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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

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## Decision

**Matter of:** The Jones/Hill Joint Venture--Costs

**File:** B-286194.3

**Date:** March 27, 2001

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Marvin Norman, Esq., and Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.

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

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### **DIGEST**

1. Protest challenging the propriety of the Department of the Navy's determination, pursuant to Office of Management and Budget Circular No. A-76, that the most efficient organization/management study (MEO/MS) for in-house performance offered the same level of performance and performance quality as the selected private-sector proposal was clearly meritorious, where certain strengths in the selected private-sector proposal that were identified during the best value competition were not considered by the agency in determining that the MEO/MS offered the same level of performance and performance quality, the agency accepted without adequate analysis unsupported claims made by the MEO/MS team regarding the MEO/MS's ability to achieve the same level of performance and performance quality as the best value private-sector proposal, and the MEO/MS provided for the performance of a certain task by individuals who were not part of the MEO/MS and whose labor costs were not accounted for in the MEO/MS.

2. General Accounting Office recommends that the protester be reimbursed for the costs of filing and pursuing its protest challenging the Department of the Navy's determination, pursuant to Office of Management and Budget Circular No. A-76, that it would be more economical to perform base operations and support services in-house, rather than contract for these services with the protester, where the protest was clearly meritorious and the contracting agency did not take corrective action in response to the protest until after the submission of an agency report, the protester's comments, a supplemental agency report, supplemental comments, and an alternative dispute resolution conference during which the GAO attorney assigned to

the protest informed the agency that it had significant litigation risk with regard to a number of issues raised by the protest.

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## **DECISION**

The Jones/Hill Joint Venture requests that our Office recommend that it be reimbursed the costs, including attorneys' fees, incurred in filing and pursuing its protest challenging the Department of the Navy's determination, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore (NASL), California, rather than contract for these services with Jones/Hill under request for proposals (RFP) No. N62474-98-R-2069.

We recommend that the Navy reimburse Jones/Hill the reasonable costs of filing and pursuing its protest.

The Navy issued the RFP on May 5, 1999, as part of an OMB Circular No. A-76 cost comparison study, to determine whether it would be more economical to perform base operations support and real property maintenance and operations services for the NASL in-house, using government employees, or under contract with a private-sector firm. The solicitation provided that a best value offer would be selected in accordance with the terms of the RFP, and "compared to the government's 'in-house' proposal" in accordance with the terms of OMB Circular No. A-76 and its supplements, to determine if contractor or in-house performance of the services was more economical. RFP § A.

The RFP explained that the best value private-sector offer proposal would be selected according to a three-step process. RFP at M-2. In the first step, responding firms would submit proposals detailing their respective past performance, corporate capabilities, and past commitment to small business, which would be evaluated under corresponding evaluation factors, each considered equal in importance. RFP at L-14-16, M-2. The RFP provided that the three most qualified offerors, as determined by the agency during step I of the evaluation process, would be invited to participate in step II of the evaluation process. RFP at M-2.

Step II of the evaluation process required the offerors to submit a written technical proposal, consisting of three volumes, and give an oral presentation. RFP at L-17, M-2. The RFP provided that volume I of the technical proposal was to include the contractor's statement of requirements (SOR), prepared in accordance with a workbook provided by the agency as part of the solicitation package.<sup>1</sup> The

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<sup>1</sup> The RFP's "work statement" set forth, under its technical requirements section, 13 "outcomes," each of which listed a number of "mandatory contract requirement[s]" and a corresponding "metric" by which contractor performance would be measured. RFP §§ C.5.1-13. The agency explains that in an outcome-based solicitation, such as  
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solicitation specified that each contractor's SOR was to include, among other things, "the contract sub-requirements their firm[] shall perform to achieve the required mandatory requirement and the stated outcome" provided in the RFP, as well as the performance metrics "by which successful accomplishment of every mandatory and proposed contract requirement and sub-requirement can be measured to determine that it has been successfully met." Each offeror's SOR was also to include the applicable units of work, quantities and frequencies for performance of the units of work, and quality performance standards that the contractor proposed to meet (such as "[r]espond within 30 minutes"). The RFP noted here that the selected best value proposal's SOR "will be reviewed and used in adjusting the Government's [in-house] Technical Performance Plan to ensure it offers the same level of performance and performance quality which is equivalent to the best value commercial proposal." RFP at L-17-18.

