United States General Accounting Office
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Comptroller General
of the United States

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Decision

Matter of: Rice Services, Ltd.

File: B-284997

Date: June 29, 2000

David B. Dempsey, Esq., and Andrew Price, Esq., Piper Marbury Rudnick & Wolfe, for the protester.
Michael D. Rossiter, Esq., Kathy B. Cowley, Esq., and Paul W. Knoth, Esq., Department of the Navy, for the agency.
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that, in performing a cost comparison pursuant to Office of Management and Budget Circular No. A-76, agency failed to reasonably compare the level and quality of performance to be obtained under the government's Most Efficient Organization/Management Study (MEO) with the level and quality of performance to be obtained under the "best value" private-sector offer is sustained where the agency's comparison recharacterizes previously evaluated strengths in the private-sector proposal as "unnecessary expenses" and "redundancies," uses "assumptions" that staffing levels in the MEO are "adequate" to meet the requirements of the performance work statement, and fails to compare the actual level of effort that will be obtained under each approach.

DECISION

Rice Services, Ltd., protests the Department of the Navy's decision, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to perform full food service activities in-house at the United States Naval Academy (USNA) in Annapolis, Maryland, rather than to contract for these services with Rice under solicitation No. N00600-99-R-1649. Rice primarily challenges the adequacy of the agency's comparison of the performance reflected in the government's Most Efficient Organization/Management Study (MEO) with the

performance reflected in Rice's proposal, and the reasonableness of the agency's determination that the two proposed performance plans were technically equivalent.

We sustain the protest.

BACKGROUND

In January 1998, the Navy announced that it intended to perform a commercial activities study to determine whether it would be more economical to perform food service activities at the USNA in-house using government employees, or under contract with a private-sector firm. A commercial activities study team was formed to document the agency's requirements by creating a performance work statement (PWS) to provide a common basis for preparation of private offerors' proposals and the government's MEO.[1] The PWS was completed and approved on March 29, 1999.

On May 21, the agency issued a request for proposals (RFP) to be used to conduct a competition between private-sector offerors. The RFP stated that the successful offeror would be selected on the basis of the proposal representing the "best value to the Government from a technical and cost standpoint"; that proposals would be evaluated on the basis of technical,[2] past performance, key personnel, and price factors; and that, when combined, the non-price evaluation factors were

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[1] 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 No. A-76, and the Circular No. A-76 Revised Supplemental Handbook (March 1996) (the "Supplemental Handbook"). The process set out in OMB Circular No. A-76 and the Supplemental Handbook broadly encompasses three steps in the conduct of a public-private competition. First, after the PWS has been drafted, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement is conducted. Second, if that competition is done on a "best value" basis, the government's MEO, which has been prepared based on the PWS, is compared with the winning private-sector offer to assess whether or not the same level of performance and performance quality will be achieved--and if it will not, to make all changes necessary to meet the performance standards achieved in the winning private-sector proposal. Supplemental Handbook, part I, ch. 3, §§ H.3.d, e. Finally, once the playing field is thus leveled, there is a cost comparison between the private-sector offer and the MEO. Id. §§ H, J.

[2] Under the technical evaluation factor, the RFP identified four equally weighted subfactors: technical approach, quality control plan, scheduling plan, and case study.

"significantly more important than cost or price."[3] RFP §§ M.4, M.5. Section C of the RFP incorporated the PWS as the statement of work, required that proposals identify both the "number of personnel and the number of man-hours proposed in each labor category," RFP § C.1.3.3.4, and advised offerors that "[t]he ultimate focus of the management team should be to not merely meet expectations, but to exceed them and make USNA the top service academy dining facility," RFP § C.1.3.2.2, and that "[f]ood quality and customer satisfaction shall always be the ultimate goal." RFP § C.5.1.1.2.

Proposals were submitted by three offerors, including Rice Services, by the July 23, 1999 closing date,[4] and in early August, each offeror made an oral presentation to the agency. Thereafter, the agency's technical evaluation team (TET) evaluated the proposals using the adjectival rating system set forth in the RFP, and prepared a report documenting that evaluation. The offerors' ratings under the non-price evaluation factors, along with their proposed prices, were as follows:

Offeror	Technical	Key Personnel	Past Performance	Price
Rice	Better	[deleted]	[deleted]	[deleted]
Offeror A	Better	[deleted]	[deleted]	[deleted]
Offeror B	Acceptable	[deleted]	[deleted]	[deleted]

Agency Report, Tab A, Business Clearance Memorandum, at 8.

