



## Decision

**Matter of:** MAR, Inc.  
**File:** B-255309.4; B-255309.5  
**Date:** June 8, 1994

Hilary S. Cairnie, Esq., Richard J. Conway, Esq., and Leticia E. Flores, Esq., Dickstein, Shapiro & Morin, for the protester.  
Lawrence Noble, Esq., and Eric S. Pommer, Esq., Noble & Pommer, for Western Instrument Corporation, an interested party.  
Arthur F. Thibodeau III, Esq., Garrett L. Rensing, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.  
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Contracting agency acted reasonably in accepting the awardee's proposed indirect cost rates without adjustment where the awardee's proposal contained a commitment to cap those rates.
2. Protester was not prejudiced by the agency's failure to apprise it during discussions of permissible alternate pricing approach utilized by the awardee, where the awardee's evaluated cost, as upwardly adjusted to reflect the solicitation's pricing methodology, is still lower than the protester's evaluated cost and the protester does not contend that its cost would be lower than the awardee's cost had it proposed on the same basis.

### DECISION

MAR, Inc. protests the award of a contract to Western Instrument Corporation (WIC) under request for proposals (RFP) No. N47408-93-R-7303, issued by the Department of

\*The decision issued on June 8, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

the Navy for the operation and maintenance of the vessel M/V Independence.

We deny the protest.

The RFP contemplated the award of a cost-plus-fixed-fee (CPFF), indefinite delivery/indefinite quantity contract, with a base contract period of 1-year with two 1-year options, for the operation and maintenance of the Navy research vessel, M/V Independence, while the vessel is at sea and in port. The M/V Independence contractor will provide, as specified by the individual delivery orders issued under the contract, a full or partial crew to operate the vessel; the necessary longshoring and engineering services to install, interface, and test equipment brought aboard the vessel for particular missions; and the engineering/technical services, where necessary, to modify the deck of the M/V Independence to accommodate any such equipment. The RFP stated that the level of effort would cover 365 days per year, and requires that the successful contractor maintain the vessel's operational readiness, seaworthiness, and security. With regard to security, the successful offeror is required to maintain security aboard the M/V Independence 24 hours per day during the normal workweek, weekends, and federal holidays.

The RFP provided that award would be made to the responsible offeror whose offer, conforming to the solicitation, was determined to be most advantageous to the government, cost and other factors considered. Technical factors were said to be more important than cost, and offerors were informed that cost proposals would be evaluated for realism and reasonableness. The RFP listed the following technical evaluation factors in descending order of importance:

- (a) Capability to Perform
- (b) Understanding of the Requirements
- (c) Technical Approach

The RFP provided an estimated level of effort of 39,928 hours for the base year of the contract, and informed offerors that they were to base their prices on the assumption that, for the base year, the vessel would be at sea for 280 days (29,960 hours), and in port for 85 days (7,480 hours), with the in-port days consisting of 38 weekend days, 5 federal holidays, and 42 maintenance days. An estimated level of effort of 38,788 hours was

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<sup>1</sup>The solicitation set forth for each of the three evaluation factors certain subfactors. The subfactors have not been included here as they are not relevant to the protest issues raised.

stated for each of the 2 option years, and offerors were to assume that for each of the 2 option years the vessel would be at sea for 220 days (23,540 hours), and in port for 145 days (12,760 hours), with the in-port days consisting of 104 weekend days, 10 federal holidays, and 31 maintenance days. The RFP also informed offerors that they were to base their prices on the assumption that an estimated 2,488 hours of engineering/technical services would be ordered during the base year and during each of the option years of the contract.

The RFP provided detailed instructions with regard to the preparation of technical and cost proposals, and included proposal pricing sheets to be completed by offerors "to provide [a] uniform format[] to ensure a consistent approach for evaluating cost proposals." In this regard, the RFP included a pricing sheet on which offerors were to provide a summary of their total estimated CPFF for the base and option years, and pricing sheets with the designated hours already included to be completed by offerors detailing their proposed costs and fee for operating and maintaining the M/V Independence while the vessel is at sea or in port, and for performing engineering/technical services.

The Navy received four proposals, including the proposals submitted by WIC and MAR, by the RFP's closing date of June 1, 1993. The agency rated WIC's proposal, which had a proposed CPFF of [DELETE] for the base and 2 option years, as excellent, and also rated MAR's proposal, which had a proposed CPFF of [DELETE], as excellent. WIC's and MAR's proposals were included in the competitive range, while the proposals of the other two offerors were excluded as technically unacceptable.

Discussions were held with WIC and MAR, and best and final offers (BAFO) were received and evaluated. A probable cost analysis of WIC's and MAR's proposals was conducted with the assistance of the Defense Contract Audit Agency (DCAA). WIC's BAFO received a technical rating of excellent with an evaluated cost of \$3,718,424, and MAR's BAFO received a technical rating of excellent with an evaluated cost of [DELETE]. The agency determined that WIC's proposal offered the best overall value to the government, based on technical and price considerations, and made award to that firm.

MAR first protests the agency's acceptance, without adjustment, of WIC's indirect cost rates, and the agency's award of a contract to WIC, in light of various concerns expressed by the DCAA in its audit of WIC's initial proposal.

When agencies evaluate 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. Federal Acquisition Regulation (FAR) § 15.609(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed cost represents what the contract should cost, assuming reasonable economy and efficiency. CACT, 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 Management Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510 (1991), 91-1 CPD ¶ 492.

DCAA's audit of WIC's initial proposal questioned WIC's proposed indirect rates for on-site (in-port) overhead, off-site (at-sea) overhead, and general & administrative (G&A) costs, of [DELETE] percent, [DELETE] percent, and [DELETE] percent, respectively, based on DCAA's determination that WIC's current actual rates for on-site overhead, off-site overhead, and G&A costs were [DELETE] percent, [DELETE] percent, and [DELETE] percent, respectively. DCAA thus recommended that the agency negotiate capped rates for WIC's indirect expenses. DCAA also determined that WIC's method of calculating its proposed direct labor rates for engineering/technical services was inconsistent with its established accounting system, and that WIC would have to revise its established accounting system in order to ensure that costs incurred during the performance of the contract for engineering/technical services are properly tracked and billed.

In response to DCAA's concerns and its discussions with the agency, WIC agreed in its BAFO to cap its on-site overhead rates, off-site overhead rates, and G&A rates, at [DELETE] percent, [DELETE] percent, and [DELETE] percent, respectively. Because of this, and the fact that WIC [DELETE] had been able to reduce its actual indirect rates for on-site overhead to between [DELETE] and [DELETE] percent, and its off-site overhead rate to between [DELETE] and [DELETE] percent, the agency concluded that WIC's proposed overhead rates were not objectionable and need not be adjusted. The agency further determined that the details of WIC's accounting system did not impact on the realism of WIC's proposed cost for engineering/technical services, and could be resolved in contract administration.

MAR nevertheless maintains that the agency erroneously determined that WIC's proposed indirect rates were realistic

because "the mere agreement to cap rates is not an indication that the offeror will reasonably be able to achieve those rates." MAR also questions the award to WIC based on the results of another DCAA audit, prepared in response to a Defense Logistics Agency request of November 13, 1992, that found WIC's financial condition [DELETE]. Finally, MAR contends that it was unreasonable for the agency to award WIC a contract in light of the accounting deficiencies identified by DCAA during its audit of WIC's initial proposal.

As a general rule, the maxim that the government bears the risk of cost overruns in the administration of a cost-reimbursement contract is reversed when a contractor agrees to a cap or a ceiling on its reimbursement for a particular category or type of work. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202. An offeror who proposes a cap has shifted the risk of cost overruns away from the government, such that upward adjustments to capped costs are improper, unless the caps are ineffective or can be circumvented. Id.; Halifax Tech. Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30. Whether an awardee will be able to perform a contract at rates capped below actual costs falls within an agency's determination of an offeror's responsibility, the affirmative determination of which we will not review absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria. See Robocom Sys., Inc., B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513.

Given that WIC agreed to and is legally bound to its capped rates, the agency acted reasonably in accepting WIC's indirect rates without adjustment. MAR's challenge to the award based on DCAA's statement that WIC's financial condition was [DELETE] simply constitutes a protest of WIC's ability to perform. Because this falls within the agency's assessment of responsibility, and there is no evidence of fraud, bad faith, or the misapplication of definitive responsibility criteria, this issue is not for review by our Office. Vitro Corp., supra. Additionally, because MAR has failed to show why the deficiencies identified in WIC's accounting system have any effect on WIC's evaluated costs, and therefore, the competitive standing of WIC and MAR, and because WIC has committed to revise its accounting system to comply with DCAA's recommendations concerning the billing of engineering/technical services during the performance of the contract, we do not see how the agency's determination here impacts on the propriety of its selection of WIC, rather than MAR, for award.

MAR next asserts that WIC's proposal should have been rejected because it was not prepared in accordance with the terms of the RFP, or, in the alternative, that it should

have been given the opportunity to propose on the same basis as WIC. This assertion is based on MAR's interpretation of the RFP's requirements with regard to the preparation of cost proposals. Specifically, MAR, while conceding that the RFP recognized that "offerors could propose minor deviations" to the solicitation's pricing sheets in preparing their cost proposals, "challenges the extent to which the Navy permitted WIC to alter the pricing sheets" relating to in-port days.

As indicated above, the RFP included three separate pricing sheets to be completed by offerors for in-port days for the base year and each of the 2 option years of the contract. To illustrate, the pricing sheet for the base year's 85 in-port days set forth under the heading "Direct Labor" each of the nine labor categories comprising the vessel's 11-person crew (i.e., Master, Mate, Able Bodied Seaman, Cook, etc.), and specified that each in-port day would consist of an 8-hour workday. Offerors were required to enter their rate per hour and total cost per day for each of these labor categories, and to multiply these labor costs by their proposed overhead rate to arrive at a total cost for the 88 hours of direct labor per in-port day. Offerors were instructed to then multiply this figure by 85 to determine the total direct labor costs for the RFP's estimated 85 in-port days of the base contract period. The in-port pricing schedule also provided amounts set by the agency for certain other direct costs, such as \$150 per day for consumables, and provided lines on which offerors were to enter their proposed G&A costs, fixed-fee, and finally, their total estimated CPFF for each in-port day, and their total CPFF for the base year's 85 in-port days.

WIC, rather than completing the single pricing sheet set forth in the RFP for the base year's 85 in-port days, included four separate pricing sheets for the base year's 85 in-port days in its cost proposal. [DELETE.]

MAR points out that [DELETE] the labor hours reflected in WIC's cost proposal fall short of the level of effort of 39,928 hours set forth in the RFP for the base year, and 38,788 hours for each of the option years. MAR thus argues that the agency "should have found WIC's proposal to be unacceptable for failing to comply with a material portion of the solicitation, i.e., the pricing model," and contends that the agency "treated offerors unequally insofar as the evaluation of pricing of offeror pricing tables was not in accordance with the solicitation."

MAR also points out that it offered, as an alternative to its proposed approach of using [DELETE] to provide security, to provide in-port security on weekends and federal holidays through a [DELETE] and claims that it was aware of the

considerable cost savings to be achieved by such an approach. MAR further claims that it recognized that by completing the pricing sheets for in-port days exactly as set forth in the RFP its costs would be "artificially inflate[d]" because it would appear from MAR's in-port pricing sheets that MAR was proposing a full 11-person crew for weekend and federal holiday security. MAR contends that it nevertheless concluded that its completion of the in-port pricing sheets in this manner would not result in a competitive disadvantage because of its understanding that every offeror was required by the RFP to complete the pricing sheets in the same manner.

Based on the foregoing, MAR argues that WIC's proposal either should have been rejected or, to the extent the alteration of the pricing sheets was permissible, the agency should have informed MAR of this option during discussions. MAR concludes that because it completed the in-port pricing sheets exactly as set forth in the RFP, its costs were overstated in its cost proposal with regard to providing weekend and holiday security by approximately [DELETE]. MAR also claims that if WIC had completed the in-port pricing sheets for the base and option years as set forth in the RFP without deviation, its costs would have totaled approximately [DELETE] million; MAR thus argues that the agency's cost realism analysis of WIC's proposal was flawed.

The agency responds that offerors were permitted by the terms of the solicitation to deviate from the pricing sheets included in the RFP so long as those deviations were clearly identified. In support of its position, the agency points to amendment No. 0004 to the RFP, which set forth the following question that had been asked at a pre-proposal conference attended by representatives of both WIC and MAR, and the agency's response.

Question-

"Amendment 0003 indicates security can be priced as a subcontract, yet there is no provision to decrease the number of bid hours in [the in-port pricing sheet] to compensate for subcontract work. Neither is there a government stipulated number of security days to be used if a subcontractor is used. Please clarify so an offeror will not be considered 'non-responsive' if subcontract security costs are proposed as other costs with a concurrent decrease in estimated crew labor hours.

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<sup>2</sup>MAR calculates that "[u]sing the Navy's price evaluation sheets, MAR's cost of in-port vessel security for weekends and holidays was approximately [DELETE]."

Answer-

"An offeror may propose a subcontractor for any part of the level of effort, including the security requirements. The total hours proposed, including those of the contractor and all subcontractors, must, at a minimum, meet the total estimated level of effort. An offeror must clearly identify any deviations from the estimated level of effort as set forth in . . . [the] [p]roposal [p]ricing [s]heets."

The agency thus concludes that "WIC's modification of the pricing sheets was done in accordance with the terms of the solicitation and was acceptable." The agency adds that, in any event, MAR was not prejudiced by the agency's allegedly improper actions, and supports this contention with various calculations.

We agree that even if the agency should have explicitly apprised MAR during discussions that variances from the pricing sheets were permissible, MAR was not prejudiced by the agency's failure to do so. Prejudice is an essential element of every viable protest, Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379, and we will not sustain a protest where the record does not establish prejudice, *i.e.*, that the protester would have had a reasonable possibility of receiving the award. Dynamic Isolation Sys., Inc., B-247047, Apr. 28, 1992, 92-1 CPD ¶ 399; QAO Corp., B-228599.2, July 13, 1988, 88-2 CPD ¶ 42.

The record shows that if the agency had determined that WIC's pricing sheets were inadequate and had adjusted WIC's proposed costs upward during its cost realism analysis to reflect the full level of effort as set forth in the RFP, or, in the alternative, had informed MAR during discussions that it could deviate from the pricing sheets to reflect only the costs of providing the requisite security for the M/V Independence on weekends and holidays, the competitive standing of the offerors would not have changed. If we accept MAR's representations that its costs would have been reduced by [DELETE] had it been accorded meaningful discussions with regard to the security requirement and cost proposal instructions, MAR's cost of approximately [DELETE] million still would not be low as compared to WIC's evaluated CPFF of \$3.7 million. Alternatively, if WIC's proposed CPFF were adjusted upward to [DELETE] million, as it would have totaled had WIC completed the in-port pricing sheets without deviation (as calculated by the agency during its cost realism analysis and verified by our Office), WIC's evaluated CPFF for the base and option years would still be low as compared to MAR's evaluated CPFF of [DELETE] million. Since MAR does not claim that its technically "excellent"



proposal is superior to WIC's "excellent" proposal, it is apparent that MAR was not prejudiced by the agency's failure to apprise MAR of the acceptability of varying the RFP's pricing sheets.

MAR attempts to demonstrate that it was prejudiced by comparing its estimated CPFF, had it prepared its cost proposal as did WIC, with WIC's estimated CPFF, presuming that WIC had prepared its proposal as did MAR. That is, in arguing that it was prejudiced, MAR calculates its CPFF using WIC's pricing sheet format for in-port days, and WIC's CPFF for in-port days by using the pricing sheets set forth in the RFP and used by MAR. MAR's argument is without merit as it demonstrates that MAR would only be the lower evaluated cost offeror if its proposal is evaluated at considerably less hours than WIC's, and not if the proposals are evaluated either as submitted to the agency or as adjusted to reflect the same level of effort. In sum, the protester was not prejudiced by the agency's failure to equalize the competition with regard to WIC's deviation from the RFP pricing sheets.

MAR also protests the manner in which the agency prepared the independent government cost estimate (IGCE) for this procurement. MAR argues here that the agency erred in using the provisional rates of the incumbent contractor--WIC--rather than WIC's actual indirect rates, or indirect rates derived from, as an example given by MAR, a market survey. MAR concludes that the agency's preparation of the IGCE in this manner was "prejudicial because the [IGCE] was used by the Navy as a cost realism benchmark to determine that WIC's cost proposal in this procurement was realistic."

As indicated previously, the agency performed the cost realism analyses with the assistance of DCAA, and, in our view, reasonably concluded that WIC's proposed costs, considering WIC's direct rates and capped indirect rates, with some adjustment, were realistic. Given our conclusion that the cost realism analyses were reasonable, and the fact the agency performed its analyses by concentrating on the realism of the offerors' proposed direct and indirect rates, and not simply on a comparison of those rates to the IGCE, we fail to see (nor has the protester explained) how the protester's argument concerning the manner in which the IGCE was prepared impacts on the propriety of the agency's award decision.

MAR contends that when the agency's actions during the conduct of this procurement "are viewed objectively and in the totality . . . the conclusion appears to be inescapable that the Navy was either intentionally or unintentionally biased in favor of WIC." We disagree. We have reviewed the record and find no credible evidence of bias or bad

faith on the part of the agency. Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16. In our view, as the above discussion demonstrates, the agency reasonably selected WIC's proposal for award based on its excellent technical rating which was equivalent to MAR's rating, and its evaluated costs which were lower than MAR's.

MAR, in a supplemental protest filed with our Office on May 10, 1994, contends for the second time that the agency "fail[ed] to accurately describe its minimum crew requirements in the solicitation." MAR bases this contention on its "belie[f] that WIC is currently operating the M/V Independence with less than a full crew." MAR first raised this argument "upon information and belief" in a protest to our Office on October 22, 1993. MAR's first protest on this basis, which included additional arguments concerning the propriety of the award of a contract to WIC, was docketed by our Office as B-255309.2. After receipt of the agency report in response to this protest, MAR, on December 14, 1993, expressly withdrew its allegations "because WIC's proposal was based upon an 11 person crew."

Given that WIC's technical and cost proposals, as recognized by MAR, were based upon an 11-person crew and were evaluated on that basis by the agency, whether WIC is complying with the requirements of the contract awarded is a matter of contract administration over which our Office does not exercise jurisdiction, except in circumstances not present here. 4 C.F.R. § 21.3(m)(1); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228. In any event, the agency has informed our Office that shortly after contract award, "a delivery order was issued and the M/V Independence was at-sea with a full 11 man crew."<sup>3</sup>

The protest is denied.

Robert P. Murphy  
Acting General Counsel

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<sup>3</sup>The RFP expressly recognized that during contract performance the agency may designate that the M/V Independence be operated with less than an 11-person crew. However, proposals were to be based upon a full 11-person crew, and both WIC and MAR competed on this basis.

# REDACTED VERSION

OGC FORM 123 (REV 3/92)  
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PROCUREMENT LAW ROUTING SLIP

File No. B-255309.4; B-255309.5

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