Volume II of the technical proposal was to include the offeror's "technical and management approach to be used to achieve and/or exceed the Government's required outcomes." This volume was to address, among other things, the offeror's strategic plan, technical approach, management approach, and proposed subcontracting goals. RFP at L-18-22. Volume III was to include the offeror's price proposal. RFP at L-22.

The solicitation explained that step III of the evaluation process would consist of the agency's evaluation of the offerors' step II technical proposals under the following factors: management and technical approach, small business commitment, and price. The RFP stated that the management and technical approach, and small business commitment factors were equal in importance, and that the step I and III ratings would be combined into one overall technical rating that would be considered approximately equal in importance to price. RFP at M-2.

The agency received proposals from six offerors, including Jones/Hill, by the RFP's closing date. AR, Tab 4, Qualifications Report (July 14, 1999), at 1. Jones/Hill's step I proposal was [DELETED] ranked of the proposals received with ratings of

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this RFP, the "contractors design the approach to accomplish the desired outcome by developing the performance requirements and the levels to which they propose to perform." The contractor's resultant SOR becomes the statement of work upon award of the contract, and provides "the what, when, where, how and how often and to what quality level [the contractor] intend[s] to do those things necessary to accomplish the Government's desired outcomes." As explained by the agency, this is in contrast to "a traditional performance-based [performance work statement] in which the Government specifies the performance requirements it wants the contractor to achieve." Agency Report (AR) at 2.

[DELETED] under the past performance factor, [DELETED] under the corporate capabilities factor, [DELETED] under the past commitment to small business factor, and [DELETED] overall. Id. at 11-13. Jones/Hill and two other offerors were invited to submit step II proposals. AR, Tab 4, Business Clearance Memorandum (Feb. 11, 2000), at 6.

The step II proposals were received and evaluated by the agency. The record reflects that the agency determined the proposals' ratings under the management and technical approach factor through the assessment of the proposals' approaches under each of the 13 "outcomes" set forth in the RFP's work statement. AR, Tab 4, Value Assessment Team (VAT) Report for Technical Proposals (Feb. 7, 2000). Jones/Hill's proposal received ratings under the management and technical approach and small business commitment factors of [DELETED] and [DELETED], respectively, for an overall rating of [DELETED], at a proposed price of [DELETED]. AR, Tab 4, Business Clearance Memorandum (Feb. 11, 2000), at 8-9. Discussions with Jones/Hill and the other two offerors were conducted, and final revised proposals were submitted.

Jones/Hill's final revised proposal was evaluated as [DELETED] under the management and technical approach factor. AR, Tab 4, Business Clearance Memorandum (Apr. 19, 2000), at 6. Specifically, Jones/Hill's final revised proposal received ratings of [DELETED] under three of the outcomes, [DELETED] under one outcome, [DELETED] under two of the outcomes, [DELETED] under one outcome, and [DELETED] under the remaining five outcomes. AR, Tab 4, VAT Report for Technical Proposals, (Apr. 12, 2000), at 16-20. The agency supported each of these ratings with explanations identifying the proposal's specific strengths, weaknesses, and deficiencies. For example, the agency rated Jones/Hill's proposal as [DELETED] under the transportation services outcome, noting that [DELETED]. Id. at 19.

