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Decision

Matter of: Del-Jen, Inc.

File: B-287273.2

Date: January 23, 2002

William A. Roberts, Esq., Phillip H. Harrington, Esq., William S. Leith, Esq., and Janet L. Eichers, Esq., Wiley, Rein & Fielding, for the protester.

Gregory H. Petkoff, Esq., Sharon A. Jenks, Esq., Thomas J. Faulconer, Esq., Richard C. Bean, Esq., and Edward L. Fitzmaurice, Esq., Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging cost comparison conducted pursuant to Office of Management and Budget Circular A-76 is sustained where the determination of the appropriate contract administration costs was unreasonable, and did not result in a fair comparison; record indicates that agency did not properly account for, and thereby understated, the contract administration effort, and associated costs, that should be included as costs of in-house performance, and that, in addition, agency may have overstated the contract administration effort, and associated costs, that should be included as costs of performance by the private-sector offeror.

DECISION

Del-Jen, Inc. (DJI) protests the decision of the Department of the Air Force to retain the civil engineering function at Hanscom Air Force Base (AFB), Massachusetts, for performance in-house, rather than contract for these services with DJI, under request for proposals (RFP) No. F19650-00-R-0001. The Air Force determined to retain the services in-house based on the results of a cost comparison conducted pursuant to Office of Management and Budget (OMB) Circular A-76, which compared DJI's proposal to perform the work against the government's in-house

management plan.¹ DJI asserts that the contract administration costs included in the cost comparison were unreasonable; the in-house management plan for a "most efficient organization" (MEO) included insufficient staffing to perform the performance work statement (PWS); and the agency improperly failed to ensure that the in-house plan and private-sector offer were based on a comparable level and quality of performance.²

We sustain the protest.

COST COMPARISON

The services solicited, described by the PWS as "typical in the commercial industry," included customer support services, infrastructure maintenance, facility maintenance, physical plant operations, utilities management, civil engineer services, environmental protection services, architectural and engineering services, construction, property management, and financial management. PWS § 1. In the event of contract performance, the RFP provided for award of a cost-plus-award-fee

¹ The solicitation provided for a cost comparison study under OMB Circular A-76, as implemented by Federal Acquisition Regulation § 52.207-2, OMB Circular A-76 Revised Supplemental Handbook (RSH), and Air Force Pamphlet No. 26-12, Sept. 25, 1992, revised Sept. 6, 1996 (AFP 26-12), Guidelines for Implementing the Air Force Commercial Activities Program.

² The procedures for determining whether the government should perform an activity in-house, or have the activity performed by a contractor, are set forth in OMB Circular A-76 and the RSH, which have been made expressly applicable to the Department of Defense and its military departments and agencies. See 32 C.F.R. § 169a.15(d) (2001). The process set out in the Circular and the RSH broadly encompasses the following steps in conducting the public/private competition. First, after the PWS has been drafted, the agency ensures, through certification by an independent reviewing official (IRO), that the government's in-house management plan satisfies the requirements of the PWS. See RSH, part I, ch. 3, § I. (The MEO reflects the in-house management plan, which is prepared by a study team and sets out the changes that will be made to the current organization.) Second, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement. Third, if that competition is done on the basis of a comparative technical evaluation (that is, if a cost/technical tradeoff is contemplated), the government's in-house plan is compared with the winning private-sector offer to assess whether or not they are based on a comparable level of performance and performance quality--and if not, to make all changes necessary to make the level of the in-house plan comparable to that of the private-sector proposal. Id. § H.3.d.e. Finally, once the playing field is thus leveled, there is a cost comparison between the private-sector offer and the in-house plan. Id. §§ H, J.

contract, for a base year, with 4 option years. The RFP stated that the private-sector offer to be compared with the MEO would be that which conformed to the RFP and represented the best value to the government. Best value was defined as "the most advantageous offer, cost and other factors considered, providing the best technical quality, business aspects, risks, and costs for a given application, and in consonance with the Government's stated importance of evaluation criteria." RFP § M.1.

Private-sector proposals were to be evaluated based on the following factors:

(1) mission capability, including business plan demonstrating an ability to meet the mission requirements, manning/staffing, and knowledge and response to unique military requirements; (2) proposal risk; (3) past performance; and (4) cost/price. The mission capability, proposal risk, and past performance factors were of equal importance, and each was more important than cost/price.

