Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: ROH, Inc.

File: B-261132

Date: August 18, 1995

William Weisberg, Esq., and William Welch, Esq., Barton, Mountain & Tolle, for the protester.
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Annett H. Madison, 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. Protest that agency conducted an unreasonable cost realism review of the awardee's proposed use of uncompensated overtime because the agency's cost analysis panel failed to accurately convey the Defense Contract Audit Agency's view that the awardee's proposed use of uncompensated overtime was excessive is denied where the cost realism adjustments ultimately applied the awardee's actual direct labor rates to its proposed hours, and the protester was not prejudiced by the agency's error.

2. Protest that agency improperly evaluated awardee's technical proposal by failing to downgrade the proposal for its reliance on uncompensated overtime--deemed excessive by the Defense Contract Audit Agency--is denied where the application of the solicitation's cost premium formula shows that the protester would prevail only if consideration of the uncompensated overtime would have resulted in the rejection of the awardee's proposal as unacceptable under the relevant subfactors which, based on the record in this case, would not happen.

DECISION

ROH, Inc. protests the proposed award of a contract to Technology, Management & Analysis Corporation (TMA) under request for proposals (RFP) No. N00024-94-R-6413(Q), issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for life cycle, engineering, technical and analytical management support

services for NAVSEA's Surface Ship Program Management Office. ROH, the incumbent contractor, argues that the Navy conducted an unreasonable evaluation of TMA's cost and technical proposals.

We deny the protest.

BACKGROUND

The RFP, issued December 10, 1993, sought offers for a cost-plus-fixed-fee level-of-effort contract to provide comprehensive technical and engineering support services for all phases of the ship maintenance and repair process for surface ships. The solicitation provided for a 1-year base period, with up to four 1-year options, with an estimated level of effort for each contract period of 121,680 man-hours.

The RFP advised that the contract would be awarded to the offeror whose proposal represented the combination of technical merit and cost most advantageous to the government. Four technical evaluation factors were listed, in descending order of importance: experience, technical approach, management approach, and facilities and resources. The RFP stated that the Navy would evaluate each offeror's proposed costs for realism and reasonableness to determine a projected cost. To establish the relative balance between technical advantage and projected cost, the RFP set forth a formula for calculating the amount of cost premium the agency would pay for additional technical merit.[1]

The Navy received initial proposals from six offerors on February 14, 1994. Technical proposals were reviewed by the technical evaluation review panel (TERP), and cost proposals were reviewed by the cost analysis panel (CAP). As part of its cost evaluation, the CAP asked the Defense Contract Audit Agency (DCAA) to verify each offeror's cost elements and generally considered the results of DCAA's audits in its report. Both the CAP and TERP submitted their reviews of initial proposals to the contract award review panel (CARP). The CARP unanimously voted to accept these reports as submitted and converted the raw technical scores to weighted scores. The CARP excluded two offerors from further consideration due to their low technical scores and decided to convene discussions with the remaining offerors.

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[1]The RFP explained that the agency would compare the lowest projected cost for a technically acceptable offeror with the projected cost of higher-scored technically acceptable offerors, and would pay a premium for a higher technical score equal to 1 percentage point in projected cost for 1 point of technical merit. Hypothetically, this relationship permits payment of a 30-percent premium for a proposal with the highest available technical score (100) when compared to the lowest acceptable technical score (70).

Upon completion of discussions, three of the four offerors whose proposals were included in the competitive range submitted best and final offers (BAFO) on January 20, 1995. Again, both the CAP and TERP produced reports for the CARP, taking into consideration the additional information provided by the offerors. The CARP unanimously voted to accept the reports as submitted, with the following results:[2]

	Weighted Score	Proposed Costs	Projected Costs
ROH	88.245	[DELETED]	[DELETED]
TMA	85.3020	[DELETED]	[DELETED]
Company A	84.6595	[DELETED]	[DELETED]

The CARP determined that all three offers were technically acceptable, and that TMA's projected cost was the lowest of the three. The CARP calculated the cost premium and determined that although ROH had the highest-rated proposal, its projected cost was greater than the premium the government was willing to pay by more than $2 million. The CARP recommended TMA for award as offering the best overall value to the government, and the contracting officer, serving as the source selection authority, concurred. ROH filed this protest shortly after it was notified that TMA had been selected for award. Award of the contract has been suspended pending the resolution of this protest. See 31 U.S.C. § 3553(c)(1) (1988).

