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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: University Research Company, LLC

File: B-294358.8; B-294358.9; B-294358.10

Date: April 6, 2006

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Tamara F. Dunlap, Esq., and David S. Stern, Esq., Smith Pachter McWhorter, and Joseph J. Petrillo, Esq., Petrillo & Powell, for the protester.

John E. Jensen, Esq., Devon E. Hewitt, Esq., Daniel S. Herzfeld, Esq., and Orest J. Jowyk, Esq., Pillsbury Winthrop Shaw Pittman, for IQ Solutions, Inc., an intervenor. Mogy E. Omatete, Esq., Department of Health and Human Services, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that agency performed an unreasonable technical evaluation when it elected not to revise previous evaluation scores as a result of corrective action limited to receiving revised proposals addressing only reproduction services is denied where the evaluation approach was consistent with the solicitation's evaluation scheme.
 2. Protester's challenge to agency's decision to make an upward adjustment to the protester's proposed costs is denied where the record shows that the adjustment was reasonably tailored to address a unique feature in the protester's cost proposal, and that if the adjustment had not been made, there was a risk that the predictive value of the cost evaluation would have been undermined.
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DECISION

University Research Company, LLC (URC) protests a decision by the Substance Abuse and Mental Health Services Administration (SAMHSA), Department of Health and Human Services (HHS), to reselect IQ Solutions, Inc. for the award of a contract pursuant to request for proposals (RFP) No. 277-04-6091, issued for the operation of the SAMHSA Health Information Network. URC argues that the agency's remedial review of reproduction costs--undertaken in response to a decision from the Court of Federal Claims--and its decision to make no changes in the technical evaluation scores as a result of the revisions made to the proposals, were unreasonable.

We deny the protest.

BACKGROUND

This is the third decision by our Office addressing this procurement. The agency remedial action reviewed here was undertaken after the Court of Federal Claims concluded that HHS acted arbitrarily by substituting a government estimate for the reproduction costs calculated by URC and IQ in their cost proposals; hence, the court held that the agency improperly normalized¹ those costs. University Research Co., LLC v. United States, 65 Fed. Cl. 500, 513 (2005). Most of the other elements of the evaluation here have been reviewed in either our prior decisions, or the prior decision of the court, and were not part of the remedial action that is the subject of this protest. We set forth below a limited overview of this procurement.

The RFP here was released on December 19, 2003, and sought offers for a contract that would realign SAMHSA's health information dissemination efforts, which were previously obtained under multiple contracts. University Research Co., LLC, B-294358 et al., Oct. 28, 2004, 2004 CPD ¶ 217 at 2 ("University Research I"). Specifically, this solicitation includes the operation of the National Clearinghouse for Alcohol and Drug Information, the National Mental Health Information Clearinghouse, and certain support services for the SAMHSA Office of the Administrator. A minor part of the dissemination efforts covered by this contract involves the reproduction of health information materials. See RFP attach. 1 (Performance Work Statement).

The RFP was set aside for small businesses, and anticipated the award of a cost-plus-award-fee contract for a base period of 1 year followed by four 1-year options. RFP at 1, 56. Section M of the RFP advised that "[a]lthough technical factors are of paramount consideration in the award of the contract, past performance and cost/price are also important to the overall contract award decision." RFP at 70. The RFP also identified four technical evaluation criteria (totaling 100 points) and advised that past performance would be worth an additional 36 points. RFP at 70-73. The four technical evaluation criteria and the weight assigned to each were: (1) understanding the project, 15 points; (2) technical approach, 35 points; (3) key personnel, 35 points; and (4) management plan and facilities, 15 points.

¹ Our Office has recognized that when an agency performs a cost realism analysis, it may be appropriate to normalize certain costs in order to achieve a greater degree of cost realism; generally, the purpose of normalizing is to segregate cost factors which are "company unique" from those that are generally applicable to all offerors and therefore subject to normalization. SGT, Inc., B-281773, B-281773.4, Apr. 1, 1999, 99-1 CPD ¶ 77 at 8.

By the February 6, 2004, initial closing date, HHS received proposals from six offerors. Shortly thereafter, the agency established a competitive range for award comprised of the proposals submitted by IQ, URC, and a third company. After discussions, receipt of revised proposals, and reevaluation, HHS concluded that IQ's proposal offered the best value to the government.

URC filed a protest with our Office challenging that decision. During that protest, the selection official admitted during a hearing that her selection document misstated the award recommendation she had received from agency project officers, who are allowed under HHS procedures to make award recommendations along with those made by agency evaluators. University Research I, *supra*, at 6-7. As a result, we sustained URC's protest, and recommended that the agency make a new selection decision using a different selection official. *Id.* at 11.

On December 22, 2004, a new selection official again selected IQ for award. In the areas of past performance and technical merit, the selection official made minor changes to the initial ratings that need not be set forth here. More significant adjustments, however, were made in the area of cost realism. With respect to IQ, the agency added the cost of two full-time speechwriters to the proposal; normalized four elements of other direct costs applicable to all offerors; and normalized the estimated savings to be recovered through user fees. Source Selection Determination, Dec. 22, 2004, at 7-9. In all, IQ's proposed costs were adjusted upward by approximately **[deleted]**.² With respect to URC, the selection official's adjustments were limited to the second and third types of adjustments described above--*i.e.*, normalized costs for the four elements of other direct costs and normalized estimated savings to be recovered through user fees. In all, URC's proposed costs were adjusted upward by approximately **[deleted]**.³

As before, the selection official set out a summary of the final technical and past performance scores of both offerors (as modified during the reevaluation), and the total proposed and evaluated costs. This summary is reflected below:

² Source Selection Determination, Dec. 22, 2004, at 14 (showing IQ's proposed costs as **[deleted]**, and its evaluated costs as \$61.130 million).

³ Source Selection Determination, Dec. 22, 2004, at 14 (showing URC's proposed costs as **[deleted]**, and its evaluated costs as \$67.274 million).

	IQ Solutions	URC
Final Technical Score	94.4 points	92.8 points
Final Past Performance	33.12 points	32.33 points
Total Proposed Costs	[deleted]	[deleted]
Total Evaluated Costs	\$61.130 million	\$67.274 million

Id. The selection official reasoned that since the technical and past performance scores were essentially equal, IQ’s proposal, with its lower evaluated costs, offered the best value to the government. Id.

After receiving notice of the agency’s revised selection decision, and a subsequent debriefing, URC filed a second protest to our Office. URC’s second protest challenged almost every facet of the revised evaluation.

On April 20, 2005, our Office denied URC’s second protest, but noted four separate errors in the agency’s evaluation and cost realism review. University Research Co., LLC, B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 27-29 (“University Research II”). However, none of these errors resulted in a reasonable possibility of prejudice to URC, id., as none of them led our Office to conclude that, but for the agency’s actions, URC would have had a substantial chance of receiving the award.⁴ McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996). In this regard, the corrected final scores and evaluated costs (accounting for these errors) reflected in our second decision are as follows:

⁴ For the record, and because HHS largely incorporates our earlier findings into its current analysis, the specific errors noted in our second decision were that: (1) IQ’s technical score should be lowered from 94.4 to 92.2 to give proper effect to the selection official’s decision to eliminate the impact of the significantly lower scores given URC by one evaluator (rather than remove the lowest score given each offeror, as the selection official initially elected); (2) IQ’s past performance score should be lowered from 33.12 to 32.16, and URC’s score lowered from 33.23 to 33.12, to correct averaging errors in the agency’s past performance review; (3) IQ’s evaluated costs should be adjusted upwards by **[deleted]**, to capture the cost of **[deleted]** additional square feet of warehouse space not accounted for in that company’s proposal; and (4) URC’s evaluated costs should be lowered by **[deleted]**, to reflect the application of URC’s lower G&A rate, rather than its subcontractor’s higher rate, to an otherwise appropriate adjustment to URC’s other direct costs. Id.

	IQ Solutions	URC
Final Technical Score	92.2 points	92.8 points
Final Past Performance	32.16 points	33.12 points
Total Proposed Costs	[deleted]	[deleted]
Total Evaluated Costs	\$62.118 million	\$67.198 million

University Research II, *supra*, at 27.

Upon receipt of our second decision, URC filed a protest at the Court of Federal Claims, reiterating several of the challenges to the evaluation URC had raised here. In all respects but one, the court reached the same conclusions as our Office; however, in the one of the four areas of other direct costs that were normalized by the agency, *i.e.*, reproduction costs, the court concluded that the agency’s actions were arbitrary. University Research Co., LLC v. United States, *supra* (“University Research III”). In the court’s view, URC’s advantage over IQ in the area of reproduction costs “could have far exceeded [IQ’s] overall edge of \$6.1 million;” thus, the court enjoined the agency from proceeding with its award to IQ. *Id.* at 513, 515.

