



Comptroller General
of the United States

603261

Washington, D.C. 20548

Decision

REDACTED VERSION'

Matter of: Delta Research Associates, Inc.

File: B-254006.2

Date: November 22, 1993

Harold Aryai Siegel, Esq., for the protester, Sophie C. Cook, Esq., Department of Energy, for the agency, Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency, in performing a probable cost analysis, reasonably relied upon the advice of the Defense Contract Audit Agency in evaluating as realistic the direct labor rates proposed by the awardee's subcontractor, since these rates were verified as the current rates that the subcontractor was paying to its employees in comparable labor categories and assessed to be realistic.
2. An agency reasonably evaluated the probable cost of the awardee's subcontractor's proposal, based upon its proposed indirect rates, even though these rates were substantially lower than the subcontractor's proposed indirect rate ceilings, since the subcontractor explained, and the Defense Contract Audit Agency agreed, that various cutbacks in the subcontractor's indirect expenses were expected to result in the reduced indirect rates.

DECISION

Delta Research Associates, Inc. protests the award of a contract to Systems Flow, Inc. (SFI) under request for proposals (RFP) No. DE-RP01-92EW12002, issued by the Department of Energy (DOE), for technical and administrative support services for its Office of Environmental Restoration and Waste Management (EM). Delta claims that the selection of SFI resulted from an improper cost realism evaluation of the proposal of the awardee's proposed subcontractor, Ebon

'The decision issued November 22, 1993, contained confidential or source selection sensitive information, and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

Research Systems, which was to perform a substantial portion of the contract work.¹

We deny the protest.

The solicitation, issued on March 19, 1992, as a total small business set-aside, sought offers for a cost-plus-fixed-fee, level-of-effort contract to provide technical and administrative assistance to DOE's Office of Planning and Resource Management, which supports EM in the areas of planning, resource and financial management, project coordination, personnel liaison, procurement, and automated office support and information management systems. That office also oversees the operation of the EM document control facilities at the Forrestal Building, Washington, D.C., and the Trevion II Building, Germantown, Maryland, and has responsibility for developing and maintaining various automated and manual control systems for internal tracking and management control. The RFP called for contractor support to that office and EM in the areas of document control and management systems, including the operation of a mailroom; organizational and personnel functions, such as recruitment and training; internal controls and procedures; and special studies and analysis. The RFP contemplated the award of a 36-month base period with an estimated 143,430 direct productive labor hours (DPLH), with a follow-on 24-month option with an estimated 93,140 DPLH.

The RFP, as amended, advised that award would be made to that responsible offeror whose offer, conforming to the RFP, was considered most advantageous to the government. The RFP stated that technical quality was more important than cost, but cautioned that evaluated probable cost may be the deciding factor for award selection, depending on whether the highest-rated technical proposal is determined to be worth the cost differential. The RFP advised that technical proposals would be point-scored on a 1,000-point scale, and that cost proposals would not be point-scored, but would be evaluated to determine their probable cost to the government.

¹In its initial protest letter, Delta challenged DOE's cost and technical evaluation of SFI's proposal. DOE fully responded to these issues in its agency report and Delta did not respond to the agency's position in any of its subsequent protest filings. Accordingly, we consider the protester to have abandoned these issues. United Eng'rs & Constructor Inc.; Stearns-Roger Div., B-240691; B-240691.2, Dec. 14, 1990, 90-2 CPD ¶ 490.

By the May 4 closing date, DOE received 12 proposals, including those of Delta² and SFI. SFI proposed Ebon, a large business, as its subcontractor for a substantial portion of the contract work.³ Ebon's cost proposal for its portion of the work was sealed and not reviewed by SFI prior to the submission to DOE.⁴

Four proposals were determined to be in the competitive range, including those of Delta and SFI. Shortly after the competitive range was established, DOE requested that the Defense Contract Audit Agency (DCAA) audit the cost proposals submitted by the competitive range offerors and their proposed subcontractors. DCAA completed its audit of the Ebon cost proposal on January 22, 1993, and the SFI proposal on February 4, finding both proposals "to be acceptable as a basis for negotiation of a fair and reasonable price."⁵

With respect to Ebon's initial proposal, DCAA recommended a downward adjustment of the firm's proposed fringe, overhead, and general and administrative (G&A) rates. While Ebon's cost proposal was based upon its actual rates for the prior

²Delta was a subcontractor under the incumbent contract for these services, which commenced on December 20, 1991.

³During the 5-year life of the contract, SFI proposed to furnish [deleted] DPLH and Ebon proposed to furnish [deleted] DPLH.

⁴Contrary to Delta's argument, there is authority for the submission to the agency of sealed subcontractor cost proposals without prime contractor review. Federal Acquisition Regulation (FAR) §§ 15.806-2(a); 15.806-3(a)(3). This arrangement may be necessary where, as here, subcontractors are competitors of their prime offerors, and are thus unwilling to disclose their indirect rates and labor rates to the prime offeror. We note that Delta also submitted a sealed subcontractor cost proposal for DOE's independent consideration.

⁵Delta notes that DCAA qualified its audit findings for Ebon because that firm had not prepared budgetary forecasts for the third year of the base period and the option years. While Delta argues that Ebon's evaluated probable cost is therefore inaccurate, we note that DCAA attached the same qualification to its audit report of Delta's cost proposal. In any case, with these qualifications, DCAA provided its opinion of the offerors' and proposed subcontractors' probable costs for these out years, and we do not find these qualifications negated the value of DCAA's expert opinions, such that DOE could not reasonably rely upon them.

year, DCAA found that Ebon had, since the submission of its initial proposal, [deleted].⁶ DCAA found that Ebon's forecasted indirect rates were a sounder measure of Ebon's probable costs than the historical indirect rates reflected in its initial proposal. DCAA also recommended only a very slight upward adjustment of Ebon's proposed direct labor costs, finding that Ebon's labor rates were realistic and were based on Ebon's current rates. DOE accepted DCAA's audit recommendations in the initial cost evaluation of Ebon's proposal.

Discussions on both the cost and technical proposals commenced with the competitive range offerors on December 22. Following two rounds of discussions, DOE requested best and final offers (BAFO) from these offerors by June 7, 1993.

In its response to the BAFO request, Ebon revised the proposed indirect rate structure with regard to fringe, overhead, and G&A indirect costs. Ebon's revised rates differed somewhat from the rates that it had furnished to DCAA on January 12 and that served as the basis for the DCAA audit recommendations. With respect to fringe and G&A rates, Ebon's BAFO rates were approximately midway between its initial proposal rates, which were based on historical rates, and Ebon's forecasted rates, which DCAA approved in its initial audit report; the BAFO rates were lower than the initial proposal rates but higher than the initially forecasted rates. With respect to overhead rates, Ebon's BAFO rate was virtually identical to the rate previously approved by DCAA, but was much lower than Ebon's initial proposal rate. Ebon explained that the rate reductions in its BAFO resulted from [deleted]. Ebon also proposed a ceiling for each of its indirect rates pursuant to an RFP clause that invited offerors to limit the government's liability for any indirect costs in excess of the designated ceilings.⁷ The ceilings that Ebon proposed were significantly higher than the projected indirect rates proposed in its BAFO and even Ebon's initial proposal rates. Finally, Ebon's BAFO adjusted its direct labor rates based upon an annual escalation factor to reflect the most current rates being paid to its employees under each labor category.

After receipt of BAFOs on June 7, the DOE contract specialist transmitted each offeror's and proposed subcontractor's cost information to DCAA for verbal rate verifications. The contract specialist spoke with the DCAA senior auditor responsible for Ebon's proposal on June 9.

⁶[Deleted].

⁷[Deleted].

The contract specialist's contemporaneous notes of this conversation, and his supporting affidavit, reflect that the DCAA auditor verified Ebon's revised labor rates as the rates currently earned by its employees, which the DCAA auditor found acceptable as a basis for estimating probable cost. The DCAA auditor also opined that Ebon's lower fringe benefits were not expected to affect the stability of its work force, inasmuch as it was a large company with many employees. In addition, the DCAA auditor took no exception to Ebon's proposed indirect rates, which she said were consistent with Ebon's revised budget, and stated that Ebon's indirect rate ceilings were appropriate for use in a resulting subcontract.⁸

DOE performed a probable cost evaluation after obtaining DCAA's verbal rate verifications for all BAFOs. With respect to Ebon's BAFO, the agency relied upon the DCAA recommendations and accepted Ebon's proposed direct and indirect rates, without adjustment, as a basis for determining that subcontractor's probable cost. DOE made certain upward adjustments to SFI's proposed costs; but overall, the SFI/Ebon BAFO, which represented low cost offer as submitted, remained low cost as evaluated. In contrast, Delta's BAFO was found to represent the highest proposed and evaluated costs. The results of the respective probable cost evaluations were:

	<u>PROPOSED BAFO COST</u>	<u>PROBABLE COST</u>
Delta	\$8,991,662	\$9,010,889
SFI	\$7,248,263	\$7,890,359

⁸Delta asserts that the DCAA auditor actually recommended that the ceiling rates be used in the probable cost analysis. In this regard, Delta points to the comments attributed to the DCAA auditor in the contract specialist's contemporaneous notes, namely, that Ebon's "[indirect rates] are acceptable. . . . Ceilings OK to use." Delta interprets this statement as a recommendation to use the ceiling rates, rather than the indirect rates, to determine Ebon's evaluated probable cost. Contrary to Delta's interpretation, we read the notes to evidence a recommendation from DCAA that DOE accept Ebon's indirect rates for the probable cost analysis but that the ceilings could also be included in a resulting contract. This interpretation is consistent with the explanation given in the contract specialist's affidavit.

The agency's final technical evaluation awarded Delta the highest score of 953 points and SFI the next high score of 942 points. The Source Selection Official (SSO) determined Delta's proposal to be "essentially technically equivalent" to SFI's proposal and specifically noted that Delta's evaluated probable cost was \$1,120,530, or 14 percent, higher than SFI's probable cost. In accordance with the evaluation criteria, the SSO determined that Delta's slight technical superiority was not worth the additional cost. On June 21, DOE awarded the contract to SFI. This protest followed.

Delta protests that DOE's cost realism analysis of Ebon's proposal was unreasonable. Specifically, Delta contends that DOE could not reasonably accept Ebon's direct labor rates as realistic and that DOE should have calculated Ebon's probable indirect costs based upon Ebon's proposed ceiling rates.

When agencies evaluate proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d); Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.-Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183, aff'd, American Mgmt. Sys., Inc., Department of the Army--Recon., 70 Comp. Gen. 510 (1991) 91-1 CPD ¶ 492; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

DOE's evaluation of Ebon's proposed direct labor rates was reasonable. The agency obtained DCAA's verification that Ebon's proposed rates were the current rates being paid by Ebon to employees in comparable positions at the time the firm submitted its BAFO, and that these rates were realistic. The contracting agency properly could rely upon this DCAA advice in performing its cost realism analysis, in the absence of evidence showing that the rates were unrealistically low. Systems Research Corp., B-237008, Jan. 25, 1990, 90-1 CPD ¶ 106; NFK Eng'g, Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497; see also Purvis Sys. Inc., 71 Comp. Gen. 203 (1992), 92-1 CPD ¶ 132.

While the protester "does not dispute that the Ebon labor rates were in fact the historic incurred rates at the time of the DCAA audit," Delta argues that Ebon's revised rates should be considered unreasonable because they are allegedly much lower than the labor rates proposed by Ebon's prime contractor, SFI, for three of the eight labor categories.⁹ At the outset, we do not agree that the labor rates proposed by Ebon are much lower than those proposed by SFI. Ebon's rates are [deleted] for all individuals within the same labor category, while SFI's rates are [deleted] for several individuals within the same category. Ebon's proposed [deleted] rates fall within the range of [deleted] rates that SFI is currently paying to its employees within each labor category.¹⁰

In any case, the agency had a reasonable basis for confidence in Ebon's proposed labor rates, having obtained DCAA's verification that the proposed rates reflected Ebon's actual rates and that Ebon had historically maintained a stable work pool with its rate structure. See United Int'l Eng'g, Inc., et al., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122; ERC Envtl. and Energy Servs. Co., B-241549, Feb. 12, 1991, 91-1 CPD ¶ 155. While the protester argues that Ebon will be forced to pay higher labor rates than it proposed to maintain a stable work force because its employees will expect salary increases [deleted] policy had been operative for over 5 months at the time Ebon submitted its BAFO, without any reported discernible effect on either Ebon's proposed labor rates or workforce stability. The contract specialist also specifically asked DCAA whether Ebon's

⁹Delta does not question the reasonableness of SFI's labor rates.

¹⁰Delta also speculates that, while Ebon's proposal states that it intends to pay one senior technical support specialist a higher rate than actually proposed, a rate commensurate with SFI's lower-end rates, and that Ebon would absorb the difference in cost, Ebon may charge the excess costs expended on this position to one of its indirect cost pools. Delta therefore asserts that Ebon's costs should be adjusted to reflect this individual's actual rates. Delta's argument assumes that Ebon will perform the subcontract in bad faith and that the government will not monitor the contract costs; these are assumptions for which there is no basis in the record. See Robocom Sys., Inc., B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513. In any case, increasing this individual's rates as proposed by Delta would not materially elevate Ebon's evaluated probable cost. However, to avoid misunderstandings as to the intent of the parties, such promises should be expressly incorporated into the contracts awarded. See FAR § 31.109.

indirect cost reductions would threaten the stability of its work force, and was assured that Ebon's very large labor pool and strong financial capability minimized any significant risk in this regard.

Against this evidence, Delta, the incumbent subcontractor, has furnished the affidavits of two of its employees, whom Ebon contacted for employment interviews and furnished with salary estimates. Delta argues that these salary estimates exceeded Ebon's proposed labor rates for jobs corresponding to the employees' current positions and show that Ebon does not intend to adhere to the labor rates stated in its proposal. However, it is not at all clear from the affidavits what positions Ebon was prepared to offer these individuals, neither of whom accepted the offers. According to the affidavits, the salary estimates these employees received were consistent with Ebon's labor rates for jobs for which these individuals might be eligible for promotion--a reasonable measure to attract incumbent personnel. Thus, Delta has failed to persuade us that Ebon intends to inflate its proposed labor rates or, more generally, that these rates are unrealistic and unreliable.

Delta also contends that DOE improperly evaluated Ebon's indirect costs, which Delta alleges should have been based upon the firm's proposed indirect ceilings, not the lower forecasted indirect rates accepted by DCAA. Delta observes that Ebon's proposed ceilings greatly exceed its projected indirect rates. In Delta's view, these higher ceilings exhibit Ebon's lack of confidence in the projected rates and means that the government will ultimately reimburse the contractor up to level of Ebon's ceilings.

As discussed above, Ebon, in its BAFO, lowered its indirect rates from the actual rates incurred the previous year and offered in its initial proposal, to reflect [deleted]. Although these proposed BAFO rates had not been audited by DCAA, DCAA found them to best represent Ebon's probable costs, based on DCAA's knowledge of Ebon's accounting system and budget. Based upon the foregoing, DOE could reasonably find that Ebon's proposed indirect rates were a more accurate index of its proposal's probable cost than its significantly higher ceiling rates.¹¹ See Technical Resources, Inc., B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176. In this regard, Delta has not explained why Ebon's ceilings are more realistic than the much lower projected indirect

¹¹In this regard, we note that the ceiling rates were even higher than the historical indirect rates, which Ebon proposed in its initial proposal before it restructured its indirect expense pools and which DCAA found were too high.

rates, except to argue that DOE should have conservatively accepted the higher ceiling rates to defend against potential cost overruns.

It is true that we have often approved an agency's use of indirect cost ceilings in calculating an offer's probable cost. Such ceilings are a powerful tool for agencies to address concerns about potential cost growth in a cost-reimbursement environment. Id. However, indirect ceiling rates that are not likely to actually limit the costs that will be incurred by the contractor and reimbursed by the government are not useful in a probable cost analysis. Here, the agency reasonably does not expect the offeror to approach the ceiling rates, and properly did not use them in estimating the likely costs of performance. See PTI Env'l. Servs., B-230070, May 27, 1988, 88-1 CPD ¶ 504.

In any case, there is no possibility of prejudice arising from the alleged improper evaluation of Ebon's indirect costs. Even if DOE had used Ebon's ceiling rates in its probable cost analysis, as Delta suggests, these rates would have only increased the awardee's total probable cost by approximately [deleted], still well below the protester's evaluated probable cost. Given that the awardee's and protester's technical proposals were determined essentially equal, the stated increase in the awardee's evaluated cost would not have affected the source selection.¹² See OAO Corp., B-228599.2, July 13, 1988, 88-2 CPD ¶ 42.

The protest is denied.

James F. Hinchman
General Counsel

¹²Similarly, we fail to see how the protester was prejudiced by the agency's use of Ebon's revised indirect rates, which allegedly lack the reliability of the rates that Ebon forecast in January 1993 and that DCAA more fully audited and recommended. Since Ebon's January rates were even lower than the revised rates that DOE used in its probable cost analysis, the protester is not assisted by this argument.