ARMED SERVICES BOARD OF CONTRACT APPEALS
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5 June 2012

CERTIFIED MAIL
RECEIPT REQUESTED

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Re: ASBCA Nos. 56624, 56751, 56752
Appeals of Metron, Inc.
Under Contract No. N00039-01-D-2202

Dear Counsel:

Enclosed is one authenticated copy of the Board's decision.

Very truly yours,

CATHERINE A. STANTON
Recorder

Enclosure

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Metron, Inc.	)	ASBCA Nos. 56624, 56751,
	)	56752
Under Contract No. N00039-01-D-2202 *et al.*	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These timely appeals involve the reasonableness and allowability of executive compensation cost paid by Metron, Inc. (Metron or appellant) in 2004 and 2005. We conclude the costs were reasonable and allowable and sustain the appeals for reasons detailed below.

FINDINGS OF FACT

A. Background

1. The subject contracts are cost-reimbursement contracts, either cost-plus-fixed fee or Time and Materials, awarded to Metron, Inc. (appellant or Metron), by various agencies of the United States government. Each contract includes FAR 52.216-7, ALLOWABLE COST AND PAYMENT, as in effect on the date of award, which requires Metron to submit annual indirect rate cost proposals and incurred cost submissions (referred to at times, herein, collectively as cost proposals). The affected contracts were entered into between 1997 and 2005. (R4, tabs 1 at 28, 6, attach. 1; app. supp. R4, tab 233 at G40).

2. Metron develops solutions to command and control problems such as search, detection, tracking, central allocations and decision support, information processing, oral command and control, and advanced data fusion through applied mathematics, physics, statistical analysis, and computer science. Among other things, it develops decision aids

and simulation technology. Department of Defense agencies use Metron's technology for: tracking submarines or surface ships using passive acoustic information; missile defense tracking and detection; tracking and detection of terrorist activity within large volume transactional databases; physics-based modeling of buried mine detection systems; mission planning; and force level modeling and simulation. Metron does not use "technology off the shelf" or existing technology (tr. 1/43). It produces computer software to (1) describe the solutions developed by Metron; and (2) process the data needed for the solutions in "real time." (Tr. 1/43-46, 56-57, 64-68, 77-78, 94-106, 244-45; app. supp. R4, tab 201 at G1846, 1856-83)

3. In 2004 and 2005, Metron's primary customer base consisted of Department of Defense agencies (app. supp. R4, tab 201 at G1845, 1860). The majority of the contracts at issue in this appeal were competitively negotiated. In connection with negotiation of Metron's R&D or Small Business Innovation Research (SBIR) contracts, the government typically performs a cost analysis or cost realism analysis. (Tr. 1/245-46, 2/242-43; app. supp. R4, tab 201 at G1886)

4. Metron has a flat organizational structure with few or no levels of intervening management between staff and executives. Its executives have technical responsibilities, business development responsibilities, and administrative responsibilities. (Tr. 1/139, 2/246-48) The CEO, Chief Financial Officer (CFO), and Chief Operating Officer (COO) comprise the top layer. The next level down is the group level. A group consists of two or more divisions and is headed by a Group Manager. The third level is the divisional level. Each division is led by a Division Manager, supported by one or more Senior Engineers (now called Senior Managers). (Ex. A-6, attach. E-2)

5. Dr. Thomas Corwin founded the firm in 1984 and has served as Metron's Chairman of the Board, President, CEO, and Chief Technical Officer (CTO). He currently is Metron's COO/President and serves as Chairman of the Board. Since Metron's inception, Dr. Corwin has been responsible for its overall strategic direction and has played an integral role in growing Metron into an organization of more than 100 professionals. Dr. Corwin created and developed a large part of Metron's tracking and search technology. (Tr. 1/39-40) Dr. Corwin has a Bachelor of Science in Mathematics from Villanova University, a Master of Science in Statistics from Princeton University, and a PhD in Statistics from Princeton University. Before founding Metron, Dr. Corwin was a Vice President of Daniel H. Wagner, Associates (Wagner Associates). (Tr. 1/22-23, 30-31; ex. A-1 at 1)

6. Dr. Lawrence D. Stone obtained a Bachelor of Science, Mathematics from Antioch College in 1964, a Master of Science, Mathematics, Purdue University, 1966, and a PhD, Mathematics, Purdue University, 1967. Dr. Stone is an expert in fusion and tracking (the science of keeping track of moving objects). He held a series of positions at Wagner Associates, from an associate to a senior associate to a Vice President. In 1986, he left Wagner Associates and joined Metron. Dr. Stone served as Metron's CEO during

2004-2009. From 1996-2003, Dr. Stone served as Metron's COO. Before that, Dr. Stone managed the Advanced Mathematics Applications Division. (Tr. 1/65, 233-35; ex. A-l at 3)

7. In addition to administrative and technical responsibilities, Division Managers have profit and loss responsibility. There is technical and financial cooperation among the divisions. Divisions may work together on proposals and projects. In 2004, Metron had two divisions: Advanced Mathematics Applications and Operations Analysis and Simulation Sciences. In 2005, Metron created the Systems & Analysis Division to support the business unit that Dr. Thomas Stefanick managed and developed in his role as a Senior Engineer. In 2005, Metron promoted Dr. Stefanick to Division Manager of the newly created division. Metron also promoted Dr. Mifflin to Group Manager responsible for "East Coast Operation," consisting of the Advanced Mathematics and Systems & Analysis Divisions. (Ex. A-6, attach. E-2; tr. 1/76-77, 250-52)

8. As defined by appellant, a business area or business unit within Metron is made up of one or more customers or types of problems in a technical area. A business unit is a "division in creation," not a profit and loss center. Senior Engineers Managers are responsible for the business units within the divisions. They are responsible for developing the new business areas and building them into divisions. Division Managers generally concentrate on developing follow-on work for business units that they created as Senior Managers. (Tr. 1/110-11, 249-52, 2/58, 110) Metron established the Senior Engineer position in 2000. Since then, the Metron Senior Engineer position has been included in the Metron executive compensation plan. (App. supp. R4, tab 213; tr. 1/171) Metron Senior Engineers are responsible for managing multiple projects for a business area personally or through subordinates, as well as business development and recruiting. (Tr. 1/50-51, 53, 110-11) According to Dr. Corwin, the responsibilities of Metron Senior Engineers are similar to those he had as a Vice President at Wagner Associates. Dr. Stone considers the Senior Engineer position to be equivalent to a Vice President. (Tr. 1/35, 50, 2/21-22, 100)

9. Non-executive positions that perform technical work at Metron include Analysts, Senior Analysts, Software Analysts, and Senior Software Analysts. These personnel may at times function as project or program managers and run projects assigned to them by a Metron executive. Metron's growth strategy includes shifting people at the entry level and giving them a career path to participate at the highest levels of Metron. Metron generally does not hire individuals outside the company directly into executive positions. (Tr. 1/72-73, 111-12)

10. Metron seeks to hire: (1) analysts with advanced degrees in mathematics or science; and (2) highly educated computer scientists. It attempts to attract and retain executives with PhDs in mathematics or one of the hard sciences. Metron's technical staff consists of approximately 100 professionals. In 2005, approximately 60% of the

technical staff held advanced degrees in mathematical and hard sciences. (Tr. 1/39-40, 45, 49, 59-61, 72-74; app. supp. R4, tab 201 at G1845, 1859, 1869, 1874-75)

11. For most projects, the technical staff is required to hold security clearances. In 2005, approximately 61% held a Top Secret or higher security clearance and approximately 30% held a Secret clearance. (App. supp. R4, tab 201 at G1845) With the exception of the CFO position, all of Metron's executive positions require a Top Secret or higher security clearance. Metron executives could not supervise projects or generate business without security clearances. The data needed are generally classified, as well as Metron's work product. Drs. Corwin and Stone and other Metron executives hold Top Secret/Sensitive Compartmented Information (SCI) clearances. To obtain a Top Secret or higher security clearance, Metron's executives must be U.S. citizens and meet other specific criteria. Only a limited talent pool meets Metron's criteria for executives relating to education, citizenship and ability to obtain and hold a Top Secret or higher security clearance. (Tr. 1/47-48, 2/5-7, 6/32-34; app. supp. R4, tab 201 at G1845; ex. A-6 at 12)

B. Metron's Executive Compensation Plan Generally

12. Metron initiated an executive compensation plan dated 14 April 1995. The plan used the median Radford Executive Survey or Radford Survey data to set base salary. (App. supp. R4, tab 204 at M44233; tr. 1/133-37) The purpose of Metron's 1995 plan was "to attract and retain management employees and encourage them to strive for outstanding results in the operation of the company from year to year, by rewarding a limited number of senior management employees – [who] made a significant impact on the success and profitability of the company" (tr. 1/135; app. supp. R4, tab 204 at M44226). The basic formula of the 1995 plan (as well as later Metron executive compensation plans) provided for total compensation equal to base salary, plus profit based incentive compensation, plus goal-based incentive compensation. Using the Radford Survey, Dr. Corwin "tried to set base salary to be average and used incentive compensation to reward superior performance." (Tr. 1/133-37)

13. Criteria for selecting a survey for a labor market analysis to determine the competitive value for similar jobs in similar companies include: (1) reputation of the survey; (2) the degree to which the survey is representative of the particular industry; and (3) the degree to which a survey "truly represents the labor markets from which you hire people" (tr. 2/129; *see also* ex. A-6 at 7-8). Around 1995, Dr. Corwin performed a survey of Metron's employees to identify companies with which Metron competed for talent and business. Dr. Corwin asked all Metron employees to identify their previous employers, offers they had received for other employment, and offers they had accepted. Dr. Corwin compared those companies to the Radford Survey participants. Dr. Corwin concluded that approximately 42% of Metron's competitors participated in the Radford Survey. (App. supp. R4, tab 205 at M1238; *see also* tr. 1/142, 154) In addition, he found that the demographic breakdown (defined in terms of industry and geography) of Metron competitors and Radford Survey participants is "proportionally indistinguishable. That

is, the demographic breakdown of the participants in the Radford Survey is statistically indistinguishable from the breakdown of Metron competitors on the Radford survey." (App. supp. R4, tab 205 at M1239; *see also* tr. 1/141-46)

14. Dr. Corwin submitted a memorandum to DCAA dated 15 November 1995, which included Metron's justification for his proposed use of the Radford Survey to establish the allowability of Metron's executive compensation during 1990-1993. In the 15 November 1995 memorandum, Dr. Corwin concluded that the Radford Survey best reflected Metron's market for labor and business. The memorandum described Dr. Corwin's 1995 internal survey and provided a summary of the results, as well as the survey itself. (App. supp. R4, tab 205; tr. 1/152-60) The method outlined in Metron's 15 November 1995 memorandum used the Radford Survey as the exclusive source for determing the reasonableness of Metron's compensation. The 15 November 1995 memorandum included Metron's draft compensation plan for 1996. The 1996 plan used Radford Survey data to calculate base salary and incentive compensation. The incentive compensation was based on the Radford Survey data and Metron's internal profit and revenue goals. (App. supp. R4, tab 205) Dr. Corwin performed this same analysis again in 1998 and 2005, with substantially the same results as those obtained from the 1995 internal survey (tr. 1/149-50).

15. Beginning January 1996, Metron submitted "Executive Compensation Reports" to the government regularly (app. supp. R4, tabs 206-12). The Executive Compensation Report memoranda described Metron's formula for calculating executive compensation using Radford Survey data for a given year and referred to the Metron reports made in previous years. Although the formula in the plan did not change significantly from year to year, the Radford Survey data used in Metron's formula changed. The goals regarding incentive compensation could also change. (*Id.;* tr. 1/162-70, 174-78) From 1995 to the present, Metron has paid its executives salary and bonus according to formulas substantially similar to the 1995 formula (app. supp. R4, tabs 205-12, 214-23; tr. 1/167).

C. <u>Metron's 2004 and 2005 Executive Compensation</u>

16. Dr. Stone became CEO in 2004. He prepared the executive compensation plan for 2004 and 2005, at the beginning of the respective fiscal years. Dr. Stone's executive compensation plan for Metron's executives was substantially similar to the plans that Dr. Corwin developed for 1995-2003. For 2004 and 2005, Metron's claimed compensation included base salary, bonus, and profit-sharing components (app. supp. R4, tabs 219-22). Metron does not provide long-term incentives to its executives (app. supp. R4, tab 224 at G1550). Dr. Stone changed the parameters of the plan, however, to put greater emphasis on revenue goals. Dr. Stone wanted to motivate the executives to achieve 25% revenue growth in their unit and the plans for 2004 and 2005 included a bonus for executives whose units achieved 25% or higher revenue growth. Dr. Stone set base salary that approximated the average base salary figures from the 2002 Radford Survey in the under $50M revenue

range. The base salary did not change for the Metron executives for 2004 and 2005. (Tr. 2/6-14)

17. For 2004 and 2005, the bonus plan provided for executive bonuses above or below the Radford Survey average target bonus figures, depending on company revenue and profitability. Dr. Stone calculated total bonus for each Metron executive using a mathematical formula based on the sum of "revenue bonus" plus "profit bonus." Dr. Stone defined "revenue bonus" and "profit bonus" by formulas. (App. supp. R4, tab 219; tr. 2/7-8) Metron's compensation structure provided that the two bonuses were interdependent. If the profit goal was not met, the revenue bonus could decrease. (Tr. 3/85-86)

18. To calculate revenue bonus and profit bonus, Dr. Stone used average base salary and average targeted Total Cash Compensation (TCC) figures in the 2002 Radford Survey for each position (tr. 2/7-8). Total Cash Compensation is equivalent to base salary plus short-term incentive (i.e., bonus) (ex. A-6 at 6). In the Radford Survey, "targeted" figures are representative of what the survey participants are projecting to pay in a given year. "Actual" figures are representative of what actually occurred in a preceding year. (*See* tr. 3/51-52)

19. Metron's "revenue bonus at target" was one half the difference between the Radford Survey average targeted Total Cash Compensation and average base salary for a given position. The other half was designated as "profit bonus" at target (tr. 2/7). The amount of revenue bonus each executive received for 2004 and 2005 was a linear function of the "revenue bonus at target." If the executive's unit exceeded the revenue target for that unit, the executive would receive more than the "revenue bonus at target." Similarly, if the unit did not achieve the revenue target, the responsible executive would receive less than "revenue bonus at target." (Tr. 2/7-8) For 2004, the revenue target for Metron executives was a percent increase in revenue between 2003 and 2004. The target percent increase for the Advanced Mathematics Division was 13%, for the OASiS Division it was 20%, and for the corporation it was 16.5% (app. supp. R4, tabs 220, 221 at M5042; tr. 2/9). For 2005, the revenue target percent increase for all Metron executives was 15% (app. supp. R4, tabs 220, 222 at M5029; tr. 2/13).

20. For 2004 and 2005, the Metron executive bonus plan also provided that Metron executives could receive a "profit bonus" if the executive's unit met the profit goals set by the company (app. supp. R4, tabs 219, 220, 221 at M5044, tab 222 at M5029). The profit bonus for the Senior Engineers was based on the profit goals for the division (tr. 2/18). The profit bonus at target was roughly equivalent to the revenue bonus at target. As was the case for the revenue bonus at target, the profit bonus was at risk. If the unit managed by the executive did not achieve the profit goals set at the beginning of the year, the executive would receive less than the profit bonus at target. If the unit exceeded the pre-established profit goals, the executive could receive a profit bonus greater than the profit bonus at target. (Tr. 2/6-18)

21. In 2004 and 2005, Metron had revenues of $16.5M and $18.3M, respectively. Metron has undergone significant and continuous growth in revenues from 1985 to 2005. Between 1995 and 2005, Metron's compound annual growth rate was between 17% and 24%. (App. supp. R4, tab 201 at G1847) Between 2003 and 2005, Metron's revenues grew on average 17% annually from $13.3 million in 2003 to $18.3 million in 2005. From 2001 through 2005, the company had positive net income. (Tr. 1/62-63; app. supp. R4, tab 201 at G1892-94, tab 202 at M44155, tab 227 at G1423, tab 249 at G1764; ex. A-5 at 4) Metron's total revenue for its FY 04 was $16,460,930. For FY 05, its total revenue was $18,273,180. (App. supp. R4, tab 201 at 51, tab 202 at A-3)

22. In the final indirect cost rate proposal for its FY 04, Metron sought reimbursement for the compensation paid to certain of its officers and employees in the following amounts:

Chief Executive Officer Lawrence D. Stone	$432,851
Chief Operating Officer Samuel J. Brown, Jr.	$365,126
Division Senior Executive Thomas L. Mifflin	$313,990
Chief Financial Officer W. Darryl Martin	$302,464
Senior Engineer Jeff Jones	$233,623
Senior Engineer Thomas A. Stefanick	$232,686
Senior Engineer Jeff Monroe	$210,108
Senior Engineer Greg Godfrey	$201,104
Senior Engineer Michael Atamian	$200,610

(R4, tab 102 at 5; app. supp. R4, tab 225 at G1448)

23. In the final indirect cost rate proposal for its FY 05, Metron sought reimbursement for the compensation paid to certain of its officers and employees in the following amounts:

Chief Executive Officer Lawrence D. Stone	$404,045
Chief Operating Officer Samuel J. Brown, Jr.	$350,461
Chief Technical Officer Thomas L. Corwin	$233,469
Director East Coast Operations Thomas L. Mifflin	$318,961
Chief Financial Officer W. Darryl Martin	$274,776
Division Senior Executive Thomas A. Stefanick	$265,457
Senior Engineer Jeff Jones	$218,123
Senior Engineer Jeff Monroe	$207,179
Senior Engineer Greg Godfrey	$207,041
Senior Engineer Michael Atamian	$206,072

(R4, tab 5 at 5; app. supp. R4, tab 250 at G1601)

24. The following chart compares the compensation claimed with the 50th and 75th percentiles of the TCC reported by the Radford Survey for use in 2004 and 2005. The Radford figures do not include an allowance for pension or take into consideration a "range of reasonableness" as discussed below:

Year 2004

Name	Executive Position	Claimed Total Compensation	Radford		Amount Under 75th Percentile
			50th	75th	
Stone	CEO	$432,851	$376,300	$432,900	-$49
Brown	COO	$365,126	$365,000	$397,600	-$32,474
Mifflin	DSE	$313,990	$301,000	$375,200	-$61,210
Martin	CFO	$302,464	$222,500	$280,000	$22,464
Jones	Senior Engineer	$233,623	$252,300	$265,500	-$31,877
Stefanick	Senior Engineer	$232,686	$252,300	$265,500	-$32,814
Monroe	Senior Engineer	$210,108	$252,300	$265,500	-$55,392
Godfrey	Senior Engineer	$201,104	$252,300	$265,500	-$64,396
Atamian	Senior Engineer	$200,610	$252,300	$265,500	-$64,890
				Total:	-$320,638

Year 2005

Name	Executive Position	Claimed Total Compensation	Radford		Amount Under 75th Percentile
			50th	75th	
Stone	CEO	$404,045	$400,000	$499,300	-$95,255
Brown	COO	$350,461	$305,300	$426,100	-$75,639
Mifflin	Mgr East Coast Ops	$318,961	$400,100	$463,800	-$144,839
Martin	CFO	$274,776	$252,600	$363,200	- $88,424
Stefanick	DSE	$265,457	$294,100	$338,300	- $72,843
Corwin	CTO	$233,469	$245,000	$350,000	-$116,531
Jones	Senior Engineer	$218,123	$256,500	$281,900	- $63,777
Monroe	Senior Engineer	$207,179	$256,500	$281,900	- $74,721
Godfrey	Senior Engineer	$207,041	$256,500	$281,900	- $74,859
Atamian	Senior Engineer	$206,072	$256,500	$281,900	- $75,828
				Total:	-$882,716

(App. br., Appx. D)

D. DCAA's Audits

25. DCAA conducted audits of Metron's final indirect cost rate proposals for its FY 04 and FY 05. The audit of the proposal for FY 04 was conducted by DCAA's Baltimore Branch Office; the audit for FY 05 was conducted by DCAA's Reston Branch

Office. For both audits, evaluations of the compensation of Metron's top-paid officers and employees were conducted by DCAA's Mid-Atlantic Region Compensation Team. (Tr. 5/8-9, 24-27; R4, tabs 5, 102)[1]

26. For Metron's FY04, DCAA's audit report, dated August 29, 2007, questioned the following amounts of compensation for Metron officers and employees as unreasonable:

Chief Executive Officer Lawrence D. Stone	$16,387
Chief Operating Officer Samuel J. Brown, Jr.	$55,133
Division Senior Executive Thomas L. Mifflin	$103,791
Chief Financial Officer W. Darryl Martin	$73,416
Senior Engineer Jeff Jones	$85,407
Senior Engineer Thomas A. Stefanick	$84,469
Senior Engineer Jeff Monroe	$61,892
Senior Engineer Greg Godfrey	$52,888
Senior Engineer Michael Atamian	$52,394
Total	$585,777

(R4, tab 102)

27. For Metron's FY05, DCAA's audit report, dated 5 December 2008, questioned the following amounts of compensation for Metron officers and employees as unreasonable:

Chief Executive officer Lawrence D. Stone	$49,354
Chief Operating Officer Samuel J. Brown, Jr.	$101,001
Chief Technical Officer Thomas L. Corwin	$49,999
Director East Coast Operations Thomas L. Mifflin	$117,391
Chief Financial Officer W. Darryl Martin	$67,189
Division Senior Executive Thomas A. Stefanick	$68,566
Senior Engineer Jeff Jones	$44,222
Senior Engineer Jeff Monroe	$76,252
Senior Engineer Greg Godfrey	$76,114
Senior Engineer Michael Atamian	$75,145
Total	$725,233

(R4, tab 5)

28. In performing the executive compensation reasonableness reviews of Metron's claimed compensation for its FY 04 and FY 05, DCAA conducted "market

[1] Because there is no substantial difference among these DCAA entities with respect to the costs in dispute, we refer only to DCAA hereafter.

pricing" of the positions being reviewed consisting of several steps. The first step was selecting compensation surveys that are appropriate for that review. The second step in market pricing was selecting the survey positions to be used as matches for the company positions being reviewed. A survey position match would be a job description in each of the surveys where the duties and responsibilities of the position being reviewed closely align with the duties and responsibilities as stated in the survey position. The next step was to determine the percentile of the compensation data set forth in the survey. DCAA used the median survey position as a starting point and an analysis was done to determine the financial performance of a company for a particular year. After carrying out these steps, DCAA derived a market price "total cash compensation," which is base salary plus short-term incentive bonus. For each position being reviewed, DCAA determined a market price total cash compensation using each of the surveys that have been selected. The values for each of the positions being reviewed from each of the compensation surveys utilized for total cash compensation were then averaged to calculate TCC for the position. Other elements of compensation—pension cost, for example—were market priced using specialty surveys for that type of compensation. As appropriate, the market priced amount for these other elements was added to the averaged total cash compensation. Finally, ten percent of the TCC plus pension amount determined for each position was added to account for a "range of reasonableness." DCAA policy, as set forth in the DCAA Contract Audit Manual (CAM), is to use a ten percent range of reasonableness. (Tr. 5/15-24; R4, tabs 5, 102; CAM ¶ 6-414.4g(6) (Dec. 2009))

29. For both 2004 and 2005, DCAA selected the Radford Survey, the Watson Wyatt Data Services' Top Management Comp Calculator and Industry Report on Middle Management Compensation survey (Watson Wyatt), the Economic Research Institute (ERI) Executive Compensation Assessor survey, and the Washington Technical Professional Forum (WTPF) Compensation Survey Report. The Radford, Watson Wyatt, and ERI surveys are national surveys. The WTPF is a regional survey of technology companies that are located in the Washington, D.C. area. DCAA used the WTPF survey because Metron had its headquarters in Northern Virginia, and had a large portion of its operations there in 2004 and 2005. For FY 05, it used the same surveys. (Tr. 5/25-39; supp. R4, tabs 8, 12)

30. For both the FY 04 and FY 05 reviews, DCAA selected the positions from the four surveys to match to the Metron positions under review. For matching the FY 04 Metron positions to the Radford Survey, DCAA matched the Metron President/CEO, COO, and CFO to the Radford positions for those job titles. DCAA used what it determined to be 66th percentile of total cash compensation related to companies with under \$50 million in annual sales. DCAA matched the VP who was responsible for the Reston Federal Division to Radford's Division Senior Executive survey position at what it considered 41st percentile of survey data because the division's sales were significantly lower than the average sales of the incumbents in the survey position. DCAA did not use the Radford Survey to match the five Senior Engineers for FY 04 because it could not

identify a Radford executive position that was an appropriate match for those jobs. DCAA disagreed with Metron's matching the Senior Engineers to Radford's Strategic Business Unit (SBU) Executive position, particularly because it did not consider the Senior Engineers to be at the level of a vice president or higher, and they were not in charge of business units. DCAA concluded that the Senior Engineer positions were program or project managers operating in mid-level management positions. (Tr. 5/26, 37, 45-56, 82-88, 95-97; R4, tab 102 at 5; supp. R4, tabs 8, 19 at G001549, tab 25 at METRON-0000560)

E. Experts

31. Christopher McGee is a partner in Mercer, the largest human resources consulting firm in the world (tr. 3/21). Mr. McGee has a Bachelor of Arts in Business Management from Catholic University. He has been in the human resources consulting field for over 25 years. Mr. McGee joined Mercer in 2005. He was previously employed by Arthur Andersen and Ernst & Young. Mr. McGee currently manages the Mercer Baltimore/Washington compensation practice. His practice serves a number of government agencies, quasi-government agencies, and government contractors. (Tr. 3/25-35) Appellant proffered, and the board accepted, Mr. McGee as an expert in the areas of human capital, compensation, and executive compensation (tr. 3/35). Mr. McGee prepared Mercer's report reviewing Metron's 2004 and 2005 executive compensation costs (ex. A-6).

32. The government offered, and the Board accepted Mr. Bruce Overton, the managing partner of Overton Consulting, Inc., as an expert in the field of executive compensation. Mr. Overton is a leading executive compensation expert and consultant. He is widely-published and has authored, *inter alia*, multiple editions of The Executive Compensation Answer Book, published by Aspen Law & Business, Inc. He has lectured and taught extensively regarding executive compensation and has served as the National President of the American Compensation Association. Applying the methods described in his report, Mr. Overton concluded that Metron's total claimed compensation for nine executives for its FY 04 exceeds a reasonable compensation for those positions by $240,000, and that Metron's total claimed compensation for ten executives for its FY 05 exceeds a reasonable compensation for those positions by $217,200. These amounts were calculated by taking the 50th percentile average of Radford and ERI for total cash compensation (base salary plus bonus) for each position, adding a pension factor to the total cash compensation, and finally adding ten percent of that total to accommodate a reasonable variation of actual pay levels. The amount of reasonable compensation that was thus calculated for each position by Mr. Overton was then subtracted from the amount Metron claimed for the corresponding position to determine the amount of unreasonable compensation claimed for each composition. In determining the compensation amounts for each position in the Radford Executive Survey, Mr. Overton purported to use regression analysis to obtain values consistent with Metron's revenues of

$16.8 million in FY 04 and $18.3 million in FY 05. (Tr. 2/117-20, 140-46; ex. G-12 at 5 15)

33. Mr. Darrell Oyer is a Certified Public Accountant. He has about 47 years of government contracting experience with both the government contracting and the accounting profession. Mr. Oyer served nearly 20 years in various capacities in DCAA. Mr. Oyer was the first Branch Manager of the DCAA Headquarters Cost Accounting Standards (CAS) Branch. Mr. Oyer was also DCAA Assistant Regional Director in the Atlanta Region with responsibility for ten audit offices. Before forming his own firm in 1991, Mr. Oyer was a partner with Deloitte & Touche, an international accounting firm, where he had approximately nine years of experience. The Board accepted Mr. Oyer as an expert in government contract accounting, government contract auditing, generally accepted accounting practices, and financial accounting. (Tr. 4/17-25) The government did not object to Mr. Oyer's qualifications as an expert in these areas (*id*). The government also did not offer expert testimony in these areas.

F. Primary Issues in Dispute

34. Mr. McGee considered that the Radford Survey is representative of the technology industry and use of that survey alone was an "appropriate practice for Metron to follow" (tr. 3/39-42, 113, 6/50). Mr. McGee noted that appellant's extensive analysis identifying Radford as the most appropriate survey was "probably the most comprehensive" of any in his experience (tr. 3/173-74).

35. Mr. Overton concurred that use of the Radford Survey by appellant was appropriate, and was frequently used by similar high-tech companies, because it is "one of the most" representative for its industry and is a "very, very, good survey" (ex. G-12 at 2; tr. 2/159-60).

36. By letter of 9 May 2007, appellant provided DCAA with a further analysis of the reasonableness of its 2004 executive compensation costs that attempted to address DCAA's methodology, in particular use of the ERI Survey. Appellant used the ERI survey because it believed it "had to do so in order to communicate and have a dialogue with DCAA" (tr. 2/33, 35). Metron's analysis showed that the ERI Survey (and the Radford Survey) would support payment of Metron executives between the 50^{th} and 75^{th} percentile. (App. supp. R4, tab 227 at G1437-38)

37. We find that for the positions in dispute, the most persuasive evidence in the record establishes that the Radford Survey provides the best information for comparison with salaries paid by Metron. The additional WTPF and Watson Wyatt and ERI survey data relied on by the government were not sufficiently comprehensive, reliable, relevant to Metron's industry, and/or the job matches were not sufficiently similar and representative to warrant material reduction of the results obtained from use of the Radford Survey data alone for the disputed positions. (Tr. 2/35-36, 45, 95, 127, 130,

3/40-43, 81-83, 115-16, 176-77; app. supp. R4, tab 227 at G1438; ex. A-6 at 22-23, attach. A at 9, attach. B at 16-17; ex G-12 at 2) Because of this conclusion we need not make detailed findings regarding appellant's extensive criticisms of DCAA's methodology pertaining to the additional surveys.

38. For both 2004 and 2005, DCAA revised the reported Radford Survey amounts for TCC for the positions in dispute. These revisions were based on the fact that significant numbers of the Radford Survey participants who reported base salary and target incentives for the year did not report actual incentives for the year. For example, in the July 2004 Survey, 63 CFOs reported base salary but only 16 reported actual incentives. Therefore, DCAA made the assumption that the 47 CFOs who did not report actual incentives received no incentive bonuses for the year. DCAA concluded that, if the "Actual TCC" amounts reported by Radford only included the participants who received a bonus, it improperly increases the Actual TCC amounts for all reporting participants. Thus, in the case of the CFOs in 2004, 47 of the participants Actual TCC would have been improperly driven up according to DCAA's analysis. To remedy this perceived disconnect in the Radford data, DCAA made adjustments to the Actual TCC reported by Radford. The DCAA adjustment involved multiplying a fraction, consisting of the number of participants reporting receipt of an actual bonus (16 CFOs in the above example) divided by the number of employees reporting a base salary (63 CFOs), by what DCAA considered to be the median actual incentive bonus. In the above example this had the practical result of reducing the median actual bonus ($48,900) by almost 75% (47/63) in the CFO example to $12,419. Radford's corresponding Actual TCC amount was also reduced as the adjusted "average" bonus was added to base salary. (Tr. 5/53, 58-80, 136-38, 147-51, 247-50; R4, tab 17 at G1394, tab 19 at G1475; app. supp. R4, tab 224 at G1472-73, tab 254 at G610)

39. Both Messrs. McGee and Overton rejected the above-described DCAA methodology as inconsistent with "generally accepted compensation practices" (tr. 2/134-36, 165, 3/46-47, 145, 179-80, 6/67). The Radford Survey collects data from its participants, analyzes the data, and provides the results of those analyses in the form shown on the Radford Survey pages. Without the underlying data, a survey user cannot create a Total Cash Compensation figure that more accurately estimates market compensation practices than the percentiles shown on the survey pages. The Radford Survey participants are not granted access to the underlying survey data. As a result, the survey reader cannot know the reason a company did not report data. Other possibilities could explain why a company may report data for one compensation element (e.g., base salary) but not report data for another compensation element (e.g., bonus) including; (1) employee turnover; (2) compensation structure (e.g., a company may leverage cash compensation with stock or choose to pay base salary at a higher percentile and put less of compensation at risk); and (3) performance. But without access to the underlying Radford Survey data, this is "all conjecture." (Tr. 2/64-66, 86, 209, 3/63, 67-70, 5/138-44)

40. Mr. McGee further criticized DCAA's methodology as follows:

> I have never seen any compensation professional anywhere ever [create survey data like DCAA did].... Never have I seen anyone do this to any kind of survey data. It is not consistent with any generally-accepted principles, and I don't know how it was even arrived at.
>
> It purports to get to a level of precision that doesn't exist in compensation, first and foremost. Secondly, it presumes, as I said earlier, that everybody's base salary is at median and then adjusts after that.
>
> If you're going to presume, I could just as easily presume that...everybody who got a zero at bonus was at or above the 75^{th} percentile in base salary.
>
> [T]here's too many assumptions, too many flawed judgments. It is just totally inappropriate to recalculate [Radford Total Cash Compensation figures].

(Tr. 3/179-80)

41. Drs. Corwin and Stone also persuasively demonstrated, *inter alia*, "there is almost no dependence of compensation on revenue within revenue bins" (app. supp. R4, tab 234 at G1307). The Radford Survey discontinued its regression analysis before 2004. Dr. Corwin plotted the regression curve that results from a 1999 Radford Survey's regression formula to show what the regression analysis would look like if plotted on a linear scale rather than logarithmic scale. Dr. Corwin found that although compensation may be dependent on revenue across the Radford Survey's revenue bins, there is little, if any, relationship between compensation and revenue within a revenue bin. (*Id.* at G1319; tr. 1/157-59, 186-89) Mr. McGee stated that the Radford Survey creates the revenue bins "because they believe that the level of statistical significance is consistent within a bin, and it varies bin to bin, but not within a bin" (tr. 3/55).

42. Mr. Overton's similar reductions, adjusting the Radford Survey using "best fit trend lines" or "regression" analyses, were also not satisfactorily supported. The analyses and supporting data used to develop the lines were not included in his report. (Tr. 2/148-49, 173) The reductions were based on the assumption that "the higher the magnitude of revenue accountability [even within the Radford under $50 million bin or range], the higher the compensation" (tr. 2/134). This generalized conclusion is unsupported by the Radford Survey. The Survey does not provide the underlying data points and participant responses necessary to perform an accurate analysis. Mr. Overton conceded that without such underlying data, it is impossible for a regression analysis to

be accurate. His assumed linear relationship between revenue and compensation discounts entirely the importance of other potential bases for the level of compensation, the varying financial, indirect cost and organizational structures, and competition for executive talent among companies in the under $50 million. (Tr. 2/170-74, 3/55-57, 61-65, 68, 80, 85, 88-89, 93-94, 103-05)

43. DCAA considered that the Senior Engineers, with one exception in 2005, were "mid-level" or project managers and not executives. In DCAA's opinion, the Senior Engineers were not properly matched by appellant with the Radford Survey's Strategic Business Unit Executive position. This conclusion was based on DCAA's opinion that the Senior Engineers were not given the title of Vice President and allegedly were not "in charge of units" or responsible for a "distinct product line" or service. (Tr. 5/35-36, 82-87, 108, 198; app. supp. R4, tabs 228, 240 at G1280-81) DCAA considered that Metron's Senior Engineers "probably have no sales responsibility" (app. supp. R4, tab 244 at G564). It also considered that Metron Senior Engineers were "not at a high enough level to directly impact the bottom line" and should be compared to the 50th percentile without regard to performance (tr. 5/248-49).

44. DCAA conceded that "there aren't many exact fits out there" and job matching often is a "judgment process" and not "clear-cut" (tr. 5/18, 131). A company's job can be matched to survey positions if the duties and responsibilities of the executive at issue are a "pretty good match, not an exact" or "seem to correlate pretty well with the duties and responsibilities of what is stated in the survey position" (tr. 5/18).

45. The Radford Survey's Job Description for Strategic Business Unit Executive states:

> Oversees the lifecycle of a specific product or directs the activities of a strategic business unit within the company that is not an internal division. Includes planning with respect to the product line or business unit, engineering/R&D, marketing and financial planning, and may also include manufacturing. Typically does not have profit and loss accountability.

(App. supp. R4, tab 229 at G1326)

46. The Radford Survey's "Job Matching Tips" for the Strategic Business Unit Executives are:

- Top executive in a unit that is not a separate division
- Product Management/SBU has distinct product or service
- Incumbent has responsibility for planning, development and marketing, but typically not P&L. Employees with P&L

responsibility (not just expense and budget responsibility) typically match to Job Code 110 [Division Senior Executive] or Job Code 115 [Division Executive]

- Incumbent must be at the VP level (or equivalent) or higher

(App. supp. R4, tab 229 at G1326)

47. Mr. McGee considered that DCAA conducted no substantive interviews of any of the executives in question including the Senior Engineers and failed to understand Metron's needs for executive talent or how it accomplished its business mission. According to Mr. McGee, DCAA improperly evaluated the executive plan from a hindsight perspective rather than whether the plan was reasonable when established at the beginning of the fiscal year and ignored Metron's legal obligations to pay executives in accordance with the established plan. Mr. McGee stressed that appellant had strong incentives and competitive market pressures to control its executive compensation costs. (Tr. 3/49, 118, 140, 145, 157-58, 168, 185-86)

48. The most persuasive evidence in the record supports the conclusion that the Senior Engineers were properly matched by appellant with the Radford Survey's Strategic Business Unit (SBU) Executive position. Both Mr. McGee and Mr. Overton agreed that selection of the SBU executive position was reasonable (tr. 2/161, 3/42; ex. G-12 at 3). Contrary to DCAA's views, we find that the Senior Engineers had substantial senior level managerial and business development responsibilities sufficient to justify comparison with the SBU executive position (app. supp. R4, tab 234; tr. 1/53, 2/22, 82, 88, 100). During the years in question, Metron did not use the title Vice President, but considered the Senior Engineer's responsibilities justified a conclusion that each was the equivalent of one (tr. 1/53, 2/22, 100).

49. Messrs. Overton and McGee agreed that each company has discretion to choose the percentile of survey data it will target based on different variables, including the talent sought, the business objectives of the company, and the amount of pay the company elects to have at risk (tr. 2/178-79, 188, 3/50-51, 84, 6/53-55). They also agree it is reasonable for Metron to target the 50th percentile of Radford Survey Total Cash Compensation for any Metron job matched to a Radford position (tr. 2/170-71, 3/40, 42) and that Metron's actual compensation could reasonably range anywhere between the 50th and 75th percentiles of credible competitive surveys (tr. 2/185, 3/84).

50. Mr. McGee's Mercer analyses based on several surveys it considered apt concluded that appellant's executive compensation levels were reasonable. Mr. McGee considered that Metron should be compared to the 75th percentile of market total cash compensation (TCC) given "Metron's unique talent requirements, the sophisticated level of technical capabilities needed to execute Metron's mission and Metron's ability to obtain stated company performance objectives" (ex. A-6 at 6). In most cases, Mr. McGee found that the compensation paid by Metron to the executives in question for both 2004

and 2005 were between the 25th percentile to just under the market median. To the extent that the COO (in 2004) and the CFO were paid above the 75th percentile, Mercer's analysis found them to be well within what Mercer uses as its 15% (plus or minus) range of reasonableness. (Ex. A-6 at 5-9, 14-18; tr. 3/105-06, 109, 155-56)

51. Mr. McGee considered that possession of a PhD degree in the mathematic and scientific fields relevant to Metron's high technology projects warranted payments of a premium. He considered that relatively few executive jobs included in the surveys require such a degree and therefore, the surveys do not adequately reflect compensation paid by the industry for executives satisfying this educational requirement. (Ex. A-6 at 11-12; tr. 3/82, 128-30) Similarly, Mr. McGee concluded that high level security clearances required for Metron's executives to perform classified government projects also warranted the payment of a premium to Metron executives other than the CFO (ex. A-6 at 12; tr. 3/102-03, 125-26). Although Mr. Overton did not consider it appropriate to pay such premiums (tr. 2/149-50, 152, 154), we find, based on Mr. McGee's extensive experience with similarly-situated government contract, high technology firms such as Metron, that possession of requisite advanced degrees and high level security clearances warrants positive consideration in establishing compensation levels. Mr. Overton lacked such extensive relevant experience (tr. 2/158-59, 176-77, 3/101-02).

52. TCC data in the Radford Survey is limited to salary and short term incentive compensation (bonuses). Both Mr. McGee and Mr. Overton accepted DCAA's factors and allowances for pensions as additions to Radford's reported TCC in determining the reasonableness of executive compensation. (Tr. 2/142, 3/78-79) However, Mr. McGee emphasized that he considered Metron's compensation to be reasonable without addition of the pension factor (ex. A-6 at 3, 25).

53. Both DCAA and Mr. Overton based their conclusions in part on financial comparisons of Metron with what they considered to be "peer group" companies. DCAA's financial comparison concluded that Metron's executives should be placed at the 66th and 41st percentile in 2004 and 2005 respectively. However, the group of allegedly comparable companies consisted of very large publicly-traded companies with materially different organizational and financial structures. We are persuaded, *inter alia*, by Mr. McGee's and Mr. Oyer's extensive criticisms of the "peer group" studies and find that the resulting comparisons by Mr. Overton and DCAA are misleading, unreliable and unreasonable. (Tr. 3/53-59, 65, 68, 72-77, 87-88, 91-92, 4/38-39, 41, 56, 5/108-10, 112, 169-70, 184-85, 194; exs. G-12, A-5 at 4-6; app. supp. R4, tabs 227, 228) Mr. Overton also criticized DCAA's financial comparisons (ex. G-12 at 6; tr. 2/140).

54. DCAA compared the Metron Division Manager position to the 25th percentile of the Radford Survey data instead of the median because it considered that the average divisional revenues of the Radford Survey participants were greater than Metron's divisional revenues. However, DCAA's conclusion is not based on the Radford Survey's

underlying data or instructions for its use or interpretation. Revenue size cannot be ascertained at any particular percentile. Messrs. McGee and Overton rejected DCAA's use of the 25th percentile for the Metron Division Managers because the Radford Survey "has provided no data on revenue size at the 25% percentile." (Ex. G-12 at 4-5; tr. 3/60-61, 5/168, 247-48; app. supp. R4, tab 224 at G1474)

55. Mr. Overton's comparable division of total Metron revenues in an attempt to create a lower scope of accountability of executives also lacks persuasive support. There is no factual basis for dividing total revenue or determining revenue responsibility for the various Metron executives. Accordingly, his adjustments of Radford Survey compensation based on his assumptions regarding division or business unit revenue accountability for each executive, at least in the case of Metron were unpersuasive and refuted by Mr. McGee. (Tr. 2/182-83, 3/55; ex. A-6 at 30, attach. B at 27, ex. G-12 at 5)

56. In or about March 2006, Metron made a voluntary one-time $950,000 contribution to its profit-sharing plan. At the end of calendar year 2005, the $950,000 was still included in Metron's net income. The $950,000 represented a fraction of Metron's 2005 pre-tax profit. Metron had an opportunity to make the profit-sharing contribution and receive credit against Metron's 2005 taxable income until Metron filed its final taxes for the year in September 2006. Metron made the voluntary contribution because it benefited Metron's employees and allowed the company to receive a tax credit. If Metron had not made the voluntary contribution, Metron would have been taxed roughly 40% on the $950,000. The $950,000 Profit-Sharing Contribution was in addition to the amounts agreed upon by Metron's Board of directors at the beginning of 2005. (Tr. 2/207, 3/28-30) Metron did not charge the $950,000 Profit-Sharing Contribution as an expense to the government through its G&A rates. In Metron's government contract cost accounting system, Metron recognized the $950,000 Profit-Sharing Contribution as an unallowable cost under FAR Part 31 (tr. 1/116, 2/208).

57. DCAA determined that the $950,000 voluntary contribution should not be included for purposes of assessing appellant's relative performance with its "peer group" for 2005. DCAA used what it considered "year-end values" that excluded the $950,000 in certain calculations assessing Metron's financial performance. (Ex. A-5 at 7-8; tr. 5/108-21, 258; R4, tabs 2, 5 at 9) Both Mr. Overton and Mr. Oyer agreed that use of these measures in the manner performed by DCAA was improper (tr. 2/140, 4/39; ex. A-5 at 4-6, ex. G-12 at 7). Mr. Oyer considered that DCAA's failure to adjust for nonrecurring transactions generally, and the voluntary contribution in dispute here specifically, failed to correctly reflect the actual financial performance of Metron year-over-year (tr. 4/25, 30-32, 38-40, 48, 53).

58. Dr. Corwin worked part-time for Metron in 2005 and was paid on an hourly basis only for his Metron work. Metron matched Dr. Corwin to the Chief Technical Officer (CTO) position in the Radford Survey even though his title was Senior Analyst. There is no indication prior to the hearing that the government questioned Dr. Corwin's

role as CTO. Having reviewed his continuing extensive functions and responsibilities within the company, we agree with Messrs. McGee and Overton and find that the CTO position was an appropriate match for Dr. Corwin. There is no evidence that the hours worked were fewer than claimed by Metron. Nor is there any indication that those hours were insufficient for him to adequately perform the duties of a CTO. Both compensation experts found that Dr. Corwin was paid below the market median for a CTO. (Tr. 1/38-40, 204-05, 3/45-46, 6/6-11, 13, 24, 27-28; ex. G-12 at 4, 12, ex. A-6 at 16)

G. Claims, Final Decisions and Appeals

59. On or about 16 August 2007 DCAA issued a DCAA Form 1 questioning $585,777 of Metron's claimed executive compensation for 2004 (app. supp. R4, tab 233 at G55-61). The Form 1 incorporated the text of DCAA's 20 July 2007 analysis (*id.* at G57-61).

