

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-216516

**DATE:** November 19, 1984

**MATTER OF:** CACI, Inc.-Federal

**DIGEST:**

1. Contrary to the protester's contention that the agency improperly "normalized" proposed levels of effort in cost realism evaluation, the agency reviewed offerors' individual approaches and made its own assessment of the level of effort using the government estimate as a guide.
2. Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low staffing levels--a deficiency which was repeatedly pointed out in discussions--was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels.
3. Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in RFP which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation.
4. Upward cost adjustment of 69-percent of proposal in cost realism analysis, primarily due to evaluated increase in staffing levels, did not amount to rewriting proposal since agency only determined for evaluation purposes what probable and realistic cost of contracting with that offeror would be.

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5. Agency erroneously added personnel as direct charge in probable realistic cost analysis of offeror's cost proposal. Offeror was covered by cost accounting standards (CAS) and proposed personnel as part of indirect charge. Under CAS part 402, offeror must account for costs incurred for same purposes in like circumstances as direct costs only or as indirect costs only. Since offeror indicates that it always charged offered personnel as indirect charge and since government cannot legally dictate how offeror should establish accounting system, further discussions should be held to verify offeror's accounting practice and to clarify government requirements.
6. Award on cost-reimbursement contract made at proposed cost amount, without further discussions, where cost analysis of successful proposal shows realistic cost of proposal is \$920,000 (5.5 percent) less than proposed amount is unusual and poor business practice, although adjustments in cost analysis and evaluation that awardee's proposal was lowest, are not found unreasonable. Since protest is sustained on other grounds, discussions concerning evaluated overstated or excessive costs should be conducted.
7. Protest that proposed award fee should have been considered in probable cost evaluation of proposals on cost-plus-award-fee contract, where such evaluation is award determinative, is not meritorious, where protester submitted proposal after being fully informed that this was the way that proposals would be evaluated. Agency had reasonable basis for not evaluating proposed award fee and this evaluation did not violate any legal requirement.
8. Award of cost-plus-award-fee contract at proposed cost plus 10 percent award fee violates regulatory limit on award fee where government evaluation of costs was that they should be \$920,000 (5.5 percent) less than

proposed costs because award fee is then 10.6 percent of government evaluated reasonable cost of awardee's proposal.

#### BACKGROUND

On September 24, 1984, CACI, Inc.-Federal (CACI), protested the award under a request for proposal (RFP) by the Naval Supply Center (Navy), Oakland, California, of contract No. N00228-84-C-5005 to Bechtel Operating Services Company (Bechtel). This cost-plus-award-fee contract was for services and materials for the receipt and warehousing, kit assembly, preservation, packaging, packing, crating, integration and shipping of self-contained, relocatable modular hospital units.

On September 24, 1984, CACI also brought an action in the United States District Court for the District of Columbia (Civil Action No. 84-2971, CACI, Inc.-Federal v. United States, et al.) requesting a temporary restraining order and preliminary injunction against further performance of the Bechtel contract pending disposition of this protest and the ultimate review of the legality of the award by the court. By memorandum order dated September 26, 1984, the court issued a temporary restraining order requiring that the Navy issue a stop work order to Bechtel to cease immediately any performance under its contract pending a decision on the motion for preliminary injunction and that the General Accounting Office give expedited treatment to the CACI protest. On October 16, 1984, in a memorandum order, the court granted the motion for preliminary injunction.

This opinion responds to the court's request. See Applicators, Inc., B-215035, June 21, 1984, 84-1 C.P.D. ¶ 656. The record which our Office considered in this matter was primarily the pleadings and affidavits filed in the lawsuit, the Navy's cost analyses documents and Bechtel's and CACI's proposals. The last arguments and documents were received in our Office on October 19, 1984.

CACI's protest basically concerns the cost evaluation of CACI's and Bechtel's proposals. CACI asserts that this evaluation was improperly performed, and that either CACI should have received the award or further negotiations should have been conducted.

We sustain the protest on two separate grounds. First, we believe the Navy improperly performed the cost realism analysis because in the analysis it added certain personnel

as direct costs, despite the fact that CACI proposed these personnel as indirect costs. We find that this evaluation violated the Cost Accounting Standards (CAS), as further discussed below. Second, as discussed below, the award fee proposed and contracted for with Bechtel violated the applicable 10-percent regulatory fee limitation.

