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

Decision

Matter of: Bendix Field Engineering Corporation

File: B-246236

Date: February 25, 1992

Frederick W. Claybrook, Jr., Esq., and David Z. Bodenheimer, Esq., Crowell & Moring, and George W. Holliday, Esq., and Richard J. Luebke, Esq., for the protester.
Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, and William W. Goodrich, Jr., Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Halifax Technical Services, Inc., an interested party.
Michael G. Winchell, Esq., Jeffrey A. Epstein, Esq., Johnny L. Litman III, Esq., and George N. Brezna, Esq., United States Marine Corps, for the agency.
Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party to maintain a protest even though it submitted the third low cost proposal and the fourth ranked technical proposal, where award was made without discussions to the low evaluated offeror and protester claims that if its cost proposal had been properly evaluated it would have been the low offeror.

2. Agency request that admission of experts to our protective order in this case be contingent upon a "cooling off" period of 5 years (in the form of a promise to avoid any participation in future procurements for these services for that period) was reasonable given the large dollar value of the contract and the competition-sensitive nature of the information to be made available to the expert.

3. Protester's challenge to the evaluation of cost proposals is sustained where: (1) agency upwardly adjusted hourly labor rates covered by a collective bargaining agreement to a higher government estimate despite the fact that the contractor already had the employees in place and had a legally binding agreement with the employees for the amount of their wages; (2) agency upwardly adjusted management salaries by normalizing any proposed management salary that fell below the government estimate, without regard to the strengths or weaknesses of the particular proposals; (3) agency performed an unreasonable normalization of

proposed travel costs by accepting some offerors' proposed travel costs and rejecting the proposed costs of others, even though the costs were widely divergent because the solicitation contained insufficient information to permit offerors to submit informed proposed travel costs; and (4) agency awarded on initial proposals without discussions after improperly upwardly adjusting protester's proposed award fee, and after unilaterally imposing an award fee on the proposal with the lowest proposed cost, thus causing that offeror to be the second low cost offeror.

4. Agency cost realism analysis was proper where: (1) agency reasonably imposed an upward adjustment on the protester's proposed hourly union labor rates for the time period after expiration of a collective bargaining agreement because the agency reasonably disagreed with protester's contention that it would be able to avoid any further increase in hourly wages; and (2) agency did not double-count certain personnel or improperly add personnel to protester's proposed costs, as protester claims.

5. Contention that agency improperly failed to increase estimated requirement for maintenance in solicitation is denied where protester fails to show that the estimate is unreasonable, and where the agency points to solicitation clauses designed to address such increases should they occur, and the protester was not prejudiced because all offerors were evaluated using the same estimate.

DECISION

Bendix Field Engineering Corporation protests the award of a contract to Halifax Technical Services, Inc. pursuant to request for proposals (RFP) No. M67004-90-R-0094, issued by the U.S. Marine Corps, for maintenance of assets aboard ships associated with the Maritime Prepositioning Forces (MPF). Bendix argues that the agency misevaluated Bendix's cost proposal, and as a result, improperly determined that Halifax was the low cost offeror and made award to Halifax without discussions. Bendix also claims that the agency was required to hold discussions to permit Bendix to clarify weaknesses in its technical proposal, and that the agency failed to modify the solicitation to reflect an increase in its needs.[1]

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[1]While this protest was pending, Bendix filed suit for injunctive relief in the U.S. District Court for the District of Columbia. Bendix Field Eng'g Corp. v. United States of Am., No. 91-2733. Although we ordinarily will dismiss a protest where the matter involved is the subject of litigation before a court of competent jurisdiction, see 4 C.F.R. § 21.9(a) (1991), the court, by order dated

We sustain the protest.

I. BACKGROUND

The MPF Program was implemented to reduce deployment time for Marine Corps forces through the prepositioning of equipment aboard 13 commercial ships divided into three squadrons. Each squadron is assigned approximately $2.5 billion worth of equipment, including tanks, light armored vehicles, artillery, ammunition, rations, medical supplies, fuel, and water, and each is equipped for up to 30 days of sustained combat.

The RFP, issued July 25, 1990, contemplated the award of a cost-plus-award-fee contract for maintenance services in support of the assets assigned to and stored on each of the 13 prepositioned ships in the program, as well as for maintenance services related to the MPF program at the Marine Corps facility on Blount Island in Jacksonville, Florida. The contractor is required to maintain the assets (for 1 base year and up to 4 option years) at a 100 percent readiness status through preventive and corrective maintenance, equipment modifications and calibration, preparation of equipment for issue, inventory management, stock rotation, and readiness reporting. In addition, the contractor is required to maintain the MPF assets regardless of where the ships are positioned. Bendix is the incumbent contractor providing these services.

The RFP advised that award would be made to the offeror whose proposal was deemed most advantageous to the government. It also stated that technical and management proposals would be evaluated separately from cost proposals and that technical merit would be the most important evaluation factor, while the management and corporate evaluation factors were less important. The evaluation scheme weighted the combined score for the technical, management, and corporate evaluation factors at 60 percent, while the score for cost was weighted at 40 percent. The RFP further advised that if proposals were determined technically equivalent, cost would assume greater significance.

Seven proposals were received in response to the RFP by the September 20, 1990, closing date. After initial evaluation, the technical evaluation group concluded that all seven

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November 21, 1991, requested that the Comptroller General consider the protest issues, along with other facts and issues before the court. In accordance with the terms of the court's order, we have considered the issues raised by Bendix in its protest, and the issues raised before the court.

proposals were technically acceptable and technically equal. The recommendation that proposals were technically equal was based on the fact that the range from the lowest to the highest score was approximately 8 points on a 60 point scale. Specifically, the scores were as follows:

Halifax	43.20
Company A	42.88
Company B	41.76
Bendix	38.84
Company D	37.70
Company E	36.28
Company F	35.22

In addition, the technical evaluation group recommended award to the low cost offeror without further discussions because the proposals only required clarification or correction of minor deficiencies.

