



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: E. L. Hamm & Associates, Inc.

File: B-280766.3

Date: April 12, 1999

Howard W. Roth III, Esq., Michael L. Sterling, Esq., and Arthur Serratelli, Esq., Vandeventer Black, for the protester.
Capt. Joseph L. Fuller, Department of the Army, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Evaluation of awardee's proposal for cost-reimbursement contract was unreasonable where awardee's cost proposal was based on use of personnel in labor category with wage determination labor rate substantially lower than that of labor category required to perform tasks set out in solicitation's performance work statement.
2. Protest is sustained where agency did not assess the realism of the awardee's proposed overhead rate, which was significantly below its most recent Defense Contract Audit Agency (DCAA) approved rate.

DECISION

E. L. Hamm & Associates, Inc. (Hamm) protests the award of a contract to Communication Technologies, Inc. (Comtek) under request for proposals (RFP) No. DABT60-98-R-0014, issued by the Department of the Army for storage and warehouse services at the Army Training Support Center (ATSC), Fort Eustis, Virginia. Hamm, the incumbent subcontractor, challenges various agency actions with regard to this procurement, including the agency's failure to perform a proper cost realism evaluation and the agency's source selection decision.

We sustain the protest.

The primary mission of the ATSC is the storage and distribution of training materials. These training materials include correspondence course books, tapes, compact discs, videotapes, posters, testing materials, training support plans, soldier handbooks, and other training materials. These materials are shipped to the

warehouse from all over the United States; upon arrival at the warehouse, they are unloaded and placed in storage locations by forklift operators and shippers/receivers. Thereafter, training materials are shipped on a scheduled and unscheduled basis worldwide to all components of the Army, authorized civilians, and foreign military. This RFP is for a follow-on contractor to provide support services for the ATSC in six major areas of warehouse operations: (1) receiving, (2) storing, (3) pre-packaging, (4) inventory control, (5) shipping and mailing, and (6) destruction and recycling. RFP § C.5.

The RFP, a total small-business set-aside, was issued on March 19, 1998, and contemplated the award of a cost-plus-award-fee contract for a base period with 4 option years. RFP §§ L.6, F.3. Proposals were evaluated on the basis of four evaluation factors with associated subfactors, listed in descending order of importance: technical, management, past performance, and cost (including options). RFP § M.3. The RFP identified technical subfactors and sub-subfactors of equal importance, management subfactors of varying importance, and past performance subfactors of equal importance. As relevant here, the technical subfactors were the offeror's degree of understanding of the six major areas of warehouse operations and the offeror's proposed level of staffing. The latter subfactor included two sub-subfactors: the adequacy of the proposed skill types, including cross utilization of personnel; and the adequacy of the number of personnel proposed.¹ RFP § M.5.

The RFP provided detailed instructions for the preparation of proposals, and requested that offerors submit separate technical/management and cost proposals corresponding to the four evaluation factors. RFP § L.9. Among other things, the technical/management proposal was to identify the offeror's proposed staffing by listing the number of personnel proposed to perform the required tasks, the mix of skill types, the personnel to be cross-utilized, and resumes for key personnel identified as the project manager and alternate project manager.² RFP § L.9.B(2)(b). To assist offerors in estimating the number of personnel necessary to accomplish the anticipated workload, the RFP included actual workload data and related workload information for fiscal years 1996 and 1997. RFP § C.1 and Technical Exhibit 2 (TE-2).

¹Prior to the RFP's issuance, the ATSC Resource Management Directorate conducted a storage and warehouse contract workload analysis (RMD study) to establish a new baseline staffing level for use in developing the independent government cost estimate (IGCE). [DELETED].

²The RFP permitted offerors to propose a project manager or a designated representative to act with full authority for the contractor. RFP § C.1.5.1.

Because the procurement is for services, it is subject to the Service Contract Act of 1965 (SCA), 41 U.S.C. §§ 351-358 (1994). Pursuant to that Act and the implementing provisions of the Federal Acquisition Regulation (FAR), the contracting officer had advised the Department of Labor (DOL), through submission of Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," of the contracting agency's intent to award a service contract. Pursuant to FAR § 22.1008-2, the SF 98 submitted to DOL was required to list all classes of workers expected to be employed by the contractor; it listed only the following service employee classifications: [DELETED]; of significance to this protest is the fact that the SF 98 did not list the [DELETED] labor category. In response to the SF 98, the contracting officer received a wage determination from DOL, which was then included in the RFP. Pursuant to the SCA, the RFP required offerors to pay non-exempt employees not less than the minimum wages and fringe benefits set forth in that wage determination. RFP § I.34 and amend. 0002, attach. 1.

