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Comptroller General of the United States

Washington, D.C. 20548

Decision

Matter of: American Management Systems, Inc.; Department of the Army--Reconsideration

File: B-241569.2; B-241569.3

Date: May 21, 1991

Raymond S.E. Pushkar, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for General Research Corporation, the protester.
Carleton S. Jones, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for American Management Systems, Inc., the requester.
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. The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

2. The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

DECISION

American Management Systems, Inc. (AMS) and the Defense Supply Service-Washington (DSS-W), Department of the Army, request reconsideration of our decision in General Research Corp., B-241569, Feb. 19, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 183, in which we sustained the protest of General Research Corporation (GRC) against the award of a cost reimbursement contract to AMS under request for proposals (RFP) No. MDA903-90-R-0094, issued by DSS-W for automated data processing (ADP) support services for the Army's Management Information System.

We deny the requests for reconsideration.

GRC protested that DSS-W's cost realism analysis was unreasonable, primarily because the agency arbitrarily "normalized" GRC's proposed labor costs, which were based upon the use of uncompensated overtime1/ over a 45-hour workweek, to labor costs that were based upon a 40-hour workweek. This resulted in a substantial increase in GRC's proposed costs in the cost evaluation and in the resultant agency determination that AMS' evaluated costs were lower than GRC's. GRC stated that the bidding of uncompensated overtime was not prohibited by law, regulation, or the RFP, and 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.

DSS-W argued that its contracting officer determined, in part relying upon the advice of the Defense Contract Audit Agency (DCAA), that GRC's offer of uncompensated overtime was inconsistent with GRC's CAS disclosure statement and accounting practices,2/ and that GRC's offer of uncompensated

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1/ "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.

2/ DSS-W throughout its report argued that DCAA had "determined" that GRC's offer of uncompensated overtime was inconsistent with its disclosure statement and accounting practices. While it is true that DCAA so advised DSS-W prior to award, DSS-W neglected to inform us that DCAA had informed the agency after award that DCAA's earlier advice was erroneous and that in fact GRC's accounting system and practices, as shown in its disclosure statement, provided for

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overtime was ambiguous because GRC failed to show how it would use its overtime hours to perform the contract.

We found that the contracting officer's reliance upon DCAA's advice was unreasonable. In this regard, the contracting officer stated in the report on the protest that he reviewed GRC's disclosure statement and was familiar with "GRC's past and present practices derived from a number of contracts that I awarded as contracting officer or reviewed as Chief of the ADP Division . . . ." However, GRC's disclosure statement specifically provided for "full time accounting,"3/ which properly accounted for the uncompensated overtime hours performed by exempt employees. Moreover, the record indicated that GRC had bid uncompensated overtime on a number of solicitations and received two awards on this basis, and that GRC, as an incumbent contractor for these services, had billed uncompensated overtime hours to the prior contract under its full time accounting system. Thus, the agency could not reasonably rely upon DCAA's advice--that GRC lacked an accounting system that properly accounted for uncompensated overtime--as a basis not to consider GRC's offer of labor rates based upon uncompensated overtime.

We concluded from the record that the agency unreasonably adjusted GRC's proposed cost upward to reflect rates based on a 40-hour workweek, rather than the 45-hour workweek GRC proposed, since nothing precluded GRC from proposing uncompensated overtime. Accordingly, we determined that DSS-W should have found GRC to be the lower evaluated cost offeror and that, since the record demonstrated that GRC's and AMS' proposals were technically equal, GRC was entitled to award as the technically equal offeror with the lower evaluated cost.

The crux of DSS-W's and AMS' reconsideration requests is that we improperly considered DCAA's post-award statements to DSS-W concerning GRC's accounting practices since this information was not available to the contracting officer at the time of his selection decision and because the contracting officer was entitled to rely upon DCAA's expert advice when he made the award selection. DSS-W and AMS now contend that the contracting officer had no reason to question the validity of

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2/(...continued)
uncompensated overtime.

3/ "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 DCAA Contract Audit Manual ¶ 6-410.4 (July 1990).

