



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: Combat Systems Development Associates Joint Venture;
Department of the Navy--Reconsideration; Vitro Corporation--
Reconsideration

File: B-259920.3; B-259920.4; B-259920.5

Date: September 8, 1995

William Weisberg, Esq., and William Welch, Esq., Barton Mountain & Tolle, for the protester.

L. Graeme Bell III, Esq., and Christopher M. Farris, Esq., Crowell & Moring, for Vitro Corporation, an interested party.

Margaret A. Alfano, Esq., Department of the Navy, for the agency.

Tania L. Calhoun, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's reevaluation of awardee's cost proposal--pursuant to General Accounting Office recommendation in prior decision to do so--is reasonable where the record shows that the contracting agency considered the aspects of the awardee's proposed use of uncompensated overtime that it had previously failed to consider, and made appropriate adjustments to the awardee's evaluated costs which did not change the outcome of the award decision; protester's mere disagreement with the agency's conclusions does not render the cost reevaluation unreasonable.
2. Request for reconsideration of prior decision sustaining protest is denied where the request is largely academic because the agency has taken the corrective action suggested--i.e., has considered the aspects of the awardee's proposed use of uncompensated overtime that it had previously failed to consider--and has reasonably concluded that its original award decision should stand, and where the request otherwise fails to show that reversal or modification of prior decision is warranted.

DECISION

Combat Systems Development Associates Joint Venture (CSDA) protests the Department of the Navy's decision to affirm its award of a contract under request for proposals (RFP) No. N00024-94-R-6360 to Vitro Corporation after having implemented our recommendation in Combat Sys. Dev. Assocs. Joint Venture, B-259920.2, June 13, 1995, 95-2 CPD ¶ _____. In that decision, we sustained CSDA's protest of the original award to Vitro on the basis that the Navy improperly evaluated Vitro's cost proposal. CSDA now argues that the Navy has improperly reevaluated Vitro's cost proposal in implementing our recommendation. In addition, the Navy and Vitro request reconsideration of our prior decision sustaining CSDA's earlier protest.

We deny the protest and the requests for reconsideration.

BACKGROUND

The solicitation sought offers for a cost-plus-fixed-fee level-of-effort contract for technical and engineering support services for the Surface Ship Anti-Submarine Warfare Combat System Program Office over a period of approximately 5 years. The RFP stated that the Navy would select the technically acceptable offeror whose proposal offered the greatest value to the government, and structured the evaluation to consider technical issues, which are not at issue here, and proposed costs. The Navy would consider the realism of the proposed costs, and develop an evaluated cost for each offeror's proposal. To establish the relative balance between technical advantage and proposed cost, the RFP set forth a formula for calculating the cost premium the agency would pay for additional technical merit.¹

The Navy received initial proposals from three offerors. Technical proposals were reviewed by the technical evaluation review panel, and cost proposals were reviewed by the cost analysis panel (CAP); both panels submitted reports to the contract award review panel (CARP). The CARP recommended negotiations, and excluded one firm from further consideration. After holding discussions with both Vitro and CSDA, the Navy evaluated best and final offers (BAFO). Vitro was given a weighted technical score of 85, with evaluated costs of \$54.6 million. CSDA was given a weighted technical score of 80, with evaluated costs of \$54.4 million.

¹The formula assumes that a proposal scoring at least 60 (on a scale of 100) would be technically acceptable, and that the agency would consider paying a premium of up to 40 percent above the cost of a proposal with the lowest evaluated cost and a technical score of 60 in order to select a proposal with the highest achievable technical score (100).

Although both proposals were technically acceptable and although CSDA's proposal was evaluated as having a slightly lower cost than Vitro's proposal, Vitro's slightly higher evaluated costs were within the range established by the RFP's premium formula, given Vitro's slightly higher weighted score. Thus, the Navy decided that Vitro's proposal was worth the additional evaluated cost, and Vitro was awarded the contract. CSDA's initial protest followed.