Each offeror's cost proposal was also evaluated and adjusted to reflect the agency's view of its most probable cost. The cost evaluation focused on cost reasonableness, cost realism, completeness of the cost proposal, and the cost proposal's compatibility with the corresponding technical and management proposals. The proposed and evaluated costs of the offerors were very close for a procurement of this magnitude.[2] Bendix and Halifax submitted the second and fourth low proposed costs, respectively--$102,613,283 versus $104,987,041. After adjustments for cost realism, Bendix was the third low offeror, while Halifax became the low offeror. Although the proposed and evaluated costs of other offerors are not shown, the table below compares the results of the adjustments to Bendix and Halifax:

	Proposed Cost	Evaluated Cost
Bendix	$ 102,613,283	$ 110,260,133
Halifax	104,987,041	109,043,602

As explained above, although the technical evaluation group recommended that proposals be considered technically equal, the source selection official justified award to Halifax as the low cost, highest rated offeror. The Marine Corps

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[2]The proposed costs of the seven offerors ranged from a low of $102,289,700 to a high of $118,820,302; the evaluated costs ranged from a low of $109,043,602 to a high of $123,234,547.

awarded to Halifax, based on its initial proposal, on October 1, 1991, and this protest followed.[3]

II. PROCEDURAL ISSUES

A. Interested Party

The Marine Corps and Halifax request dismissal of this protest on the basis that Bendix is not an interested party for the purpose of filing a bid protest under our Bid Protest Regulations. See 4 C.F.R. § 21.0(a). Both argue that Bendix lacks the direct economic interest required to protest the award because Bendix submitted the third low cost proposal and because its technical proposal was ranked fourth.

Where a protester claims that its proposal was improperly evaluated, and claims that if the proposal had been properly evaluated the protester would be in line for award, that protester has the requisite economic interest to protest the award. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162. In this case, Bendix raises two challenges to the agency's award without discussions: that the agency misevaluated cost proposals and that it would have been the lowest cost offeror if its proposal had been evaluated properly; and that the agency was required to hold discussions and permit offerors with deficiencies to strengthen and clarify their proposals. Given these arguments and the record here, Bendix--with its claims that after discussions it would have been in line for award--is clearly an interested party under our Bid Protest Regulations. Id.

B. Admission of In-House Counsel to Protective Order

During the course of this protest, our Office issued a protective order covering material related to the offerors' proposals and the agency's process for evaluating proposals and selecting an awardee. See 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)). As part of this process, we received applications from two of Bendix's in-house counsel requesting admission to the protective order: Messrs. George Holliday and Richard Luebke. Mr. Holliday serves as Secretary and a member of the Board of Directors of Bendix and is involved in reviewing government solicitations and advising Bendix operating

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[3]Contract performance has not been suspended since the agency did not receive notice of the protest within 10 calendar days following award. See 4 C.F.R. § 21.4(b) (1991).

groups on government contract issues;[4] Mr. Luebke works in the same office as Mr. Holliday, and he, too, is involved in the same review of government solicitations and providing advice to Bendix operating groups on government contract issues.

In determining whether to grant access to protected material, we consider such factors as whether counsel primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of bids and proposals, the degree of physical separation with respect to those who participate in competitive decision-making and the degree and level of supervision to which in-house counsel is subject. See U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

Based on Mr. Holliday's membership on the board, as well as his role as an attorney involved in reviewing government solicitations to provide advice to Bendix operating groups, we were unable to conclude that the risk of inadvertent disclosure of protected material was sufficiently small to warrant granting access to protected material. Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134. With respect to Mr. Luebke's application, we reached the same conclusion. Mr. Luebke shares office space and a secretary with Mr. Holliday; in addition, Messrs. Holliday and Luebke are the only two attorneys in this particular office, and Mr. Luebke handles the same substantive issues as Mr. Holliday. TRW, Inc., B-243450.2, Aug 16, 1991, 91-2 CPD ¶ 160. In that these two attorneys appear to operate interchangeably, we find no basis for differentiating between them for purposes of granting access to protected material.

C. Admission of Experts to Protective Order

Both the protester and the interested party in this case requested admission of experts for assistance in reviewing the agency's cost realism adjustments. Although we agreed with the agency in its contention that experts are generally not needed in our reviews of cost realism adjustments, there is strong policy in favor of permitting protesters to choose the assistance they deem necessary to pursue their protest.

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[4]Mr. Holliday explained that he reviewed solicitations to determine if proposed clauses are appropriate, if risk is excessive, if the specifications contain conflicts, and if the solicitation complies with applicable statutes. Mr. Holliday stated that he did not attend pre-proposal meetings, participate in decisions about whether Bendix should participate in a procurement, assist in the preparation of proposal, or provide marketing advice.

PRC, Inc., General Services Administration Board of Contract Appeals No. 11204-P, May 14, 1991, 91-2 BCA ¶ 23,996. Since there was no challenge to the admissability of the particular experts selected by Bendix and Halifax, we admitted the experts based on the strength of their affidavits and the precautions taken, at the agency's insistence, to prevent inadvertent disclosure of protected information.

