



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Department of the Air Force; Defense Contract Audit Agency; Canadian Commercial Corporation/Heroux, Inc.--Reconsideration

File: B-253278.3; B-253278.4; B-253278.5

Date: April 7, 1994

Robert Allen Evers, Esq., Gardner, Carton & Douglas, for the protester.
Ricke D. Hamilton, Esq., and Gregory H. Petkoff, Esq., Department of the Air Force, and John N. Ford, Esq., Defense Contract Audit Agency, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Statement in Conference Report on the 1994 Department of Defense (DOD) Appropriations Act regarding the meaning of the 1993 DOD Appropriations Act provides no basis for the General Accounting Office (GAO) to reverse a prior decision sustaining a protest on the basis that the Defense Contract Audit Agency improperly certified the proposal of a DOD depot pursuant to section 9095 of the 1993 DOD Appropriations Act, where the 1993 Appropriations Act language was clear.
2. The General Accounting Office affirms prior decision that the Defense Contract Audit Agency (DCAA) acted unreasonably in certifying, pursuant to section 9095 of the 1993 Department of Defense (DOD) Appropriations Act, a proposal submitted by a DOD depot as including comparable estimates of all direct and indirect costs at the depot's proposed price of \$14.1 million, where, based on an audit, DCAA concluded that the proposal costs were understated by \$1.3 million, primarily because DCAA found that the labor efficiencies, on which the proposal's labor hours were based, were overstated.

DECISION

The Department of the Air Force, the Defense Contract Audit Agency (DCAA), and the Canadian Commercial Corporation/Heroux, Inc. (Heroux) request reconsideration of our decision, Canadian Commercial Corp./Heroux, Inc., 72 Comp. Gen. 312 (1993), 93-2 CPD ¶ 144, in which we

sustained Heroux's protest against a work assignment to the Department of the Air Force, Ogden Air Logistics Center, Financial Management Plans and Program Division (FMP), for the repair and overhaul of aircraft landing gear and landing gear components. The work assignment had been made under request for proposals (RFP) No. F42600-92-R-2053, issued by the Air Force, on which FMP and various private firms, including Heroux, submitted proposals. Our decision recommended that the FMP work assignment be terminated and award made to Heroux.

We affirm our prior decision.¹

The competition was conducted pursuant to statutory authorization contained in the Department of Defense (DOD) Appropriations Act, 1993, Pub. L. No. 102-396, § 9095, 106 Stat. 1876, 1924 (1992) (1993 Appropriations Act) and the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 381, 106 Stat. 2315, 2392 (1992). These statutes permit DOD to acquire the repair of aircraft components through competition between DOD depot maintenance activities and private firms with the proviso that DCAA "certify that the successful bids include comparable estimates of all direct and indirect costs for both public and private bids."

The RFP contemplated the award of a firm, fixed-price contract with certain cost reimbursable elements for a base year with two 1-year options. The RFP requested the submission of technical, cost/price, and past performance proposals, and contained detailed instructions regarding the preparation of the proposals. The RFP required that the cost/price proposal include, among other things, "enough information to judge if the estimating methodology is reasonable, to determine [whether] the scope of the estimate is realistic, and that all requirements priced in the proposal are complete."

¹Heroux states that it filed its request for reconsideration "protectively," that is, in the event that we grant DCAA's and the Air Force's requests for reconsideration, Heroux requests that our Office consider the arguments raised by Heroux in its original protest that improper discussions were held with FMP regarding its price proposal, that FMP gained an unfair competitive advantage because certain FMP personnel participated in the drafting of the solicitation, and that the Air Force personnel who evaluated FMP's personnel have a conflict of interest and are biased. We did not address these arguments in our prior decision because of our recommendation that award be made to Heroux. Because we affirm our prior decision, we again find it unnecessary to consider these arguments.

The solicitation also provided at section L-349, "Submission of Proposals by DOD Sources," that DOD sources may submit proposals in response to the solicitation. This section of the RFP specified that DOD proposals "shall include the amounts for all direct and indirect costs including factors, rates and supporting information as appropriate for audit," and that "[e]ach proposal will be manually adjusted to provide equitable cost comparability." The RFP stated at section M-349, "Cost Comparability Adjustments by DOD Sources," that the Cost Comparability Handbook (CCH), developed by the Defense Depot Maintenance Council Cost Comparability Committee, would be used to manually adjust proposals submitted by DOD sources, and that copies of the handbook would be provided to requesting interested parties.

The RFP provided that award would be made to the responsible offeror whose offer was determined to best meet the needs of the Air Force at a reasonable price, and listed the following evaluation criteria in descending order of importance: management, technical, cost/price, past performance. The solicitation encouraged offerors to submit their best offers in their initial proposals because the agency intended to make award on the basis of initial proposals without discussions.

The agency received eight proposals by the RFP's November 17, 1992, closing date. The proposals were evaluated by the Source Selection Evaluation Team (SSET), with FMP's proposal receiving an overall score of 74 out of 100 points at a proposed price of \$14,139,712, and Heroux's proposal receiving an overall score of 76 at a proposed price of \$15,237,394. The SSET determined that FMP's and Heroux's proposals were acceptable for award without discussions as they had received the highest technical scores and were the lowest priced. FMP's cost proposal was provided by the agency to DCAA, with the request that DCAA "audit and certify that [FMP's] cost proposal . . . is in compliance with the [CCH]."

DCAA found in its audit of FMP's proposal that FMP had understated its costs by \$1,286,863. Approximately \$1,059,569 of this amount resulted from DCAA's conclusion that the staffing proposed in FMP's proposal, which was based on a projected 95 percent labor efficiency for the base year and 2 option years of the work assignment, was understated by 18,040 hours.² In arriving at this calculation, DCAA determined, based on its review of FMP's historical rates for direct labor hours as well as FMP's

²The net adjustment resulted in an evaluated total of 207,862 hours for FMP's proposal. Heroux, the incumbent contractor, proposed a total of 232,365 hours.

proposed management plan and manpower projections, that FMP's proposed 95 percent efficiency for direct labor hours was unrealistic and would not be attained, and that efficiency rates of 87 percent for the base year, 91 percent for the first option year, and 94 percent for the second option year, were more likely to be achieved by FMP.³ The remaining difference in FMP's proposed costs and the costs determined by DCAA (\$227,594) was based on DCAA's determination that FMP had understated its costs by varying amounts in the areas of production overhead, manufacturing support, fringe benefits, and cash awards, and that FMP had failed to comply with the CCH in the preparation of some areas of its proposal. DCAA concluded that the total cost of FMP's proposal, including all direct and indirect costs and cost comparability adjustments per the CCH, was \$15,426,575. Nevertheless, DCAA stated in its audit report that FMP's proposal "was acceptable for evaluation."

In response to a query by the Air Force, DCAA stated that the phrase "acceptable for evaluation" constituted DCAA's certification of FMP's proposal at FMP's proposed cost of \$14,139,712. The Air Force, in its source selection, considered FMP's proposal at its proposed cost, and selected FMP as the offeror whose proposal offered the best overall value, given that its proposal was considered essentially technically equal to Heroux's and offered the lowest cost.⁴

On April 30, 1993, Heroux protested to our Office that the work assignment to FMP was improper, contending, among other things, that DCAA had not complied with the requirement in section 9095 of the 1993 Appropriations Act "[t]hat [DCAA] shall certify that successful bids include comparable estimates of all direct and indirect costs for both public and private bids." Heroux specifically argued that DCAA's certification of FMP's proposal at FMP's proposed price of \$14,139,712 was arbitrary and unreasonable in light of DCAA's determination that FMP had understated its proposed

³FMP's labor efficiency for fiscal year 1992, the most recent full year for which data is available, was 84 percent.

⁴The Air Force accounted for the DCAA projection of FMP's cost as \$15,426,575 by assigning FMP's proposal a moderate cost risk. The Air Force did not otherwise evaluate FMP's cost at this higher level. Cost risk was not identified as an evaluation factor under the RFP. Ordinarily, where, as here, cost is evaluated for purposes of making a source selection decision, the proposed costs should be projected to the determined probable cost of a particular offeror's proposal, and not merely assigned a risk rating. See CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542.

costs by \$1,286,863, and that the work assignment to FMP should be terminated and award made to Heroux.

We sustained the protest, agreeing with Heroux that DCAA acted unreasonably in certifying that FMP's proposal, at its proposed price of \$14,139,712, "include[d] comparable estimates of all direct and indirect costs."⁵ In reaching our decision, we expressly agreed with DCAA's stated position that, under section 9095 of the 1993 Appropriations Act, it was required to determine whether FMP's costs were fairly stated or reasonable in order to certify that FMP's proposal included comparable estimates of all direct and indirect costs.⁶ We found, however, that DCAA had not properly certified FMP's proposals because DCAA's determination that FMP's proposed costs were fairly stated at FMP's proposed price of \$14,139,712, essentially ignored the findings presented in DCAA's audit report that FMP's costs were understated by \$1,286,863.

Based on the contents of DCAA's audit report and the testimony of DCAA personnel at the hearing, we concluded that FMP's proposal could only be certified by DCAA as including comparable estimates of all direct and indirect costs and comparability adjustments at the upward adjusted cost of \$15,426,575. Because the certifiable cost of \$15,426,575 was higher than Heroux's firm, fixed price of \$15,237,394, and because Heroux's proposal was at least technically equal to FMP's, it was clear from the record that Heroux's offer should have been selected for award under the RFP evaluation scheme. We therefore recommended that the work assignment to FMP be terminated and award made to Heroux. These requests for reconsideration followed.

The Air Force and DCAA contend that the following language in the Conference Report of November 6, 1993, accompanying the DOD Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418 (1993), mandates the reversal of our prior decision:

⁵A hearing was held during our consideration of the protest at which certain of the issues raised were addressed by the parties. Our conclusions in our prior decision were based on the testimony at the hearing as well as the written submissions of the parties.

⁶DCAA played an active role in the initial bid protest. In addition to the participation of DCAA's counsel in the hearing, at which two DCAA auditors testified, DCAA submitted comments in response to our request that DCAA explain its "interpretation and implementation of section 9095" of the 1993 Appropriations Act. Video Transcript (VT) 14:40:58.

"Section 9095 of the fiscal year 1993 Defense Appropriations Act required certification of both public and private bids for depot maintenance contracts by the [DCAA]. The conferees wish to clarify their intent that, for competitions carried out under this provision, DCAA audit reports containing an opinion that a bid was prepared in accordance with the DOD Cost Comparability Handbook and is acceptable for evaluation shall be considered a valid certification. The inclusion of findings questioning costs as either understated or overstated are to be considered of an advisory nature only, unless specifically stated by DCAA." H.R. Conf. Rep. No. 339, 103d Cong., 1st Sess. 49 (1993).

The Air Force and DCAA maintain that this expression of intent in the Conference Report on the 1994 DOD Appropriations Act establishes that our interpretation of the earlier appropriation act was in error. The conferees intention--that DCAA opinions about whether proposed costs are understated or overstated be advisory only--was enacted into law in section 8068 of the 1994 DOD Appropriations Act. That provision removed DCAA from its certification role after October 1, 1993, as follows:

"[t]he Senior Acquisition Executive of the military department or defense agency concerned, with power of delegation, shall certify that successful bids include comparable estimates of all direct and indirect costs for both public and private bids." DOD Appropriations Act, 1994, Pub. L. No. 103-139, § 8068, 107 Stat. 1418, 1455 (1993).

As a result, since October 1, 1993, DCAA audit reports have been advisory only because the procuring agency is now responsible for certifying bids. However, the competition at issue in this case took place in fiscal year 1993 and the language of section 9095 of the 1993 DOD Appropriations Act applicable to that competition is clear and unambiguous--a certification by DCAA is a precondition to award.' We see

⁷The Senate Report accompanying the bill enacted as the 1993 Appropriations Act states that DCAA is required "to certify that winning bids under public/private competitions have included all labor and non-labor costs." S. Rep. No. 408, 102d Cong., 2d Sess. 346 (1992). This language is consistent with the statute itself, and, to the extent that
(continued...)

no way to give effect to the contrary approach suggested by the Conference Report accompanying the 1994 DOD Appropriations Act. As stated above, we agree with DCAA's interpretation that in order for it to comply with the requirement that it "certify that the successful bids include comparable estimates of all direct and indirect costs," DCAA was required to determine whether the successful offeror's costs were fairly stated and reasonable.

DCAA also argues that our Office has no authority to review DCAA's actions in this or any other procurement where DCAA is not the procuring agency, and that, in determining that DCAA's certification of FMP's proposal was unreasonable, our decision did not properly defer to DCAA's interpretation of section 9095 of the 1993 Appropriations Act.

The authority of our Office to decide bid protests is established by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (1988). CICA provides that the Comptroller General shall decide protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552. The 1993 Appropriations Act is the statute that authorizes DOD to procure the repair of aircraft components through competition between DOD depot maintenance activities and private firms and is, therefore, a "procurement statute." Thus, CICA grants our Office authority to consider protests that the 1993 Appropriations Act's certification requirements were not followed. See generally RJP Ltd., 71 Comp. Gen. 333 (1992), 92-1 CPD ¶ 310.

DCAA's argument that we did not properly defer to its interpretation of section 9095 of the 1993 Appropriations Act is predicated on DCAA's misunderstanding of our decision. As stated in our decision, "[w]e agree with DCAA's position that, under section 9095 of the [1993] Appropriations Act, it was required to determine whether FMP's costs were fairly stated or reasonable in order to certify that FMP's proposal included comparable estimates of all direct and indirect costs."

⁷(...continued)

it aids in the understanding of Congress's intent with regard to DCAA's role, it reiterates the requirement that DCAA "certify" bids. The Conference and House Reports are silent with regard to DCAA's role. See H.R. Conf. Rep. No. 1015, 102d Cong., 2d Sess. 53 (1992); H.R. Rep. No. 627, 102d Cong., 2d Sess. 54-55 (1992).

We did find, however, that DCAA's certification of FMP's proposal was unreasonable under DCAA's stated position. As discussed in our prior decision, in competitions between DOD entities and private firms, the offer of the DOD entity is more closely analogous to a cost reimbursement type contract offer, rather than the fixed-price offer of the private firm, because, absent contractually authorized changes, the government is not legally obligated to pay a private firm more than the offered price, while the government will pay for any cost overruns by a DOD entity from public funds. Hoboken Shipyards, Inc., B-224184.2, Jan. 20, 1987, 87-1 CPD ¶ 70; Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23, aff'd on recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428.^a

Thus, in order to ascertain whether a depot proposal's costs are fairly stated or reasonable so it can be said that they include "comparable estimates of all direct and indirect costs," the certification process should include a cost realism analysis so that the required comparability certification is based on a reasoned judgment of the actual cost to the government if a DOD depot receives the award. A certification process which only ascertains how the offer was prepared and what elements were contained in the offer, but does not include a review as to the reasonableness and quantum of the cost elements of the offer, would render the certification meaningless. Newport News Shipbuilding and Dry Dock Co., B-221888, supra. Specifically, where, as here, the labor costs are believed to be significantly understated, the proposal cannot reasonably be said to be fairly stated or reasonable, and the offer therefore cannot be reasonably certified. Id.

^aThe competitions in Newport News Shipbuilding and Dry Dock Co., and Hoboken Shipyards, Inc. were conducted under statutory authority set forth in Title II of the Defense Appropriations Act for fiscal year 1986, Pub. L. No. 99-190. That Act appropriated funds for a test program to acquire the overhaul of four or more vessels by competition between public and private shipyards, and provided in pertinent part:

"The Secretary of the Navy shall certify, prior to award of a contract under this test, that the successful bid includes comparable estimates of all direct and indirect costs for both public and private shipyards."

The only real difference between the prior provisions and the 1993 Appropriation Act proviso is that under the latter authority the certification is to be made by DCAA.

In sum, our determination that DCAA did not act reasonably in certifying FMP's proposal was not based on an interpretation of section 9095 of the 1993 Appropriations Act contrary to that of DCAA's. Rather, we agreed with DCAA's position that under section 9095 it was required to determine whether FMP's costs were fairly stated or reasonable in order to certify FMP's proposal, but found that DCAA's certification of FMP's proposal costs was contradicted by DCAA's own findings, presented in its audit report, that showed FMP's costs were not fairly stated or reasonable.

