

MR. Pietrovito



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Research Corporation

File: B-241569

Date: February 19, 1991

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Carleton S. Jones, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for American Management Systems, Inc., an interested party.
Gregory E. Smith, Esq., and Wendy E. Ojeda, Esq., Department of the Army, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a negotiated procurement for the award of a cost reimbursement contract, the procuring agency's upward adjustment of the protester's proposed costs to reflect the agency's cost realism adjustment of the protester's proposed labor rates, which were based upon the offer of uncompensated overtime, to labor rates based on a 40-hour workweek was unreasonable, where offerors were not prohibited from offering uncompensated overtime, the protester's offer clearly provided for uncompensated overtime to satisfy the solicitation's requirements, and the protester's standard and disclosed accounting practices provided for the incurring and billing of uncompensated overtime.
2. Where the agency reasonably concluded that labor costs would escalate during the option periods of a cost reimbursement contract, the procuring agency reasonably sought to normalize the offers of the awardee and the protester where the protester did not offer labor escalation, and the awardee did. It was not reasonable, however, for the agency to remove the labor escalation costs from the awardee's proposal to normalize the two firms' proposals, but rather these costs should have been added to the protester's lower labor cost proposal.
3. Protest is sustained and award recommended to the protester, if otherwise appropriate, where the record shows that the protester's and awardee's proposals were technically equal, and the protester's evaluated costs should be considered lower than the awardee's.

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DECISION

General Research Corporation (GRC) protests the award of a cost reimbursement contract to American Management Systems, Inc. (AMS) under request for proposals (RFP) No. MDA903-90-R-0094, issued by the Defense Supply Service-Washington (DSS-W) for automated data processing (ADP) support services for the Department of the Army's Management Information System. GRC contends that DSS-W's cost realism evaluation of its cost proposal was unreasonable.

We sustain the protest.

The RFP, issued on July 25, 1990, contemplated the award of a cost-plus-fixed-fee, indefinite delivery, requirements contract for ADP support services for a base and 4 option years. Offers were solicited to perform six specified tasks, and the RFP stated the government's estimated level of effort to be 8 man-years, based upon a 40-hour workweek, for all tasks in each period. Offerors were informed that they must substantiate offers varying from the government's estimated level of effort.

The RFP stated that award would be made to the responsible offeror whose conforming offer was determined to be the best overall, price or cost and other factors considered. The RFP listed technical evaluation factors and stated that the technical area was more important than cost and that a cost realism analysis would be performed.

Of the seven offers received in response to the RFP, DSS-W determined that six offers, including the offers of AMS and GRC, the incumbent contractor, were in the competitive range.^{1/} AMS' and GRC's initial technical proposals were the two highest scored technically. Despite their high technical scores, both offerors proposed less than the government's estimated level of effort.

Cost and technical discussions were conducted with all offerors, and revised proposals and best and final offers (BAFO) requested. Both GRC and AMS were informed in discussions that the agency found their proposed levels of effort to be understated and that they might be downgraded if they did not provide the government's estimated level of effort. AMS upwardly revised its cost proposal consistent with its increased proposed level of effort to meet that suggested in the RFP. GRC also increased its level of effort

^{1/} GRC provided these services for 4 years under Contract No. MDA903-86-C-0368.

to that suggested in the RFP by proposing uncompensated overtime and adding a staff person. GRC also reduced its labor costs by proposing an uncompensated overtime labor rate for its salaried employees.^{2/} GRC submitted the second lowest BAFO cost proposal while AMS submitted the highest cost proposal.

In the final technical evaluation, AMS' and GRC's offers were again the two highest scored, receiving technical scores of 4,340 and 4,222, respectively, of a maximum of 5,000 available points. The technical evaluation panel recommended award to either AMS or GRC and stated that "[t]he two technical proposals are substantially the same."

DSS-W performed a cost realism analysis of the two offerors' cost proposals that showed GRC had not included costs for other direct costs (ODC) and labor escalation while AMS had proposed both ODCs and labor escalation. In addition, the agency found that GRC's use of uncompensated overtime was not realistic because it deviated from the firm's standard accounting practices and because GRC's BAFO was ambiguous concerning the use of uncompensated overtime.