DCAA's pre-award advice--that is, that GRC's disclosed accounting system did not provide for uncompensated overtime--since the contracting officer had not reviewed GRC's CAS disclosure statement prior to award and was not familiar with GRC's bidding and billing practices, and that our conclusions to the contrary are in error.

DSS-W and AMS are incorrect in their assertion that our decision, finding unreasonable the agency's cost realism adjustment of GRC's proposed labor rates, was primarily based upon DCAA's post-award advice. Rather, as explained in detail in the prior decision, we found that the contracting officer could not reasonably accept DCAA's erroneous pre-award advice concerning GRC's disclosure statement and accounting practices where this advice was clearly inconsistent with GRC's disclosure statement, GRC's standard bidding and billing practices (with which the record indicated the contracting officer was familiar), and the agency's evaluation and acceptance of several of GRC's proposals containing uncompensated overtime rates.

It is true that DCAA's post-award advice to DSS-W confirmed that its earlier advice was in error, as noted in our prior decision. We discussed this change in DCAA's position in our prior decision, in part to correct DSS-W's misrepresentation of DCAA's position on this matter throughout the protest process (including the informal conference on the protest). DSS-W maintained that DCAA had "determined" that GRC's accounting system did not account for uncompensated overtime and presented DCAA's handwritten notes to substantiate this position. However, at the time DSS-W presented these arguments, DCAA had actually determined that GRC's accounting system used full time accounting, which accounted for uncompensated overtime, and had so informed the agency orally and in writing. DSS-W never informed us as to what DCAA actually had determined regarding GRC's disclosure statement and accounting system and practices, nor provide us with DCAA's letter to the agency, detailing DCAA's error concerning GRC's accounting system.4/

DSS-W now argues that it did not inform us of DCAA's reversal of its earlier advice to the agency, concerning GRC's accounting system, because this post-award advice was not relevant to the contracting officer's award decision. However, since DSS-W argued throughout the protest that GRC's

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4/ We obtained directly from DCAA the audit agency's October 24 letter that informed DSS-W that GRC's CAS disclosure statement and full-time accounting system provided for uncompensated overtime.

offer of uncompensated overtime rates was a deviation from its standard billing practices and was not consistent with its disclosed accounting system, we do not think that the agency could reasonably fail to disclose DCAA's actual position regarding GRC's disclosed accounting system.

In any event, DSS-W and AMS argue that the contracting officer reasonably accepted DCAA's pre-award advice concerning GRC's accounting system and practice because the contracting officer had not reviewed GRC's disclosure statement before award and was unfamiliar with GRC's bidding and billing practices. The contracting officer now states in this regard that he "relied on the advice of experts at DCAA . . . with no [other] information in hand to contradict that expert opinion . . . ."

These contentions are inconsistent with the agency's representations during the protest that its contracting officer had determined that GRC's disclosure statement did not provide for uncompensated overtime. For example, the contracting officer stated in his report to us that:

> "Although the protest states that uncompensated overtime is referred to explicitly in the disclosure statements, I found no use of the term 'uncompensated overtime' in the CAS disclosure statements. DCAA was also unable to find any explicit mention of uncompensated overtime in the CAS disclosure statements that they had on file."5/

Similarly, DSS-W's contention, that the contracting officer had little knowledge of GRC's bidding and billing practices, is also inconsistent with the agency's representations during the protest. For example, the contracting officer stated in his report that:

> "My knowledge of GRC's past and present practices derived from a number of contracts that I awarded as contracting officer or reviewed as Chief of the ADP Division, as well as my consultation with staff and DCAA on six occasions about three different issues (initial compliance, escalation and uncompensated overtime, and CAS disclosures), led me to determine that [GRC's] proposal was unrealistic as stated."

5/ The agency now states that the contracting officer's review of GRC's disclosure statement occurred after award. We recognized in our prior decision that other documentation in the record suggested that DSS-W did not obtain GRC's disclosure statement until after award, notwithstanding the contracting officer's statement.

