

12. As to PRC, OPTIMUS' third subcontractor, the Product Team, in addition to seeking the same responses from PRC as it had from OTS (regarding the use of 2,080 hours and the direct charging of administrative costs) and requesting clarifications of other items, notified PRC that it found PRC's Cost Exhibits 1 and 2 "unacceptable," because of the very same failings noted with regard to the CGH cost proposal. PRC, like CGH, had neglected to furnish breakdowns by cost element on Cost Exhibit 1, and, like both CGH and OPTIMUS, had erroneously shown burdened labor rates on Cost Exhibit 2, rather than the required unburdened rates. Also, he noted gross discrepancies between the price (\$[Deleted]) and associated labor hours ([Deleted]) proposed by PRC in its Cost Exhibit 1 and those listed for PRC by OPTIMUS (\$[Deleted] and [Deleted] hours, respectively). Finally, as to PRC, that subcontractor failed to furnish a Cost Exhibit 4 to detail support for its on-site fringe benefit, overhead and G&A rates. *Id.*, pages 16-17; *see also* AR, Statement of Chairperson, Cost Evaluation Team in Response to Protest of OPTIMUS Corporation (hereinafter "Spiegel Statement"), page 3, ¶9.

13. In comparison, the cost proposal materials submitted by SCATS and the prospective subcontractors on its team were relatively error free. The preliminary review worksheets of Mr. Spiegel indicate that there was only one omission from the SCATS cost proposal. For Cost Exhibit 4, the SIR required offerors to provide cost projections not only for the current fiscal year, but for the next two fiscal years. Although SCATS provided a projection for the current fiscal year (CY98), it failed to do so for the other two years. Also, for one of SCATS' prospective subcontractors, Mr. Spiegel found that the subcontractor, Science Applications International Corp. ("SAIC"), had provided for labor escalation at rates lower than the 3.5% figure specified by the SIR. Otherwise, SAIC's cost proposal conformed to the SIR. SCATS' only other subcontractor, Booz Allen & Hamilton, Inc., Mr. Spiegel found to have provided a cost proposal that was fully compliant with the SIR. On that basis, Mr. Spiegel had concluded that the SCATS proposal, including the proposals of its subcontractors, was "not grossly deficient." AR, Exhibit 12, pages 5-7 (emphasis in the original); AR, Spiegel Statement, page 6.

14. By letter dated July 7, 1998, OPTIMUS responded to the Product Team's questions regarding OPTIMUS. Among other things, the letter acknowledged OPTIMUS' error in failing to include \$[Deleted] for Subcontractor/Material G&A in the total on Cost Exhibit 1 and attached a revised Cost Exhibit 1 to reflect the correction of that error. With respect to the erroneous inclusion of burdened labor costs on Cost Exhibit 2, OPTIMUS acknowledged that error as well, and likewise included a revised Cost Exhibit 2 with its July 7, 1998 letter. As to the error regarding cost for office space, OPTIMUS' letter explained that it had incorrectly used "[Deleted] sq. ft." rather than "[Deleted] sq. ft." in its calculation, thus producing a total of \$[Deleted] rather than \$[Deleted] ([Deleted] sq. ft. x \$[Deleted]/sq. ft. = \$[Deleted]). The revised Cost Exhibit 1, the letter stated, included the corrected figures. AR, Exhibit 6, pages 1 and 9.

15. On July 7, 1998, there were three pertinent telephone conversations between the Contracting Officer, Ms. Dyer, and representatives of OPTIMUS. The first, according to both parties, was with Ms. Carole Davis, OPTIMUS' Executive Vice President and Chief Financial Officer. Ms. Davis asked whether OPTIMUS could revise its June 8 proposal. Ms. Dyer's response was that the FAA was not looking for revised proposals at that time, but that offerors would be given an opportunity to submit revised proposals at a later date. Ms. Dyer assured Ms. Davis (1) that FAA's "pricing person" (apparently referring to Mr. Gary Spiegel, Chairperson of the Cost Evaluation Team) would review the offerors' answers to the July 7 questions regarding cost proposals; and (2) that the FAA would not award a contract based on the original proposal, if the offeror was "uncomfortable" with it or if the Product Team was unclear as to "what the proposal said." *See* Contracting Officer's Chronology Timeline (hereinafter "Chronology").

16. The second July 7, 1998 telephone conversation, according to Ms. Davis' Statement in Response to Contracting Officer's Chronology Timeline, was between Ms. Dyer and OPTIMUS' Mr. Eric A. Adolphe, OPTIMUS' President and Chief Executive Officer. During that conversation, according to Ms. Davis, Ms. Dyer advised Mr. Adolphe that OPTIMUS should go ahead and resubmit its costs.

