



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Aberdeen Technical Services

File: B-283727.2

Date: February 22, 2000

Ruth Y. Morrel, Esq., DynCorp, for the protester.
Vera Meza, Esq., and David H. Scott, Esq., U.S. Army Materiel Command, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging a cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76 is sustained, where in-house estimate failed to include the full costs for a program manager and other key personnel positions required by the solicitation.
2. Protest that agency improperly disallowed a price reduction offered by the protester in its final proposal revision is sustained where the solicitation contemplated the award of a fixed-price contract, and any risks associated with performance thus will be borne by the contractor, not the government.
3. Allegation that in performing a cost comparison pursuant to Office of Management and Budget Circular No. A-76, agency improperly failed to follow the requirements for comparing a "best value" private-sector offer with the government's Most Efficient Organization/Management Study (MEO) is sustained, where the record shows that agency failed to determine whether the MEO offered the same level of performance or performance quality as the "best value" private-sector offer.

DECISION

Aberdeen Technical Services (ATS) protests the decision of the Department of the Army, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to manage and operate base industrial operations in-house at the Aberdeen Proving Ground (APG), Maryland, rather than to contract for these services under request for proposals (RFP) No. DAAD05-98-R-0565. ATS

challenges the cost comparison on numerous grounds, arguing that the Army failed to include all of the costs required for in-house performance in its estimate and made improper upward adjustments to ATS's proposal. The protester also contends that the agency improperly failed to follow the requirements contained in the Circular and the Revised Supplemental Handbook (March 1996) for comparing a "best value" private-sector offer with the government's Most Efficient Organization/Management Study (MEO).

We sustain the protest.

Background

The Army issued the RFP on August 4, 1998, as part of a cost comparison pursuant to OMB Circular No. A-76. Contracting Officer (CO) Statement at 1. The RFP contemplated the award of a fixed-price contract. RFP § L.7. The services required under the RFP include logistics, operations and maintenance, risk management, organizational support, and community and family activities. *Id.* § C-1.1. The RFP listed management, technical, past performance, and cost/price as evaluation areas. The RFP stated that selection of a private sector proposal would be based on a "best value" determination. *Id.* § C-5.4, at 1.

On December 17, the government submitted its MEO to the CO; on January 4, 1999, the agency received three proposals from private-sector firms in response to the RFP. CO Statement at 1. The Army evaluated the proposals, held discussions, and received final proposal revisions from the two offerors within the competitive range, including ATS. Based on the results of the final evaluation, ATS's proposal was selected as the "best value" offer for purposes of the cost comparison. Agency Report (AR), tab 5, Source Selection Authority, Cost/Technical Tradeoff Analysis, at 5.

On May 27, the agency conducted a cost comparison between the government's MEO and ATS's proposal. The results of that cost comparison showed that ATS's proposal (\$129,559,970) was less expensive than the government's estimate (\$130,062,726) to perform the services in-house. AR, exh. 13A, Cost Comparison of In-House vs. Contract or ISSA Performance.

On June 3, the CO received a memorandum from the Department of Labor (DOL), instructing all federal contracting agencies to increase prevailing health and welfare fringe benefits in accordance with the methodology described in the memorandum. AR, exh. 14A, Memorandum No. 192, from Deputy Administrator, Wage Determination No. 94-2247 (Rev. 15) (May 24, 1999). In addition, three employees and an employee association filed administrative appeals of the tentative selection of ATS as a result of the cost comparison. ATS itself also filed an appeal, stating that in light of challenges it anticipated would be filed by non-prevailing parties, it believed that correction of certain alleged errors in the government cost estimate would

strengthen its position as the tentative awardee. AR, exh. 19, Letter from DynCorp Technical Services to the CO 1 (July 8, 1999).

On July 12, the agency convened an administrative board to review the appeals. The Army also requested that the Defense Contract Audit Agency (DCAA) assist the board by reviewing the appeals and expressing an opinion with respect to the issues raised by the appellants. The board then temporarily suspended its review pending DCAA's assessment of the appeals. In response to the Army's request, DCAA performed an audit of the issues raised in the appeals and their impact on the in-house estimate and on ATS's price.

