



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Hattal & Associates

**File:** B-243357; B-243357.2

**Date:** July 25, 1991

Robert D. Bowytz, Esq., and Kenneth D. Brody, Esq., Keck, Mahin & Cate, for the protester.  
Roberta Comer for Technical Resources, Inc., an interested party.  
Margaret M. Bees, Esq., Federal Emergency Management Agency, for the agency.  
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest is sustained where solicitation provided that technical factors were more important than cost and record indicates that agency made award to the low-cost, technically acceptable offeror without properly assessing relative technical merit.
2. Agency's cost realism analysis of awardee's proposal was reasonable where agency relied on information provided under Defense Contract Audit Agency's audit and verified awardee's proposed labor rates, fringe benefits, overhead rates, and subcontractor costs.
3. Proposal to perform emergency broadcasts from an off-site location does not constitute a unique or innovative solution to contract performance where the issue was raised in a pre-proposal conference and the agency currently uses off-site locations to perform many of its broadcasts.

## DECISION

Hattal & Associates protests the award of a contract by the Federal Emergency Management Agency (FEMA) to Technical Resources, Inc. (TRI), under request for proposals (RFP) No. EMW-90-R-3410. Hattal protests that FEMA failed to follow the evaluation criteria stated in the RFP, failed to make cost realism adjustments to TRI's cost, and engaged in technical transfusion.

We sustain the protest on the basis that FEMA failed to follow the evaluation criteria set forth in the RFP.

#### BACKGROUND

The RFP was issued on June 22, 1990, requesting offers to provide video conferencing support and production services for FEMA's Emergency Education Network (EENET).<sup>1/</sup> The solicitation contemplated the award of a cost-plus-fixed-fee contract for a 1-year base period, with two 1-year option periods. Section L of the RFP required offerors to submit technical and business proposals for each year of contract performance, and also required submission of proposed costs to perform two emergency broadcasts per year. Amendment 1 of the RFP expressly stated that offerors should assume the emergency broadcasts would originate from FEMA's on-site studio in Emmitsburg, Maryland.

Section M of the RFP listed the following technical evaluation factors and associated point values:<sup>2/</sup>

Soundness of Technical Approach	35 points
Project Organization and Management	15 points
Key Personnel	30 points
Creativity	20 points

Section M also provided that technical factors would be more important than cost, but noted that cost could become the deciding factor if proposals were found to be technically equal.

Initial proposals were submitted on July 30, 1990. Pursuant to 48 C.F.R. § 4415.612-71 (1990), FEMA established a Technical Evaluation Panel (TEP) consisting of four voting members and two non-voting members. The TEP evaluated the initial proposals and determined that the proposals of Hattal, TRI, and two other offerors were in the competitive range. Discussions were conducted with these firms and revised proposals were submitted on November 21.

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<sup>1/</sup> FEMA's EENET is a one-way video, two-way audio, point-to-multipoint, satellite-distributed video network. The network is serviced from FEMA's broadcast studio located on-site at the National Emergency Training Center in Emmitsburg, Maryland, and transmits to various emergency operation locations throughout the country.

<sup>2/</sup> The RFP further divided each evaluation factor into several subfactors and listed associated point values for each subfactor.

On November 29, 1990, the TEP evaluated the revised proposals and subsequently summarized its evaluation in a report dated December 10. The TEP gave Hattal a point score of 85.25 and TRI a point score of 86. Based on this evaluation, the contracting officer determined that TRI's and Hattal's proposals remained in the competitive range,<sup>3/</sup> and that their proposals were technically equal. An audit of the proposals was conducted by the Defense Contract Audit Agency (DCAA). After reviewing the audit results, FEMA conducted further discussions with both offerors concerning both cost and technical issues, and requested BAFOs by February 15, 1991.

In its February 15 submission, Hattal made some changes to its technical proposal. Rather than reconvening the TEP to reevaluate Hattal's technical proposal, the contracting officer forwarded the proposal to FEMA's project officer for her review.<sup>4/</sup> By memorandum dated February 19, the project officer advised the contracting officer that Hattal's proposal was "technically acceptable." Based on this assessment and the earlier TEP evaluation, the contracting officer determined that both offers were technically equal and concluded that cost should be the deciding factor for contract award.

