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Comptroller General
of the United States

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Washington, D.C. 20548

REDACTED VERSION*

Decision

Matter of: KPMG Peat Marwick, LLP

File: B-259479.2

Date: May 9, 1995

Lee Curtis, Esq., William A. Roberts III, Esq., and Jerone C. Cecelic, Esq., Howrey & Simon, for the protester. James S. Kurz, Esq., and Thomas R. Folk, Esq., Hazel & Thomas, P.C., for Bradson Corporation, an interested party. Diane M. Sidebottom, Esq., Advanced Research Project Agency, for the agency. Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to perform adequate cost realism analysis is sustained where: (1) contracting agency erroneously concluded that no cost realism analysis was required, even though solicitation contemplated award of a cost-reimbursement contract; and (2) contracting officer's review of awardee's direct labor rates was essentially limited to an undocumented and generalized comparison with labor rates used in dissimilar procurements which required substantially different support services.

2. Protest alleging that awardee was improperly permitted to substitute new personnel and otherwise modify its technical approach after award is sustained since agency permitted awardee to materially modify its offer without giving other offerors the same opportunity.

DECISION

KPMG Peat Marwick, LLP, protests the award of a contract to Bradson Corporation under request for proposals (RFP) No. MDA972-94-R-0001, issued by the Advanced Research

*The version dated May 9, 1995, contained confidential source selection sensitive information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

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Projects Agency (ARPA) for financial management support services at the agency's Comptroller Office, located in Arlington, Virginia. Peat Marwick contends that the award to Bradson was improper because the agency failed to perform a proper cost realism analysis and because ARPA permitted the awardee to correct material deficiencies and otherwise modify its technical approach after award.

We sustain the protest.

BACKGROUND

The Solicitation

ARPA manages high-risk research programs for the Department of Defense (DOD). All research, development, test and evaluation efforts are performed by government contractors, federally funded research and development centers, military and federal laboratories, universities, and non-profit organizations. The responsibility for overseeing and contracting with these entities to perform the required research--i.e., planning, budgeting, programming and executing the required contracts and grants--rests with ARPA's Comptroller Office staff. The services being procured here will support ARPA's operation and maintenance of a financial system that processes over 5,500 documents annually and involves a yearly budget of approximately \$3 billion.

The RFP was issued on July 19, 1994, as an unrestricted procurement, and contemplated the award of a cost-plus-fixed-fee contract for a 3-year "Basic Effort" period (90,480 man-hours); a 1-year "Basic Effort" period (6,240 man-hours); and 4 years of various financial management "Option Items" (requiring between 2,080 and 8,320 man-hours per item).

The solicitation required the submission of both technical and cost proposals. In this regard, the solicitation organized the required financial management support services into four "task" categories: Fiscal Control Desk (Task 1); Budget Analysis Support (Task 2); Program Analyst Support (Task 3); and Administrative Support (Task 4). According to a "Labor Category Summary" provided by the agency in response to offerors' questions, offerors were given the following "desired" labor mix staffing guideline for preparing technical proposals. First, with respect to the 3-year "Basic Effort" period, offerors were asked to propose a minimum staffing plan comprised of 4 Fiscal Control Desk personnel, 7 Program Analysts and 2.5 Budget Analysts. For the 1-year "Basic Effort" period, the labor category summary

indicated that 3 program analysts were desired to perform this work.²

For their technical proposals, offerors were to submit a 35-page detailed "Technical Plan" which was required to:

"demonstrate an approach that is feasible, consistent, comprehensive, and sound. [The Technical Plan] must focus on the maintenance of the fiscal database, integrity controls, and follow-up procedures to ensure continuity and future data reliability. The contractor must provide clear and convincing evidence that demonstrates the way in which the statement of work will be met . . . [and] must include

"a detailed, sequenced description of how each task will be carried out and anticipated results related to the objectives."

Thus, while the total number of personnel required for this contract was specified in the RFP, the organization and structure of these personnel in their performance of the required tasks were left to the discretion of each offeror, to be addressed as part of its proposed "technical plan."

With their technical proposals, the RFP also required offerors to submit resumes for every proposed employee. In this regard, the solicitation set forth a resume format, as well as the following "Personnel Requirements" clause:

"Individuals proposed for this effort must have a minimum of a Bachelor of Arts or Science degree with a major in accounting or a closely related field or equivalent experience. In-depth experience in government accounting systems, financial operations, and cost accounting or budget analysis is preferred."

²The labor category summary also set forth staffing requirements for the various option items, not at issue here.