Additional Background on Uncompensated Overtime

The solicitation here required offerors proposing to utilize uncompensated overtime to, among other things, have an approved and established cost accounting system; describe the level of uncompensated overtime expected and its effect on performance; and include a copy of their corporate policy on uncompensated overtime.[3] Moreover, the RFP advised that the realism of personnel compensation

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[2]In preparing its response to this protest, NAVSEA discovered that the weights assigned to the technical factors and subfactors were slightly inconsistent with the order of precedence stated in the RFP. The CARP reviewed the documentation and concluded that in no instance was the difference between TMA's and ROH's weighted technical scores more than half a point higher than the original weighted technical scores. ROH does not challenge this conclusion.

[3]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 (continued...)

rates, including the discounting of hourly rates due to uncompensated overtime, would be part of the proposal evaluation.[4] In addition, the RFP provided that unrealistic rates might indicate greater risk in the technical area of the evaluation, and might result in a reduced technical score and/or adjustments to the cost proposal. Finally, the RFP included the clause at Federal Acquisition Regulation (FAR) § 52.222-46, which cautions against proposing professional compensation that is unrealistically low and informs offerors that failure to comply with its provisions may constitute sufficient cause to justify rejection of a proposal. FAR § 52.222-46(d).

In its initial proposal, TMA advised the Navy that all of its senior and junior staff, and some of its support staff, were exempt employees who had been required to work a standard [DELETED]-hour work week since November 1992. However, for this contract, TMA proposed to require its exempt employees to work uncompensated overtime as follows: all senior staff level I (SSLI) employees would be required to work [DELETED]-hour weeks, and all other exempt employees would be required to work [DELETED]-hour weeks. TMA explained that it calculated its hourly rates for these exempt personnel by dividing their annual salaries by 2,080[5] and multiplying the result by the ratio of either 40/[DELETED] or

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[3](...continued)
Fair Labor Standards Act, without additional compensation." Defense Federal Acquisition Regulation Supplement (DFARS) § 252.237-7019(a)(1); Tracor Applied Sciences, Inc., B-253732, Oct. 19, 1993, 93-2 CPD ¶ 238.

[4]As discussed in greater detail below, an offeror using uncompensated overtime can propose lower effective rates. For example, if an employee is paid $20 per hour for 40 hours of work, but will actually work 5 additional hours without compensation, her effective hourly rate is lower:

$$\frac{\$20.00 \times 40 \text{ hours}}{45 \text{ hours}} = \frac{\$17.78}{\text{hour}}$$

[5]The RFP stated that its manpower estimates are based on a rate of 2,080 productive man-hours (40 hours/week x 52 productive weeks/man-year), and required offerors to propose manpower projections in equivalent man-hours or to precisely define and substantiate any other standards utilized.

40/[DELETED], depending upon their personnel category. For example, TMA provided the following calculation using its proposed program manager:

$[DELETED] per year/2,080 hrs. = $[DELETED]/hr.

$[DELETED]/hr. x 40/[DELETED] = $[DELETED]/adjusted hr.

Accordingly, for this individual, TMA's spreadsheet showed a direct labor rate of $[DELETED] multiplied by a direct labor baseline of 2,080 hours, for a total of $[DELETED] in salary for the base year of the contract.

TMA reported that its exempt personnel historically worked an average of [DELETED] hours in excess of the standard [DELETED]-hour week with no adverse effects, and submitted a history of the average work weeks as of the end of 1993. The proposal included letters from each affected employee in which they agreed to work the stated levels of uncompensated overtime, an explanation of the firm's accounting system, and the firm's 1992 policy on uncompensated overtime.

In response to the Navy's request to audit TMA's cost proposal, including its direct labor rates and uncompensated overtime, DCAA's audit report stated that TMA's proposed labor rates were based on its December 1993 payroll and explained their computation. DCAA stated that it verified the current labor rates of the proposed employees using TMA's February 1994 payroll, and verified the proposed rates of new hires using the contingency hire letters. As a result, DCAA recommended upward adjustments for several proposed personnel to the verified rates. With regard to TMA's proposed use of uncompensated overtime, DCAA reported that:

> "Although [TMA] has . . . adequate uncompensated overtime policy and procedures, we find the proposed hours which includes [sic] uncompensated overtime, excessive for [SSLI] ([DELETED] hrs.) employees and [DELETED] annual hours for other employees."

