Hiring Incumbent Staff: GAO Says You Get What You Pay For

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The Government Accountability Office's recent decision in A-P-T Research Inc., B-413731.2, April 3, 2017, 2017 CPD ¶ 112, emphasizes the importance of evaluating an offeror's ability to recruit and retain incumbent personnel in the course of a cost realism analysis. This article discusses the GAO's decision in A-P-T and provides a survey of protests over the past two years in which GAO sustained cost realism challenges on this basis.


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Cost Realism Requirements

When an agency evaluates a proposal for the award of a cost-reimbursement contract or order, an offeror's proposed costs are not dispositive. Regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. The Federal Acquisition Regulation therefore requires agencies to perform a cost realism evaluation to determine the extent to which each offeror's proposed costs represent what the contract costs are likely to be. FAR §15.404–1(d). When an offeror intends to use incumbent personnel, its ability to recruit and retain such personnel with the labor rates proposed becomes a key factor of the cost realism evaluation. A number of decisions over the past two years have reiterated this concept.[1]

A-P-T Research

In A-P-T, unsuccessful offeror A-P-T Research Inc. protested NASA's award to Alphaport Inc. A-P-T protested, among other things, the agency's failure to conduct a reasonable cost realism analysis. To evaluate cost, the agency provided estimated level of effort hours for nine different labor categories, as well as the experience, skills and description for each category. The Source Evaluation Board ("SEB") rejected a number of standard cost realism techniques when performing its evaluation. The SEB rejected the government estimate, concluding that the estimate used only a single aggregate labor rate, which could not be used to assess compensation for the nine different labor categories proposed. The SEB also rejected a comparison to the burdened labor rates from the incumbent contract, stating that the incumbent contract's use of 23 engineering labor categories did not provide a meaningful comparison to the new contract's five engineering categories. The SEB also considered and rejected salary data from other Kennedy Space Center contracts with similar labor classifications. Instead, the agency chose to use commercial salary data from salary.com and the Economic Research Institute.

The Source Selection Authority ("SSA") concluded that Alphaport's direct labor rates were "within an average range (in some cases slightly below average)" of the SEB's data and that the adjusted rates were realistic.[2] The SSA concluded the Alphaport's lower evaluated cost ($48.1 million as opposed to A-P-T's $57.0 million) provided the best value to the government.

In sustaining A-P-T's challenge to the agency's cost realism evaluation, tne GAO focused on the incongruence between Alphaport's proposed professional compensation, which demonstrated compensation on the low end of commercial salary surveys, and Alphaport's technical approach, which identified a high retention rate for incumbent professional staff.

In setting forth the standard for a cost realism evaluation, the GAO noted that "such an evaluation involves consideration of not only the realism of the various elements of each offeror's proposed cost, but also consideration of whether each offeror's proposed cost reflects a clear understanding of the requirements to be performed, and is consistent with the unique methods and materials described in each offeror's technical proposal.[3] The GAO also noted that "where a cost-reimbursement contract's cost is driven in significant measure by labor costs, the procuring agency is required to evaluate each offeror's direct labor rates to ensure that they are realistic."[4]

The GAO concluded that the agency's evaluation contained "no meaningful explanation of how the agency concluded that Alphaport would be able to retained [DELETED] percent of incumbent employees at the compensation offered." In doing so, the GAO specifically highlighted the agency's failure to consider the labor rates currently used by incumbent A-P-T: "Indeed, given that the agency's current [ ] contract with A-P-T is a cost-reimbursement contract, the SEB's statement that it could not compare proposed compensation levels to the compensation provided to A-P-T's incumbent employees is not persuasive."[5]

The GAO also emphasized that, while an agency need not reject lower-than-average labor rates, it does need to reconcile those numbers with the proposal as a whole. The GAO suggested that below-average compensation might have been acceptable had the agency identified specific reasons why such rates would not affect Alphaport's ability to recruit incumbent personnel, "such as the work being perceived as relatively simple, an abundance of eligible candidates in the market keeping compensation levels low, or counterbalancing fringe benefits."[6]

Target Media

The GAO's decision in Target Media demonstrates the importance of reconciling an offeror's technical approach with its proposed costs, particularly when an offeror has named specific incumbent personnel it intends to hire. In Target Media, the agency conducted its cost realism analysis by comparing awardee Imagine One's proposed rates to Imagine One's own internal payroll data, rather than comparing the proposed rates to market rates, salaries paid to incumbent personnel, or rates proposed by other offerors. The GAO concluded that such an analysis did not sufficiently assess whether Imagine One's cost approach aligned with its technical proposal. The GAO pointed out that "[a]s part of its technical proposal, Imagine One submitted a staffing plan that included a listing of approximately [DELETED] proposed personnel, comprised of [DELETED] named personnel and [DELETED] unnamed personnel designated as 'pending.'"[7] Because of Imagine One's demonstrated reliance not only on incumbent personnel in general, but also specific employees, the GAO determined that the agency unreasonably limited its analysis to Imagine One's internal cost data and "did not assess the realism of the proposed rates through such methods as comparison of the rates to the prevailing market rates, the rates paid to incumbent employees, or the rates proposed by other offerors."[8]

Smartronix; Mantech

In Smartronix, the GAO addressed (1) what comparisons an agency may use in assessing an offeror's ability to recruit and retain incumbent personnel, and (2) what an analysis such comparisons must actually entail. In that case, protesters first challenged the underlying components of the agency's cost realism analysis. Specifically, protesters challenged the agency's failure to limit its cost realism assessment to a comparison of offerors' rates to the incumbent's historical rates. In rejecting this argument, the GAO stated that "the contracting officer determined that it was prudent to also consider relevant market survey data provided by vendors because market prices could have changed since the time of the previous award to Smartronix, who is the incumbent, and realism has to be evaluated based on a vendor's unique approach."[9] The GAO also found it reasonable to compare the proposed rates of the four offerors.

The GAO did find fault, however, with the actual analysis the agency performed in making these comparisons. For instance, the GAO noted that the agency assessment amounted to a "limited high-low analysis," in which the agency concluded that each offeror proposed low rates for some positions and high rates for others, and that the balance therefore presented no cost realism concerns. Moreover, despite finding that the agency need not focus on a historical rate comparison, the GAO nevertheless noted that "the contemporaneous evaluation record does not address the realism of [awardee] Jacobs' proposed rates with respect to the awardee's ability to capture the large number of incumbent personnel contemplated by the PWS and Jacobs' own proposed approach."[10] The GAO explained that "[w]hile we agree that the agency was not bound to automatically find Smartronix's and ManTech's rates, which were based in part on historical rates paid by the firms in performance of the incumbent contract, as the mandatory benchmarks for realism, there is no contemporaneous documentation demonstrating that the agency analyzed whether the market rates relied upon by Jacobs would be sufficient to retain personnel who are currently being paid higher rates under the incumbent contract."[11]

Tantus Technologies

In Tantus Technologies, the GAO focused on the "retention" aspect of the "recruitment and retention" of incumbent personnel. The agency in that procurement credited awardee Edaptive for its staffing plan, which proposed to employ a number of incumbent personnel. The agency determined that "utilizing such a large number of incumbent staff would provide several benefits to the agency, including a low-risk transition and continuity of services."[12] The agency conducted a cost realism analysis by comparing Edaptive's rates with the rates for comparable labor categories published on salary.com.

The GAO sustained Tantus Technologies' challenge to the agency's cost realism analysis. The GAO focused on Edaptive's proposal to hire a number of incumbent key personnel and to pay them substantially lower hourly rates than their prior employees: "We agree with the protester that the agency's cost evaluation was not reasonable to the extent that it relied on labor rate data inconsistent with the actual hourly rates of the proposed employees."[13] The GAO noted that Edaptive's approach might have been realistic had it proposed to hire new employees; however, given that Edaptive proposed to use primarily incumbent staff, the analysis did not consider "whether the proposed costs are realistic in light of an offeror's actual technical approach."[14] Because the agency failed to consider whether Edaptive's proposed labor rates for each year of the contract were consistent with actual rates paid to the employees in the prior year, the GAO found its cost realism analysis unreasonable.

Takeaways

A-P-T and these related cases provide several key takeaways:

First, the decisions demonstrate that while an agency need not rely on historical rates when assessing an offeror's ability to recruit and retain incumbent personnel, such data might provide the most realistic comparison. Accordingly, agencies using external market data such as salary.com must ensure that such data still provides an adequate comparison. While agencies need not rely solely on historical rate comparisons, agencies must document how alternative methodologies satisfy any concerns regarding the recruitment and retention of incumbent personnel.

Second, these decisions provide examples of appropriate methods for conducting a cost realism analysis. For instance, A-P-T explained that agencies may accept below-average direct labor rates, provided that the agency justifies its decision by identifying reasons why such rates would not affect incumbent personnel recruitment, such as the work being perceived as relatively simple, an abundance of eligible candidates in the market keeping compensation levels low, or counterbalancing fringe benefits.

Finally, these decisions remind us that the key to a successful cost realism analysis does not start with the agencies, but rather with the offerors themselves. Contractors should keep these principles in mind when drafting cost proposals and assessing viable direct labor rates. Every offeror aims to submit a competitively priced proposal; however, offerors must remember that, to the extent they intend to rely on incumbent personnel in a cost-type contract, they must be able to justify any below-average compensation rates. If an offeror fails to provide such assurance, it risks upward adjustment of its costs by the agency during a cost realism analysis and a potential protest if the agency fails to do so.

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[1] This article does not address other recent decisions addressing the same topic in the context of price realism, as opposed to cost realism. See, e.g., Giacare & Medtrust Jv LLC, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321; Valor Healthcare Inc., B-412960, July 15, 2016, 2016 CPD ¶ 206; L-3 Nat'l Sec. Sols.,Inc., B-411045, Apr. 30, 2015, 2015 CPD ¶ 233.

[2] A-P-T Research Inc., B-413731.2, April 3, 2017, 2017 CPD ¶ 112.

[3] Id. (citing CALNET Inc., B–413386.2, B–413386.3, Oct. 28, 2016, 2016 CPD ¶318 at 4, 6).

[4] Id.

[5] Id. at fn. 12.

[6] Id. (citing AT & T Gov't Sols. Inc., B–413012, B–413012.2, July 28, 2016, 2016 CPD ¶237 at 22–23).

[7] Target Media Mid Atl. Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358.

[8] Id.

[9] Smartronix Inc.; Mantech Advanced Sys. Int'l Inc., B-411970, Nov. 25, 2015, 2015 CPD ¶ 373.

[10] Id.

[11] Id.

[12] Tantus Techs. Inc., B-411608, Sept. 14, 2015, 2015 CPD ¶ 299.

[13] Id.

[14] Id. (citing Tricenturion Inc.; Safeguard Servs. LLC, B–406032 et al., Jan. 25, 2012, 2012 CPD ¶52).
