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Decision

Matter of: NHIC Corporation

File: B-310801; B-310801.2

Date: February 12, 2008

Daniel R. Forman, Esq., John E. McCarthy Jr., Esq., Shauna E. Alonge, Esq., and Jonathan M. Baker, Esq., Crowell & Moring LLP, for the protester.

W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., Daniel E. Chudd, Esq., Eric R. Haren, Esq., and James C. Cox, Esq., Jenner & Block LLP, for Palmetto GBA, LLC, an intervenor.

Christine Simpson, Esq., and Douglas Kornreich, Esq., Department of Health & Human Services, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging cost realism analysis is denied, where agency performed a comprehensive analysis of all major cost elements and relied on subject matter experts to reasonably determine that proposed costs were consistent with each offeror's technical approach and were realistic for the work to be performed.

DECISION

NHIC Corporation protests the award of a contract to Palmetto GBA, LLC, issued by the Department of Health & Human Services, Centers for Medicare & Medicaid Services, for the administration of Medicare claims. NHIC challenges the agency's cost realism evaluation.

We deny the protest.

The RFP provided for award of a cost-plus-award-fee contract for the combined administration of Part A and Part B Medicare fee-for-service claims. Under this contract, a "Medicare Administrative Contractor" (MAC) is to provide claims processing, payment, and other administrative services for "Jurisdiction 1," which consists of California, Nevada, Guam, Northern Mariana Islands, American Samoa, and Hawaii. RFP §§ B.1, B.2. Both NHIC and Palmetto previously provided these services for various jurisdictions under separate contracts for Part A and Part B

Medicare claims¹; this is the first time that Parts A and B have been combined under a single contract. Transcript (Tr.)² at 13-14, 33.

The RFP contemplated a 5-year period of performance, which included a 12-month “implementation” period, a 9-month “base period,” four 1-year option periods, and a 6-month period for “outgoing contractor workload transition activities.” RFP § F.2. The RFP provided that award of the contract would be made on a best-value basis, considering the equally weighted factors of technical approach, implementation, management controls, past performance, and corporate experience; when combined, these factors were more important than cost, which was not a weighted factor. Id. §§ M.2(a), M.3(a). The technical factors (which included equally weighted subfactors and sub-subfactors) were assigned adjectival ratings of outstanding, very good, good, marginal, or poor; and cost, which was not assigned an adjectival rating, was evaluated to determine each offeror’s “total proposed estimated cost/price.” Id. § M.2(d) and (e). With regard to the evaluation of cost, the RFP required the agency to perform a “cost reasonableness and realism” analysis, id. § M.2(a), and further stated that

[t]he purpose of this cost realism [analysis] will be to determine what the Government should realistically pay for the proposed effort, if the offeror’s proposed costs reflect the offeror’s understanding of the Government’s requirements, and if the proposed costs are consistent with the various elements of the offeror’s technical proposal.

Id. § M.2(e). Risk, although not a separately rated factor, was to be considered and “integrate[d]” into the rating assessments of each of the factors for award. Id. § M.2(b).

The RFP instructed each offeror to provide a technical proposal explaining its technical approach to performing the requirements described in the statement of work, and a business proposal explaining the bases for its proposed costs. To prepare the cost estimates contained in the business proposal, offerors were instructed to use the “annual workloads” for the base and option years as provided in the RFP. These workloads estimated the number of items to be processed annually for various functions that the MAC would perform under Medicare Parts A and B, including annual workloads for claims processing; appeals processing; provider customer service; provider reimbursement and audit; provider enrollment, inquiries,

¹ Although both contractors have performed this work, NHIC is an incumbent contractor for Jurisdiction 1. Tr. at 89.

² Transcript citations refer to the hearing on the protest that our Office held on January 9, 2008.

and oversight; medical review; and other “Medicare Integrity Program” services. Id. § L.11.

Both NHIC and Palmetto submitted technical and business proposals in response to the solicitation that were found to be in the competitive range. Palmetto’s initial proposed cost was [REDACTED] and NHIC’s initial proposed cost was [REDACTED]. Agency Report (AR), Tab 56, Source Selection Determination, at 2. A technical evaluation panel (TEP) evaluated the technical proposals and a business evaluation panel (BEP) evaluated the business proposals.³ To assist the BEP, a cost subject matter expert (SME) initially performed a cost realism analysis based on historical data from prior contracts. This analysis estimated that the cost to the government of performance by Palmetto would likely be \$709,558,450, and the cost of performance by NHIC would likely be \$600,294,065.⁴ AR, Tab 91, Initial Cost Realism Analysis, at 33, 38. However, the SME stated that this analysis “does not reflect any adjustments to account for any program requirements changes which may have been implemented during or subsequent to FY2006 that may be reflected in [each offeror’s] proposed cost and fee.” Id.

After discussing the analysis with the cost SME and the evaluation teams, the contracting officer determined that this initial cost realism analysis had “limited applicability” because the analysis did not take into account changes to program requirements, efficiencies or innovations due to each offeror’s unique technical approach, or differences in cost reporting requirements between the MAC contract and prior contracts; in addition, the cost realism analysis for Palmetto’s proposal included costs associated with a team member who performed prior contracts but who was not proposed to perform the MAC contract here. Tr. at 43-55; Contracting Officer’s Statement ¶¶ 5-6, 20-22. For these reasons, the contracting officer and evaluation teams decided not to rely on this analysis and, instead, decided to take a “bottom up” approach to the cost realism evaluation. This “bottom up” approach was to “break [the proposal] down so that we do account for [the offeror’s] approach, that we can determine if it reflects a clear understanding of the statement of work, and is it realistic for the work to be performed?” Tr. at 51, 174; AR, Tab 56, Source Selection Determination, at 4.

The TEP and BEP were asked to perform a new cost realism analysis to determine whether proposed costs (including labor hours, labor rates, fee structure, and other costs) were realistic based on each offeror’s approach. The functional areas evaluated for cost realism included (1) implementation costs, (2) level of effort as it relates to claims processing, provider customer service program, appeals, audit and

³ A past performance evaluation panel evaluated past performance.

⁴ The independent government estimate, which was also based on historical data, was \$536,897,009. AR, Tab 91, Initial Cost Realism Analysis, at 37, 42.

reimbursement, medical review/local coverage determinations, fraud and abuse, Medicare secondary payer, and provider enrollment, (3) travel, (4) subcontracts, and (5) fee proposed (base and award). E.g., AR, Tabs 59-62, Final Cost Realism Analysis Memos and Supplemental Memos (Palmetto and NHIC).

As part of this cost realism analysis, the BEP consulted with the Defense Contract Audit Agency (DCAA), which reviewed the proposed costs (including labor rates) and accounting practices of each offeror and their major subcontractors.⁵ AR, Tabs 71-81, DCAA Audit Reports. In addition, the TEP was tasked to review whether the mix of labor categories and number of hours proposed reflected a clear understanding of the requirements, were consistent with the offeror's proposed approach, and were reasonable and realistic for the work to be performed. Contracting Officer's Statement ¶¶ 32-33; Tr. at 492-93. Although several of the TEP members had expertise in particular areas and performed their own independent analysis, Tr. at 431-32, 499-502, SMEs for the functional areas were also consulted and asked to assist with this analysis.⁶ The SMEs reported their analyses to the TEP, each indicating that there was no basis for adjustment in all but one of the functional areas for one of the offerors,⁷ and provided the TEP with a list of questions about the proposals to be forwarded to the offerors. E.g., NHIC Hearing exhs. 24(c) and 28(c), SME's Cost Realism Adjustments and Question Summaries of NHIC's and Palmetto's Initial Business Proposals; exh. 31, Cost Realism Analysis Worksheets, at 69-74. The TEP considered the SMEs' questions and, in some cases, was able to answer the question without forwarding it to the offeror or determined that a discussion question was unnecessary; other questions were presented to offerors during discussions. Tr. at 234, 506-07.

⁵ Where the DCAA recommended adjustments, the agency notified the offeror during discussions, and the offeror made the appropriate adjustments in subsequent revised proposals. Agency's Legal Memorandum at 46.

