

DECISION

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

26303

FILE: B-209577.2

DATE: September 21, 1983

MATTER OF: Technicolor Government Services, Inc.

DIGEST:

1. Protest against agency's use of cost comparison transmittal memorandum specified in the solicitation is dismissed since the protest was not made to the agency prior to bid opening as required by our Bid Protest Procedures.
2. Based on review of record, GAO cannot question Navy's decision to perform required services in-house.

Technicolor Government Services, Inc. (TGS), protests the Naval Engineering Command's determination to continue shop support for public works services "on an in-house" basis at the National Naval Medical Center in Bethesda, Maryland. This determination was made after the Navy's evaluation of TGS's bid which was submitted under invitation for bids (IFB) N62477-82-B-8202. The IFB provided for a cost comparison study to be conducted in accordance with Office of Management and Budget Circular A-76 (Circular A-76).

On bid opening, the only bid received was the bid of TGS in the amount of \$5,655,477. The cost comparison study showed that in-house performance was more beneficial to the Government by \$449,949 for the first year. No computation was made for the second and third option years. As allowed by the IFB, TGS appealed the cost comparison. On appeal, the Navy's appeal board determined that the cost comparison study was defective in several respects and correction was directed, including computations of costs for the second and third option years. The revised study reduced the cost advantage of in-house performance to \$225,924 for the first year with a contracting cost advantage only in the third year, for a 3-year total in-house cost advantage of \$211,997.

TGS raises several objections, which we discuss below, against the Navy's cost comparison.

We deny the protest.

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Generally, we do not review an agency decision to perform work in-house rather than to contract for the services because we regard the decision as a matter of policy within the province of the executive branch. Where, however, an agency uses the procurement system to aid in its decision-making, spelling out in the solicitation the circumstances under which the Government will award or not award a contract, we will review whether the agency followed announced procedures in comparing in-house and contract costs. We do so because we believe it would be detrimental to the system if, after the agency induces the submission of offers, it deviates from the ground rules or procedures announced in the solicitation and which were relied on by those induced to submit offers. RCA Service Company, B-208204.2, April 22, 1983, 83-1 CPD 435. In the course of our review, we will question only whether mandated procedures were followed and not the procedures themselves since the procedures are matters of policy within the province of the executive branch. Technicolor Graphic Services, Inc., B-205242, May 24, 1982, 82-1 CPD 486.

First, TGS argues that the Navy incorrectly used "Transmittal Memorandum (TM)" No. 4 of Circular A-76 instead of TM No. 6 in connection with computing costs for the item entitled "Utilization of Government Capacity."

The Navy alleges that this contention by TGS is untimely since the IFB expressly provided that the "comparison will be made in accordance with the procedures specified in TM No. 4 of Circular A-76 * * * and implementing guidance," but the protest of TGS was not made prior to bid opening as required by our Bid Protest Procedures.

TGS asserts, however, that it was not reasonable to interpret the above IFB to limit the cost comparison only to the procedures transmitted under TM No. 4 since, according to TGS, TM No. 4 does not contain procedures; moreover, TM Nos. 5 and 6 are allegedly included in the phrase "implementing guidance," which also should have been taken into consideration.

TM No. 4 sets forth policies for acquiring commercial or industrial products and services needed by the Government and does not, itself, contain procedures for cost comparison, but it does transmit Circular A-76, dated March 29, 1979, and the Cost Comparison Handbook (Handbook), which do contain cost comparison procedures. These other documents must be considered to be a part of TM No. 4. Moreover, Circular A-76, March 29, 1979, states (in paragraph 10, page 10) that each agency will provide for implementation of the

Circular. TM Nos. 5 and 6, however, are not implementations issued by the several agencies, but documents issued by OMB; therefore, TGS should not reasonably have considered TM Nos. 5 and 6 to be "implementing guidance" which would be used in comparing cost under this procurement. The only reasonable construction of the IFB, therefore, is that the procedures set forth in the OMB Circular A-76 and Handbook, which were transmitted by TM No. 4, would be utilized.

Since the IFB specifically provided that cost comparisons would be made in accordance with the procedures specified in TM No. 4, the protest of TGS against the use of TM No. 4 is a protest based upon an alleged impropriety in the solicitation. But the protest was not made prior to bid opening; consequently, this issue of the protest is untimely and will not be considered.