Faced with the court’s decision, HHS elected to clarify its requirement for reproduction work, reopen discussions with URC and IQ, and seek revised cost information (and revised technical proposals, if needed) limited to the subject of reproduction services. AR, Tab 7. At first, URC opposed the corrective action, arguing that IQ might improperly adopt URC’s approach to meeting the agency’s reproduction needs, thereby eliminating URC’s competitive advantage in this area. AR, Tab 8. After IQ represented to the parties that it would not adopt URC’s approach, URC withdrew its objection and reported to the court that the parties had reached an agreement on corrective action. AR, Tab 9.

Subsequently, on July 13, HHS issued an amendment to the solicitation with significant upward revisions to the amount of reproduction—essentially, photocopying—anticipated here. Specifically, the amendment advised that it was providing information “to replace the statement given in Task IV, Section C.1 of the Statement of Work as Bullet 11.” RFP amend. 2, at 2.⁵ The information provided in

⁵ The original provision in the RFP stated: “Reproduce (black and white—60 percent and color—40 percent) approximately 1.6 million pieces (single sheets) each month during the first year of operation, with a 15-20 percent increase for each year

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amendment 2 consisted of annual estimates for the base year, and for each of the 4 option years, of the amount of black and white pieces (described as single sheets) and color pieces that would need to be reproduced under the contract. The new estimates were:

Annual Reproduction Estimates
(stated in millions of pieces)

	Black and White	Color	Total
Base Year	22.2	14.8	37.0
Option Year 1	25.6	17.0	42.6
Option Year 2	28.9	19.6	48.5
Option Year 3	33.3	22.5	55.8
Option Year 4	38.3	25.9	64.2
All Years	148.2	99.9	248.1

RFP amend. 2, at 2. In addition, a request for clarifications letter was provided to both URC and IQ; this letter sought revised reproduction costs and any changes to each offeror’s approach to providing reproductions. AR, Tabs 11-12.

On July 26, responses were received from both URC and IQ. The responses were reviewed by a technical team, and by a cost analyst, who prepared discussion questions for both offerors. The technical reviewers concluded that the reproduction approaches of both offerors would meet the government’s requirements, while the cost analyst raised matters to be addressed in each offeror’s final proposal revisions (FPR). Contracting Officer’s (CO) Statement at 2. On October 11, FPRs were received from both offerors. The FPRs were reviewed by the CO and the cost analyst, as the technical reviewers had identified no additional issues that needed to be addressed. *Id.* at 3. The total revised reproduction costs proposed by the offerors were very close: URC estimated its reproduction costs at [deleted], IQ estimated [deleted]. AR, Tab 41, at 8, 10.

URC’s revised proposal, including its FPR, introduced a pricing feature we will refer to as a “two-tiered, fixed-price cap.” Specifically, URC offered to charge the agency a fixed price—applicable to both black and white and color impressions⁶—of

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thereafter.” RFP attach. 1 (Performance Work Statement), at 29. Upon deletion of this provision, there was no guidance in the solicitation regarding monthly amounts of copying.

⁶ During discussions, and in response to questions raised by URC, HHS changed the terminology to describe the amount of photocopying required by the solicitation from “pieces” to “impressions.” AR, Tab 24 (RFP amend. 4, at 1). The distinction
(continued...)

[**deleted**] per impression, provided that the number of impressions in any given month did not exceed one-twelfth of the total annual estimate.⁷ AR, Tab 31 (URC's FPR), at 9. In the event the number of impressions in any given month were to exceed one-twelfth of the total annual estimate, URC offered a higher combined price of [**deleted**] per impression; this higher price is applicable only to the number of required impressions in excess of the URC-imposed limit. Id. The lower-priced cap of [**deleted**] per impression is fixed for the life of the contract. Id. at 15. The higher-priced cap of [**deleted**] per impression is fixed for the base year, and escalates annually thereafter.⁸ Id. at 9.

In contrast, IQ's revised proposal, including its FPR, adopts a more traditional approach. IQ does not propose fixed-price caps, but instead calculates separate estimated unit costs for black and white impressions, and for color impressions, and does so for the base year, and each option year. AR, Tab 32, at 10. IQ's proposal also provides detailed supporting calculations showing how it estimated the proposed unit costs. For example, in the base year IQ estimates a unit cost of [**deleted**] for black and white impressions, and [**deleted**] for color impressions. Id.

In attempting to evaluate the different cost approaches, the agency noted that URC's proposed costs were calculated entirely using the lower fixed-price cap amount, based upon an apparent assumption that HHS would use the risk of higher costs to smooth out fluctuations in the workload over the course of the year. See Protester's Comments, Feb. 13, 2006, at 16-17. Given URC's approach, HHS asked for monthly information on photocopying from its incumbent contractor, which is also URC's proposed subcontractor for this work. The incumbent contractor provided the agency with historical data showing significant seasonal fluctuation in the agency's clearinghouse activity--the activity which generates the demand for photocopying. AR, Tab 33, at 1. Using this historical information, HHS concluded that the number of impressions would exceed the monthly limit set by URC in 5 of 12 months each year. As a result, the agency decided that URC's approach presented a high risk that costs would be higher than those reflected in the company's proposal, and

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captured by this change is not at issue in this protest, and will not be discussed here; however, we will use the term "impressions" from this point forward.

⁷ URC refers to its pricing approach as a "cap," AR, Tab 31, at 9, although in actuality URC's approach is more like a conditional fixed price, as we see no indication in this record that URC will ever bill the agency less than [**deleted**] per impression. Nonetheless, for ease of reference, we will use the nomenclature adopted by URC and the agency, and refer to this device as a fixed-price cap.

⁸ G&A and fee are also added to these "caps," the agency is not billed at these amounts. See AR, Tab 31, at 17-18.

recalculated URC's costs applying the higher fixed-price cap for 5 months of each year. AR, Tab 35.

With respect to IQ's proposed photocopying costs, HHS reviewed the calculations provided in IQ's revised proposal, and decided that there was little risk of a cost overrun in the proposal. As a result, the agency made no adjustment to IQ's proposed photocopy costs. AR, Tab 39.

On December 20, 2005, the selection official prepared a revised selection document, again selecting IQ for award. AR, Tab 41. In many respects, the most recent selection decision builds on the analysis and evaluation results previously reviewed and found reasonable by our Office, and by the court.

To summarize the revised selection document, we start by noting that the selection official observed that the reproduction effort here was, proportionately, a small part of the effort envisioned by this contract. In this regard she estimated that the reproduction effort would account for approximately \$4 to \$5 million of the total estimated costs of \$60 to \$65 million. AR, Tab 41, at 4. She also explained that, in her view, there was nothing in the limited revisions here that should generate any change to the technical or past performance scores given these offerors. Specifically, she concluded that both firms would be able to fulfill the government's reproduction requirements with their approaches; she reached this conclusion based on input received from agency technical experts. As a result, she elected not to adjust the technical scores of either offeror based on their approaches to photocopying. Id.

With no changes to the technical and past performance scores assigned to these proposals, the selection official concluded the proposals could be viewed as essentially equal. The relevant point scores are set forth below.

	IQ Solutions	URC
Final Technical Score	92.2 points	92.8 points
Final Past Performance	32.16 points	33.12 points

Id. at 15.

With respect to the evaluation of costs, our table below attempts to isolate the relative cost of, and cost realism adjustments to, the revisions made to these proposals after the corrective action taken in response to the court's decision. Thus, we: (1) show the total proposed costs of both offerors less their prior proposed costs of reproduction (including fee, etc.); (2) identify each offeror's revised proposed costs for reproduction; (3) provide the sum of numbers (1) and (2) above

to show each offeror's revised total proposed costs; (4) show the total evaluated costs, including all cost realism adjustments other than those made to revised reproduction costs; (5) identify the cost realism adjustment made to each offeror's revised reproduction costs; and (6) provide the sum of numbers (4) and (5) above to show each offeror's total revised evaluated costs at the end of the agency's cost realism assessment.

	URC	IQ
(1) Total Proposed Costs (less prior Proposed Reproduction Costs)	[deleted] (AR, Tab 41, at 10)	[deleted] (AR, Tab 41, at 8)
(2) Revised Proposed Reproduction Costs	[deleted] (AR, Tab 41, at 10)	[deleted] (AR, Tab 41, at 8)
(3) Total Revised Proposed Costs	[deleted] (AR, Tab 41, at 14)	[deleted] (AR, Tab 41, at 14)
(4) Total Evaluated Costs (with all realism adjustments other than for Reproduction Costs)	\$67.635 million (AR, Tab 41, at 14) (CO's Supp. State. at 11)	\$61.981 million (AR, Tab 41, at 14)
(5) Plus cost realism adjustment for Reproduction Costs	\$1.647 million (AR, Tab 55, at 3) (Supp. AR, at 8)	-- 0 --
(6) Total Revised Evaluated Costs	\$69.282 million (Supp. CO State. at 12)	\$61.981 million (Supp. CO State. at 12)

Given the selection official's conclusion that the proposals here were essentially equal under the technical merit and past performance evaluation factors, and given that URC's evaluated costs were approximately \$7.3 million higher than IQ's evaluated costs, the selection official again chose IQ for the award. Supp. CO Statement at 12.

This protest followed.

DISCUSSION

In its most recent protest, URC argues that HHS acted unreasonably when it elected not to revise the technical evaluation scores in this competition as a result of the proposal changes made to meet the agency's revised reproduction needs. With

respect to the cost realism review, URC attacks both the agency's upward adjustment to URC's proposed reproduction costs, and the agency's decision to make no upward adjustments to IQ's proposed costs.

In the discussion that follows, we find that the agency reasonably concluded that while no changes were necessary in the technical scores for these proposals, an upward adjustment in URC's proposed costs was needed as a result of URC's unique approach to structuring its cost proposal. Given these conclusions, and the fact that URC's and IQ's proposals remain essentially equal under the technical and past performance evaluation factors, we need not address in detail URC's arguments regarding IQ's proposed costs, because, even if we agreed with URC on every front--and we do not--IQ would remain the offeror with the lowest evaluated costs.

Technical Evaluation

URC argues that the agency erred in not making changes to the technical evaluation scores previously assigned during this procurement as a result of the changes URC and IQ made in their proposals for providing reproduction services. In fact, URC argues that as many as 65 out of 100 possible evaluation points could have been affected by the revised photocopying costs (and approaches) solicited here. URC Comments, Feb. 13, 2006, at 5.

Our standard in reviewing a protester's challenges to an agency's evaluation of proposals is to examine the record to determine whether the agency's judgment was reasonable and consistent with stated evaluation criteria, and with applicable statutes and regulations. ESCO, Inc., B-225565, Apr. 29., 1987, 87-1 CPD ¶ 450 at 7.

As a preliminary matter, we think it is useful to reiterate the reason for, and the nature of, the revisions made to these proposals. In its review, the Court of Federal Claims concluded that IQ was apparently confused about the reproduction requirements of this contract when it submitted its final cost proposal during the previous stage of this competition. University Research Co. III, *supra*, at 513. As a result, the court concluded that it was arbitrary for the agency to normalize the costs of reproduction services, rather than seek clarifications from IQ. *Id.* To implement the court's findings, identical letters were issued to URC and IQ revising the agency's reproduction requirements and seeking clarifications limited to responding to the additional reproduction information provided. AR, Tabs 11, 12. As instructed, the responses of both offerors were very limited; while the materials submitted appear extensive, they amount generally to identifying the equipment to be used, explaining how the agency's reproduction requirements will be met, calculating a revised cost to the agency, and providing detailed backup support materials such as lease and service agreements. *Id.*, Tabs 31, 32.

When the selection official here received the revised reproduction proposals from URC and IQ, she asked HHS employees with subject matter expertise on

reproduction (the reviewers worked in the agency's print shop) to review the equipment identified, and determine whether the proposed approaches would be adequate to meet the government's requirements; they concluded that the approaches of both companies would meet the government's needs. CO's Statement, at 2. Separate cost analysts identified other issues for the selection official, which led to discussions before the call for FRPs limited to the reproduction issue.

With respect to URC's contention that these submissions should have triggered revisions in the point scores of these offerors, we note first that there was little in this RFP's evaluation scheme directly related to reproduction services, given the nature of four factors--understanding the project, technical approach, key personnel, and management plan and facilities--and the narrative explanation provided for each of them. RFP at 71-72. For example, the first of the factors that URC contends should have been reassessed was the "understanding the project" evaluation factor. The narrative explanation of this factor begins:

The offeror demonstrates understanding of the scope and complexity of the public health and knowledge dissemination challenges posed by severe mental illnesses as viewed primarily from the perspective of consumers and their families, policymakers, and mental health care providers.

