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DECISION



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

[Protest of Air Force Determination Not to Contract Support Services]

FILE: B-195617

DATE: February 21, 1980

MATTER OF: Jets, Inc. - DLG 00067

DIGEST:

1. GAO will consider protest from bidder alleging arbitrary rejection of bid when contracting agency utilizes procurement system to aid in determination of whether to contract out by spelling out in solicitation circumstances under which contractor will or will not be awarded contract.
2. Provision in agency's cost comparison manual containing procedures to determine whether to contract out--that in-house cost estimate should be submitted to contracting officer at least 2 days prior to "start of negotiations"--is unclear. Recommendation is made that agency clarify manual with respect to when cost estimate should be submitted to contracting officer.
3. Where protester's contentions--that agency took advantage of protester's proposal in preparing in-house cost estimate regarding reduced staffing from the current level of 329 to 259 and other matters--and agency's directly conflicting explanation constitute only evidence, protester has not met burden of proving its case by clear and convincing evidence.
4. Contention--that cost comparison was incorrect because agency assessed protester \$2,139,290 representing personnel relocation-related expenses associated with contracting out--is without merit where agency's explanation for assessment is reasonably based.
5. Contention--that RFP should not have contained provision assessing contractor \$750,000 for

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new equipment associated with contracting out--first raised after closing date for receipt of initial proposals is untimely under GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), and will not be considered on merits.

6. Contention--that agency should have used fringe benefit factor of 38 percent instead of 8.44-percent factor used to assess cost of Government of continuing to perform in-house--is without merit where agency explains that Public Law No. 95-485 required use of policies in effect prior to June 30, 1976, and the factor then in effect was 8.44 percent.
7. Claim for proposal preparation costs is denied where record shows that protester was not arbitrarily treated, was not improperly induced to submit proposal where no contract was contemplated, or was not denied contract which it would have received.

OL 8/13/2
Jets, Inc., protests an Air Force determination that base operating support services at Newark Air Force Station, Ohio, would be performed at a lower overall cost to the Government by continuing performance by Government personnel rather than contracting with Jets. The Air Force obtained the cost of contracting by evaluating Jets' proposal--the only proposal received in response to request for proposals (RFP) No. F33600-79-R-0294. The cost of continued Government personnel performance was estimated by a management engineering team (MET) based on the 654-page statement of work contained in the RFP. Jets contends that the procedures followed by the Air Force in reaching the determination violated mandatory requirements and that the cost comparison is incorrect and was not performed in good faith. Jets claims that it should receive the award or that it is entitled to proposal preparation costs.

Initially we point out that the underlying determination involved here--whether this work should be performed in-house by Government personnel or performed by a contractor--is one which is a matter of executive branch policy not within our protest function. Local F76, International Association of Firefighters, B-194084, March 28, 1979, 79-1 CPD 209. At the same time preserving the integrity of the procurement system is within our protest function. Recently, we stated that where, as here, a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, by spelling out in a solicitation the circumstances under which a contractor will or will not be awarded a contract, a protest from a bidder alleging that its bid has been arbitrarily rejected will be considered by our Office. See Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38; Locals 1857 and 987, American Federation of Government Employees, B-195733, B-196117, February 4, 1980, 80-1 CPD ____. Hence, Jets' protest will be considered.

For the reasons stated herein, both the protest and claim are denied.

I. Was the In-House Estimate Timely Completed and Sealed?

Jets argues that applicable Air Force policy and procedures required that the estimated cost to continue performance with Government personnel should have been completed and sealed prior to the date for receipt of initial proposals under the RFP, April 23, 1979. That was not initially done until May 16, 1979. Jets contends that, before the Government estimate was completed, personnel performing the in-house estimate had knowledge of its proposed manning, proposed costs, and the names and salaries of proposed supervisors. Jets concludes that the Air Force's failure to follow the requirement to complete and seal the Government estimate prior to receipt of initial proposals compromised the integrity of the competitive procurement system.

Jets points to the following section of Air Force Manual (AFM) 26-1 as establishing the requirement that

the in-house estimate must be completed and sealed prior to the receipt of initial proposals:

"1-20. Negotiated Procurement Procedures:

"a. General. Under negotiated procurement, public disclosure of the contract price cannot be made until after award. This is necessary to preserve the integrity of the procurement process * * *. Additionally the in-house cost estimate * * * must be submitted to the contracting officer in a sealed envelope no earlier than seven days and no later than two days before the start of negotiations. Under no circumstances will the in-house cost estimate be provided to personnel involved in the negotiation or evaluation of contractor proposals until the most favorable offer to the Government has been determined." (Emphasis added.)

Jets also points to a letter dated August 30, 1978, from Headquarters, Department of the Air Force, regarding implementation of the cost comparisons procedures of AFM 26-1, which contained examples of required milestone charts. Both examples showed that the in-house estimate was completed and sealed prior to receipt of initial proposals or bid opening. Further, on the sample milestone chart, the receipt of initial proposals and the start of negotiations were the same date.

In response, the Air Force essentially denies any improprieties in the process and argues that (1) since the milestone schedule is a sample, it cannot be assumed that this sample chart must be complied with for each and every Air Force cost comparison, and (2) the Air Force did not intend the "start of negotiations" to be interpreted as the submittal of initial proposals; instead, the term negotiations as used in AFM 26-1 clearly anticipates the start of "final negotiations."

It is not clear to us when the start of negotiations takes place within the meaning of AFM 26-1.

It could start, as Jets contends, when the initial proposals are submitted. In any event, we believe the pertinent question is whether a fair and reasonable cost comparison was made, not whether the sealed in-house cost estimate was submitted late to the contracting officer. Therefore, we need only consider Jets' contention that the cost comparison was incorrect and not performed in good faith, although by separate letter we are recommending that the Air Force clarify AFM 26-1 with respect to when the cost estimate should be submitted to the contracting officer.

II. Did the Air Force Use Jets' Ideas in Preparing the In-House Estimate?

Jets contends that the Air Force took advantage of ideas and manning structures that it proposed in making the in-house estimate. Jets principally argues that the Air Force's in-house staffing estimate was reduced from an authorized strength of 329 to 259 compared to Jets' proposed 256; Jets believes that this similarity in staffing was not coincidental. Jets also questions why the Government did not accomplish this cost saving years ago. Jets also refers to a July 19, 1979, memo from an Air Force commander stating that "[t]he following organizational structure is the one I have concurred to as a counter proposal to contracting the communications support at Newark AFS * * *." Jets asks how did he know the details of the contractor proposal. Further, Jets notes that on July 25, 1979, signs appeared on bulletin boards at the air station reading "We Won," "No Contractor," etc., and yet in accord with AFM 26-1 the amount of the estimated contract cost was not to be revealed at that time.

In response, the Air Force explains that AFM 26-1 requires the Air Force to base the in-house estimate on the number of civilian man-years required to perform the same workload and standard of performance in the RFP's statement of work. Management engineering techniques were used to price the RFP's statement of work to determine the minimum manning sufficient to perform the statement of work; that method is somewhat analogous to zero-based budgeting and allows the Air Force to determine where efficiencies can be achieved.

The Air Force is not permitted by AFM 26-1 to use the current manpower authorization or the actual people employed to cost the in-house estimate. The Air Force also reports that on August 3, 1979, Air Force Headquarters directed a reduction in the manning level to 259 man-years and as of October 1, 1979, the onboard civilian strength was less than 259 personnel; onboard strength as of November 20, 1979, is below the 259 level and will remain at or below the 259 man-year level unless validated workload changes dictate otherwise.

Regarding the July 19 memo, the Air Force reports that the commander had no knowledge of the contractor's proposal; instead, this message was the culmination of discussions and correspondence started in February 1979 concerning the manning and organizational configuration of the communications operating location. The operating location chief disagreed with the commander over the number of in-house people to be used and the disagreement was resolved with the "counterproposal" message, which refers to comments of the operating location chief, and was not intended to be a proposal to counter the Jets' offer.

Concerning the "we won" notices on the base, the Air Force investigated and reports that it found no evidence that Air Force personnel leaked information concerning the contractor's offer. Since such posting took place after the Government's estimate was revealed, the Air Force suggests that it was equally possible that contractor personnel or their relatives who knew the amount of the contractor's proposal and, after opening of the Government's estimate, knew that their offer was higher than the estimate may have revealed in a public place that the Government's estimate was low.

The record in each of the above three examples of alleged improprieties consists of Jets' view of the circumstances and the Air Force's conflicting view. In these matters, we have consistently stated that the protester has the burden of proving its case. See Amex Systems, Inc., B-195684, November 29, 1979, 79-2 CPD 379 (protest was denied since we could not

determine from the record that the Air Force's cost comparison was either faulty or misleading, as alleged); Tri-States Service Company, B-195642, January 8, 1980, 80-1 CPD ___ (protest was denied since we had no basis on the record to dispute the Army's cost comparison). Here, in view of (1) the Air Force's firm denial that its personnel used information contained in Jets' proposal to make the in-house estimate, and (2) the protester's failure to produce clear and convincing evidence to support its position, this aspect of the protest is denied.