DSS-W decided to normalize the offerors' cost proposals for ODCs and labor escalation by removing these costs from AMS' offer, which reduced AMS' proposed costs by \$543,974. The agency in its probable cost analysis also upwardly adjusted GRC's estimated direct labor by adjusting its proposed uncompensated overtime labor rates, which were based upon a 45-hour workweek, to labor rates based upon a 40-hour workweek. This resulted in an increase in GRC's proposed costs of \$317,231. The agency's cost adjustments resulted in the following probable cost determination:

	<u>PROPOSED BAFO COST</u>	<u>PROBABLE COST</u>
GRC	\$2,783,895	\$3,101,126
AMS	\$3,414,123	\$2,870,149

^{2/} "Uncompensated overtime" refers to the overtime hours (hours in excess of 8 hours per day/40 hours per week) incurred by salaried employees who are exempt from coverage of the Fair Labor Standards Act, 29 U.S.C. § 202 (1988). Under the Act, exempt employees need not be paid for hours in excess of 8 hours per day or 40 hours per week.

Award was made to AMS on September 29, 1990, and the first contract task order was awarded on September 30. This protest followed on October 9.^{3/}

GRC argues that DSS-W's cost realism analysis was unreasonable. Regarding its offer of uncompensated overtime, GRC contends that the bidding of uncompensated overtime is not prohibited by law, regulation or the RFP,^{4/} and states that the firm's offer of uncompensated overtime was consistent with its standard accounting practices, as disclosed in its Cost Accounting Standards (CAS) Disclosure Statement.^{5/} GRC also argues that DSS-W should have known that GRC's use of uncompensated overtime was consistent with the firm's accounting procedures and practices because GRC, as the incumbent contractor, had negotiated task orders and billed DSS-W utilizing a full time accounting system,^{6/} under which the agency received the benefit of labor rates based on

^{3/} Contract performance has not been suspended since the agency did not receive notice of the protest within 10 calendar days following contract award. See 4 C.F.R. § 21.4(b) (1990).

^{4/} Section 834 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1613 (November 5, 1990) (to be codified at 10 U.S.C. § 2331) requires the Secretary of Defense to establish regulations, within 180 days of the date of the Act, ensuring that proposals for contracts for professional and technical services are evaluated on a basis that does not encourage mandatory uncompensated overtime. The Department of Defense has not yet issued regulations responsive to this requirement.

^{5/} GRC, as a CAS covered contractor, is required to file a Disclosure Statement, describing its cost accounting practices and procedures, with the cognizant administrative contracting officer and contract auditor. See Federal Acquisition Regulation (FAR) § 30-202.

^{6/} "Full time accounting" refers to an accounting practice in which all hours worked in a pay period are accounted for and divided into an employee's salary to determine that employee's labor rate for that period. See Defense Contract Audit Agency (DCAA) Contract Audit Manual ¶ 6-410.4 (July 1990).

uncompensated overtime.^{7/} GRC also states that it submitted other offers to, and received two contracts from, DSS-W based upon the firm's use of uncompensated overtime.

DSS-W states that it found unrealistic GRC's BAFO labor rates, which were based upon uncompensated overtime, because these rates appeared to be deflated in comparison to GRC's "historical" "standard" labor rates, which were based on the 40-hour workweek used in GRC's initial cost proposal. The agency argues that from its review of GRC's CAS Disclosure Statement and consultations with DCAA that GRC's uncompensated overtime rates appeared to deviate from GRC's standard accounting practices. DSS-W further contends that GRC did not show how it would use the uncompensated overtime hours to satisfy the solicitation level of effort and that GRC's BAFO was ambiguous because it stated two different labor rates and provided that "[i]n the preparation of task order proposals, direct labor will be calculated using the then-current average labor category bid rates." Furthermore, the agency contends that "[t]o be fair to all offerors it was necessary . . . to evaluate labor costs for each offeror on the same basis - the level of effort requested in the solicitation which was based on a 40 hour work week."