Technical/past performance proposals were received from [DELETED] offerors, including DJI. After conducting several rounds of discussions, and after the withdrawal of one of the proposals, the Air Force requested complete proposals, including cost proposals, from the remaining [DELETED] offerors. Based on the complete proposals, the agency established a competitive range consisting only of DJI. After further discussions with DJI, the Air Force requested final proposal revisions; based on its revised proposal, DJI's proposal was selected for comparison with the in-house MEO. The ensuing September 2000 cost comparison resulted in a tentative decision that performance by DJI of the civil engineering function would cost less than in-house performance. Specifically, the Air Force found that the evaluated cost of performance by DJI over 5 years would be \$160,352,343 (including the application of contract administration costs and the minimum conversion differential), as compared to the MEO's cost of \$162,154,921, a difference of \$1,802,578 in DJI's favor.

Affected civil engineering employees thereupon filed a number of appeals with the Base Administrative Appeal Review Team (BAART). Among other things, the employees asserted that the cost of administering a contract with DJI had been understated. (Under Circular A-76, the cost of administering a contract is added to the private-sector proposal for purposes of the public/private comparison.) In the appeal, the employees contended that, while the estimate used in the comparison was based on using seven contract administrators, including three GS-12, two GS-11 and two GS-9 positions, in fact eight contract administrators were required and the GS-9 positions should have been GS-11 positions. By decision dated February 2, 2001, the BAART found for the employees on these and several other issues. This resulted in the elimination of DJI's evaluated cost advantage--as revised after the BAART decision, DJI's cost was \$160,846,703, as compared to the MEO's cost of \$156,434,748--and, consequently, reversal of the determination to contract out to DJI.

On February 12, 2001, DJI protested to our Office the Air Force's decision to retain the function in-house rather than contract with DJI. Among the issues raised in DJI's protest to our Office were a number of issues which the BAART had declined to

address when DJI raised them in its comments on the appeals filed by the affected employees. Subsequent to filing its protest at out Office, DJI filed an appeal with the agency raising those issues. In light of these facts, the Air Force maintained that we should allow DJI's agency-level appeal to run its course before reviewing the matter. After conference calls with the parties, we dismissed DJI's protest pending the exhaustion of the agency appeal process (B-287273, Apr. 11, 2001). See DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19 at 2 n.1.

By decision dated October 2, the BAART found for DJI with respect to four of its appeal issues. However, the resulting October 3 revised cost comparison still favored in-house performance of the civil engineering function, as shown below:

	MEO	DJI
Total proposed costs	\$72,121,940	\$65,104,637
Contract administration	0	3,157,781
One-time conversion costs	0	152,115
Federal income tax adjustment	0	<325,522>
Total adjusted costs	72,121,940	68,089,011
Minimum conversion differential	0	4,927,421
Final adjusted costs ³	\$72,121,940	\$73,016,432

In responding to the protest, the Air Force conceded that the MEO had failed to provide for computer repair and maintenance required by the PWS. When the cost of providing these services was included in the MEO cost, the MEO's advantage with respect to adjusted costs decreased to \$471,656. Agency Memorandum of Law at 41. DJI asserts that the in-house cost estimate and the overall cost comparison were flawed in a number of other respects, and that, if these errors were corrected, its evaluated cost would be lower than the MEO's.

Where, as here, an agency has used the procurement system to determine whether to contract out or to perform work in-house, we will consider a protest alleging that the agency has not complied with the applicable procedures in its selection process, or that the evaluation was inconsistent with the solicitation criteria or otherwise unreasonable. See Trajen, Inc., B-284310, B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61 at 3. To succeed in its protest, a protester must demonstrate, not only that the agency failed to follow established procedures, but that its failure could have materially affected the outcome of the cost comparison. BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 at 19. Here, we conclude that the cost comparison was unreasonable in several respects, and that the deficiencies could have materially affected the outcome of the comparison.

³ Unlike the prior cost comparisons, the costs used for the October 2001 cost comparison did not include project work, which explains the much lower numbers.