The agency also represented that the contracting officer "consulted with the [DCAA], reviewed historical data of previous offers and analyses from other GRC contracts, considered his staff's professional analysis and relied upon his own experience with GRC." Furthermore, DSS-W admitted during the protest that GRC had offered uncompensated overtime on other DSS-W solicitations and that the agency had awarded two contracts to GRC, before the award here, which were based on offers of uncompensated overtime.6/

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains either errors of fact or law or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a) (1991); Gracon--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. We will not reconsider a prior decision based upon arguments that could have and should have been raised at that time since the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--otherwise would be undermined. Department of the Navy--Recon., B-228931.2, Apr. 7, 1988, 88-1 CPD ¶ 347; Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Thus, parties that withhold or fail to submit all relevant evidence, information or analyses for our initial consideration do so at their own peril. Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

DSS-W's argument on reconsideration--that the contracting officer had no reason to know at the time of award that DCAA's pre-award advice was incorrect--varies from its position during the protest that DCAA and the contracting officer had "determined" that GRC's disclosed accounting system and practices did not provide for uncompensated overtime. DSS-W's revised contention concerning what its contracting officer knew or reviewed could have and should have been raised at the time of our initial consideration of the protest. Department of the Navy--Recon., B-228931.2, supra; Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, supra. Thus, we will not reconsider our decision based upon these new arguments and evidence that are inconsistent with the arguments and information provided to us by the agency during our initial consideration of the protest.

6/ DSS-W's argument--that it had no basis to question DCAA's advice that GRC could not account for uncompensated overtime--is incongruous with the agency's evaluation of GRC proposals offering uncompensated overtime apparently without question and with the award of contracts on the basis of such proposals.

In any event, we disagree with the apparent belief of DSS-W and AMS that a contracting officer's cost realism determination will be deemed reasonable, although based upon incorrect information, where the incorrect information was provided to the contracting officer by experts outside the procuring agency--e.g., DCAA--and the contracting officer had no reason to know that the advice was erroneous. A contracting officer's cost realism determination may not reasonably be based upon erroneous audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.7/ While a contracting officer may ordinarily rely upon DCAA in performing a cost realism analysis rather than perform all aspects himself, NKF Eng'g, Inc.; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497, this does not mean that a contracting officer is thereby insulated from responsibility for error.8/ PAI, Inc., 67 Comp. Gen. 516 (1988), 88-2 CPD ¶ 36. A contracting officer's judgment concerning the realism of an offeror's proposed costs must be

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7/ We note that this same rule applies to other judgments of contracting officers. See e.g. Fiber-Lam, Inc., B-237716.2, Apr. 3, 1990, 69 Comp. Gen. ___, 90-1 CPD ¶ 351 (contracting officer may not automatically rely upon information provided by transportation rate specialists that results in improper or unreasonable evaluations of offered prices). In this regard, the courts and board of contract appeals have imputed audit information to contracting officers. See e.g. United States v. Hanna Nickel Smelting Co., 253 F. Supp. 784 (D. Ore. 1966) (knowledge of contractor's accounting practices imputed to agency), aff'd on other grounds, 400 F. 2d 944 (9th Cir. 1968); E-Systems, Inc., ASBCA No. 18877, Feb. 23, 1976, 76-1 BCA ¶ 11,797 (knowledge of contractor's pooling and allocation of material costs, known to DCAA, was imputed to the contracting officer). Similarly, a contracting officer is not insulated from responsibility for erroneous advice provided by experts within the procuring agency, i.e., a price analyst or a technical evaluator.

8/ FAR § 15.805-1 (FAC 90-3) provides that:

> "The contracting officer, exercising sole responsibility for the final pricing decision, shall, as appropriate, coordinate a team of experts and request and evaluate the advice of specialists in such fields as contracting, finance, law, contract audit, packaging, quality control, engineering traffic management, and contract pricing." [Emphasis added.]

reasonably based and not arbitrary. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Where this judgment is founded upon incorrect information, it will not be deemed reasonable.9/ See Vinnell Corp., B-180557, Oct. 8, 1974, 74-2 CPD ¶ 190.

DSS-W also contends that GRC did not provide sufficient cost and pricing data to support its offer of uncompensated overtime. This contention was not mentioned by the agency during our initial consideration of the protest, nor is there any indication in the agency's contemporaneous evaluation documents that GRC's offer was not supported by sufficient cost or pricing data. Even at this stage the agency does not identify what cost or pricing data GRC failed to provide or what other data the agency required for its cost realism evaluation. Since this argument could have and should have been raised during our initial consideration of the protest, we will not reconsider our decision based upon this new argument. See Department of the Navy--Recon., B-228931.2, supra.

DSS-W next argues that we erroneously concluded in the prior decision that "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." The agency contends that the manning chart to which we referred provides 8 man-years of effort but in increments of 40 hours per week.10/ As explained in the prior decision, GRC, in response to the agency's technical discussions, provided the requested 8 man-years of effort in its revised technical proposal. It was not until GRC's best and final offer (BAFO), after the revised technical proposal, that GRC offered uncompensated overtime to provide the offered 8 man-years of effort. Thus, GRC's manning chart in the revised technical proposal and its BAFO, read together, unambiguously offer uncompensated overtime to provide the requested level of effort. In this regard, the RFP sought offers of man-years of effort to perform, and not specific persons, as DSS-W's argument implies.

DSS-W and AMS finally argue that we erred in concluding that GRC's and AMS' offers were technically equal and in recommending award to GRC as the technically equal offeror

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9/ The General Services Administration Board of Contract Appeals follows a similar rule. See Compuware Corp., GSBCA No. 9356-P, Mar. 21, 1988, 88-2 BCA ¶ 20,663.

10/ The agency does not state why this alleged error of fact warrants reversal of the prior decision.

with the lower evaluated cost.11/ The agency states, without explanation, that the conclusion of its technical evaluation panel that the two proposals were "substantially the same" is not the same as "'technical equivalence' in the legal sense." DSS-W contends that since the source selection authority (SSA) is not bound by the ratings or recommendations of the technical evaluation panel, see TRW, Inc., B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560, we erred in not allowing the SSA the opportunity to judge the difference in technical merit between GRC's and AMS' offers and to perform a cost/technical tradeoff.12/ In this regard, the agency argues that the offerors proposed different approaches to performing the contract work and has submitted the affidavit of its technical evaluation panel chairman who now states that he is "of the opinion that there were differences in the merits of the two proposals."

While DSS-W argues on reconsideration that there are technical differences between the offers that should be considered by the SSA, the agency has failed to point to a single technical difference. The unsupported statement of the technical evaluation panel chairman and the fact that the two offerors may have proposed differing approaches to accomplishing the contract work do not show that our determination, based upon the protest record, that the proposals were technically equal was incorrect. As described in the prior decision, none of the contemporaneous evaluation documentation in the record, which includes the evaluators' notes and scoring sheets, and the agency's business clearance memorandum, indicate that AMS' proposal was considered technically superior to GRC's proposal. In the absence of any evidence from the SSA or

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11/ AMS also contends that the issue of whether the two proposals were technically equal was not raised by GRC until its post-conference comments and therefore this issue was untimely and should not have been considered. The question of whether the two proposals were technically equivalent arose in the context of our recommendation for relief and not in deciding the arguments of the parties. Since, as described in the prior decision, the record established no discernible technical differences between the two offers, we recommended award to GRC.

12/ DSS-W contends that "[t]he cost/technical tradeoff conducted by GAO [General Accounting Office] in this opinion was insufficient to establish the technical equality of the two proposals." Technical equivalence, however, is not decided on the basis of a cost/technical tradeoff; rather, cost/technical tradeoffs are performed to assess the relative value of proposals in light of the technical merit and cost/price offered.

another agency official specifying differences in technical merit between the two proposals, we have no basis upon which to further delay the resolution of this protest by referring the procurement back to the agency for additional evaluation.

Accordingly, since DSS-W and AMS have failed to demonstrate errors of fact or law that warrant modification of our award recommendation, we will not reconsider our decision in this regard.

The requests for reconsideration are denied.

for James F. Hinchman
General Counsel