

DECISION

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

25900

FILE: B-209900**DATE:** August 2, 1983**MATTER OF:** TS Infosystems, Inc.**DIGEST:**

1. To prevail in a protest that cost comparison used by agency in reaching its decision to perform photocopying services in-house was faulty and misleading, a protester must demonstrate not only a failure to follow established procedures, but also that this failure materially affected the outcome.
2. A protest alleging that the solicitation's requirement for exactly 28 photocopiers is unduly restrictive is untimely because a protest alleging improprieties in a request for proposals must be filed prior to the closing date for receipt of initial proposals.
3. A protest that the agency improperly determined alternative proposal to be technically unacceptable is academic where cost comparison data establishes that the alternate proposal is of substantially greater cost than the in-house performance estimate.

TS Infosystems, Inc. (TSI) protests the cancellation of request for proposals (RFP) No. HC-10734 issued by the Department of Housing and Urban Development (HUD) for photocopying services at the agency's Washington, D.C. headquarters. Based on a comparison of HUD's estimate of in-house performance costs with TSI's best and final offer, HUD determined that it would be less costly to retain the photocopying services in-house. As its bases for protest TSI asserts that the agency's cost comparison was inaccurate, that the solicitation requirement for 28 copying machines was unduly restrictive, and that HUD improperly rejected the firm's alternate proposals as technically unacceptable. We deny the protest in part and dismiss it in part.

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The RFP at Article XIX notified offerors that HUD's estimate of the cost of in-house performance was being developed for comparison with the prices proposed in response to the solicitation, and that the agency's estimate would be developed in accordance with the requirements and cost standards set forth in Office of Management and Budget (OMB) Circular A-76 and the related Cost Comparison Handbook, Supplement No. 1 (1979), as revised.

The solicitation required that the photocopying services be provided by 28 copying machines with the capacity to produce at least three million copies per month with minimal queuing time. Of 36 firms solicited, three offers were received. After evaluation of the proposals, two of the three were found to be technically unacceptable, leaving TSI as the sole remaining offeror.

TSI responded with three separate proposals, a Prime Proposal and Alternate Proposals #1 and #2. During oral discussions, TSI was informed that both alternate proposals were technically unacceptable, but apparently HUD did not inform TSI of the specific reasons for those determinations at that time. Nonetheless, TSI submitted its best and final offer for the Prime Proposal and a best and final offer for Alternate #1. The cost comparison for the 2-year contract was as follows.

| | <u>TSI</u> | <u>HUD</u> |
|-----------------|-------------|-------------|
| Prime Proposal: | \$2,116,983 | \$1,838,960 |
| Alternate #1: | 1,963,735 | |

Thus, the cost of in-house performance was determined to be \$278,023 under the cost of TSI's Prime Proposal.

HUD then notified TSI that its Prime Proposal had been found to be most advantageous to the Government, but as the firm's cost was higher than the in-house performance cost, no contract would be awarded. TSI protested that HUD had underestimated certain in-house costs and had overestimated certain contracting out items. Accordingly, HUD reevaluated its cost comparison estimate, and made several adjustments which resulted in an insignificant increase in its in-house costs by \$539.

The revised comparison thus demonstrated that the in-house cost still would be significantly below the cost of contracting out.

TSI contends that the cost comparison is deficient because it understated certain costs the Government would incur while overstating the cost of performance by contract, such as increased equipment rental and one-time conversion charges.

1. Inaccuracy of Cost Comparison

We generally do not review an agency decision to perform work in-house rather than to contract out for the services because we regard the decision as a matter of policy within the province of the executive branch. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38. Where an agency, however, utilizes the procurement system to aid its decision, specifying the circumstances under which a contract will or will not be awarded, we will review an allegation that the agency did not follow established cost comparison procedures, as a faulty or misleading cost comparison which would materially affect the decision whether or not to contract out would be abusive of the procurement system. MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. The protester must demonstrate not only a failure to follow established procedures, but also that this failure materially affected the outcome of the cost comparison. The protester may meet its burden by presenting sufficient evidence to raise a reasonable doubt whether the result of the cost comparison would be different if the correct procedures were followed if the agency does not dispel that doubt. Serv-Air, Inc., AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317. In this regard, we have held that it is essential to the integrity of the cost comparison process that the agency identify and document all elements of the comparison. MAR, Incorporated, supra; Serv-Air, Inc.; AVCO-- Air Force Request for Reconsideration, B-195183.3, November 3, 1981, 81-2 CPD 375.

In the matter before us, we cannot find that HUD failed to follow the established cost comparison procedures of Circular A-76, and the related Cost Comparison Handbook, or that it failed to provide a rational basis for its cost determinations. For example,

TSI asserts that HUD failed to include General and Administrative (G&A) costs in the in-house estimate. In this respect HUD has stated that the G&A costs were excluded because none of the offices providing G&A support would alter their staffs or other costs if the services were contracted out. There is nothing in the record to contradict HUD's assertion. Thus, we agree that the determination to exclude G&A costs was reasonable, and was consistent with the January 26, 1982 revision to paragraph 9(3) of Circular A-76 which provides that:

"Costs that would be the same for either in-house or contract operation need not be included in the cost comparison. An example of such a situation is where a contractor would use the same facilities as an in-house operation."

Therefore, as the cost of G&A support services would be the same for in-house performance and contract operation, the cost for those services was properly excluded from the in-house estimate.

TSI has raised other items which it claims result in the Government's understating its own cost of performance. We have examined these allegations and in our view there is nothing in the record which shows that their exclusion materially affected the outcome of the comparison. For example, although TSI alleges that HUD did not include costs for the depreciation of certain office furniture or costs for supplies such as staplers and paper clips, the amounts involved would undoubtedly be negligible, and we therefore find no basis upon which to question the in-house estimate.

Although TSI also challenges the inclusion of costs for increased equipment rental and one-time conversion charges in the contracting out estimate, we find little support for its position. As HUD points out, the equipment rental charges did not reflect additional equipment to be secured, but rather represented increased rates on other copying equipment presently used by HUD that would result from loss of volume discounts should the copying services be contracted. HUD's rationale accords with chapter IV, section G.1. of the Cost Comparison Handbook allowing for the inclusion in the contracting out estimate of "Other

Costs" which encompass "unusual circumstances which may be encountered in particular cost analyses." We agree that the loss of such volume discounts represents such an "unusual circumstance," and we have no basis to question either the inclusion of those costs or their amount.

Regarding the inclusion of one-time conversion costs, HUD relates that they reflected its knowledge of what equipment removal charges would be incurred if its present rental agreement were to be terminated. This approach was not unreasonable, as HUD had no specific knowledge as to whether an offeror would choose to retain the existing copiers. In any event, even if the \$6,712 for those costs were to be excluded from the contracting out estimate, the material outcome of the cost comparison would remain unchanged.

Clearly, TSI has not demonstrated that HUD failed to follow established procedures, thereby meeting its burden to raise doubts sufficient enough for us to question whether the cost comparison's outcome may have been materially affected. We deny this ground of its protest. See Midland Maintenance, B-202977.2, February 22, 1982, 82-1 CPD 150.

2. Unduly Restrictive Requirement

TSI alleges that the solicitation's requirement for exactly 28 copiers is unduly restrictive of competition, and is not a rational expression of HUD's minimum needs. We will not consider the merits of the allegation, as TSI's protest on this issue is clearly untimely.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), provide that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. The Advantech Corporation, B-207793, January 3, 1983, 83-1 CPD 3. Here, the closing date for initial proposals was June 5, 1982. TSI did not raise the unduly restrictive

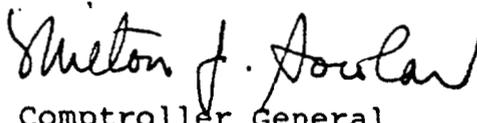
issue concerning the requirement for 28 copiers with HUD until October 26, and did not protest to this Office until November 18. Thus, its protest on this issue is clearly untimely and will not be considered.

3. Improper Rejection of Alternate Proposals as Technically Unacceptable

TSI has alleged that HUD's rejection of its alternate proposals as technically unacceptable was improper. We will not consider the allegation. As to the rejection of Alternate #1, the issue is academic because the revised cost comparison shows that Alternate #1 would still exceed the cost of in-house performance by \$124,236. Therefore, whether Alternate #1 was technically acceptable or not is irrelevant.

Regarding HUD's rejection of Alternate #2, TSI's protest on this issue is clearly untimely. Our Bid Protest Procedures provide that protests alleging other than solicitation deficiencies apparent prior to bid opening or the closing date for receipt of proposals shall be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2). Here, the basis for TSI's protest concerning determinations of technical unacceptability was HUD's written explanation of October 13, 1982, detailing why Alternates #1 and #2 were unacceptable. TSI protested to HUD on October 26, but only raised the acceptability issue regarding Alternate #1. TSI did not raise the unacceptability issue regarding Alternate #2 until its subsequent protest to our Office on November 18. Therefore, as the protest was filed beyond the 10-day period, the issue is untimely and will not be considered. See Harter Corporation, B-210927.2, June 21, 1983, 83-1 CPD

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States