As necessary background for considering the other protest issues, we will first summarize the contents of the cost study in the next two paragraphs.

The first eight lines of the cost comparison worksheet reflect the costs of in-house performance, e.g., direct material on line 1, direct labor on line 2, etc. The costs are increased for inflation on line 8, and the total is entered on line 9. Lines 10 to 16 are for the costs of contracting, e.g., the contract price on line 10 and contract administration costs on line 12. These costs are totaled on line 17. The rest of the cost comparison worksheet is for various additions to and deductions from the lines 9 and 17 totals.

Line 24 of the cost comparison worksheet is entitled "Utilization of Government Capacity." The Handbook explains that this factor is intended to measure the impact on the work center of contracting for a service that the work center currently provides. 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 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 must be absorbed by the remaining in-house activities. These continuing costs are a

cost of contracting, and they must be charged, in the course of comparing costs, to the bidder. This is accomplished by adding line 24 to the total cost of contracting. Line 25 of the worksheet is entitled "One-time Conversion Costs" and includes severance pay of employees displaced by contracting and the cost of Government employees "held over" while commercial performance is phased in.

Selective Application of TM No. 4 and TM No. 6

TGS contends that the Navy has selectively utilized TM Nos. 4 and 6 to favor in-house performance. TGS alleges that Navy has deleted personnel-related and depreciation costs prior to applying specified inflation percentages on line 8 in the agency cost portion of the cost comparison, a procedure not expressly provided in OMB Circular A-76 until TM No. 6 was issued.

The Navy alleges that, prior to TM No. 6, the Handbook "did not provide any specific guidance" involving removal of labor and depreciation from lines 1 to 7 prior to computing costs of inflation on line 8. But it was recognized that "consistency required that Government labor rates not be inflated while contract labor rates were held constant for bidding purposes."

We agree with the Navy. The IFB provides that the bid is warranted by the contractor not to include any allowance for increased costs for the option years, and that the contract price will be adjusted for increases in labor costs resulting from the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (Supp. IV 1976), and the Service Contract Act, 41 U.S.C. § 351, et seq. (1976). Since the bid does not contain adjustments for increases in labor costs for the second and third years, it would distort the cost comparison study if the agency included personnel costs in the inflation computation unless labor cost adjustments were also added to the cost of contracting, which has not been done.

Utilization of Government Capacity, Line 24

TGS contends that the underutilization costs on line 24 are overstated for the second and third years because the costs will be substantially reduced by proper management. Navy states, however, that a policy has been adopted to include a cost unless specific steps could be shown which would result in savings.

The Handbook provides that the increased cost attributable to underutilized capacity due to contracting should be added to the cost of contracting for the first year 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."

The Handbook, therefore, only calls for an agency's judgment of the likelihood that reorganization or reallocation will occur. Dyneteria, Inc., B-205487, June 1, 1982, 82-1 CPD 506.

TGS has not shown a departure from the Handbook and our Office has no basis to question the amounts used by Navy. Accordingly, we deny this part of the protest of TGS.

One-Time Conversion Costs, Line 25

TGS contends that Navy has overstated the one-time conversion costs on line 25 of the cost comparison worksheet, which are added to the cost of contracting. TGS asserts that these costs are overstated as a result of use by Navy of excessive figures for severance pay of employees affected by contracting and for excessive personnel for conversion overlap.

TGS asserts that it would offer employment to 100 of about 115 employees who would be displaced by contracting. The first study assumed that no separated employees would be hired by the contractor.

The Navy's appeal board agreed with TGS that the assumption of the first study was not valid, but stated that:

"* * * it is not reasonable to assume that the 100 people identified by TGS would be offered comparable positions with TGS, nor would the Government normally have access to this type of corporate information prior to the bid and actual contract award."

The appeal board based its conclusion on the construction of a "reasonable model." The model was based on four assumptions, namely: (1) the majority of retirement

eligible personnel will retire; (2) persons with "retreat rights" will exercise them; (3) the contractor will subcontract all Davis-Bacon work to job shops to avoid underutilization of high cost personnel, "thereby, dramatically reducing contractor demand for Government personnel in the carpenter, paint and sheet metal shops"; and (4) the contractor will make job offers only to the most experienced Government workers who will be able to provide continuity of services and specific technical and site knowledge--"again* * * virtually eliminating demand for general trades such as carpenters, painters, and sheet metal workers."

The above assumptions resulted in a "reasonable model" which concluded that only 17 percent of the affected Government employees would be hired by TGS.

TGS contends that the third and fourth assumptions are erroneous.

TGS agrees with the Navy that Davis-Bacon work will be subcontracted. But the company alleges that Davis-Bacon work has no substantial effect on the number of carpenters, painters, and sheet metal workers required for other maintenance service at the medical center, given that the IFB shows an annual planning target of only 17,500 hours of Davis-Bacon work, which constitutes approximately 7.1 percent of the total contract. The IFB also contained estimated hours of service work, minor work, maintenance and repair, preventive maintenance, and other maintenance and repair activities requiring facilities maintenance skills, including carpentry, painting and sheet metal.

In support of its contention that an estimate of 83 percent of displaced employees receiving severance pay is unreasonably high, TGS argues that under the IFB's "Right of First Refusal" clause, it is required to give "displaced" Government employees priority in hiring. TGS also has submitted a history of TGS conversions from in-house or takeovers by TGS. In a Montgomery, Alabama, conversion, TGS hired 80 percent of displaced Government employees. In a takeover at Middle River, Maryland, TGS hired 73 percent of incumbent employees and 94.6 percent of positions bid by TGS. In a takeover at Fort Collins, Colorado, TGS hired 73 percent of incumbent employees. And in a conversion in Washington, D.C., where only eight employees were displaced, TGS hired 17 Government employees on right of first

refusal. Finally, TGS furnished the tabular statement of the Manpower Impact of Contract Conversions prepared by the Department of the Army which showed that in 26 conversions studied, the contractor hired 72.2 percent of separated personnel and 79.4 percent when adjusted for one installation being closed.

The Navy contends, first, that "in view of the statutory definition of what is covered under the Davis-Bacon Act, which covers work by all those specialties, it necessarily follows that the need for such specialty trade in the contractor's employ would be almost eliminated" to avoid underutilization. Second, the Navy contends that the IFB does not require the contractor to make job offers to all who are displaced, but only to those who fit into the "contractor's job planning," and job planning in this respect would entail "hiring only the most experienced." Third, as to the data on contractor hiring practices, the Navy points out that this data did not exist at the time of the cost comparison. Navy also contends that the four contracts cited by TGS are flawed because only two of the contracts were cost comparison contracts involving Government employees and are not comparable to the solicitation here involved either in the geographical area of employment or in the positions involved. Moreover, the one contract which the Navy considered to be relevant was an Army contract in which a "high percentage of several employees were hired by [TGS]."

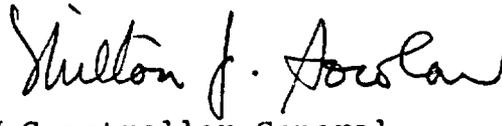
Based on the record, we cannot conclude that the Navy's estimate of 84 displaced positions was overstated as alleged by the protester. The evidence is not sufficient for our Office to determine what a reasonable number of displaced positions would be. The protester therefore has failed to show that the decision to perform the services in-house resulted from an erroneous estimate by the Navy.

Finally, TGS protests the alleged retention--for the cost comparison--of 100 percent of the current workforce by the Government for the 2-week phasein period. TGS believes this comparison also was especially deficient because of the Navy's alleged error in computing severance costs. And TGS argues that had the Navy properly recognized that TGS would have hired many Government employees starting from "day 1" of the contract--when the phasein was to begin--the phasein cost would have been even lower.

Contrary to the allegation, while the first cost study apparently assumed a 100-percent overlap for 2 weeks, on appeal, overlap for less skilled trades was eliminated, pest control force and motor vehicle operator overlap was reduced to 1 week, and the appeal board recognized that overlap expense would be reduced by displaced employees hired by the contractor.

Navy Instruction 4860.6C, above, provides that personnel may be provided to assist the contractor during a transition period of from 30 to 90 days. Therefore, the 1- and 2-week transition period provided for in the cost study is well within the period provided for in the Instruction. Consequently, TGS has not shown a violation of cost comparison procedures.

We deny the protest.

for 
Comptroller General
of the United States