On August 27, DCAA issued its report on the appeals. DCAA found that of all of the issues raised, four had merit, but only one of the four had a significant impact on the cost comparison. AR, exh. 34, DCAA Audit Report No. 6201-99C17900002, Aug. 27, 1999, at 2. Specifically, DCAA concluded that an employee appeal regarding the rate ATS used to compute health and welfare benefits would result in an increase of approximately \$925,516 to ATS's price (to reflect application of DOL's updated fringe benefits determination). Id.

On August 31, following issuance of DCAA's report, the board reconvened to complete its review and provide its findings to each appellant. The board issued its findings and directed the CO to correct certain errors in the cost comparison form as identified in the appeals, and to recalculate the in-house cost estimate accordingly. AR, exh. 40, Administrative Appeals Board Report to [Commercial Activities] Manager, Sept. 1, 1999.

The CO states that all upheld appeal issues were implemented as the board directed. CO Statement at 2. After the adjustments were made in accordance with the board's direction, ATS's price for purposes of the cost comparison was \$131,183,324, while the in-house cost estimate was \$129,401,287, a difference of \$1,782,037 in favor of in-house performance. AR, exh. 41B, Cost Comparison of In-House vs. Contract or ISSA Performance, Sept. 13, 1999. On September 14, the CO notified ATS of the results of the new cost comparison. This protest followed.

The Selection Process under OMB Circular No. A-76 and GAO's Review

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of governmental functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel.

Circular No. A-76 and the Supplemental Handbook set out the steps of the cost comparison process. Supplemental Handbook, Part I, Ch. 3. First, a performance work statement (PWS) is drafted, which establishes performance standards and

measures common to the MEO and the private-sector offerors. In that regard, the Supplemental Handbook alerts agencies to the need to ensure that the PWS does not reduce competition. *Id.* ¶ C. Once the PWS has been established, the management study leading to the drafting of the MEO can be conducted, and the competition among private-sector offerors can be held. The Supplemental Handbook was amended in 1996 to permit a "best value" (that is, a cost/technical tradeoff) approach in selecting the private-sector proposal. *See* 61 Fed. Reg. 14,338, 14,339, 14,345 (1996). Once a "best value" private-sector offer has been selected, the CO is to submit to a reviewing authority the government's MEO, which must comply with the technical requirements of the solicitation. Supplemental Handbook, Part I, Ch. 3, ¶ H.3.d. The reviewing authority then evaluates the MEO and assesses whether or not the same level of performance and performance quality will be achieved under the in-house plan.¹ *Id.* The government then makes changes if necessary to ensure that the MEO meets the performance standards of the selected private-sector offer, revises its in-house cost estimates, and submits the revised estimates to an "independent review officer" for acceptance. *Id.* ¶ H.3.e. Finally, after these steps have been taken to ensure that the private-sector proposal and the MEO are comparable in terms of the performance standards, the CO opens the government's in-house cost estimate for comparison with the private-sector offeror's proposed price. *Id.* ¶ J.3; *see also* Federal Acquisition Regulation (FAR) § 7.306(b).

Protest Issues

ATS raises numerous objections to the cost comparison conducted here, arguing that the Army's cost estimate does not include the total cost to the government of in-house performance for certain key personnel, and that the agency made improper adjustments to ATS's proposed price. For example, ATS argues that the Army's MEO does not include the cost of a full-time project manager (PM), which ATS included in its proposal as, it contends, was required by the RFP. In addition, ATS argues that the MEO improperly omitted the cost of other key personnel responsible for performing essential functions such as quality assurance/control, safety and health oversight, environmental compliance, procurement, and project controls--all of which ATS proposed as full-time employees in its proposal. ATS estimates that the impact of these omissions alone would increase the cost of in-house performance by

¹ As we have previously noted, while the Supplemental Handbook does not explicitly require that the reviewing authority document the assessment of whether the same level of performance and performance quality will be achieved in-house, we believe that the reviewing authority's decision should be documented contemporaneously with that decision. *See NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 5 n.3.

nearly \$11 million.² ATS further contends that the Army improperly adjusted ATS's price upward to add back into its proposal certain "lapse rate" savings that ATS had deducted from its final proposal. ATS also argues that the agency improperly failed to follow the requirements contained in OMB Circular No. A-76 and the Supplemental Handbook for comparing its "best value" proposal with the MEO.