The agency evaluated Jones/Hill's final revised proposal as [DELETED] under the small business commitment factor for an overall final revised proposal rating of [DELETED]. AR, Tab 4, Business Clearance Memorandum (Apr. 19, 2000), at 6. Given that Jones/Hill's step I and II proposals received ratings of [DELETED], the agency rated Jones/Hill's proposal as [DELETED] overall. Id. at 9. The agency determined that Jones/Hill's proposal, with a final proposed price of [DELETED], represented the best value to the government. Id.

In accordance with the terms of the RFP (at L-5-6) and the OMB Circular No. A-76 Supplemental Handbook, part I, ch. 3, ¶ H.3.d., the NASL Most Efficient Organization/Management Study (MEO/MS) and Jones/Hill's proposal were provided to the cognizant quality comparison panel (QCP) to ensure that the MEO/MS and Jones/Hill proposal offered the same level of performance and performance quality. AR at 3-4. The record reflects that the QCP compared the MEO/MS's SOR with Jones/Hill's SOR, determined that a number of clarifications or revisions were required regarding the level of performance and performance quality reflected in the

MEO/MS's SOR, and requested that the MEO/MS team clarify these matters and respond as appropriate. AR, Tab 5, attach. 1, Letter from Source Selection Authority (SSA) to MEO/MS Team regarding Quality Comparison Items for Clarifications/Revisions (May 3, 2000).

The MEO/MS team responded to the QCP's request by identifying each "leveling issue" raised, the MEO/MS team response, and the required changes to the MEO/MS and the in-house cost estimate. AR, Tab 5, attach. 2, MEO/MS Team Response to Leveling Issues. The record reflects that the QCP accepted the MEO/MS team's responses in all but two areas. The QCP informed the MEO/MS team by telephone of these areas, and the MEO/MS team submitted a narrative response providing in part that it would adjust the MEO/MS to address the QCP's concerns. AR, Tab 5, attach. 4, MEO/MS Memorandum to SSA on Additional Information on Leveling. The QCP then determined that the adjusted MEO/MS and Jones/Hill proposal would provide for the same level of performance and performance quality. The QCP's determination was subsequently reviewed and approved by the SSA. AR, Tab 5, SSA Decision Document.

The MEO/MS was next forwarded to the cognizant Independent Review Authority for re-certification. AR at 4; Tab 7, Commercial Activity Cost Comparison Review of NASL Base Operating Services. After the re-certification of the MEO/MS, the agency conducted the cost comparison by first adding the "minimum conversion differential and costs of conversion" to Jones/Hill's proposed price, for an adjusted total cost to contract for services of [DELETED]. Because the revised MEO/MS's costs totaled \$137,614,706, the agency determined to perform the requirements in-house. AR at 4-5.

Jones/Hill filed an administrative appeal. The agency's administrative appeal authority ratified the determination to perform the requirements in-house, making only a minimal increase in the costs associated with in-house performance to a total of \$137,921,286. *Id.* at 5; Tab 8, Memorandum from the Commander in Chief, U.S. Pacific Fleet to the Chief of Naval Operations, NASL Final Decision Summary Report; Tab 9, Decision of Administrative Appeal Authority on NASL Cost Comparison Decision.

Jones/Hill then filed its protest with our Office on September 1, 2000, challenging the adequacy of the agency's comparison of the performance reflected in the NASL MEO/MS with the performance reflected in Jones/Hill's proposal, and the reasonableness of the agency's determination that the revised MEO/MS and Jones/Hill's proposal offered the same level of performance and performance quality. Jones/Hill also contended during the course of the protest that the agency improperly failed to inform the offerors of certain changes to the agency's requirements, as well as of the existence and terms of an interservice support agreement (ISSA) between the Navy and the General Services Administration (GSA), and a memorandum of agreement (MOA) between NASL and GSA that, according to

the protester, adversely affected its competitive position overall and specifically with regard to its provision of transportation services and the related costs.

