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## Decision

**Matter of:** The Futures Group International

**File:** B-281274.5; B-281274.6; B-281274.7

**Date:** March 10, 2000

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### DIGEST

1. In response to a decision sustaining a protest and finding that the agency had failed to conduct a reasonable cost realism analysis of the awardee's proposed costs, the agency's corrective action--determining that the awardee's probable costs were the lowest and confirming award to that firm--was unreasonable, where the agency was advised by the Defense Contract Audit Agency that the awardee's proposed uncapped indirect rates were understated by an amount that would have affected the outcome of the competition and there was an apparent change in the magnitude of the contract work from that envisioned by the awardee's proposal.

2. Agency unreasonably discounted Defense Contract Audit Agency audit finding, based on the awardee's actual contract performance, that the awardee's proposed uncapped indirect rates were considerably understated for the first 2 years of the 5-year contract and found that the awardee's proposed rates should be judged only on the basis of the awardee's knowledge when it submitted its proposal; a cost realism analysis, even on reevaluation, should consider all information reasonably available as of the time of the evaluation.

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## DECISION

The Futures Group International protests the award of a contract to Deloitte Touche Tohmatsu under request for proposals (RFP) No. M/OP-98-918, issued by the United States Agency for International Development (USAID), to implement a project intended to increase access to family planning and other reproductive health products and services obtained through the commercial and private sectors in developing countries. We previously sustained Futures' protest of the award to Deloitte because USAID improperly evaluated the realism of Deloitte's proposed indirect rates. The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ \_\_. This protest concerns the corrective action USAID undertook in response to our decision that culminated in USAID again selecting Deloitte for award.

We sustain the protest.

## ORIGINAL COMPETITION

The RFP, which contemplated the award of a cost-plus-award-fee contract for a 5-year period, set forth a best-value award evaluation scheme, considering technical, past performance, and cost realism. RFP §§ B.2, B.4, M.1(a). The RFP stated that the combination of all evaluation factors, other than cost, were significantly more important than cost. RFP § M.2(d). For cost realism, the RFP contemplated adjusting proposed costs based on the results of the cost realism evaluation and considering the adjusted costs for evaluation purposes. RFP § M.3.

Futures and Deloitte submitted proposals by July 15, 1998. USAID evaluated the proposals, conducted discussions, and evaluated best and final offers (BAFO) (received September 8). Futures' and Deloitte's proposals were both rated outstanding under the non-cost factors. Initial Protest Agency Report, exh. No. 2, Negotiation Memorandum, at 7; see id., exh. No. 8, Supplemental Technical Evaluation, Sept. 11, 1998, at 1, attach. USAID also determined Deloitte's \$87,904,406 proposed BAFO cost and Futures' \$94,290,894 proposed BAFO cost were reasonable and realistic, and made no probable cost adjustments. Id., exh. No. 2, Negotiation Memorandum, at 7, 16; Hearing Transcript (Tr.) at 29, 38, 70-71.<sup>1</sup> USAID made award to Deloitte on September 28, after determining that Deloitte's significantly lower cost proposal represented the best value. Initial Protest Agency Report, exh. No. 2, Negotiation Memorandum, at 7.

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<sup>1</sup> A hearing was conducted in connection with our consideration of Futures' prior protest.

Futures protested USAID's evaluation, including the cost realism evaluation, arguing that USAID unreasonably accepted Deloitte's proposed overhead and general and administrative (G&A) rates, notwithstanding that they were at levels significantly below Deloitte's historic rates. On October 21, USAID authorized performance of the Deloitte contract, notwithstanding the protest, as being in the government's best interest. Memorandum for the Head of the Contracting Activity, Oct. 21, 1998.

