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DECISION



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

[Protest of Agency Decision to Cancel IFB's]

FILE: B-197589

DATE: March 18, 1981

MATTER OF: ACMAT Corporation

DIGEST:

1. Disputes over agency decisions to perform work in-house are generally matters for executive branch resolution. However, GAO does review allegations that cost comparisons to determine whether contracts should be awarded or solicitations canceled were based on grossly underestimated Government estimates since, if true, cancellations in such circumstances would be detrimental to procurement system.
2. Protest that agency estimates of in-house performance costs were too low is denied where agency reliance on supervisors' and engineers' estimates of labor hours was not unreasonable.
3. Protest that agency improperly omitted certain cost items in estimating cost of in-house performance is denied where protester has not shown violation of OMB Circular No. A-76 or Office of Naval Material Instruction 4860.12A. Therefore, protester has not carried burden of proof.

ACMAT Corporation protests the Naval Facilities Engineering Command's decision to cancel two invitations for bids (IFB) for certain maintenance and construction work required over a 3-year period at the Naval Underwater Systems Centers (NUSC) at New London, Connecticut (IFB No. N62472-79-B-0182), and Newport, Rhode Island (IFB No. N62472-79-B-0178). [The solicitations were canceled because the contracting officer determined that the work could be performed at a lower cost to the Government through continued use of Government personnel rather than outside contractors.] Basically

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[ACMAT contends that the Navy's estimates of the cost of in-house performance were unrealistically low.] ACMAT contends that, [since the determinations to cancel were reached by comparing the low bids received under each IFB to unrealistically low Government estimates, the contracting officer's determinations to cancel both solicitations were improper.]

We do not consider the protest to have merit.

The complained-of determinations, made under the aegis of Office of Management and Budget (OMB) Circular No. A-76, essentially rested on the outcome of comparisons of the cost of performance by Government personnel versus the cost of contractor performance. [Both solicitations contained notices that a cost comparison would be made and] stated in pertinent part:

"The government's in-house cost estimate will be compared with the bid of the low responsive and responsible bidder, as determined by the contracting officer. If the total contractor cost is lower than the government's in-house cost estimate, a contract will be made if otherwise appropriate. However, a contract award will not be made for at least five workdays after bid opening to allow for review of the in-house cost estimate. If the in-house cost estimate is lower than the low responsive and responsible bidder, the workload will be accomplished in-house."

Bids were opened on August 23, 1979, with the following results:

NUSC, Newport

ACMAT Corporation	\$3,042,000
Moloney & Rubien Construction	3,281,298
Government estimate	1,420,551

NUSC, New London

ACMAT Corporation	\$ 995,518
Seaman-Bratko Corporation	1,386,000
Carlin Contracting Co.	1,464,000
Government estimate	506,105

Subsequently, ACMAT reviewed the Government estimates and complained to various officials in the contracting activity that the Government estimates were too low. The Navy allowed ACMAT to review actual work records for maintenance and construction tasks performed at the NUSC facilities during 1978. Based upon its review, ACMAT contends that the Navy's actual labor costs in 1978 were four times greater than the labor costs used in formulating the estimates. ACMAT argues that the Navy erroneously failed to include costs of transportation, equipment, tools, fuel, and depreciation in its estimates. In sum, ACMAT charges that the Navy grossly underestimated the cost of in-house performance and, consequently, improperly canceled the protested solicitations. [ACMAT charges that the Navy has not performed an independent, objective review of the determinations to cancel in view of ACMAT's appeal and requests that our Office conduct an independent investigation of the matter.]

[The Navy asserts that matters] relating to OMB Circular No. A-76 concern policy questions of the executive branch of Government and, therefore, are not reviewable by our Office. In this regard, the Navy cites paragraph 11 of OMB Circular No. A-76, revisions of March 29, 1979, which states that the procedures under OMB Circular No. A-76 do not authorize an appeal outside of the contracting agency. The Navy emphasizes that both Government estimates were audited by the Naval Audit Service which certified their accuracy after some minor corrections were made.]

Generally, we regard a dispute over an agency decision to perform work in-house rather than to contract out for those services as involving a policy matter to be resolved within the executive branch. When, however, an agency utilizes the procurement system to aid in its decisionmaking, spelling out

in a solicitation the circumstances under which the Government will award/not award a contract, we believe it would be detrimental to the system if, after the agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the decision as to whether a contract will be awarded. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38. Therefore, [we do review allegations that a cost comparison to determine whether to award a contract or cancel a solicitation is based upon a grossly underestimated estimate of the cost of in-house performance.]

The Navy indicates that its in-house cost estimates were not based upon actual NUSC work records because the cost of examining those work orders was prohibitive. Furthermore, [the Navy states that the NUSC accounting system does not break down labor and material charges into costs attributable to individual task orders. Therefore, [the labor costs used to estimate in-house performance costs were based upon engineering or supervisor estimates of individual jobs required under the IFB's. The estimates were audited by the Naval Audit Service which checked the estimates against supporting documentation where possible and certified the overall estimates as accurate (with relatively minor revisions).]

ACMAT requests that our Office conduct an independent investigation to determine the validity of the Navy's labor estimates. However, as part of our bid protest function, [we will not investigate to determine the accuracy of a protester's assertions. Rather, it is the protester that has the burden to affirmatively prove its case.] See Tri-States Service Company, supra.

[We find no impropriety in the Navy's relying upon supervisors and engineers to determine the cost of labor to perform the tasks required under the IFB's in view of the fact that such personnel should be familiar with these jobs and because the Navy believed the cost of examining actual work orders to be prohibitive. [We have no basis to question the accuracy of these

estimates but note that they were certified as accurate by the Naval Audit Service--a Navy activity separate from the procuring activities. Accordingly, we cannot find unreasonable the Navy's decision to rely upon supervisors' and engineers' certified labor-hour estimates. See PM Contractors, Inc., B-192495, January 8, 1979, 79-1 CPD 8; United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 CPD 301.

Regarding ACMAT's charge that the costs of transportation, equipment, tools, fuel, and depreciation should have been included in the Navy's estimate of in-house performance cost, ACMAT indicates that it was told by NUSC officials that such cost items are excluded in accord with the Navy's established accounting procedures. While the Navy has neither confirmed nor refuted this statement, the Navy has reported that these cost comparisons were performed in accord with Office of Naval Material Instruction (NAVMATINST) 4860.12A and using the Cost Analysis Worksheet found at Appendix C to that Instruction. With the exception of depreciation costs, the Cost Analysis Worksheet does not break down the cost of in-house performance to show the elements of cost which ACMAT claims should be included in the Government estimate. Moreover, excluding depreciation, these specific cost items are neither enumerated as part of the Government in-house operation in OMB Circular No. A-76 nor in NAVMATINST 4860.12A. In any event, we do not think that ACMAT has carried its burden of proof because ACMAT has not shown how the Navy has violated provisions of OMB Circular No. A-76 or NAVMATINST 4860.12A and no violations are apparent from our review of those provisions. In the case of depreciation, we note that depreciation costs are to be included only for new or additional facilities or equipment required for in-house performance, and the Navy's audit shows that no new or additional capital investment will be required by the Government because of performing these services in-house.

The protest is denied.]


Acting Comptroller General
of the United States