The narrative portion of the initial CAP report simply stated the extent of TMA's proposed use of uncompensated overtime without reference to DCAA's finding that the hours were excessive. The CAP calculated the productive man-hours for the personnel proposed to work [DELETED] hours per week at [DELETED] per year,[6] and accepted that level.[7] The CAP also reported that TMA provided adequate

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[6]According to its proposal, TMA accounted for [DELETED].

[7]The initial CAP report's calculations of TMA's direct labor costs makes adjustments only for new and contingent hires. The calculations also utilize TMA's proposed direct labor baseline of 2,080 man-hours per year.

documentation of its uncompensated overtime and that DCAA had "verified that [DELETED] hours per week were performed over the last year." Finally, the CAP stated that "DCAA accepted TMA's uncompensated methodology and took no exception to the proposed direct labor rates." The initial CARP unanimously voted to accept the CAP report as submitted.

During discussions, NAVSEA posed the following question to TMA, based on its above example:

> "[In] your cost proposal, [the program manager's] . . . annual salary is listed at $[DELETED]. . . . [Y]our technical proposal states that [he] will be dedicated 100 percent to this contract. However, . . . your cost proposal [lists] [his] proposed direct labor cost . . . at $[DELETED]. Provide a detailed explanation as to why the proposed direct labor cost for [him] is not $[DELETED], since he will be dedicated 100 percent to this contract as stated in your [s]taffing [p]lan? Provide a detailed explanation as to the discrepancy between the percent of time dedicated to this contract by each employee as stated in your [s]taffing [p]lan . . . , the corresponding proposed direct labor cost by each employee as stated in your [c]ost [p]roposal . . . and the corresponding annual salary for each employee?"

TMA responded by stating that it had interpreted 100-percent dedication to the contract to mean a total of 2,080 hours per person, regardless of the total number of hours worked by each person, but that it had now restructured its proposal to accommodate its revised perception of the government's requirements. TMA explained that:

> "All exempt employees will work [DELETED] hours annually, of which [DELETED] hours will form the direct labor baseline for this contract with the remainder of hours being applied to earned benefits (leave, sick leave, holidays, etc.) and indirect labor (general and administrative) tasks. A select number ([DELETED]) of senior managers will each work a total of [DELETED] hours annually of which [DELETED] hours will form the direct labor baseline for this contract. The non-exempt personnel baseline by definition must be 2,080 hours."

TMA's BAFO reflected this costing methodology by increasing its direct labor baselines from 2,080 for exempt employees to [DELETED] or [DELETED], depending upon their personnel category. TMA also retained most of its earlier-proposed direct labor rates. The firm also included an updated revision of its uncompensated overtime policy, and risk mitigation information on its use of uncompensated overtime.

The narrative section of the final CAP report is identical to the narrative in the initial CAP report--i.e., it does not address TMA's revised direct labor baselines.[8] Instead, the report states that the only adjustments made to TMA's direct labor costs were those for contingent and new hires. Despite the failure of the narrative section of the report to address these issues, however, the calculations appended to the report reflect TMA's revised approach. The direct labor baselines are increased from 2,080 man-hours to [DELETED] hours for SSLI employees, and to [DELETED] man-hours for all other exempt employees. In addition, most of the direct labor rates are adjusted upward from those in TMA's BAFO or those in the initial CAP's projections.

The second and third TERP reports also do not address the issue of TMA's uncompensated overtime and, despite the apparent discrepancies in the final CAP report between the narrative and the attached calculations, the final CARP unanimously accepted the CAP's report as submitted without commenting on the matter of uncompensated overtime.

DISCUSSION

ROH's protest centers around the Navy's consideration of TMA's uncompensated overtime. ROH argues that the cost realism evaluation of TMA's proposal was unreasonable because the CAP ignored DCAA's finding that TMA's uncompensated overtime was excessive, and because the adjustments in its final calculations are not clearly related to TMA's proposed use of uncompensated overtime. ROH also argues that the technical evaluation of TMA's proposal was unreasonable because neither the TERP nor the CARP was made aware of DCAA's view, and both failed to downgrade the firm's proposal accordingly.

Cost Evaluation

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.605(d). Consequently, a cost realism analysis must be performed by the agency 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.

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[8]In fact, despite the specific statement in TMA's response to the discussion question that the personnel it proposed to work [DELETED]-hour weeks would work [DELETED] man-hours per year, or [DELETED] productive man-hours, the second CAP report repeated the initial CAP report's assessment that these personnel would work [DELETED] productive man-hours.

Contracting officers are required by the FAR to document this evaluation, FAR § 15.608(a)(1), and when properly documented, 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.

Since the RFP here required offerors to propose costs using an estimated number of man-hours, an offeror that can credibly state that certain of its employees will work more than 40 hours per week without additional compensation can, other things being equal, propose lower costs. See Systems Research & Applications Corp., B-225574.2, May 26, 1987, 87-1 CPD ¶ 540. In addition, although the methodology for using uncompensated overtime may vary, offerors are permitted to calculate their costs using an effective rate which is lower than the employee's standard hourly rate. Id. Since offerors proposing uncompensated overtime may use this lower effective hourly rate to calculate their total proposed costs, the reduction in proposed costs can be substantial.

As an initial matter, the parties agree that DCAA considered TMA's proposed use of uncompensated overtime to be excessive, but disagree as to the extent of DCAA's disapproval--the Navy asserts that DCAA's concern was limited to those personnel proposed to work [DELETED]-hour weeks; ROH counters that DCAA's concern extended to those personnel proposed to work [DELETED]-hour weeks.

On this issue, the DCAA report stated that:

> "The proposed labor rates are based on the offeror's 24 December 1993 payroll for current employees. The contractor computed the proposed labor rates by dividing the annual salary of exempt employees by [DELETED] hours for the [SSLI] employees and [DELETED] for all the other employees except for nonexempt. We verified the current labor rates of the proposed employees to the contractor's payroll for period ending 4 February 1994. We verified the proposed rates of new hires to the contingency hire letters. Although [TMA] has . . . adequate uncompensated overtime policies and procedures, we find the proposed hours which includes [sic] uncompensated overtime excessive for [SSLI] ([DELETED] hours) employees and [DELETED] annual hours for other employees."

Our reading of this portion of the report leads us to conclude that DCAA's concern extended to both categories of personnel: "we find the proposed hours which includes [sic] uncompensated overtime excessive . . . for [SSLI] . . . employees and . . . other employees." However, in support of its position, the Navy has obtained an affidavit from the DCAA auditor responsible for TMA's audit in which he states

that, "based on TMA's established [DELETED]-hour work week and its most recent actual salary, labor rate, and hours performed for each exempt employee," DCAA found only TMA's proposed [DELETED] hours per week excessive, not its proposed [DELETED]-hour work week.

Regardless of the scope of DCAA's concerns, there is no question that the CAP report failed to accurately reflect DCAA's review of TMA's uncompensated overtime. First, the CAP report erroneously informed the CARP that "DCAA verified that [DELETED] hours per week were performed over the last year." DCAA's audit report reached no such conclusion and TMA's uncompensated overtime history does not support such a statement.[9] Second, the CAP report inexplicably failed to inform the CARP that DCAA considered TMA's proposed levels of uncompensated overtime to be excessive. Third, while its statement that "DCAA took no exception to the proposed direct labor rates" is true, absent the critical information that DCAA considered the amount of uncompensated overtime excessive, the CAP report leaves the erroneous impression that DCAA placed its imprimatur on both the rates and the number of hours.

Despite several opportunities, the Navy has not explained the initial CAP report's failure to accurately reflect DCAA's views on this matter, and we have no basis to conclude that the initial CAP considered DCAA's position. The initial CAP did not adjust TMA's cost proposal with respect to uncompensated overtime--or explain why adjustments were not necessary--and its failure to accurately present the results of DCAA's audit report prevented the initial CARP from fulfilling its responsibilities in this regard. As the Navy correctly points out, however, the initial CAP and CARP reports are not determinative here, as the second CAP and CARP reports were the bases for the agency's cost/technical tradeoff analysis and resulting selection decision.

The Navy essentially contends that any errors in the initial CAP report were cured by the second CAP report's calculations, which show an upward adjustment of TMA's labor rates to reflect actual labor rates and do not credit TMA with uncompensated overtime above an average [DELETED]-hour per week level. The Navy explains that the changes in many of the direct labor rates used in the second CAP report's calculation of TMA's projected costs reflect a rate verification,

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[9]The Navy's assertion that the TMA employees proposed to work a [DELETED]-hour week have historically worked between [DELETED] and [DELETED] hours blurs the history relied upon by both the Navy and DCAA. That history, ending as of September 1994, shows that of the [DELETED] non-SSLI exempt employees proposed, only [DELETED] have worked more than [DELETED] hours per week. [DELETED] worked an average of only [DELETED] hours per week, and [DELETED] had no history at all.

provided by DCAA, of the costs proposed in TMA's BAFO. According to the Navy, the rates in the second CAP report are actual rates based on TMA's [DELETED]-hour work week.[10]