CONTRACT ADMINISTRATION

As noted above, estimated contract administration costs are normally added to the cost of the private-sector proposal for purposes of cost comparisons under Circular A-76. Here, the cost of contract administration is an element both of the evaluated cost of private-sector performance, where it represents the expected cost to the government of administering the contract, and of the cost of in-house performance, where it represents the effort the MEO must undertake in order to ensure proper performance of its support contracts--referred to in the record here as "MEO subcontracts"-- which the MEO proposed as part of its effort in performing the PWS. In this regard, while an adequate contract administration effort clearly is essential to ensuring that cost, schedule and performance requirements are met, a realistic estimate of expected contract administration effort for purposes of the comparison of the cost of in-house performance to the cost of contract performance also is essential if the cost comparison is to be realistic and fair. See 10 U.S.C. § 2462. The realism and fairness of the estimates of contract administration costs play an especially important role here, because the evaluated cost of performance by DJI is lower than the cost of in-house performance, even after addition of the conversion differential, and the cost of in-house performance becomes low only after consideration of the cost of contract administration.

Accounting for the required contract administration effort in a realistic and fair manner can be difficult in view of the necessarily uncertain nature of estimating the number and grade of the contract administrators that will be necessary to administer the contract. We think it helpful that the most recent guidance from the Department of Defense in this regard, the department's A-76 Costing Manual (Mar. 14, 2001), specifies the number and grade level of the contract administrators whose cost is to be included in the cost of contract performance (and effectively establishes a ceiling on the number of contract administrators whose cost is to be included in the in-house cost). A-76 Costing Manual, §§ C1.4.2.3, C8.2.7. Because of the chronology of events, however, the Air Force was not required to use that guidance here.⁴

Another problematic element in arriving at a fair and realistic estimate of the contract administration effort is that the applicable guidance provides for

⁴ DOD components are required to use the Department of Defense's (DOD) current A-76 Costing Manual where the in-house management plan was projected to be submitted to the IRO on or after March 15, 2001, or was submitted to the IRO after April 15, 2001, and may use it where, as here, the in-house management plan was projected to be submitted to the IRO before March 15. Memorandum From DOD Deputy Under Secretary of Defense (Installations), DOD A-76 Costing Manual (Interim Guidance) and DOD A-76 Costing Software (win.COMPARE2), Mar. 13, 2001.

determining the maximum permitted estimate of the expected contract administration resources based on the MEO staffing level, not the staffing of the offeror whose contract actually would be administered.⁵ RSH, part II, ch. 3 § C.2 and Table 3-1; AFP 26-12 (1996) § 3e(1) and app. B. Thus, the MEO staffing level, which here includes both specifically identified government in-house positions and staff attributed to the MEO subcontracts, becomes a critically important consideration in ensuring a fair comparison.

Here, our review of the record indicates that the Air Force's approach in determining the appropriate contract administration costs was unreasonable, and did not result in a fair comparison. Specifically, we find that the agency did not properly account for, and it thereby understated, the contract administration effort, and associated costs, that should be included as costs of in-house performance. In addition, the record indicates that the agency may have overstated the contract administration effort, and associated costs, that should be included as costs of performance by DJI. We set out our findings in detail below.

MEO Subcontracts

DJI asserts that the in-house management plan understated the number of contract professionals that would be required to administer MEO subcontracts. These "subcontracts" represent existing contract support to the facility which the MEO intended to continue to rely upon (in addition to government FTEs) in performing the PWS.

The calculation of the cost of in-house performance, as set forth in the OMB Circular A-76 cost comparison form, includes personnel costs (Line 1), material and supply costs (Line 2), other specifically attributable costs (Line 3), overhead costs (Line 4), and additional costs (Line 5). The RSH further provides that Line 1 "includes the cost of all direct in-house labor and supervision necessary to accomplish the requirements specified in the PWS." RSH, part II, ch. 2 § B.1. In addition, the RSH states as follows:

In-house cost estimates that assume a mix of in-house labor and existing contract support should include the cost of labor for the Government's administration and in-house inspection of those support contracts on Line 1. . . . The cost of the support contracts themselves, including the cost of related Government furnished equipment and

⁵ The record here does not make clear why the applicable guidance bases the estimated contract administration effort required to administer the private-sector contract on the MEO's, rather than the private-sector offeror's, proposed staffing level.

facilities not provided to the contractor under this cost comparison, should be entered on Line 3 Other Specifically Attributable costs.

RSH, part II, ch. 2 §§ B.2, D.9.

In response to DJI's appeal of the adequacy of the MEO contract administration staff, the BAART found that the MEO included 3 FTEs of quality assurance-type contract administration effort spread over 26 existing personnel positions, the cost of which was properly included in the in-house cost on Line 1 (personnel cost) of the cost comparison.⁶ The BAART also found that the MEO included government contracting professionals necessary to perform the contract administration effort, see AFP 26-12 § 10-13a; it stated that the cost of these professionals was "properly accounted for in the COMPARE model," but did not specify where the costs were listed. Second Appeal Decision of the BAART, Oct. 2, 2001, ¶ 71. It has become evident during the course of the protest that it is the Air Force's position that the cost of the required contracting professionals is included in overhead. Agency Comments, Jan. 2, 2002, at 10; Agency Memorandum of Law at 23; Contracting Officer's Statement at 47.

