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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: SRS Technologies

File: B-291618.2; B-291618.3

Date: February 24, 2003

J. Patrick McMahon, Esq., William B. Barton IV, Esq., and William T. Welch, Esq., Barton, Baker, McMahon & Tolle, for the protester.
Alan Dickson, Esq., Paul C. Burkholder, Esq., and Howard A. Wolf-Rodda, Esq., Epstein, Becker & Green, for Sparta, Inc., an intervenor.
Raymond M. Saunders, Esq., and Capt. Richard L. Hatfield, Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a solicitation for a cost reimbursement contract for services that did not prohibit or limit the use of uncompensated overtime, the agency unreasonably raised the protester's evaluated costs in the cost realism analysis to remove the impact on the protester's proposed labor rates based on its use of uncompensated overtime from its labor costs.

DECISION

SRS Technologies protests an award to Sparta, Inc. under request for proposals (RFP) No. HQ0006-02-R-0011, issued by the Missile Defense Agency (MDA), for support services for the Deputy for Force Structure Integration and Deployment. SRS protests the agency's cost and technical evaluation and the source selection decision.

We sustain the protest.

The RFP, issued as a small business set-aside on July 31, 2002, contemplated the award of a cost-plus-fixed-fee, level-of-effort contract for 1 year with 4 option years. The resulting contract will consolidate support services previously covered by two separate contracts for which the incumbent contractors are SRS and Sparta.

Award was to be made on a "best value" basis with non-cost factors collectively being significantly more important than cost. The RFP stated the non-cost factors in the following descending order of importance: (1) technical expertise, (2) corporate experience, (3) management plan, and (4) past performance. The RFP stated that the cost evaluation would consider whether an offeror's proposed costs were realistic, complete and reasonable.

The vast majority of costs under the RFP were for labor. The RFP provided estimated total labor hours for each of the contract line item numbers (CLIN). The estimated total hours required were 56,400 hours per year (which represents 30 full-time equivalents per year) plus 2,880 hours for surge effort per year. Offerors were to propose an appropriate mix of staff from various labor categories, along with the portion of the total estimated hours proposed for each position. Each offeror was also to identify its current labor rates, related cost rates, and annual escalation rates, consistent with its proposed staffing matrix and management plan. The RFP stated that, based on the agency's cost realism analysis, the agency might adjust an offeror's proposed costs to identify the most probable cost for evaluation purposes.

The agency received proposals from SRS and Sparta, which were evaluated as follows:[1]

	SRS	Sparta
Technical Expertise	[DELETED]	[DELETED]
Corporate Experience	[DELETED]	[DELETED]
Management Plan	[DELETED]	[DELETED]
Past Performance	[DELETED]	[DELETED]
Most Probable Cost	$[DELETED]	$37,160,881

The evaluated cost figures for both proposals reflect adjustments made by the agency. Sparta's proposal incorrectly added its individual CLIN prices and stated in one place a total estimated cost of $[DELETED]. Agency Report, Tab C-2, Sparta Proposal, at I-10. The correct total was $37,160,881, which was correctly stated in the cost element summary table included in Sparta's cost proposal. Id. at II-2. After verifying this apparent error with Sparta, the agency stated Sparta's total estimated cost accordingly.[2] Contracting Officer's Statement at 4.

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[1] The color rating scale was blue (exceptional), green (acceptable), yellow (marginal), and red (unacceptable). The proposal risk rating scale was low, moderate and high. The past performance risk rating scale was low, moderate, high, and neutral.

[2] Contrary to the protester's contention, there is no evidence that this adjustment was the result of discussions.

SRS's proposal stated a total estimated cost of $[DELETED].[3] Agency Report, Tab B-2, SRS Proposal, vol. 1, at 9. This figure was based on proposed labor rates that assumed the performance of [DELETED] hours of uncompensated overtime per week ([DELETED] hours annually) per full-time equivalent. Id., vol. 2, at 27 and last page (unnumbered). The impact of SRS's approach, as calculated by the agency (that is, the increase that would have occurred in SRS's proposal if SRS's proposed labor rates had not taken uncompensated overtime into account), totaled $[DELETED]. Agency Report, Tab 21, Proposal Analysis Report, at 22.