The Air Force argues, as it did during the consideration of our prior decision, that even though section 9095 of the 1993 Appropriations Act specifically requires that DCAA certify that successful bids include comparable estimates of all direct and indirect costs, DCAA's determinations in this regard constitute nothing more than advice to the agency as to DCAA's estimate of costs which need not be followed. We disagree.

As discussed in our prior decision, section 9095 of the 1993 Appropriations Act requires that DCAA "certify" the successful bid as a condition of award; such a mandatory certification cannot reasonably be said to be "advisory." As such, DCAA's role under section 9095 of the 1993 Appropriations Act is different from the advisory role that it ordinarily plays of providing audit recommendations as to the cost realism of offerors' proposals in response to solicitations contemplating the award of cost reimbursement contracts, which the agency is not bound to accept. See e.g., Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16.

The Air Force argues that DCAA acted reasonably in certifying FMP's offer at its proposed price, and again challenges DCAA's assessment of FMP's labor efficiency rates in the audit report, arguing that DCAA takes a "conservative approach" to auditing. The Air Force also contends that our Office erred as a matter of law when we allegedly substituted our own certification for that of DCAA by concluding that FMP's proposal could only be certified by DCAA at \$15,426,575--the amount that DCAA had determined FMP's performance would cost the government. DCAA also claims that our decision is in error because only DCAA can certify a bid as containing comparable estimates of all direct and indirect costs, and neither DCAA nor our Office can certify a bid at a different figure than that proposed by an offeror.

As recognized in our prior decision, we agree that only DCAA is vested with the authority to certify FMP's proposed costs. However, here DCAA could not reasonably certify

FMP's proposal, given its audit findings that FMP's realistic cost was over \$1.3 million higher. In reaching our conclusion that FMP's proposal could only be certified by DCAA as including comparable estimates of all direct and indirect costs, as required by section 9095 of the 1993 Appropriations Act, at the upward adjusted cost of \$15,426,575, we expressly adopted the opinions set forth by DCAA in its audit report of FMP's proposal, and those of the DCAA personnel who testified at the hearing.

As discussed in our prior decision, the bases of DCAA's conclusions have been substantiated and explained at length, with no indication of uncertainty on DCAA's part as to its conclusion that FMP's proposal was understated by \$1,286,863. See VT 12:12:45; 12:13:40; 12:13:58; 12:35:01; 14:35:58; 14:37:52. Specifically, DCAA maintained that its assessment of FMP's labor efficiency rates was accurate while that of FMP was not, and that because of this FMP's proposal did not include all direct and indirect costs. VT 12:13:58. While the Air Force continues to challenge DCAA's assessment of FMP's labor efficiency rates, asserting that FMP is more cognizant of its projected labor efficiencies than DCAA, it has produced no evidence that DCAA's judgment was unreasonable. DCAA stated that in order for FMP's proposal to be comparable, it would have to be adjusted upward by \$1,286,863 to \$15,426,575, VT 12:35:58, and that the cost to the government of FMP's performance will be \$15,426,575. VT 12:12:45; 12:13:40; 14:35:01; 14:37:52. We noted that while the DCAA audit report included the statement "DCAA does not approve or recommend prospective costs because the amounts depend partly on factors outside the realm of accounting expertise, such as opinions on technical and production matters," the record showed that DCAA was firmly of the view that FMP's costs would approximate \$15,426,575 based on its audit findings. VT 12:12:45; 12:13:40; 12:35:58; 14:37:52. Finally, DCAA still does not assert in its request for reconsideration that its audit report or auditors were incorrect in determining that the most likely cost to the government of FMP's performance will be \$15,426,575. While the Air Force asserts that FMP's proposed costs should be considered a more accurate representation of its costs, as opposed to DCAA's audit, it has not argued or shown that DCAA's upward adjustments to FMP's proposed costs were unreasonable.

Thus, contrary to the Air Force's characterization, we did not "certify" FMP's proposal at any price. Rather, we determined that DCAA could not reasonably certify FMP's proposal, given DCAA's own audit findings regarding the amount that FMP's proposal should total, including all direct and indirect costs and comparability adjustments in accordance with the CCH, and found that, based on the record and adopting DCAA's audit findings, FMP's proposal could

only be reasonably certified if it was at \$15,426,575.⁹ This meant that FMP was not in line for award under the RFP evaluation scheme, given Heroux's lower fixed price and higher technical score, and there was no need for FMP's proposal to be certified at a higher cost. As such, the Air Force's source selection, which relied upon DCAA's purported certification of FMP's proposed costs, was in error, given DCAA's findings that FMP's probable costs are higher than the fixed price of Heroux's technically higher rated proposal.

The Air Force next alleges that our decision is based, in part, on "evidence [that] was never before the parties," specifically referencing footnote 9 of our prior decision where we noted that DCAA's conclusion that FMP's labor efficiency rates were unrealistic was consistent with the findings of our Office as set forth in the audit report Air Force Depot Maintenance: Improved Pricing and Financial Mgmt. Practices Needed, GAO/AFMD-93-5, November 17, 1992. The Air Force states that it was "never on notice" that this report would be considered.

The Air Force is incorrect in its assertion that reference to the audit report constituted the consideration of "evidence outside the record." The protester cited to and quoted extensively from the Air Force Depot Maintenance audit report in its June 21, 1993, comments on the agency report. As such, the Air Force was clearly on notice of the introduction of the audit report into the record before our Office, and because the protester's June 21 comments were followed by the Air Force's submission of a supplemental report in response to the protester's June 21 comments, as well as the Air Force's submission of post-hearing comments, the Air Force had ample opportunity to comment on the audit report. In any event, this "evidence" should be considered in the context in which it appeared--a footnote that merely noted that DCAA's findings regarding FMP's labor efficiency rates were consistent with the findings made in an audit report issued by our Office.

The Air Force next advances a series of arguments that, even assuming that we properly decided that DCAA's certification of FMP's proposal was unreasonable, our recommendation that award be made to Heroux was improper and should be modified.

⁹Based on the record, which confirmed the reasonableness of DCAA's audit findings, there was no other figure on which a DCAA certification could be based. Obviously, if DCAA's audit findings as to FMP's realistic cost had approximated FMP's proposal, rather than being more than \$1 million distant, its certification would have been reasonably based; however, that was not the case here.

The agency first contends that DCAA should be given the opportunity to again audit FMP's proposal, because our prior decision "might--in the DCAA's professional judgment--impact the exact comparable dollar estimate they are prepared to certify under section 9095" of the 1993 Appropriations Act. This argument provides no basis to modify our recommendation. The DCAA audit report is extremely detailed and reflects over 200 hours of DCAA's time. VT 14:34:18. As discussed above, DCAA's conclusions have been substantiated and explained at length by DCAA, with no indication of uncertainty on DCAA's part (even on reconsideration) as to its conclusion that FMP's proposal was understated by \$1,286,863. Thus, we see no reason why DCAA should be requested to audit, for a second time, the same FMP proposal, inasmuch as DCAA's determination that FMP's proposal, properly priced including all direct and indirect costs and comparability adjustments in accordance with the CCH, should total \$15,426,575, was already based on DCAA's professional judgment as auditors.

The Air Force also contends that our recommendation of an award to Heroux is flawed because Heroux's proposal has yet to be certified by DCAA, as required by section 9095 of the 1993 Appropriations Act. The Air Force apparently misunderstands our recommendation. In accordance with the terms of section 9095 of the 1993 Appropriations Act, DCAA must certify that the bid of the successful offeror includes comparable estimates of all direct and indirect costs, regardless of whether the successful offeror is a DOD depot or a private firm. Our recommendation contemplates that the Air Force will obtain whatever legal clearances it believes are necessary, including DCAA's certification, prior to making award to Heroux. In this case, however, DCAA's certification of Heroux's firm, fixed-price proposal would appear to be a ministerial act,¹⁰ given that the agency is not legally obligated to pay Heroux more than its offered

¹⁰As stated by the Air Force, DCAA's considerations in determining whether to certify a private firm's proposal, such as Heroux's, are different than the considerations of DCAA when it reviews the proposal of a DOD entity for certification purposes, in that where an agency contemplates the award of a competitive, firm, fixed-price contract to a private firm, DCAA assumes the reasonableness of the private firm's proposed price on the basis of the competitive process. VT 15:12:18; 15:13:28. In contrast, as discussed above, offers by government depots are more closely akin to cost reimbursement contracts with private firms, under which the government is liable for all costs, and thus a more detailed review of such offers is necessary.

price, and there is no suggestion that Heroux's proposal represented a buy-in.¹¹

In its request for reconsideration, the Air Force argues for the first time that "Heroux, in total cost terms, actually has a hybrid bid." The agency contends that if award is made to Heroux, the landing gear components to be repaired will have to be moved from the United States to Heroux's facility in Quebec, Canada, at the government's cost, and that the CCH requires that these costs be added to Heroux's offer for evaluation purposes.

We disagree with the Air Force on this point. The RFP does not state anywhere that these claimed transportation costs will be added to the offers of private firms for evaluation or certification purposes, and the Air Force did not apply any such evaluation factor to the seven proposals submitted by private firms during its previous evaluation.¹² Thus, we see no basis on which these alleged costs can be considered in evaluating Heroux's offer. See Environmental Technologies Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202 (agency may not use unstated cost factors in calculating an offeror's evaluated price). Additionally, to the extent that the CCH requires the calculation of such transportation costs, it is clear from the RFP that "the [CCH] will be used to manually adjust proposals submitted by DOD sources," and not proposals submitted by private firms. Further, Heroux challenges the factual basis for the Air Force's assertion that additional transportation costs will be incurred by the Air Force if award is made to Heroux, asserting that the parts to be repaired come from all over the world, and that the transportation costs to ship the parts to Heroux or FMP should be equivalent, and in any case cannot be quantified. Based on the record, we find no basis to adjust Heroux's price to account for these previously undisclosed transportation costs. Id.

The Air Force next contends that, because FMP's upward adjusted price of \$15,426,575 is relatively close to Heroux's firm, fixed-price offer of \$15,237,394, and FMP's and Heroux's technical proposals received relatively equal technical ratings (74 for FMP and 76 for Heroux),

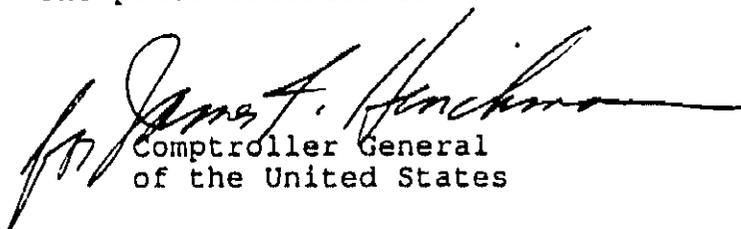
¹¹As noted above, Heroux's proposed hours significantly exceed FMP's proposed hours and even the FMP hours as projected as reasonable by the DCAA. Also, Heroux's proposal was certified as reasonable by cognizant officials of the government of Canada.

¹²While the RFP did contain some cost reimbursable elements applicable to both the depot and private offerors, transportation costs was not one of them.

discussions followed by a request for best and final offers (BAFO) are needed in order to determine which offer should be selected for award under the RFP's best value evaluation scheme. We disagree.

The agency's assertion here is contrary to the representations made by it during the initial protest. For example, with regard to the technical merit of FMP's and Heroux's proposals, the document in support of the competitive range determination states that proposals submitted by FMP and Heroux "had no substantial drawbacks requiring the issuance of clarification requests or discrepancy reports (CR or DR), and are therefore considered eligible for award without discussions." Similarly, the SSET's proposal analysis report states that "[a]fter conducting the evaluations, the SSET determined that two sources, Heroux [and FMP], were eligible for award without discussions," noting that "[n]o CRs or DRs were generated for either Heroux [or FMP]." With regard to the price proposals submitted by Heroux and FMP, the agency contract price analyst for this procurement testified that there was no need for discussions, and to request BAFOs without discussions would constitute "auctioneering." VT 15:21:30. Further, the Air Force has not made any credible showing as to why discussions are now necessary; for example, the Air Force has not pointed to any weaknesses or uncertainties that exist in the offerors' technical proposals and need to be corrected so that the proposals meet the Air Force's needs, nor has the agency explained why discussions as to cost will not result in an impermissible auction as it maintained previously.

The prior decision is affirmed.


Comptroller General
of the United States