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs of contract performance and proposed fees are not considered controlling since an offeror's estimated costs may not provide valid indications of final actual costs that the government is required, within certain limits, to pay. See FAR § 15.605(d); Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482. 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.-Federal, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

We find from the record here that DSS-W's cost realism determination was not reasonably based. First, GRC's CAS Disclosure Statement, which the contracting officer states was

^{7/} GRC has submitted the affidavit of its director for business planning, who states that in the last fiscal year of the prior contract GRC had a total average of 2,328 man-hours per year, which reflects an average of 44.8 hours per week, for its long-term personnel.

considered prior to DSS-W's determination, specifically states that GRC, for each employee, records all labor hours worked in a pay period and calculates a separate labor rate for that period.^{8/} Such an accounting practice describes full time accounting and does properly account for the performance of uncompensated overtime by exempt employees. In fact, this method of accounting for uncompensated overtime is specifically stated to be acceptable by the DCAA. See DCAA Contract Audit Manual ¶ 6-410.4(1). Furthermore, the RFP does not prohibit offerors from bidding uncompensated overtime, nor are we aware of any law or regulation prohibiting the use of uncompensated overtime. Cf. PAI, Inc., 67 Comp. Gen. 516 (1988), 88-2 CPD ¶ 36, and Hardman Joint Venture, B-224551, Feb. 13, 1987, 87-1 CPD ¶ 162 (where the solicitations specifically prohibited the offer of uncompensated overtime).

DSS-W contends that it was informed by DCAA that GRC's Disclosure Statement did not explicitly refer to uncompensated overtime and that the firm's accounting system did not account for uncompensated overtime. While the record indicates that DCAA orally informed the agency, prior to the agency's award decision on September 29, that GRC's accounting practices did not appear to provide for uncompensated overtime, DCAA, in response to our inquiry, informed us that its oral advice to DSS-W was in error, and that DSS-W had been so advised both orally on October 16 and in writing on October 24. The DCAA October 24 letter also states that DCAA favors accounting for uncompensated overtime.

Notwithstanding this advice, DSS-W in its report and subsequent arguments on the protest, indicated that DCAA "determined" that GRC's Disclosure Statement and accounting practices did not provide for uncompensated overtime.^{9/} In this regard, the agency provided us with a copy of DCAA's July 27 handwritten notes of DCAA's oral advice to DSS-W, which state that GRC's Disclosure Statement is "silent on the use of uncompensated overtime" and that GRC's accounting system does not account for uncompensated overtime. DSS-W, however, failed to advise us of DCAA's October 24 letter that states that GRC's CAS Disclosure Statement and full time

^{8/} Other documentation in the record suggests that DSS-W did not obtain the Disclosure Statement until shortly after award.

^{9/} AMS, the interested party, also understood from the agency's arguments that "DCAA found no historical support for GRC's proposed uncompensated overtime rates, and found no reference to 'uncompensated overtime' in GRC's CAS disclosure statement."

accounting system do provide for uncompensated overtime, and that its previous advice to DSS-W was in error.^{10/}

In any event, we find unreasonable the agency's reliance on DCAA's early, erroneous advice concerning GRC's Disclosure Statement and its accounting practices. As noted above, the method of accounting for labor hours described in GRC's Disclosure Statement is clearly inconsistent with the oral advice the agency received from DCAA. Yet, DSS-W states it reviewed this Disclosure Statement in finding GRC's method of accounting inappropriate for uncompensated overhead.

Also, DSS-W should have been familiar with GRC's accounting system from the parties' dealings under the prior contract for these services. Indeed, GRC states, and the agency does not rebut, that GRC billed on the basis of full time accounting with the result that the agency on the prior contract received the benefit of labor rates based on uncompensated overtime. Moreover, notwithstanding the problems DSS-W said it had with GRC's accounting practices on this RFP, DSS-W has previously evaluated several proposals, apparently without question, which offered uncompensated overtime at specified rates, and made awards to GRC.

While agencies may ordinarily rely on the advice of DCAA when performing a cost realism analysis, see NFK Eng'g Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497, an agency cannot blindly rely upon such advice where there is reason to doubt the validity of the information. See PAI, Inc., 67 Comp. Gen. 516, supra. Under these circumstances, DSS-W's reliance on DCAA's oral advice was unreasonable. For these same reasons, the agency could not simply reject GRC's lower uncompensated overtime rates as being inconsistent with GRC's "historical" 40-hour rates that it confirmed with DCAA. See PAI, Inc., 67 Comp. Gen. 516, supra (agency could not accept offeror's uncompensated overtime rates, as confirmed by DCAA, where RFP prohibited uncompensated overtime).