The Navy filed its report in response to Jones/Hill's protest on October 5. The report denied the protest allegations, and provided documentation in support of its position. On October 16, Jones/Hill submitted comments on the agency report that responded in detail to the agency's positions, and refined many of the arguments raised in its initial protest based upon the information provided in the agency report.

The agency subsequently requested the opportunity to submit a supplemental report. The General Accounting Office (GAO) attorney assigned to the case agreed, and, in a telephone conference with the parties, requested that the agency include in its supplemental report responses to certain issues that, in our Office's view, had been inadequately addressed in the initial report. In this regard, the GAO attorney specifically requested that the agency address in more detail its determination that the MEO/MS and Jones/Hill proposal offered the same level of performance and performance quality, and the propriety of the agency's decision to inform only the MEO/MS team (and not the private sector offerors) of the ISSA between the Navy and GSA, and the MOA between NASL and GSA.

Our Office received the supplemental report on October 25. In this report, the agency explained for the first time the manner by which the QCP determined that the MEO/MS and Jones/Hill's proposal would provide the same level of performance and performance quality. For example, the protester had pointed out in its comments that 68 strengths in its proposal identified by the VAT during the private sector best value competition were not considered by the QCP during its consideration of whether Jones/Hill's proposal and the MEO/MS would provide the same level of performance and performance quality. Protester's Comments at 28-29. The agency explained in its supplemental report that this was so because the results of the best value determination were not provided by the VAT to the QCP, and in the agency's view, "[n]either the solicitation nor logic requires such 'strengths' to be accounted for by the QCP." Supplemental Report at 3. The supplemental report also responded to the protester's assertion that the agency's determination that the MEO/MS and Jones/Hill proposal offered the same level of performance and performance quality was unreasonable by referring, as examples, to a number of areas in the record that, in the agency's view, established the reasonableness of its determination.

After receiving Jones/Hill's supplemental comments disputing the Navy's positions, the Navy contacted our Office and requested that the GAO attorney assigned to the protest participate in alternative dispute resolution (ADR) in an attempt to resolve the protest. The GAO attorney agreed to conduct an ADR conference, and during this conference, held on November 14, the issues presented in the protest were discussed at length with the parties. The GAO attorney informed the parties that in his view the agency faced significant litigation risk regarding its determination that the MEO/MS and Jones/Hill proposal offered the same level of performance and

performance quality, and with regard to the propriety of the agency's decision to inform only the MEO/MS team of the ISSA between the Navy and GSA and the MOA between NASL and GSA.

The agency notified our Office and the protester in its comments dated November 16 that it intended to take corrective action in response to the protest. Specifically, the agency stated that the QCP would examine each of the 68 strengths in Jones/Hill's proposal that had been identified by the VAT (but which were previously not considered by the QCP), and would have the MEO/MS adjusted as necessary to account for those strengths "that predict a higher quality performance (as opposed to 'strengths' such as a well-written proposal)." Agency's Post-ADR Comments at 10. The agency added that it would review the Jones/Hill and MEO/MS approaches regarding the maintenance and repair of streetlights (one of the areas specifically discussed at the ADR session that had been considered by the QCP) and "determine whether the different approaches offer a comparable level of quality of performance." Id. at 11. The agency stated that the MEO/MS would be adjusted as necessary, and added that "[i]n any event, the QCP will prepare a detailed written justification on its conclusion." Id. The agency added that it would follow a similar approach to respond to the protester's concerns regarding the maintenance and cleaning of the Fire Fighting School (another area specifically discussed at the ADR session that had been considered by the QCP). Id.

In response to the protester's contention that the agency had improperly failed to inform the offerors of certain changes to the agency's requirements during the conduct of the procurement, the agency conceded that "it should have amended the solicitation." Id. The agency concluded, however, that it would not take any corrective action to address this shortcoming because in its view "the protester has not suffered any prejudice thereby." Id. The agency also declined to take any action in response to Jones/Hill's protest of the propriety of the agency's determination to inform only the MEO/MS team, and not the private sector offerors, of the ISSA between the Navy and GSA and the MOA between NASL and GSA, arguing that its actions in this respect were reasonable. Id. at 6-10.

Our Office concluded that the agency's proposed corrective action, although not addressing all of the protester's concerns, nevertheless rendered the protest academic. In this regard, we found that because the agency was going to reassess its determination that the NASL MEO/MS would provide the same level of performance and performance quality as Jones/Hill's proposal, and if needed, would request that the MEO/MS be further adjusted, and inasmuch as it appeared, based upon the record, that these adjustments may be significant, it was possible that Jones/Hill's

proposal would be determined low under the cost comparison. Accordingly, on November 22, 2000, we dismissed the protest as academic.<sup>2</sup>

Jones/Hill subsequently filed this request for reimbursement of its protest costs, arguing that the Navy had unduly delayed taking corrective action in response to Jones/Hill's clearly meritorious protest.

When a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based upon the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 4.

The Navy first responds to Jones/Hill's request for costs by contending that the specific process by which the QCP determined that the NASL MEO/MS would provide the same level of performance and performance quality as Jones/Hill's proposal was consistent with the terms of the solicitation. The Navy thus argues that Jones/Hill's protest challenging the QCP's failure to consider the strengths in Jones/Hill's proposal as identified by the VAT during the best value competition is untimely. Agency Response to Protester's Request for Costs at 2. Specifically, the agency points out that the solicitation stated that volume I of the step II proposal (which was to include the offeror's SOR) would "be reviewed and used in adjusting the Government's Technical Performance Plan to ensure that it offers the same level of performance and performance quality which is equivalent to the best value commercial proposal." RFP at L-17. The agency next points out that according to the RFP, volume II of the step II proposal (which was to include the offeror's "technical and management approach to be used to achieve and/or exceed the Government's desired outcomes") was "for Source Selection Board use only and

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<sup>2</sup> Jones/Hill filed a request for reconsideration with our Office on December 4, 2000, contending that our Office was without authority to dismiss its protest unless the corrective action addressed each of the protest issues raised. We denied this request for reconsideration in Jones/Hill Joint Venture--Recon., B-286194.2, Dec. 8, 2000, 2000 CPD ¶ 203. We explained that even though the Navy's proposed corrective measures may not have addressed all of the issues raised by Jones/Hill in its protest, the measures may affect the cost comparison and the attendant determination whether to perform the requirements in-house or by contract with Jones/Hill. Accordingly, we found that the dismissal of Jones/Hill's protest as academic was appropriate under the circumstances because our Office does not consider matters that may well make no difference in a procurement's outcome.



[would] not be provided to the [MEO/MS] Team at any time during the A-76 review process.” RFP at L-18. The agency argues that because of these provisions, “the solicitation expressly warned offerors that to the extent ‘quality adjustments’ were to be made in the quality comparison process, it would only include comparisons with respect to information contained in Volume I.” Agency’s Response to Protester’s Request for Costs at 2. The agency thus concludes that Jones/Hill’s protest was an untimely challenge to the evaluation methodology identified in the RFP. Id.

The agency’s argument here is without merit. Contrary to the agency’s position, the RFP simply does not state that volume II of the selected private-sector step II proposal (setting forth the technical and management approach) would not be considered by the agency in its comparison of the MEO/MS’s and selected proposal’s levels of performance and performance quality. Moreover, since the agency was required by the Supplemental Handbook to ensure that the MEO/MS would achieve the same level of performance and performance quality as Jones/Hill’s proposal, to somehow read the RFP’s statement that volume I of the step II proposal (setting forth the proposed SOR) would be used in determining whether the MEO/MS and selected private-sector proposal offered the same level of performance and performance quality, as also precluding the agency’s consideration of Jones/Hill’s proposed technical and management approach set forth in volume II (which was part of the agency’s best value selection of Jones/Hill’s proposal), would render the RFP inconsistent with the provisions of the Supplemental Handbook; such a reading is simply not reasonable.