In addition, because of the large dollar value of the contract here and the intensity of the competition, the agency requested that admission under the protective order be made contingent upon submission of a supplemental affidavit from the experts promising to avoid any participation in future procurements for these services for a period of 5 years. In our view, the agency's requested "cooling off" period for the experts was reasonable, and their admission was made contingent upon such a promise. Upon receipt of supplemental affidavits, experts representing the protester and the awardee were admitted to the protective order.

III. DISCUSSION

A. Evaluation of Cost Proposals

Bendix first argues that the award to Halifax lacked a rational basis because the agency's cost evaluation was unreasonable. According to Bendix, if the agency had properly evaluated costs, Bendix, not Halifax, would have been the low cost offeror.

Where 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. Because the contracting agency is in the best position to make this cost realism determination, 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 Mgmt. Sys., Inc.; Dept. 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.

As explained above, the technical evaluation group here analyzed each technical proposal and concluded that all proposals were technically equal, technically acceptable,

and that award could be made to the low evaluated offeror. Concurrently, the agency analyzed each of the initial cost proposals and made adjustments to the proposed costs as part of its cost realism determination. Although the technical evaluation group suggested that proposals be considered technically equal, the source selection official justified award to Halifax as the offeror with the low evaluated cost and highest technical rating. Bendix argues that in nine separate instances, the agency made improper upward adjustments to its cost proposal as part of a cost realism review, and that these adjustments more than account for the $1.2 million difference between its evaluated costs ($110,260,133) and those of Halifax ($109,043,602).[5] These nine adjustments--broadly grouped in five categories--are discussed below.

1. Adjustment of union labor rates

Bendix first raises two claims regarding upward adjustments to its proposed hourly labor rates covered by a current collective bargaining agreement (CBA) between Bendix and its employees. The hourly union employees at issue here are described in the RFP, and in Bendix's proposal, as Department 27H employees. Since Bendix is the incumbent contractor, and its 27H employees are in place and covered by a CBA until May 1993, Bendix proposed its actual costs under the CBA until the expiration of that agreement. From the expiration of the CBA until the conclusion of the contract--the end of fiscal year 1996 if all options are exercised--Bendix proposed no further increase in the wage rates for these employees. In its evaluation of Bendix's cost proposal, the Marine Corps made two types of adjustment to these union wage rates: (1) it increased certain of the rates above the amount agreed to under the CBA for the

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[5]In its initial protest filed with our Office, Bendix challenged only four adjustments to its cost proposal. The agency and Halifax argue that all other adjustments challenged by Bendix should be dismissed as untimely. We disagree. Bendix's initial protest clearly asserts that its cost proposal was misevaluated and that the result was an improper determination that Bendix was not the low cost offeror. This contention was sufficient to put the agency on notice that the cost adjustments to Bendix's proposed costs were at issue. Also, the additional five cost adjustment issues were presented to the district court prior to issuance of its order of November 21, 1991, which requested a decision on the protest filed with our Office, and the additional issues raised before the court. Accordingly, we will consider all of Bendix's challenges to the adjustments made to its cost proposal. See Northwestern Travel Agency, Inc., B-244592, Oct. 23, 1991, 91-2 CPD ¶ 363.

period the CBA would be in effect; and (2) it imposed a 3 percent annual escalation factor to the rates from the expiration of the CBA until the conclusion of the contract.

We consider first Bendix's claim that it was unreasonable to increase to its hourly union labor rates above the amounts in the CBA for the period the CBA would be in effect. For the reasons that follow, we find that a contracting agency may not impose a government estimate to upwardly adjust labor categories proposed by an incumbent contractor which has a binding negotiated agreement with its employees to perform the services at a lower rate.

On this issue, the Marine Corps has simply failed to respond on the merits to the protester's contentions that the upward adjustment was unreasonable. Rather, the agency claims that this challenge to the cost realism adjustment is untimely because it was not raised in Bendix's initial protest. While the agency is correct that this matter was not raised in the initial protest, Bendix did raise this issue in its November 5, 1991, Reply Brief in response to the Government's Opposition to Bendix's Request for Preliminary Injunction--well in advance of the November 25 date the agency filed its report on the protest with our Office. In addition, the agency knew prior to filing its report that the court ordered our Office to consider both the issues in the initial protest and those before the court, without regard to whether they were timely filed. As discussed above, in such circumstances, we will consider such issues, regardless of when raised, as part of our decision for the court. See Northwestern Travel Agency, Inc., supra.

In its report, the Marine Corps did explain that it evaluated proposed labor rates by comparing those rates to government estimates and by identifying labor categories where Bendix understated its wage rates. According to the agency, where the proposed rates were lower than the government estimate, the agency adjusted the rates upward to the estimate. The agency, however, failed to provide any substantive response to Bendix's assertions that the upward adjustment of labor rates covered by the binding CBA was unreasonable.

Bendix's comments on the agency report developed this argument in great detail. In addition, its expert calculated the effect of the upward adjustment of the union rates covered by the CBA while it remained in effect.[6] When one considers the effect of this adjustment without the annual escalation factor (discussed below and found

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[6]These calculations by Bendix's expert stand unrebutted in the record by the agency.

reasonable), the record shows, and we find, that this adjustment added $2,079,842 to Bendix's proposed costs--nearly twice the amount of the difference between the evaluated costs of Bendix and Halifax.