17. According to Ms. Davis, the third conversation of July 7, 1998 was when she called Ms. Dyer back to confirm that instruction to Mr. Adolphe. Although Ms. Dyer's Chronology lists a second telephone conversation on July 7, 1998 with Ms. Davis, it does not relate the substance of that conversation.

According to Ms. Davis, Ms. Dyer, during that conversation, did confirm her instruction that OPTIMUS go ahead and resubmit all of its Cost Exhibits. In this regard, Ms. Davis states, she asked Ms. Dyer whether OPTIMUS ought also resubmit the H.1 ceiling rates, since, in its July 7 written response to question 8 of the Product Team's July 7 questions regarding OPTIMUS' cost proposal, OPTIMUS had indicated that it had erroneously listed its bid rates as its H.1 ceiling rates, and that it was not willing to accept its bid rates as ceiling rates. In its response, OPTIMUS expressly sought permission to re-submit the Section H.1 ceiling rates, with higher ceilings, which were [Deleted]% above the bid rates. In this regard, the question and answer had been as follows:

1. In completing the indirect expense ceiling provision (H.1), you have entered the same rates that you listed on page 2 of the cost proposal. We want to confirm your willingness to accept as ceilings the "bid" rates that are reflected in Cost Exhibit 1. If the actual rates turn out to be lower than the rates in H.1, then you would be reimbursed at the actual rates. If the actual rates exceed the rates in H.1, you would be paid at the rates in H.1. Are you aware of how the ceiling provision applies?

OPTIMUS Response:

No, OPTIMUS is not willing to accept as ceilings the "bid" rates that are reflected in Cost Exhibit 1. Yes, OPTIMUS is aware of how the ceiling provision applies, in pricing we erred in providing the wrong rates. The rates that OPTIMUS intended to provide are [Deleted]% over the bid rates. With the permission of the Contracting Officer, OPTIMUS would like to resubmit Section H.1 of the Cost Proposal with the proper ceiling rate factor.

AR, Exhibit 6, page 8.

18. Although Ms. Davis' statement is rather obtuse on this point, it seems, according to the statement, that during that latter conversation on July 7, 1998, Ms. Davis asked Ms. Dyer whether, in lieu of submitting a new H.1 with revised ceiling rates, the FAA "committee" (*i.e.*, Evaluation Team) would accept her "statement" (presumably the answer to question 8) "as the replacement." Ms. Dyer's response, according to Ms. Davis, was to the effect that OPTIMUS need not resubmit the H.1 ceiling rates, that the answer to the question was sufficient and, that the Team would evaluate OPTIMUS' proposal based on the ceiling rates being [Deleted]% higher than its bid rates. In this connection, Ms. Davis' statement reads as follows:

When I spoke with her [*i.e.*, Ms. Dyer], she confirmed what Mr. Adolphe stated [about resubmitting the Cost Exhibits], I then went on to ask her if I should in fact change all my exhibits including H.1 ceiling rates or would the committee accept my statement as the replacement. She indicated that either was fine.

19. Oral presentations were conducted during the period July 8-15, 1998. AR, Exhibit 15, page 4. OPTIMUS had elected to make an early presentation. Final Agency Submittal, Second Supplemental Statement of the Contracting Officer in Response to OPTIMUS' October 27-28, 1998, Documents, ¶3, page 2.

20. By letter dated July 13, 1998, PRC provided a separate response to the Product Team's July 7 questions that had been directed to it. In that response, PRC acknowledged its various errors, and provided (1) a revised Cost Exhibit 1, which broke down the costs by individual cost element, and which corrected the total labor hours to conform to those shown by OPTIMUS for PRC (total of [Deleted] hours); (2) a revised Cost Exhibit 2, to show unburdened labor rates; (3) a revised Cost Exhibit 3, reflecting direct labor hours and direct labor rates "only for the Labor proposed"; and (4) a Cost Exhibit 4 as support of its on-site indirect costs. As to Cost Exhibit 4, PRC acknowledged that the exhibit had been erroneously "omitted from the initial submission." AR, Exhibit 7, PRC Letter of July 13, 1998 and enclosures.

21. The Product Team, by FAX (facsimile) transmittal dated July 22, 1998, forwarded additional questions to the offerors and prospective subcontractors regarding cost proposals. The letter afforded offerors an opportunity to provide answers and, if desired, revised cost proposals by 11:00 A.M., Friday, July 31, 1998 to the Product Team's offices at FAA Headquarters in Washington, D.C. The FAX suggested, but in no way mandated, that offerors obtain and provide sealed envelopes with any proprietary subcontractor data along with their own submissions, indicating that "it is easier for the FAA, if the offer comes in as one package." As part of any revised cost proposal, the July 22, 1998 FAX specifically allowed for revisions to the prices proposed as well as the Section H.1 ceiling rates on indirect expenses. In this latter regard, the letter stated:

You may also make changes to provision **H.1**, " CEILING RATES ON INDIRECT EXPENSES." *If you are not revising the previously proposed ceiling rates, please state that you are not.*

AR, Exhibit 9, Product Team FAX of July 22, 1998 (italics supplied). The FAX transmittal also advised that "*unless otherwise notified by the Contracting Officer, the FAA intends to end discussions by 11:00 am on 31 July.*" *Id.*

22. Among the additional questions for OPTIMUS and its subcontractors that had been forwarded by the Product Team's July 22, 1998 FAX transmittal, there were only two for PRC which have any significance in terms of the instant protest. Those pertained to: (1) the Product Team's discovery (after reviewing PRC's revised Exhibit 1) that it had been using a [Deleted] percent escalator in lieu of the 3.5 percent escalator the SIR specified; and (2) a discrepancy in PRC's G&A rates between those appearing on PRC's revised Cost Exhibit 1 (between [Deleted]% and [Deleted]%) and those appearing on its new Cost Exhibit 4 ([Deleted]% for FY1998 and [Deleted]% for FY1999 and FY2000). AR, Exhibit 9, Product Team Facsimile Letter of July 22, 1998, Questions and Requests for PRC, Inc. (Subcontractor to OPTIMUS).

23. Six of the original eight offerors, including OPTIMUS and SCATS, submitted revised cost proposals on July 31, 1998. The other two firms dropped out of the competition. Chronology Timeline, Document 3.

24. OPTIMUS' July 31, 1998 proposal included sealed envelopes from its subcontractors. *See* AR, Exhibit 6 (OPTIMUS letter dated July 31, 1998 and attachments); AR, Exhibit 7 (PRC submission dated July 30, 1998); AR, Exhibit 8 (CGH Revised Cost Exhibit 2, dated 7/31/98). The PRC materials reflect that it made a correction to Cost Exhibit 1 to incorporate the specified 3.5 percent escalator. The PRC July 30, 1998 submission also corrects for the discrepancy in G&A rates between Cost Exhibits 1 and 4 noted in the July 22, 1998 questions. AR, Exhibit 7, PRC July 30, 1998 Submission, Cost Exhibits 1 and 4.

25. In addition, the Product Team noted the OPTIMUS and PRC late July 1998 submittals contained one further discrepancy. Specifically, whereas the price in Cost Exhibit 1 of PRC's revised proposal of July 30, 1998 was \$[Deleted], the total price figure shown by OPTIMUS for PRC in OPTIMUS' July 31, 1998 submission was only \$[Deleted]. *Compare* AR, Exhibit 6, OPTIMUS July 31, 1998 Submission, chart entitled "Cost Exhibit 1, Proposed Price By Element Of Cost And Year, Statement of Work 1 and 2," figure opposite Subcontractor 3 (PRC) under column entitled "Total 5 Years" *with* AR, Exhibit 7, PRC July 30, 1998 Submission, chart entitled "Cost Exhibit 1, Proposed Price By Element Of Cost And Year, Total, Statements of Work 1 and 2," figure opposite "Total Price" under column entitled "Total, 5 Years"; *see also* Spiegel Statement, page 5, ¶4.

26. Ms. Dyer, the Product Team Contracting Officer and SSO brought this additional discrepancy to OPTIMUS' attention, during a telephone conversation on August 4, 1998. More specifically, as related in the OPTIMUS Statement in Response to Statement of Cost Chairperson which was issued and signed by OPTIMUS' President and Chief Executive Officer, Mr. Eric A. Adolphe (hereinafter the "OPTIMUS Statement"), Ms. Dyer raised the discrepancy with Mr. Adolphe and Mr. Christopher Dougherty, OPTIMUS' Chief Operations Officer. Mr. Dougherty then "investigated" the error and, according to Mr. Adolphe, reported to him that the source of the problem was that "PRC incorrectly bid the Programmer Analyst Category instead of the Program Analyst Category." OPTIMUS Statement, page 3 (emphasis

supplied). Mr. Adolphe implies now that this error was attributable to the Product Team's failure to address OPTIMUS' earlier complaints concerning the confusion created by the use of such similarly titled labor categories:

Mr. Dougherty investigated and explained to me that the error was due to the fact that PRC incorrectly bid the Programmer Analyst Category instead of the Program Analyst Category. This mistake was an understandable error because the titles for both categories so closely matched. Throughout the bid and proposal process, I pointed out that these labor categories were very confusing (please see response number 5 below). However, the Contracting Officer was unable to provide the necessary clarifications to our questions.

Id.

27. Mr. Adolphe states that, during their August 4, 1998 conversation, Ms. Dyer (1) "indicated that she understood the nature of the error"; (2) asserted that it was "not a concern," because the subcontractor's proposal would "only be used as back up data only," and that the FAA would "rely on the prime contractor's submission." According to Mr. Adolphe, he explained to Ms. Dyer that OPTIMUS would "honor the rates in its proposal." He states further:

[T]he Contracting Officer asserted that this verbal explanation would be sufficient. However, I explained to her that if she felt that it was absolutely necessary, I would attempt to procure the necessary changes from PRC management. The Contracting Officer then said "Thank you, but that won't be necessary."