Deloitte's cost proposal proposed [DELETED] overhead rate and [DELETED] G&A rate with no offered rate ceilings, which offer was not changed in its revised cost proposal and BAFO.<sup>2</sup> Deloitte's Cost Proposal § B.5; Deloitte's Revised Cost Proposal § B.5; Deloitte's BAFO § B.5. On file with USAID's Overhead, Close Out, and Special Cost Division of the Contract Audit Management Branch of the Office of Procurement (OCC) was a 1997 incurred cost submission that showed Deloitte had historically experienced [DELETED] overhead rate and [DELETED] G&A rate. Initial Protest Agency Report, exh. No. 21, e-mail from OCC representative (Sept. 23, 1998); Tr. at 31-32. Nothing in Deloitte's proposal explained or justified why its proposed rates were substantially less than its historic rates. By Futures' unrebutted calculations, if USAID had applied the historic rates to Deloitte's cost proposal, Deloitte's evaluated costs would be increased by more than \$14 million, such that Futures' proposal would have represented the lowest evaluated cost. Protester's Comments on Initial Protest, Jan. 22, 1999.

After the submission of BAFOs and prior to award, OCC noted the discrepancy between Deloitte's proposed and historic indirect rates to the contracting office and "recommended that ceiling rates be used for the [overhead] and G&A rates." Initial Protest Agency Report, exh. No. 2, Negotiation Memorandum, at 9, and exh. 21, e-mail from OCC representative (Sept. 23, 1998). USAID did include caps on the rates in the awarded contract to Deloitte, but did so at the [DELETED] and [DELETED] rates, although the contract specialist testified that capping at the higher historic rates rather than the lower proposed rates was an error. Deloitte Contract § B.6; Tr. at 42-43. During the course of the protest, on February 2, 1999 (just after the hearing), USAID modified the contract to incorporate ceiling rates at the same level proposed by Deloitte.<sup>3</sup> Agency Submission on Initial Protest, Feb. 2, 1999, at 3.

#### PRIOR PROTEST DECISION

We sustained the protest because the contemporaneous record did not evidence that USAID reasonably found Deloitte's proposed rates realistic. As noted, Deloitte's cost

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<sup>2</sup> No discussions were conducted with Deloitte regarding its proposed indirect rates. Initial Agency Report, exh. 6.

<sup>3</sup> Since this post-protest action was not part of the agency's cost evaluation, it did not affect the outcome of our decision.

proposal did not explain or justify its proposed indirect rates, which were substantially lower than its historic rates, nor did it correlate the lower rates to the receipt of the contract, and there was no evidence of any analysis by USAID that would support a determination that Deloitte's proposed indirect rates were realistic, given its historic rates. The Futures Group Int'l, *supra*, at 4-6.

At the hearing on the initial protest, a new and previously unadvanced reason was stated as to why Deloitte's proposed overhead and G&A rates were realistic.<sup>4</sup> The USAID contract specialist testified that the [DELETED] rate was found realistic because Deloitte intended to form a Washington office and the 1997 incurred cost submission reflected a [DELETED] suboffice overhead rate. Tr. at 30. Deloitte argued at the hearing and in its post-hearing comments that the [DELETED] overhead rate reflected a blended rate comprised of Deloitte's suboffice overhead rate of [DELETED] and home office rate of [DELETED], as indicated on Deloitte's 1997 incurred cost submission, and that Deloitte was proposing to separately cost overhead at the suboffice rate, as evidenced by the establishment of a Washington office in its proposal.<sup>5</sup> Tr. at 112-14, 176; Agency's Post-Hearing Comments, Feb. 9, 1999, at 12; Deloitte's Post-Hearing Comments, Feb. 9, 1999, at 16-18; *see* Initial Protest Agency Report, exh. No. 22, Deloitte 1997 Overhead Expense Table, Mar. 31, 1998, at 1; Deloitte's Technical Proposal at III-14; Deloitte's Cost Proposal, Itemized Cost and Fee Calculation, item 6, Washington Office Cost.

