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Decision

Matter of: ELS Inc.
File: B-283236; B-283236.2
Date: October 25, 1999

Joseph G. Billings, Esq., for the protester.
William A. Weisberg, Esq., Leigh T. Hansson, Esq., and Jeff S. Robinette, Esq.,
Reed Smith Shaw & McClay, for ADI Technology Corporation, an intervenor.
Annett H. Madison, Esq., Naval Sea Systems Command, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a procurement for a cost-type, level-of-effort support services contract, the agency conducted a reasonable cost realism analysis where, among other things, it assessed the consistency of awardee's proposed labor hour and labor mix with that identified in the solicitation, verified the awardee's proposed direct labor and indirect cost rates with the Defense Contract Audit Agency, and found that awardee demonstrated a more than satisfactory technical approach and understanding of the contract requirements.
2. Agency reasonably evaluated awardee's proposed professional compensation plan pursuant to Federal Acquisition Regulation § 52.222-46, where the agency determined from a review of the awardee's proposed direct labor rates and the awardee's offer of current, long-time employed personnel that awardee could provide a quality workforce throughout the contract term.
3. General Accounting Office will question the composition of, and changes to, an evaluation panel only if there is evidence of bad faith, bias, or conflict of interest.

DECISION

ELS Inc. protests the award of a contract to ADI Technology Corporation under request for proposals (RFP) No. N00024-98-R-2907, issued by the Naval Sea Systems Command for services in support of the SEAWOLF Attack Submarine Acquisition

Program. ELS complains that the agency improperly evaluated ADI's proposed costs and that ELS's proposal should have been selected for award.

We deny the protest.

The RFP, issued as a small business set-aside, provided for the award of a cost-plus-fixed-fee (CPFF), level-of-effort contract for program management, engineering, logistics, and computer system support for the SEAWOLF program office (PMS-350) for a base year with 4 option years. RFP at 2, 3, 9, 35. A broad statement of work was provided to describe the kinds of services that the contractor could be requested to perform. RFP at 9-19.

The RFP provided an annual level-of-effort estimate for each year of the contract (155,000 productive labor hours for the base year and 685,000 labor hours for the entire contract period), and informed offerors that any deviation from the labor-hour estimates without substantiation may result in rejection of the proposal. RFP at 105. In addition, the RFP identified and defined labor mix categories (various levels of senior, junior, and support staff), and stated the government's anticipated mix of labor categories (e.g., senior staff level 1 would comprise 1.4 percent of the mix). For each of these labor categories, the RFP stated an estimated minimum, unburdened hourly rate for the base year based upon a 40-hour work week. Offerors were informed that, "while not a firm requirement, [these rates represent] the minimum unburdened hourly rate (direct labor), the Navy estimates is required to hire and retain personnel at the skill levels defined under the Labor Mix Definitions." RFP at 107. The RFP also informed offerors that they may offer "uncompensated effort" (also known as uncompensated overtime) in their proposed level of effort.¹ RFP at 82.

The RFP provided for award, without discussions, on the basis of a cost/technical tradeoff, and identified the following evaluation factors and subfactors:

Technical Category	
Experience Factor	
	a. Personnel qualifications
	b. Corporate experience
	c. Past performance
Technical Approach Factor	
	a. Understanding and approach
	b. Specific technical capability
	c. Unique ideas and capabilities

¹ The RFP defined "uncompensated effort" to be "hours provided by personnel in excess of 40 hours per week without additional compensation for such excess work." RFP at 82.

Management Approach Factor	
	a. Organization
	b. Interface
	c. Contract management
	d. Cost management
	e. Workforce loading plan
	f. Start-up plan
Facilities and Resources Factor	
Cost Category	
Projected Cost to the Government Factor	

RFP at 116-17. The experience and technical approach factors were stated to be of equal importance and to be more important than the management approach factor, which was stated to be significantly more important than the facilities and resources factor. RFP at 117. Offerors were informed of the relative importance of the technical and cost categories as follows:

The Government will compare the projected cost of the offeror with the lowest projected cost which is technically acceptable to the projected cost of any higher scored technically acceptable offerors. The Government is willing to pay a premium equal to 35% of the lowest evaluated cost plus fixed fee of a technically acceptable proposal to move from a minimally technical acceptable proposal (score of 70) to the highest achievable technical proposal (score of 100) using the Straight Line Methodology [as set forth in attachment M-1 to the RFP].