While ROH correctly questions the lack of an explanation in the CAP report and the lack of contemporaneous documentation to explain the Navy's adjustment, our review must consider the entire record, including statements and arguments made in response to the protest. Allied-Signal Aerospace Co., Bendix Communications Div., B-249214.4, Jan. 29, 1993, 93-1 CPD ¶ 109; JSA Healthcare Corp., B-242313; B-242313.2, Apr. 19, 1991, 91-1 CPD ¶ 388; Burnside-Ott Aviation Training Center, Inc.; Reflectone Training Sys. Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158. The submissions here, particularly those concerning DCAA's rate verification of TMA's BAFO, show that the Navy rejected TMA's proposed direct labor rates in favor of its actual rates, which were based on a [DELETED]-hour work week rather than the [DELETED]-hour and [DELETED]-hour work weeks in TMA's proposal. Since these were the figures relied upon by the CARP in its final decision, the Navy's failure to adequately document its decision did not affect its ultimate decision.

Technical Evaluation

ROH also argues that the CAP's failure to inform the CARP or TERP of DCAA's concerns about TMA's excessive reliance on uncompensated overtime prevented the agency from properly downgrading TMA's technical proposal.

In considering protests against an agency's evaluation of proposals, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. A protester's disagreement with the agency's judgment, without more, does not show that the judgment was unreasonable. Id.

Again, as stated above, the RFP specifically advised that unrealistic hourly rates might provide additional risk in the technical area of the evaluation, and might result in a reduced technical score. In addition, FAR § 52.222-46, included in the solicitation, emphasizes the importance of proposing reasonable hourly rates for professional employees to ensure the retention of qualified personnel and the continued ability to perform, and cautions offerors that failure to comply with its provisions may constitute sufficient cause to justify rejection of a proposal.

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[10]The parties do not dispute the reasonableness of TMA's [DELETED]-hour work week.

As ROH contends, while the record shows that both the TERP and the CARP knew the extent of TMA's proposed use of uncompensated overtime, there is no evidence that either panel was aware that DCAA viewed TMA's proposed use of uncompensated overtime as excessive. To the contrary, the second CAP report's narrative erroneously suggests that DCAA did not take exception to TMA's proposed use of uncompensated overtime and, as discussed above, the attached calculations, standing alone, do not convey DCAA's view. In summary, the record strongly suggests that neither the CARP nor the TERP ever considered this issue prior to the filing of this protest.

After these matters were brought to the Navy's attention during the pendency of this protest, the CARP submitted additional findings stating that it would not have downgraded TMA's technical proposal on the basis of its proposed use of uncompensated overtime. The CARP concedes that TMA's requirement that SSLI employees work [DELETED]-hour weeks is excessive, but asserts that it would not have rejected TMA's proposal on this basis because the firm's history clearly showed these employees working [DELETED] to [DELETED] hours weekly. Further, the CARP states that in view of TMA's [DELETED]- to [DELETED]-hour actual work weeks, its proposal to require other exempt personnel to work [DELETED]-hour weeks would not significantly decrease TMA's ability to attract and retain competent professional employees, or require downgrading of the technical proposal.

In addition, the Navy argues that even if TMA's technical proposal were downgraded under all of the relevant technical factors and subfactors[11] to the lowest technically acceptable score of 70--TMA received a total technical score of 85.3--the application of the RFP's cost premium calculation leaves ROH outside of the allowable cost premium by $571,670. Hence, the Navy contends that ROH was not prejudiced by the agency's failure to downgrade TMA's proposal.

Although ROH correctly argues that the RFP's inclusion of FAR § 52.222-46 gave the agency the option to reject as technically unacceptable any offeror providing inadequate or unrealistically low professional compensation, TMA received high scores under each subfactor relevant to the issue of uncompensated overtime. In addition, the CARP has stated that the firm's work history would preclude rejection of its proposal on this basis. While it is clear that the Navy should have addressed the issue of the significant amounts of uncompensated overtime included in TMA's

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[11]ROH does not dispute the Navy's view that the subfactors relevant to the uncompensated overtime issue are personnel qualifications (under the experience factor); understanding and approach (under the technical approach factor); and organization (under the management approach factor). TMA's technical score under these factors was 86.5, 87.5, and 82.5, respectively.

proposal, we conclude that ROH was not prejudiced by the Navy's failure to consider this matter in the course of the technical evaluation. Merrick Eng'g, Inc.--Recon., B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444.

The protest is denied.

Comptroller General
of the United States