In a supplemental agency response filed after Bendix provided this Office with its detailed comments and calculations, the Marine Corps again failed to provide a substantive rebuttal--it again argued only that Bendix had not raised this issue in a timely manner, despite the prior court order. Finally, in a conference call with all the parties and representatives of the agency and this Office, the Marine Corps explained that it adjusted the labor rates above the amount of the CBA because, in some cases, it concluded that laborers with more experience than those covered by the CBA should have been proposed. In addition, during that telephone call the agency claimed for the first time (2 weeks prior to the due date of our decision to the court) that Bendix was not prejudiced as a result of these adjustments because similar adjustments were made to Halifax and other offerors.

We find the agency's responses unpersuasive, and the adjustments unreasonable. The Marine Corps was aware that Bendix was the incumbent contractor, had negotiated the CBA with employees already performing the services at issue, and was under no obligation to pay a higher rate until expiration of the CBA.[7] In addition, if the agency was concerned that Bendix had proposed employees with insufficient experience, those concerns are not reflected anywhere in its evaluation of Bendix's technical proposal. Further, the agency has failed to respond to Bendix's detailed challenge to this adjustment with evidence that Bendix is either incorrect, or that it was not prejudiced in this regard.[8]

Despite the dearth of argument or evidence from the agency addressing whether other offerors were similarly prejudiced in this regard, our Office will not disturb an award without concluding that the protester was prejudiced by the agency's actions. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990,

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[7]In fact, the agency published the CBA rates to all offerors in an amendment to the RFP.

[8]Although the agency did not respond to these allegations, Halifax did. In materials provided by its expert and filed at the same time as the agency supplemental response in reply to Bendix's comments, Halifax claimed that Bendix's calculations were incomplete and overstated. In its reply, Bendix addressed both arguments. Halifax did not, however, provide any evidence or calculations to address the question of prejudice.

90-2 CPD ¶ 130, aff'd, B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444. We find that Bendix has shown sufficient prejudice to prevail in its claim that the agency's selection decision was unreasonable. Based on our comparison of both the number of union positions proposed by Bendix and Halifax, as well as the number of employees in these positions, it appears that Bendix fashioned its proposed approach with greater reliance on union labor than did Halifax.[9] Specifically, Halifax stated in its cost proposal that it was using 17 labor categories covered by the CBA. Halifax Cost Proposal, ¶ 2.3.4. Our comparison of the labor categories covered by the CBA (RFP, Amendment 0003), with the detailed Bendix labor totals for the base year period (Bendix Cost Proposal, pp. 2-3 through 2-27) indicates that Bendix proposed approximately 50 such categories. Comparing actual numbers of employees, Bendix apparently proposed 358 CBA-covered employees, while Halifax proposed 192.[10]

In short, we find, based on the arguments before us, that the agency's selection decision was unreasonable and that Bendix was sufficiently prejudiced to prevail in its challenge to that decision. Bendix proposed union labor rates based on a binding CBA that clearly represented what the contract would cost for these employees--at least until the expiration of that agreement. The Marine Corps had no rational basis to upwardly adjust these actual rates based

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[9]Although we recognize that Halifax places greater reliance on subcontractors than Bendix--and clearly there are additional CBA-covered labor positions and employees at the subcontract level in Halifax's proposal--we have no evidence from the agency or Halifax to establish that the adjustments made to Halifax and its subcontractor will offset those made to Bendix.

[10]On February 19, 1992--4 days before the statutory deadline for this decision, and 4 days before the decision was due by court order--a representative of the Marine Corps contacted our Office to advise us that the agency had developed additional information with respect to the issue of prejudice to Bendix as a result of the adjustment to union labor rates. The agency representative explained that this information was generated in response to the telephone conference call of February 11. We declined to permit the agency to submit further argument in this regard since the material would have been received far too late for reasoned consideration by our Office, or by the protester, and since the purpose of the February 11 call was to permit the agency to raise precisely the issues it now seeks to raise. See Aircraft Porous Media, Inc., B-241665.2; B-241665.3, Apr. 8, 1991, 91-1 CPD ¶ 356; aff'd, B-241665.4, June 28, 1991, 91-1 CPD ¶ 613.

on a government estimate. See generally General Research Corp., supra. Since we find that this adjustment increased Bendix's proposed costs by $2,079,842, and the difference between these offerors was approximately $1.2 million, if the Marine Corps had not adjusted Bendix's actual hourly union rates, Bendix would have been the offeror with the lowest evaluated cost.

With respect to Bendix's second claim about union wage rates--that it was unreasonable to increase its hourly wage rates after the expiration of the CBA--we do not reach the same conclusion. According to Bendix, it surveyed the Jacksonville area and concluded that no additional increases in union wages would be necessary to retain its work force. The agency, on the other hand, properly took notice of other documented instances where it appeared Bendix had attempted to unrealistically claim an ability to pay lower wages and disagreed with Bendix's assessment of the Jacksonville labor market. As a result, the agency adjusted Bendix's hourly union wage rates by the amount of the escalation factor Bendix applied to its non-union wage rates. Given the agency's concern that if Bendix were wrong such costs would be borne by the government, we find the agency acted reasonably in applying this escalation factor to Bendix's union wage rates after expiration of the CBA. See E.H. White & Co., B-227122.3; B-227122.4, July 13, 1988, 88-2 CPD ¶ 41 (challenge denied to an agency's upward adjustment of proposed labor costs where offeror failed to propose an increase in such costs after expiration of union agreement).