On February 21, 1991, the contracting officer awarded the contract to Hattal as the low-cost offeror. However, later that day the contracting officer reviewed the proposal documents again and decided she had erred in making the award to Hattal. Specifically, she determined that while TRI's price was based on performing emergency broadcasts from the on-site location identified in the RFP, Hattal's proposal was based on performing emergency broadcasts from a less-expensive, off-site location.<sup>5/</sup> The contracting officer terminated the contract based on her conclusion that award to Hattal was improper because the offerors had not submitted proposals based on the same requirements.

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<sup>3/</sup> The other two proposals received significantly lower scores and were dropped from the competitive range.

<sup>4/</sup> The project officer was a non-voting member of the TEP.

<sup>5/</sup> FEMA states in its agency report that "during negotiations Hattal proposed, and FEMA accepted, a price for an emergency broadcast originating from an off-site location. This was a deviation from the requirement of the solicitation." FEMA does not explain why or how "acceptance" of this aspect of Hattal's proposal occurred during negotiations. At that time, the solicitation had not been amended to permit proposals for emergency broadcasts from off-site locations.

FEMA states that, after terminating Hattal's contract, it reevaluated its needs, concluded that off-site emergency broadcasts would adequately meet its needs, and reopened negotiations to permit both TRI and Hattal to propose emergency broadcasts from off-site locations. The contracting officer requested submission of another round of BAFOs by February 22, 1991. Both Hattal and TRI submitted BAFOs with changes to their technical proposals.

Again, the contracting officer sent the technical proposals to the project officer for review rather than reconvening the TEP. The project officer reviewed Hattal's proposal, identified a few areas that needed clarification, and advised the contracting officer, "if you can have [certain areas of the proposal] clearly defined, I am sure I would have no problem finding Hattal & Associates technically acceptable."

The project officer reviewed TRI's proposal and advised the contracting officer, "I have several significant problems and concerns with what I view as major changes to [TRI's] technical approach." Among other things, the project officer stated she was concerned by the fact that TRI had reduced the level of personnel effort it proposed, and had substituted new personnel for individuals previously proposed. The project officer noted that these changes adversely affected specific areas in which TRI's proposal had been highly rated by the TEP, and concluded:

"My impression is that TRI has changed their overall approach to performing this contract through their cost-cutting measures, and has significantly decreased the overall level-of-effort and technical capability of the support offered to the Emergency Education Network. Moreover, I view the 'Best and Final' levels-of-effort and capability to be significantly below the minimum requirements spelled out in the RFP Scope of Work."

Based on the project officer's assessment, the contracting officer again reopened discussions with the offerors, asking each offeror for additional information in various areas. Another round of BAFOs was submitted on March 6. Again, TRI's BAFO was reviewed by the project officer.<sup>6/</sup> By memorandum dated March 7, 1991, the project officer expressed her continued concern over TRI's substitution of personnel, noting that one of the newly proposed individuals lacked EENET experience.

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<sup>6/</sup> There is no evidence in the record that the project officer reviewed Hattal's proposal again.

On March 11, 1991, the contracting officer awarded the contract to TRI. In explaining her award determination, the contracting officer acknowledged the concern created by TRI's personnel substitution but concluded:

"This concern was not strong enough to effect [sic] the technical acceptability of TRI's proposal. It was therefore determined that TRI's BAFO submission be deemed technically acceptable. . . .

"Based on the results of the last round of Best and Final Offers, it was determined that TRI was the lowest offeror. As each firm remained technically competent and responsive, cost became the sole deciding factor for selection of a contractor for award."