Rice proposed a total staffing level of [deleted] full-time equivalents (FTEs), which was [deleted]. As part of its technical proposal, Rice submitted [deleted].

The agency identified various aspects of Rice's proposed staffing plan as "strengths" under the evaluated factors. Overall, as indicated in the table above, the agency rated Rice's proposal as "Better" under the technical evaluation factor.[5] In supporting this evaluation that Rice's proposal

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[3] With respect to the relative weighting of the non-price evaluation factors, the RFP provided that technical and past performance were of equal importance, and that key personnel was slightly less important.

[4] The government's MEO was also submitted at that time, but was not provided to the agency's technical evaluators until after they had completed their review of the private-sector proposals.

[5] The RFP provided that a rating of "Better" meant:

> Fully meets all solicitation requirements and <u>significantly exceeds many of the solicitation requirements.</u> Response exceeds an "Acceptable" rating. <u>The areas in which the Offeror exceeds the</u>

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"significantly exceed[ed] many of the solicitation requirements . . . [in] areas . . . which . . . are anticipated to result in a high level of efficiency or productivity or quality," the agency stated:

> The strength of the offeror's proposal lies with [deleted].

Agency Report, Tab G, Summary of Offerors, at 28.

More specifically, the agency rated Rice's proposal as "Better" under three of the four technical evaluation subfactors—[deleted]--and again supported each of these determinations with explanations identifying specific strengths. For example, with regard to the subfactor [deleted], the agency stated:

> Strengths: [deleted].

Id. at 21.

Similarly, in supporting its determination that Rice's proposal "significantly exceed[ed] many of the solicitation requirements" under the evaluation subfactor [deleted], the agency credited Rice for use of its [deleted], and for its [deleted], stating:

> Strengths: [deleted].
>
> Summary: The oral presentation demonstrated [deleted].

Id. at 25.

As indicated in the table above, Rice's proposal did not offer the lowest price. Accordingly, the agency performed a "best value" analysis of the three proposals, comparing the relative technical merits reflected in each with the prices proposed. In performing this analysis--which led to selection of Rice's proposal as the "best value" to the government--the agency stated:

> Rice's Technical Proposal strengths are its [deleted].

Agency Report, Tab A, Business Clearance Memorandum, at 20.

(...continued)

> requirements are anticipated to result in a high level of efficiency or productivity or quality.

RFP § M.4 (emphasis added).

On December 13, copies of the government's MEO, along with supporting appendices and attachments, were provided to the TET.[6] One of the things that initially "jumped out" at the evaluators was the [deleted] contained in the MEO. TET Chair Testimony, Hearing Video Transcript[7] (VT) at 13:25-26. Overall, the MEO proposed to perform the required tasks using [deleted].[8] In addition to [deleted], the MEO indicated an intent to [deleted] of currently performing personnel, and to make greater use of [deleted]. Notwithstanding the agency's characterization of the MEO as "drastically cutting costs," Agency Report at 11, the total cost associated with the MEO was [deleted]--that is, less than [deleted] percent lower than Rice's actual proposed price.

After providing the TET with copies of the MEO, the contracting officer directed the TET chair to perform a comparison of the level of performance and performance quality that would be achieved under the MEO and under Rice's proposal.[9] Agency Report at 6. On December 16, the TET chair conducted a telephone conference call with two of the three other TET members,[10] which lasted between 45 minutes and an hour.[11] At the conclusion of that call, the TET chair drafted a memorandum to the

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[6] The TET that reviewed the MEO was comprised of the same personnel who had evaluated the private-sector proposals.

[7] In resolving this protest, GAO conducted a hearing, recorded by videotape, at which testimony was obtained from the contracting officer, the TET chair, and a TET member.

[8] The executive summary of the MEO states: "The MEO staffing structure reflects a [deleted]. More specifically, the MEO's Technical Performance Plan (TPP) states: [deleted]. The MEO also included certain [deleted]; however, other than an already existing contract with Rice for "wardroom service" (that is, setting the tables, serving the food, cleaning the tables, and cleaning the dining hall), the total costs associated with the [deleted] accounted for less than [deleted] percent of the total MEO cost. Agency Report, Tab Z-2, Line Rationale, at 14.

[9] At the GAO hearing, the contracting officer testified that she asked the TET chair to perform a "line by line" comparison. VT at 10:37. In contrast, the TET chair testified that she was only instructed to perform a comparison at a "high general level, not an extremely detailed level." VT at 14:06.

[10] The TET chair testified that she was not able to include the third TET member on the conference call, and spoke with him separately at a later time. VT at 13:20-21.