2. Adjustment of management salaries

Bendix raises a similar claim to the one regarding upward adjustments of union labor rates with respect to the agency's evaluation of management level employees. For this analysis, the agency compared Bendix's proposed pay rates for its management positions to a government estimate of pay rates for these individuals. In instances where the Bendix proposed rate was lower than the government estimate, the agency adjusted the Bendix rate upwards; in instances where the Bendix proposed rate was higher than the government estimate, the agency used Bendix's rate. As a result, the agency increased Bendix's proposed costs in 29 management categories, adding approximately $760,198 to its proposal.[11]

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[11]Bendix argues that this upward adjustment is even larger ($1,153,039), when one considers the effect of the Marine Corps decision not to accept Bendix's contention that it will reduce direct labor costs over the life of the contract by replacing 38 management employees with less senior employees. After its initial pleadings, Bendix no longer

Our previous decisions have explained that when an agency is performing a cost realism analysis, it is sometimes appropriate to use the technique of cost normalization to achieve a greater degree of cost realism. Cost normalization involves the measurement of offerors against the same baseline where there is no logical basis for differences in approach or where there is insufficient information provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. Dynalectron Corp., et al., 54 Comp. Gen. 562 (1975), 75-1 CPD ¶ 17, aff'd, 54 Comp. Gen. 1009 (1975), 75-1 CPD ¶ 341. As we stated in Dynalectron, the purpose of such an analysis ". . . is to segregate cost factors which are 'company unique'--dependent on variables resulting from dissimilar company policies--from those which are generally applicable to all offerors and therefore subject to normalization." 54 Comp. Gen. at 575.

In our view, the Marine Corps' mechanical application of estimates to every management category in the solicitation is not a reasonable normalization of costs because it does not meet the standard required when reviewing competing cost proposals--i.e., an agency must make an independent analysis of each offeror's cost proposal to determine the likely realism of proposed costs, particularly when an agency makes award on the basis of initial proposals without discussions. Kinton, Inc., 67 Comp. Gen. 226 (1988), 88-1 CPD ¶ 112. An offeror's proposed management employees and issues such as how senior they must be and how they are to be compensated, will clearly differ from one company to the next. In its blanket adjustment of all offerors, the Marine Corps makes no allowance for different management approaches and the possible use of different skill levels to serve in management positions. In Kinton, we sustained a protest against just such an upward adjustment to a government estimate of proposed staff hours without considering the special skills of proposed individuals reflected in the offeror's higher per hour rate. Therefore, we find that the Marine Corps' adjustment of all offerors' management employees--including Bendix's--to a preestablished, but unpublished estimate, is unreasonable without further analysis of the reasons for the variations among proposals. See OptiMetrics, Inc.; NU-TEK Precision Optical Corp., 68 Comp. Gen. 714 (1989), 89-2 CPD ¶ 266.

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pursued this agency decision as part of its challenge to the cost realism analysis; rather, Bendix argues that the agency's view of the proposed replacement of 38 senior managers indicates that discussions should have been held to permit Bendix to clarify its position in this regard. Therefore, this contention is not included in our review of the cost realism analysis.

3. Double-counting and addition of personnel

Bendix makes three claims that the Marine Corps either double-counted positions or added positions to its cost proposal. These claims are that the Marine Corps: (1) double-counted five medical personnel whose salaries were already included in the proposal as part of a subcontract price ($972,508), (2) double-counted three key personnel whose salaries were already included in the proposal under different job titles ($870,688), and (3) improperly added 2 man-years of effort to Bendix's proposal ($448,763).

With respect to the allegation that the Marine Corps improperly double-counted medical personnel, Bendix explains that its proposal identified a subcontract with a hospital for sterilization of surgical sets. Pointing to its detailed staffing tables in its cost proposal, Bendix shows that the subcontracted positions (two biomedical technicians, two medical technicians, and one operating room technician) were listed on the staffing tables followed by the designation "SUB."

Bendix contends that the Marine Corps added to its proposal the amount of the government's estimate for each of these positions by referring to the agency's cost evaluation materials. Bendix points to the agency's listing of these positions and the corresponding government estimate for these positions on its Labor Rate Comparison Spread Sheet (see Bendix Cost Evaluation, Encl. 2), despite the fact that these positions were included in the price of the subcontract. According to Bendix, the listing of these subcontracted positions on the spread sheet indicates that the agency included costs for these positions in developing its estimate of Bendix's proposed costs. If Bendix were correct in this regard, the agency's calculation would result in double-counting these individuals since their salaries were also included in the price for the hospital subcontract.

The agency responds that Bendix misunderstands the purpose of the Labor Rate Comparison Spread Sheet when it assumes that all the comparisons there were added together to determine the agency's evaluation of each offeror's proposed costs. Rather, the agency argues that it instead calculated evaluated costs by returning to the staffing tables each offeror provided with its cost proposal. In addition, the agency states, and the record shows, that the cost evaluation notes reflect that the evaluators understood that the costs for these personnel were covered by the price of the subcontract.

The protester's allegation in this regard appears to be based on a misunderstanding of how the agency used the Labor

Rate Comparison Spread Sheet. The agency's claim that the spread sheet was used for comparison only and that the evaluated costs were computed from the staffing tables within each offeror's proposal is supported by the record. If the spread sheet had been totaled and added to Bendix's costs, the adjustments made to Bendix's proposal would have been much larger than they were, since the total of the numbers on the spread sheet exceed the amount of the adjustment to Bendix's proposal. In addition, since the cost evaluation notes in the record provide clear evidence that the agency was aware that the medical personnel discussed here were included in the price for one of Bendix's subcontractors, we deny Bendix's claim that these personnel were double-counted.

Bendix's second contention of agency double-counting involves three key personnel whose salaries were already included in the proposal under different job titles. On this issue, there appears to be little disagreement. The RFP at clause H-5 requires each offeror to identify key personnel in each of 24 specific areas. For three of these positions the agency could not locate individuals in the Bendix proposal with the job title contained in the RFP. As a result, the contracting officer explains that he added these positions to the agency's evaluation of Bendix's proposed costs. This adjustment resulted in an increase to Bendix's proposal of $870,688.

Bendix explains that its proposal used different job titles for these three individuals. Instead of the titles in the RFP--facilities manager, fiscal/payroll manager, and production manager--Bendix listed these individuals as motor pool officer, business specialist, and operations officer, respectively. Apparently Bendix believes it was unreasonable for the agency to fail to recognize that these three positions were the same.

In our view, Bendix fails to show that the agency cost evaluation was unreasonable in this regard. Although there was no requirement that offerors use the same job titles as the RFP, it is incumbent upon an offeror to present its proposal in such a way that the agency can ascertain that the proposal meets the agency's requirements. Since the job titles used by Bendix are very different from those in the RFP, we will not conclude that the agency acted unreasonably in failing to recognize that the job categories were the same. Accordingly, we find the agency acted reasonably in adjusting Bendix's proposed costs in this instance.

With respect to Bendix's claim that the agency improperly added 2 man-years of effort to Bendix's proposal, we again do not conclude that the agency acted unreasonably. As with its claim that the agency double-counted medical personnel

associated with a subcontract, Bendix concludes that the agency added two positions to its overall proposal by again referring to the Labor Rate Comparison Spread Sheet. If, as Bendix contends, the agency calculated evaluated costs by totaling the figures on the Labor Rate Comparison Spread Sheet, the presence of two additional positions on the spread sheet resulted in an overstatement of Bendix's proposed costs by $448,763.

Although the agency offers no explanation for its inclusion of two additional positions on the Labor Rate Comparison Spread Sheet, it again explains that the spread sheet was not totaled to determine an offeror's evaluated costs. Instead, as explained above, the agency states it calculated evaluated costs by returning to the staffing tables each offeror provided with its cost proposal. Thus, it claims that Bendix was not misevaluated by an error in that spread sheet regarding the inclusion of two additional positions. As stated above, the agency's explanation about the use of its spread sheet is supported by the fact that the record shows that if the spread sheet had been totaled and added to Bendix's costs, the adjustments made to Bendix's proposal would have been much larger than they were. Under these circumstances, we do not conclude that the agency improperly added man-years to Bendix's proposal.

4. Adjustments to travel costs

Bendix next complains that the agency performed an irrational review of proposed travel costs by normalizing the costs of some offerors, while accepting the costs proposed by others. In this regard, the agency accepted the proposed travel costs of Bendix and Halifax, despite the fact that Bendix's proposed travel costs were nearly $400,000 higher than those of Halifax. Yet, in evaluating three of the proposals, the agency substituted a government estimate of travel costs for the amounts proposed. Bendix argues that if the agency had applied its estimate to each of the offerors, thus normalizing costs across the board, Bendix's relative standing vis-a-vis Halifax would have improved approximately $400,000.

Although we will not reveal the exact amount of the government estimate or the offerors' proposed travel costs,[12] a few facts are necessary for this discussion: (1) the four offerors whose travel costs were accepted proposed costs ranging from approximately $420,000 to $900,000; (2) the

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[12]Since the remedy for sustaining this protest will involve holding discussions and permitting offerors to submit revised proposals, revealing these amounts would be inappropriate.

three offerors whose travel costs were rejected and replaced with the government estimate, proposed travel costs from $0 to approximately $500,000; and (3) the government estimate for these costs was over $1 million.

According to the Marine Corps, it was not necessary to adjust the proposed travel costs of four of the offerors because the proposed costs were reasonable and appeared to represent a sufficient amount of travel. Instead, the agency suggests that differences between how the offerors planned to meet the RFP's travel requirements were the reason for the differences between the proposed travel costs.

As its lone example, the agency cites the fact that the RFP, at section H-11(c)(2), requires all offerors to provide at least one annual vacation for shipboard employees back to their homes. In this regard, the Marine Corps claims that since Halifax will require its shipboard employees to take their required annual vacations when the ship returns to its home port for routine maintenance (thus reducing international travel), it was reasonable for the agency to accept the lower travel costs proposed by Halifax. The agency fails to point out, however, that Halifax's stated vacation policy for shipboard employees is almost indistinguishable from the policy stated in the Bendix proposal. Compare Bendix Cost Proposal at 2-2 with Halifax Cost Proposal, § 4.4. Thus, this issue cannot be cited as a rational explanation for the differences in cost between these proposals. See TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239.

As we stated above, when agencies use cost normalization techniques to assess the realism of competing cost proposals, it is important to segregate cost factors which are "company unique" from those which are applicable to all offerors. Dynalectron Corp., et al., supra. The concept of maintaining prepositioned ships to respond to a military crisis, by definition, suggests that travel costs for employees involved in maintaining the ships might vary depending upon the location of the ships and the contingencies at issue. Thus, offerors were essentially involved in guesswork because the Marine Corps is buying services in this procurement that might be performed anywhere in the world.

In short, we find that the agency should not have permitted offerors' proposed travel costs to become a factor in determining award, especially when the agency itself admits that it was impossible to predict the amount of travel

required by this contract.[13] Therefore, we conclude that the agency's adjustments here are irrational and fail to equally adjust differences between offerors where the solicitation contained insufficient information to permit offerors to submit informed proposed travel costs. See Kirschner Assocs., Inc., B-199547.2, Aug. 26, 1981, 81-2 CPD ¶ 178, aff'd, B-199547.3, Dec. 1, 1981, 81-2 CPD ¶ 435 (agency unreasonably permitted widely varying proposed travel costs to play a role in its decision to award a cost-plus-fixed-fee contract to the low cost offeror, even though the solicitation failed to provide sufficient and unambiguous information permitting competition on an equal basis); Moshman Assocs., Inc., B-192008, Jan. 16, 1979, 79-1 CPD ¶ 23 (protest sustained where agency failed to normalize travel costs given uncertainties in solicitation). We also find that the agency's actions in this regard resulted in an approximate $400,000 relative overstatement of Bendix's costs.