#### THE PROCUREMENT

The RFP was issued in December 1983 and solicited technical and cost proposals for the performance of the integration, assembly and warehousing services for 3 years and a phase-in period. The RFP also encompassed a number of options for shelter outfitting and preassembled module construction. The Navy states that this full complement of services had not previously been procured from commercial sources.

Proposals were received on March 19, 1984, from CACI, Bechtel, Holmes & Narver Services, Inc. (Holmes & Narver), and Pan-Am World Services, Inc. (Pan-Am). Technical proposals and revisions thereto were evaluated by a technical evaluation board. Cost proposals were separately reviewed. Written and oral discussions were conducted with all offerors. On August 14, 1984, the offerors were advised that their proposals were "acceptable" and "substantially equal" technically and that the predominant factor in determining the awardee would be the lowest cost, as evaluated on the basis of the government's determination of a realistic cost. Pan-Am dropped out of the competition because it was unable to submit further proposal revisions by the required deadline.

The three remaining offerors were expressly advised that award fee would not be considered part of the evaluated cost, although proposed base fee would continue to be considered part of this cost. The Navy states that it eliminated award fee from the cost evaluation to encourage offerors to offer a larger award fee instead of base fee. The option costs were also not part of the evaluated cost.

The best and final offers were received on August 31, 1984. The final proposed costs (excluding options) and base fee (not award fee) of CACI, Bechtel, and Holmes & Narver were as follows:

Bechtel . . . . .	\$16,739,609
Holmes & Narver . . . . .	12,666,127
CACI . . . . .	9,528,740

Holmes & Narver proposed a base fee equal to 1.5 percent of its proposed costs and an award fee equal to 7 percent of its proposed costs. Bechtel and CACI both proposed a zero-percent base fee but an award fee equal to 10 percent of their proposed costs, that is, \$1,673,961 and \$952,874, respectively.

The Navy evaluated the proposed costs, excluding award fee and options, of the offerors as follows:

Bechtel . . . . .	\$15,818,637
Holmes & Narver . . . . .	16,220,008
CACI . . . . .	16,123,757

The evaluated realistic cost of Bechtel is 5.5 percent below its proposed costs, while the evaluated realistic costs of Holmes & Narver and CACI are 28 percent and 69.2 percent, respectively, higher than their proposed costs. Based upon this evaluation, the Navy awarded the contract to Bechtel.

#### COST EVALUATION OF CACI PROPOSAL

##### 1. Generally

We have consistently held that considering evaluated costs instead of proposed costs provides a sounder basis for determining the most advantageous proposal, since the government is required--within certain limits--to pay the contractor's actual allowable and allocable costs. 52 Comp. Gen. 870, 874 (1973); Dynatrend, Inc., B-192038, Jan. 3, 1979, 79-1 C.P.D. ¶ 4 at 22. A government determination of evaluated realistic cost is no more than an informed judgment of what costs should be reasonably incurred by acceptance of a particular proposal. Grey Advertising Inc., 55 Comp. Gen. 1111, 1126 (1976), 76-1 C.P.D. ¶ 325 at 17-18, and cases cited therein. Determining whether submitted proposals are realistic as to cost must properly be left to the informed judgments and administrative discretion of the contracting agency, which is in the best position to judge the realism of costs and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. 50 Comp., Gen. 592, 600 (1971);

Raytheon Company, 54 Comp. Gen. 169, 184 (1974), 74-2 C.P.D. ¶ 137 at 19-20. These agency determinations should not be second-guessed unless they are not supported by a reasonable basis. Kentron-Hawaii, Limited v. Warner, 480 F.2d 1166, 1172 (D.C. Cir. 1973); Management Services, Inc., 55 Comp. Gen. 715, 724 (1976), 76-1 C.P.D. ¶ 74 at 10.