60. On 29 August 2007, DCAA issued its audit report regarding Metron's 2004 incurred costs (app. supp. R4, tab 233 at G30-61). On 11 September 2007, the ACO, forwarded the audit report to Metron (app. supp. R4, tab 233).

61. On 16 October 2008, DCAA issued a Form 1 regarding Metron's 2005 final indirect rates submission (R4, tab 3). The Form 1 disapproved $514,387 of the compensation costs claimed by Metron in its final indirect cost rate submission for its FY 05 (R4, tab 3).

62. By letter dated 30 October 2008, the ACO issued a final decision finding Metron's 2004 claimed executive compensation unreasonable in the amount of $585,777. As part of her decision, the ACO made a demand for payment in the amount of $316,997, the DCMA administered portion of the questioned costs. (R4, tabs 105; app. supp. tab 242) In her final decision, the ACO adopted DCAA's statement of the facts and "relied heavily" on the audit report (*id*; tr. 3/256-58, 265-66).

63. Metron appealed the ACO's 30 October 2008 final decision. The appeal was assigned ASBCA No. 56624 (R4, tab 106).

64. By letter dated 20 November 2008, Metron submitted a claim for costs disallowed by DCAA for 2004 and 2005 to ACO DeCarlo. Metron asserted its right to the $316,997 of executive compensation costs that the ACO had previously demanded. In addition, Metron requested a contracting officer's final decision that Metron's 2005 executive compensation costs were reasonable and allowable. (R4, tab 4)

65. On 19 February 2009, the ACO issued a second Final Decision and Demand for Payment. The final decision denied Metron's claim seeking $316,997 for the executive compensation costs that the ACO had determined to be unreasonable in her October 2008 final decision concerning FY 04 and for which she had demanded

repayment. The ACO found that Metron had been paid the $316,997 at issue through its 2004 indirect billing rates, and had not repaid the government these costs in response to the demand issued in her previous final decision. The final decision also found that $725,233 of the compensation claimed by Metron for its FY05 was unreasonable under the criteria set forth in FAR 31.205-6(b)(2). It further found that Metron had been paid the unreasonable compensation, and that the DCMA-administered portion of this amount was $376,449. A demand for repayment of this amount was made upon Metron. (R4, tab 6)

66. On 25 February 2009, Metron appealed the ACO's 19 February 2009 final decision (i) denying its claim of 20 November 2008, and (ii) asserting a demand for repayment of $376,449. The Board docketed the contractor's claim as ASBCA No. 56751 and the government's claim as ASBCA No. 56752. These two appeals were consolidated with ASBCA No. 56624 on 13 May 2009. (R4, tab 7; Board's Corrected Notice, 26 February 2009; Board's ltr., 13 May 2009)

DECISION

Determination of the reasonableness of executive compensation is a fact-specific inquiry, requiring examination, *inter alia,* of the specific tasks, responsibilities, education/training and work experience of the executives in question. *Techplan Corp.,* ASBCA No. 41470 *et al.,* 96-2 BCA ¶ 28,426 at 141,987, 141,989; *see also Information Systems & Networks Corp.,* ASBCA No. 47849, 97-2 BCA ¶ 29,132. Citing *Techplan,* we recently stated in *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-1 BCA ¶ 34,920:

> In addition to the more general definition of "reasonable" in FAR 31.201-3, FAR 31.205-6, COMPENSATION FOR PERSONAL SERVICES (finding 24), provided at the relevant time that compensation for personal services must be reasonable for the work performed and "must be based upon and conform to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply" an agreement to make the payment. This clause sets forth factors to consider for testing the reasonableness of compensation that are in addition to those in FAR 31.201-3. Some of the factors are general conformity with the compensation practices of other firms of the same size, other firms in the same industry, and firms in the same geographic area.

Id. at 171,718.

Although the contracts in dispute span a considerable period and involve several iterations of the general FAR reasonableness and executive compensation cost provisions, neither party contends that the variations in language over time materially impact the considerations relevant to the determination of the reasonableness of Metron's executive compensation in this dispute.

1. Reasonableness Generally

Based on the entire record, we conclude that Metron has sustained its burden of proving that the 2004 and 2005 executive compensation costs in dispute were reasonable. Appellant's executive compensation plan set reasonable compensation levels depending on achievement of pre-established management goals and internal metrics and there is no evidence that the plan was not consistently followed by Metron. After analyzing available surveys, Metron concluded that the Radford Survey best matched the company, among other things, in terms of size/revenue (under $50 million), industry (high technology), and geographic location (national). Appellant reasonably determined that it most accurately reflected compensation for business and executive talent paid by its competitors for comparison with the executive compensation paid by appellant. As explained herein, we do not find persuasive the government challenges to the reasonableness of appellant's claimed compensation costs.

The adequacy of Metron's compensation levels and approach was persuasively supported by Mr. McGee's analyses. In this case, we agree with Mr. McGee. We are also satisfied that appellant's use of the highly reputable Radford Survey alone best fit appellant's circumstances and was sufficient to establish and corroborate the reasonableness of the executive compensation costs paid to the executives in dispute. We have found that contractors are not necessarily required to use more than one compensation survey. *Cf. Techplan,* 96-2 BCA ¶ 28,426 at 141,989; *Information Systems & Networks,* 97-2 BCA ¶ 29,132 at 144,941; *Ralph M. Parsons Co.,* ASBCA No. 37931 *et al.,* 91-1 BCA ¶ 23,648 at 118,461; *Burt Associates, Inc.,* ASBCA No. 25884, 82-1 BCA ¶ 15,764 at 78,012-13. Mr. Overton also considered that Metron's use of Radford was reasonable.

In most cases, the 2004 and 2005 executive compensation paid by Metron was within 10% of the Radford Survey's median Total Cash Compensation amounts for the positions in dispute. The record establishes that to the limited extent that Metron paid an executive at approximately the 75th percentile of reporting companies in the Radford Survey, the compensation level was reasonable. *Cf. Techplan,* 96-2 BCA ¶ 28,426 at 141,989. In particular, Mr. McGee persuasively supported the reasonableness of the compensation amounts (even without adding the DCAA allowance for pension costs). Moreover, both experts and DCAA agreed that a "reasonableness range" above or below the level for all percentiles was a minimum of a plus or minus 10%. *Cf. Techplan,* 96-2 BCA ¶ 28,426 at 141,993.

We note that while Metron offered short term incentives it did not offer long term incentive compensation as did many of its competitors. Radford's data includes short term incentives (bonuses) but does not include, *inter alia*, allowances for pensions and deferred compensation. Accordingly, DCAA increased the Radford amounts to reflect pension costs. Appellant emphasizes that pension additions to TCC further demonstrate the reasonableness of Metron's compensation levels. Both Mr. McGee and Mr. Overton accepted DCAA's proposed pension factor. However, Mr. McGee emphasized that Metron's TCC was reasonable based on use of the Radford Survey alone without adding an amount for pension cost. Mr. McGee noted that private companies that do not offer long term incentive compensation commonly increased TCC to remain competitive.

We also consider that Metron's payment of compensation at the 50th to 75th percentile TCC was reasonable because of the financial and nonfinancial accomplishments and performance of Metron and its executives for the years in question.

Appellant had positive net income from 2001 through 2005 and experienced significant and continuous growth in revenues over the 20 years from 1985 to 2005. The Metron executives met or exceeded financial goals expressed in appellant's compensation plan. Metron's contracts were typically competitively evaluated and awarded. In effect, the competitiveness of Metron's compensation was tested by the market.

Recruitment and retention of the requisite PhD-educated executives capable of obtaining the necessary security clearances for the highly sophisticated sensitive and technical work performed by Metron also support our conclusion that the executive compensation in dispute here was reasonable. Although Metron does not precisely quantify premiums associated with clearances and education as discrete elements of its compensation plan, Mr. McGee considered them of significant value, prevalent in the high technology government contracting industry, and properly for consideration in assessing the overall reasonableness of Metron's executive compensation.

2. <u>Additional Compensation Surveys</u>

We have fully considered the government's contentions regarding the use of additional surveys to "average" in determining reasonableness. However, we have determined that on the facts of this case the Radford Survey data alone provides a sufficient foundation for proving the reasonableness of appellant's executive compensation. In view of this conclusion, detailed findings and further discussions of the parties' extensive contentions regarding the survey methodology, government methodology and relative quality of the additional surveys, *vis a vis* the Radford Survey, are not required. In short, the alternative surveys relied on by the government were less appropriate, comprehensive, technology-industry-oriented, reliable and/or persuasive than the Radford Survey for the positions in dispute in this case.

Although on the facts of this case we consider that use of multiple surveys was not required to establish the reasonableness of Metron's executive compensation for the positions in dispute, appellant compared the Radford results with ERI Survey data at

DCAA's insistence. In our view, the results did not significantly or adversely call into question the results obtained by the Radford Survey. Applying a 10% range of reasonableness, Metron determined that its compensation was between the 50th and 75th percentile of the ERI TCC figures for 2004 and 2005. Although Mr. Overton considered that use of the ERI survey to "validate" the Radford results was reasonable, he viewed the ERI data as less germane and credible for comparison.

3. Senior Engineers/Managers and Dr. Corwin

We have considered the opposing views of the parties regarding the status of Metron's Senior Engineers/Managers as executives. Based on the facts and record in this appeal, we conclude that they qualify as executives and were appropriately matched by appellant with comparable Radford Survey executive positions. The evidence establishes that the Senior Engineers had greater responsibilities than acknowledged by the government, in particular with respect to business development. Both Mr. McGee and Mr. Overton agreed that the Radford Survey's Strategic Business Unit (SBU) Executive was an appropriate match for the Senior Engineers and reasonably used by Metron in evaluating their compensation. The responsibilities, importance and status of the Senior Engineers were illustrated by actual corporate events. Dr. Stefanick was promoted by Metron to a Division Manager as a result of his success as a Senior Engineer who managed and developed a business unit that grew into appellant's Systems & Analysis Division. On the facts of this case, we consider that the best "match," albeit not perfect, was Radford's SBU Executive position.

The government contends that Dr. Corwin should have been paid as a part-time senior analyst in 2005 and did not serve as an executive. We have found to the contrary and consider that appellant properly matched Dr. Corwin to Radford's Chief Technical Officer position based on his continuing extensive responsibilities and functions within Metron. Both Mr. Overton and Mr. McGee found that the CTO match was proper. There is no evidence that the part time hours worked by Dr. Corwin were inaccurate or brought into question his ability to properly perform CTO functions.

4. Government Extrapolations and Adjustments of Radford Data

Both the DCAA and Mr. Overton's adjustments of the Radford Survey results were deficient as described in our findings. In particular, they were both based on unproven, highly questionable assumptions. They were not based on analyses of actual, underlying data that Radford used in deriving its reported survey results. Because of the various flaws in the government's data and methodology and the lack of persuasiveness of its analyses, we are unable to make use of the analyses even if we were otherwise disposed to make minor reductions in the compensation paid to any of appellant's executives.

We have determined that Mr. Overton's and DCAA's interpolations and extrapolations based on use of "regression" tools and analyses were deficient and not sufficiently supported. Since Radford does not provide the underlying participant data it is impossible accurately to perform a regression analysis. Surveys generally, and the Radford Survey in particular, generally provide data for the 25th, 50th and 75th percentiles within a revenue bin. The Radford Survey does not provide data for additional intermediate percentiles such as the 41st and 66th percentiles used in the government's analyses. The accumulation and reporting of Radford results by revenue bins does not reasonably imply that revenue is the sole determinant of executive compensation within each bin. The use of a "regression" or similar analyses to interpolate approximate points on a continuum between these percentiles is fraught with problems, especially where as, in this case, Radford's underlying data is unavailable. Greater scientific, statistical or analytical certitude is not possible given this lack of data.

Mr. Overton reduced the Radford data using "best fit trend lines" or "regression" analyses because in his opinion executive compensation is driven by the magnitude of revenue accountability. However, nothing in the Radford Survey supports his assertion that within each revenue bin (in this case under $50 million bin) there is a direct relationship between increasing revenue and increasing compensation. It is speculative to make any such assumption which fails to recognize the potential significance of other non-revenue factors that may influence compensation. Similarly, DCAA's assumptions based on the overriding importance of revenues are factually unjustified. In the extreme case, promising high technology companies may have little or no revenues in their early growth stages.

In addition, we have found that the "peer group" analyses performed by both DCAA and Mr. Overton were based on misleading comparisons with much larger companies with markedly differing organizational and financial structures. The government contends that it used the proper measures of Metron's financial performance for comparison with peer companies and this comparison reasonably placed the compensation levels for Metron executives at 66% in 2004 and 41% for 2005. The difference between the two years was largely attributable to the $950,000 contribution in FY 05. However, we have found that the size and characteristics of the group of companies selected by the government to benchmark performance were not similar or reasonably comparable to the group of Radford Survey participants used to benchmark compensation. Comparing the performance of small, private, closely-held companies such as Metron to publicly-traded, Fortune 500 companies such as IBM was misleading and unfair.

DCAA's "peer group" comparison for 2005 was also deficient to the extent that its financial comparisons misanalyzed the $950,000 voluntary contribution. The non-recurring, post-year-end contribution was clearly made for tax purposes. Among other things, it speaks to Metron's financial strength and ability to sustain performance levels based on recurring and ongoing operations. The voluntary contribution also, of course, was not claimed as an expense for government contract purposes. Given the nature of the contribution, it was misleading for DCAA to make financial comparisons that failed to properly consider the significance of this non-recurring item. Mr. Oyer and Mr. Overton were in substantial agreement on this point. We will not second guess appellant's interpretation of its own compensation plan methodology with respect to treatment of the voluntary contribution as it affects achievement of pre-established profit and performance goals in this case.

With respect to compensation of division executives, the government's analyses developed an alleged "average" of the divisional revenues of Radford Survey participants in the under $50 million bin. This fragmenting of total Metron revenues was based on perceptions of what were considered by the government to be division revenues of each Metron division for comparison with the alleged average Radford revenues. Noting that the alleged "average" divisional revenue for all participants was significantly greater than Metron's alleged division revenues, the government analyses considered that Metron's division executives should only be compensated at the 25th percentile level. Again, the essential problem with these analyses is that it makes rather simplistic and highly questionable assumptions concerning the relation of revenues to compensation within the Radford under $50 million bin. The assumptions are not supported by underlying Radford data. DCAA conceded that it was not possible to discern revenue amounts of participants at any particular percentile. We have found that Metron executives also had cross-divisional responsibilities and that technical and financial support and collaboration among divisions were present. Here, we consider that total Metron revenue was the appropriate benchmark for assessing compensation reasonableness of the division executives.

Because we have determined that the government analyses of the reasonableness of appellant's executive compensation are unpersuasive as a consequence of the deficiencies discussed above, individually and collectively, we need not address alleged additional deficiencies and issues raised by appellant challenging those analyses.

CONCLUSION

For the foregoing reasons, we conclude that appellant has sustained its burden of proving that the 2004 and 2005 executive compensation costs in dispute were reasonable and allowable. Accordingly, the appeals are sustained.

Dated: 4 June 2012

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56624, 56751, 56752, Appeals of Metron, Inc., rendered in conformance with the Board's Charter.

Dated: JUN 05 2012

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals