

Van Schaik



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

Decision

Matter of: T&M Joint Venture
File: B-240747
Date: December 19, 1990

Kenneth S. Kramer, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Richard J. Luebke, Esq., for Bendix Field Engineering Corp., an interested party.
Michael J. Cunningham, Jr., Esq., Department of the Navy, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that in cost realism analysis agency incorrectly applied Service Contract Act (SCA) wage rates to labor categories filled by employees that are considered professional by protester and therefore exempt from the SCA is denied where protester has not shown that agency unreasonably determined, for purposes of determining low-cost offeror, that labor categories in question would likely be found to be subject to the SCA under the contract.

DECISION

T&M Joint Venture, which consists of team members Tracor Applied Services, Inc. and Mantech Technical Services Corporation, protests the award of a contract to Bendix Field Engineering Corporation under request for proposals (RFP) No. N00421-88-R-0167, issued by the Navy for systems engineering and integration support services.

We deny the protest.

The solicitation contemplated the award of a cost-plus-fixed-fee level-of-effort contract for a 6-month base period and 5 option years. For the base period and for each of the options, the solicitation included an estimated level-of-effort and an additional optional estimated level-of-effort.

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Under the solicitation as amended, the total estimated level-of-effort for the base period and all options was 650,000 man-hours.

The award was to be made to the offeror submitting the technically acceptable proposal with the lowest evaluated total estimated cost-plus-fixed-fee for the base period and the options. The solicitation indicated that proposals would be evaluated for cost realism which was to be determined in part by reference to the costs which the offeror could reasonably be expected to incur in performing the contract in accordance with its offer.

The RFP specified numerous labor categories and the corresponding level-of-effort needed for each category. As amended, the RFP notified offerors that a number of the listed labor categories were covered by a Service Contract Act (SCA) wage determination incorporated into the solicitation. The wage determination included a note which stated that for employees in six listed labor categories: Computer Programmer I, Computer Programmer II, Computer Programmer III, Computer Systems Analyst I, Computer Systems Analyst II, and Computer Systems Analyst III, the wage determination "[d]oes not apply to employees employed in a bona fide executive, administrative or professional capacity as defined and delineated in" 29 C.F.R. § 541.

Three firms submitted proposals: Bendix, Tracor, and Mantech. All three proposals were found to be technically unacceptable although the proposals of Bendix and Tracor were considered capable of being made acceptable. The agency rejected Mantech's proposal and created a competitive range consisting of Bendix and Tracor. Bendix and T&M Joint Venture, as the successor in interest to Tracor, submitted revised proposals. After discussions and technical responses, both were found to be technically acceptable. At that time, the Navy performed a cost realism analysis on the two competitive range proposals and requested best and final offers (BAFO) from both.

The Navy evaluated the BAFOs for cost realism and determined that a contract with Bendix would cost the government \$19,041,219; with T&M, the cost would be \$19,272,678. Since both proposals were technically acceptable, based on the cost evaluation, the Navy awarded the contract to Bendix as the technically acceptable offeror with the lowest evaluated total estimated cost.

After the contract was awarded, in preparation for a debriefing of T&M and for this protest, the contracting officer reevaluated the cost proposals and found a number of mistakes in the cost analysis, including mathematical errors and the failure to include the full cost of one SCA labor category in

Bendix's proposal. The result of the corrections of the two competitive range proposals is shown below:

	Proposed Cost	Evaluated Cost	Corrected Cost
Bendix	\$18,981,462	\$19,041,219	\$19,056,376
T&M	\$18,446,774	\$19,271,678	\$19,340,673

Based on the Navy's reevaluation, Bendix remained the low cost offeror.

T&M first argues that in the cost realism analysis of its proposal, the Navy incorrectly applied SCA wage rates to four categories of professional employees proposed by T&M which are exempt from the SCA.^{1/} According to T&M, it informed the Navy in its BAFO that its employees in the labor categories in question were professionals outside of the ambit of the SCA and were proposed at the actual salary rates paid to those individuals. T&M notes that the SCA expressly does not apply to persons employed in a bona fide executive, administrative or professional capacity. Also, the RFP wage determination specifically indicated that this statutory exception would apply to bona fide executive, administrative, or professional employees in six specific categories, including the four labor categories which T&M argues are professional and SCA exempt.

T&M also notes that the Department of Labor's (DOL) regulations specifically provide that persons in the field of automatic data processing, such as those in the labor categories in question, may be exempt from the SCA if they perform tasks requiring the exercise of discretion and independent judgment. In support of its view that these labor categories are exempt from the SCA as requiring the services of professional employees, T&M points out that the solicitation described the labor categories in question as "key personnel," which it defined as "skilled/experienced professional and/or technical personnel" and that under the solicitation such key personnel are expected to exercise judgment and discretion. According to the protester, the education and experience requirements for these positions as described in the RFP's statement of work and the tasks that key personnel are to perform also support its view that the positions in question are professional and exempt from the SCA. T&M maintains that there is no evidence in the record that the contracting officer considered these solicitation

^{1/} The labor categories in question and the status of employees in those positions in the firm are considered proprietary by T&M. For this reason, our discussion of this issue will be limited.

provisions in determining that the T&M employees in question were subject to the SCA.

Finally, T&M argues that the contracting officer could have, but did not, consider Tracor's staffing policies, which have been approved by the Defense Contract Administration Services Management Area (DCASMA) Austin, and could have considered that other Navy procuring offices have approved Tracor's proposal of employees in some of the questioned labor categories as professional. T&M maintains that as a result of this error, its estimated cost for evaluation purposes was overstated by \$390,018.

By applying SCA wage rates to the T&M labor categories, the agency was not attempting to determine which SCA rates will actually apply under the contract, a matter of contract administration which will ultimately be determined by the DOL. Rather, the Navy was simply using the SCA wages which were incorporated into the RFP in examining the offerors' proposed rates in the context of its cost realism analysis. In this respect, since this is a cost-reimbursement contract, the Navy evaluated proposed costs to determine whether they were realistic. The purpose of a cost realism analysis by an agency under a level-of-effort, cost-type contract is to determine the extent to which the offeror's proposed labor rates are realistic and reasonable. Since an evaluation of this nature necessarily involves the exercise of informed judgment, the agency is clearly in the best position to make this cost realism determination; consequently, we will review such a determination to ascertain whether it is reasonable and consistent with the terms of the RFP. Donald Clark Assocs., Inc., B-238857; B-238857.2, Aug. 2, 1990, 90-2 CPD ¶ 93; Bendix Field Eng'g Corp., B-230076, May 4, 1988, 88-1 CPD ¶ 437. For the reasons set forth below, we believe that the agency acted reasonably in using the incorporated SCA rates as the basis for its realism determination.

DOL's regulations, in relevant part, describe an "employee employed in a bona fide . . . professional capacity" as one:

"(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

"(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

"(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

"(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and" 29 C.F.R. § 541.3(a)-(d).

As T&M notes, DOL's regulations at 29 C.F.R. § 541.207(c)(7) specifically contemplate that labor categories such as those in question here, which involve persons working in the automatic data processing field, may be exempt from the SCA if they perform tasks requiring the exercise of discretion and independent judgment. For example, that provision indicates that a systems analyst exercises discretion and independent judgment when he develops methods to process accounting, inventory, sales, and other business information on computers or when he determines the exact nature of a data processing problem and structures the problem in a logical manner to be solved by a computer system. A computer programmer uses discretion and independent judgment when he does the preliminary work of analyzing a computer problem to work out exact and logical steps for its solution, when he determines exactly what information must be used to prepare documents, and when he ascertains the exact form in which information is to be presented.

Although T&M emphasizes the education levels required by the labor categories in question as a factor under the DOL's regulations, education is not determinative of SCA-exempt status and, of the four positions in question, two do not require even a 4-year baccalaureate degree. While the other two positions list advanced degrees, they also allow substitution of experience for those degrees. Further, the fact that the positions in question are all "key personnel" under the RFP is not determinative of professional status; the solicitation includes as "key personnel" some positions such as "Drafter V" and "Drafter IV" which require only a high school degree and, we believe, clearly are not professional positions.

T&M argues that employees in the categories in question are considered professional under Tracor's staffing policies, which have been approved by DCASMA, and that other Navy procuring offices have approved Tracor's classification of the employees in those categories as professional. As the Navy points out, under DOL regulations, the determinative factor for deciding whether a particular employee is a service employee subject to the SCA is the work performed by that employee on an SCA-covered contract. 29 C.F.R. § 4.155. Thus, SCA coverage of service employees does not depend on the contractual relationship that exists between Tracor and its employees, 29 C.F.R. § 4.155, or on the approval of particular employees as SCA-exempt under other contracts.

The statement of work does require the contractor to "design," "analyze," and "develop" automatic data processing hardware and software, and we have no reason to doubt that employees in the categories established by T&M would perform these professional type duties. Nonetheless, we have reviewed the T&M labor categories and the RFP statement of work in the context of DOL's regulations and we have no basis to challenge the agency's judgment that the bulk of the work to be required of employees in the categories in question is not of the type that consistently demands the exercise of discretion and judgment and is not predominately intellectual and varied in character. See 29 C.F.R. § 541.3(b), (c). Thus, we find reasonable the Navy's classification of the labor categories in question for purposes of measuring what a contract with T&M would be likely to cost.

T&M also argues that the Navy made other errors in the cost evaluation of its proposal. First, T&M maintains that the Navy incorrectly applied SCA wage rates to job categories not identified by the solicitation as covered by the SCA. Further, according to the protester, although the solicitation stated that labor rates for SCA-covered labor categories would not be escalated in the later years, in the cost realism analysis, on those same labor categories to which the agency incorrectly applied SCA rates, the agency also failed to adjust the option-year rates to eliminate escalation which the contractor had proposed. T&M maintains that these errors improperly increased its evaluated cost by \$112,488.

Also, according to the protester, the Navy applied incorrect indirect rates to two labor categories in T&M's proposal and inconsistently applied a 4 percent escalation factor in the evaluation. T&M maintains that these two errors improperly increased its evaluated cost \$110,199 and \$5,000, respectively.

We need not consider those additional arguments because even if we were to agree with them, the alleged errors would not make the protester's evaluated cost lower than Bendix's. In this respect, the difference between the evaluated cost of T&M (\$19,340,673) and Bendix (\$19,056,376) is \$284,297 and "correction" of the other alleged errors would reduce T&M's evaluated cost by only \$227,687.

Finally, T&M argues that the significance and magnitude of the errors in the cost analysis of its proposal call into question the evaluation of Bendix's proposal and mandate a thorough review by this Office of the analysis that led the Navy to conclude that Bendix's proposal had the lowest evaluated cost.

We have reviewed the Navy's cost realism analysis of Bendix's proposal and we conclude that analysis was reasonable and consistent with the evaluation scheme set out in the solicitation. As the Navy points out, Bendix took no exception to the SCA rates in its proposal. The only significant error we are aware of in the Bendix cost evaluation was pointed out by the Navy. That error resulted in increasing Bendix's evaluated cost to \$19,056,376 as we pointed out above and, standing alone, had no effect on the selection decision.

The protest is denied.



for
James F. Hinchman
General Counsel