We will first discuss CACI's assertions concerning the evaluation of its proposal which caused its costs to be evaluated 69.2 percent higher than its proposed costs. CACI's proposal was rated technically acceptable as well as technically equal to Bechtel's proposal. CACI asserts that, therefore, no fair or rational cost realism analysis could have produced such an extraordinary upward adjustment of CACI's proposed costs. This adjustment was primarily caused by major evaluated increases in CACI's proposed staffing levels. CACI believes its staffing should have been considered sufficient in view of its acceptable technical rating and the Navy's actions were tantamount to an impermissible rewriting of CACI's proposal. Additionally, CACI has raised three specific concerns about its cost evaluation. First, CACI asserts that the Navy improperly evaluated the proposals against a Navy predetermined and undisclosed staffing estimate, that is, the proposed staffing was "normalized" to this estimate without considering the unique or differing performance approaches proposed by the various offerors. CACI asserts that "normalization" of staffing was irrational since the RFP solicited innovative approaches. CACI also asserts that the cost evaluation improperly eliminated its proposed use of Amtech Field Service Corporation (Amtech), a CACI affiliate with lower overhead rates, in the cost evaluation. CACI asserts that the Navy's use of higher CACI overhead rates in the evaluation caused its proposed costs to be improperly evaluated higher. CACI further argues that various personnel who were proposed as part of CACI's indirect costs were treated in the Navy cost evaluation as direct charges, which violated the CACI's CAS Disclosure Statement.

We have reviewed, in camera, the Navy cost evaluation of both CACI's and Bechtel's proposals. Although the government cost estimate was used by the Navy in evaluating CACI's proposal, it appears that the Navy primarily considered CACI's technical approach in evaluating CACI's cost proposal, both with regard to the level of effort proposed for each category of work and compensation levels to be paid, using the government estimate as a guide. In this regard, CACI's proposed personnel in each job category were not automatically adjusted to the government estimate of the needed personnel to perform the job. Some job categories

were accepted as proper and others were adjusted to levels of effort different from the specific government estimate for that category. We note that Bechtel's proposed levels of effort were accepted by the Navy in most cases, even where the government estimate was more or less than the Bechtel proposal. The final evaluated Bechtel levels of effort in some cases exceeded and in some cases were less than CACI's evaluated levels of effort. Consequently, we do not believe the Navy "normalized" CACI's and Bechtel's proposed personnel costs without consideration of the individual technical approaches.

We find, however, that the Navy's explanations of this matter are somewhat misleading. From reading the Navy's arguments, one could reasonably conclude that CACI's and Bechtel's proposals were only innovative as to their individual "bar coding" approaches. ("Bar coding" is a process for maintenance and control of inventory and records through a machine readable representation of data.) Further, one could conclude that adjustments were made to the proposals to bring them in line with the government estimate, as adjusted to take into account the lesser level of effort in certain categories of work thought achievable by "bar coding." The Navy seems to indicate that it used this "conservative" approach in evaluating CACI's proposal despite its disbelief that CACI's "bar coding" approach would really achieve savings in the level of effort. Therefore, we can see how Bechtel and CACI were misled into believing that "normalization" occurred in the cost evaluation.

It is apparent that the Navy and CACI disagree as to what level of effort CACI would take to satisfactorily perform this work in accordance with CACI's technical approach and the RFP requirements. It is also clear that the Navy believed that CACI was trying to "buy-in" and obtain this award with an unrealistically low level of effort and compensation system. CACI asserts that it is not "buying in" and that its innovative and proprietary "bar coding" approach would permit it to perform at its proposed level of effort. The Navy has provided detailed reasons critiquing CACI's particular "bar coding" approach, while CACI has defended its approach and stated that the Navy misunderstood its proposal. Based on the record, and in view of the broad discretion vested in the contracting agency in these technical/cost matters, we cannot say that the agency's position is unreasonable. See Electronic Data Systems Federal Corporation, B-207311, Mar. 16, 1983, 83-1 C.P.D. ¶ 264.

Furthermore, the record indicates that during discussions, the Navy repeatedly told CACI that it was significantly understaffed and specifically indicated the areas where this understaffing was perceived to exist. In this case, CACI submitted a number of proposal revisions. CACI made some adjustments to its proposed levels of effort as a result of these discussions and provided various explanations of why it could perform the work with its proposed level of effort. These adjustments, however, did not satisfy the Navy and the explanations did not persuade the Navy. Contrast Bank Street College of Education, B-213209, June 8, 1984, 84-1 C.P.D. ¶ 607 at 14, where the agency did not disclose concern to the protester over a low proposed level of effort in discussions, but the agency's cost evaluation adding significantly more staffing was upheld as reasonable.

It is admittedly unusual that the cost of a technically "acceptable" and "equal" proposal would be adjusted upwards 69 percent, primarily because of evaluated staffing. Under many procurements, this would be considered in the technical evaluation as reflecting adversely on the offerors' understanding of the government's requirements. However, a cost analysis can be a function entirely separate and not related to the outcome of a technical evaluation. Vinnell Corporation, B-203806, Aug. 3, 1982, 82-2 C.P.D. ¶ 101 at 8. A review of the technical evaluation criteria in this RFP shows how such a large adjustment to a technically acceptable offer could occur.