Sparta's proposal did not propose the use of uncompensated overtime or rates based on the use of uncompensated overtime. Notwithstanding this, the agency sent letters to both offerors requesting them to identify how their accounting systems account for uncompensated overtime and whether their systems identify uncompensated overtime as delivered level of effort for direct productive labor hours. Agency Report, Tab D-17, Letters from Agency to Offerors (Sept. 17, 2002). Sparta responded that it identifies uncompensated overtime hours, but does not charge the government for those hours; however, Sparta did not revise its proposal to offer uncompensated overtime, stating that it "did not base its proposal . . . on 'required uncompensated overtime' by our employees." Agency Report, Tab D-17, Letter from Sparta to Agency (Sept. 19, 2002). SRS's response essentially restated the information presented in its cost proposal, i.e., that SRS charges the government a reduced hourly rate for each productive hour, whether compensated or uncompensated, that passes on the savings from uncompensated overtime to the government with each hour billed; SRS stated that its invoices identify all productive hours and do not distinguish between compensated and uncompensated hours.[4] Agency Report, Tab D-17, Letter from SRS to Agency (Sept. 19, 2002).

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[3] The agency states that it adjusted SRS's proposed costs to reflect "[DELETED] costs." Contracting Officer's Statement at 4. In fact, SRS's proposal included prices for all CLINs, including the ones for estimated [DELETED] costs, and correctly stated a total estimated cost of $[DELETED] that included all cost elements. However, SRS's cost proposal provided separate cost element summary tables for [DELETED] labor costs and [DELETED] labor costs. Agency Report, Tab B-2, SRS Proposal, vol. 2, at 2-2, 2-11. The agency consolidated these two tables into a single cost element summary table and identified the consolidation as a cost adjustment. The agency's action did not adjust either SRS's proposed [DELETED] costs or its total estimated cost as stated in the proposal. The agency and SRS agree on the total costs proposed by SRS (i.e., $[DELETED]).

[4] While the agency initially characterized these exchanges as discussions, we agree with the agency that these exchanges concerning the offerors' accounting practices for uncompensated overtime, which did not request, or lead to, proposal revisions, did not constitute discussions, but were mere clarifications. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5; Northeast MEP Servs., Inc., B-285963.9, Mar. 8, 2001, 2001 CPD ¶ 66 at 3-5.

In a memorandum to the file following these exchanges, the contracting officer stated:

> SRS proposal included labor costs that had been adjusted by the amount of forecasted Uncompensated Overtime . . . Sparta['s] proposal did not address [Uncompensated Overtime]. . . . Discussions with both companies revealed identical accounting treatment of [Uncompensated Overtime], and it was assumed that each contractor would deliver the same amount of [Uncompensated Overtime] in providing the level of effort specified by the Government. Therefore, the Government adjusted SRS upward [$[DELETED]] to assure fair and reasonable comparison of labor costs.

Agency Report, Tab D-15, Contracting Officer's Memo (Oct. 15, 2002), at 1.[5] This cost adjustment brought SRS's most probable cost from $[DELETED] to $[DELETED]. Agency Report, Tab D-21, Proposal Analysis Report, at 22.

In briefing the source selection authority (SSA), the source selection evaluation team (SSET) presented the technical differences between the proposals and why Sparta's proposal was considered technically superior. The SSET also recommended that, although SRS's most probable cost was over $[DELETED] lower than Sparta's, the evaluated costs should be considered "equal" because the evaluated cost difference was not considered material, and that the source selection decision should be based solely on the evaluated technical superiority of Sparta's proposal. The SSET's rationale for considering the $[DELETED] cost difference immaterial was that, historically, actual costs under cost reimbursement contracts can vary from the estimates by a similar magnitude for a contract of this size and scope, and the nature of this contract led the agency to conclude that a similar level of cost variation should be expected under this contract. Agency Report, Tab D-20, SSET's Briefing to SSA, at 39. The SSA accepted the SSET's recommendations regarding the technical superiority of Sparta's proposal and rationale for finding the $[DELETED] price difference not material, and did not perform a cost/technical tradeoff, but selected Sparta based solely on its higher evaluated technical merit.[6] Agency Report, Tab D-23, Source Selection Decision, at 3.

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[5] The record contains no documentation of the agency's cost evaluation prior to the contracting officer's memorandum.

[6] While SRS did not timely protest the agency's determination that this cost differential was not material (SRS first protested this after receipt of the agency report, even though this determination was reasonably disclosed at SRS's debriefing but not protested in SRS's initial protest), the reasonableness of the agency's judgment that a $[DELETED] difference in most probable costs is immaterial and should not be considered in the award selection decision is, in our view,

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By letter dated November 12, the agency notified SRS that the contract was awarded to Sparta. SRS received a written debriefing on November 13. This protest followed on November 15.

SRS alleges that the agency's most probable cost adjustment associated with its proposed use of uncompensated overtime in calculating its proposed labor rates was unreasonable. We agree and sustain the protest on this basis.

When an agency evaluates proposals for the award of a cost reimbursement contract, an offeror's proposed estimated costs of contract performance are not considered controlling, since an offeror's estimated costs may not provide valid indications of the final actual costs that the government is required, within certain limits, to pay. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary. General Research Corp., B-241569, Feb. 19, 1991, 91-1 CPD ¶ 183 at 5.

The agency determined, in upwardly adjusting SRS's probable costs to remove the value of uncompensated overtime from its proposed costs, that both offerors "would deliver the same amount of [uncompensated overtime] in providing the level of effort specified by the Government" and that both offerors' accounting practices treated uncompensated overtime in an identical manner. Agency Report, Tab D-15, Contracting Officer's Memorandum, Oct. 15, 2002, at 1, see Tab D-23, Source Selection Decision, at 2. In our view, this determination was unreasonable and not supported by the record, and does not provide a basis for not crediting SRS's proposed costs with the savings attributable to its lower labor rates resulting from its use of uncompensated overtime.

The record establishes that SRS's proposed labor rates were based on the use of uncompensated overtime and Sparta's were not. Nothing in the RFP prohibited or limited proposals based upon the use of uncompensated overtime. SRS's proposal incorporated proposed savings from uncompensated overtime directly into its labor rates, and thus each productive hour billed would include a proportional share of the

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questionable and not supported by the record. While actual costs under cost reimbursement contracts may indeed vary from estimated costs, there is nothing in the record here to suggest that any variations would affect the two proposals differently so that the cost difference would be eliminated here. Since we recommend below that a new source selection be made, the agency should perform a cost/technical tradeoff in making its award selection.

proposed uncompensated overtime. This is one of the "acceptable accounting methods" established by the Defense Contract Audit Agency (DCAA). DCAA Contract Audit Manual § 6-410.4 (Jan. 1998). The agency does not contend that this aspect of the proposal of SRS--an incumbent contractor that assertedly performed that contract using uncompensated overtime, see Protester's Comments at 22-23--was unacceptable or unrealistic, or that SRS's proposed rates were unrealistically low.[7]

Under the circumstances, in the absence of a reasonable basis to determine that SRS's proposed use of uncompensated overtime was unacceptable or unreasonable, or question whether the agency would in fact receive the savings attributable to SRS's proposed use of uncompensated overtime, the agency, in its cost realism analysis, was required to accept SRS's proposed labor rates based on its use of uncompensated overtime.[8] See General Research Corp., supra at 7-9. There was no reasonable basis for the agency to equate the cost proposals of SRS and Sparta in terms of uncompensated overtime, and to normalize the proposed costs in the cost realism analysis by eliminating from SRS's most probable cost the value of proposed uncompensated overtime from SRS's proposed labor costs. Id. at 9. The record shows that if this adjustment had not been made to SRS's proposed costs, the evaluated cost difference between the proposals would have been

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[7] In contrast, Sparta's response to the agency's inquiry discussed a methodology that would report direct productive hours by identifying compensated and uncompensated hours, charge compensated hours at standard labor rates, and not charge for uncompensated overtime hours. This is not one of the enumerated "acceptable accounting methods" enumerated in the DCAA Contract Audit Manual. The record thus does not support the agency's determination that both proposals had identical accounting treatment of uncompensated overtime. Moreover, since neither offeror proposed costs for hours beyond those solicited and there was no requirement that the proposed personnel be dedicated to this contract cost objective, and because Sparta did not propose the use of uncompensated overtime in any case, the agency's assumption that both offerors would deliver the same amount of uncompensated overtime under the contract was not reasonable.

[8] By comparison, Sparta's labor rates did not reflect savings for uncompensated hours, its method of accounting for uncompensated overtime did not estimate the amount of uncompensated overtime hours contemplated, and the agency had no contractual means of requiring Sparta to perform the contract with uncompensated overtime hours. Given Sparta's accounting methodology, even assuming the reasonableness of the agency's apparent belief that Sparta may in fact provide uncompensated overtime (which it did not offer), the agency could not reasonably presume any cost savings associated with such uncompensated overtime in evaluating Sparta's proposal. See Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230 at 3-10.

$[DELETED] rather than $[DELETED]. Thus, the source selection decision was unreasonable. We sustain SRS's protest on this basis.

The predominate basis for SRS's other protest contentions stem from an allegation that Sparta's proposal misrepresented the key personnel in its staffing plan. While we have recognized that an offeror's misrepresentation could provide a basis for disqualifying the proposal and canceling a contract award, in order to sustain a protest alleging misrepresentation, the record must show that the misrepresentation was material, i.e., that the agency relied upon the misrepresentation and it had a significant impact on the evaluation. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 11. The only evidence presented by the protester in support of this contention is an affidavit stating a second-hand account of Sparta allegedly contacting SRS's employees and subcontractors seeking to fill employment and subcontract opportunities with Sparta. We see nothing out of the ordinary, however, in the alleged actions of Sparta, and we do not believe that they alone establish a misrepresentation or "bait and switch." See Veda Inc., B-278516.2, Mar. 19, 1998, 98-1 CPD ¶ 112 at 16-17. We also note that Sparta has not replaced any of its proposed staff, and has not notified the agency that it intends to do so, as required by the terms of the contract.[9] Agency Report at 11.

SRS also alleges that its proposed staff should have been rated superior to that of Sparta's because it had the larger incumbent contract. However, SRS has not otherwise supported this allegation by showing that the qualifications of its proposed staff are superior to Sparta's, nor has SRS substantively challenged the primary reason for its lower rating under the technical expertise factor, i.e., that its proposal relied [DELETED]. See Agency Report, Tab D-22, SSA Briefing Minutes, at 3; Tab 23, Source Selection Decision, at 1. We conclude that this allegation does not provide a basis to sustain the protest.

SRS protests the corporate experience evaluation, again asserting that, since it performed the larger of the two incumbent contracts, its experience should have been rated higher than Sparta's. However, the record shows that, even considering the differences in the sizes of the incumbent contracts, Sparta had a greater number of relevant contracts and a greater breadth of overall experience than did SRS. While SRS asserts that the agency did not consider its subcontractors' experience, the record shows that this experience was properly not considered for either offeror because these subcontractors were not considered "major" (defined as performing 30 percent or more of the total proposed effort), consistent with the RFP corporate experience evaluation criterion. RFP at 63.

The protester finally alleges that the agency was required, but failed, to give SRS an opportunity to address adverse past performance information. However, the agency

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[9] Performance under the contract has been stayed pending resolution of this protest.

asserts, and the protester does not substantively respond, that there was no prejudice to SRS, even if clarifications or discussions should have been conducted regarding its past performance, because SRS's resulting [DELETED] rating, as compared to Sparta's [DELETED] rating, under this lowest weighted evaluation criterion was not considered by the SSA in making the source selection decision. Agency Report, Tab D-23, Source Selection Decision, at 2 ("[DELETED]").

We recommend that the agency conduct a new cost evaluation, perform a cost/technical tradeoff, and make a new source selection decision, conducting discussions with both offerors if appropriate. If an offeror other than Sparta is selected for award, the agency should terminate the contract awarded to that firm. We also recommend that the agency reimburse the protester its costs of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2002). 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 of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel