

DECISION



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

118545 PL-1 Golden

FILE: B-205487

DATE: June 1, 1982

MATTER OF: Dyneteria, Inc.

DIGEST:

1. Protester's challenge to the calculation of two line items of Office of Management and Budget Circular No. A-76 cost comparison to GAO is dismissed where protester did not file specific objections to these two items with agency under the agency's appeal procedure.
2. Where DAR and solicitation advised bidders of the Office of Management and Budget Circular No. A-76 cost comparison appeal procedure, protest against propriety of procedures not filed prior to bid opening is untimely.
3. Protest against Defense Logistics Agency's determination to continue to perform equipment maintenance in-house is denied where the protester has not shown that the cost comparison was faulty or violated mandated procedures for determining the costs of in-house operation versus contracting out and where, if the protested line cost was overstated because of double counting, the error does not impact the evaluation result.

Dyneteria, Inc. (Dyneteria), protests the Defense Logistics Agency's (DLA) decision to cancel solicitation No. DLA005-81-B-0026, for the equipment maintenance responsibilities at the Defense Depot, Tracy, California. The solicitation was canceled because the contracting officer, pursuant to an Office of Management and Budget (OMB) Circular No. A-76 (Circular A-76) cost comparison analysis, determined the work could be performed at a lower cost to the Government through continued use of Government personnel rather than an outside contractor.

We deny the protest in part and dismiss the protest in part.

Upon receiving notice of DLA's decision and the supporting cost data, Dyneteria, the low bidder in line for award, timely filed an administrative appeal protesting the cost comparison study on six bases. Specifically, Dyneteria contended that the in-house cost estimate was understated with regard to direct labor (lines 3, 4, 7, 9 and 33 of the cost comparison), and line 24, costs assessed for underutilization of Government capacity resulting from contracting out the work. DLA denied the appeal. Dyneteria then timely appealed to GAO that the cost comparison was inaccurate and that Dyneteria was entitled to award. In its initial protest letter filed with GAO on November 13, 1981, and a supplemental statement received on November 27, 1981, Dyneteria raised the line 24 issue. On January 13, 1982, Dyneteria filed "additional information." In this filing, Dyneteria objects to DLA's calculation of inflation estimates (line 8), one-time conversion costs (line 25), in addition to providing more support for its protest of line 24.

DLA has responded to Dyneteria's protest of line 24 on the merits, but contends that the lines 8 and 25 issues were never raised by Dyneteria in its appeal to DLA and should be dismissed because Dyneteria did not exhaust its administrative remedies. DLA cites Direct Delivery Systems, 59 Comp. Gen. 465 (1980), 80-1 CPD 343, as support for its position. In that decision, we stated that we will not consider a protest challenging a Circular A-76 cost evaluation unless the administrative appeal process, if available, has been exhausted.

Dyneteria contends that it did exhaust its appeal with DLA, by alleging there that the cost comparison was incorrect, and that the allegations concerning lines 8 and 25, although not specifically raised, were merely additional support for Dyneteria's basic contention. Dyneteria also contends that DLA's administrative appeal did not afford an opportunity for oral presentation, allowed only 5 days to review the cost analysis and submit its appeal to DLA, and violated procedural due process.

In our view, the lines 8 and 25 issues which Dyneteria failed to appeal to DLA cannot now be considered by GAO and are dismissed.

In Direct Delivery Systems and other cases (see, for example, JAC Management, Inc., 60 Comp. Gen. 372 (1981)),

81-1 CPD 274; Urban Enterprises, B-201619, February 17, 1981, 81-1 CPD 101), we dismissed similar protests because, while an administrative appeal was available, the protester did not appeal the cost comparison on any basis to the agency, filing directly with GAO.

Dyneteria's appeal to the Agency did not raise a general objection to the entire cost analysis, but raised specific objections on certain cost items. This was consistent with the requirement that requests for review of a cost analysis be based on specific, not general, objections. See Defense Acquisition Regulation (DAR) § 7-2003.89 (Defense Acquisition Circular (DAC) No. 76-28, July 15, 1981); paragraph L-16 of the solicitation. Therefore, we see no support for Dyneteria's contention that the lines 8 and 25 objections, not specifically appealed to DLA, were mere additional support for a previously raised objection, and we will not consider the lines 8 and 25 objections on this basis. See JAC Management, Inc; supra; Urban Enterprises, supra.

Dyneteria's other reasons why GAO should consider the protests of lines 8 and 25 relate to the propriety of the appeal procedures. There is no contention that DLA did not follow its procedures.

We note that the solicitation contained, as required by DAR § 4-1202 (DAC No. 76-28, July 15, 1981), the standard clause apprising bidder's of cost comparison appeal procedures (DAR § 7-2003.89). In addition, DAR § 4-1202, of which Dyneteria is on constructive notice (see BOSTI, Inc., B-200502, October 15, 1980, 80-2 CPD 282), further discusses the appeal procedure. Therefore, Dyneteria's protest of the appeal procedure relates to an alleged impropriety in the solicitation which was apparent prior to bid opening. Such an impropriety should have been, but was not, filed with either DLA or GAO prior to bid opening. 4 C.F.R. § 21.1(b)(1) (1981). Under these circumstances, this aspect of the protest is dismissed as untimely.

We will now consider Dyneteria's contention that the line 24 costs were overstated.

Line 24 of the cost comparison worksheet is entitled "Utilization of Government Capacity." The Department of Defense Cost Comparison Handbook (CCH) explains that this factor is intended to measure the impact on the work center of contracting for a service that the work center currently

provider. The decision to contract can result in the work center becoming completely idle, operating at a reduced capacity, or operating at the same or increased capacity. If contracting out would cause the work center to operate at less than its current level of utilization of capacity, the cost, if any, of this underutilization of capacity must be considered. In that case, any overhead/general and administrative costs currently allocable to the service being considered which will continue to be incurred if the service is contracted out must be absorbed by the remaining in-house activities. These continuing costs are a cost of contracting out and they must be charged, in the course of comparing costs, to the bidder.

Dyneteria objects to DLA's decision to straightline its overhead costs representing underutilized capacity for the 3 years of the contract. Dyneteria contends that DLA refuses to recognize that the costs of underutilization of personnel, which the protester concedes would be properly charged to the contractor in the first year, would not continue in years 2 and 3. Dyneteria states that DLA, by prudent management, could accomplish savings through reassignment of tasks, reorganization and reduction of personnel. In this connection, Dyneteria states that deletion of line 24 costs from years 2 and 3 reduces the line 24 total from \$1,367,484 to \$456,300 (the first year), resulting in a savings of \$911,184. Dyneteria asserts that, since the decision favoring in-house versus contracting out was based on savings of \$449,536, the \$911,184 reduction of costs under line 24 overturns the decision to remain in-house.

Dyneteria contends that Circular A-76 guidance affirmatively mandates that the Government achieve these savings. Dyneteria points out that OMB transmittal memorandum No. 6, dated February 24, 1982, states that:

"In charging underutilized capacity do not include any underutilized personnel-related costs on line 24. Prudent management will ensure that personnel are assigned to other tasks or reductions made in the size of the overhead organization. Therefore these costs are not properly chargeable to the cost of contracting out."

The memorandum deleted the line 24 calculation method in the CCH and added a new method to reflect the above quote.

This provision is not applicable here. While Dyneteria points out that the memorandum states that "no new policy is contained" therein, the solicitation was issued in July 1981, and the parties bid with reference to the following Circular A-76 guidance then applicable to the procurement in the CCH:

"* * * [The] increased cost [attributable to underutilized capacity due to contracting out] should be added to the cost of contracting out for the first year in the period of performance, and for each subsequent year unless it is likely that the agency will dispose of or be able to more fully utilize the excess capacity through reorganization or reallocation of work."

In our view, this provision, which DLA used to compute line 24, is clearly different than the memorandum. We will not retroactively apply this guidance to a completed cost comparison. Cf. Serv-Air, Inc.; AVCO, B-195183, October 24, 1980, 80-2 CPD 317, affirmed, B-195183.3, November 3, 1981, 81-2 CPD 375.

Contrary to Dyneteria's allegation, the provision does not require agency reorganization or reallocation of work, but calls for an agency judgment of the likelihood that reorganization or reallocation will occur. DLA found that it was not likely that the excess capacity would be disposed of or be more fully utilized through reorganization or reallocation of work. This was because Defense Depot, Tracy, determined that it was not likely to dispose of command, personnel staff, comptroller, personnel management, administrative support or program management personnel as a result of contracting out the maintenance function primarily since these functions are not maintained specifically to provide direct support to the maintenance function. These functions would remain if the maintenance was contracted out since only a small portion of their duties are utilized throughout any given year to support the maintenance function. Dyneteria has not shown that DLA's position that it would be unable to eliminate jobs is incorrect. See Midland Maintenance, B-202977.2, February 22, 1982, 82-1 CPD 100, and D-K Associates,

Inc. B-201503, B-201625, September 10, 1981, 81-2 CPD 208, wherein we denied similar protests concerning line 24 costs because the protester did not show the agency's calculations violated the cost comparison guidance.

Finally, Dyneteria alleges that line 24 costs were improperly inflated by \$313,000 over the 3-year period because certain items were double counted. Because of the reported \$449,536 difference favoring in-house performance, even if Dyneteria is correct, this would not impact on the evaluation result.

The protest of the line 24 evaluation is denied.

for *Milton J. Forster*
Comptroller General
of the United States