#### FAILURE TO FOLLOW EVALUATION CRITERIA

Hattal protests that FEMA failed to follow the RFP evaluation scheme which listed the technical factors and associated point values against which proposals would be evaluated and which provided that technical factors would be more important than cost. Hattal maintains that FEMA ignored the RFP's evaluation scheme and awarded the contract to the lowest priced, technically acceptable offeror.<sup>7/</sup>

For the reasons discussed below, we find the record does not support FEMA's contention that it awarded the contract on the basis of the RFP's evaluation criteria and related weights. Rather, the record contains numerous statements by the project

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<sup>7/</sup> FEMA argues that this portion of Hattal's proposal is untimely. FEMA asserts that Hattal was on notice following the first contract award on February 21 that award would be based on cost and, therefore, it should have protested within 10 days of that time. FEMA misconstrues Hattal's protest. Award on the basis of cost could have been proper provided the agency had properly evaluated the technical proposals of the offerors and made its source selection decision after giving appropriate consideration to technical factors. The award to Hattal on February 21 provided no reason for Hattal to believe that FEMA had failed to properly evaluate technical proposals or had failed to give greater weight to technical factors in making its source selection decision. Thus, FEMA's argument that Hattal's protest is untimely in this regard is without merit.

officer and contracting officer that the BAFOs submitted after November 21, 1990, were merely reviewed to establish "technical acceptability."<sup>8/</sup>

As noted above, the RFP provided that "key personnel" was the second most important evaluation factor, comprising nearly one-third of the total evaluation score. The evaluation worksheets and the TEP's December 10, 1990, report show that the TEP rated the proposal TRI submitted on November 21 slightly lower than Hattal's with regard to "key personnel," expressing concern that some of TRI's less experienced personnel might use this contract as a "training ground."

Between TRI's submission of its revised proposal on November 21, 1990, and submission of its BAFO on February 22, 1991, TRI made numerous reductions and substitutions with regard to the personnel it proposed. Among other things, TRI cut nearly 1,000 hours of direct labor,<sup>9/</sup> dropped one member of the regular broadcast crew it proposed, and dropped two members from the crew proposed to perform emergency broadcasts. In making these reductions, TRI deleted the costs for providing any administrative and clerical support services. As a direct result of these reductions in the level of services proposed, TRI was able to offer a lower cost than Hattal.

Following TRI's submission of its BAFO on February 22, the project officer concluded that TRI had altered its technical approach so drastically that it was no longer technically acceptable. Because of the project officer's concerns, the contracting officer sought clarifications from TRI and requested a final round of BAFOs to be submitted by March 6. After reviewing TRI's March 6 BAFO, the project officer wrote

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<sup>8/</sup> Our conclusion in this regard is consistent with TRI's own understanding of how FEMA conducted this procurement. In comments filed with our Office, TRI criticized Hattal's protest, stating:

"[Hattal] appears to be unfamiliar with the manner in which the government in general and FEMA in particular awards procurements; that is, after technical acceptability is established, the contract is awarded to the lowest priced bidder. This was the case in the last contract award of the EENET contract."

<sup>9/</sup> TRI's November 21 proposal contained 7,798 hours of direct labor to be provided by its own employees. Its February 22 BAFO proposed only 6,865 hours. Ultimately, in TRI's final BAFO submitted on March 6, the level of direct labor was further reduced to 6,841 hours.

a one-page memorandum, stating--without explanation--"(a)fter reviewing the latest version of [TRI's] proposal, I feel TRI has satisfied most of my concerns regarding [its] technical approach." The project officer's memorandum further contained a detailed discussion of her continued dissatisfaction with TRI's substitution of personnel.

When an RFP provides that technical factors will be considered more important than cost, a procuring agency may not make its award decision as though the RFP provided for award to the lowest cost, technically acceptable offeror. RCA Serv. Co., B-219406.2, Sept. 10, 1986, 86-2 CPD ¶ 278. It is improper for an agency to induce an offeror to prepare and submit a proposal emphasizing technical excellence, then fail to consider technical factors and award solely on the basis of cost. Such action clearly disregards the RFP's evaluation criteria. Id.; Kempton-Rossman Int'l, B-220772, Feb. 4, 1986, 86-1 CPD ¶ 127; Applied Financial Analysis, Ltd., B-194388.2, Aug. 10, 1979, 79-2 CPD ¶ 113.