III. Was the Cost Comparison Faulty?

Regarding the Air Force's estimate of the contracting costs with Jets, Jets principally questions why it was charged with \$2,139,290 in relocation expense, severance pay and retained pay for the entire present manning of 329 when, in fact, the contractor would hire some 70 percent of the incumbent personnel and no relocation nor retained pay would be involved for them. Further, in Jets' view, the Government's cost should have been increased accordingly for those 70 people for relocation costs, severance pay and retained pay.

Jets also questions why the Government required in the RFP that the contractor purchase some \$750,000 worth of new equipment (vehicles, forklifts, tractors, etc.) when this identical equipment was in place as Government-owned equipment and then why the contractor was charged with the cost of shipping the Government equipment to other installations. Finally, Jets questions why the Government added only 8.44 percent to its salary costs for fringe benefits such as retirement, health and welfare, insurance, projected pay increases, when in actual fact these fringe benefits total about 38 percent of salaries.

We note that Jets raised other questions relative to the cost comparison but their resolution is unnecessary since they involve such a small amount of money relative to the in-house, 3-year estimate, \$14,372,687, as compared with the estimated cost of contracting with Jets, \$20,937,335. Similarly, Jets' objection to the

Air Force using revised in-house estimate dated July 23, 1979, which reduced the in-house estimate by about \$200,000, need not be considered because the difference is not determinative.

Regarding chargeable incumbent personnel expenses, the Air Force reports that there is no assurance that Jets would offer employment to 70 percent of the incumbent employees, or that any would accept the offer; experience shows that those higher graded employees involved would want to remain on the Federal payroll until they are eligible to retire; therefore, they would be willing to relocate. The data automation personnel have a valuable skill which is needed elsewhere in the Air Force to retain their current grade/pay and they, too, would be willing to relocate. Other employees with retained pay entitlement want to remain with the Air Force to retain the civil service retirement benefits. Further, the Air Force states that no relocation costs or severance pay expenses were charged to other than base operating support personnel because other surplus actions generated no separations or relocations; other surplus employees would be placed at or below their current grade. In essence, the Air Force estimates that there are no anticipated added costs chargeable to continued Government operation of this project by reason of the proposed personnel reduction; all personnel above the 259 figure will be absorbed by attrition, retirement, or other assignments. Finally, the Air Force notes that the base's capacity to absorb 47 people reduced the amount assessed against Jets for this cost category.

We have carefully examined the Air Force's position and Jets' contentions on incumbent personnel expenses and we have no basis to conclude that the Air Force's position is without a reasonable basis. Accordingly, this aspect of Jets' protest is denied.

Regarding the RFP's new equipment provisions, the Air Force reports that the decision not to furnish the equipment to any contractor was based upon requirements for the equipment at other Air Force bases to fulfill shortages and is in accordance with AFM 26-1. The Air Force notes, however, that Jets' protest on

this issue is untimely since this requirement to furnish equipment was apparent in the solicitation. Therefore, Jets was required to file the protest prior to the date established for receipt of proposals in order for the protest to be timely under 4 C.F.R. § 20.2(b)(1) (1979).

On the timeliness of this aspect of Jets' protest, the Air Force is correct. Accordingly, we will not consider the merits of this portion of Jets' protest.

Regarding the fringe benefit factor, the Air Force reports that it was required by section 814 of Public Law No. 95-485, October 20, 1978, 92 Stat. 1625, to use its June 30, 1976, regulations and policies in conducting this contracting out cost comparison. The calculation in the Government in-house estimate of civilian personnel costs for the Government's contribution for retirement and disability, health insurance and life insurance prior to June 30, 1976, was 8.44 percent. Whether or not the 8.44-percent factor is an accurate estimate of actual costs, the Air Force explains that it was required to use this factor.

Jets has provided no basis for us to take exception to the Air Force's explanation. Therefore, this portion of Jets' protest is denied.

IV. Conclusion and Proposal Preparation Cost Claim

In conclusion, we have no basis to find that the Air Force's in-house and contractor cost estimates were faulty. Accordingly, based on the record, since Jets was not subject to arbitrary treatment, not improperly induced to submit a proposal where no contract was contemplated, or not denied a contract which it would have received, it is not entitled to proposal preparation costs. See Rand Information Systems, B-192608, September 11, 1978, 78-2 CPD 189.


Deputy Comptroller General
of the United States