OPTIMUS Statement, page 3. Mr. Adolphe also alludes to a "letter dated August 4, 1998 to the Contracting Officer" that "confirmed this understanding." *Id.* No such letter appears in the record.

28. In a letter to Ms. Dyer dated August 5, 1998, Mr. Adolphe states: "The purpose of this letter is to confirm our telephone conversation on Tuesday, August 4, 1998." The letter does not go on to describe the substance of the conversation or to confirm the purported "understanding" that revised materials from PRC would not be needed. The letter instead notified the Contracting Officer that the discrepancy had resulted from PRC having inadvertently used its "Senior Systems Analyst" labor rate "for [Deleted] hours," rather than the much lower "Program Analyst" rate, that PRC erroneously "transposed the labor categories during final preparations." Nothing was said in that letter about any confusion between the "Programmer" and "Program" Analyst labor categories being the purported source of the discrepancy. AR, Exhibit 6, OPTIMUS letter dated August 5, 1998.

29. These two divergent explanations of PRC's July 30, 1998 error have not been reconciled. Moreover, a review of the PRC July 30, 1998 submission indicates that neither explanation is accurate. PRC bid in the labor category of "Senior Systems Analyst" only under SOW1, and under that SOW, there is no "Program Analyst" category, only a "Programmer Analyst" category. The "Program Analyst" category appears only under SOW2. PRC's materials show a \$[Deleted]/hour differential between the rates for a "Senior System Analyst" (\$[Deleted]/hour) and a "Programmer Analyst" (\$[Deleted]/hour) for Contract Year 1. That magnitude of a differential would not account for the \$[Deleted] discrepancy (between the \$[Deleted] shown by PRC and the \$[Deleted] shown by OPTIMUS for PRC), if the mistake were limited to the [Deleted] hours mentioned in OPTIMUS' August 5, 1998 letter, *i.e.*, the number of hours bid by PRC for "Senior System Analyst" for Year 1. However, the full amount of the discrepancy might be explained, if the mistake applied to the total number of hours actually bid by PRC under SOW1 for the "Senior System Analyst" for all five contract years, *i.e.*, [Deleted] hours under that labor category. *See* AR, Exhibit 7, Chart entitled "Cost Exhibit 2, Proposed Direct Labor Hours, Rates and Costs, Statement of Work 1. What OPTIMUS intended in its August 5 letter by "transposed ... during final preparation" is not explained.

30. Interestingly, whereas the SIR definition of "Programmer Analyst" under SOW1 is significantly different than that of "Program Analyst" under SOW2, PRC's proposed rates for both labor categories were identical (\$[Deleted] shown as the "3.50% escalated rate" under both categories). *See* AR, Exhibit 7, Charts entitled "July 29, 1998, Labor Rate Matrix". Thus, the initial explanation for the \$[Deleted] difference between the PRC and OPTIMUS proposals provided by Mr. Dougherty to Mr. Adolphe and by Mr. Adolphe to the ODRA via the OPTIMUS Statement was completely incorrect. Whatever confusion OPTIMUS may have experienced during the bidding process regarding the similar labor category titles did not result in and does not explain the errors in OPTIMUS' cost proposal. In any event, the \$[Deleted] discrepancy cannot be traced to confusion created by the Product Team.

31. Although the aforesaid OPTIMUS Statement and the OPTIMUS Statement in Response to Contracting Officer's Chronology Timeline (hereinafter the "OPTIMUS Timeline Response") are somewhat unclear in this regard, it appears that Mr. Adolphe had two telephone conversations with Ms. Dyer on August 5, 1998, one prior to the transmission of the OPTIMUS August 5, 1998 letter (which was faxed to the Contracting Officer at 1:42 P.M.) and one after. The OPTIMUS Timeline Response states, in part, with regard to the first conversation:

She [Ms. Dyer] then [after saying it would not be necessary to revise OPTIMUS' proposal to correct for the PRC error] asked me to send her a statement clarifying this error. I told her that I would. I asked her if she would like me to get something from PRC as well and she said that, "that would be helpful." I told her that if she needed PRC to make changes that I would escalate this matter to PRC management. She again told me that this would not be necessary and that she would rely on our proposal, but to get a letter out to her right away. I complied.

32. With regard to the second conversation, the OPTIMUS Timeline Response continues:

She later called me back and told me that she would indeed need PRC's corrections and I told her that I would get someone from PRC management to work on it and get it to her. She requested it by noon the next day.

TO PROCEED TO NEXT PAGE,