Under the RFP technical evaluation scheme, certain minimum requirements had to be met in order for proposals to be considered acceptable--none of which directly addressed proposed staffing levels. Additionally, the offerors' technical approach was graded against certain criteria in descending order of importance as follows:

- a. Technical Approach
- b. Resources Availability
- c. Management Capability
- d. Experience
- e. Cost

Only under the "Resources Availability" criterion was proposed staffing to be specifically judged and staffing levels were only one subelement of that criterion. Consequently, under the Navy's technical evaluation, a proposal



with "unrealistically" low staffing levels could be rated acceptable and equal to other proposals with much higher staffing levels by virtue of receiving higher scores in the top-ranked "Technical Approach" evaluation criterion.

We have noted that technically equal proposals may be evaluated as having very different realistic costs. The Bendix Corporation, B-208184, Sept. 16, 1983, 83-2 C.P.D. ¶ 332 at 5-6. Despite the size of the upward adjustment to CACI's proposal, this does not amount to rewriting CACI's proposal; the Navy only determined, for evaluation purposes, what the probable and realistic cost of contracting with CACI would be. Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 C.P.D. ¶ 422 at 9. The characterization in the technical evaluation of CACI's staffing as "average" does not bind the agency to accept that staffing in the cost evaluation. See Vinnell Corporation, B-203806, supra, at 8; Computer Sciences Corp., B-210800, supra, at 9.

Based upon our review of the cost evaluation and record (except for our comments below on the Navy's treatment of CACI's proposed indirect cost personnel), we cannot say that the adjustments to CACI's proposed costs were irrational or not soundly based, despite our inability to completely rationalize the cost evaluation document with the subsequent Navy explanations. See PRC Computer Center, 55 Comp. Gen. 60 at 78 (1975), 75-2 C.P.D. ¶ 35 at 22; Grey Advertising, Inc., 55 Comp. Gen., supra, at 1134-1135. In this regard, it appears that the Navy has documented in the cost analysis document the reasons for each adjustment in CACI's proposed levels of effort and compensation levels. It also appears that these adjustments were based upon the Navy's assessment of CACI's proposal using the government estimate as a guide in the evaluation. Finally, it seems clear that CACI was adequately apprised that its proposed level of effort was perceived to be deficient.

## 2. Amtech Overhead Rates

CACI states that the Navy did not consider its use of Amtech in calculating the indirect rates in the cost evaluation. However, our in camera review substantiates the Navy's position that Amtech's proposed rates were adopted for purposes of the cost evaluation, without verification with cognizable audit agencies. Such verification may now be achievable in view of the recommendation below.

### 3. Consistency with Cost Accounting Standards

As part of the cost analysis, the Navy added a certain level of effort to CACI's proposed accounting function as a direct charge. CACI proposed no level of effort for its accounting function because it proposed charging this cost as an indirect cost.

CACI asserts that the Navy's treatment of its accounting function as a direct charge would cause CACI to violate its CAS Disclosure Statement filed pursuant to 50 U.S.C. app. § 2168(h) (1982). The Navy responds that since dedicated accounting personnel are necessary to perform this contract, CACI's charging this cost to its indirect account instead of as a direct cost probably violates CACI's CAS Disclosure Statement. From our review, it appears that CACI consistently indicated to the Navy that this function would not be a direct charge to the contract under its accounting system, but rather would be included as a part of CACI's indirect pool costs charged under the contract. The Navy states that CACI's approach reflects a misunderstanding of the RFP's extensive cost reporting requirements and that only a dedicated accounting function can fulfill contract requirements. CACI states that the RFP did not require a dedicated accounting function and to require this now would necessitate an RFP amendment. This matter was discussed on a number of occasions during negotiations in an obviously inconclusive manner. Also, the parties apparently disagree as to what level of effort will be required to perform this function, whether it be a direct or indirect charge under the contract, and as to whether CACI's existing accounting personnel in its indirect cost pool could properly perform these contract functions. Finally, the Navy claims that it asked CACI to certify that this charge would never be charged directly. CACI denies this and questions whether such a request would have been appropriate in any case.

We have reviewed the CACI CAS Disclosure Statement and have determined that the accounting function is not clearly indicated to be either a direct or indirect charge under that statement. It is notable that neither the Navy nor CACI has pointed to a particular paragraph in the Disclosure Statement which allegedly supports their respective positions.

The Navy says that because dedicated accounting personnel are necessary, its cost must be charged as a direct cost to the contract because they can be identifiable with a particular final cost objective, citing Defense

Acquisition Regulation (DAR) § 15-202(a) (Defense Acquisition Circular (DAC) No. 76-33, Feb. 15, 1982). The Navy contrasts "direct" charges with "indirect" costs which are incurred for common or joint objectives, citing DAR § 15.203(a) (DAC No. 76-33, Feb. 15, 1982).

However, the Navy fails to recognize that part 402 of the CAS supplements this general rule for CAS-covered contractors, such as CACI. See DAR part 3-12 (DAC No. 76-46, Aug. 24, 1983); DAR Appendix "O"; 4 C.F.R. part 402 (1984). Section 402.40 of CAS, 4 C.F.R. § 402.40 (1984), states:

"§ 402.40 Fundamental requirement.

"All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective. Further, no final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final objective." (Emphasis added.)

CACI asserts that it always charges the accounting functions as an indirect charge on all its contracts. There is no indication that the Navy attempted to verify whether or not this was the case during the audit or negotiations. Further, there is no indication that the Navy attempted to ascertain whether CACI's existing accounting personnel (apparently charged to its indirect cost pool) had any excess capacity to accommodate the Navy's requirements. In any case, even assuming the RFP required dedicated accounting personnel, CACI was required to cost this function consistent with CAS part 402. If CACI has provided the accounting function as an indirect charge on other contracts (government or nongovernment), CAS part 402 (4 C.F.R. part 402 (1984)) would seem to require CACI to charge this function to this contract as an indirect charge. If this contract required something different from CACI's ordinary accounting functions, it is possible that CACI could elect to charge this as a direct charge. But, even in this event, it would be CACI's initial election of how it wanted

to manage its accounting system, so long as CACI complied with CAS. The government cannot legally dictate how an offeror should establish his accounting system. Dynatrend, Inc., B-192038, supra, at 19.

In view of the foregoing, we find that the Navy improperly added the accounting function as a direct charge without proper verification of the appropriate treatment of this cost under CACI's accounting system and the CAS. Therefore, we sustain this aspect of the protest and recommend that revised proposals be submitted. From our review of CACI's final cost proposal, CACI seemed to propose Amtech--its affiliate--to perform this function and the costs for this function would be part of Amtech's indirect cost pool. Since Amtech's CAS Disclosure Statement was not provided this Office, we can only speculate that Amtech's accounting system is similar to CACI's accounting system. In any event, it is not clear what effect this would have on the cost evaluation. Although CACI speculates that deletion of the direct charge adjustment made for the accounting function would make it the low evaluated offeror, it may be that the Navy had legitimate concerns about CACI's proper satisfaction of the Navy's accounting requirements.

We have found no specific requirement in the RFP for a dedicated accounting staff. The record is conflicting as to whether the Navy wanted this "dedicated" function at the Navy's Oakland, California, facility or in the CACI home office. Although the contracting officer says in her affidavit that she did not say or convey to CACI that these employees had to be located in California, the cost analysis document justified adding accounting positions to the level of effort because "the long distance accounting approach" cannot meet the stringent RFP cost control and reporting requirements. Since this protest has been sustained, if the Navy has a legitimate requirement for the accounting function or any other function not specifically designated in the RFP to have dedicated personnel, offerors should be advised and given an opportunity to submit proposals on that requirement in accordance with proper accounting practice and the Navy should evaluate the proposed approaches in accordance with CAS.

In this regard, the Navy also added personnel to CACI's management control function. We are unable to determine from the record whether these added personnel would be proposed as part of CACI's or Amtech's indirect cost pool.

Discussions should be conducted with CACI on this point to assure compliance with CAS and that RFP requirements are met. The CACI CAS Disclosure Statement does specifically indicate that "contract administration" is treated as an indirect charge in CACI's accounting system.

In any case, the Navy is entitled to perform a cost analysis and conduct such discussions as required to verify that whatever approach is proposed will satisfy the RFP's accounting, reporting, and/or contract administration functions. Even if any of these cost areas are eventually considered to be properly part of the indirect cost pool, the Navy would be entitled to review the offerors' indirect cost rates to ascertain what effect, if any, proper satisfaction of these requirements would have on the indirect cost pool and rates.

#### AWARD AT ESTIMATED COST HIGHER THAN EVALUATED COST

CACI protests the award of a contract to Bechtel at its proposed estimated cost of \$16,739,609, because Bechtel's proposal was evaluated to cost only \$15,818,637 and the award amount exceeded CACI's evaluated cost of \$16,123,127. (Actually, the contract amount shown on the contract document includes the unevaluated options, which may or may not be exercised. Therefore, the total contract estimated cost is shown on the contract document as \$18,844,193.) From reviewing the cost analysis document, it appears that large reductions in Bechtel's evaluated cost from its proposed cost can be accounted for in two areas. First, there was a significant reduction in the materials and supplies from those proposed by Bechtel. The analysis attributes this reduction to the determination that less materials and consumables for packing and crating would be needed than were proposed. The second, and the majority of the total \$920,972 reduction from Bechtel's proposed cost, is attributed to a reduction in the level of effort of a Bechtel proposed subcontract with the BDM Corporation (BDM) for automatic data processing. The Navy was so impressed by Bechtel's particular "bar coding" approach that it believed the labor hour estimate proposed under the BDM subcontract was excessive when compared to the government estimate for this task.

The Navy and Bechtel assert that it is entirely proper to make an award in an amount higher than the evaluated costs because the contract is a cost-reimbursement type which only obligates the Navy to pay the costs actually incurred by the contractor in accordance with certain specific cost standards, provided they are reasonable,

allocable and otherwise allowable. See DAR § 3-405.5 (1976 ed.). Additionally, it is asserted that the Navy can control contract costs through use of the technical direction clause, award fee mechanism, the Allowable Cost, Fee and Payment clause (DAR § 1-203.4 (DAC No. 76-17, Sept. 1, 1978)), the subcontract clause, and other contract provisions. Consequently, the award amount is only a ceiling beyond which it may be more difficult to get costs reimbursed. According to the Navy, the evaluated cost, on the other hand, is the government's educated guess of what the contract will really cost for the purpose of an award judgment. The contracting officer also states that reopening negotiations after evaluation of best and final offers appeared unnecessary because, under the contract provisions, Bechtel required approval from the contracting officer of the BDM subcontract so the costs were considered easily controlled.

It is clear, as even CACI concedes, that adjustment to proposed costs to determine realistic costs can be both downward and upward. Computer Sciences Corp., B-210800, supra. Moreover, this Office has recognized that contract awards can be in a different amount than the evaluated costs. Bell Aerospace Company; Computer Sciences Corp., 54 Comp. Gen. 352 (1974), 74-2 C.P.D. ¶ 248, as explained in GTE Sylvania, Inc., 57 Comp. Gen. 715 at 755 (1977), 77-2 C.P.D. ¶ 422 at 49; Prospective Computer Analysts, B-203095, Sept. 20, 1982, 82-2 C.P.D. ¶ 234 at 5. We do not agree with CACI that this large reduction to Bechtel's proposed costs necessarily makes Bechtel's proposal less than equal to CACI's under the technical evaluation criteria or is tantamount to rewriting Bechtel's proposal. See Computer Sciences Corp., supra, at 9. We have reviewed, in camera, the downward adjustments made by the Navy to Bechtel's cost proposal in its cost realism analysis and cannot say they are unreasonable. Grey Advertising Inc., 55 Comp. Gen., supra, at 1134-1135. Consequently, based on the foregoing, we cannot find the Navy's assessment that Bechtel's evaluated costs were lower than CACI's evaluated costs was unreasonable.

However, award without further discussions under these circumstances is certainly an unusual and poor business practice. Consequently, inasmuch as we have sustained this protest on other grounds, we believe the Navy should conduct discussions with Bechtel in an effort to negotiate the evaluated overstated or excessive costs prior to award. See

Griggs & Associates, Inc., B-205266, May 12, 1982, 82-1 C.P.D. ¶ 458; Bank Street College of Education, B-213209, supra, at 23; Ikard Manufacturing Company, 63 Comp. Gen. 239 at 241 (1984), 84-1 C.P.D. ¶ 266 at 4. As we stated in 50 Comp. Gen. 739, 745 (1971).

". . . the time for exploring the cost aspects of a proposal--that is, all proposals within a competitive range--is during the course of negotiations and not at some time after receipt of best and final offers . . ."

#### TREATMENT OF AWARD FEE IN COST EVALUATION

CACI has complained that if the award fee had been considered in the cost evaluation then it would clearly have been the low evaluated offeror because of Bechtel's significantly higher proposed award fee of \$1,673,961 as opposed to CACI's award fee of \$952,874. However, CACI was fully aware that the award fee would not be evaluated when it submitted its best and final offer. Indeed, CACI took full advantage of this evaluation scheme by proposing a maximum 10 percent award fee. CACI cannot now complain about this evaluation scheme. See section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984). In any case, it is clear that the agency had a legitimate and reasonable basis for not evaluating award fee as part of the total cost in evaluating proposed costs, that reason being to encourage offerors to propose less base fee and more award fee. In any case, there is no legal requirement that award fee be evaluated as part of the cost evaluation where the evaluation is in accordance with the scheme disclosed to the offerors.

#### VIOLATION OF LIMIT ON AWARD FEE

CACI also asserts that the award fee in the Bechtel contract violated pertinent fee limitations. We agree. DAR § 3-405.5(d) (1976 ed.) states that "maximum fee (base fee plus award fee) [on a cost-plus-award-fee contract] shall not exceed the limitations stated in 3-405.6(c)(2)." DAR § 3-405.6(c)(2) (DAC No. 76-16, Aug. 1, 1978) states in pertinent part:

"(2) 10 U.S.C. 2306(d) provides that in the case of a cost-plus-fixed-fee contract the fee shall not exceed ten percent (10%) of the estimated cost of the contract, exclusive of

the fee, as determined by the Secretary concerned at the time of entering into such contract. . . ."

As indicated in DAR § 3.405.6(c)(2), supra, the estimated cost is to be determined by the government at the time of entering into a contract. This government determination could only be done by a price or cost analysis. See DAR § 3-806 (DAC No. 76-7, Apr. 29, 1977); DAR § 3-803 (DAC No. 76-40, Nov. 26, 1982); DAR § 3-807(a)(3) (DAC No. 76-16, Aug. 1, 1978); DAR § 3-807(d) (DAC No. 76-16, Aug. 1, 1978).

In this case, Bechtel's proposal for an award fee of \$1,673,961 with no base fee was based upon its proposed cost of \$16,739,609. The Navy's evaluated cost estimate of the contract, however, was only \$15,818,637. Consequently, since the Navy accepted Bechtel's proposal without further discussions, Bechtel's fee is 10.59 percent of the Navy's evaluated estimated cost.

The Navy and Bechtel themselves disagree on the maximum award fee available under the contract. The Navy recognizes that the contractually agreed upon amount of \$1,673,961 as the limitation, but argues that the "estimated costs," on which the fees are based, referenced in the regulation are those estimated amounts that have been contractually agreed upon. The Navy analysis effectively ignores the requirement for an independent government assessment of Bechtel's costs. The regulation does not indicate that the contract's estimated costs is what is referenced in determining the limit on fee; rather, the regulation contemplates a separate government determination of the estimated costs.

Bechtel asserts that the maximum award fee would be 10 percent of the Navy's cost realism estimate, i.e., \$1,581,864, because DAR § 3-405.5(d), supra, and § 3-405.6(c)(2), supra, make this amount a ceiling on the award fee "by definition" such that this limitation cannot be violated by the award document. However, it certainly is not proper to contract in violation of the regulations and rely upon the regulations to reform the contract. Cf. B. B. Saxon Company, Inc., 57 Comp. Gen. 501, 506 (1978), 78-1 C.P.D. ¶ 410 at 9. The very disagreement of the parties on this point shows the need for further negotiations. Finally, it is argued that Bechtel may not in fact earn in excess of a 10-percent award fee because only "excellent" performance, which is speculative, would allow Bechtel to earn all the award fee permitted by the contract. However, DAR § 3-405.5(d), supra, and DAR § 3-405.6(c)(2), supra, govern contracts as they are



awarded. Therefore, this argument has no merit and the protest is sustained on this point.

CONCLUSION

Based upon the foregoing, CACI's protest is sustained. In accordance with the guidance set forth in this decision, there should be further negotiations with the offerors in the competitive range and revised cost proposals should be solicited. Unless Bechtel is the successful offeror on this recompetition, its contract should then be terminated.

*for Milton J. Fowler*  
Comptroller General  
of the United States