The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allied Maritime Management Organization Inc.

File: B-222918, B-222918.2

Date: August 26, 1986

DIGEST

1. Agency cost evaluation of successful offeror's cost proposal was reasonable. Agency is entitled to rely upon advice of Defense Contract Audit Agency in analyzing overhead and general and administrative costs rates.

2. Copy of protester's timely second protest on a RFP on which he earlier protested the cost evaluation, was not provided to the contracting officer within 1 day of filing as required by the Bid Protest Regulations. Second protest, which also relates to an aspect of the cost evaluation, will not be dismissed where the agency report is provided within 25-day statutory time limit.

3. Protest of interpretation and application of letter requesting revised proposals is timely, if filed within 10 days of when protester is apprised that agency interpreted letter inconsistent with protester's view of letter's meaning.

4. Proposals offering less than 2,080 direct labor hours per labor category in response to request for revised proposals, which solicited a man-year's effort per labor category, are acceptable where the hours less than 2,080 hours represent holiday and leave benefits and are included in those offerors' overhead pools under their accounting systems.

DECISION

Allied Maritime Management Organization Inc. (Allied), protests the award of a contract pursuant to request for proposals N66604-85-R-0040, by the Naval Underwater Systems Center (NUSC), Newport, Rhode Island, to MAR, Inc. (MAR), for the operation and maintenance of a research facility and vessel in Bermuda. Allied initially protested that the cost evaluation of the proposals was improper. After receiving the agency report on the protest, Allied protested that MAR's proposal was unacceptable because it proposed less than the required level of effort. We deny the protests.

The RFP requested technical and cost proposals for a cost-plus-fixed-fee level of effort contract. After the proposals were evaluated, discussions conducted, and best and final offers submitted, three of the four

offerors, MAR, Palisades Geophysical Institute, Inc. (PGI), and Allied were rated highly acceptable technically. The fourth offeror was rated unacceptable. Since MAR's estimated costs were evaluated to be the lowest of the three, it was awarded the contract on April 15, 1986. PGI had the second lowest evaluated cost.

On April 25, 1986, Allied protested that NUSC had not performed an adequate or proper cost evaluation of MAR's and PGI's proposals. Allied contends that since it knows its basic wage level was 2 percent less than MAR's and PGI's, it is inexplicable that its cost was not rated low. The five specific aspects of the cost evaluation which Allied questions are that: (1) MAR's and PGI's overhead and general and administrative (G&A) rates were not properly reviewed and may not be consistent with those charged on previous or present government contracts; (2) overtime may not have been quoted by MAR and PGI; (3) the proposed final fees may not have been evaluated; (4) appropriate escalation and salary increases may not have been proposed by MAR and PGI and; (5) "pass through" costs, e.g., insurance, may not have been properly evaluated.

We have consistently held that considering evaluated costs instead of proposed costs provides a sounder basis for determining the most advantageous proposal, since the government is required--within certain limits--to pay the contractor's actual allowable and allocable costs. 52 Comp. Gen. 870, 874 (1973); CACI Inc.-Federal, 64 Comp. Gen. 71 (1985), 84-2 C.P.D. ¶ 542. A government determination of evaluated realistic cost is no more than an informed judgment of what costs would be reasonably incurred by acceptance of a particular proposal. Grey Advertising, Inc., 55 Comp. Gen. 1111, 1126 (1976), 76-1 C.P.D. ¶ 325 at pgs. 17-18. Determining whether submitted proposals are realistic as to cost must properly be left to the informed judgments and administrative discretion of the contracting agency, which is in the best position to judge the realism of costs and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. 50 Comp. Gen. 592, 600 (1971); Raytheon Company, 54 Comp. Gen. 169, 184 (1974), 74-2 C.P.D. ¶ 137 at 19-20. These agency determinations should not be second-guessed unless they are not supported by a reasonable basis. Kentron-Hawaii, Limited v. Warner 480 F.2d 1166, 1172 (D.C. Cir. 1973); CACI Inc.-Federal, 64 Comp. Gen. supra at 75.

We have reviewed in camera NUSC's cost evaluation of the proposals, which was not provided to the interested parties because of its discussion of proprietary cost data. See CACI Inc.-Federal, 64 Comp. Gen. supra at 76. To perform its cost analysis of the proposals, NUSC requested and obtained the audit assistance of the Defense Contract Audit Agency (DCAA), whose review included the offerors' proposed overhead and G&A rates. DCAA either confirmed the proposed rates or recommended different rates. The contracting officer adopted DCAA's advice in performing the cost analysis of the proposals. We have held that the contracting officer can reasonably rely upon DCAA's advice in these matters. Dynatrend Inc., B-192038, Jan. 3, 1979, 79-1 C.P.D. ¶ 4. Therefore, we do not object to this aspect of the cost analysis.

Our review also indicates that the required hours of overtime were quoted as direct labor costs by all three offerors; the proposed fees were reviewed by NUSC to assure their reasonableness; escalation on labor costs was quoted by the offerors and confirmed by NUSC as reasonable and realistic; and each of the "pass through" costs, including insurance, was properly reviewed to assure reasonableness. Consequently, we deny Allied's protest regarding the cost analysis of MAR's and PGI's cost proposals.

The Navy report on Allied's initial protest disclosed that MAR's and PGI's best and final offers proposed less direct labor hours than Allied's best and final offer on this level of effort contract. Allied protested by letter dated June 10, 1986, that the proposals of MAR and PGI should have been rejected as unacceptable because they proposed a lesser number of direct labor hours than required by the RFP and by NUSC's request for best and final offers.

The Navy and MAR argue that this second protest should be dismissed because Allied failed to provide the contracting officer with a copy of the protest within 1-day of filing at our Office as required by section 21.1(d) of our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1986). The Navy reports that the contracting officer did not receive a copy of this second protest until 7 days after it was filed at our Office and that it only obtained a copy through its own efforts. The protester admits the possibility that it inadvertently failed to provide the contracting officer with the required copy.

While we may dismiss protests for failure to comply with this procedural requirement, we do not do so automatically, but only where the agency has been prejudiced by the protester's noncompliance. Colt Industries, B-218834.2, Sept. 11, 1985, 85-2 C.P.D. ¶ 284. In this case, the person designated by the Navy for contact in protest matters was immediately apprised by this Office that the protester's comments on the agency report on the initial protest contained a new protest basis; that a new file was being opened in the matter; and the Navy was requested to respond to this second protest. A copy of this second protest was made available by this Office to that Navy office within 1 day.

We are unpersuaded by the agency claims that it was prejudiced by its failure to timely receive the copy of the second protest. In this regard, we note that the second protest also concerned the cost evaluation, a matter which was analyzed and reviewed in detail by the agency in responding to the initial protest. Also, the agency responded to our Office on the second protest 6 days earlier than the statutory 25-working day submission time period. Until it submitted its report on the second protest, the Navy did not request that it be dismissed for this failure. Under the circumstances, we decline to dismiss Allied's second protest. Sixth and Virginia Properties, B-220584, Jan. 14, 1986, 86-1 C.P.D. ¶ 37; Container Products Corp., B-218556, June 28, 1985, 64 Comp. Gen. 641 (1985), 85-1 C.P.D. ¶ 727.

The Navy further contends that the June 20 protest should be dismissed as an untimely protest of the content of the March 20, 1986, request for best and final offers, which the Navy contends is clear on its face. However, Allied's protest is actually based on the interpretation and application of the March 20 letter. Therefore, we will consider the protest as timely filed since it was filed within 10 days of when Allied was apprised that other offerors proposed less direct labor hours. Raytheon Support Services, Inc., B-219389.2, Oct. 31, 1985, 85-2 C.P.D. ¶ 495.

Allied protests that MAR and PGI have not proposed to furnish the required number of manhours on this level of effort contract. The RFP required a level of effort of "77,520 manhours of direct labor" be furnished. Offerors were required to propose an estimated number of direct labor hours in each of 13 specific labor categories to perform this work. After proposals were audited and evaluated, and discussions conducted, NUSC wrote a letter dated March 20, 1986, to the offerors within the competitive range requesting them to submit revised cost proposals as follows:

> "The number of hours specified in [Level of Effort clause] is hereby deleted for [12 of 13 labor categories]. Instead, each offeror shall provide one person for each labor category on a man year basis, and provide the anticipated annual salary for each person.
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> . . . . .
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> "The total amount of the man year cost plus overtime shall be compared to the direct labor costs previously submitted. It is expected that these costs will closely approximate or be equal to previous submissions. Any unexplained discrepancies could render an offeror's proposal unacceptable for contract award."

Attached to this letter was a form entitled "Direct Labor Costs" where offerors were to designate the "annual salary" for each labor category. All parties agree that a "man-year" is equivalent to 2,080 labor hours (52 weeks times 40 hours per week). The record shows that the Navy modified the level of effort provisions in the March 20 letter to ask for "man-years" of effort because PGI, the incumbent contractor, noted during discussions that the level of effort in the RFP, as amended, seemingly required that each labor category be fully staffed year round, even when a person staffing the job category was on leave.

In its best and final offer, Allied proposed 2,080 direct labor hours while both PGI and MAR proposed less than 2,080 direct labor hours. The Navy explains that MAR and PGI in their best and final offers subtracted hours representing holidays and anticipated leave under their applicable personnel policies from 2,080 direct labor hours for each proposed labor

category because the proposed overhead (indirect cost) pools of these offerors include these particular fringe benefits. The Navy contrasts this to Allied, which proposed 2,080 direct labor hours for each labor category and did not include these particular fringe benefits in its proposed overhead pool. Allied apparently intends to recover its cost of these benefits as direct labor under this contract.

Allied argues that the March 20, 1986, request for revised proposals requires that each offeror propose 2,080 direct labor hours, since it requested the annual salary for each labor category on a "man-year" basis. Allied contends that the March 20, 1986, letter did not purport to delete the "level of effort" clause in the contract and left unchanged the total 77,520 direct labor hours level of effort required by that clause. Allied believes the March 20 letter merely requested a slightly different format for the cost proposal and did not significantly modify the level of effort provision. Allied contends that the RFP did not permit offerors to quote holiday and leave hours on other than a direct labor cost basis and that MAR's and PGI's proposals should be rejected for proposing less than 2,080 direct labor hours per employee. In this regard, one Allied affiant states that, on other contracts, Allied does allocate a portion of its salary costs to its overhead pool, but here the RFP required all salary costs to be charged as direct labor.[1/]

We agree with the Navy that neither the March 20 letter nor the RFP dictated any particular accounting treatment of proposed vacation and fringe benefits. Allied's decision to allocate leave benefits as a direct cost was its own business decision and was not mandated by the RFP.

The RFP specifically recognized that offerors could utilize their own accounting systems to propose on this requirement as follows:

> "Any offeror having an accounting system which includes, within overhead or G & A , the cost elements set forth above shall specifically state this fact within the SF 1411 cost proposal. This will preclude these costs from being unduly considered in the Government's cost evaluation."

1/ This contention seems inconsistent with Allied's initial protest that MAR's and PGI's overhead rates were improper because they may be different from those proposed on other government contracts. Also, if Allied has changed its method of allocation, this would affect its overhead rate and may violate the Federal Acquisition Regulation, 48 C.F.R. §§ 31.201-1 and 31.203(d), which requires indirect cost to be allocated in accordance with generally accepted accounting principles which are consistently applied.

Moreover, we have held that ordinarily the government cannot dictate how an offeror should establish its accounting system, so long as it complies with applicable law and regulations. CACI Inc.-Federal, 64 Comp. Gen. supra at 80; Dynatrend, B-192038, Jan. 3, 1979, supra, at 19.

In support of its contention that the RFP required leave benefits to be quoted as direct labor, Allied references the RFP requirement that a portion of the hours of two labor categories must be charged for overhead because they were needed to perform administrative work for the contractor's own account. Allied contends that this shows that all other required labor hours must be charged as direct labor. However, we find that this has no relation to a contractor's accounting treatment of leave benefits, which many, if not most, contractors treat as an overhead item.

Allied also refers to an answer at the preproposal conference which indicated that the contract anticipated large amounts of "stand-by" time with intensive labor efforts, such as a 5-day voyage and 18 hours consecutive laboratory research work. Allied claims that this further implied that all work hours must be direct labor costs and leave would be scheduled during stand-by time. However, these anticipated periods of intensive labor has been apparently accounted for in the requested overtime hours and the Navy's preproposal conference response does not imply that leave must be costed as a direct labor item.

Finally, Allied notes the references to "direct labor costs" in the March 20 letter and the attachment thereto to support its contention that the leave benefits must be proposed as direct labor. However, the reference to direct labor costs in the March 20 letter does not preclude offerors from charging leave and holiday hours to overhead, since the letter only references direct labor costs "previously submitted" under the RFP. Moreover, the Navy states that the attachment to the March 20 letter entitled "direct labor costs" is merely a useful format by which to compare the revised best and final cost proposals to the initial cost.

Therefore, offerors could account for leave benefits in accordance with their individual business practices in proposing on this RFP. The present situation is distinguishable from that in Analytics Inc., B-205115, Aug. 18, 1982, 82-2 C.P.D. ¶ 147, the primary case relied upon by Allied. In that case a specified number of "productive man-hours" was required and the awardee improperly subtracted leave and other benefits from this specified number in its best and final offer. In Analytics, the other offerors proposed these productive man-hours as direct labor hours and otherwise accounted for leave and fringe benefits in their cost proposals. However, in Analytics, "productive man-hours" was precisely defined as "on the job time spent working actively on objectives or tasks under any resulting contract." Although the term "man-year" is not defined by this RFP, we believe the absence of the adjective "productive" is significant, and a reasonable interpretation of "man-year" in this context would be 2,080 labor hours to include authorized nonproductive

man-hours, such as authorized stand-by time and leave benefits, the cost of which would be allocated in accordance with the offeror's particular accounting systems.

Moreover, it appears that Allied's initial cost proposal did not include leave benefits and that its best and final offer for the first time proposed these benefits. In this regard, the record shows that Allied's initial cost proposal did not indicate that leave benefits were included in its overhead pool, even though its compensation benefits package stated that the proposed employees had specific leave benefits. Nevertheless, Allied's initial cost proposal only proposed as direct labor the level of effort man-hours for each catagory specified in the RFP with no additional direct charge for anticipated leave. PGI and MAR proposed, as direct labor, the same specified level of effort, but also included leave benefits beyond this level of effort in their overhead pools. That is, although Allied undoubtedly expected to be reimbursed for its employees' leave benefits, its initial cost proposal either (1) did not include these costs or (2) included the leave benefits in the direct labor hours of the level of effort proposed. The initial cost evaluation placed MAR and PGI at a disadvantage because their cost proposals proposed the same number of direct labor hours as Allied and also accounted for their leave benefits, while Allied's proposal either did not account for the benefits or proposed a lesser level of effort. The Navy's initial cost evaluation apparently did not account for this discrepancy. The best and final responses to the March 20 letter could be evaluated on an equal basis, however, because the annual man-year salaries proposed by all offerors included leave benefits, whether chargeable as a direct labor cost in the case of Allied or as an overhead item in the cases of MAR and PGI.

Our review discloses that the Navy reasonably evaluated MAR as the lowest cost offeror. Allied's assertion that its lower wage rates must have caused its proposal to be evaluated at a lower cost than MAR's is not supported by the record. The protest is therefore denied.

Harry R. Van Cleve
General Counsel