[11] In her written statement responding to the protest, the contracting officer (who did not participate in the call) indicated: "The [TET] was convened via a three-hour telephone conference for purposes of the comparison." Agency Report at 5. The TET chair testified that the meeting lasted "approximately an hour." VT at 14:08.

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contracting officer stating that the MEO and Rice's proposal were "technically equivalent." Agency Report, Tab L, Memorandum from TET Chair To Contracting Officer (Dec. 16, 1999). Contrary to the earlier determinations that Rice's technical proposal "significantly exceed[ed] many of the solicitation requirements," and that Rice's technical approach was [deleted], the TET chair's memorandum now stated: "Neither [the MEO nor Rice's proposal] proposes innovations or techniques that will produce results in excess of what is required by [the solicitation]." Id. The memorandum was the only documentation prepared by the agency to support the "technical equivalency" determination, and it consisted of only two paragraphs--which are quoted below in their entirety:

> 1. The source selection team members performed an analysis and comparison of the U.S. Naval Academy's management plan to the technical proposal submitted by Rice Services and the performance work statement requirements of [the solicitation]. Based on this analysis and comparison, we have determined that both the government (USNA) and Rice Services have submitted plans that meet the requirements of [the solicitation]. Although the two plans differ in their organizational and staffing approaches, they both result in a plan that meets all of the requirements of the performance work statement (PWS).
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> 2. Both plans detail key personnel qualifications, quality control and quality assurance plans, scheduling plans, report requirements, maintenance plans, menu planning, feeding and service requirements, boat load-outs, sanitation, special event planning, procurement, warehousing, accounting management and financial accountability. They both address coverage and accounting for Class A & B and Class C & D catering requirements. Neither plan proposes innovations or techniques that will produce results in excess of what is required by [the solicitation]. The plans are therefor[e] deemed to be technically equivalent.

Agency Report, Tab L, Memorandum from TET Chair to Contracting Officer (Dec. 16, 1999).

Based on the TET's determination that the plans were technically equivalent, the contracting officer compared the cost associated with the MEO to Rice's proposed price, after adjusting that price for certain items contemplated by OMB Circular

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One of the other TET members who participated in the call testified that it lasted "about 45 minutes." VT at 16:19.

A-76.[12] Following these adjustments, Rice's evaluated price became [deleted]. Because the cost of the MEO was lower at [deleted], the agency determined to perform the requirements in-house. Rice filed an administrative appeal and the agency's administrative appeal authority ratified this determination, concluding in the final decision that the only additional adjustment that was required was a minimal increase ([deleted]) to the cost of the MEO. This protest followed.

DISCUSSION

Rice protests that the record fails to provide a reasonable basis for the Navy's determination that the MEO staffing plan will meet the PWS requirements and that the level and quality of performance under the MEO are equivalent to the level and quality of performance offered by Rice's proposal. We agree.

To preserve the integrity of the A-76 cost comparison, private-sector offerors and the government must compete on the basis of the same scope of work. See Supplemental Handbook, part I, ch. 3, ¶ H.3.e; see also Aberdeen Tech. Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 8; DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543 at 4. That is, the MEO and private-sector proposals must, first, comply with the minimum PWS requirements. Then, where, as here, a "best value" approach is taken in evaluating private-sector proposals, the agency must perform a direct comparison between the non-price aspects of the MEO and the "best value" private-sector proposal. More specifically, the agency must compare the MEO to the private-sector proposal to determine "whether or not the same level of performance and performance quality will be achieved," Supplemental Handbook, part I, ch. 3, ¶ H.3.d—and, if not, the agency must make "all changes [to the MEO] necessary to meet the performance standards accepted [in the private-sector proposal]."[13] Id. ¶ H.3.e. Thus, the level and quality of performance reflected in the "best value" private-sector proposal becomes the benchmark against which the level and quality of performance of the MEO must be measured.

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[12] Adjustments were made for contract administration, one-time conversion cost, federal income tax deduction, and minimum conversion differential. Agency Report at 7.

[13] This "leveling of the playing field" is necessary because a "best value" solicitation may result in submission of proposals which exceed the PWS requirements. Here, as noted above, the solicitation specifically encouraged private-sector offerors to "not merely meet expectations, but to exceed them," RFP § C.1.3.2.2, and established that, in selecting the "best value" proposal, non-price evaluation factors would be "significantly more important than cost or price." RFP §§ M.4, M.5. Failure to ensure that the MEO offers the same levels of performance as the private-sector proposal selected to compete with the MEO can cause the very technical superiority which led to the private-sector proposal's selection to become the cause for losing the public/private cost comparison. Aberdeen Tech. Servs., supra, at 14.