RFP at 71. We find little in the language quoted above, and little in any of the other four paragraphs of narrative associated with this evaluation factor, that would cause us to conclude that the agency acted improperly in not reassessing proposals under this factor. In short, this factor was assessing the offeror's understanding of a host of services associated with operating these public health clearinghouses, only a small part of which involves the operation of photocopy machines.⁹

We think the protester's best argument for a technical reassessment can be found under the fourth evaluation factor, "management plan and facilities." The most relevant portion of the narrative explanation associated with this factor states:

The offeror should provide a plan to implement and maintain all facilities and equipment necessary to conduct the tasks outlined in the SOW [Statement of Work]. The offeror should demonstrate resource capacity and capabilities to ensure successful operation and completion of the SOW tasks, including adequate physical space, facilities, necessary office equipment, computer hardware, computer software, and any other equipment (such as audio/visual and delivery vehicles) necessary to perform the project. The offeror should have an

⁹ We reach a similar conclusion with respect to the RFP's technical approach evaluation factor.

adequate plan for self-assessment, evaluation, and continuous improvement.

RFP at 73. Even here, however, we see nothing that requires revising the offerors' scores under this evaluation factor as a result of these more detailed proposals to provide reproduction services. For example, while we agree that reproduction equipment appears to fall within the scope of the term "necessary office equipment" in the evaluation factor quoted above, reproduction equipment is but one of many types of office equipment used to perform these services. Moreover, "necessary office equipment" is but one element of several that are assessed under this factor, which in total was worth only 15 points. Thus, in our view, even if changes were made here as a result of identified reproduction equipment—and we have seen nothing in these pleadings to suggest what those changes might be—any changes would appear to be de minimis at best.

Our inquiry does not stop with section M, however. We also note that little of the solicitation's description of the services required here is devoted to the subject of making reproductions. The RFP's performance work statement describes a broad range of services and briefly mentions that there will be a certain amount of reproduction effort required under this contract. Specifically, the RFP's 33-page detailed description of services devotes a total of 2½ lines to describing reproduction services. RFP attach. 1 (Performance Work Statement), at 29.¹⁰ Moreover, the entire mention of reproduction services found in the RFP's section L (wherein the agency provides instructions to offerors about information that must be included in their proposals) is set forth below:

Corporate Capabilities, Facilities and Equipment

- (1) The Offeror should demonstrate that adequate facilities, space and equipment (personal computers, laptop computers, modems, work processing, xerographic, facsimile) are available for the accomplishment of project goals and objectives.

RFP at 65 (§ L.2.B.a.(4)(g)(1)).

In short, we see nothing about the evaluation scheme here, or about the proposals submitted by IQ and URC, that would have required HHS to recalculate the previous evaluation scores in response to these limited revised proposals.

¹⁰ This reference was deleted in its entirety by amendment 2 to the RFP, wherein HHS revised its reproduction requirements as part of its implementation of the corrective action taken after the court decision. RFP amend. 2, at 2.

Evaluation of URC's Proposed Costs

We turn next to the only adjustment the agency actually made in this limited reopened competition--the upward adjustment that was made to URC's proposed costs. As indicated above, URC proposed an approach that has been termed a "two-tiered, fixed-price cap," stated as a price per impression, depending on the number of impressions required during any given month. Specifically, if the number of impressions in any given month did not exceed one-twelfth of the total annual estimate, URC provided one, much lower, consolidated price of **[deleted]** per impression. If the number of impressions exceeded one-twelfth of the total annual estimate in any given month, URC's consolidated price rose to **[deleted]** per impression for the base year, and escalated further each year thereafter.

When faced with this unusual price arrangement in a cost-reimbursement environment, and when it noticed that URC's estimated costs for reproduction were calculated entirely using the lower price per impression, HHS decided to obtain historical information about monthly variations in the number of impressions. HHS then used this information to attempt to determine the most likely cost of performance by URC, and made an upward adjustment to URC's costs to account for the months of the year when reproduction services might exceed one-twelfth of the annual total estimate. In URC's view, this action was unreasonable.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated costs of performance are not dispositive, since, regardless of the costs proposed, the government is required to pay the contractor its actual and allowable costs. University Research II, *supra*, at 22; Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26; CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 3. Accordingly, a cost realism analysis must be performed when a cost-reimbursement contract is contemplated in order to determine the probable cost of performance for each offeror. Federal Acquisition Regulation § 15.404-1(d)(2).

We find unpersuasive URC's contention that HHS acted improperly in attempting to calculate the likely impact of a cost approach that URC, not HHS, introduced to this procurement. As an initial matter, we note that the RFP here does not include any language that supports URC's apparent premise that the required number of impressions in any given month would be equal to one-twelfth of the annual total estimate.¹¹ Moreover, as a matter of common sense it stands to reason that when an

¹¹ We note that the language in the initial version of the RFP that URC points to for support of its contention that the solicitation anticipated fixed monthly amounts of reproduction needs was deleted by amendment 2 of the RFP. Given the deletion of the RFP language using monthly estimates, we do not understand why protester's counsel continues to rely upon it. Compare Protester's Comments, Feb. 13, 2006, at (continued...)

agency estimates its reproduction needs on an annual basis, some months might involve more than one-twelfth of that total and some months might involve less.

As a general rule, the use of approaches such as cost ceilings, caps, or even fixed rates like those here, in a cost-reimbursement environment, can shift the responsibility for cost overruns from the government to the contractor, and can provide a powerful tool for controlling costs to the government—provided there is no reason to question the effectiveness of the approach. Halifax Tech. Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30 at 6; Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202 at 7. When, however, contractor-imposed conditions on cost-control devices risk undermining the predictive value of an agency’s cost evaluation, the agency must take steps to ascertain the effect of such conditions. Comarco, Inc., B-258204.6, Oct. 26, 1995, 96-1 CPD ¶ 12 at 7. Here, we think the knowledge that, in the past, the reproduction workload fluctuated from one month to the next, required the agency to evaluate the impact of these fluctuations on URC’s proposed costs. See id.

URC defends its pricing approach, and criticizes the agency’s adjustment, by arguing that it was unreasonable for the agency not to use URC’s pricing mechanism as an incentive to send more of the reproduction work to the Government Printing Office, in order to “smooth out” any fluctuations in the reproduction workload. In our view, URC’s pricing approach, apparently intended to manipulate the government’s management of its workload, raised cost issues the agency needed to consider if it was not planning to make changes in how it managed its workload, which the agency was neither inclined, nor required, to do. Thus, we find that the agency acted reasonably in attempting to evaluate the effect of this approach on the likely cost of contract performance.¹²

(...continued)

6 n.1, 14, and 15 with RFP amend. 2 (July 13, 2005), at 2. In addition, we think URC was uniquely placed among the offerors to understand the risk of its approach; URC’s proposed subcontractor for the reproduction work is the incumbent providing these services. It was the incumbent that provided the agency the historical monthly data HHS used in its cost realism analysis.

¹² Though only peripherally related to the cost realism review, we note that URC argues that HHS conducted a disparate evaluation when it used monthly historical data not provided in the RFP to assess URC’s proposed costs, but did not use the same data to assess the capacity of the two offerors in the technical evaluation. Again, we disagree. There is no evidence in this record that the agency intended to assess labor capacity, or the capacity of the proposed reproduction equipment, with an eye towards possible variations in the monthly reproduction workload over the 5-year period of this contract. Rather, the agency looked to whether the labor and equipment proposed were sufficient to meet the agency’s requirements assuming an approximately steady annual amount of reproduction over the life of the contract,

(continued...)

Evaluation of IQ's Proposed Costs

URC also argues that HHS should have made several upward adjustments to IQ's proposed costs. Given the results of our review of the technical evaluation, and of the adjustment to URC's proposed costs, URC must overcome a difference of \$7.3 million in evaluated costs between essentially equal proposals in order to show that its proposal, rather than IQ's, offered the best value to the government. As set forth below, we find that URC cannot make the showing it must to prevail here.

In its comments filed after receipt of the agency report (and after review of IQ's cost proposal by a URC cost expert admitted to the protective order here), URC calculated a total of \$6.1 million in upward adjustments (\$4.386 million associated with reproductions, and \$1.703 million associated with warehouse space) it argued should be made to IQ's cost proposal. Protester's Comments, Feb. 13, 2006, at 12. Even if we assume that URC is right in both areas, its evaluated costs would still exceed those of IQ by approximately \$1.2 million. Since the proposals here are essentially equal, we see no reason to conclude that the agency would select URC for award, even if IQ's proposed costs were increased as URC contends.

In its supplemental comments--filed after receipt of detailed and convincing rebuttal arguments from HHS and IQ in answer to certain of URC's contentions about IQ's proposed costs--URC proffered several new adjustments to IQ's proposed reproduction costs, not previously argued. Specifically, URC's cost expert revised his previous assumptions regarding the average size of reproduction orders that HHS would place with its contractor, as opposed to placing those orders with the Government Printing Office (GPO). (By using lower-sized average orders, URC's expert spreads the fixed cost of each reproduction run over fewer impressions, thereby increasing the amount of the adjustments to IQ's costs.) In explanation, he states, "I have revised this analysis based on the recognition, in the [IQ] original technical proposal, of limitations resulting from regulations of the [GPO]." Protester's Supp. Comments, Mar. 7, 2006, attach. 1 at 2. Thus, URC posits alternate adjustments to IQ's costs based on whether one assumes an average order size for reproductions of 5,000 impressions (generating a total adjustment of \$6.9 million), or 2,500 impressions (generating a total adjustment of \$9.7 million). *Id.* at 3.

(...continued)

and reasonably concluded that they were. Under the circumstances here, where a unique proposed pricing approach, unforeseen and unrequested by the agency, reasonably triggered an attempt to consider the cost implications of that cost proposal, we see no reason the agency had to export that tailored cost analysis approach to its technical evaluation.

In our view, these revised calculations are, in essence, new arguments untimely raised. Our Bid Protest Regulations require protesters to raise issues within 10 days of the time a protester knows, or should have known, of the basis for its protest. 4 C.F.R. § 21.2(a)(2) (2005). In addition, neither our regulations, nor the statutory deadlines under which we operate, permit the piecemeal presentation of protest arguments. See QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 13. The agency report here was provided to the protester, and presumably to its expert, on February 2, 2006, and the protester filed its comments 10 working days later. These supplemental arguments, raised more than 1 month after receipt of the agency report, follow filings by the agency and IQ that effectively rebut certain arguments found in URC's comments—for example, URC's contention that IQ did not propose sufficient labor to provide the reproduction services required here.¹³ Moreover, the unwarranted piecemeal nature of these arguments is highlighted by the cost expert's admission, quoted above, that the most recent calculations are based on reviewing anew IQ's initial proposal, which was first provided to URC in August 2004 as part of our initial review of this procurement.

Since we conclude that URC has raised these supplemental contentions in an untimely fashion, and since the late presentation of these contentions has deprived the agency and IQ of a meaningful opportunity to rebut them, we will not consider URC's revised calculations in detail. Even accepting, however, URC's untimely contentions regarding the adjustments associated with an average order size of 5,000 impressions, IQ would still be the offeror with the lowest evaluated costs (given that these adjustments of \$6.9 million are less than the \$7.3 million difference in proposed costs). Furthermore, given the effective rebuttal of URC's argument regarding IQ's labor capacity, the same observation likely would apply with respect to URC's contentions regarding the adjustments associated with an average order size of 2,500 impressions. The materials prepared by URC's cost expert, however,

¹³ Specifically, URC argued in its comments that IQ proposed only one shift of labor, and that in the option years, the quantity of reproduction services could not be accomplished on IQ's machines in the course of a single 8-hour shift per workday. HHS pointed out that IQ had, in fact, proposed **[deleted]** employees to perform these services, and was silent in its proposal on the subject of shifts. Given that the reproduction services were located in a warehouse that was available to the agency 24 hours per day, the agency and IQ pointed out that the company retained the management discretion to use the proposed employees in **[deleted]** shifts, if needed, to meet the agency's reproduction needs. Supp. CO's Statement at 5. In addition, HHS and IQ pointed out the restrictive nature of many of the assumptions employed by URC's cost expert to make the argument that the reproduction work would require more than one shift of labor on IQ's reproduction equipment. We have reviewed these assumptions and think they undercut the credibility of URC's arguments; they do not establish that the agency acted unreasonably in accepting IQ's proposed costs.

simply do not permit the ready isolation of the amount of the argued adjustment associated with labor capacity to allow for its use in rebuttal.¹⁴ Thus, we conclude that URC's arguments in its supplemental comments are not only untimely, but do not show that those adjustments were appropriate, or even that it was prejudiced by the agency's decision not to make them.

In short, based on the record here, URC cannot overcome the difference in evaluated costs to establish that it was prejudiced by any of the errors it contends were made. Wyle Labs., Inc., B-288892, B-288892.2, Dec. 19, 2001, 2002 CPD ¶ 12 at 17-18.

The protest is denied.

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General Counsel

¹⁴ IQ also noted the difficulty in isolating the costs associated with different adjustments in the materials prepared by URC's cost expert. IQ's Supp. Comments, Mar. 7, 2006, at 10.