For their cost proposals, offerors were required to complete and submit the RFP's 6-page "Prices/Costs" schedule-- comprised of 16 contract line item numbers (CLIN) which corresponded to each of the Basic Effort and option item requirements. Offerors were also directed to complete and submit standard form 1411, "Contract Pricing Proposal Cover Sheet," identifying a line item cost breakdown for each proposed CLIN. Offerors were instructed that all cost information "must be consistent with the offeror's cost accounting system" and that the cost breakdown should identify materials; equipment; direct labor rates; fringe benefits; overhead; general and administrative, and other direct costs.

Whereas cost proposals were to be evaluated for realism, the RFP advised offerors that technical proposals would be evaluated for technical approach and personnel qualifications. With respect to contract award, the solicitation provided that the government intended to award a contract without discussions to the most advantageous offeror. In this regard, the RFP warned:

"Prospective offerors are advised that the support required under this effort must be of high technical quality to provide adequate technical support for the office; therefore, a higher priced, technically superior proposal may be selected as affording the [g]overnment the greater overall value."

The Evaluation

By the September 9 closing date, three proposals--including the protester's--were received. From September 9 through late October, a technical evaluation board (TEB) evaluated each offeror's technical proposal. By memorandum dated October 28, the TEB advised the advisory council--which was responsible for weighing the technical scores in accordance with the source selection plan, and evaluating the cost proposals--that "of the three proposals, Peat Marwick and Bradson were judged to be acceptable with a rating of excellent." While the third proposal was rated good, the TEB concluded that the third offeror "could only perform the effort with difficulty." Included with the TEB's score sheets was a 1-page summary setting forth a "Strengths" and "Weaknesses" paragraph for each offeror. Of significance

here, the "Weaknesses" identified for Bradson were as follows:

"--Wrong people proposed for tasks--need to shuffle

"--Dual role of ARPA Support Group Manager and Program Analysis Task Leader is unreasonable for one individual (overwhelming)

"--All proposed resumes are not from relevant contracts."

After receiving the TEB's technical evaluation results, the advisory council took the TEB's raw technical scores and computed weighted scores, in accordance with the source selection plan. The resulting range of weighted technical scores and proposal costs was as follows:

<u>Offeror</u>	<u>Weighted Score</u>	<u>Cost</u>
Peat Marwick	[DELETED]	[DELETED]
Bradson	[DELETED]	[DELETED]
Offeror X	[DELETED]	[DELETED]

The advisory council determined that because there was only a [DELETED] point difference between Peat Marwick and Bradson, and because the TEB had represented that both these proposals were rated "excellent," the two offerors' technical proposals were technically equivalent. Consequently, the advisory council recommended that contract award be based on cost.

According to the contracting officer--who was the de facto chair of the advisory council--because three offerors had competed for this requirement, she concluded that the agency had obtained "adequate price competition," and consequently, no cost realism analysis was required. In response to questions from the source selection authority (SSA), the contracting officer performed a cursory comparison of Bradson's direct labor costs with a graphics contractor's direct labor rates, and inquired about the rates which another contractor's employee was paid for unspecified financial management services; based on this review, the contracting officer concluded that Bradson's costs were unobjectionable. Based on the advisory council's recommendation, the SSA decided to make award to Bradson based on its lower cost.

On November 14, the contracting officer contacted the president of Bradson and asked him to come to her office for an 11 a.m. meeting; at the conclusion of this meeting,

Bradson was awarded the contract for this requirement. At this meeting, the contracting officer also introduced the president of Bradson to the ARPA Comptroller, and to the Comptroller's Budget Analyst, who had drafted the statement of work (SOW) for this RFP and was one of the TEB members. The Comptroller advised Bradson's president that he wanted to discuss the logistics of Bradson's transition to begin contract performance and a meeting was scheduled for 2 p.m. that afternoon. As discussed in detail below, as a result of the 2 p.m. post-award meeting, Bradson modified its staffing approach, and replaced 13 of its proposed 18 personnel with new candidates.

On November 22, Peat Marwick filed a protest challenging the cost realism evaluation; on January 6, after discovering the personnel substitutions, Peat Marwick amended its protest to include a challenge to the agency's technical evaluation and the post-award personnel modifications by Bradson.

Protester's Contentions

Peat Marwick contends that the agency failed to perform a proper cost realism analysis, and that Bradson's cost is unrealistically low. Next, the protester challenges Bradson's post-award personnel substitution and staffing plan modification on two grounds: first, Peat Marwick alleges that Bradson proposed key personnel which the contractor had no intention of providing; alternatively, Peat Marwick argues that the agency's decision to allow Bradson to modify its staffing plan and replace 13 of its 18 proposed personnel with new hires constituted an improper post-award modification which invalidated the agency's technical evaluation and otherwise subverted the competitive process.

In order to resolve these issues, this Office conducted a hearing pursuant to 4 C.F.R. § 21.5(a) (1995).³ Based on the record here, including testimony received from members of the TEB, members of the advisory council, the SSA, Bradson's president, and Bradson's proposed project manager, we conclude that the award to Bradson was improper, and recommend that the agency recompile this requirement under a revised solicitation which accurately reflects its actual minimum requirements.

³References to that testimony are cited by Transcript Volume Number and page as follows: (Tr. Vol. No., p.).

DISCUSSION

Failure to Perform Adequate Cost Realism Analysis

As noted above, the solicitation provided that offerors' proposed costs would be evaluated for realism. Specifically, the RFP's "Cost Evaluation" paragraph provided:

"(a) In evaluating the offeror's proposed costs for this project, the [g]overnment's concern is to determine whether (i) it reflects the prospective contractor's understanding of the project and ability to successfully organize and perform the contract, (ii) is based on adequate estimating procedures and is supported and realistic in terms of the offeror's proposed technical approach, (iii) is reasonable when compared to any similar complex efforts."

Notwithstanding this provision, the agency maintains that no cost realism analysis was required to be performed since adequate price competition was obtained. In making this assertion, the agency relies on the language of Federal Acquisition Regulation (FAR) § 15.804-3(a)(1), which exempts an agency from requesting cost or pricing data when "adequate price competition" is obtained.⁴

The agency has confused the requirement for obtaining cost and pricing data with the requirement to perform a cost realism analysis. Although both requirements may coexist in a procurement--in fact, a contracting agency may decide to require certified cost and pricing data in connection with its cost realism analysis--these requirements are nonetheless separate and distinct.

Under the Truth in Negotiations Act, 10 U.S.C. § 2306a (1994), an agency must obtain cost and pricing data for all negotiated contracts in excess of \$500,000 except in certain circumstances, such as where adequate price competition exists. See also FAR § 15.804-2. The agency must perform a

⁴We note that contrary to ARPA's position, this procurement did not involve "price competition" within the meaning of the applicable regulation as the RFP's stated basis for award was not price. See FAR § 15.804(b) (competition exists if two or more offerors submit offers meeting the agency's needs and the contract is to be awarded to the offeror submitting the lowest evaluated prices).

cost realism analysis, however, whenever a cost reimbursement-type contract is contemplated. The basis for the cost realism analysis rule is that an offeror's estimated costs may not provide valid indications of the final and actual allowable costs that the government is required to pay. FAR § 15.605(d); Tecom, Inc., B-257947, Nov. 29, 1994, 94-2 CPD ¶ 212. Consequently, a cost realism analysis must be performed to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc.--Fed., 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. This requirement exists regardless of whether or not an agency is otherwise required to request cost and pricing data. Consequently, to the extent ARPA asserts that no cost realism analysis was required here, its argument is incorrect.

At the hearing on this matter, the contracting officer testified that even though she believed no cost realism analysis was required, in response to questions from the SSA that Bradson might be "buying in," she conducted a limited review of the awardee's proposed direct labor rates.

The contracting officer testified that she first attempted to contact the Defense Contract Audit Agency (DCAA) to discuss Bradson's direct labor rates; however, an auditor at DCAA informed the contracting officer that no rate information was available regarding Bradson. (Tr. Vol. No. 2, p. 255.) Next, the contracting officer testified that she compared Bradson's direct labor rates to those of a contractor who is currently performing a graphics services contract for the agency; based on a general review of that contractor's direct labor costs--which did not involve a labor category comparison but instead just a "general comparison"--the contracting officer concluded that Bradson's proposed direct labor rates were realistic. (Tr. Vol. No. 3, p. 10.) The contracting officer also testified that she spoke with an employee of another government contractor who performs some financial support work for ARPA, and concluded that Bradson's proposed direct labor rates were unobjectionable. (Tr. Vol. No. 3, p. 4.)

ARPA contends that this limited review constituted a sufficient cost realism analysis for purposes of this procurement. We disagree.

The contracting officer explained that her analysis consisted solely of "an informal rate check" and that "[t]he individual cost elements, every individual cost element [were] not looked at." (Tr. Vol. No. 2, pp. 264; 295.) The limited nature of this review reflects the contracting officer's position--reiterated throughout her hearing testimony--that no type of cost realism analysis

was required. (Tr. Vol. No. 2, pp. 252; 254; 292; 295.) In fact, the contracting officer conceded that she did not examine the elements she normally would have as part of a cost realism analysis; the contracting officer testified that:

"[i]f this were a sole-source competition, or if it were not based on adequate price competition, I would have gone down and addressed each element of cost And I would have done a weighted guidelines, which is a profit analysis" (Tr. Vol. No. 2, p. 278.)

Because the contracting agency is in the best position to assess cost realism, and must bear the difficulties or additional expenses resulting from a defective analysis, our review of an agency's exercise of judgment in this area is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183, aff'd, American Mgmt. Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510 (1991), 91-1 CPD ¶ 492; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. In this case, even assuming that the type of services required here did not warrant an in-depth analysis of each and every cost item, see Radian, Inc., B-256313.2, B-256313.4, June 27, 1994, 94-2 CPD ¶ 104, we see no basis to conclude that a meaningful cost realism analysis was performed.

First, we find the "comparison" analysis conducted by the contracting officer to be unreasonable. Unlike the work called for by this RFP--which requires an academic background and experience in accounting and financial services--the graphics contract to which the contracting officer compared Bradson's direct labor rates reflects a different labor category--one which does not require the expertise ARPA sought under this RFP. (Tr. Vol. No. 3, p. 15.) Further, while the contracting officer apparently asked an employee of another contractor about her labor rate, the contracting officer did not verify the data received from the employee, nor did she know any of the details about the underlying contract. (Tr. Vol. No. 3, pp. 10-13.) For example, the contracting officer did not examine the employee's actual contract, nor did she know when it was awarded, or what type of contract--cost-reimbursement or fixed-price--had been awarded. (Tr., Vol. No. 3, pp. 10-13.) Nor were Bradson's direct labor rates ever compared to either of the other two offerors' proposed direct labor rates. Finally, the contracting officer did not analyze cost elements which she would have had she been responsible for performing a cost realism analysis; at a

minimum, given the services-type contract at issue here, a cost realism would have included an examination of the reasonableness of each offeror's direct labor rates, overhead rates, and G&A rates. See id. We sustain the protest on this ground.

Personnel Substitution and Staffing Plan Modifications

The record shows that 1 hour after awarding the contract to Bradson, ARPA's Comptroller met with Bradson to discuss the agency's requirements. According to the parties' testimony, at this meeting, the Comptroller asked Bradson whether its proposed personnel were available. (Tr. Vol. No. 1, p. 37; Tr. Vol. No. 3, p. 35.) The Bradson president replied that they were. Id. In response, the Comptroller then explained that several of Bradson's personnel needed to be "shuffled" and that the contractor's technical approach needed to be modified so that Bradson's proposed project manager was not responsible for performing the two tasks of project management and program analyst. (Tr. Vol. No. 4, pp. 11-14.) The Comptroller then proceeded to elaborate upon the agency's specific financial management support needs, and suggested that Bradson replace several of its proposed personnel with less experienced or entry-level people. (Tr. Vol. No. 4, p. 12-14.) Specifically, the Comptroller explained that for several of the tasks--in particular, the Fiscal Control Desk--any individual with more than entry-level experience--such as Bradson's proposed employee who had 20 years of financial management support experience--would become bored and nonproductive in the position. Id. The Comptroller also advised Bradson that before it began performing the contract, the awardee should meet with each of the ARPA technical offices to ensure that the proposed key personnel were suited to the "personality" of that office and were a good "fit". (Tr. Vol. No. 4, pp. 14-17.) As a result of this meeting, Bradson replaced 13 of its proposed 18 key personnel with new candidates and otherwise modified its technical approach so that the project manager could perform in accordance with ARPA's wishes.

At the hearing, the ARPA Comptroller testified that his purpose in holding the post-award meeting with Bradson was to modify the awardee's proposed personnel placement and offer "guidelines" on these personnel. (Tr. Vol. No. 4, pp. 62-64.) The ARPA Comptroller also reported that he intended to discuss and resolve "a couple of minor weaknesses in" Bradson's proposed technical approach, which the Comptroller identified as the project manager's location and position and the proposed placement or "shuffling" of some of Bradson's proposed personnel. (Tr. Vol. No. 4, pp. 10-14.) Notwithstanding the Comptroller's classification of these deficiencies as "minor," the record

shows that without the personnel substitutions and staffing placement modifications, the agency did not anticipate successful performance from Bradson. (Tr. Vol. No. 4, pp. 75, 207.)

Peat Marwick challenges the post-award contract modifications. First, the protester maintains that Bradson engaged in a "bait and switch" of personnel; that is, Peat Marwick maintains that Bradson never intended to provide the personnel it proposed but only used these individuals' names in its technical proposal to win a positive technical evaluation. Alternatively, Peat Marwick argues that the agency engaged in an improper post-award modification which altered the underlying contract.⁵ We have carefully reviewed the testimony by Bradson's president and proposed project manager at the hearing and we see no basis to conclude that Bradson did not intend to provide the key personnel it proposed. The record establishes that Bradson intended to provide its proposed staff without substitutions. (Tr. Vol. No. 1, pp. 43, 70-73; Tr. Vol. No. 2, p. 67; Tr. Vol. No. 3, p. 35; Tr. Vol. No. 4, p. 14.) In our view, Bradson's intent to substitute personnel did not arise until after award, when the Comptroller expressed the agency's preference for less experienced, better "fit" personnel.

While there has been no showing that Bradson misrepresented the availability of its proposed personnel, the record shows that the agency awarded the contract to Bradson with the intent to change the contract terms, and then through post-award discussions, improperly permitted the awardee to materially modify its proposal. As noted above, Bradson replaced 13 of its proposed 18 key personnel with new candidates and otherwise modified its technical approach, so that it could perform in accordance with ARPA's wishes. The record shows that the replacement Bradson personnel were less experienced than the key personnel originally proposed by the awardee. For example, one of the proposed fiscal control personnel with 20 years experience was replaced by a candidate with only 1 month of experience; another program

⁵Both the agency and the interested party contend that this Office lacks jurisdiction to review these allegations since they pertain to post-award, or contract administration matters. While our Bid Protest Regulations provide that matters of contract administration are generally not subject to our review, see 4 C.F.R. § 21.3(m)(1) (1995), an exception to this rule exists, where--as here--the protester asserts that the agency's post-award conduct constitutes evidence that the underlying procurement and evaluation process were flawed. See Theater Aviation Maintenance Servs., B-233539, Mar. 22, 1989, 89-1 CPD ¶ 294.

analyst candidate--who graduated in 1982 and had 12 years of DOD experience--was replaced by a 1988 college graduate, who had 6 years of government experience and no DOD experience. At least 6 of the 13 replacement personnel have substantially lower levels of experience, having been in the work force only since 1994; 5 of these personnel had less than 5 months of work experience at the time of contract award.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal. FAR 15.601; Paramax Systems Corp; CAE-Link Corp., B-253098.4; B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282. In this case, the post-award communications between the agency and Bradson clearly constituted discussions since these contacts resulted in Bradson's materially modifying its proposed staff and technical approach.⁶ It is a fundamental principle of federal procurement that all offerors must be treated equally. Id. Consequently, the conduct of discussions with one offeror requires that discussions be conducted with all offerors whose proposals are in the competitive range, and that the offerors have the opportunity to submit revised offers. Id.; ALT Communications, Inc., B-246315, Mar. 2, 1992, 92-1 CPD ¶ 248. Under the circumstances here, because Bradson was given the opportunity to materially modify its technical proposal, discussions should have been held with all offerors in the competitive range and revised proposals should have been requested. Since this did not occur, and thus the record unequivocally demonstrates that offerors were treated unequally, we sustain this ground of protest.

⁶The agency asserts that under the RFP's "Key Personnel" clause, a standard provision which allows the contracting officer to authorize substitutions of personnel so long as the replacement personnel qualifications "are equal to or better [than] the qualifications of the personnel being replaced," it had unfettered authority to change Bradson's proposed personnel. Contrary to ARPA's position, the RFP's key personnel clause cannot be used by the agency if the effect of the substitution is to significantly modify the contract awarded; such an interpretation would render meaningless the competition on the original solicitation requirements. See Planning Research Corp. v. U.S., 971 F.2d 736 (Fed. Cir. 1992). Rather, the key personnel clause is simply intended to permit the natural turnover of personnel that tends to occur during the performance of a contract. Moreover, as discussed above, at least six of Bradson's replacement personnel were not "equal to or better" than the personnel originally proposed, as required by the key personnel clause.

CONCLUSION

In light of our decision, we recommend that the agency reopen the competition and conduct discussions with all competitive range offerors, as needed, and give offerors an opportunity to submit revised proposals. The agency then should reevaluate proposals and perform an adequate cost realism analysis. In the event that Bradson is not the successful offeror based upon the record, its current contract should be terminated for convenience.

Since we sustain the protest, we also find Peat Marwick entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. See 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1), Peat Marwick's certified claim for such costs, detailing the time expended and the cost incurred, must be submitted to ARPA within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States