These arguments were unsuccessful because the record did not contain any evidence that USAID's conclusion that Deloitte's overhead rate was reasonable was based on an understanding by the agency that Deloitte's proposed Washington office was considered a suboffice with separate indirect rates for accounting purposes. We noted that neither Deloitte's technical proposal nor its cost proposal attributed the lower proposed rate to the treatment of the Washington office as a suboffice, and stated:

Although Deloitte now describes the Washington office as its suboffice for accounting purposes, its technical proposal did not refer to the office as such and its cost proposal attributed the indirect rate to the home office, which is the category denoted on the 1997 overhead expense sheet accounting for the [DELETED] historical overhead rate. Thus, we fail to see how the contract specialist could reasonably have

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<sup>4</sup> This reason had not been mentioned in any of the contemporaneous evaluation documentation, or in any submission by the agency or the awardee/intervenor up until the hearing, even though the realism of Deloitte's indirect rates had been squarely raised by Futures and been otherwise addressed by these parties.

<sup>5</sup> Deloitte's home office is also located in the Washington, D.C. area. *See* Deloitte Technical Proposal at III-2.

determined that [DELETED] was the correct historical rate to apply for evaluation purposes, even if he had reviewed Deloitte's 1997 submission (without seeking further explanation from Deloitte).<sup>6</sup>

The Futures Group Int'l, *supra*, at 7-8 n.13.

We sustained Futures' protest and recommended that, "consistent with th[e] decision, the agency perform a proper cost evaluation, including a cost realism analysis, reopen discussions if necessary, and make a new best-value determination."<sup>7</sup> *Id.* at 12.

#### IMPLEMENTATION OF CORRECTIVE ACTION

To implement the corrective action, USAID requested that the Defense Contract Audit Agency (DCAA) audit Futures' and Deloitte's cost proposals, particularly Deloitte's proposed overhead and G&A rates. Agency Report, Jan. 17, 2000, Supplemental Negotiation Memorandum, at 5. DCAA performed three separate audits of Deloitte's cost proposal and two audits of Futures' cost proposal. The record shows that DCAA conducted these audits based on the assumption that Deloitte had proposed a suboffice rate for this procurement. *See, e.g., id.*, DCAA Audit Report No. 6311-99I21000003-S1, Sept. 10, 1999, at 140. The audits were completed in mid-September 1999. In the first audit, DCAA simply concluded:

[DELETED] We analyzed the contractor's computation of these rates and took no exceptions.

*Id.*, DCAA Audit Report No. 6311-99I21000002, Apr. 16, 1999, at 101. After USAID's OCC verified that DCAA had not analyzed the realism of Deloitte's proposed rates, but had simply verified Deloitte's arithmetic, it requested DCAA to consider the realism of the proposed rates. *Id.*, Supplemental Negotiation Memorandum at 6. After further analysis, DCAA stated the following concerning Deloitte's indirect rates:

It is our opinion the proposed Site Overhead and G&A rates are understated in the short run. The potential underpricing of the

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<sup>6</sup> We also note that Deloitte's cost proposal expressly reported its provisional billing rates for overhead and G&A at the historic [DELETED] and [DELETED] levels. Deloitte Cost Proposal § 5.

<sup>7</sup> Because of other apparent discrepancies in the record, we suggested that a cost realism analysis of all aspects of the cost proposals be performed. The Futures Group Int'l, *supra*, at 8 n.15. We denied Futures' protest of the technical evaluation. *Id.* at 9-12.

proposal is due to the fact the Commercial Market Strategies programs were not fully implemented as planned. We believe the potential underpricing is attributable to these extenuating circumstances and do not consider it to be intentional.

Id., DCAA Audit Report No. 6311-99I21000003-S1, Sept. 10, 1999, at 140; see DCAA Audit Report No. 6311-99I21000003, July 30, 1999, at 114. Regarding the [DELETED] overhead rate, DCAA stated:

[Deloitte] is currently performing this effort at the home office. Therefore, no actual expense data is currently available for this site overhead rate. We were able to compare the direct labor proposed to the projected direct labor and year to date direct labor incurred through 6 March 1999.

. . . . .

Based on this analysis, we are of the opinion the site overhead is understated as proposed due to the extenuating circumstances. In addition, the contractor accounts for two overhead rates, a home office rate and a site rate. [DELETED]

Id., DCAA Audit Report No. 6311-9I21000003-S1, Sept. 10, 1999, at 140-41; see DCAA Audit Report No. 6311-99I21000003, July 30, 1999, at 114-15. Regarding G&A, DCAA stated:

We compared the total cost input proposed to the projected base for [FY] 1999 and compared historical G&A rates to proposed. In addition, we annualized the six month year to date actual pool and base costs for G&A and calculated a rate of [DELETED] percent. [Deloitte] is proposing a G&A of [DELETED] percent. It is our opinion the G&A rate is understated as proposed due to the extenuating circumstances.

[DELETED] In addition, when comparing historical site overhead rates and G&A rates to proposed, it was noted that when [Deloitte] was performing similar, though smaller efforts, the proposed rates appear to be more reflective of the historical rates given the magnitude of [this] contract. Therefore, we are of the opinion the site overhead and G&A rates are only understated in the short run.

Id., DCAA Audit Report No. 6311-99I21000003-S1, Sept. 10, 1999, at 141; see DCAA Audit Report No. 6311-99I21000003, July 30, 1999, at 115. DCAA calculated that Deloitte's proposed costs were understated by approximately \$4.5 million for the first 2 years of the contract. Id., DCAA Audit Report No. 6311-99I21000003, July 30,

1999, at 126-29; DCAA Audit Report No. 6311-99I21000003-S1, Sept. 10, 1999, at 152-54; see Protester's Comments, Jan. 27, 2000, at 12.

USAID's OCC reviewed the DCAA audit reports and recommended the following regarding Deloitte's overhead and G&A rates:

Since DCAA has determined that the proposed overhead and G&A rates are potentially understated in years one and two, we recommend the proposed site overhead and G&A rates be incorporated into [this] contract as ceiling indirect rates . . . [DELETED] DCAA opinion is that the site overhead and G&A rates will reach proposed levels during year two assuming [this] contract is fully implemented.

The bid protest and related corrective action have adversely affected the site overhead and G&A rates, therefore the proposed site overhead rate of [DELETED] and G&A rate of [DELETED] were reasonable at the time they were proposed. . . . In the absence of this delay in contract performance, the proposed [DELETED] G&A is reasonable.

Agency Report, Jan. 17, 2000, OCC Memorandum 513-14 (Oct. 21, 1999).

In reevaluating the offerors' costs, the contract specialist referenced the advice provided by OCC and found Deloitte's [DELETED] overhead and [DELETED] G&A rates were reasonable and realistic, noted that rate ceilings at these values were incorporated in the contract after the initial protest, and stated:

It could be argued that for the assessment of realism, the initial period of the contract should be burdened with the higher rates that DCAA found are currently being experienced by Deloitte. However, since the purpose of the cost realism assessment is to determine the likely contract cost based on an evaluation of the information available at the time the proposals were submitted, the USAID position incorporated the site overhead rate of [DELETED] and G&A rate of [DELETED]. This position is reasonable since available information indicates that these rates would have been the likely result if Deloitte had been able to perform this contract consistent with their technical approach, and had not been impacted by the protest.

Id., Supplemental Negotiation Memorandum, at 9.

After making various probable cost adjustments to the proposed costs, USAID evaluated Deloitte's cost at \$87,881,797 and Futures' cost at \$91,130,804. Id. at 38. No cost adjustments were made to Deloitte's proposed cost to reflect the more than \$4.5 million understatement in indirect costs found by DCAA (discussed above). USAID again determined that Deloitte's proposal represented the best value on the

basis of its lower evaluated cost, and on November 22 affirmed the Deloitte award. Id. at 39-40. This protest followed.

## PROTEST OF CORRECTIVE ACTION

Futures challenges the propriety of USAID's cost realism evaluation of Deloitte's proposal, again arguing that USAID should have adjusted Deloitte's cost to reflect its higher historical rates. Futures argues that the DCAA audits of Deloitte's rates were flawed because USAID allowed DCAA to assume that Deloitte had proposed a site rate instead of the home office rate contained in its proposal.<sup>8</sup> Futures further argues that at a minimum USAID should have adjusted Deloitte's indirect rates to account for the \$4.5 million in understated costs referenced by DCAA, which itself would have caused Deloitte's proposal to have a higher evaluated cost than Futures. Futures also argues that Deloitte's indirect rate ceilings under the contract should not have been considered for purposes of the cost realism evaluation because the ceilings were negotiated after the award.

Where our Office sustains a protest and recommends corrective action, the specific details of the corrective action necessarily depend on the particular facts and circumstances surrounding the procurement. Therefore, we leave the details of implementing corrective action to the discretion and judgment of the contracting agency. The agency, however, must exercise this discretion reasonably and in a fashion that remedies the procurement impropriety that was the basis for our protest recommendation. See CitiWest Properties, Inc., B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ 3 at 6.

## ANALYSIS

Here, even though more than 8 months passed before the recommendation made in our prior decision was implemented by confirming the award to Deloitte, USAID elected not to conduct discussions or obtain revised and updated proposals. The agency took this position, even though the DCAA audits had revealed that the magnitude of the contract, as performed, was significantly less than was anticipated by Deloitte's proposal, and in the face of DCAA audits that revealed that Deloitte's indirect costs were understated by \$4.5 million. As noted by Futures, if this figure were factored into the cost realism analysis by the agency, then Futures' evaluated cost would be lower than Deloitte's and its proposal would be in line for award. USAID discounted DCAA's calculation of Deloitte's understated indirect costs,

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<sup>8</sup> Futures states that this assumption was inconsistent with, and/or represented a change in, Deloitte's proposal, and that Futures could have proposed a suboffice or site rate if allowed to modify its proposal.



basically finding that this understatement was solely the result of Futures' protest<sup>9</sup> and that USAID's cost realism analysis was "to determine the likely contract cost based on an evaluation of the information available at the time the proposals were submitted."<sup>10</sup> Agency Report, Supplemental Negotiation Memorandum, at 9.

USAID did not apply the proper standard in evaluating the cost realism of Deloitte's proposal. The calculation of a probable cost through a cost realism analysis, even on reevaluation, is required to "reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal" and this "probable cost shall be used for purposes of evaluation to determine the best value." Federal Acquisition Regulation § 15.404-1(d)(2)(i). The regulation does not contemplate that

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<sup>9</sup> USAID's claim that the understatement in Deloitte's indirect costs was solely the result of the protest is not clearly supported by the record. USAID states that, even though the agency promptly authorized performance under the contract after the initial protest was filed, the protest caused the agency's overseas missions to be reluctant to use their limited resources to fund the programs covered by this contract and Deloitte to be unwilling to lease space in a separate Washington office, which resulted in Deloitte not achieving its projected revenue base, which presumably would have supported its low proposed indirect rates. See Agency Legal Memorandum at 24-25. However, there is no documentation in the record that shows that the failure to generate the contract base anticipated by Deloitte in its proposal was the result of the agency's overseas missions' concerns about Futures' protest, and the protester suggests that there may be programmatic reasons for this failure. See Protester's Comments, Jan. 27, 2000, at 15-17. In addition, Deloitte, which reports that it has now set up this office after the issuance of our prior decision sustaining the protest, has not confirmed that the protest was the reason it did not promptly set up the promised Washington office.

<sup>10</sup> We note that USAID was not entirely consistent in deciding to limit its review to the information available at the time proposals were submitted. For example, even though a reasonable reading (and apparently USAID's reading until the hearing) of Deloitte's proposal indicated that its proposed overhead and G&A rates were home office rates, USAID and DCAA performed the cost realism analysis as if they were clearly proposed as suboffice rates. Moreover, when it analyzed Deloitte's proposed CAPS country costs and found them reasonable as proposed, the agency relied on data obtained from Deloitte stating that its costs were based on [DELETED] countries at an estimated [DELETED] per country; however, Deloitte's proposal indicated that its costs were based on [DELETED] per country for [DELETED] countries. See Deloitte Revised Cost Proposal, CAPS Country Programs, Note 6.A; Letter from Deloitte to USAID (Apr. 22, 1999); Agency Report, Jan. 17, 2000, Supplemental Technical/Cost Realism Review Memorandum 399-400 (June 20, 1999). We need not decide if the communications with Deloitte on these matters constituted discussions, since we recommend below that discussions be reopened.

the cost realism analysis will be limited to the information available at the time proposals were submitted; rather, a cost realism analysis is required to consider information reasonably available as of the time of the evaluation. See L-3 Communications Corp., Oceans Sys. Div., B-281784.3, B-281784.4, Apr. 26, 1999, 99-1 CPD ¶ 81 at 5-13.

Thus, USAID's decision, in calculating Deloitte's probable costs, to completely discount the documented understatement in Deloitte's proposed indirect rates was unreasonable. In this regard, we also note that, while DCAA confirmed that Deloitte's proposed rates resembled suboffice rates Deloitte charged on some smaller contracts (as is suggested in Deloitte's 1997 incurred cost document), the record show that Deloitte's proposed rates were not based on current contract data, and that DCAA's audit review revealed that Deloitte's actual indirect rates to date were in line with Deloitte's higher [DELETED] historical rates and that Deloitte's accounting system had not been audited.<sup>11</sup>

The record shows that one reason USAID felt comfortable accepting Deloitte's rates as proposed was that during the course of Futures' prior protest, 1 day after the hearing, Deloitte agreed to cap its overhead and G&A rates at the proposed level. See Agency Legal Memorandum at 24-25; Agency Report, Jan. 17, 2000, Supplemental Negotiation Memorandum, at 9. Since the cap represented a material change in Deloitte's proposal, however, it could not be considered by the agency in the evaluation without having discussions with all competitive range offerors. See Integrated Sys. Group, B-272336, B-272336.2, Sept. 27, 1996, 96-2 CPD ¶ 144 at 4-6 (post-award communications regarding ambiguous prices constituted discussions where they affected the offerors' relative proposed prices); Paramax Sys. Corp.; CAE-Link Corp., B-253098.4, B-253098.5, Oct. 27, 1993, 93-2 CPD ¶ 282 at 6 (agreement by agency and awardee after award selection to lower the awardee's proposed fees to make its proposal acceptable constituted discussions requiring discussions with all competitive range offerors); see also Serv-Air, Inc.; Kay and Assocs., Inc., B-258243 et al., Dec. 28, 1994, 96-1 CPD ¶ 267 at 6-7 (discussions were required to allow an offeror to propose a cap on its proposed indirect rates).

Moreover, in the 8 months USAID took to implement its corrective action, the circumstances of the competition materially changed. Specifically, Deloitte materially changed its proposal by agreeing to a cap on its indirect rates after contract award and the record evidences that, for whatever reason (protest or otherwise), the contract work is not of the magnitude envisioned by Deloitte's proposal in that the anticipated contract base has not been generated. See United

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<sup>11</sup> Where rate checks by DCAA are based on current contract data, the rates are inherently more reliable, in that they are tested, easily confirmed measures of realism. See L-3 Communications Corp., Oceans Sys. Div., *supra*, at 12.

Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-12 (changed circumstances after award selection required the submission of revised proposals).

Based on our review, we think that USAID acted unreasonably in confirming the Deloitte award without conducting discussions.<sup>12</sup>

The protest is sustained.

We recommend that USAID reopen discussions with Futures and Deloitte, obtain revised proposals based on USAID's actual requirements, and make a new best-value determination.<sup>13</sup> In addition, we recommend that Futures be reimbursed the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Comptroller General  
of the United States

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<sup>12</sup> Futures also argues that USAID unreasonably evaluated and conducted improper post-BAFO discussions concerning the realism of Deloitte's CAPS country program costs. We need not consider this issue since we recommend that discussions be reopened.

<sup>13</sup> Where, as here, the contracting agency decides to continue performance of a protested contract based on a finding that to do so would be in the best interest of the government, the Competition in Contracting Act of 1984 requires our Office to make our recommendation without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2) (1994); 4 C.F.R. § 21.8(c) (1999).