⁶ The areas analyzed by SMEs were claims processing, provider customer service program, appeals, audit and reimbursement, medical review/local coverage determinations, comprehensive error rate testing, Medicare secondary payer, unique requirements, fraud and abuse, and implementation. AR, Tab 56, Source Selection Determination, at 4.

⁷ An initial upward adjustment to Palmetto's proposal was recommended for its proposed audit and reimbursement costs, based on the agency's belief that the costs of one of Palmetto's proposed subcontractors were understated. However, Palmetto addressed the agency's concerns during discussions and upwardly adjusted its proposed costs accordingly, thus making an adjustment to the proposed costs unnecessary. AR, Tab 61, Final Cost Realism Analysis Memo (Palmetto), at 8-9.

Several rounds of discussions were held with offerors that resulted in each offeror making adjustments to proposal pricing. As reflected in final proposal revisions (FPR), NHIC decreased its proposed cost to \$450,598,174 (based on approximately [REDACTED] labor hours), and Palmetto increased its proposed cost to \$357,663,785 (based on approximately [REDACTED] labor hours). AR, Tab 56, Source Selection Determination, at 2; Tab 58, SSB Presentation, at 10. As part of the ongoing cost realism analysis, the TEP evaluated the discussion responses and FPRs by “verify[ing]” and “validat[ing]” the responses provided by the offerors. Tr. at 512. In most instances, further input from SMEs was deemed unnecessary, although some consultation with SMEs did occur. Tr. at 503, 508-09. Ultimately, the TEP was responsible for making recommendations to the BEP as to whether adjustments to proposed labor hours were warranted. Tr. at 455, 532. No adjustments were recommended. AR, Tabs 59-62, Final Cost Realism Analysis Memos and Supplemental Memos (Palmetto and NHIC).

The results of the SME and TEP analyses were forwarded to the BEP for consideration. Based on all of the information before it, the BEP concluded that each offeror’s proposed costs “are realistic for the work to be performed; reflects a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the Offeror’s Technical Proposal.” E.g., AR, Tab 59, Final Cost Realism Analysis Supplemental Memo (Palmetto), at 2, 4; see Tab 60, Final Cost Realism Analysis Supplemental Memo (NHIC); Tabs 61-62, Final Cost Realism Analysis Memos.

The contracting officer presented the results of the technical and cost evaluation to the source selection board (SSB) and source selection authority (SSA). Tr. at 108-09. With regard to the technical evaluation, both NHIC’s and Palmetto’s proposals were rated “very good” overall and found to be “essentially technically equal.” AR, Tab 56, Source Selection Determination, at 2. With regard to the cost evaluation, the contracting officer explained how the cost realism analysis was performed and identified the costs of each offeror’s proposal for direct labor, fringe, overhead, travel, subcontractors, other direct costs, and base and award fee. AR, Tab 57, Supplemental SSB Presentation, at 5; Tab 58, SSB Presentation, at 10, 13. Recognizing that there was a \$92 million delta between NHIC’s and Palmetto’s proposals, the contracting officer advised the SSB and SSA, in some detail, that Palmetto’s proposed costs were realistic due to its business strategy, proposed innovations, and efficiencies.⁸ AR, Tab 57, Supplemental SSB Presentation, at 2-4; Tr. at 89-92, 105-06. For example, among the various reasons identified by the contracting officer why Palmetto’s proposed costs were realistic (described more fully below), she noted that, unlike NHIC, Palmetto [REDACTED]. See Tr. at 26. After reviewing all of the presented information, the SSA selected Palmetto’s lower

⁸ The RFP placed a premium on the offeror’s use of innovations. RFP § M.3; Statement of Work, § C.4.3.

cost and technically equal proposal for award. NHIC protested to our Office, complaining that the agency's cost realism analysis was inadequate, undocumented, and flawed, and did not reasonably account for the \$92 million difference between proposals.⁹

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d); Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR § 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7; Metro Mach. Corp., B-295744; B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 10-11. Because the contracting agency is in the best position to make this determination, we review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8-9.

⁹ In its initial protest, NHIC also challenged the technical and risk evaluation, contending that it was unreasonable for both proposals to receive the same technical rating because the agency "failed to give proper consideration to the technical impact of Palmetto's low pricing" and NHIC, as an incumbent, better "understands what is required to successfully perform [the agency's] requirements." Protest at 17-19. In its comments, NHIC provided a number of specific examples to support its protest, all of which are premised on its belief that Palmetto's staffing must be unrealistically low because NHIC's proposed staffing was higher. We find this argument unpersuasive, given that both offerors have previously performed this work and their proposals offered different technical approaches. The agency has explained that it evaluated each offeror's proposed staffing to ensure that the proposed labor mix and number of hours were consistent with their approach and were feasible, Tr. at 483, 493, and specifically with regard to Palmetto, the agency has shown how the firm based its proposed labor mixes and number of hours on [REDACTED]. Tr. at 17-40; Agency Hearing exh. A., Palmetto's Initial Proposal, at 25-61. NHIC has provided no convincing evidence that the agency's evaluation, or Palmetto's technical approach, was unreasonable or inconsistent with the RFP.

NHIC contends that the cost realism analysis was not adequately documented. Although the record consists of multiple documents and reports reflecting the analysis performed by the SMEs, TEP, and BEP, NHIC contends that the documents themselves do not explain the agency's rationale and contain only "checked boxes [referring to worksheets where a SME or TEP member checked "yes" or "no" as to whether there was a basis for adjusting costs], conclusory assertions, and discussions questions" to show that costs were realistic. NHIC's Post-Hearing Comments at 2.

We find that the record shows that the agency performed a comprehensive and thorough cost realism analysis that considered all of the major cost elements for each of the functional areas to be performed under the contract. The agency relied on the TEP members and SMEs, each of whom has special expertise in the functional areas, to review whether the proposed labor hours and mix of labor categories were realistic for the work to be performed and were consistent with the offeror's technical approach. In addition, the BEP consulted with the DCAA to verify that labor rates and other costs were reasonable.

The record contains extensive contemporaneous documentation--numerous spreadsheets, worksheets, discussion questions and responses, and reports--that were created by the SMEs, TEP, and BEP. Although it is true that the documents are replete with conclusory statements that proposed costs were realistic, the record nonetheless evidences that a comprehensive cost realism analysis was performed and contains documents, such as the briefing slides to the SSB and the source selection determination, that provide the rationale for the agency's cost realism conclusions.¹⁰ E.g., AR, Tab 58, SSB Presentation, at 10-13; Tab 57, Supplemental SSB Presentation, at 2-4; Tab 56, Source Selection Determination, at 3-4; see also Contracting Officer's Statement ¶¶ 61-73.

During the hearing held by our Office, and as reflected in the contemporaneous documents, the agency explained why, and how, the evaluators determined that Palmetto's proposed costs, including labor costs, were realistic, even though they

¹⁰ NHIC relies on National City Bank of Indiana, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190, where our Office sustained the protest because the cost realism analysis was not adequately documented. In that case, unlike here, the agency did not consult SMEs and the record was devoid of any documentation created by the technical evaluation board that purported to evaluate the realism of the awardee's proposed staffing reductions; there existed only an undated, unsigned "Memo to File" that contained a 2-sentence statement that the technical evaluation board was asked if the awardee's staffing reductions were realistic, and the technical evaluation board responded that the reductions were realistic. Id. at 12-13.

were lower than the costs proposed by NHIC.¹¹ Specifically, as stated above, Palmetto took advantage of the opportunity, throughout its proposal, to [REDACTED]. Tr. at 26. Other identified reasons for Palmetto's lower costs were that Palmetto [REDACTED] and identified a number of "efficiency drivers" for claims processing, appeals, and medical review. AR, Tab 56, Source Selection Determination, at 2-3; Tab 57, Supplemental SSB Presentation, at 2-4; Contracting Officer's Statement ¶¶ 61-73; Tr. at 17-27, 30-31, 34, 38-39, 105-06, 406-17. Specific examples of some of these "efficiency drivers" for three of the major activities (claims processing, appeals, and medical review), as enumerated in the contemporaneous documents, include:

- **Claims Processing**
[REDACTED]
- **Appeals**
[REDACTED]
- **Medical Review**
[REDACTED]

AR, Tab 56, Source Selection Determination, at 3; Tab 57, Supplemental SSB Presentation, at 2-4.

NHIC contends that there is no basis to conclude that any of the proposed "efficiency drivers" would result in cost savings, since the agency failed to quantify any of the asserted cost savings. However, an adequate cost realism analysis does not require an in-depth verification of each and every item; an agency may reasonably rely on statements in an offeror's proposal which demonstrate the realism of its proposed costs, without independently verifying each item of proposed costs. Pacific Architects and Eng'rs, Inc., B-274405.2, B-274405.3, Dec. 18, 1996, 97-1 CPD ¶ 42 at 7; Ferguson-Williams, Inc.; Hawk Mgmt. Servs., Inc., B-232334, B-232334.2, Dec. 28, 1988, 88-2 CPD ¶ 630 at 6. Here, Palmetto's proposal explained that its "labor estimating approach" was based on [REDACTED]. Palmetto's proposal identified [REDACTED].¹² Agency Hearing exh. A, Palmetto's Initial Proposal, at 26-61. As the contracting officer explained, Palmetto "did a really good

¹¹ While we generally accord greater weight to contemporaneous evidence of an evaluation and source selection decision, we will consider post-protest explanations that provide a rationale for contemporaneous conclusions where, as here, those explanations are credible and consistent with the contemporaneous record. EDO Corp., B-296861, Sept. 28, 2005, 2005 CPD ¶ 196 at 5 n.2; Manassas Travel, Inc., B-294867.3, May 3, 2005, 2005 CPD ¶ 113 at 3.

¹² NHIC contends that its proposal identified similar efficiencies and innovations, but the agency persuasively explains that NHIC's proposal [REDACTED]. Tr. at 26, 151, 154-55, 169, 417-18, 520-21, 577, 580.

job of laying out ‘this is what we’ve been doing, this is what we’re going to do for you now, and this is the impact.’”¹³ Tr. at 91, 174. The SMEs and TEP members considered this information contained in Palmetto’s proposal, looked to see whether the approach was feasible, and based on their own experience, could find no basis to upwardly adjust Palmetto’s proposed costs.¹⁴ Tr. at 453, 483, 492-93, 522-23. NHIC has not shown that the agency’s evaluation was unreasonable.

NHIC also complains that the evaluation cannot be found reasonable because the agency needed more information to conduct its analysis. In this regard, it notes that the SMEs advised the TEP that there was no basis to adjust Palmetto’s proposed costs, but at the same time posed questions that suggested that information was needed before such a determination could be made. NHIC points to the analysis of Palmetto’s initial proposal in the functional area of provider education and training, which is one aspect of the provider customer service program. There, the SME reported that Palmetto’s subcontractor “did not provide a description of the labor categories used for the [provider customer service program]” and thus it “is not clear what kind of work people in each of these categories will be doing,” and therefore recommended that this be a discussions question. NHIC Hearing exh. 28(c), SME’s Cost Realism Adjustments and Question Summary of Palmetto’s Initial Business Proposal, at 4. NHIC notes that despite this statement, the contemporaneous worksheets of the SME’s analysis show a check mark in the box indicating that there was no basis to adjust Palmetto’s proposed costs.¹⁵ NHIC Hearing exh. 31, Cost Realism Analysis Worksheets, at 69.

¹³ For example, Palmetto identified that [REDACTED]. Similarly, Palmetto [REDACTED], which translated into [REDACTED], and proposed to [REDACTED]. Agency Hearing exh. A, Palmetto’s Initial Proposal, at 34-35. NHIC asserts that because [REDACTED], the expansion of [REDACTED] would result in savings that are “immaterial.” NHIC Post-Hearing Comments at 57-58. However, we note that besides the foregoing efficiencies, Palmetto’s proposal identifies a number of other efficiencies and innovations that, in the aggregate, the agency could reasonably conclude demonstrated the realism of Palmetto’s proposed labor hours and costs. Agency Hearing exh. A, Palmetto’s Initial Proposal, at 26-51. NHIC has failed to show that the claimed savings would not be achieved.

¹⁴ In some instances, where technology innovations did not have a great impact on historical data, the evaluators used historical data to validate the cost realism of Palmetto’s approach. Tr. at 335, 339-40, 424-25.

¹⁵ It is unclear from the record who checked the box. As various agency witnesses explained, some worksheets were completed by the SMEs, and others were completed by the TEP based on the SMEs’ analysis. Tr. at 438, 464, 497, 534. Although NHIC argues that the agency’s “confus[ion]” over who was responsible for checking the box reveals a flawed evaluation, NHIC’s Post-Hearing Comments at 11, (continued...)

As the SME who evaluated this area explained at the hearing, “the title of [the labor] category did provide some description of what that [full time equivalent] would be doing. So there was some basis to make a determination” as to whether the proposed costs were realistic. Tr. at 368-69; see Tr. at 371-72, 377. Where, for example, she saw a category that was identified as “representative,” she assumed it referred to a “customer services representative” or “written correspondence representative.” Tr. at 369. However, she recommended to the TEP that a discussion question be presented to Palmetto seeking further description of the labor categories. A discussion question was presented to Palmetto, and the firm responded. Although the SME was not asked to review Palmetto’s response, one of the TEP members reviewed the information and determined that there was no basis to adjust Palmetto’s proposed labor hours. Tr. at 377, 471.

We acknowledge that the record does not contain any documentation confirming that a TEP member analyzed Palmetto’s costs for provider customer service after receipt of that firm’s discussion responses, other than a conclusory statement by the BEP that Palmetto “adequately addressed this issue” during discussions. AR, Tab 61, Final Cost Realism Memo (Palmetto), at 3. However, even if we were to conclude error here, NHIC has not shown that it has been prejudiced as a result.¹⁶ That is, NHIC has not shown that Palmetto’s costs are understated for the provider customer service program (or any other area for that matter), or that the agency was incorrect in concluding that adjustments were not warranted. Furthermore, we note that the quantity of hours for the provider customer service program is very small in relation to the overall contract. Agency Hearing exh. A, Palmetto’s Initial Proposal, at 28. Thus, we cannot see how an adjustment in this area, even if warranted, would overcome the \$92 million cost difference between proposals.¹⁷

(...continued)

we find this to be inconsequential as to whether the underlying analysis was reasonable.

¹⁶ Competitive prejudice is a necessary element to every protest; we will not sustain a protest unless the protester shows that but for the agency’s error, it has a substantial chance for award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996).

¹⁷ NHIC points to another example, where the SME evaluating NHIC’s proposal for the provider outreach and education function noted that NHIC had not provided its assumptions regarding the percentage of calls it expected to handle by “interactive voice response” (IVR) technology. NHIC Hearing exh. 24(c), SME’s Cost Realism Adjustments and Question Summary of NHIC’s Initial Business Proposal, at 3-4. Citing a SME comment in the contemporaneous documentation, NHIC concludes that the SME made inappropriate assumptions regarding NHIC’s IVR usage. Id. at 4. However, we fail to see how NHIC was prejudiced by the assertedly incorrect

(continued...)

NHIC also asserts that the agency should have relied more heavily on the initial cost realism analysis, which the agency rejected in favor of performing its “bottom up” approach, particularly given that this was a cost analysis technique permitted by the FAR. NHIC’s Comments at 20; see FAR § 15.404-1(c)(2)(i)(B). However, the FAR does not require that agencies rely on historical data comparisons, and, in any event, the agency reasonably explained why the historical data used here to compile the initial cost realism analysis (as well as the independent government estimate) was of “limited applicability,” especially since it did not take into account each offeror’s specific approach. Tr. at 49-50. Similarly, NHIC contends that the agency should have compared proposals to reconcile labor hour disparities. NHIC’s Comments at 9; FAR § 15.404-1(c)(2)(iii)(C). Again, the FAR does not mandate such comparisons and, in this case, such a comparison would not be meaningful without considering the differences in technical approaches. See The Futures Group Int’l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 8 n.15.

In sum, NHIC has not shown the agency’s “bottom up” cost realism evaluation to be unreasonable. As discussed above, the agency followed a process that is consistent with the FAR, in that the agency “independently review[ed] and evaluat[ed] specific elements of each offeror’s proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror’s technical proposal.” FAR § 15.404-1(d)(1). Moreover, except for its arguments that historical data should have been the basis for the cost realism analysis, which we have rejected, NHIC has not demonstrated, or even attempted to quantify, that cost realism adjustments in the challenged areas would have eliminated the \$92 million cost differential and resulted in NHIC’s most probable cost being lower than Palmetto’s; thus, NHIC has not shown that its proposal, which was technically equal to Palmetto’s, had a substantial chance for award.

NHIC also asserts that the contracting officer provided the SSB and SSA with “materially inaccurate and unsupported information” upon which to base the source selection decision. NHIC’s Post-Hearing Comments at 42. For example, it asserts that the briefing slides presented to the SSB and SSA “grossly understated the delta in proposed labor hours.” Id. In support of this argument, NHIC points to a briefing slide that identified each offeror’s proposed costs; the slide stated that the costs for NHIC were based on “approximately [REDACTED] direct labor hours including subcontractors,” and for Palmetto were based on “approximately [REDACTED] labor hours including subcontractors; excluding Service Center labor and Key Personnel and other managers in indirect rates.” Id. at 43-44; AR, Tab 58, SSB

(...continued)

assumption because the agency did not make any adjustments to NHIC proposed costs as a result of this assumption.

Presentation, at 10. NHIC contends that the labor hour totals did not include NHIC's subcontractor and did include Palmetto's service center labor, which had the effect of understating the labor hour differential.¹⁸ However, the contracting officer rebutted the accuracy of NHIC's contention, Tr. at 99-100, 103, and explained that the labor hour difference was presented as an approximation that was rounded to the nearest [REDACTED]. Tr. at 100-04. The record does not evidence that the SSB or SSA was misled as to the labor hour or cost differential between proposals.

As another example, NHIC contends that the contracting officer falsely represented in the briefing slides that Palmetto proposed less expensive labor rates than NHIC, contending that its fully burdened labor rates are, in fact, lower than Palmetto's. However, the contracting officer explained that her reference to lower labor rates referred to direct labor costs only and that she made that clear to the SSB and SSA, Tr. at 208-09, and the briefing slides identified all of the cost elements for each offeror for both their original and final proposals, including direct labor, fringe, overhead, travel, subcontractors, other direct costs, general and administrative costs, base fee, and award fee. AR, Tab 58, SSB Presentation, at 10. The record does not show that the SSB or SSA was misled.

Finally, NHIC complains that discussions were "misleading" in that the agency asked only "superficial and narrow questions" and failed to alert NHIC that its direct labor hours were overstated, thus leading NHIC to believe that its staffing levels were competitive. NHIC's Comments at 36-45. However, unless an offeror's proposed cost is so high as to be unreasonable or unacceptable, an agency is not required to tell an offeror during discussions that its proposed cost is high in comparison to a competitor's proposed cost, even where cost is the determinative factor for award. DeTekion Sec. Sys., Inc., B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 15; Cherry Road Techs.; Electronic Data Sys. Corp., B-296915 *et al.*, Oct. 24, 2005, 2005 CPD ¶ 197 at 20. Here, the agency found NHIC's proposed cost to be reasonable and realistic for its technical approach. No discussions concerning NHIC's higher cost was required.

The protest is denied.

Gary L. Kepplinger
General Counsel

¹⁸ That is, NHIC contends that including additional subcontractor to NHIC's labor hours, as the slide represented, would have increased the [REDACTED] labor hour total. Conversely, excluding Palmetto's service center labor, as the slide represented, would have reduced Palmetto's [REDACTED] labor hour total. Thus, NHIC argues, the labor hour differential was even larger than represented in the slide.