CSDA's Initial Protest

CSDA argued, among other things, that the Navy's evaluation of proposed costs was unreasonable because it failed to properly consider the overall effect of the cost-cutting efforts in Vitro's BAFO--i.e., Vitro's combination of significant pay and benefit cuts together with voluntary uncompensated overtime--on Vitro's probable costs.

In its BAFO, Vitro, the incumbent contractor, proposed that its employees would provide voluntary uncompensated overtime at average amounts of [DELETED] or [DELETED] hours per week.² Since Vitro did not have evidence of providing uncompensated overtime in the past, the firm submitted signed certifications from each of its exempt employees promising to provide the uncompensated overtime. Vitro also proposed to cut employee pay between [DELETED] and [DELETED] percent on the day of contract award, and to implement certain cuts in employee benefits. Since the record showed that Vitro intended to announce the pay cuts on the date of contract award, its employee certifications promising to voluntarily provide [DELETED] (or [DELETED]) hours of uncompensated overtime every week were made without knowledge of the pending cuts.³

The Navy evaluators considered the realism of Vitro's proposed uncompensated overtime levels, as well as the impact of the proposed pay and benefits cuts on the technical evaluation. As to the cuts in pay and benefits, the Navy concluded that Vitro's approach would have a negative impact on employee morale and downgraded Vitro's technical proposal in areas related to contract management and

²Vitro's [DELETED] most senior people would provide [DELETED] hours of uncompensated overtime each week, while all other exempt personnel would provide [DELETED] hours of uncompensated overtime each week. Uncompensated overtime is used to describe "hours worked in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act (FLSA), without additional compensation." Defense Federal Acquisition Regulation Supplement § 252.237-7019(a)(1).

³The record shows that Vitro's unannounced pay cut for its current employees would affect all but the [DELETED] employees proposed.

retention of personnel. As to the uncompensated overtime, the Navy accepted the uncompensated overtime levels because it concluded that the signed certifications were adequate evidence that they were realistic.

We sustained the protest because the Navy failed to consider that the certifications were solicited from and provided by employees without knowledge of pending decreases to their pay and benefits, and we concluded that the Navy's cost realism review must consider whether Vitro's certifications truly provided evidence of a long-term willingness to provide this voluntary unpaid effort over the life of the contract. We recommended that the Navy reconsider its evaluation of uncompensated overtime and make a finding regarding the likelihood that, under the circumstances here, Vitro would deliver the uncompensated overtime proposed.

The Navy's Implementation of our Recommendation

After our decision was issued, the CARP and CAP convened to review and implement our recommendation. While the agency disagreed with some of our findings, as discussed below, it produced supplemental CAP and CARP reports specifically addressing our concerns.

The CAP report adopted a "worst-case" scenario wherein it rejected all of the uncompensated overtime certifications save those from the [DELETED] employees whose pay and benefits were not cut. Using this approach, the CAP recalculated Vitro's costs and arrived at a normalized amount of \$53,975,674, a sum slightly less than CSDA's evaluated cost. The CARP accepted and supplemented the CAP's findings, and concluded that since Vitro's adjusted costs were lower than CSDA's, its proposal remained the greatest value to the government. The Navy affirmed the award to Vitro and lifted the stop-work order which had been issued as a result of the initial protest. This protest followed.

CSDA'S PROTEST

CSDA argues that the Navy improperly accepted the certifications of Vitro's [DELETED] staff wherein the [DELETED] staffers stated that they would voluntarily perform uncompensated overtime. CSDA contends that the Navy failed to consider that even though the [DELETED] staff's pay was untouched by the proposal—unlike that of the exempt employees—the additional [DELETED] burdens attendant to [DELETED] those employees whose pay and benefits were cut will be so significant as to render their certifications unreliable.

Since the government is bound to pay the contractor its actual and allowable costs under a cost reimbursement contract regardless of the costs proposed, Federal Acquisition Regulation § 15.605(d), the contracting 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. The agency's judgment is entitled to great weight, because it is in the best position to assess the realism of the proposed costs and must bear the major repercussions of any difficulties or expenses that may result from a defective analysis. Systems Research Corp., B-237008, Jan. 25, 1990, 90-1 CPD ¶ 106. 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 Management 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.

As stated above, our decision sustaining CSDA's initial protest was based on the conclusion that the Navy improperly failed to consider whether, under the unique circumstances here, Vitro's certifications truly provided evidence of a long-term willingness to provide voluntary unpaid effort over the life of this contract. In implementing our recommendation to reevaluate CSDA's cost proposal, the Navy fully considered this issue.

With respect to the [DELETED] employees—a small fraction of the total effort here—the CAP stated that it had no basis to reconsider its acceptance of their certifications because their pay was not "affected" by Vitro's planned cuts—that is, their pay would not be cut. The CAP further explained that it fully expected these employees to provide the uncompensated overtime to which they had certified because their average salary rate was [DELETED] that of CSDA's [DELETED], and they were proposed to work [DELETED] uncompensated overtime, on average, than CSDA's [DELETED].

The CARP accepted these findings and added that it was not unreasonable to expect these [DELETED] staff, who make between \$[DELETED] and \$[DELETED] per year, to work a [DELETED]-hour week. The CARP made a point of addressing CSDA's argument, first raised in its earlier response to the Navy's request for reconsideration, that the [DELETED] staff would be affected by the cuts imposed upon the remaining employees because there would be [DELETED] burdens attendant to the [DELETED] of disgruntled employees. The CARP specifically disagreed with this argument, and stated that:

"[It did] not share CSDA's concern that people who make between \$[DELETED] and \$[DELETED] a year will not work the hours that they promised to work because others will be [working] less. To the extent that Vitro's [DELETED] is burdened by disgruntled or resentful employees, the CARP took that into account in November of 1994 when it reduced the ratings and scores associated with Vitro's technical proposal."

Hence, CSDA's argument that the Navy failed to consider the effect of the pay cuts on the [DELETED] employees is without basis. The CARP, which discussed this issue in some detail in its supplemental report, clearly considered the effects cited by CSDA and concluded that they were insufficient to repudiate the [DELETED] employees' certifications. Given that the agency has expressly considered this issue and made written findings setting forth its views, CSDA's speculation that these employees will not perform as promised is inadequate to cause us to reject the Navy's conclusion, which we find reasonable.

The protester also contends that our Office should reject the Navy's reliance on the certifications prepared by Vitro's [DELETED] employees because [DELETED] at the firm rejected the initially proposed [DELETED]-hour work week. We disagree. First, CSDA's contention overlooks the reason for the change stated during the earlier protest—that the company was unwilling to propose a [DELETED]-hour workweek policy unless the policy was company-wide, and that the company was unwilling to impose a company-wide policy at this time. Second, the CARP specifically addressed this issue, stating as follows:

"There is no merit to CSDA's assertion that because senior management had previously rejected a [DELETED]-hour week, 'there is some factual reason to believe that the [DELETED] staff would not be willing to work uncompensated overtime managing a group of disgruntled employees.' The [DELETED] who certified to work the uncompensated overtime hours are not the [DELETED] that rejected the [DELETED]-hour week for [FLSA] exempt employees."

We see no basis to regard the CARP's conclusions as unreasonable.

In sum, our reading of CSDA's protest shows that, in addition to ignoring key passages of the supplemental CAP and CARP reports bearing directly on the issues it raises in its comments, its allegations amount to a mere disagreement with the Navy's conclusions in its reevaluation of Vitro's cost proposal. Such disagreement does not render the cost evaluation unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

THE RECONSIDERATION REQUESTS

The Navy asks our Office to reconsider the earlier decision sustaining Vitro's protest on the basis that the decision: (1) contains two factual inaccuracies; (2) erred as a matter of law regarding whether the Navy could have awarded on the basis of initial proposals; and (3) included, within the range of recommended corrective actions, certain actions that the Navy argues would have been inappropriate under the circumstances of this procurement. Vitro also requested reconsideration of our prior decision, echoing the Navy's concerns about whether our prior decision accurately reflected Vitro's proposed changes in benefits.

Under our Bid Protest Regulations, a party requesting reconsideration must show that our prior decision contains errors of fact or law or failed to consider information that warrants reversal or modification of our decision. See 4 C.F.R. § 21.12(a) (1995). For the reasons set forth below, both requests for reconsideration fail to show that we erred in our initial conclusion that the Navy unreasonably accepted Vitro's proposed uncompensated overtime on the strength of the employee certifications submitted in Vitro's BAFO without considering the impact of the proposed, but unannounced, pay cuts.

As a preliminary matter, we consider the Navy's request for reconsideration largely academic at this point, especially with regard to the recommended corrective action and whether the Navy could award based on initial proposals. With respect to the recommended corrective action, our Office proposed a range of corrective actions in order to permit the agency the flexibility to rectify the omission that caused our Office to sustain the protest--i.e., the failure to consider the effect of the unannounced pay cut on the certifications to voluntarily provide uncompensated overtime. This range extended from simply making the finding that the Navy has made here, to reopening discussions and requesting another round of BAFOs, the action the Navy thought would be inappropriate given certain circumstances present in this case. However, since filing its reconsideration request, the Navy has reevaluated the existing proposals, rejected Vitro's proposed uncompensated overtime for all but a handful of its employees, and convincingly shown that even without that uncompensated overtime, Vitro's proposal presents the greatest value to the government. Since the Navy's approach, which we find reasonable in the discussion above, avoided the corrective action that the Navy argues would have been inappropriate in this case, the question is academic and we need not consider the matter further.

Similarly, the Navy's contention that our Office should reconsider the decision because we concluded that the Navy acted properly in including Vitro's proposal in the competitive range and holding discussions is misplaced. Our decision upheld the Navy's decision to hold discussions, and rejected the protester's contention that the Navy's actions were improper. The Navy's reconsideration request, however, hinges on dicta in our decision suggesting that it could have accepted CSDA's initial proposal despite its failure to include an executed certificate of procurement integrity. This dicta--involving a question that has since been expressly decided, see Worldwide Servs., Inc./Perry Management Corp., a Joint Venture, B-261113, Aug. 19, 1995, 95-2 CPD ¶ ___ (permitting an offeror in a negotiated procurement to submit a certificate of procurement integrity does not constitute discussions with only one offeror)--does not provide a basis for reversing our prior decision which, in this regard, upheld the Navy's actions.

The Navy also argues that our prior decision contained two factual errors. First, the Navy claims that our Office erred when we stated that Vitro's cuts in pay and benefits ([DELETED], and [DELETED]) were to be announced on the date of contract award. The Navy states that while the cuts in pay of between [DELETED] and [DELETED] percent were to be announced on the date of contract award, the cuts in [DELETED] and [DELETED] were announced earlier.⁴ (The Navy makes no representation about when Vitro's employees might have learned about losing their [DELETED].)

Our review of the evaluation record, together with the pleadings provided by the parties, shows that the Navy's CAP and CARP routinely discussed these issues together, leading our Office to conclude that the pay and benefits cuts were to take place simultaneously, and were to be announced at the time of contract award.⁵ In reviewing these passages for purposes of preparing this decision, we recognize that

⁴Vitro, on the other hand, explains that there were no real cuts in [DELETED] and [DELETED], only an accounting change. Vitro also explains that the change in leave accrual was a company-wide change, not a change that applied just to the employees performing this contract. With respect to the two alleged accounting changes, we note that the Navy evaluators appeared to believe that Vitro was reducing these benefits, and expressed extensive concerns about the decision to do so. These concerns were reflected in decisions to downgrade Vitro's technical proposal in several areas. See Combat Sys. Dev. Assocs. Joint Venture, *supra*, at 10-11. In any event, based on our conclusions regarding the Navy's contentions in this regard, we see no separate basis for reconsideration in Vitro's request.

⁵For example, the initial agency report in this protest attributed to the CARP the following observations and concerns:

"Vitro stated that a pay cut ranging from [DELETED]% would be instituted for all the proposed people except for the [DELETED] people. Also all people would work uncompensated overtime at [DELETED] or [DELETED] hours average per week. Furthermore, Vitro plans on cutting the following benefits: a decrease in [DELETED], decrease in [DELETED], and the elimination of [DELETED]."

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"With the pay cut, benefits cut, and uncompensated overtime, the CARP is concerned that Vitro would not be able to retain the current highly qualified people or be able to attract qualified people." (Emphasis added.)

Agency Report, Feb. 13, 1995, at 12. In addition, in the BAFO CARP report, the Navy noted that the pay cut was unannounced. BAFO CARP Report at 10.

neither the evaluation materials, nor the proposal itself, clearly state that both events would take place at the same time.⁶ Nonetheless, we do not consider this minor inaccuracy sufficient to cause us to reverse our prior decision. Our decision was based on the fact that employee certifications promising to voluntarily provide significant levels of uncompensated overtime for the next 5 years were solicited by Vitro, and provided with its proposal, when the employees were unaware that their pay would be cut on the day of contract award by [DELETED] to [DELETED] percent. Under those circumstances, we concluded that the certifications might be less reliable than they would be otherwise, and we recommended that the Navy consider this possibility. While the situation would be even more troubling if, as we believed, these pay cuts were accompanied by benefits cuts, the fact that two of the three benefits cuts may have been announced earlier does not change our concern about the reliability of the certifications, given the pending unannounced pay cuts.

Second, the Navy argues that our decision was based on a misconception that any [DELETED] by Vitro would also be required to perform uncompensated overtime. We recognize that the Navy properly did not factor uncompensated overtime into its cost evaluation of [DELETED], since uncompensated overtime was proposed only for [DELETED]. However, the issue of [DELETED] is incidental to the critical issue at hand—*i.e.*, whether it was reasonable to accept certifications from existing employees ([DELETED]) when those employees were unaware of pending pay cuts—and does not affect our conclusion that the Navy needed to consider the impact of the unannounced pay cuts before accepting the certifications here.⁷

Finally, the Navy argues that our Office incorrectly concluded that CSDA was prejudiced by the Navy's actions that led our Office to sustain the protest. In its reconsideration request, the Navy presents a detailed analysis supporting its claim.

Our prior decision concluded that the evaluated costs of Vitro and CSDA were so close—\$54.6 million versus \$54.4 million, respectively—that even a partial discounting of the amount of proposed uncompensated overtime the Navy would accept as

⁶For the record, we are also unable to locate any provision in the evaluation materials or pleadings that clearly indicates that they will occur at different times.

⁷We note that there are now three different performance levels required by Vitro of its employees on this contract: senior people promise to perform [DELETED] hours of uncompensated overtime each week; existing employees promise to deliver [DELETED] free hours each week; and new hires—who presumably will work side-by-side with their more senior colleagues—will be permitted to work [DELETED]. Given that the Navy is committed to reimbursing all costs incurred on this contract for the next 5 years, the Navy's contract administrators will be required to closely monitor Vitro's performance to ensure that these services are rendered as proposed.

realistic could have a determinative effect on the technical/cost tradeoff. While the Navy now presents a partial discounting scenario where Vitro remains the awardee, we stand by our prior conclusion that there was significant evidence of prejudice to CSDA. Without an express consideration of the issue we identified in our prior decision, there was no basis to assume that the agency would select one scenario for partially discounting Vitro's proposed uncompensated overtime over any other, or that, under the scenario selected, Vitro would remain in line for award.

The protest and the requests for reconsideration are denied.

Robert P. Murphy
General Counsel