The agency's argument that GRC's BAFO did not demonstrate how or whether it would use uncompensated overtime hours to perform the contract requirements is also unmeritorious. GRC's BAFO clearly provided for the use of uncompensated overtime to satisfy the government's estimated level of effort. The RFP estimated 8 man-years of effort to perform

^{10/} We obtained this relevant letter directly from DCAA. The Competition in Contracting Act of 1984 and our Bid Protest Regulations require an agency to submit a complete report, including all relevant documents, on the protested procurement. 31 U.S.C. § 3553(b) (1988); 4 C.F.R. § 21.3(i).

the six contract tasks in the base and each option year. GRC, in its revised technical and cost proposals, detailed on a manning chart how its proposed personnel would provide the requested 8 man-years of effort with the salaried personnel working 45 hours per week.^{11/} Thus, DSS-W's concern that it most probably would pay GRC's labor costs at the higher 40-hour rate because GRC could not bill for, or did not actually intend to use, uncompensated overtime does not appear to be factually based.^{12/}

We also find without merit the agency's contention that GRC's BAFO was ambiguous regarding its proposed labor rates. The agency contends that GRC in its BAFO submitted "two sets of labor rates: a 'standard bid rate of 2080 hours' which is a 40 hour work week, and an 'uncompensated overtime rate at 2340 hours' which is a 45 hour work week." The agency argues that since GRC submitted these two rates and stated that in preparing task orders it would calculate direct labor based on the "then current average labor category bid rates," the agency did not know at which labor rate it would ultimately be billed.

GRC's BAFO specifically states that "[t]he average bid labor rates, in this case, uncompensated overtime rates based on a 45 hour work week, are used to calculate the direct labor costs" Furthermore, the estimated direct labor costs for all the GRC's salaried employees were calculated on the basis of the stated uncompensated overtime rates. It could not have been any clearer, in light of the full time accounting system used by GRC, that GRC had offered to perform the estimated level of effort with uncompensated overtime, and that its billing labor rates would be calculated on the basis of the actual overtime worked to achieve this level of effort. The two labor rates, to which the agency refers, appear on Schedule A to GRC's BAFO cost proposal, and it is clear that the two rates were simply stated for the agency's information to demonstrate the difference between the rates.^{13/}

^{11/} We note that the RFP sought offers of man-hours of effort to perform the contract services and not the delivery of specific persons, as DSS-W implies. Accordingly, employees proposed on this solicitation may also work on other contract efforts.

^{12/} DSS-W does not contend that GRC could not successfully accomplish the contract tasks with the necessary amount of man-hours using uncompensated overhead.

^{13/} Inexplicably, this schedule and other detailed cost notes were omitted from the copy of GRC's BAFO cost proposal originally provided to us by DSS-W.

The agency also argues that it was necessary to "normalize" GRC's proposed labor rates to a 40-hour workweek so that, to be fair, all offerors would be evaluated on the basis of a 40-hour workweek. We do not agree. Normalization is a technique sometimes used within the cost adjustment process in an attempt to arrive at a greater degree of cost realism. It involves measuring offerors against the same cost standard or baseline in circumstances where there are no logical differences in approach or in situations where insufficient information is provided in the proposals, leading to the establishment of a common "should have bid" estimate by the agency. See Dynalectron Corp. et al., 54 Comp. Gen. 562 (1975), 75-1 CPD ¶ 17.

There is no basis on this record for the agency to "normalize" the two offerors' proposed labor costs to a 40-hour workweek, since the offerors proposed differing approaches to accomplishing the contract work. AMS proposed a 40-hour workweek, while GRC offered to satisfy the RFP requirements with uncompensated overtime. Since there is no prohibition in the RFP to the use of uncompensated overtime, and its use is consistent with GRC's standard accounting practices, we see no basis for the agency to "normalize" labor rates that actually reflect the firms' bidding strategies. Furthermore, such an adjustment serves to artificially inflate GRC's labor rates beyond those that would be billed under GRC's full time accounting system and appears to violate Cost Accounting Standard 401, which requires offerors' estimates of proposal costs to be consistent with their standard cost accounting practices. See FAR § 30.401; CACI Inc.-Federal, 64 Comp. Gen. 71, supra.

In view of the foregoing, we find improper DSS-W's upward adjustment of GRC's proposed costs to reflect labor rates based on a 40-hour workweek rather than the uncompensated overtime rates GRC proposed. Since GRC clearly offered rates based upon uncompensated overtime and these rates were consistent with the RFP and its cost accounting practices, the agency could not arbitrarily adjust GRC's rates to a "standard" rate based on a 40-hour workweek. Furthermore, there was no need for GRC to "cap" this rate in its proposal in order for this rate to be accepted, as suggested by DSS-W, since there is no reason to believe this rate did not represent GRC's actual uncompensated overhead rate. DSS-W's improper labor rates adjustment resulted in GRC's evaluated costs being overstated by \$317,231.^{14/}

^{14/} This included the concomitant adjustments to overhead, general and administrative costs, and fees.

We also question the method by which DSS-W's "normalized" labor escalation in the firms' offers. It is true that GRC failed to bid labor escalation, while AMS did, and it was therefore appropriate for DSS-W to seek to normalize the two offers based upon the agency's reasonable determination that labor costs would escalate over the option periods of the contract. See Dynalectron et al., 54 Comp. Gen. 562, supra. However, simply removing the costs of labor escalation from AMS' proposed costs was not a reasonable method of normalizing these costs.

Labor escalation, which provides for the increase in labor costs due to inflation or other usual salary increases over the life of the contract, is accomplished by the use of a percentage multiplier that is applied to an offeror's proposed direct labor costs. The two offerors did not bid the same direct labor costs, and GRC's labor costs are lower than AMS'. Accordingly, assuming the same labor escalator is applied to both offers, GRC's labor escalation would be lower than AMS'.

Thus, GRC's proposed labor costs should be multiplied by the same labor escalator proposed by AMS, as recommended and calculated by DCAA. DCAA calculated the labor escalation on GRC's uncompensated overtime labor costs to be \$292,662. DSS-W, however, reduced AMS' proposed costs by dropping the labor escalation costs of \$301,735 to "normalize" the two proposals.

We conclude that a proper cost realism analysis of the two offers would result in GRC's evaluated costs being \$3,076,557 while AMS' evaluated costs would be \$3,171,884. That is, GRC's evaluated costs should have been considered lower than AMS'. Since the record indicates, as the technical evaluation panel noted, that the two firms' technical proposals were essentially equal, the basis for award should be the firms' evaluated costs.^{15/} See Applied Mathematics, Inc., 67 Comp. Gen. 33 (1987), 87-2 CPD ¶ 395. Accordingly, we sustain GRC's protest and find that GRC was entitled to award as the technically equal offeror with the lower

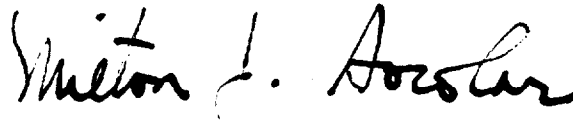
^{15/} In its report, DSS-W suggests, pointing to AMS' slightly higher technical score, that AMS was technically superior to GRC. This argument is not supported by the record, which indicates that the two firms were technically equal. In this regard, the agency has not stated that there is any discernible difference between the two firms' technical proposals. Furthermore, none of the contemporaneous evaluation documentation in the record, or the agency's business clearance memorandum, state any technical differences between the two firms' proposals.

evaluated cost. See Secure Servs. Technology, Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421.

GRC also protests other aspects of DSS-W's cost realism analysis, e.g., the agency's normalization of the offerors' ODCs; the adequacy of the agency's discussions with GRC concerning its cost proposal; and the adequacy of the agency's post-award debriefing. We need not address these other issues since we sustain the protest on the basis of DSS-W's improper evaluation of uncompensated overtime and labor escalation.

We recommend that DSS-W terminate AMS' contract for the convenience of the government and make award to GRC if otherwise appropriate. In addition, GRC is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). GRC should submit its claim for its protest costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

for 
Comptroller General
of the United States