DJI argues that the in-house contract professional positions required to administer the MEO subcontracts should have been costed on Line 1, rather than included in overhead, and that the MEO cost was understated as a result. Citing an example set forth in DOD's current A-76 Costing Manual--for a hypothetical MEO of 38.61 FTEs, the cost comparison included 2 contract administration FTEs, including 1 GS-12 contracting officer's representative and 1 GS-11 contract specialist--DJI asserts that the cost (estimated as \$349,233) for at least 1 GS-11 contract specialist should be added to Line 1 (personnel) of the cost comparison form. A-76 Costing Manual § C8.3.2.

The Air Force claims that the cost of the required contracting professionals was properly accounted for as overhead in Line 4, which the 1996 version of AFP 26-12 (as well as the RSH) calculates as 12 percent of the total civilian personnel costs entered on Line 1. Agency Comments, Jan. 2, 2002, at 10; Agency Memorandum of Law at 23; Contracting Officer's Statement at 47; RSH, part II, ch. 2 § E.3; AFP 26-12 (1996) § 3.c. In support of this position, the agency cites the 1992 version of AFP 26-12, which provides that overhead is to be calculated based on the addition of various operations and general and administrative overhead costs; as noted by the agency, "Procurement and Contracting" is listed as one of the typical types of general and administrative overhead activities. AFP 26-12, fig. 10-16.

⁶ The 3 FTEs of contract administration effort included in the MEO staffing were spread over the following 26 personnel positions--[DELETED]. Second Appeal Decision ¶ 70 n.4.

We agree with DJI that the cost comparison did not properly account for the cost of the contract professional effort required for administration of the MEO subcontracts. While the agency is correct in its reference to AFP 26-12, the pamphlet was revised in 1996 to specifically provide that "[i]n-house cost estimates that assume a mix of in-house labor and existing contract support should include the cost of labor for the Government's administration of those support contracts on Line 1 of the Cost Comparison Form." AFP 26-12 (1996) § 5c. This is consistent with the 1996 version of the RSH, which, as noted above, similarly directs that the cost comparison "include the MEO cost of labor for the Government's administration and in-house inspection of the continued support contracts on Line 1." RSH, part II, ch. 2 §§ B.2, D.9.⁷ In short, this direction clearly, and, in our view, reasonably, requires that the cost of all of the personnel necessary to administer the support contracts--the MEO subcontracts--must be included in the MEO's Line 1 cost, and not assumed to simply be part of the Line 4 overhead cost.⁸ These are additional costs to the government, over and above ordinary overhead, attributable directly to the MEO's planned approach. Thus, the agency's failure to include the cost of the required contracting professionals on Line 1 was improper.

DJI Contract Cost Adjustments

DJI asserts that the agency's estimates of the number and grade levels of the contract administrators that would be required to administer DJI's contract, the cost of which is added to DJI's contract price for purposes of the cost comparison, were improperly increased during the appeals process.

Both the RSH and AFP 26-12 include a table for use in determining the maximum number of contract administration FTEs required to administer the private-sector contract. The table provides for calculating the maximum contract administration effort based on the level of MEO staffing, but does not address the grade level of the contract administrators.⁹ RSH, part II, ch. 3 § C.2 and Table 3-1; AFP 26-12 (1996)

⁷ Consistent with the AFP and RSH, the current DOD A-76 Costing Manual directs that Line 1 include "(1) the cost of the FTEs necessary to perform inspection and surveillance of the MEO subcontract and (2) the cost of FTEs necessary to perform contract administration for the MEO subcontract." A-76 Costing Manual § C1.4.2.

⁸ While the 1996 revisions to AFP 26-12 did not specifically address the reference to "Procurement and Contracting" in the definition of overhead activities, we note that the 1996 revisions to AFP 26-12 were furnished in the form of general revisions, rather than specific change pages or a reissuance of the entire pamphlet.

⁹ As revised in 1996 to decrease the maximum number of contract administration FTEs, the table specifies, for example, a ceiling of 2 contract administration FTEs for MEO staffing of 21 to 50; 3 FTEs for MEO staffing of 51 to 75; 4 FTEs for MEO staffing of 76 to 100; 5 FTEs for MEO staffing of 101 to 120; 6 FTEs for MEO staffing
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§ 3e(1) and app. B. In contrast, the current DOD A-76 Costing Manual does specify grade levels. A-76 Costing Manual § C8.2.7, fig. C8.F1.

In the initial cost comparison, the contract administration cost associated with administering the private-sector contract was calculated based on 7 contract administrators, including three GS-12s, two GS-11s and two GS-9s. As explained by the Air Force during the subsequent appeals, in determining the appropriate number of contract administration personnel by reference to the table, it interpreted AFP 26-12 as allowing consideration of only the 163 FTEs which comprised the MEO in-house staff, and not the additional contract manpower equivalents (CME) associated with the MEO subcontracts. In its decision on the appeals, however, the BAART noted that AFP 26-12 specifically provides that "the CMEs associated with . . . purchased services should be added to the FTEs reflected in the MEO to determine the number of contract administration positions required." AFP 26-12 § 10-13b. The BAART concluded that the agency was required to include the CMEs for purposes of determining the appropriate number of contract administrators in the case of award to DJI. Final Appeal Decision of the BAART, Jan. 22, 2001 (First Appeal Decision) ¶¶ 112, 118. The agency determined that there were 70 CMEs associated with the MEO subcontracts; when the 70 CMEs were added to the in-house government FTEs, the total MEO staffing was 233 FTEs. Since the contract administration table allowed a maximum of eight contract administrators for staffing at this level, the cost of an additional GS-11 contract administrator was added to DJI's contract cost in the revised cost comparison. The BAART also found that the skill mix for contract administrators--two GS-9s, two GS-11s, and three GS-12s--used in the initial cost comparison was inadequate; as a result, the two GS-9 positions were raised to, and costed as, GS-11 positions in the revised cost comparison. *Id.* ¶¶ 10, 42, 45.

Additional Contract Administrator--CME Calculation

DJI argues that it was improper to add an eighth contract administrator to the cost of contracting out, and calculates that this resulted in the overstatement of DJI's costs by \$351,673. According to the protester, adding the eighth position was improper because the BAART misread the applicable guidance to require that the CMEs be considered in using the contract administration table, and, alternatively, because the number of CMEs was overstated, leading to an overstatement of the number of contract administrators needed.

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of 121 to 150; 7 FTEs for MEO staffing of 151 to 200; 8 FTEs for MEO staffing of 201 to 250; and 9 FTEs for MEO staffing of 251 to 300. RSH, part II, ch. 3, Table 3-1; 61 FR 14,344 (1996); AFP 26-12 (1996) app. B.

We do not agree with DJI that the CMEs should not have been included in the contract administrator calculation. Rather, based on the plain language of AFP 26-12 § 10-13b, quoted above and cited by the BAART, we think it is clear that the guidance requires that CMEs should be added to the MEO FTEs to derive the staffing number used to determine the maximum permitted number of contract administrators from the table. Further, although it was not required to be used in this cost comparison, we consider it instructive that the current DOD A-76 Costing Manual, § C8.2.1, fig., likewise expressly requires that the MEO staffing level used to estimate the size of the contract administration effort include CMEs. We recognize that, as noted by DJI, the RSH does not define the concept of "MEO Staffing" to be used in the contract administration table with the same precision as AFP 26-12 or DOD's A-76 Costing Manual. However, while the RSH does not expressly require consideration of the CMEs in calculating the MEO staffing, it also does not exclude their consideration, and thus does not provide a basis for ignoring the express requirements of AFP 26-12.

We do agree with DJI, however, that the record does not support the agency's attribution of 70 CMEs to the MEO subcontracts. In defending its calculation, the Air Force explains that the CME staffing was derived by a support service contractor using several techniques, including consultation with Hanscom AFB functional experts; use of the Air Force Manpower Standard listing the average manpower needed to accomplish certain tasks and the average monthly workload associated with the task at a normal base; technical estimates; and, for 14 of the CMEs, application of an "average labor factor" (FTE cost) of \$25,000 to the assumed labor component (70 percent) of the contract cost. Current Year (1999) Contract Manpower Equivalent (CME) Determination Process; Agency Comments, Jan. 8, 2002, at 8-10; Agency Comments, Dec. 5, 2001, at 7.

While the Air Force has presented a general explanation of the approach used to calculate the CMEs, it has not detailed the actual calculations involved, notwithstanding our specific request that it do so. The agency's failure in this regard is significant, since the calculation that it does describe--applying an average FTE cost of \$25,000 to the assumed 70-percent labor component of the contract cost--appears questionable on its face.¹⁰ The Air Force has furnished no evidence that it can obtain the required labor for an average, fully burdened cost of \$25,000 per CME, and its assumption that such low-cost employees will be available seems inconsistent with its assertion elsewhere (as discussed below) that it was necessary to calculate the contract administration costs for DJI using higher-grade contract

¹⁰ DJI argued in its BAART appeal that a more realistic cost would be \$40,000 per CME. Using this cost, DJI concluded that the value of the MEO subcontracts must have been greater than the \$2,603,500 reported by the agency. Second Appeal Decision ¶¶ 57-65.

administrators partly because Hanscom AFB is in such a high-cost area. While the agency argues that the \$25,000 per CME relates to only 14 of the 70 CMEs, who were unskilled labor, if we assume a 70-percent labor component and a total subcontract value of \$2,603,500 (the figure used by the agency), the fully burdened cost per CME for all 70 CMEs does not increase by much—the average remains only \$26,035, which would still appear to be unrealistically low. We conclude that the calculation of 70 CMEs lacks a reasonable basis, and that unless the in-house estimate of its subcontract costs is increased, the estimated number of its subcontract personnel appears overstated.

Since the record suggests that fewer than 70 CMEs should have been included in the agency's staffing, the determination that 8 contract administrators would be required to administer DJI's contract (which determination, again, is based on the MEO's staffing) is necessarily drawn into question. The agency generally explains that eight contract administrators are required because the requirement here is an extremely complex one that includes all of the functions that operate and maintain the infrastructure of the base, as well as quality of life enhancements. According to the agency, the complexity of the requirement, when considered in conjunction with the complex, cost-plus-award-fee contract type, will present significant contract administration challenges with respect to both quality assurance and the processing of contract payments. Contracting Officer's Statement of Facts at 43; Agency Memorandum of Law at 18. However, the contemporaneous determination that these considerations warrant 8 contract administrators was premised on a staffing level (233 FTEs) that included 70 CMEs. It is fair to assume that, if a significantly lower number of CMEs were attributed to the MEO subcontracts, the agency may have determined that fewer administrators were needed.

For example, using the \$40,000 cost per CME suggested by DJI, and assuming (as the agency did for some contracts) that labor amounts to 70 percent of the cost of the support contracts, the number of CMEs could be as low as 46, for an overall total MEO effort of 209 FTEs. While 209 FTEs falls within the 201-to-250 FTE range for which the relevant table permits 8 contract administration FTEs, the number of contract administration FTEs specified in the table, as the protester notes, is only a maximum; the agency still must perform a reasoned analysis of the number of contract administrators actually required. See BAE Sys., *supra*, at 29-30 (RSH specifies the maximum level of contract administration staffing, not the required level, and provides for the agency to perform a reasoned analysis of the number of contract administrators actually required). In our view, a reduction in the underlying contract staffing by as much as 10 percent (from 233 to 209 FTEs) warrants a new, reasoned and dispassionate determination, not undertaken in the heat of litigation, of the contract administration staffing level that would be required in the case of an award to DJI.¹¹

¹¹ We note that although Table 10-3 in AFP 26-12 requires command clearance to use fewer than the number of contract administrators allowed under the contract

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Skill Mix

DJI also questions the BAART's determination that the skill mix of the initial contract administration team (three GS-12s, two GS-11s and two GS-9s) should be enhanced by adding higher-grade personnel; this resulted in converting the two GS-9s into GS-11s, as well as the subsequent addition of a GS-11 (rather than a GS-9) as the eighth contract administrator. The protester claims that the agency has failed to justify using a mix of personnel different from that used in the initial cost comparison and that, contrary to the requirements in the current DOD A-76 Costing Manual, it improperly failed to include any position of a lesser grade than GS-11. It concludes that these errors unfairly inflated the cost of contracting with DJI.¹²

The Air Force defends the revised skill mix, maintaining that the preliminary grade mix was inconsistent with the position descriptions as subsequently properly classified by the personnel specialist and certified by the deputy base civil engineer (as her supervisor); the replacement of GS-9s with GS-11s as a result of the appeal process therefore simply corrected a mistake. In addition, in response to our request that it explain why there was insufficient less-complex contract administration work to warrant any contract administration-related position with a grade below GS-11, the Air Force maintains that the ultimate grade levels were consistent with the complexity of the requirement, the complex cost-plus-award-fee contract type, the fact that the MEO included only a small proportion of low-grade (GS-6 or WG-6) positions, and the high cost of living in the area surrounding Hanscom AFB.

The agency's position is unpersuasive. As an initial matter, there is a stark inconsistency between the agency's approach and the contract administration staffing mix required under the current DOD A-76 Costing Manual. Whereas the agency is adding to DJI's proposed price the cost of three GS-12s and five GS-11s, the Costing Manual currently requires that a contract administration staff of eight include two GS-6s and two GS-9s, with no more than 2 GS-11s and 2 GS-12s.

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administration table in AFP 26-12, the table does not prohibit using fewer contract administrators. Further, AFP 26-12 § 10-13c specifically contemplates that "it may be possible to use lower contract administration staffing than is shown" in the contract administration table. In any case, the requirement to obtain command clearance does not relieve the agency of its obligation under Circular A-76, which is the overriding guidance for this cost comparison, to perform a reasoned analysis of the number of contract administrators actually required. See BAE Sys., supra, at 29-30.

¹² Del Jen calculates that \$142,687 was added to its price as a result of converting the two GS-9 contract administration positions to GS-11 positions.

A-76 Costing Manual § C8.2.7, fig.C8.f1. Although the Costing Manual was not required to be used here (since the in-house management plan was projected to be submitted to the IRO before March 15, 2001), its use was permitted, and we consider the manual persuasive evidence of at least a starting point for a realistic and fair estimate of contract administration costs.¹³

Further, the agency's position that higher-grade, higher-cost contract administrators were warranted for DJI by the complexity of the requirement and the high cost of living appears to be inconsistent with the approach to determining the MEO's own subcontract administration costs. In this regard, according to the agency, the quality assurance part of the contract administration effort required for the MEO subcontracts--which accounted for approximately [DELETED] percent of the MEO's total first year cost--could be satisfied by 3 FTEs of effort from a group of 26 employee positions, including [DELETED] GS-7s and [DELETED] GS-9s, as well as [DELETED] GS-12s and [DELETED] GS-11s. In other words, notwithstanding that the MEO subcontracts necessarily encompassed the same PWS requirements reflected in DJI's proposal, the agency assumed that higher-level, more expensive contract administrators would be necessary to administer DJI's contract, while at the same time apparently assuming that some lower-grade, less expensive personnel were adequate to administer the PWS work under the MEO subcontracts. The agency claims that this anomaly is explainable by the fact that the quality assurance requirements with respect to MEO subcontracts would be somewhat less demanding than administering DJI's contract. This claim, in our view, is undermined by the agency's inconsistent positions regarding the complexity of the PWS work. Moreover, since the agency's rationale for using higher-grade personnel to administer DJI's contract depended in part on the fact that Hanscom AFB is in a high-cost area, we would expect a similar impact on the in-house costs; however, there is nothing in the record showing that the skill mix for the MEO subcontract administrators reflects this consideration. We conclude that the contract administration costs included in DJI's performance cost have not been shown to be reasonable.¹⁴

¹³ As noted in the manual, "[t]he grades outlined in Figure C8.F1 were developed by the Defense Contract Management Agency (DCMA) by utilizing statistics developed to comply with the Defense Acquisition Workforce Improvement Act (DAWIA). This data was used to develop the average grades for contract administration FTEs. The table in Figure C8.F1 was created to streamline the costing for contract administration and to ensure all DOD Components use the same standardized approach." A-76 Costing Manual § C8.2.5.

¹⁴ The Air Force argues that, in noting the disparity between the grade levels of the MEO contract administration (quality assurance) staff and those of the contract administrators, DJI raised a new, untimely argument. We disagree with the agency that the argument is untimely; rather, we view it as merely further support for DJI's challenge of the skill mix. Further, even if this particular sub-issue were viewed as
(continued...)

COMPLIANCE WITH PWS

DJI asserts that the Air Force failed to ensure that the MEO includes sufficient staffing to satisfy the PWS requirements. We do not agree. Our review of the record indicates that the MEO's management and technical performance plans described how the current agency operations would be streamlined and consolidated; presented an approach to performing the PWS that included such efficiencies as the multitasking of MEO staff (as documented in the position descriptions prepared for each MEO position); and, significantly, proposed a staffing level that exceeded DJI's proposed staffing level.¹⁶ Furthermore, the MEO furnished the IRO (who certified that the in-house management plan satisfies the requirements of the PWS) with a detailed work breakdown statement specifying which MEO positions would be involved in satisfying significant PWS requirements. We conclude that DJI has furnished no basis for finding the staffing of the MEO inadequate.

COMPARABLE LEVEL AND QUALITY OF PERFORMANCE

DJI asserts that the agency improperly failed to ensure that the in-house plan and private-sector offer were based on a comparable level and quality of performance.

In this regard, in an A-76 procurement where, as here, the private-sector competition is conducted on a best-value basis and an agency identifies areas in the private-sector proposal that exceed the performance work statement requirements, the agency must assess whether or not the same level of performance and performance quality will be achieved by the MEO and ensure that the in-house cost estimate and private-sector offer are "based upon the same scope of work and performance standards." RSH, part I, ch. 3, §§ H.3.d, e, J.3; DynCorp Tech. Servs. LLC, B-284833.3, B-284833.4, July 17, 2001, 2001 CPD ¶ 112 at 12-13; Aberdeen Tech.

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untimely, we would view it as appropriate for resolution pursuant to the exception to our timeliness rules for protests raising issues significant to the procurement system. 4 C.F.R. § 21.2(c) (2001). Specifically, this issue is significant because it brings into question the realism and fairness of contract administration costs in an A-76 cost comparison.

¹⁶ The record indicates that the MEO included: (1) 163 government in-house FTEs; and (2) \$2,603,500 annually in subcontracted effort, which the agency determined encompassed a significant number of CMEs, and DJI's assumption of \$40,000 per CME (with labor amounting to 70 percent of the cost) indicated could include as few as 46 CMEs. In contrast, DJI's proposal indicated that DJI and its principal subcontractor together would furnish [DELETED] FTEs, and that DJI would subcontract for only an additional annual \$[DELETED] in subcontract effort (which translates to [DELETED] CMEs using the above calculation).

Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 13-15. This “leveling of the playing field” is necessary because a best-value solicitation invites submission of proposals that exceed the RFP requirements, together with the higher costs or prices that often accompany a technically superior approach. The Jones/Hill Joint Venture-Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 10. Otherwise, the successful private-sector offeror may be at an unfair disadvantage when compared to the in-house cost estimate, which must only satisfy the minimum performance work statement requirements.

DJI asserts that the agency improperly failed to ensure that the in-house cost estimate was based on the level of performance and performance quality reflected in DJI's offer to [DELETED].

DJI's argument is without merit. Here, the Air Force repeatedly advised DJI that its proposal did not include elements with respect to mission capability/risk, other than its proposal to [DELETED], that constituted a strength, that is, “a significant, outstanding, or exceptional aspect of an offeror's proposal that has merit and exceeds the specified performance or capability requirements in a way beneficial to the Air Force.” Release of Interim Ratings and Request For Complete/Cost Proposals, June 30, 2000, at slides 2, 7-9. On three occasions, including twice after DJI responded to the agency's first notice by claiming that its proposed enhancements exceeded the minimum requirements in a way beneficial to the agency, the Air Force effectively advised DJI that it did not view aspects other than [DELETED] as beneficial ones that would warrant a higher price/cost. Id.; DJI Proposal Submission, July 10, 2000; Evaluation Notices, Aug. 1, 2000; Request for Final Proposal Revision, Aug. 14, 2000. Further, while the proposal to [DELETED] was listed as a strength in the interim evaluations released to DJI, and the agency viewed this (in conjunction with other measures) as enhancing DJI's ability to minimize turnover and retain staff, Proposal Analysis Report, at 11, we agree with the agency that this proposed approach did not amount to the proposal of a measurable enhancement in performance and performance quality requiring an adjustment to the MEO plan.

RECOMMENDATION

We conclude that there were deficiencies in the cost comparison that could have materially affected the outcome of the comparison. Since, however, there is no way on this record to determine the precise cost impact of these deficiencies and what the proper costs should be when the deficiencies are corrected, we recommend that the Air Force review the cost comparison consistent with our discussion. If, as a result of that review, the Air Force concludes that DJI's evaluated price (including the various adjustments) is lower than the cost of in-house performance, we recommend that the agency make award to DJI. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester's certified claim for costs, detailing the time spent and costs incurred, must be

submitted to the agency within 60 days of receiving this decision. 4 C.F.R.
§ 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel