's cost proposal by adding, as a direct cost, personnel proposed by CACI as part of its indirect cost pool, without properly verifying how the particular cost was treated under CACI's accounting system and the Cost Accounting Standards.

Second, we held that Bechtel's proposed award fee violated a 10 percent regulatory limitation. This was because the Navy, in its cost realism analysis, estimated that Bechtel's cost of performance would be $15,818,637, and based its selection on this amount. The subsequently-awarded contract, however, was for $16,739,709, the full amount proposed by Bechtel. This means, we stated, that a proposed award fee of $1,673,961 is 10.59 percent of the estimated cost of the contract, and thus exceeds the 10 percent limitation in Defense Acquisition Regulation (DAR) § 3-405(a), reprinted in 32 C.F.R. pts. 1-39 (1984).

Based on the foregoing, we recommended that the Navy conduct further negotiations with the offerors in the competitive range and then solicit revised cost proposals. Unless Bechtel was the successful offeror on this recompetition, we recommended that its contract be terminated.

The Navy requests reconsideration of the portion of our opinion concerning the fee limitation, asserting that our decision is legally incorrect on this point and has no regulatory support. However, the Navy also states that it intends to follow our recommendations in this matter. The decision was requested by the United States District Court for the District of Columbia in connection with CACI, Inc. - Federal v. United States et al. (Civil Action No. 84-2971). The court has subsequently dismissed this action without prejudice. Since the matter has been dismissed without prejudice by the court, we will reconsider the fee limitation portion of our decision. See Optimum Systems, Inc., 56 Comp. Gen. 934 (1977), 77-2 CPD ¶ 165; Planning Research Corporation Public Management Services Inc., 55 Comp. Gen. 911 (1976), 76-1 CPD ¶ 202.

As noted above, DAR § 3-405(a) states that the maximum fee (base fee plus award fee) on cost-plus-award-fee contracts shall not exceed the limitations stated in DAR § 3-405.6(c)(2), as follows:

> ". . . 10 U.S.C. 2306(d) provides that in the case of a cost-plus-fixed-fee contract, the fee shall not exceed ten percent (10%) of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary concerned at the time of entering into such contract . . . ."

We stated in CACI:

> "As indicated in DAR § 3-405.6(c)(2), supra, the estimated cost is to be determined by the government at the time of entering into a contract. This government determination could only be done by a price or cost analysis. . . ."

The Navy's basic disagreement with our decision in CACI concerns the interpretation of the phrase "estimated cost of the contract," as used in the regulation. The Navy asserts that a "cost realism estimate" such as it used to evaluate CACI's and Bechtel's proposals is separate and distinct from the "estimated cost" for which it has contracted and which it used to determine the award fee. The Navy concludes that it determined the "estimated cost of the contract" when it accepted Bechtel's proposal, including proposed costs, and that this was a matter within the Navy's discretion.

The Navy's action in this case, i.e., executing a contract in an amount that is $920,000 more than it expected performance to cost, was unusual. Indeed, in most cases the estimated cost for award selection purposes would be the same as or higher than the estimated cost specified in the contract. Consequently, we believe such a discrepancy between proposal and agency-anticipated costs would ordinarily warrant reopening price negotiations.

In our prior decision, we interpreted DAR § 3-405.6 (c)(2) as requiring the same estimate used for award selection purposes to be used for determining the fee limitation. However, upon further reflection, we now agree that the Navy has a valid point and that the regulation must be interpreted such that the controlling figure for calculating an award fee should be that objective estimated cost figure specified in the contract. In this case, this amount appears to be bona fide as CACI's intended estimated cost of the contract; there is no indication here that this higher estimated cost was intended solely to justify a fee in excess of what would otherwise be the fee limitation. Our original recommendation, as the Navy points out, would require the agency unilaterally to set the contract price, which it legally could not do. Here, without further negotiations, the Navy could only have accepted the best

and final price proposed by Bechtel. This "estimated cost" is then the maximum amount that will be funded, and an award fee that does not exceed 10 percent of this amount does not violate DAR § 3-405.6(c)(2). This is so even if this estimated cost ultimately turns out to be erroneously low, so that actual fee earned may exceed ten percent of the actual costs incurred.

To the extent indicated, we modify our prior decision.

Harry R. Van Cleve
for Comptroller General
of the United States