Comptroller General
of the United States

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: TDS, Inc.

File: B-261827.3

Date: February 1, 1996

Brian A. Darst, Esq., Lee P. Curtis, Esq., and William Roberts III, Esq., Howrey & Simon, for the protester.
Daniel R. Weckstein, Esq., and Howard W. Roth III, Esq., Vandeventer, Black, Meredith & Martin, for MILCOM Systems Corporation, an interested party.
Michael S. Roys, Esq., Department of the Navy, for the agency.
Marie Penny Ahearn, Esq., David A. Ashen, Esq., and John M. Melody, Esq., GAO, participated in the preparation of the decision.

DIGEST

1. Agency could properly make award on basis of initial proposals where solicitation advised offerors of this possibility and contracting officer's decision not to engage in discussions was reasonable.

2. Protest that agency misevaluated cost proposals by upwardly adjusting protester's proposed cost and conversely failing to upwardly adjust awardee's proposed cost in certain cost elements, with result that protester's cost was higher than awardee's is denied, where upward adjustment of protester's cost was unobjectionable in the two challenged elements; evaluation of awardee's cost was unobjectionable in three of four challenged elements; and agency's calculated increase of [deleted] in fourth challenged element would not displace awardee as low offeror.

3. Protest that technical proposals were misevaluated and protester's lower-rated proposal should have been rated equal to awardee's higher-rated proposal need not be considered when, even assuming proposals should have been rated technically equal, solicitation provided that price would be controlling factor for substantially equal technical proposals, protester's evaluated cost was not low, and cost realism evaluation is unobjectionable.

DECISION

TDS, Inc. protests the Department of the Navy's award of a contract to MILCOM Systems Corporation, under request for proposals (RFP) No. N00612-94-R-8405, for

engineering support services for the Naval Command, Control & Ocean Surveillance Center, Charleston, South Carolina. TDS principally challenges the evaluation of cost and technical proposals.

We deny the protest.

BACKGROUND

The RFP, as amended, contemplated award of a cost-plus-fixed-fee, indefinite quantity contract for 1 base year with 4 option years, with additional options for level of effort increases for each year, to support cryptologic systems, counternarcotics systems, and special intelligence communications systems. The support to be furnished by the contractor includes overall program management, acquisition engineering, system integration, assembly and installation, software engineering, system documentation and configuration management.

The RFP provided for award to be made to the responsible offeror whose offer conforming to the solicitation was most advantageous to the government, price and other factors considered. The solicitation listed the following technical evaluation factors, in descending order of importance: corporate experience, personnel qualifications, detailed technical approach, management plan, and facilities. Management plan and facilities were of equal importance.

Although the solicitation stated that technical factors were moderately more important than cost, offerors were advised the importance of cost would increase "with the degree of equality of the proposals," such that "[w]here competing proposals [were] found to be substantially equal technically, price [would] be the controlling factor in award." The solicitation stated that cost proposals would be evaluated for realism and understanding of the scope of work. The solicitation established 28 labor categories, with stated minimum qualifications and estimated annual requirements for straight time, overtime and holiday time, for which offerors were to propose personnel. Offerors were required to propose hourly rates for each labor category and to break down the costs to include base labor rate, overhead rate, G&A expense, other costs, profit, and a total labor rate. The RFP cautioned that any proposal lacking realistic rates may result in a higher evaluated price. Finally, the solicitation informed offerors that the government intended to evaluate proposals and award a contract without discussions and that, therefore, each offeror should ensure that its initial offer contained the offeror's best terms from both a cost and technical standpoint.

The agency received 12 offers by the closing date, including one from TDS and two from MILCOM (each one with a different team of subcontractors). The agency evaluated technical proposals based upon an adjectival rating scheme (with the ratings outstanding, better, acceptable, marginal and unacceptable). As set forth

below, one of MILCOM's proposals (MILCOM 1734 with SAIC-Amsec and Unisys as team members) received an overall "better" rating and was the highest ranked proposal. TDS's proposal received an overall "acceptable" rating and was the lowest ranked of the four proposals--including MILCOM's second proposal (MILCOM 1735)--rated acceptable. As adjusted for cost realism, MILCOM's was the low acceptable offer, and TDS's was fourth low. The ratings (broken down for the three evaluators)[1] were as follows:

	TDS	MILCOM
TECHNICAL		
Corporate Experience	Better Better Acceptable	Outstanding Outstanding Better
Personnel	Acceptable Acceptable Marginal	Better Acceptable Acceptable
Technical Approach	Acceptable Acceptable Acceptable minus	Better Better Better
Management	Acceptable Acceptable Acceptable minus	Acceptable Acceptable Marginal[2]
Facilities	Better Acceptable Acceptable	Better Better Better
OVERALL TECHNICAL	Acceptable plus Acceptable Acceptable	Better Better Better

[1]The record does not include a consensus adjectival rating for each evaluation factor. Accordingly, the ratings given by each of the three evaluators are set forth above.

[2]Although originally stated to be acceptable, after the filing of the protest one evaluator's rating of MILCOM's proposal under the management factor was discovered to be in error. The correct rating, listed above, was marginal.

The Navy determined that MILCOM's proposal (1734) was most advantageous to the government based on its highest technical rating and lowest evaluated cost among the proposals rated acceptable or better ([deleted] versus TDS's [deleted]). Upon learning of the subsequent award to MILCOM on the basis of initial proposals, TDS filed this protest with our Office.

DISCUSSIONS

TDS first challenges the agency's determination to make award on the basis of initial proposals, arguing that "irregularities" in the procurement precluded award without discussions. We find nothing improper in the agency's decision to make award without discussions.

TDS argues, for example, that making award based on MILCOM's initial proposal was unwarranted because MILCOM engaged in an improper "bait and switch" regarding its key personnel. Specifically, TDS alleges that Unisys, a MILCOM subcontractor for approximately [deleted] percent of the work proposed, intends to use key personnel other than those persons identified in the resumes provided in its proposal to fulfill a portion of the key personnel duties. According to the protester, this is evident from the use of "blended," or average, rates in Unisys's cost proposal, where the individual rates of a group of staff performing the same duties are averaged into one rate. As an example, TDS points to Unisys's proposal of an individual to serve as a project manager, a key personnel position. Unisys furnished a resume and letter of commitment for this individual, and indicated that he would be full-time, i.e., 2,080 standard hours. The rate for this labor category, however, was based on the rates of four of Unisys's labor categories, with no category furnishing more than 50 percent of the required effort. TDS concludes that unnamed additional individuals will be performing part of the project manager function.

"Bait and switch" refers to an offeror's misrepresentation in its proposal of the personnel it expects to use during contract performance. To demonstrate that a bait and switch has occurred, a protester must demonstrate not only that personnel other than those proposed are performing the services (i.e., that a switch has occurred), but also that the awardee represented in its proposal that it would rely on certain specified personnel in performing the services, that the agency relied on this representation in evaluating the proposal, and that it was foreseeable that the individuals named in the proposal would not in fact be available to perform the contract work. See Free State Reporting, Inc., B-259650, Apr. 14, 1995, 95-1 CPD ¶ 199.

We find no evidence of bait and switch. Unisys's proposal of blended labor rates, where some work under a particular solicitation labor category would be performed by individuals other than those for whom resumes were submitted, was not

inconsistent with its proposal of full-time key personnel for whom it submitted resumes, since the RFP provided estimated hours for particular key personnel labor categories in excess of the number of hours to be worked by the proposed personnel. For example, the RFP estimated the agency's requirement under the program manager labor category as 14,000 straight time hours for the base year, i.e., 6.7 program managers (assuming 2,080 hours per man year). However, the RFP provided that only four acceptable resumes were necessary for the highest possible score for program manager. It thus is clear, we think, that the RFP contemplated that individuals other than those for whom resumes had been submitted would be used to complete a portion of the required work. It follows that Unisys's proposal of blended rates did not evidence a bait and switch, and did not render the agency's decision to proceed with award without discussions improper.

Since the solicitation advised all offerors that the government intended to make award on the basis of initial proposals without holding discussions and, as discussed below, there was a reasonable basis for concluding that MILCOM submitted the most advantageous offer, and there has been no showing of any other improprieties which would militate against an award based on initial proposals, there is no basis to object to the agency's decision not to conduct discussions. Federal Acquisition Regulation (FAR) § 15.610(a)(4); See Facilities Management Co., Inc., B-259731.2, May 23, 1995, 95-1 CPD ¶ 274.

COST EVALUATION

TDS challenges the evaluation of cost proposals. In its cost realism analysis, the Navy generally took the following steps: (1) verified that offerors priced all estimated hours; (2) reviewed the offered labor rates for the Service Contract Act non-exempt (i.e., wage determination) employees to ensure that they complied with the Department of Labor minimum wages; (3) reviewed the labor rates of the professional labor categories, comparing them to rates on other contracts, to ensure that they were sufficient to attract and retain skilled personnel; (4) reviewed the escalation of proposed professional labor rates; (5) obtained rate checks from the Defense Contract Audit Agency (DCAA) on G&A and overhead rates; and (6) confirmed that each offeror had a cost accounting system sufficient for a cost type contract. In addition, the agency examined proposals for uncompensated overtime which, if offered, was required by the RFP to be identified and reflected by an adjustment to hourly professional rates for such hours in accordance with Defense Federal Acquisition Regulation Supplement (DFARS) § 252.237-7019. If uncompensated overtime was proposed, a separate evaluation was performed to determine whether the actual wage rate was unrealistically low so as to have a possible negative effect on contract performance. As a result of this analysis, MILCOM's proposed cost ([deleted]) was adjusted upward by [deleted] to [deleted], and TDS's ([deleted]) was adjusted upward by [deleted], to [deleted].

TDS argues that a reasonable cost realism evaluation would have led the Navy to adjust MILCOM's prices upward by at least $3,786,416. TDS also argues that its proposed costs were realistic and should not have been increased. TDS concludes that its evaluated cost should have been lower than MILCOM's.

When a cost reimbursement contract is to be awarded, a cost realism analysis must be performed by the agency. See FAR §§ 15.801 and 15.805. However, an agency is not required to conduct an in-depth cost analysis or to verify each and every item in conducting its analysis. The Warner/Osborn/G&T Joint Venture, B-256641.2, Aug. 23, 1994, 94-2 CPD ¶ 76. The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved, since it is in the best position to assess what the contract should cost, assuming reasonable economy and efficiency, and must bear the difficulties or additional expenses resulting from a defective cost analysis. Id. Consequently, our review is limited to a determination of whether an agency's cost evaluation was reasonably based and not arbitrary. General Research Corp., 70 Comp. Gen. 279 (1991), 91-1 CPD ¶ 183; Science Applications Int'l Corp., B-238136.2, June 1, 1990, 90-1 CPD ¶ 517. We find that the Navy's realism analysis was reasonable.

TDS's Cost Proposal

a. Professional Salary Escalation

TDS challenges the salary escalation rate used by the agency in calculating the most probable cost of TDS's proposal. The Navy upwardly adjusted TDS's proposed wage rates for professionals by 2 percent for each option year because the firm had proposed no escalation in salaries over the 5-year contract period. The agency concluded that freezing salaries for 5 years was unrealistic, and would contribute to excessive personnel turnover and negatively affect TDS's ability to obtain qualified personnel. (The contract negotiator considered the fact that TDS's subcontractor had proposed a [deleted] percent escalation rate to support this assessment.) The contracting officer based the 2-percent escalation factor on the 2- to 4-percent annual escalation proposed by other offerors and the 3- to 4-percent escalation forecast in the Data Resource Index data available from DCAA.

TDS argues that the annual 2-percent escalation adjustment was unreasonable because the agency failed to consider the fact that in many cases its professional rates start out higher and remain higher than those proposed by MILCOM.[3]

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[3]Although TDS also argues that the adjustment was unreasonable because the agency did not make comparable adjustments to MILCOM's allegedly low professional rates, as discussed below, MILCOM's rates have not been shown to be

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TDS has not shown that the Navy's assumption of a 2-percent annual escalation of professional salaries was unreasonable. TDS's own proposal indicated that professional wages would increase over the contract period. For example, TDS stated in its cost proposal that the salaries of professional employees will be reviewed annually and that raises or merit increases may be made. In addition, the proposal stated that "when new [non-professional wage rate] labor determinations are implemented TDS reviews the impact of the determination on the entire contract, and quite often increases the pay of the professional staff accordingly." As for the use of a 2-percent escalation factor, we note that this was lower than the rate forecast in data available from DCAA, was at the low end of the range of escalation factors proposed by other offerors, and was lower than the escalation factor ([deleted] percent) proposed by TDS's own subcontractor. There is no basis to conclude that the application of a 2-percent escalation factor was unreasonable.

b. Uncompensated Overtime

TDS challenges the cost realism adjustment made to account for TDS's proposed overtime hours. The government estimate included in the solicitation for use in preparing proposals provided an estimate of annual overtime hours. While TDS listed its overtime compensation rate for the proposed overtime as "N/C," interpreted by the agency as no charge, and stated that its professional employees "are not eligible for overtime pay," the proposal also stated that TDS did not use uncompensated overtime. The contracting officer adjusted TDS's cost upward to reflect the concern that if TDS did not use uncompensated overtime (and the cost proposal showed no adjustment for uncompensated overtime), the required overtime must be compensated, in which case the government was at risk of having to reimburse TDS.

TDS argues that it was improper to adjust its proposed cost upward to account for the proposed overtime since its proposal indicated that it did not pay overtime and, according to the protester, the Navy was aware of TDS's practice of not paying its professional employees for overtime hours based on TDS's past contracts with the agency.

The fact that TDS's proposal indicated that it did not pay overtime, or that TDS may not have previously paid its professional staff for overtime, does not demonstrate that the cost realism adjustment was unreasonable. Again, TDS proposed overtime hours in response to the solicitation requirement to base cost proposals on specified annual overtime hours. Although TDS now characterizes these hours as

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[3](...continued)
unrealistic.
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"uncompensated overtime," TDS's proposal stated that its employees did not work uncompensated overtime. TDS's failure to specifically identify in its proposal and account for any uncompensated overtime, as required by DFARS § 252.237-7019, left it unclear how it would compensate the employees working the overtime. Since TDS's proposal also did not provide for professional employees who work overtime to receive compensatory time off, the agency could reasonably assume that the employees would be paid at straight time rates for the overtime hours. Further, although TDS listed "N/C" as its overtime compensation rate and proposed an "O/T Direct Labor Cost" of $0 for the required overtime hours, its proposal did not preclude recovery of the cost of any straight-time compensation paid its employees for working these hours. Accordingly, the agency reasonably concluded that there was a risk of the government's being charged for any and all hours worked on the contract, and therefore reasonably adjusted TDS's evaluated costs upward to reflect such risk.

MILCOM's Cost Proposal

a. Professional Wage Rates

TDS challenges the Navy's acceptance of the awardee's proposed professional labor rates (and those of its subcontractors) on the basis that the rates were below the average of the rates contained in wage rate survey data submitted by the awardee and those contained in a separate survey of wages for the geographic area of performance--Charleston, South Carolina--submitted by a competitor.

This argument is without merit, since there is no basis for concluding that the survey averages were controlling for purposes of determining reasonableness. Rather, we think the fact that the surveys contained ranges of rates (high to low) suggests that reasonable salaries may vary within a geographic area depending upon an offeror's specific circumstances, the view apparently adopted by the agency. We note that, under TDS's stricter view, some of TDS's own professional rates would be unreasonable since they were also below the survey averages. TDS has made no showing that MILCOM's rates, which fell within the survey's salary ranges, were so low that they would hinder the firm's ability to recruit and retain qualified staff.

b. DCAA Audit

TDS challenges the Navy's failure to obtain a DCAA audit of MILCOM's proposal to verify the firm's indirect G&A rates.

When the Navy contacted DCAA to verify MILCOM's proposed G&A rates, it was informed that no rates were available because MILCOM did not currently have any cost-type contracts. Although DCAA generally recommended an audit of MILCOM's proposal, the Navy did not believe that an audit was required in view of the highly

competitive procurement situation with respect to this procurement. However, the Navy contract negotiator did discuss MILCOM's cost proposal with DCAA and the DCAA auditor agreed with the negotiator's assessment that MILCOM's proposed reductions to the G&A rate approved by DCAA in fiscal year 1994 were conservative. (The DCAA 1994 approved rate was [deleted] percent; MILCOM's proposed rates here were [deleted], [deleted], [deleted], [deleted] and [deleted] percent, respectively, for the base year and 4 option years.) In fact, the Navy negotiator expected MILCOM's actual rates to be even lower due to the potential size of this contract (and the resulting increase in the base over which MILCOM's G&A expense would be apportioned).

The Navy's failure to obtain an audit of MILCOM's proposal was unobjectionable. While DCAA audits can be of assistance to a contracting officer in evaluating proposed costs, they are only advisory in nature and therefore are not required for a proper cost analysis. Motorola, Inc., B-254489; B-254489.2, Dec. 15, 1993, 93-2 CPD ¶ 322; Anamet Labs., Inc., B-241002, Jan. 14, 1991, 91-1 CPD ¶ 31. Moreover, the Navy did request input from DCAA regarding MILCOM's proposed G&A rates, but DCAA did not have this information.[4] DCAA instead confirmed to the Navy that "MILCOM's estimates (projections) have been fairly accurate in the past," and agreed with the agency's assessment that MILCOM's proposed reductions appeared conservative in view of the additional work MILCOM was expected to receive as a result of the contract award. We conclude that the agency's failure to obtain a DCAA audit of MILCOM's proposal did not render the cost evaluation unreasonable.

c. Blended Rates

TDS contends that the agency should have increased MILCOM's evaluated cost to account for its subcontractor's (Unisys) use of blended rates, when the work in a proposal labor category would be performed by more than one individual. In explaining this contention, TDS states that:

> "[i]n developing its labor rates, UNISYS used a weighing factor inconsistent with the MILCOM technical proposal. Specifically various internal labor categories were weighed . . . to develop an average rate, whereas the technical proposal identified only one (1) or in some instances two (2) key employees per labor category. Since the weighing in the cost proposal is inconsistent with . . . MILCOM's technical proposal, this UNISYS weighing resulted in an erroneous

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[4]Where rate checks are unavailable for certain items of cost, the agency may rely on information contained in an offeror's cost proposal in performing a cost evaluation. See Radian, Inc., B-256313.2; B-256313.4, June 27, 1994, 94-2 CPD ¶ 104.

depiction of the actual costs which will be incurred using key employees."

This argument is without merit. As discussed above, MILCOM's technical proposal properly was based on the use of some unnamed personnel under certain key positions. The fact that the blended rate in the cost proposal reflected the labor categories of these unnamed individuals would explain the disparity between the number of categories included in the blended rate and the number of individuals identified in the technical proposal. There is no showing that Unisys's blended rate for any given position included lower-rate labor categories that would not be used to fill that position. The blended rates thus provided no basis for an upward cost adjustment.

d. Wage Determination

TDS complains that the agency failed to consider the impact on the evaluation of a modified wage determination for fringe benefit rates, which increased benefits to $2.56 per hour from the $2.39 rate set forth in the last wage determination included in the solicitation, and which was received by the agency prior to award. See FAR § 22.404-6(c). As noted by the agency, however, since both MILCOM and TDS proposed a health and welfare fringe benefits rate of $2.39 per hour, both proposed health and welfare fringe benefits rates would have to be adjusted upward by the same amount.[5] Further, according to the agency (and unrefuted by the protester), even accounting for differences in overhead, G&A and fixed fee, the evaluated cost of MILCOM's proposal relative to TDS's would only increase by [deleted], which would not displace MILCOM as the low offeror. The failure to consider the increased rate in the evaluation thus did not affect the award.

TECHNICAL EVALUATION

TDS alleges a number of improprieties in the evaluation of technical proposals, concluding that its proposal should have been rated equal to MILCOM's; according

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[5]One of MILCOM's subcontractors proposed [deleted] per hour; in its cost realism analysis, the agency adjusted the rate upward to $2.39 per hour.

to the protester, "MILCOM is no more technically qualified to perform the work than TDS."

Even assuming TDS were correct that its proposal should have been rated technically equal to MILCOM's, the solicitation provided that in the case of substantially equal technical proposals, cost would be the controlling factor. Since MILCOM's proposal was reasonably found to offer a lower cost, TDS would not have been in line for award even if its proposal were rated technically equal to MILCOM's. See ROH, Inc., B-258810.2, Apr. 10, 1995, 95-1 CPD ¶ 187 (prejudice is an essential element of every protest).

The protest is denied.

Comptroller General
of the United States