Further, the Federal Acquisition Regulation (FAR) requires agencies to document their selection decisions so as to show the relative differences between proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR § 15.612(d)(2). In reviewing protests against allegedly improper evaluations, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the solicitation's stated evaluation criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. In order for us to review agencies' determinations, an agency must have created adequate documentation as required by the FAR. Department of the Army--Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211. Where there is inadequate supporting rationale in the record for the source selection decision, we cannot conclude that the agency had a reasonable basis for its decision. American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53; Waddell Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269.

Our review of TRI's proposals discloses that, in response to the questions FEMA posed following submission of the February 22 BAFO, TRI did not change its proposal in any material respect and, in fact, further reduced the number of direct labor hours it proposed.<sup>10/</sup> TRI's narrative responses accompanying its March 6 BAFO also provide no basis from which FEMA could conclude that this proposal was technically equal to the earlier submissions evaluated by the TEP. For example, in response to FEMA's question regarding how TRI intended to

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<sup>10/</sup> In TRI's March 6 BAFO, it reduced the number of direct labor hours it proposed from 6,865 hours to 6,841 hours.

perform the administrative and clerical services it had deleted, TRI stated that clerical functions would be performed by the proposed EENET Office Manager. However, TRI's March 6 BAFO decreased the amount of time proposed for its EENET Office Manager.

Also, FEMA asked TRI to justify the decreased size of the crew it proposed for emergency broadcasts. TRI responded that it had altered its proposal to provide a "bare bones" crew because it believed the emergency broadcasts "will not be expected to be as elaborate as normal EENET broadcasts." This response may have explained why TRI believed its proposal could still meet FEMA's minimum requirements with less technical effort, but it provided no basis for a conclusion that TRI's approach was the technical equivalent of its earlier submissions. In short, from this record it appears that TRI's responses merely established that its proposal was technically acceptable. They do not provide a basis for the conclusion that TRI's March 6 BAFO, which proposed nearly 1,000 fewer direct labor man-hours than initially proposed, was the technical equivalent of the earlier submissions.

Although FEMA argues that the project officer's March 7 review constituted a reevaluation of TRI's proposal against the RFP's criteria, the record does not reflect such an evaluation. Rather, the project officer's one-page memorandum--the only document she created--does not refer to the RFP's evaluation criteria and primarily addresses the project officer's continued dissatisfaction with TRI's substitution of personnel. Even if the project officer evaluated TRI's final BAFO against the evaluation criteria, as FEMA maintains, the March 7 memorandum does not satisfy the FAR requirement to document the selection decision, showing the basis and reasons for that decision, nor does it permit our Office to determine whether the evaluation was reasonable and consistent with the stated criteria. See American President Lines, Ltd., supra.

In summary, the record indicates that, in evaluating the BAFOs submitted after November 21, 1990, FEMA did not follow the evaluation scheme which emphasized technical excellence and awarded a contract to the low-cost offeror without considering the proposals' relative technical merits beyond a determination of technical acceptability. A procuring agency's determination that two proposals are "technically acceptable" is not the equivalent of a determination that they are "technically equal" where, as here, the RFP places greater value on technical excellence. RCA Serv. Co., supra; Kempter-Rossman Int'l, supra; Applied Financial Analysis, Ltd., supra.

Accordingly, Hattal's protest is sustained on the basis of FEMA's failure to reasonably show that its source selection decision was based on the RFP's evaluation criteria.

#### COST REALISM ANALYSIS

Hattal also protests that TRI's proposed price was unrealistically low and that FEMA failed to conduct an adequate cost realism analysis of TRI's proposal. Hattal's argument in this regard is based on an analysis of TRI's proposed cost for the base year vis-a-vis its proposed cost for the option years. Hattal argues that, given TRI's proposed cost for the base year, its proposed cost for the option years should have been higher.<sup>11/</sup>

Hattal is essentially protesting that, because of its familiarity with the requirements of this contract, its calculation of the proposed costs is the only reasonable approach and, since TRI's approach differs from Hattal's, TRI's approach must be unreasonable. Hattal's opinion that its approach to calculating costs is the only reasonable one does not provide a basis to sustain its protest. The record shows that FEMA verified the costs of the direct labor hours proposed (broken down as to the rate and number of hours proposed for each individual along with associated fringe benefits), as well as overhead rates, travel costs, and subcontractor costs. In verifying proposed costs, FEMA relied on information provided by the DCAA audit. Hattal does not suggest that DCAA's audit information was erroneous, nor is there anything in the record which calls into question the accuracy of this information. Cf. American Management Systems, Inc.; Department of the Army--Reconsideration, B-241569.2; B-241569.3, May 21, 1991, 91-1 CPD ¶ 492.

An agency is not required to conduct an in-depth analysis or to verify each item in conducting a cost realism analysis. Ferguson-Williams, Inc. et al., B-232334; B-232334.2, Dec. 28, 1988, 88-2 CPD ¶ 630. Even an alleged buy-in (offering cost estimates less than anticipated costs during performance) by a low-priced offeror furnishes no basis to challenge an award where the agency knows the estimated cost of the contractor's performance before award and makes award based on that knowledge. PTI Env'tl. Servs., B-230070, May 27, 1988, 88-1 CPD ¶ 504. Since a cost realism assessment necessarily involves the exercise of informed judgment and the agency is clearly in the best position to make that assessment, our Office will review such a determination only to ascertain

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<sup>11/</sup> TRI's proposal contained costs of \$544,472 for the base year; \$610,246 for the first option year; and \$628,553 for the second option year.

whether it has a reasonable basis, JKW Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198. Hattal has not identified any specific error in FEMA's cost realism analysis, nor demonstrated that the DCAA audit information was faulty, and we find nothing in the record which discredits the analysis. Accordingly, this basis of protest is denied.

#### TECHNICAL TRANSFUSION

Finally, Hattal asserts that its proposal to perform emergency broadcasts from an off-site location constituted a unique and innovative technical approach and that FEMA engaged in improper technical transfusion by amending the solicitation to permit TRI to propose off-site emergency broadcasts. We disagree.

Prior to submission of initial proposals, FEMA conducted a pre-proposal conference. At that conference, a potential offeror questioned whether offerors would have to propose emergency broadcasts originating from FEMA's on-site studio in Emmitsburg, Maryland. FEMA responded in the affirmative. The transcript of the pre-proposal conference was subsequently incorporated into the RFP through Amendment 1. The record further indicates that a substantial portion of EENET broadcasts currently originate from off-site locations.

Technical transfusion is the disclosure to other offerors in a negotiated procurement of one offeror's innovative or ingenious solution to a problem. Strobe Data, Inc., B-220612, Jan. 28, 1986, 86-1 CPD ¶ 97. In light of the questions raised at the pre-proposal conference and FEMA's existing use of off-site locations for EENET broadcasts, the amendment to the RFP permitting TRI to propose off-site emergency broadcasts did not involve disclosure of one offeror's innovative idea. Rather, it reflected a change in what offerors were permitted to propose. This is not technical transfusion. See SRI Int'l, B-224424, Oct. 7, 1986, 86-2 CPD ¶ 404; Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. Hattal's protest in this regard is denied.

#### RECOMMENDATION

Since FEMA failed to apply the evaluation scheme established in the RFP, we recommend that FEMA reevaluate the final proposals submitted consistent with the technical factors and related weights listed in section M of the RFP. Following this evaluation, FEMA should determine which offer is most advantageous to the government, taking into consideration the RFP requirement that technical factors be given greater weight than cost. In the event Hattal's proposal is determined to be most advantageous to the government, FEMA should terminate the contract with TRI and award the contract to

Hattal. We also find that Hattal is entitled to the costs of filing and pursuing this protest including attorneys' fees, 4 C.F.R. § 21.6(d)(1).

The protest is sustained in part and denied in part.

*for* Milton J. Fowler  
Comptroller General  
of the United States