RFP at 119-20.

The RFP stated that the agency would evaluate offerors' cost proposals for "realism and completeness of the cost proposal, the traceability of the cost to the offeror's technical proposal and the proposed allocation of [labor hours] and labor mix." RFP at 102. In addition, the RFP stated that the agency would consider pertinent cost information, including the Defense Contract Audit Agency's (DCAA) recommended rates for direct labor, overhead, and general and administrative costs, to determine an offeror's probable cost of performance. *Id.* Offerors were also informed that the agency would evaluate proposed costs for compliance with Federal Acquisition Regulation (FAR) § 52.222-46, Evaluation of Compensation for Professional Employees, which provides in part that the agency will evaluate proposed compensation plans to ensure that they reflect "a sound management approach and understanding of the contract requirements"; [assess] "the offeror's ability to provide uninterrupted high-quality work"; and consider proposed compensation "in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation." RFP at 118-19.

Proposals were received from six offerors, including ELS (the incumbent contractor) and ADI. Technical proposals were evaluated by the technical evaluation review panel (TERP), which prepared a detailed evaluation report. Agency Report, Tab 6, TERP Report. The TERP members individually evaluated and scored each proposal. Then, the TERP chairperson compiled a draft consensus report from the individual evaluators' documentation. The draft report was reviewed by each evaluator and discussed by the TERP as a group until the TERP reached its consensus judgment that was documented in the final TERP report, which provided adjectival scores and detailed narrative for each evaluation factor and subfactor. Id. at 6.

The TERP found that overall ADI's proposal was "good borderline." Specifically, the TERP noted that ADI's proposal exceeded the RFP requirements, and had proposed approaches, plans, and techniques that "when implemented should result in effective and efficient performance." The TERP also found that ADI's proposal had a few weaknesses, but that the weaknesses were more than offset by proposal strengths. Id. at 10.

ELS's proposal was assessed as being "good solid" overall. Like ADI's proposal, ELS's proposal was found to exceed the RFP requirements, to reflect approaches, plans, and techniques that when implemented were expected to result in effective and efficient performance, and to exhibit a few weaknesses that were more than offset by proposal strengths. Id. at 47.

Cost proposals were evaluated for accuracy, reasonableness, and realism by the cost analysis panel (CAP) to determine what the proposed effort likely would cost the government. Agency Report, Tab 8, CAP Report, at 2. The CAP reviewed each offeror's proposal to evaluate the proposed labor mix (in comparison to that estimated in the RFP), the mix of prime and subcontractor labor hours, and reasonableness of proposed rates, escalation and other direct costs. In addition, the CAP requested advisory audit reports from cognizant DCAA offices concerning offerors', and their subcontractors', direct labor rates, indirect rates, uncompensated overtime, other direct costs, and subcontractor costs. Id. at 3-7.

With respect to ADI's cost proposal, the Navy found that ADI proposed the labor hours estimated by the RFP, but offered in its labor mix a slightly larger number of labor hours in the senior labor categories than estimated in the RFP. Id. at 3-4. The agency also found that ADI proposed [DELETED] hours of uncompensated overtime, which represented [DELETED] percent of the total labor hours proposed by ADI. Id., encl. 1, at 2-3. The Navy also considered DCAA's advisory audit report, which found that some of ADI's direct labor rates were understated and accepted ADI's proposal of uncompensated overtime. Agency Report, Tab 12, DCAA Audit Report, at 4-5. DCAA also questioned ADI's proposed on-site overhead rate (for an office in Crystal City, Virginia) but accepted ADI's overhead rate for its off-site facility (its offices in Springfield, Virginia) and accepted ADI's other proposed indirect cost rates. Id. at 6-9. As a result of DCAA's recommendations, the CAP

adjusted ADI's proposed costs of \$22,503,256 upward to \$23,674,680.² Agency Report, Tab 8, CAP Report, encl. 1, at 1.

The CAP also evaluated ELS's cost proposal and considered DCAA's audit recommendations concerning that firm's cost proposal. ELS's proposed cost of \$30,569,450 was not adjusted by the agency. Agency Report, Tab 8, CAP Report, encl. 4, at 1.

The TERP's and CAP's evaluation reports were presented to the contract award review panel (CARP), which was also briefed as to each report. Agency Report, Tab 9, CARP Report, at 4-5. The CARP accepted both the TERP's and CAP's evaluation findings. To assess the relative merits of the firms' proposals, the CARP first applied a pre-determined weighting factor to the offerors' technical evaluation scores and then applied the straight line methodology announced in the RFP to calculate the "best value" cost for ADI and ELS:³

	Weighted Technical Score	Evaluated CPFF	Best Value Cost
ADI	82	\$23,674,680	\$20,360,225
ELS	86	\$30,569,450	\$26,152,939

The CARP concluded that ADI's proposal reflected the best value to the government. Agency Report, Tab 9, CARP Report, at 5-6. Award was made without discussions to ADI, and this protest followed.

ELS complains that the agency did not properly assess the cost realism of ADI's proposal. Specifically, ELS argues that the Navy did no more than obtain a rate check of ADI's proposal from DCAA,⁴ that the agency did not consider technical risk

²The amount by which ADI's proposed cost was adjusted varied slightly from that recommended by DCAA. Although the Navy accepted DCAA's recommended rates, the agency used ADI's proposed labor hours (which, as noted above, were consistent with the RFP's estimates) to calculate the adjustment.

³ELS does not challenge the agency's application of the RFP's straight line methodology.

⁴ELS asserts that the contracting officer stated at the protester's debriefing that the agency had not performed a cost realism analysis and had simply relied upon a rate check with DCAA. Protest at 2-3. The agency denies that the contracting officer made these statements and states that a complete cost realism analysis was performed. Agency Report at 6. As the protester acknowledges, "the parties' disagreement over what was said at the debriefing is not dispositive of whether [the agency] conducted a cost realism analysis." Protester's Comments at 9.

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associated with ADI's proposal in its cost evaluation, that the Navy failed to consider "other historical data" in ADI's proposal that demonstrated that ADI had experienced cost growth on other contracts in its cost evaluation, that the Navy did not compare ADI's low proposed costs with the government's higher estimate of the work, and that the Navy did not evaluate ADI's professional compensation in accordance with FAR § 52.222-46. ELS also complains that the Navy improperly failed to negotiate ceiling rates for ADI's overhead, given that DCAA had recommended that the agency negotiate caps of ADI's indirect rates.

When agencies evaluate proposals for the award of cost reimbursement contracts, an offeror's proposed estimated costs are generally not dispositive because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 11. 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. FAR §§ 15.305(a)(1), 15.404-1(d); CACI, Inc.--Fed., B-216516, Nov. 19, 1984, 84-2 CPD ¶ 542 at 5. Because the contracting agency is in the best position to make this cost realism determination, 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., B-241569, Feb. 19, 1991, 91-1 CPD ¶ 183 at 5, recon. denied, American Management Sys., Inc.; Department of the Army--Recon., B-241569.2, B-241569.3, May 21, 1991, 91-1 CPD ¶ 492.

We find, contrary to the protester's arguments, that the agency did not simply obtain a "rate check" from DCAA in assessing the realism of ADI's cost proposal. Rather, the record shows that the agency performed a detailed cost realism analysis of the offerors' proposals.⁵

Each offeror's understanding of the technical requirements was assessed by the agency's TERP. ADI's proposal, which was rated "good high" under the

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Accordingly, we have examined the entire record to determine whether the analysis that the agency actually performed constituted a reasonable cost realism assessment. See Aircraft Porous Media, Inc., B-241665.2, B-241655.3, Apr. 8, 1991, 91-1 CPD ¶ 356 at 7-8.

⁵Contrary to ELS's apparent belief, there is no requirement that DCAA be provided with offerors' technical proposals or the results of the agency's technical evaluations. Rather, a contracting agency may appropriately decide to obtain only rate verification and other historical information from DCAA as a part of the contracting agency's cost evaluation. See The Warner/Osborn/G&T Joint Venture, B-256641.2, Aug. 23, 1994, 94-2 CPD ¶ 76 at 6. Here, the Navy itself assessed offerors' technical approaches and understanding, which is entirely proper.

understanding and approach subfactor, was found to reflect a technical approach that “more than” adequately addressed, and demonstrated understanding of, the RFP requirements. Agency Report, Tab 6, TERP Report, at 15. The CAP ensured that each offeror’s, including ADI’s, proposed labor mix was consistent in both the technical and cost proposals. Agency Report, Tab 8, CAP Report, at 3. In addition, the CAP evaluated offerors’ proposed labor hours and mix against the RFP estimates to assess the reasonableness of offerors’ proposed staffing; here, ADI, like ELS, proposed the number of labor hours estimated by the RFP and was found to have an acceptable labor category mix. Id. at 3-4. The CAP evaluated offerors’ proposals (including ADI’s and ELS’s) of uncompensated overtime. Id. at 5-7, encl. 1, at 2-3; encl. 4, at 1-2. The CAP also compared ADI’s average direct labor rates for each of the specified labor categories with the estimated rates stated in the RFP and found that [DELETED] of ADI’s rates were above the RFP’s estimates.⁶ Supplemental Agency Report at 11.

In addition, the agency requested verification of the offerors’ proposed direct labor and indirect cost rates from DCAA. DCAA reported that some of ADI’s proposed direct labor rates and its proposed on-site overhead rate (for a facility to be staffed in Crystal City, Virginia) were understated. Agency Report, Tab 12, DCAA Audit Report, at 4-6. DCAA, however, accepted as realistic ADI’s proposed labor escalation rate, off-site overhead rate (for its Springfield, Virginia facility), general and administrative (G&A) cost rate, and subcontract handling costs. Id. at 6-9. DCAA also reported that ADI’s accounting system was adequate for accumulation, segregation, and reporting of costs under government contracts. Id. at 2. As a result of DCAA’s audit recommendation, the CAP upwardly adjusted some of ADI’s direct labor rates and the firm’s proposed on-site overhead rate; this also resulted in an increase in ADI’s G&A costs (although its proposed G&A rate was accepted). Agency Report, Tab 8, CAP Report, encl. 1, at 1.

ELS nevertheless complains that the agency’s cost realism evaluation was inadequate because the agency failed to consider technical risk as part of its assessment of probable costs. Specifically, the protester states that the TERP noted that some of ADI’s proposed general personnel did not meet the requirements of the RFP, see Agency Report, Tab 6, TERP Report, at 11, and that the TERP rated ADI’s proposal as being a “moderate” risk under the interface subfactor to the management approach evaluation factor and under the facilities and resources factor. Id. at 21. ELS asserts that ADI’s proposed costs should have been upwardly adjusted in the cost evaluation to reflect these concerns.⁷

⁶ADI’s average direct labor rate for [DELETED], which was considered to be a minimal difference, given that these staff members are current ADI employees. Supplemental Agency Report at 11.

⁷ELS also complains that the agency’s cost realism evaluation failed to take into consideration technical risk concerning the technical approach and corporate

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It is true that the TERP noted some concern with ADI's general personnel under the personnel qualifications subfactor, but considered this to be a minor weakness, given the strength of ADI's proposed key personnel.⁸ In fact, the TERP rated ADI's proposal as "good solid" and "low risk" under this subfactor. Agency Report, Tab 6, TERP Report, at 10-12. As to ADI's moderate risk rating under the interface subfactor and the facilities and resources factor, the TERP expressed concern that [DELETED]. The TERP found, however, that ADI's approach was "likely to meet the requirements of the RFP with moderate Government assistance during contract performance to ensure adequate interface." *Id.* at 21, 27. The TERP's evaluation concerns were presented to the CARP, which was also briefed by the TERP chairperson concerning the technical evaluation results; the CARP did not adjust any of the offerors' evaluated probable costs of performance based upon the technical evaluation results. Agency Report, Tab 9, CARP Report, at 4-6.

We find no basis in this record to question the reasonableness of the agency's determination not to upwardly adjust ADI's proposed costs for evaluated risks in its technical proposal. Contrary to ELS's complaint that the agency did not consider these concerns in its cost realism evaluation, the record shows that the CARP, which chose not to disturb the CAP's cost recommendations, considered these ratings. *Id.* The fact that there is some risk associated with an aspect of a proposal does not mean that the agency cannot regard the costs of performance, as proposed, as realistic inasmuch as risk is simply a reflection of the degree to which that which is proposed may or may not happen. *See Vinnell Corp.*, B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271 at 6. Here, the agency concluded that ADI could perform the contract, perhaps with moderate government assistance, within the level-of-effort proposed. Given that the RFP provided for the award of a level-of-effort contract and identified estimated staffing levels, and that ADI's proposal, which offered the RFP's estimated level-of-effort, was found to reflect a good technical understanding and approach, we find the agency's determination to be reasonable.

ELS also complains that the agency did not consider ADI's "other historical data" in performing its cost realism analysis of ADI's proposal. Protester's Comments at 14-15. Specifically, ELS notes that the RFP required offerors to submit other historical data as part of their cost proposal for "recent experience that is similar to the effort/task described" in the RFP. RFP at 113. ADI's proposal included historical

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experience in a number of other offerors' proposals. Protester's Comments at 13-14. Because ELS does not identify these concerns in ADI's proposal, we find these complaints to be irrelevant to the selection of ADI's proposal and do not consider them.

⁸The TERP also expressed concern with the qualifications of some of ELS's proposed personnel. Agency Report, Tab 6, TERP Report, at 48-49.

data on five recent contracts with the Navy showing cost growth that ELS alleges the Navy failed to consider.⁹ Agency Report, Tab 4, ADI Proposal, at 3-1 to 3-6.

The Navy responds that the CAP did consider ADI's "other historical data" in its cost evaluation, although the CAP's report did not document this consideration. Supplemental Agency Report at 7. The Navy provided the declaration of the CAP member responsible for drafting the CAP report, who states that she "was aware that both ELS and ADI indicated a history of cost growth on prior contracts and I considered this in my cost realism analysis." Supplemental Agency Report, encl. 1, Declaration of Contract Specialist, at 1. She further states that she found that ADI provided "adequate and reasonable explanations" for the five contracts that experienced cost growth. In this respect, she states that she, as contract specialist, had personal knowledge of one of the contracts identified by ADI and knew to be correct ADI's explanation that the cost overrun associated with this contract was attributable to the scope of work and number of customers being greater than that anticipated by the original solicitation. Id. at 1-2.

ELS replies that the CAP's determination that ADI had adequately explained in its cost proposal that its cost growth was attributable to factors beyond its control is inconsistent with the TERP's concern expressed under the past performance subfactor. Specifically, the TERP stated that:

ADI's proposal (section 1.3, table 1-5) indicates a fairly wide disparity between the average hourly price awarded under a contract and the actual hourly price paid. This disparity resulted in higher than expected costs. The Offeror's rationale for this disparity is that after the contract began, more senior people were required to perform the [statement of work] than originally proposed. The rationale, however, set a pattern for increased cost risk.

Agency Report, Tab 6, TERP Report, at 15.

We do not find that this TERP concern demonstrates that the CAP's determination not to upwardly adjust ADI's probable cost because of ADI's other historical data was unreasonable. The record shows that the TERP did not have access to the data available to the CAP regarding ADI's cost growth, including the contract specialist's personal knowledge. In any event, the TERP noted that ADI's proposal was low risk under the past performance subfactor, although "[s]ome government assistance may be required to monitor increased cost risk." Id. We also note that the TERP made

⁹ELS admits that its other historical data also shows cost growth on similar work and that no cost adjustments were made in the cost realism analysis for its proposal, but contends that the cost growth on its contracts was less than ADI's on its contracts. Protester's Comments at 14.

nearly the same finding in ELS's proposal, whose costs were not upwardly adjusted, under the past performance subfactor:

The average hourly price awarded versus experienced indicates fairly wide disparity resulting in higher than expected costs (Fig. 1-8, past performance). The Offeror and its subcontractors provide a rationale for this disparity. The overarching rationale stated in the proposal is that the contract required a higher labor rate than proposed. This is a weakness because it occurs in every contract for both the prime and its subcontractors.

Agency Report, Tab 6, TERP Report, at 50-51.

ELS next complains that the Navy did not compare ADI's low proposed costs with the significantly higher government estimate of the work. The Navy responds that an independent government estimate was not prepared for this work and that the estimate to which ELS refers is actually a budgetary estimate in the agency's purchase request. See Agency Report, attch. B, Procurement Request, at 2 (estimating a total contract value of approximately \$26.6 million); Supplemental Agency Report, encl. 2, Declaration of Contracting Officer, at 2.

We find that ELS's arguments do not provide us with any basis to question the agency's cost evaluation of ADI's proposal. Regardless of the status of the estimate contained in the procurement request, there is no absolute requirement that the agency compare an offeror's proposed costs with the government estimate. See EDAW, Inc., B-272884, Nov. 1, 1996, 96-2 CPD ¶ 213 at 5-6; Energy and Envtl. Servs. Corp., B-258139.4, May 15, 1995, 95-2 CPD ¶ 32 at 4. Rather, the agency may employ various types of analyses in determining what, in the agency's view, it would realistically cost the offeror to perform given the offeror's technical approach. Here, as described above, the agency performed a detailed and reasonable cost realism evaluation.

ELS also complains that the Navy did not evaluate ADI's professional compensation in accordance with FAR § 52.222-46. ELS argues that ADI's proposed labor rates, based upon ADI's offer of uncompensated overtime, are lower than those estimated in the RFP and lower than ELS's incumbent contract rates.¹⁰

The record establishes that the Navy reasonably determined that ADI proposed an adequate professional compensation plan to ensure that ADI would be able to provide a stable professional workforce to perform the contract. The purpose of a review of compensation for professional employees under FAR § 52.222-46 is to

¹⁰ELS also suggests that the labor rates estimated in the RFP were mandatory minimum rates. We disagree. The RFP specifically states that these rates were "not a firm requirement," but were the government's "estimates" of the minimum rates necessary for adequate performance. RFP at 107.

evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. Research Management Corp., B-237865, Apr. 3, 1990, 90-1 CPD ¶ 352 at 8. Here, the Navy compared ADI's rates (after adjusting them to a 40-hour week) with those in the RFP to assess the quality of compensation ADI provided to its professional employees, and found ADI's rates comparable to those in the RFP.¹¹ In addition, the Navy determined that [DELETED] ADI's proposed junior and senior professional staff were currently employed by ADI or a proposed subcontractor at the proposed and/or DCAA verified compensation levels, and that the average length of employment at ADI or a proposed subcontractor was [DELETED] years ([DELETED] years for senior staff). Agency Report at 10; Supplemental Agency Report at 9-10. This, the Navy found, demonstrated ADI's capability to provide a quality workforce throughout the contract term. Although ELS challenges the Navy's calculation of ADI's labor rates, asserts that they are less than ELS's rates, and notes that ADI did not [DELETED],¹² the fact remains that ADI proposed a currently employed, stable workforce, which provided the Navy with a reasonable basis for its determination that ADI's professional compensation plan was acceptable.

ELS also complains that the Navy improperly failed to negotiate ceiling rates for ADI's overhead and G&A costs where DCAA recommended that the agency negotiate caps on ADI's indirect rates. The Navy responds that it was aware that DCAA recommended negotiating a cap of ADI's indirect rates, but concluded that it was not appropriate here. Specifically, the contracting officer concluded that fluctuations in ADI's indirect cost rates had been relatively minor, based upon his experience, which did not indicate a need for negotiating a cap. Supplemental Agency Report, encl. 2, Second Declaration of Contracting Officer, at 3. In addition, the contracting officer was concerned that negotiating ceiling rates with ADI would require opening discussions with all offerors. Finally, the agency was sensitive to shifting cost risk from the government (as is normally contemplated in a cost-type contract) to ADI, where a level-of-effort contract with a broad statement of work was contemplated. Supplemental Agency Report at 15.

We find no basis in this record to question the agency's decision not to cap ADI's indirect rates. DCAA audit recommendations are advisory only; the degree to which they are used is within the discretion of the contracting officer. OAo Corp., B-228599.2, July 13, 1988, 88-2 CPD ¶ 42 at 6. In this regard, FAR § 42.707 provides an agency with the discretion, and not the requirement, to negotiate an indirect cost

¹¹Because the Navy reasonably did not find that ADI had proposed unreasonably low labor rates or that ADI's rates demonstrated a lack of technical understanding, there was no basis to reduce ADI's technical score, as ELS argues. See Energy and Envtl. Servs. Corp., *supra*, at 6.

¹²ELS also did not [DELETED]. See Agency Report, Tab 8, CAP Report, encl. 4, at 2.

rate ceiling in certain situations, including where an offeror has proposed indirect cost rates lower than what may reasonably be expected during contract performance. FAR § 42.707(b)(1)(iii). Here, the agency concluded that ADI's indirect cost rates, as adjusted in the cost realism evaluation, did not present such a risk that a cap should be negotiated. While ELS disagrees with the agency's exercise of its discretion, it has not shown it to be unreasonable.

ELS also objects to the composition of the TERP, complaining that the panel did not contain any representatives of PMS-350 (the office to be supported under the contract) and that during the evaluation of proposals there was a substitution of evaluators. ELS argues that as a result of this allegedly unqualified evaluation panel three of its proposed personnel were found not to meet the RFP requirements. The Navy disputes that it misevaluated the three named ELS employees and points out that, in any event, ELS was not prejudiced because this was viewed as a minor concern and ELS received a high technical score (89 of 100 possible points) under the personnel qualifications subfactor. See Agency Report, Tab 6, TERP Report, at 47.

We find that ELS's arguments provide us with no basis to question the agency's technical evaluation. The composition of a technical evaluation panel is within the discretion of the contracting agency, which we will question only if there is evidence of the panel's bad faith, bias, or conflict of interest. Xeno Technix, Inc., B 278738, B-278738.2, Mar. 11, 1998, 98-1 CPD ¶ 110 at 6. ELS did not timely provide any facts suggesting bad faith, bias, or conflict of interest on the part of evaluators that would cause to examine the changes in or composition of the evaluation panel.¹³ Mere speculation as to possible misconduct by the agency's evaluators or evaluation panel does not provide a basis for protest. Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588 at 4.

With respect to the evaluation of the three ELS employees, the record conclusively establishes that the protester was not prejudiced, even accepting ELS's arguments. Not only did ELS receive a high technical score under the relevant evaluation subfactor, but the agency also questioned the qualifications of another seven

¹³On September 30, 1999, after the record was closed for this protest, the protester tendered an unsigned affidavit, bearing the date August 20, of an employee of a subcontractor asserting improprieties in the evaluation of proposals.

employees proposed by ELS, and ELS does not challenge the evaluations of these employees, or even dispute the agency's statement that ELS was not prejudiced in any case.

The protest is denied.

Comptroller General
of the United States