The agency, in contesting the protester’s request that it be reimbursed its protest costs, next contends that “it is well recognized that the guiding rules [of the OMB Circular No. A-76 process] are murky at best,” and that “because OMB Circular A-76 and other guidance is unclear, [Jones/Hill’s] protest is far from ‘clearly meritorious.’” Agency’s Response to Request for Costs at 1-3. As explained below, we disagree.

The Supplemental Handbook clearly provides, as recognized by the Navy, that where, as here, a best value approach is taken in evaluating private-sector proposals, the agency must compare the MEO/MS to the successful private-sector proposal to determine “whether or not the same level of performance and performance quality will be achieved,” and, if not, make “all changes [to the MEO/MS] necessary to meet the performance standards accepted [in the private sector proposal].”<sup>3</sup> Supplemental Handbook, part I, ch.3, ¶¶ H.3.d, e.

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<sup>3</sup> Although the Supplemental Handbook requires that the MEO/MS achieve “the same level of performance and performance quality,” we recognize that it may not be feasible to precisely match the level and quality of performance of the MEO and the private-sector offer. Rice Servs., Ltd., B-284997, June 29, 2000, 2000 CPD ¶ 113 at 11. Accordingly, we believe that this requirement is satisfied by ensuring that a

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This “leveling of the playing field” is necessary because a best value solicitation invites submission of proposals that exceed the RFP requirements, together with the higher prices that often accompany a technically superior approach. Failure to ensure that the MEO/MS offers a level of performance comparable to that of the best value private-sector proposal selected to compete with the MEO/MS can cause the very technical superiority that led to the private-sector proposal’s selection to become the cause for losing the public/private cost comparison. Aberdeen Tech. Servs., supra, at 14.

The starting point for this analysis is the agency’s own evaluation, during the private/private competition, of the proposal that was selected for comparison with the MEO/MS. If the evaluators identified strengths in that proposal, or if they identified areas in which that proposal exceeded the RFP requirements, the agency must consider those strengths in comparing that proposal with the MEO/MS. See Rice Servs., Ltd., supra, at 8-9. The agency may ultimately conclude that the two offer comparable levels of performance and performance quality, despite some differences. See, e.g., NWT, Inc.; PharmChem Labs., Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 14-17. The agency may decide that certain strengths identified in the private-sector proposal are important and that others are not, a judgment that our Office would review for reasonableness if a protest were filed. Here, for example, the Navy advised our Office that it intended to limit its corrective action to strengths in Jones/Hill’s proposal “that predict a higher quality performance (as opposed to ‘strengths’ such as a well-written proposal).” That distinction appears reasonable.

What the agency cannot do is ignore, in reviewing the levels of performance and performance quality, the strengths that were identified by the agency’s own evaluators in the private-sector proposal. Our Office sustained the protest in Rice because the agency there appeared to set aside, without a reasonable basis, the strengths that had been identified in Rice’s proposal during the private/private competition.

In sustaining the Rice protest, we relied on the language in the Supplemental Handbook that, in our view, unambiguously sets out the required process. In any event, at least since we issued the Rice decision in June 2000, it should have been clear that we would view a protest as clearly meritorious if it alleged, and the record established, that an agency had identified strengths in the selected private-sector proposal during the best value private-sector competition, but then failed to consider those strengths during the comparison of the protester’s proposal and the MEO/MS (absent a reasonable explanation of why the strengths were not required to be

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comparable level of performance and performance quality is achieved. See Aberdeen Tech. Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 15.

considered in determining whether a comparable level of performance and performance quality would be achieved in the MEO/MS). Because that was what happened here, we view Jones/Hill's protest as clearly meritorious.

Specifically, as was noted by the protester as well as the GAO attorney at the ADR conference, here the VAT identified 68 strengths in Jones/Hill's proposal during the private-sector best value competition. These strengths, however, were not considered by the QCP in making its determination that the MEO/MS would provide the same level of performance and performance quality as Jones/Hill's proposal. The record contains no reasonable explanation for the QCP's failure to consider the 68 strengths that the agency itself had identified in Jones/Hill's proposal. Because the agency failed to consider those strengths in determining that the MEO/MS and Jones/Hill proposal would provide the same level of performance and performance quality, or in the alternative, reasonably explain why these strengths were not considered, this aspect of Jones/Hill's protest was clearly meritorious.

Even when the record reflected some consideration by the QCP of the level of performance and performance quality offered by Jones/Hill's proposal, we find, as we did in Rice, that the agency accepted, based upon unsupported assumptions and without adequate analysis, claims by the MEO/MS regarding its ability to achieve the same level of performance and performance quality offered in the private-sector offeror's proposal. Failure to perform an adequate analysis in this regard can result in giving one side (in this case, the MEO/MS) an unfair competitive advantage, because it is unreasonably freed of the cost burden associated with the other side's higher level of performance. We set out two examples here to illustrate why, in our view, Jones/Hill's protest was clearly meritorious in this regard, even if the record does not establish the precise cost implications of these issues.

First, as described in the utilities outcome section of its proposal, Jones/Hill proposed to maintain the NASL's street and parking lights through "both a proactive PM [preventive maintenance] program and a program to replace lights when they burn out." Supplemental Comments at 19; Jones/Hill Technical Proposal, vol. II, at 59-60. The agency, in comparing the MEO/MS and Jones/Hill's proposal, noted that the MEO/MS "did not adequately address street/parking [light] repair," and pointed out this inadequacy to the MEO/MS team. Agency Report, Tab 5, attach. 2, at 9. The MEO/MS team responded that its "maintenance concept for the street and parking lights at [NASL] is to run to failure and repair lights as required," and because of this, no adjustments to the MEO/MS were required. Id. Although there is nothing in the record setting forth the agency's views on this matter, the MEO/MS team's response was apparently considered acceptable by the agency with regard to the level of performance and performance quality, and no adjustment was made to the MEO/MS.

In its comments on the agency report, Jones/Hill questioned the reasonableness of the agency's apparent determination that the MEO/MS's "repair" approach would

provide the same level of performance and performance quality as Jones/Hill's proposed preventive maintenance and repair approach. Protester's Comments at 26-27. The agency, while recognizing that Jones/Hill's proposal offered a preventive maintenance and repair approach, while the MEO/MS offered a "failure/replacement approach," responded in its Supplemental Report at 3-4 that

[e]ven with the best preventive maintenance approach, some percentage of lights will probably fail before their scheduled replacement. If the [MEO/MS's] approach of having nighttime boiler operators replace lights from a ready stock immediately results in a probable outage rate of essentially the same percent, the end result is the same probable performance value and quality to the customer.

As noted by the GAO attorney at the ADR conference, the record did not include any contemporaneous explanation as to why the QCP had concluded that the MEO/MS "repair" approach would provide the same level of performance and performance quality as Jones/Hill's proposed preventive maintenance and repair approach, which may well have driven up the private firm's proposed cost. Moreover, the position advanced by the agency in its supplemental report (as set forth above) was by its own terms predicated on an analysis of the "probable outage rate" associated with each approach, and there was no indication that any such analysis had ever been done. Thus, with regard to this outcome, the record failed to reflect a reasonable basis for the agency's determination that the level of performance and performance quality that would be obtained under the MEO/MS would be the same as the level and quality of performance that would be obtained under Jones/Hill's proposal. See Supplemental Handbook, part I, ch. 3, ¶ H.3.e. Indeed, the agency agreed to take corrective action by reevaluating the different approaches to this outcome.