5. Adjustment of award fee

Bendix also raises two claims regarding the agency's adjustment of proposed award fees: (1) Bendix claims that the agency improperly adjusted Bendix's proposed award fee when it made other upward adjustments to Bendix's proposed costs; and (2) Bendix claims that the agency improperly added a fee to the proposal submitted by the nominal low cost offeror--thus moving that company from the position of low cost offeror to that of second low cost offeror, behind Halifax.

The RFP here envisioned award of a cost-plus-award-fee contract including both a base fee and an award fee. In calculating the evaluated cost for each offeror, the agency first determined the amount of the upward adjustment to be applied to each offeror's proposed cost, then calculated the amount of additional fee (based on the percentages the offeror used to calculate its award fee), and added that

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[13]In its pleadings before our Office, the agency stated:

> "The Marine Corps was not in a position to totally evaluate each offerors proposed travel costs. It would be impossible for the Government to precisely estimate the amount that travel would cost over the next five years. In the cost normalization analysis, the Marine Corps did not want to substitute its judgment for that of the offerors and accepted each offeror's proposed travel costs provided that the offeror proposed sufficient travel."

Marine Corps Reply, Jan. 8, 1992, p. 7.

figure to the upward adjustment. According to Bendix, this upward adjustment of proposed award fee was improper.

Our prior decision in Booz, Allen & Hamilton, B-213665, Sept. 24, 1984, 84-2 CPD ¶ 329, stated that it is irrational for agencies to increase offerors' proposed fees as a part of a cost realism analysis. When an agency performs a cost realism analysis, it is required by regulation to attempt to ascertain its most probable cost as a result of the offeror's approach. FAR § 15.605(d). As we explained in Booz, Allen, upward adjustments to such proposed fees shed little light on the issue of whether the costs proposed by an offeror are a realistic assessment of the costs the agency will be required to reimburse. In addition, when agencies make award on initial proposals without discussions, the proposed award fee, if otherwise permissible, will not vary from the amount in the proposal. See CACI, Inc.-Fed., 64 Comp. Gen. 439 (1985), 85-1 CPD ¶ 363. Thus, we conclude that the Marine Corps improperly adjusted Bendix's proposed award fee as part of its cost realism analysis.[14] We find that this adjustment caused a net increase to Bendix's proposed costs of $315,612.[15]

With respect to Bendix's similar challenge to the adjustment made to the second low offeror, the agency argues that Bendix lacks standing to challenge adjustments made to another offeror's cost proposal for purposes of arguing that the other offeror, not the awardee, should have been the low evaluated offeror, and hence should have received the contract.

The Marine Corps mistates Bendix's argument in its challenge to Bendix's standing to raise this issue. Bendix is arguing that the award decision lacked a reasonable basis, and that,

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[14]We find unpersuasive the Marine Corps' argument that our decision in Booz, Allen has no application here because the Marine Corps made its adjustment as part of a cost reasonableness review and not a cost realism analysis. Regardless of what terminology one uses, the Marine Corps was making an adjustment to an offeror's proposed costs in order to determine which offeror proposed the lowest cost to the government, and ultimately, the Marine Corps made award of a contract in excess of $100 million based on its conclusions as a result of such adjustments. Under such circumstances, the adjustments made must be reasonable and must be legally supportable. A routine upward adjustment of an offeror's proposed award fee does not meet that standard.

[15]Since a similar adjustment was made to Halifax's proposed costs, the amount of this increase to Bendix's proposed costs was netted against the smaller adjustment to Halifax.

as discussed in more detail in the following section, the Marine Corps was required by 10 U.S.C. § 2305(b)(4)(A)(ii) (1988) to hold discussions with all offerors in the competitive range unless the agency can clearly demonstrate that it made award to the low cost offeror. Bendix raises this challenge to the cost realism review not to secure award for some other offeror, but to establish that the agency was required to hold discussions because it failed to meet its statutory mandate to ensure that award on initial proposals was made to the low cost offeror. If Bendix is successful in this regard, it wins an opportunity to submit a revised proposal and become the successful offeror. Thus, Bendix clearly possesses the requisite economic interest required by our Bid Protest Regulations to be considered an interested party for raising this issue. 4 C.F.R. § 21.0(a).

The low offeror in this competition proposed to perform the services at issue without receipt of a base fee. Because of the agency's concern that the lack of such a fee might deprive the agency of its ability to provide a financial incentive for performing these services, the agency added a fee to the proposal of the low cost offeror. This adjustment was improper. Although agencies may be properly concerned about the risk of poor performance when a contractor attempts to provide services at little or no profit, such matters are more appropriately considered as part of an analysis of the risk involved in awarding a contract to that offeror. Systems and Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441, aff'd, B-234142.2, Aug. 30, 1989, 89-2 CPD ¶ 191. Where, as here, however, an agency makes award on initial proposals, it is not rational to create a fee and unilaterally impose it on an offeror's proposal to determine its cost realism, without holding discussions with that offeror. See CACI, Inc.-Fed., supra. As a result of this calculation, the agency again undercuts its conclusion that it made award here to the low cost offeror.

B. Award on Initial Proposals

Bendix also argues that the agency acted improperly in making award on initial proposals without holding discussions. In this regard, Bendix claims: (1) that the agency was precluded by statute from making award to Halifax without discussions, unless the agency could demonstrate that acceptance of Halifax's initial proposal would result in the lowest overall cost to the government, and (2) that the agency was required to hold discussions with offerors to permit them to address agency concerns about weaknesses and deficiencies in their proposals.

1. Statutory requirement for award to low cost offeror

With respect to the statutory mandate regarding discussions, 10 U.S.C. § 2305(b)(4)(A)(ii) (1988) requires agencies to hold discussions unless

> ". . . it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the cost or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States."

Although this requirement was rescinded for procurements under Title 10 of the United States Code by section 802 of the Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802(d)(3)(A), 104 Stat. 1485, 1589 (1990) (hereinafter, the "Act"),[16] the effective date of this provision was May 5, 1991. 56 Fed. Reg. 41,732, 41,733 (1991). Since the Marine Corps issued this RFP on July 25, 1990--more than 3 months prior to passage of the Act on November 5, 1990, and nearly a year prior to the effective date of the provision--the agency action here is governed by the earlier version of this statute. See Raytheon Co.--Recon., supra. Given our conclusions that the agency's adjustments to the Bendix cost proposal lacked a reasonable basis, award without discussions in this instance clearly violated the requirements of the statutory mandate. Kinton, Inc., supra.

2. Failure to hold discussions to address deficiencies

Bendix argues that the agency improperly failed to hold discussions even though the evaluation materials show that its technical proposal could easily have been revised and improved. In this regard, Bendix points to a document provided during debriefings which describes nine alleged "Weaknesses/Deficiencies/Clarifications" identified in the technical evaluation of the Bendix proposal. According to Bendix, the Marine Corps characterized three of these items as "major weaknesses," while the remaining six items were considered minor. Bendix contends it should have been permitted to revise its initial proposal because it could have clearly and easily addressed the Marine Corps'

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[16]The new provision permits award without discussions ". . . provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary." See Raytheon Co.--Recon., B-240333.2, Mar. 28, 1991, 91-1 CPD ¶ 334.

concerns, and as a result, possibly have been in line for award.

Since we conclude that the award determination lacked a reasonable basis and that the agency violated its statutory mandate to ensure that award without discussions was made to the low cost offeror, the agency was required to hold discussions with Bendix regarding deficiencies in its proposal. Since our recommendation here will include holding negotiations with all offerors in the competitive range, when the agency holds such negotiations it should direct Bendix, if otherwise appropriate, to the areas of its proposal that require modification. In addition, the deficiencies in Bendix's proposal appear to be correctible.

C. Failure to Amend Solicitation

In its pleadings before the court, Bendix also complains that the agency improperly failed to amend the RFP to reflect what Bendix argues will be a substantial increase in the number of man-years required to perform the services here.[17] The RFP, issued nearly 18 months ago, estimated the required maintenance for the MPF ships at 575 man-years. According to Bendix, since the 13 ships were involved in combat and actually supported troops during the Desert Shield and Desert Storm campaigns, the maintenance required for equipment stored on the ship will be substantially higher than the estimate provided in the solicitation.

The Marine Corps disagrees with Bendix regarding the impact of combat operations on the maintenance estimates included in the solicitation. The agency argues that its figure was only an estimate and contends that even if there is a temporary increase in requirements, the total level of effort required will not approach the 700 man-years alleged by Bendix. In addition, the Marine Corps points to a provision in the solicitation providing for a contract modification if the level of effort exceeds 110 percent of the stated estimate.

Contracting agencies must have the primary responsibility for determining minimum needs and the method of accommodating those needs. Mills Mfg. Corp., B-224004; B-224005, Dec. 18, 1986, 86-2 CPD ¶ 679, aff'd, B-224004.2; B-224005.2, Apr. 10, 1987, 87-1 CPD ¶ 393. Absent a clear showing that work load estimates included in a solicitation

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[17]Again, although this issue was not raised in the protest filed with our Office, we will include it in this decision in deference to the court's order. See Northwestern Travel Agency, Inc., supra.

for a requirements contract were not made in good faith, or were not based on the best information available, our Office will not disturb such estimates. Caltech Serv. Corp., B-240726, Dec. 18, 1990, 90-2 CPD ¶ 497; Sentinel Elecs., Inc., B-221914.2 et al., Aug. 7, 1986, 86-2 CPD ¶ 166. Here, the record shows that, despite a temporary increase in requirements, the agency does not expect a significant deviation in the long run from its published estimates. In addition, we note that since all offerors were evaluated based on the same maintenance estimate, Bendix suffered no prejudice as a result of any failure to adjust the solicitation's estimates. In short, we find no basis for overturning the agency's estimate of its requirements for these services.

IV. CONCLUSION AND RECOMMENDATION

For the reasons set forth above, we find that the agency conducted an unreasonable evaluation of cost proposals and thus lacked a rational basis for making award to Halifax. In addition, we find that the agency violated the statutory prohibition on awarding contracts based on initial proposals--i.e., without discussions--to other than the offeror proposing the lowest overall cost to the government.

We recommend that the Marine Corps conduct negotiations with all offerors and solicit best and final offers. If the agency concludes that an offeror other than Halifax is entitled to award, then Halifax's contract should be terminated and award made to the appropriate firm. We also find that the protester is entitled to recover its costs of filing and pursuing the protest before our Office, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). Bendix should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

We sustain the protest.

for Milton J. Socolar
Comptroller General
of the United States