Pursuant to FAR § 22.1006(b), the agency included in the RFP the clause at FAR § 52.222-42, which identified the classes of service employees expected to be employed under the contract and stated the wages and fringe benefits payable to each if they were paid by the contracting agency. In that clause, the RFP listed warehouse specialist, shipping/receiving clerk, data entry, general clerk, stock clerk, and truck driver; again, of significance to this protest was that the clause did not list [DELETED] employees. RFP § I.84.

Offerors were required to complete section B of the RFP, the price/cost schedules, for the base period and each option period of the contract by inserting the unit rate for each of the six areas of warehouse operations and extended costs based upon the number of months for each warehouse function. RFP § B. Cost proposals were required to include a cost breakdown with supporting data, including a direct labor cost matrix, a cost summary matrix, overhead, and general and administrative costs. RFP § L.9.C. As relevant here, offerors were to identify the individual elements of cost making up the offeror's overhead pool, including separate breakouts of their home office overhead rate. Id. § L.9.C(3)(h).

The agency received [DELETED] proposals; only the [DELETED] highest-rated proposals (all of which had received an overall rating of exceptional) were determined to be in the competitive range. Following a protest by Hamm to our Office (B-280766), the Army revised the competitive range to include Hamm and [DELETED] other offerors whose proposals had received an overall rating of [DELETED]. Oral discussions were held with all competitive range offerors. Most offerors, including Comtek and Hamm, were told that [DELETED]. Agency Memorandum for Record. By letter of October 19, 1998, the agency requested final revised proposals from the competitive range offerors. As relevant here, the letter advised that the workload data in TE-2 should be used for pricing section B, including the option years.

Final revised proposals were evaluated and ranked as follows:

Rank	Offeror	Total Cost	Tech. Rating
1	Offeror A	[DELETED]	[DELETED]
2	Comtek	[DELETED]	[DELETED]
3	Offeror C	[DELETED]	[DELETED]
4	Hamm	[DELETED]	[DELETED]
5	Offeror D	[DELETED]	[DELETED]
6	Offeror E	[DELETED]	[DELETED]

Price Negotiation Memorandum at 2.

Although several competitive range proposals received an overall consensus rating of exceptional, the evaluation record indicates that the proposals were not considered technically equal. In this regard, the proposals of Offeror A, Comtek, and Offeror C each received [DELETED] rating under the three non-cost factors; Hamm's proposal received a rating of [DELETED] under the technical factor, and [DELETED] rating under the management and past performance factors; and Offeror E's received a rating of [DELETED] under each of the three non-cost factors. With regard to cost, the evaluators did not consider it necessary to make probable cost adjustments to any of the revised proposals; except for Offeror [DELETED],³ the evaluators concluded that each of the revised cost proposals reflected the offeror's technical approach; that the offerors used the appropriate SCA wage rates; and that the cost proposals reflected the offerors' proposed performance. Agency Cost Analysis-Final Revised Proposals at 2-5.

In its technical proposal, Comtek identified its staffing by functional areas corresponding to the six major warehouse functions in the performance work statement (PWS), including proposing [DELETED] to perform a variety of the tasks; the technical proposal made no reference to the use of [DELETED]. Comtek's cost proposal, however, shows that it intended to provide [DELETED] employees (whose wage determination rate is substantially lower than that of the [DELETED] position) to perform most of the warehouse functions.⁴ Specifically, the Comtek proposal states:

³[DELETED]

⁴As explained in detail below, while the contemporaneous evaluation record makes no reference to Comtek's proposed use of the [DELETED] labor category, as part of its supplemental response to the protest, the agency reported that it had identified and evaluated the impact of this aspect of Comtek's proposal. See Agency Supplemental Report, Statement of Army Cost Analyst at 1st unnumbered page.

[DELETED]

Comtek Revised Cost Proposal, § 2.1.

To determine whether the technically superior, highest-ranked proposal provided the greatest benefit to the government, the evaluators reviewed and compared the added benefits offered in Offeror A's and Comtek's proposals. The evaluators concluded that the added benefits offered by Offeror A [DELETED] were not worth the estimated cost premium of approximately [DELETED] and therefore recommended that award be made to Comtek as the offeror proposing the next highest-ranked, technically superior offer with the lowest evaluated cost. Agency Cost Analysis--Final Revised Proposals at 5-6. The contracting officer concurred, and preaward notices dated November 25, 1998 were sent to the unsuccessful offerors. Price Negotiation Memorandum at 2-3. A written preaward debriefing was provided to Hamm. On December 10, the contract was awarded to Comtek and this protest followed.

The protester contends that the agency's cost realism evaluation of Comtek's proposal was flawed. Protester's Response to Agency Comments at 2. The protester specifically objects to the agency's acceptance of the awardee's labor and overhead rates, which it asserts are unrealistically low. Id. at 4-12.

With regard to labor rates, the protester argues that a proper cost realism analysis would have revealed that Comtek's proposed labor rates were unrealistically low, primarily because the firm proposed to use an inappropriate category of employees to perform most of the warehouse functions. Specifically, under Comtek's proposal, most of the warehouse functions will be performed by employees designated as [DELETED] rather than [DELETED], which, in the protester's view, is the appropriate labor category that should be used. As support for this position, Hamm notes that the category of employees performing most of the work under current and past contracts is the [DELETED]. Hamm claims that Comtek's costs should have been adjusted upward to reflect more realistic rates because the [DELETED] labor category wage determination rate is substantially higher than that of the [DELETED] labor category (*i.e.*, [DELETED] per hour versus [DELETED] per hour). Protester's Comments at 20-22.

The purpose of a cost realism analysis by an agency under a cost reimbursement contract is to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirement; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. FAR § 15.404-1(d)(1). In considering a challenge to an agency's cost realism analysis, our Office considers whether the analysis was reasonable. DCT, Inc., B-253545, B-253545.2, Sept. 28, 1993, 93-2 CPD ¶ 230 at 5. Here, the reasonableness of the cost realism analysis with respect to the labor categories proposed turns on whether the agency had a reasonable basis for

concluding that the work under this contract is appropriately covered by the [DELETED] labor category, on whose lower wage determination rates the awardee's cost proposal was premised.

The categories of employees at issue here are described in the DOL's Directory of Occupations⁵ as:

[DELETED]

SCA Directory of Occupations at [DELETED] (4th ed. 1993 & 2nd Supp. 1995).

The Army points out that the RFP did not require Comtek to utilize the same staffing mix as currently employed by the incumbent contractor ([DELETED]); instead, the Army stated it was the offeror's responsibility to propose a labor mix that could most efficiently perform the solicitation requirements. Agency Legal Memorandum at 4-5. Essentially, it is the Army's position that offerors were free to use either the [DELETED] category or the [DELETED] category to perform the tasks at issue.

In support of its position, the agency submitted a statement from its cost analyst, who states that he is very familiar with the work currently being performed and who was also a member of the technical evaluation team. The cost analyst states that, as part of the agency's cost realism analysis, the contracting specialist questioned whether Comtek's proposed [DELETED] labor category was an appropriate classification. The cost analyst states that he then reviewed the SCA classification for [DELETED] and [DELETED] in light of the PWS tasks, and concluded that the [DELETED] category was an appropriate class of employee to perform the required tasks. He further concluded that the tasks for which Comtek proposed the [DELETED] category employees, such as [DELETED], fit within the [DELETED] description of duties. Agency Supplemental Report, Statement of Army Cost Analyst, at 2nd and 3rd unnumbered pages.

For instance, according to the cost analyst, the tasks that will be performed by Comtek's [DELETED] employee include removing pre-wrapped books from shelves, carrying them in a shopping cart to a location for labeling, then simply placing a gum back envelope label on the books since each book is delivered to the warehouse pre-wrapped and ready for mailing; the employee will primarily deal with individual books being mailed, and will not handle books being mailed in heavy boxes or in bulk or prepare the mailing label. Likewise, the cost analyst states that under the SCA classification, a [DELETED] category employee is required to keep inventory forms of merchandise stocked and merchandise returned to storage, and

⁵The Directory contains standard job titles and descriptions for many commonly utilized service employee occupations. FAR § 22.1008-2(b)(1).

the cost analyst noted that keeping track of inventory is the major clerical duty performed in the Ft. Eustis Warehouse. Id. Based on that review, the agency reports, it reasonably concluded that Comtek's proposed use of the [DELETED] classification was in compliance with the SCA. Id. at 1st and 2nd unnumbered pages. As a result, the agency found that it had no basis to adjust Comtek's proposed costs upward.

Our analysis leads us to conclude that the use of employees in the [DELETED] category in Comtek's cost proposal was not appropriate. Accordingly, we find that the Army's determination that Comtek's costs are realistic is unreasonable.

Determining which wage determination labor category applies to work to be performed under a contract has a significant effect on the competition since one offeror can clearly gain a competitive advantage if it is allowed to use a labor category with lower minimum wages. More importantly, however, allowing one firm to do so risks defeating the purpose of the SCA and negating DOL's role in implementing that Act, since the SCA and DOL's implementing actions are meant to set the minimum wages to be paid for performance of the work. Here, the effect of the Army's actions was that DOL's minimum wage rates were not applied equally to all offerors: Comtek was permitted to pay its employees, doing the very same work, substantially less than the wage determination rates that served as the minimum wages governing all other offerors.

We conclude that a comparison of the language of the PWS with the definitions in the Directory demonstrates that it was unreasonable for the agency to agree that the [DELETED] labor category is an appropriate class of service employees to perform the tasks at issue.⁶ While we recognize the importance of permitting offerors to propose innovative staffing approaches, the staffing approach must include staff that appropriately can be used to perform the PWS. Here, the combination of the language of the PWS and the labor category descriptions in DOL's Directory rendered unreasonable the cost analyst's position that the positions of [DELETED] could properly be filled by employees in the [DELETED] labor category, with its relatively low wage rate.

⁶While we recognize that selecting the appropriate wage determination is an area in which DOL must be accorded deference, we note that the record contains no evidence that DOL would agree with the Army's view that the [DELETED] labor category, with its substantially lower wage determination, is appropriate for the work at issue here. The only indication in the record of DOL's view is an April 2, 1997 informal opinion from DOL in response to an inquiry from Hamm regarding the classification of employees for this effort; that informal opinion, while not definitive, is consistent with our conclusion that the [DELETED] category is the appropriate match for this type of work. Letter from DOL to Hamm 1 (Apr. 2, 1997).

The various tasks specified in detail in the PWS are similar to the duties to be performed by a [DELETED], as set forth in the Directory. For example, under the PWS one of the six warehouse operation tasks involves inventory control and some of the duties to be performed by the contractor's staff under this warehouse operation task include (1) performing an inventory of training materials, providing the results by the required suspense date, and performing recounts when discrepancies are identified; (2) performing an inventory on materials remaining in warehouse after completion of pre-packaging requirements; and (3) the use of a government-furnished computer to enter the location, quantity, receipt date, inventory adjustments, and materials returned to stock for all training products. RFP § C.5.5. These tasks fall squarely within the Directory's description of the [DELETED] category, quoted above.

In contrast, the Directory description of the [DELETED] category begins by stating that the category applies to tasks performed [DELETED]. This alone renders suspect the Army's conclusion that this labor category was appropriate for the contract. Virtually the entire balance of the Directory's description is equally inapplicable to the work to be performed under this contract. For example, under this solicitation, the employees will not be required [DELETED]. While some of the duties to be performed by a [DELETED] employee in a [DELETED] may be similar to some of the required tasks identified in the PWS, the overwhelming majority of the duties described in the Directory for this labor category will not be performed at the Fort Eustis warehouse.

Based on this analysis, we conclude that Comtek's proposed use of a [DELETED] to perform the majority of the duties identified in the PWS under the shipping/mailling warehouse task was inappropriate. On the other hand, Hamm's proposed use of a [DELETED] to perform most of the shipping/mailling warehouse duties was an appropriate class of employees. See Comtek Revised Cost Proposal at Table 2.2-2.1; Hamm Revised Cost Proposal, § IV, at IV-3.

We note several other indications in the record that support our conclusion about the reasonableness of proposing [DELETED] employees to do the majority of the duties described in the PWS. First, unlike its cost proposal's extensive reliance on lower-paid [DELETED] employees, Comtek itself in its technical proposal indicated its intent to staff positions with [DELETED]. This inconsistency suggests that either the cost proposal did not cover the costs inherent in the technical proposal, or that the technical evaluation did not take into account the labor category that Comtek intended to use for performing the tasks at issue. See TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 at 11.

Second, the record shows that, prior to receipt of Comtek's proposal, the agency itself did not believe that the [DELETED] labor category was appropriate for this

procurement.⁷ While an agency is not precluded from accepting a proposal based on unanticipated, innovative approaches, here the record indicates that, prior to receipt of Comtek's proposal, the agency believed that the detailed description of the tasks set out in the PWS accurately described the work to be performed, and, the agency has not offered any persuasive explanation why Comtek's staffing approach is appropriate under these circumstances. As explained above, we find that detailed description irreconcilable with the use of [DELETED] employees.

Finally, our review of the proposals submitted by the other competitive range offerors also shows that none of those proposals was based on the use of [DELETED] employees. Again, while offerors are generally permitted to be innovative in staffing approaches, the absence of the use of such employees by other offerors at least suggests that the PWS descriptions were viewed as precluding their use.

Even if we assume that the Army cost analyst was justified in concluding that the [DELETED] labor category was appropriate, this does not justify the agency's actions. If the tasks were really as limited as the cost analyst stated in his post-protest statement (involving simply removing books from shelves, carrying them in a shopping cart to be labeled, and placing a label on them), so that the [DELETED] category might be appropriate, this suggests that the far more sophisticated tasks set out in the PWS did not accurately describe the nature of the work to be performed.⁸

In addition to the protest issue regarding the use of the [DELETED] category, Hamm also challenges the agency's acceptance of Comtek's proposed overhead rate of [DELETED], which is substantially below its [DELETED] DCAA approved overhead rate of [DELETED], without any evidence or basis to conclude that the proposed [DELETED] rate was realistic.⁹ See Agency Cost Analysis--Final Revised

⁷As explained above, on the SF 98 that it submitted to DOL, which was required to identify all classes of service employees to be utilized under the contract, the agency listed several labor categories, including [DELETED], but did not list [DELETED]. Similarly, when the agency was required, under FAR § 22.1006(b), to inform prospective offerors of the classes of service employees expected to be employed under the contract, the Army listed several labor categories, but not [DELETED] employees.

⁸Hamm also points out that although Comtek's technical proposal indicates that the firm will provide [DELETED].

⁹Consistent with the RFP's instructions for the preparation of proposals, Comtek's cost proposal listed the various elements of cost in its overhead pool which
(continued...)

Proposals. Comtek's cost proposal does not explain or justify why its proposed overhead rate for this contract was significantly less than its [DELETED] approved rate. Instead, the only explanation provided by Comtek to the agency on this issue states:

[DELETED]

The contemporaneous record contains no justification or support for the agency's determination that Comtek's proposed [DELETED] overhead rate was realistic. The contracting officer's rationale for accepting this rate, quoted above, submitted in response to the protest, provides no meaningful basis for accepting this rate, which is significantly lower than the one approved by DCAA. Instead, he simply states that he accepted the rate proposed by Comtek without any realism evaluation. Critical to our conclusion in this regard is [DELETED]. See Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202 at 7. Here, nothing in the record establishes that the low proposed rate will be the one that the government's reimbursement will actually be based on. In the absence of any support for the agency's acceptance of the realism of Comtek's proposed overhead rate, we conclude the evaluation lacked a reasonable basis. See The Futures Group Int'l, B-281274.2, Mar. 3, 1999, at 3-8 (protected decision; redacted version not yet available for public distribution); Coleman Research Corp., B-278793, Mar. 16, 1998, 98-1 CPD ¶ 111 at 4-5; WMP Security Servs. Co.; E.H. White & Co., B-232133, B-232133.2, Nov. 29, 1988, 88-2 CPD ¶ 528 at 2-4.

Our standard of review for prejudice requires that the protester demonstrate a reasonable possibility that it was prejudiced by the agency's actions, that is, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Hamm has provided an un rebutted submission from its consultant showing that these two evaluation errors could require an upward adjustment of Comtek's proposed costs by approximately [DELETED]. Protester's Comments, Exh. 1, Declaration of Consultant, at 1-4. We conclude that Hamm has demonstrated that it would have had a reasonable possibility of receiving the award but for the agency's failure to reasonably evaluate Comtek's proposal. Therefore, we conclude that the agency's actions prejudiced the protester and we sustain the protest.

In crafting our recommendation, we recognize that, in the first instance, the Army needs to determine whether, in its view, the skills and duties of the [DELETED]

⁹(...continued)

support its DCAA approved overhead rate of [DELETED]; it also identified the far fewer elements of cost which would be included in its proposed [DELETED] overhead rate for this contract. Comtek Revised Cost Proposal at Table 2.7-1.

labor category suit its needs. If the agency determines that this labor category is acceptable, we recommend that the agency revise the PWS and list of labor categories in the RFP accordingly, and request revised proposals. Alternatively, if it is determined that the [DELETED] labor category is not appropriate here, we recommend that the Army reevaluate Comtek's proposal consistent with the terms of the current version of the RFP and with our decision, hold discussions with all competitive range offerors, and then request and evaluate final revised proposals. In any event, the agency must perform a proper cost evaluation, including a cost realism analysis.

If Comtek is not the successful offeror following corrective action, we recommend that the agency terminate Comtek's contract for the convenience of the government and make award as appropriate. We also recommend that Hamm be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States