



United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** American Technical Services, Inc.

**File:** B-407168; B-407168.2

**Date:** November 21, 2012

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John A. Burkholder, Esq., McKenna Long & Aldridge LLP, for the protester.  
Samuel Frazer, Esq., Department of the Navy, for the agency.  
Noah B. Bleicher, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that the agency performed an unreasonable cost realism analysis is denied where the record shows that the agency reasonably relied on indirect cost rate data that was provided by the protester specifically for cost analysis purposes.
  2. Protest that the awardee's subcontractor had an unequal access to information organizational conflict of interest is denied where the allegations were not based on hard facts.
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### DECISION

American Technical Services, Inc. (ATS), of Glendale, California, protests the issuance of a task order to AdapTech Corporation, of Clifton, Virginia, under request for proposals (RFP) No. N00024-11-R-3315, by the Department of the Navy for engineering support services.<sup>1</sup> ATS objects to the agency's cost realism analysis and contends that the contractor selected for the task order has an unmitigated organizational conflict of interest.

We deny the protest.

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<sup>1</sup> Although the solicitation at issue here was captioned as an RFP, the Navy was in fact seeking task order proposals from small businesses holding SeaPort-e multiple award contracts in the Navy's Southwest Zone 6 region. RFP at 59. We will adopt the Navy's terminology throughout the decision.

## BACKGROUND

The Navy published the RFP at issue on April 19, 2011, seeking proposals from small businesses to provide technical, engineering, assessment, laboratory, calibration program, and test equipment analysis support services for the product engineering assessment department of the Naval Surface Warfare Center, Corona Division. RFP at 2, 5; Agency Report (AR) at 2. The RFP contemplated the issuance of a cost-plus-fixed-fee task order with a 1-year base period of performance and four 1-year option periods. RFP at 44, 51. The RFP provided that the task order would be issued on a best value basis, considering the evaluation factors of technical and management approach,<sup>2</sup> past performance, and evaluated cost. RFP at 59-62. The technical and management approach factor was stated to be more important than the past performance factor, and the two together were significantly more important than the evaluated cost factor. RFP at 60.

The RFP stated that the Navy would evaluate offerors' cost/price proposals for price reasonableness and cost realism.<sup>3</sup> RFP at 62. To facilitate this evaluation, offerors were instructed to provide costs and pricing for proposed labor hours and various labor categories, using their "most current labor rates and indirect rates." RFP at 53, 57. In addition, offerors were asked to provide supporting cost data, including correspondence from Defense Contract Audit Agency (DCAA) showing that DCAA had approved the offeror's proposed indirect rates. RFP at 57. The RFP advised that the Navy would use "[p]ertinent cost information, including but not limited to DCAA recommended rates" to determine the most probable cost of an offeror's proposal. RFP at 62. The RFP further advised that the Navy would adjust proposed costs if such costs were found to be unrealistic. RFP at 62.

Eight offerors, including ATS and AdapTech, submitted proposals before the solicitation closed on May 19, 2011. Agency Report (AR) at 2. In conducting the cost realism analysis of ATS's proposal, a Navy contract specialist contacted DCAA for audited rate data in June 2011. AR, Tab 7A, Documents Related to ATS Cost Realism, at 17. DCAA informed the Navy that it did not have any current audited rate data for ATS. *Id.* at 16. Because DCAA did not have relevant rate information for ATS, the Navy contract specialist requested rate information directly from ATS. In an email dated September 20, 2011, the contract specialist wrote to ATS's president:

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<sup>2</sup> The technical and management approach factor included the following three subfactors: (a) plan to accomplish; (b) personnel qualifications and experience; and (c) transition plan. RFP at 54.

<sup>3</sup> For purposes of evaluating offers, the RFP stated that the agency would add the total evaluated costs for the base year to the total evaluated costs for the four option years. RFP at 59.

Please provide copies of two recent invoices, submitted by your company, for work performed under federal contracts. This information is necessary for the Government to conduct cost analysis for your proposal. Please provide this information no later than 4:00PM PST, 21 September 2011. Thank you.

AR, Tab 7A, Documents Related to ATS Cost Realism, at 13. In its response the next day, ATS provided the Navy with two invoices--one dated August 19, 2011, and one dated September 19, 2011--for work performed for the Navy under another command's contract. Id.; AR at 7. The table below shows the indirect rates proposed by ATS in its offer and the indirect rates included in the invoices provided by ATS to the Navy contract specialist:

<b>Indirect Rate</b>	<b>ATS Proposed Rates</b>	<b>ATS Invoice Rates</b>
Overhead	[deleted]	[deleted]
G&A <sup>4</sup>	[deleted]	[deleted]
M&S <sup>5</sup>	[deleted]	[deleted]

AR at 4; See AR, Tab 2A, ATS Proposal, at 33, 36; AR Tab 7A, Documents Related to ATS Cost Realism, at 2, 7.

ATS proposed an overall cost of \$16,914,334.78. AR, Tab 4A, Post-Business Clearance Memorandum, at 19. Using the actual indirect rates from the two ATS invoices, the Navy contract specialist adjusted ATS's cost upward by approximately \$1.9 million for a total evaluated cost of \$18,788,700.54.<sup>6</sup> Id. at 25. A Source Selection Evaluation Board (SSEB) evaluated proposals and, as relevant here, rated ATS's and AdapTech's proposals as follows:

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<sup>4</sup> General and administrative costs.

<sup>5</sup> Material handling and subcontract administration costs.

<sup>6</sup> AdapTech proposed an overall cost of \$15,251,082.05, and the contract specialist adjusted its cost upward for a total evaluated cost of \$16,343,503.66. AR, Tab 4A, Post-Business Clearance Memorandum, at 8, 15.

<b>Offeror</b>	<b>Technical and Management Approach<sup>7</sup></b>	<b>Past Performance<sup>8</sup></b>	<b>Evaluated Cost</b>	<b>Proposed Cost</b>
AdapTech	Acceptable	Relevant / Satisfactory Confidence	\$16,343,503.66	\$15,251,082.05
ATS	Good	Very Relevant / Substantial Confidence	\$18,788,700.54 <sup>9</sup>	\$16,914,334.78

AR at 5; AR, Tab 4A, Post-Business Clearance Memorandum, at 8, 46; AR, Tab 4B, Source Selection Authority Memo, at 1-9.

In reviewing the SSEB's evaluation findings, the source selection authority (SSA), who was also the contracting officer, noted that ATS received higher ratings than AdapTech in all of the RFP's non-price factors. AR, Tab 4B, Source Selection Authority Memo, at 8. The SSA found that both firms submitted strong proposals and offered "essentially the same personnel," but that ATS's proposal was superior because the firm had received letters of intent from incumbent personnel and had a more experienced group manager than AdapTech. *Id.* at 7-8. However, the SSA found that ATS's proposal superiority did not warrant paying a price premium of \$815,065.63 per year. *Id.* at 8. Award was made to AdapTech on August 3, 2012, and following a debriefing, ATS filed this protest.

## DISCUSSION

ATS protests that the Navy unreasonably evaluated ATS's proposed costs and that this flawed cost realism analysis resulted in an unreasonable best value determination. Comments at 4. ATS also alleges that AdapTech should have been disqualified from competing for the task order due to an unmitigated organizational conflict of interest. Supplemental Protest at 6.

<sup>7</sup> The possible ratings under the technical factor were outstanding, good, acceptable, marginal, and unacceptable. See AR, Tab 4B, Source Selection Authority Memo, at 7, 9.

<sup>8</sup> The possible ratings under the past performance factor were not relevant/no confidence, somewhat relevant/limited confidence, relevant/satisfactory confidence, and very relevant/substantial confidence. See AR, Tab 4B, Source Selection Authority Memo, at 7, 9.

<sup>9</sup> ATS's evaluated price was the highest considered for award.

ATS asserts that the agency's cost realism analysis was unreasonable because the Navy relied on the "wrong cost data" when it adjusted ATS's indirect labor rates upward based on invoices from 2011. Protest at 4; Comments at 2. ATS argues that the Navy should have used two 2012 ATS invoices for its cost realism evaluation rather than the older 2011 invoices, because the 2012 invoices reflected lower indirect rates.<sup>10</sup> Comments at 2. According to the protester, had the agency relied on the lower indirect rates from the more recent 2012 invoices, the cost realism analysis "would have resulted in an infinitesimal upward adjustment, if any at all." Id. at 3.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, the agency must perform a cost realism analysis to evaluate the extent to which an offeror's proposed costs are realistic for the work to be performed. Federal Acquisition Regulation (FAR) § 15.404-1(d); Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 9; Tidewater Constr. Corp., B-278360, Jan. 20, 1998, 98-1 CPD ¶ 103 at 4. Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR § 15.404-1(d)(2)(ii). 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. 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., supra, at 8-9.

As discussed above, the contract specialist here asked ATS to provide "two recent invoices" for work performed under federal contracts and explicitly told ATS that the information was "necessary for the Government to conduct cost analysis for your proposal." AR, Tab 7A, Documents Related to ATS Cost Realism, at 13. In response, ATS provided the Navy with two very recent invoices--one of which was dated only one day before the Navy's request--that reflected higher indirect rates than what ATS had proposed. ATS did not provide any explanation for why the more recent invoice rates were higher than the proposed rates; did not object to the Navy's use of the invoices in the evaluation; and did not later provide more recent invoices for the agency's consideration. In fact, we note that the invoices ATS argues should have been used did not exist when the Navy requested the

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<sup>10</sup> Specifically, ATS points to two invoices that ATS submitted for payment to the Navy--one on January 24, 2012, and the other on February 7, 2012--for "comparable" work under a different Navy contract. Comments at 2. The indirect rates ATS charged on the February invoice were lower than the rates charged on the January invoice. See id.

information.<sup>11</sup> On this record, we find nothing objectionable about the agency's reliance in its cost realism analysis on invoices ATS itself provided.<sup>12</sup>

Next, the protester contends that the agency should have "disqualified" AdapTech from competing for the task order due to an organizational conflict of interest (OCI). Supp. Protest at 6. Specifically, ATS alleges that a company that performed work for AdapTech's subcontractor under a different contract had access to "staffing, personnel and cost information" of one of ATS's subcontractors here. Id. at 7. ATS contends that this information provided AdapTech with an unfair competitive advantage and constitutes an unequal access to information OCI. Id. at 6-7.

The FAR requires that contracting officials avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR §§ 9.505(b), 9.505-4; CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25; Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 at 8.

A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). The identification of conflicts of interest are fact-specific inquiries that require the

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<sup>11</sup> The protester argues that the Navy "knew or should have known" that ATS's indirect rates had lowered since 2011, because the contract specialist and contracting officer held the same positions for both this task order and the one under which ATS submitted the 2012 invoices. Comments at 2-3. However, there is no evidence that ATS ever asked that the 2012 invoices be considered for this procurement here.

<sup>12</sup> To the extent that the protester complains that the Navy conducted its cost realism analysis "10 or 11 months" before the task order was issued, we find that the protester has not shown this interval to be unreasonable. See Protester's Surreply at 1.

exercise of considerable discretion. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009).

Here, ATS complains that a company that performed work for AdapTech's subcontractor on a different contract had access to the staffing, personnel, and labor rates of the protester's subcontractor. ATS, however, has not alleged hard facts to demonstrate the existence of an OCI. For example, ATS has not detailed what specific staffing, personnel, or labor rate information the company supposedly obtained during the prior contract; whether or how that information was conveyed to AdapTech; or how the information even relates to this procurement. Indeed, there is no evidence that AdapTech was involved in the prior contract, that the company that allegedly received information will be involved in performance of the task order here, or that the company that allegedly received the information has any ongoing relationship (business or contractual) with AdapTech. In sum, ATS has provided none of the facts that would be needed to show that the issuance of the task order to AdapTech was tainted by an unmitigated OCI.<sup>13</sup> See AR at 14.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>13</sup> Moreover, as the agency points out, 11 of the 13 labor categories proposed by ATS's subcontractor were subject to a wage determination under the Service Contract Act (SCA), which imposed minimum levels for the rates for these labor categories. AR at 10-11. For these 11 SCA positions, ATS's subcontractor proposed to pay the minimum wage determination rate, thus nullifying any alleged competitive advantage stemming from nonpublic information. With respect to the remaining two positions--those not covered by the SCA--AdapTech's subcontractor actually proposed a higher rate for one of the positions. AR at 12. On this record, we find no evidence that AdapTech enjoyed an advantage due to an impermissible unmitigated OCI.