As explained below, we conclude that the record fails to reflect a reasonable basis for the agency's determinations that performance under the MEO will meet the PWS requirements and, more significantly, that the level of performance and quality of performance that will be obtained under the MEO are equivalent to the level and quality of performance that will be obtained under Rice's proposal.

Regarding the agency's determination that the MEO complies with the PWS requirements, the record contains no documentation—other than the TET chair's two paragraph memorandum quoted above—which reflects a reasoned analysis of the manner in which the MEO staffing plan will meet the PWS requirements.[14] In reviewing the evaluation and analysis that the TET performed with regard to the MEO's staffing plan, the testimony of the TET member whom the agency chose to provide as a hearing witness,[15] is both instructive and striking. Specifically, the TET member testified:

> If the government doesn't know what it takes to get the job done, nobody does, so I gave consideration, uh, assumption that their staffing was adequate to meet the PWS requirements. I didn't spend a whole lot of time with that to be honest with you.

VT at 15:52.

More significantly, the record fails to reflect any meaningful comparison of performance under the MEO with performance under Rice's proposal. First, the agency's statements offered to support its "technical equivalency" determination are directly contrary to the agency's own prior assessments regarding the strengths of Rice's proposal—and on which the "best value" selection of Rice was based. For example, in evaluating Rice's proposed scheduling plan during the private-sector

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[14] Although the Supplemental Handbook does not explicitly require the agency to document this determination, our cases consistently emphasize the importance of a well-documented evaluation record to show that the assessment was not arbitrary, unreasonable, or contradicted by the record. We believe the agency's required determination in this regard should be documented contemporaneously with that decision. See NWT, Inc.; PharmChem Lab., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 5 n.3.

[15] Upon GAO's determination that a hearing would be necessary to resolve this protest, the parties were so notified, and GAO specifically requested that the contracting officer and the TET chair appear as witnesses. GAO Confirmation of Hearing (May 9, 2000). In addition, GAO stated that "the Navy may bring any additional witness(es) whom the Navy believes may provide relevant testimony." Id. In response, the agency provided the TET member whose testimony is quoted above.

competition, the agency identified as a "strength" Rice's [deleted]. In attempting to justify its "equivalency" determination, the agency recharacterizes this [deleted] as "an unnecessary expense," refers to [deleted] as "redundant," and refers to Rice's proposal generally as containing "inefficiencies and staffing redundancies." Agency Report at 49, 57, 59. In short, either the agency's initial evaluation of the private-sector offerors--and the source selection decision resulting from that evaluation--was materially flawed, or the subsequent comparison of the MEO to the "best value" proposal is based on inaccurate representations.

Further, the record fails to reasonably support the agency's conclusions regarding certain purported efficiencies under the MEO. In responding to Rice's protest, the agency characterized the MEO as reflecting an "innovative strategy to re-structure existing services." Agency Report at 48-49. Yet, as noted above, the record reflects no analysis regarding the MEO's intended staffing to perform any particular PWS requirements. Rather, it appears the TET simply "assum[ed] that [the MEO] staffing was adequate." VT at 15:52. Again, the TET member whom the agency chose to provide as a hearing witness, testified:

> Q. What criteria were you looking at to determine that the levels of performance would be equal?
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> A. Well, the level of the key personnel certainly --
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> Q. But that was a wash [as between Rice and the MEO], wasn't it?
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> A. Yeah, right, right . . . .
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> A. Well, the number of people looked adequate on the staffing tables . . . You know, I looked at them individually, and they looked adequate. I mean, I had no reason to question the staffing.
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> . . . . .
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> Q. Did you then compare using Rice's level of performance, based on what their proposal was, and compare the MEO to that?
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> A. I didn't compare a level of performance. I didn't compare that. I wasn't looking for a level of performance. I was looking to ensure that it was adequate performance.

VT at 15:59-16:01.

Consistent with this testimony, the TET chair testified that the MEO and Rice's proposal "were fairly different in their approach, so it was hard to make a direct head to head comparison, so I pretty much defaulted to the PWS."[16] VT at 13:52. Further, the TET chair's December 16 memorandum does not meaningfully compare the MEO and Rice's proposal; instead, it merely states that "[both plans] meet the requirements [of the PWS]." Agency Report, Tab L, Memorandum from TET Chair to Contracting Officer.

Finally, the TET chair acknowledged that the comparison of the MEO to Rice's proposal was only done on a "high general level, not an extremely detailed level," VT at 14:06, and that the TET did not consider the specific effort that each approach took to performing the various required tasks. That is, the TET did not compare the level of effort that would be provided at any specific point--for example, the staffing levels that would be provided for a particular weekday meal period. VT at 14:59. In this regard, the TET chair testified that the comparison of proposed staffing, [deleted], was based on the total number of people that would be used under each approach--without considering the amount of effort that each person would expend. VT at 13:53. The TET chair elaborated that, based on the perception that the MEO intended to use approximately the same total number of people ([deleted]) as Rice intended to use ([deleted]), the levels and quality of performance were considered equal. Id. Thus, an employee working part-time under the MEO was essentially considered to be equal, with regard to level of performance, to an employee working full-time under Rice's proposal. We believe that, in evaluating proposed approaches to performing a labor-intensive PWS such as that presented here, a comparison of staffing plans which assumes, without further explanation, that an employee working part-time reflects an equal level of performance as an employee working full-time, is unreasonable.

The agency essentially argues that, as long as the MEO met the PWS requirements, Rice's "inefficiencies" should not be "forc[ed]" on the MEO, and cautions that "[t]he General Accounting Office in considering this case should carefully consider the impact [of GAO's decision] upon other [A-76] Cost Comparisons." Agency Report at 54.

We are sensitive to the agency's stated concerns regarding inefficiencies, and our Office is not recommending that the Navy award a contract that the agency believes exceeds its requirements. The solicitation and the evaluation record here, however,

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[16] Although the TET chair also testified she did not believe Rice's proposal offered anything more than what the PWS called for, VT at 13:25, she had no explanation to reconcile that conclusion with the TET's earlier conclusion that Rice's proposal "significantly exceed[ed] many of the solicitation requirements," VT at 14:00, and, in fact, recognized that the latter conclusion "seems to conflict with what we thought in [the earlier evaluation] as far as [deleted]." VT at 14:07-08.

establish that the agency viewed proposals which exceeded the minimum requirements as desirable, and that the agency was willing to pay a higher price for such proposals. Specifically, as noted above, the solicitation encouraged offerors to prepare proposals offering more than the minimum PWS requirements, advising them that "[t]he ultimate focus of the management team should be to not merely meet expectations, but to exceed them," and providing that non-price evaluation factors would be "significantly more important than cost or price." RFP §§ C.1.3.2.2, M.4. M.5. Then, applying those provisions, the agency selected a proposal which did not offer the lowest price because the agency concluded that the non-price aspects of the proposal--specifically including its proposed staffing plan--"significantly exceed[ed] many of the solicitation requirements." See RFP § M.4.

If review of the MEO has now caused the Navy to change its view that price is significantly less important than non-price factors (which view led it to determine that Rice's proposal represented the "best value" to the government), the agency should, as addressed below, amend the solicitation and recompete its requirements. As long as the solicitation remains as it is, the agency must, under the A-76 process, make adjustments to the MEO to meet the performance level of the selected private-sector offer. Supplement Handbook, part I, ch. 3, ¶ H.3.e. The agency is not free to compare an MEO and private-sector offer of differing performance levels and make a cost/technical tradeoff between them. While we recognize that it may not be feasible to precisely match the level and quality of performance of the MEO and the private-sector offer, the Navy in this case undertook no meaningful adjustment analysis.

RECOMMENDATION

In light of the fact that the agency now appears to have a substantially different view of how Rice's proposal addresses the government's stated needs than it did at the time it found that proposal to represent the "best value" to the government, we recommend that the agency first determine whether its needs have changed and whether the solicitation under which the private-sector offerors previously competed accurately reflects the government's actual requirements. In the event that the Navy concludes that the solicitation does not reflect its current needs, the agency should issue a revised solicitation reflecting its requirements (for example, to give greater weight to staff efficiencies and price) and reopen the competition among the private-sector offerors, after which it should conduct a new cost comparison between the successful private-sector offeror and the MEO.

In the event that the agency determines that the RFP does reflect its current requirements, we recommend that the agency perform a reasonable and meaningful analysis of the level of performance and quality of performance that will be obtained under the MEO, considering, for example, the actual levels of effort, that is, actual amount of time to be expended in performing the various identified tasks; perform a documented comparison of the MEO's intended level of performance to that offered

by Rice's proposal; and make necessary adjustments to the MEO to meet the standards reflected in Rice's proposal, after which a new cost comparison between Rice's proposal and the amended MEO should be conducted.[17]

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). 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.

Comptroller General
of the United States

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[17] Rice also protested various portions of the agency's cost comparison. In light of our recommendations above, implementation of which may well alter many of the challenged calculations, our decision does not address Rice's protest regarding those particular cost issues.