Second, with regard to the Fire Fighting School outcome, the record reflected that the QCP had noted that Jones/Hill's proposal included certain cleaning and maintenance services not provided for by the MEO/MS, and that the MEO/MS team had been informed of this apparent difference. AR, Tab 5, Letter from Source Selection Authority to the MEO/MS team regarding Quality Comparison Items for Clarifications/Revisions (May 3, 2000), encl. 1 at C.5.7-Fire Fighting School. In response, the MEO/MS team stated that "[t]he current MEO provides this service," explaining, among other things, that "[t]he majority of cleaning will be performed by the students following completion of each class" and "[m]inor touch-up cleaning is performed by the instructor." AR, Tab 5, attach. 2, MEO/MS Response to Leveling Issues, at 19. The students, however, were not included in the MEO/MS (the record is less clear about the instructors), and their labor costs were not otherwise accounted for in the MEO/MS.

Again, although there is nothing in the record setting forth the agency's views on this matter, the MEO/MS team's response was apparently considered acceptable. As pointed out by the GAO attorney at the ADR conference, the record did not

reasonably support the agency's determination that the revised MEO/MS, which apparently provided for much of the maintenance at the Fire Fighting School to be performed by students, offered the same level of performance and performance quality as Jones/Hill's proposal, which provided for the same maintenance services to be performed by dedicated personnel.

In addition, the MEO/MS's approach shifted whatever costs were involved outside the MEO/MS, while Jones/Hill's proposal included the costs for those personnel, thus rendering the resulting cost comparison unfair. See Imaging Sys. Tech., B-283817.3, Dec. 12, 2000, 2001 CPD ¶ \_\_\_ at 9 (in a public/private cost comparison, it is neither realistic nor fair to treat work as cost-free to the government merely because the work will be performed by government personnel outside the framework being studied). The Supplemental Handbook unambiguously requires that the MEO/MS include "all" labor and costs associated with the performance of the tasks required, and the agency is required to ensure, during its review of the MEO/MS, that those costs are accounted for.<sup>4</sup> Supplemental Handbook, part I, ch. 3, ¶ I; part II, ch. 2.

In sum, we believe that the Supplemental Handbook clearly informed the agency of two of its obligations in conducting a cost comparison under OMB Circular No. A-76: (1) to compare the MEO/MS with the selected best value, private-sector proposal and determine "whether or not the same level of performance and performance quality will be achieved," and, if not, make "all changes [to the MEO/MS] necessary to meet the performance standards accepted [in the private-sector proposal]"; and (2) to ensure that the MEO/MS includes the costs associated with the performance of the tasks required. Supplemental Handbook, part I, ch. 3, ¶ H.3.d, e; part II, ch. 2. Here, a reasonable inquiry would have promptly disclosed to the agency the absence of a legally defensible position to Jones/Hill's protest challenging the adequacy of the agency's comparison of the performance reflected in the NASL MEO/MS with the performance reflected in Jones/Hill's proposal, and the reasonableness of the agency's determination that the revised MEO/MS and Jones/Hill's proposal offered the same level of performance and performance quality. Thus, we regard Jones/Hill's protest as clearly meritorious, and find that the agency unduly delayed taking corrective action in response to the protest, given that it did not do so until after the submission of an agency report, the protester's comments, a supplemental agency report, supplemental comments, and an alternative dispute resolution conference during which the GAO attorney assigned to the protest informed the agency that it had significant litigation risk with regard to a number of issues raised by the protester. See York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, supra, at 5.

Accordingly, we recommend that Jones/Hill be reimbursed the reasonable costs of filing and pursuing its protest, including those incurred here, i.e., requesting a

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<sup>4</sup> As noted above, this issue related to the Fire Fighting School was one of the areas regarding which the agency agreed to take corrective action.

recommendation for costs. York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.--Costs, supra, at 6. Jones/Hill should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the Navy within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1) (2000).

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