Discussion

Where, as here, an agency has conducted an A-76 competition, thus using the procurement system to determine whether to contract out or perform work in-house, our Office will consider a protest alleging that the agency has not complied with the applicable procedures in its selection process or has conducted an evaluation that is inconsistent with the solicitation criteria or otherwise unreasonable. See Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335 at 3-4; Base Servs., Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 at 2. To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but also that its failure could have materially affected the outcome of the cost comparison. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30 at 2. This is consistent with our position that our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, 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).

In this decision, we address certain issues raised by ATS which, when considered together, clearly could have a material impact on the outcome of the cost comparison. Those issues relate to the RFP's requirement for the PM and other key personnel to be proposed on a full-time basis; the agency's decision to add back into the protester's price ATS's "lapse rate" reduction; and the agency's approach to comparing ATS's proposal with the MEO. As noted above, using the figures provided

² According to ATS, the impact of the correction as a result of the exclusion from the MEO of a full-time PM is to increase the government's estimate by as much as \$936,323. In addition, according to ATS's calculations, the impact of correcting the MEO to include quality assurance staff (an increase of between \$1,467,459 and \$4,150,185, depending on the precise number of staff added), and other key personnel costs (\$1,859,716), could increase the government's estimate by as much as \$6,009,901, for a grand total increase to the MEO of more than \$11 million (\$936,323 + \$4,150,185 + \$6,009,901) for these key personnel costs alone. Protest, Sept. 24, 1999, at 3-7. The agency does not take issue with or otherwise dispute any of the protester's calculations.

by ATS--and undisputed by the agency-- adjusting the MEO to reflect the key personnel positions could result in an upward adjustment to the government's estimate of as much as \$11 million, resulting in a total in-house estimate as high as \$140,401,287. In addition, restoring the "lapse rate" reduction in the protester's final proposal results in a downward adjustment to ATS's price of \$[DELETED], resulting in a total price of \$130,070,543, a difference of more than \$10 million in favor of contracting for the services based on these adjustments alone.³

Program Manager and Other Key Personnel

The agency does not dispute that the "performance-based requirement" included in section C of the RFP (essentially, the PWS) applied to the MEO as well as to private-sector offers.⁴ The agency contends, however, that, because the RFP contemplated a "performance-based" contract, it did not require offerors to identify specific, full-time, key personnel. Hearing Transcript (Tr.) at 8-9. Rather, according to the agency, the RFP merely described required functions and left it up to the offerors to decide how those functions would be performed. The Commercial Activities (CA) manager, who headed the team that prepared the PWS, explained at the hearing convened on this matter that with respect to several essential functions, "[the team's] intent was never to have several individuals just working full-time on let's say, for example, quality assurance, quality control, [and] safety. And some of the key positions that [are] part of this protest were never intended to be dedicated people." Tr. at 10. This approach was reflected in the MEO. For example, the responsibility for performing environmental compliance was added to the duties of an individual currently responsible for "safety and health" at APG, which the government considered to be a "multidisciplinary" position. Tr. at 55. The agency took the same approach with respect to other key personnel positions identified in the RFP. Specifically with respect to the PM position, the agency added project management

³ ATS also argues that the MEO significantly overestimated one-time conversion costs (related to health benefits, real property inventory/inspection, relocation of personnel, retraining, severance, and unemployment benefits). According to ATS the agency overestimated these costs by approximately \$7 million. The protester also maintains that the Army improperly adjusted ATS's proposal upward to reflect DOL's revised health and welfare benefit rate. In view of our conclusion and recommendation based on consideration of the key personnel and lapse rate issues, we need not address these other issues.

⁴ Indeed, since the performance requirements set out in section C of the RFP would apply to both the selected private-sector offer and the MEO, the requirements consistently used the term "Performing Activity," instead of "contractor." See RFP § C-5.4, at 1.

functions to the duties assigned to the Director of Installation Operations (IO); further, the MEO included only 25 percent of the cost of a PM because, according to the CA Manager, “the [PM’s] duties only require that many hours.” Id. at 16.

Section L of the RFP contained detailed instructions to offerors on how to prepare their proposals. With respect to key personnel, offerors were required to:

Describe by name and position title, those personnel that are considered to be key to this program. Key personnel shall be dedicated to the [Performing Activity (PA)] and are responsible for essential functions, including, but not limited to, project management, safety and health, environmental compliance, procurement, quality assurance/control, and project controls. Provide resumes for each Key Personnel proposed to be dedicated to the PA. . . . Letters of commitment and agreements for Key Personnel to be located full time at [Aberdeen Proving Ground] shall be included and signed by each of the proposed key personnel.

RFP § L.2, vol. I--Management, tab 3: Key Personnel (emphasis added).

With respect to the PM position, the RFP stated as follows:

The PA shall provide an on-site [PM] physically present during normal operating hours. This individual shall be responsible for the overall management and coordination of the Award and shall act as the central point of contact with the Government. The PA’s [PM] shall be available for discussion with the [contracting officer’s representative (COR)] during normal operating hours. When Award work is being performed at times other than normal operating hours, an individual shall be designated by the PA to act for the [PM]. Two weeks prior to the commencement of work under the provisions of this Award, the PA shall furnish to the COR, a copy of the PA organizational chart as proposed for the performance of this PBR. The PA chart shall include names, addresses and telephone numbers of the [PM] and supervisory and key management personnel who shall serve as a focal point between the PA and the Government to resolve problems and emergency situations. The PA shall keep this list updated and shall notify the COR immediately, in writing, whenever changes are made.

RFP § C.1.3.1.3, Project Manager and Key Personnel, § C-5.4, at 7.

The agency takes the position that this provision does not require a full-time PM (or any other key person), but only calls for an individual to be “on-site” to act as PM when needed. According to the agency, requiring a PM to be “on-site” should not be interpreted to mean “full-time.” The agency explains that the MEO meets this requirement by providing that another individual (i.e., the Director of IO) will already

be “on site,” full-time, and will be available to perform the duties of a PM in addition to his other existing duties. CO Statement at 3. The agency further states that the responsibilities of the PM are “minimal,” and that many of the duties of a contractor PM would not be relevant if the work is retained in-house. For instance, there would not be a need for discussions between the PM and a COR concerning contract performance. In addition, if the services are provided in-house, there would be little if any need for “coordination” of the award. The government thus included only 25 percent of the cost of a PM in its MEO, because, according to the CA Manager, “the duties [of a PM] only require that many hours.” Tr. at 16. The agency further states that, if the RFP were interpreted as requiring a “full-time” PM, the agency would “realign” the MEO PM’s responsibilities with other positions within the MEO so as to eliminate the need to allocate any cost for a PM, reducing the costs of this position for the government to zero.

To preserve the integrity of the cost comparison, private-sector offerors and the government must compete on the basis of the same scope of work. See Supplemental Handbook, Part I, Ch. 3, ¶ H.3.e. See also DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543 at 4; Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166 at 3; EC Servs. Co., B-218202, May 23, 1985, 85-1 CPD ¶ 594 at 3. As explained in greater detail below, we conclude that the Army did not meet this standard here.

Section L.2 of the RFP specifically listed program management, safety and health, environmental compliance, procurement, quality assurance/control, and project controls, as “essential functions.” The RFP further stated that essential functions are the responsibility of key personnel, and required that key personnel be “dedicated to the PA.”⁵ In our view, the RFP thus not only required offerors to propose a separate individual, devoted exclusively to carrying out the functions of PM, but also required dedicated, full-time employees to perform the other essential functions listed in the RFP. We further find that the RFP required that key personnel, such as the PM, be located “full-time” at APG. In this connection, the agency concedes that the PM is a “key person,” who is to be “on site” full-time. CO Statement at 3. Further, with respect to the PM position, rather than having “minimal responsibilities,” as the agency suggests, the RFP clearly required offerors to provide a PM responsible for “the overall management and coordination of the Award” and to act as a single,

⁵ Webster’s Ninth New Collegiate Dictionary (1988) defines the term “dedicated” as a person “devoted to a cause, ideal or purpose,” or an individual “given over to a particular purpose.” This definition comports with our understanding of the term in the RFP to require the individuals to be exclusively devoted to the work at issue. Accordingly, we fail to see, and the agency has provided no convincing argument, how either the MEO or a private-sector offeror could be permitted to propose key personnel who would spend a significant part of their time on other projects.

central point of contact with the government. RFP § C.1.3.1.3, Project Manager and Key Personnel, at C-5.4, at 7.

The Army's argument that the PM position is irrelevant if performance of the services is retained "in-house" (because there would be no need for coordination or management functions) is unpersuasive. The RFP specifically listed program management as an essential function, and retaining the services "in-house" neither immunizes the government from problems that may arise during performance, nor reduces the risk of emergencies, the resolution of which the PM (or other key personnel) is specifically responsible for handling. See *Aspen Sys. Corp.*, *supra*, at 3-4. The overall significance of having a full-time, dedicated PM is further highlighted by the fact that the RFP required offerors to designate an individual to act for the PM to resolve performance problems or handle emergencies when work is performed outside normal operating hours. Having such management and coordination responsibilities, in our view, can hardly be considered "minimal" or as insignificant to the overall successful performance of the contract as the agency suggests.

The source selection plan (SSP) provides further support for our conclusion that the RFP contemplated that offerors would propose full-time PM and other key personnel, and that failure to do so could have resulted either in severely downgrading the proposal or rejecting it as technically unacceptable.⁶ Specifically, with respect to key personnel in general, evaluators were instructed to determine if the offeror's proposal reflected that responsibility and authority for commitment of resources are located on-site at APG. SSP, Appendix 7, Management Evaluation Criteria, ¶ I.1.1(d). The SSP further instructed that in evaluating each offeror's management organization, evaluators were to consider whether offerors included a statement in their proposals that all key positions are located at APG, and that the personnel in those key positions are dedicated, full-time employees. *Id.* ¶ I.1.1(c). In this connection, the source selection evaluation board (SSEB) Chairman testified that with respect to personnel, the evaluators focused on whether ATS proposed key personnel located full-time at APG, and whether ATS had provided signed statements from key personnel in that regard. Tr. at 108. The SSP's instructions to evaluators and the SSEB's approach are thus consistent with our interpretation that the RFP called for offerors to propose full-time key personnel responsible for performing the essential functions listed in the RFP.

Given the requirement in the RFP for a dedicated PM, and in light of the RFP's specific designation of other essential functions as the responsibility of dedicated key personnel, we find the agency's position that the RFP did not require a dedicated

⁶ Key personnel was to be evaluated within the management area. RFP § M, at 1-2.

full-time PM or any other key employee, to be an unreasonable interpretation of the RFP. Moreover, we find that the RFP required that all key personnel be full-time employees. The agency's solution, therefore, to simply task several existing positions with the additional responsibilities the RFP assigns to a PM--thereby eliminating the PM position altogether--or combining essential functions into "multidisciplinary" positions, is simply contrary to the terms of the RFP.

Accordingly, we find reasonable ATS's interpretation that the RFP required a dedicated, full-time PM and other key personnel to perform the essential functions listed in the RFP (e.g., safety and health, environmental compliance, procurement, quality assurance/control and project controls). Further, in light of the Army's explanation in response to ATS's protest of its actual intent with respect to the PM position--in particular, that the PM's functions could either be performed by another individual or eliminated altogether, and that the other essential functions could be combined--we find that ATS was misled to its competitive prejudice. See DynCorp, supra, at 7-8; Aspen Sys. Corp., supra, at 4. Essentially, ATS had to comply with performance requirements that did not apply to the MEO. The severity of the prejudice to ATS is evident from a comparison of ATS's estimate of more than \$11 million to reflect the time (and therefore the cost) of a full-time PM and other key personnel, with the MEO including far fewer hours (and therefore lower costs) for those personnel.

Lapse Rate

In its final proposal revision, ATS reduced its direct labor costs to reflect savings from what the firm termed a "lapse rate." In this regard, ATS explained in its final revised proposal as follows:

Net productive hours for non-exempt personnel have been reduced by application of a [DELETED]% lapse rate. This lapse rate reflects the fact that vacant positions are not filled instantly. There is normally some period of time where a position is vacant and thus there are no wages paid for that position during that period.

To obtain accurate lapse rates, ATS analyzed rates involving 12 similar contracts over the last seven years--a total of 54 contract performance years. The average lapse experienced was [DELETED]%.

AR, exh. 12, ATS Volume IV--Cost/Price Final Proposal--May 7, 1999, at IV-4.0-1. Accordingly, in its final proposal revision, ATS reduced its costs to reflect a “lapse rate” of [DELETED] percent for the base and option periods.⁷ Id.

In reviewing one of the employee appeals that questioned ATS’s “lapse rate” reduction, DCAA found that the appeal did not warrant making any adjustments to ATS’s final proposed price. Specifically, DCAA explained as follows:

The appellant cites no regulation or guidance that prohibits ATS from including a lapse factor in its proposal. We discussed this issue with the [Army Audit Agency (AAA)] and CA Cost Team to determine if they were aware of any regulation or guidance relating to this issue. The AAA and CA Cost Team were not aware of any such regulation or guidance. AAA stated that [Department of the Army] PAM 5-20 costing procedures require that the MEO and thus the in-house cost estimate to cost all staffing for all performance periods. Our discussion with CA Cost Team indicated that the MEO could have included a lapse factor for costing the in-house cost estimate but did not. Lacking any definitive regulation or guidance prohibiting ATS from proposing a lapse factor, we do not consider the appellant’s issue warrants an adjustment to ATS’s BAFO.

AR, exh. 34, DCAA Audit Report No. 6201-99C17900002, Aug. 27, 1999, at 16.

DCAA’s assessment notwithstanding, the board directed that ATS’s proposed costs be adjusted upward to add back into ATS’s proposal the savings from the [DELETED] percent lapse rate. The board’s entire analysis of this issue stated as follows:

A review of the contractor’s proposal describing the development of their net productive hours per year for hourly employees included a [DELETED]% reduction due to the lapse resulting from vacancies and turnover. This [DELETED]% reduction allows the contractor to reduce their bid by approximately [DELETED] hours per hourly employee per

⁷ We note that there is disagreement in the record as to the actual amount of the “lapse rate” reduction. According to the agency, the “lapse rate” reduction added back into ATS’s proposal was \$[DELETED]. CO Statement at 11. According to ATS’s calculation, however, the correct figure should be \$[DELETED]. Protester’s Comments, Dec. 17, 1999, at 3 n.1. The difference between these amounts, however, is immaterial to this decision.

year. The hours worked are the basis for the contractor's labor costs and should reflect all the hours to be charged to the contract effort. Make this adjustment adding back the [DELETED]% where reduced and recalculate on the Cost Comparison Form.

AR, exh. 40, Administrative Appeals Board Report to CA Manager, Sept. 1, 1999, at 3. Following the board's direction, the CO states that she added \$[DELETED] to ATS's proposal.

The protester challenges the agency's decision to add back into ATS's proposal the lapse rate reduction due to anticipated vacancies and attrition. In particular, the protester argues that nothing in the costing procedures or the Supplemental Handbook authorizes the agency to make such an adjustment to its fixed-priced proposal.

In response to this protest issue, the agency has provided no evidence or convincing argument in support of its action. In particular, when asked at the hearing to explain the basis for the decision to add the lapse rate amount back to ATS's proposal, the board Chairperson testified that "[i]t seemed to me to be a ploy to arbitrarily reduce" ATS's total price, and that the reduction was not "on solid ground." Tr. at 174-75. The Chairperson further testified that he believed that in proposing the "lapse rate" reduction, ATS deviated from established costing procedures. In this connection, the Chairperson testified that although he understood that ATS would be obligated to perform all of the work required by the RFP, he did not "see how that's possible" given the "lapse rate" reduction. Tr. at 181-82. The Chairperson could, however, point to no procurement law, regulation, Circular A-76, or the Supplemental Handbook provision that prevented ATS from proposing the "lapse rate" reduction in its final revised proposal. Tr. at 185.

The RFP anticipated award of a fixed-price contract, with offerors proposing a lump-sum amount for each month's work. As a result, an offeror's decision to reduce its final price, while it may raise concerns about the firm's understanding, technical approach, or capability, could not properly lead the agency to adjust the price up again. Such an evaluated-cost adjustment may be appropriate under a cost-reimbursement solicitation, but is inappropriate in the evaluation of proposals when a fixed-price contract is to be awarded, since the government's liability is fixed, and the risk of cost escalation is borne by the contractor. See Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4. That is, under a fixed-price contract, as contemplated by the RFP here, the risks associated with performance are to be borne by the contractor, not the government. Harris Corp., B-274566, B-274566.2, Nov. 27, 1996, 96-2 CPD ¶ 205 at 5. We recognize that the fixed-price nature of the private-sector proposals under the RFP here differs from the MEO, whose in-house cost estimate is more akin to a cost proposal in a cost-reimbursement context. That is, even if the expectation of vacancies (the premise of the price reduction) were found to be unreasonable, ATS would still be permitted to

reduce its price, although, in a cost-reimbursement context, and in the calculation of MEO costs, a corresponding cost reduction might be rejected. While it may have appeared to the agency that ATS was thus benefiting from a flexibility denied the MEO, that benefit corresponds to ATS's assumption of the risk inherent in a fixed-price contract.

Since the RFP contemplated the award of a fixed-price contract, and in the absence of any persuasive argument or rationale for its action, we conclude that the Army acted unreasonably in adding the "lapse rate" reduction (\$[DELETED]) back into ATS's price.

Supplemental Protest

In a supplemental protest, ATS argues that the agency improperly failed to follow the requirements contained in OMB Circular No. A-76 and the Supplemental Handbook for comparing its "best value" proposal with the MEO. In this connection, ATS argues that the agency erred by not ensuring that the MEO offered the same level of performance or performance quality as ATS's "best value" offer. According to ATS, had the agency followed these requirements, the Army would have been required to make changes to the government's MEO, resulting in significantly increasing the estimated cost of in-house performance over contracting out for these services.

The agency takes the position that the proposal evaluation team (PET) that evaluated the private-sector proposals reviewed the MEO and "a consensus was reached that the Government's proposal met the requirements of the [PWS], and therefore offered the same level of performance and performance quality offered by ATS, the offeror selected to compete against the Government offer." Supplemental CO Statement at 1 (emphasis added). The agency focuses on the fact that the RFP stated that technical proposals would be evaluated on a pass/fail basis and that no additional merit credit would be given for technical proposals exceeding the government's minimum requirements. The agency's view thus seems to be that, since the technical factor covered the performance standards in the RFP and the technical factor was evaluated on a pass/fail basis, rules governing "best value" procurements do not apply here. The SSEB Chairman explicitly stated, at the hearing conducted by our Office, that after selecting ATS's proposal, the evaluators did not compare ATS's proposal to the MEO to determine whether the MEO offered the same level of performance or quality as ATS proposed. Tr. at 116-17. It is thus undisputed that the agency did not compare ATS's proposal with the MEO to assess whether or not the same level of performance and performance quality will be achieved under the in-house plan.

Where a "best value" approach is taken in the evaluation of private-sector offers, it is critical to the integrity of the A-76 process that the agency follow the procedures discussed earlier in this decision to ensure that the MEO offers the same performance level and quality proposed by the selected private-sector offer. "Best

value” here means simply that the solicitation sets out evaluation criteria allowing a price/technical tradeoff, so that other than the low-priced offer may be selected. If an agency fails to compare the performance and quality levels of the private-sector offer and the MEO and follow the A-76 procedures to correct any inequality in that regard, a private-sector offeror risks discovering that the technical superiority that helps it win the private/private competition will, because of its higher price, cause it to lose the public/private cost comparison.

Here, the RFP explicitly stated that selection of a private-sector proposal would be based on a “best value” determination. RFP § C-5.4, at 1. The RFP, as noted above, listed management, technical, past performance, and cost/price as areas for evaluation. The agency is correct in pointing out that the technical area was to be evaluated on a pass/fail basis; it is thus true that in the technical area proposals would be reviewed only to determine whether they met the RFP’s minimum technical requirements. If that were the only nonprice evaluation factor, we would agree with the agency that no comparison between the performance level and quality of ATS’s proposal and those of the MEO would be required. However, there were other nonprice factors, and they were not evaluated on a pass/fail basis. Specifically, the RFP explained that the management and past performance areas were of equal importance, and when combined were slightly more important than the price area. The management area was to be evaluated by assigning adjectival ratings (unacceptable, acceptable, good, or excellent), and the past performance area was to be evaluated for risk (high, moderately high, moderate, moderately low, low, or neutral).

We focus on the management area, since there offerors clearly could improve their ratings--and thus their chances of being selected for the public-private cost comparison--by offering superior, even though more expensive, solutions. We note that the agency agrees that the management area was evaluated on a “best value” basis. Tr. at 103. The management factor included, among other subfactors, management approach and key personnel. According to the RFP, in order to earn a management rating of “good,” which is the rating that ATS’s proposal was assigned, a proposal had to meet the following standard:

When the solicitation requirements are addressed and the proposal offers some advantages, some innovation, above average personnel, or overall thorough understanding and good approach; and are coupled with below average risks and/or manageable disadvantages.

RFP § M, Rating Methodology for Evaluation Area I.

In the selection of the private-sector proposal that would compete with the MEO in the final cost comparison, the agency conducted a price/technical tradeoff. In that analysis, the agency determined that the ATS proposal’s “good” management rating and “moderately low risk” past performance rating made it equal to the other private-

sector proposal's "excellent" management rating and "moderate risk" past performance rating, so that the lower price of ATS's proposal became the deciding factor. AR, tab 5, Source Selection Authority, Cost/Technical Tradeoff Analysis, at 2. While ATS's lower price played a key role, its selection was also premised on its "good" management score--a score presumably justified by the evaluators' conclusion that its proposal offered the agency advantages, innovation, above-average personnel, or an overall thorough understanding and good approach.

In these circumstances, we believe that the agency was required to compare the proposed performance level and quality, including in the management area, in ATS's proposal and in the MEO to be sure that they were comparable. Supplemental Handbook, Part I, ¶ H.3.d. The most obvious area that needed comparative analysis was ATS's offer to provide full-time key personnel, in contrast to the MEO's reliance on shared-time ("multidisciplinary") employees, as discussed above. Yet, while the agency makes reference in its written submissions to our Office to having ensured that the MEO and ATS were offering the same level of performance, see, e.g., Supplemental CO Statement at 2, that appears to be in the context of its view that "the Government's proposal met the requirements of the [PWS], and therefore offered the same level of performance and performance quality offered by ATS." Supplemental CO Statement at 1. In our view, the agency's conclusion that the MEO met the minimum RFP requirements has no bearing on the question of whether the MEO was premised on the same level of performance and quality as ATS's proposal. The record does not indicate that the agency properly addressed that question, as required by Circular A-76. Because of the risk that the cost comparison was skewed due to unequal levels of performance or quality, the Army's failure to follow the A-76 procedures prejudiced ATS. Accordingly, we sustain the protest on this basis as well.

Recommendation

Given our conclusion that the in-house cost estimate improperly omits the full costs associated with the key personnel called for by the RFP, we recommend that the Army's costs for these positions be calculated, documented, and included in the estimate. With respect to the "lapse rate" issue, we recommend that the Army deduct ATS's proposed reduction (\$[DELETED]) from its price for purposes of the cost comparison. In addition, we recommend that the agency follow the requirements in the Circular and the Supplemental Handbook for comparing a "best value" private-sector offer with the MEO and, if necessary, adjust the MEO to match the performance level and quality offered by ATS's "best value" proposal, including its management proposal. The agency should then conduct a new cost comparison in accordance with this decision. See Supplemental Handbook, Part I, ¶ J.3; FAR § 7.306(b).

We recognize that the Army's position in response to the protest is that it did not intend to require that offerors include full-time, dedicated personnel in their proposals. If that remains the Army's position, we recommend that it issue a revised RFP accurately reflecting its intention and reopen the competition among the private-sector offerors on the basis of the revised RFP, after which it should conduct a new cost comparison between the successful private-sector offer and the MEO.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States