

DECISION



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

FILE: B-212017

DATE: April 3, 1984

MATTER OF: Day & Zimmerman, Inc.

DIGEST:

1. Protest challenging A-76 cost comparison result favoring in-house performance is denied where the protester cannot demonstrate that its reliance upon an apparently ambiguous RFP so influenced its offered price that the cost comparison outcome was materially affected.
2. Agency was not required to use certain revised A-76 cost comparison procedures apparently in effect when the RFP was issued where the activity conducting the cost comparison had been granted a waiver by higher command, and an RFP amendment informed all offerors that those procedures would not be used.
3. GAO will not review a contracting agency's decision to grant a particular installation a waiver from using revised A-76 cost comparison procedures, since the decision is simply the exercise of an executive agency's discretionary authority, which GAO will not question.

Day & Zimmerman, Inc. (D&Z) protests a decision by the Department of the Army, pursuant to an Office of Management and Budget (OMB) Circular A-76 cost comparison, to continue furnishing installation support services at the New Cumberland Army Depot (NCAD), Pennsylvania, through government employees rather than by contracting for those services with D&Z, the low offeror under request for proposals (RFP) No. DAAG 36-82-R-0039. D&Z principally complains that the Army's in-house cost estimate was not based upon the scope of work set forth in the RFP and used by the firm in preparing its offer. Additionally, D&Z asserts that certain line items of the cost comparison were not properly computed, especially those which, D&Z urges, should have been computed in accordance with revised OMB Circular A-76 procedures in effect at the time that the

cost comparison was conducted. D&Z also alleges that the composition of the Army's administrative appeal board precluded an objective review of the issues raised by the firm in its initial appeal to that body. We deny the protest.

Background

The RFP was issued on June 15, 1982, requiring offerors to submit proposals covering a 2-month phase-in period commencing August 1, 1983, a 1-year performance period commencing October 1, 1983, and four separate 1-year options for fiscal years 1985 through 1988. The RFP's Executive Summary informed offerors that the cost comparison would be conducted in accordance with Supplement 1 (March 1979) to OMB Circular A-76 (commonly known as the Cost Comparison Handbook), as implemented by Department of Defense (DOD) Handbook 4100.33H and Department of the Army Circular 235-1, to determine whether accomplishing the specified services in-house or by contract would be more economical. In addition, Amendment 0002, issued August 2, 1982, provided offerors a series of questions and answers relative to inquiries from prospective offerors before and during the pre-proposal conference. At number 82, in response to a request that the Army indicate the OMB Circular A-76 transmittal memoranda numbers and dates of applicable supplements under which the procurement was being conducted, the Army replied:

"OMB Circular A-76 Revised dated 29 Mar 79;
Transmittal Memo No. 4, dated 29 Mar 79; and
Transmittal Memo No. 5, dated 26 Sep 80."

D&Z submitted its initial proposal on September 17, 1982, a revised proposal on November 19, 1982, and its best and final offer on February 18, 1983. On March 29, 1983, the Army publicly announced the result of the cost comparison. D&Z had submitted the low offer of \$27,116,598, but when its price was evaluated and adjusted in accordance with the cost comparison procedures, the Army determined that the government would realize a savings of \$4,933,112 over 5 years if the services were retained in-house and therefore decided to cancel the solicitation. D&Z then appealed to an administrative appeal board convened by the Army.

The appeal board noted that several errors in the cost comparison had been made and reduced the amount of savings to the government by \$293,480, to \$4,639,632. However,

B-212017

because the ultimate outcome of the cost comparison was unaffected, the appeal board affirmed the decision to cancel the solicitation.

Scope of Work

We generally 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. 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, since a faulty or misleading cost comparison which would materially affect the decision whether or not to contract for the services would be abusive of the procurement system. MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. The burden is on the protester to demonstrate not only that a failure to follow established procedures occurred, but also that this failure could have materially affected the outcome of the cost comparison. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317.

D&Z asserts that the cost comparison was fundamentally flawed because the Army's in-house estimate was not based upon the scope of work set forth in the RFP and used by the firm in preparing its offer. As the basis for its assertion, D&Z states that the aircraft maintenance mission currently being performed at NCAD will be transferred to another installation¹ and that this fact was not made known to the firm until the result of the cost comparison was announced on March 29; therefore, its offer reflected continued support for that mission. According to D&Z, the Army's in-house estimate was materially underestimated because, unlike the firm's offer, it was prepared with

¹NCAD had planned an October 1, 1982 effective date for the transfer. By a June 23, 1982 decision of the Secretary of the Army, however, the transfer was postponed without a new effective date, although NCAD expected it to be completed prior to October 1, 1983. We have been informed by the Army that the mission transfer was effected on September 30, 1983 and the attendant reduction-in-force and relocation of personnel on January 16, 1984.

knowledge that the aircraft maintenance mission would be transferred on or before October 1, 1983, the date set for commencement of contract operations.

D&Z urges that the workload data contained in the RFP includes the effort necessary to support the mission. As evidence thereof, D&Z asserts that Attachment 28 to the RFP, "Unscheduled Maintenance and Repair Historical Data-FY 81," presents certain workload data for fiscal year 1981, when the mission was being fully supported at NCAD, and that Exhibits V and X of the RFP, respectively entitled "Preventive Maintenance, Buildings and Equipment" and "NCAD Building and Structures List, Workload Data," lend credence to its argument by indicating that aircraft maintenance facilities are included within the scope of work. Additionally, D&Z alleges that NCAD personnel acknowledged during a meeting with D&Z on April 17, 1983 that the workload data in the RFP included the level of effort required to support the mission.

Consequently, D&Z urges, because the Army's in-house estimate did not reflect continued support for the 800-person aircraft maintenance mission, which constituted approximately 18 percent of NCAD's total civilian workforce of 4,400, the in-house estimate should be increased by 18 percent, or \$6,372,682, to compare fairly with D&Z's offer which, the firm asserts, included the cost of supporting the mission.

The Army's position on this issue, as noted by the appeal board, essentially is that there was nothing in that portion of the performance work statement itself which addressed the aircraft maintenance mission; that the statement of work dealt with mobile equipment and facilities, not specific NCAD missions; and that the statement of work did not relate to manpower spaces to be supported. Thus, the Army considers that responses to the RFP were based on the work to be performed at NCAD in its totality, not on the NCAD's separate missions.

D&Z is correct that, as required by OMB Circular A-76, both the government and contractor cost figures must be based upon the same scope of work and the same level of performance. Here, we agree with D&Z that the workload data in the RFP, contrary to the Army's position, appeared to reflect continued support for the mission. Attachment 28 to the RFP specifies that the scope of work relating to

unscheduled maintenance and repair is based upon 1981 historical data, and that data presumably reflects support for the aircraft maintenance mission. Further, our analysis of the NCAD Management Study used in preparing the in-house estimate reveals that the study employs data which in no instance is identified as any later than fiscal year 1981. Essentially, although there is no mention of the aircraft maintenance mission in either the RFP or the Management Study, the persistent reliance upon 1981 data does not allow us to conclude that the scope of work accurately reflected discontinued support of that mission. Also, we note that the RFP's Executive Summary identifies the workforce at NCAD as "approximately 4,430 civilian employees"--apparently the number of employees including the aircraft maintenance mission. Under the circumstances, we believe it was entirely reasonable for offerors to compute and submit their offers based on support for more than 4,000 employees and an aircraft maintenance mission. Thus, we find that the RFP failed to provide offerors with the precise, unambiguous description of work to which they were entitled. See Klein-Sieb Advertising and Public Relations, Inc., B-200399, September 28, 1981, 81-2 CPD 251.

We cannot find, however, that this deficiency was so prejudicial to D&Z as to cast doubt upon the cost comparison's outcome. We do not accept D&Z's position that the in-house estimate should be increased by 18 percent of the government's anticipated costs, or \$6,372,682, in order to compare with the firm's offer. The Army asserts that in-house cost would be the same with or without the aircraft maintenance mission since the same buildings and facilities will continue to be utilized; therefore, we feel that the effect of the exercise D&Z suggests would be an illogical comparison of overstated workloads.

The correct approach, in our view, is that if the RFP should not have indicated continued support for the aircraft maintenance mission, D&Z's offer should be reduced by some figure to reflect the true scope of work, rather than increasing the in-house estimate hypothetically to reflect work which in fact will not be performed. We are not prepared, however, to reduce D&Z's price by 18 percent arbitrarily in order to support that approach. First, we note that although the aircraft maintenance mission was slotted for 800 personnel, only 580 civilian employees have actually been performing those duties, so that 18 percent of the NCAD civilian work force in fact was not transferred. Second,

and more importantly, we do not believe that transfer of a particular percentage of an installation's workforce necessarily directly equates with the same percentage reduction in the cost of supporting the entire installation. Here, for example, the buildings that housed the aircraft maintenance mission still need to be maintained; indeed, the Army advises that, in large part, the buildings will remain in use and, as stated above, estimates no change in the cost of in-house support.

We thus do not believe that D&Z, which has the burden to prove that the cost comparison outcome would have been different, Serv-Air, Inc.; AVCO, supra, has shown that its apparent reliance upon continued support for the mission so influenced its offered price that the cost comparison's result was thereby materially affected.

Line Item Computations

D&Z alleges that the Army failed to compute certain line items of the cost comparison properly, especially those line items which, D&Z urges, should have been computed in accordance with revised OMB Circular A-76 procedures in effect at the time that the cost comparison was conducted. Those procedures are reflected in OMB Transmittal Memorandum No. 6 (TM-6), January 26, 1982. Principally, D&Z contends that the Army, in violation of those revised procedures, improperly added \$2,447,961 to line 24 of the contracting estimate, "Utilization of Government Capacity." Among other clarifications, TM-6 provides that the costs for underutilized government personnel formerly chargeable to the contractor on line 24 should be eliminated from the cost comparison because efficient management by the government would ensure that excess personnel would be reassigned or that reductions would be made in overhead.

TM-6 specified that it was to be effective immediately when issued, that is, as of January 26, 1982, and applicable to all studies in process where no cost comparison had been made, provided that there was sufficient time to make changes prior to submission of the cost comparison form to the contracting officer by the date specified for proposals or bids. The Secretary of Defense, however, did not approve TM-6 for use within the DOD until April 1982,

when he required the use of TM-6 procedures in all cost comparisons in solicitations issued on or after April 15, 1982. (As noted above, the RFP in this case was issued on June 15, 1982.)

By memorandum of April 22, the Army's Depot System Command headquarters informed NCAD and other facilities that those facilities having a substantial portion of their in-house estimate completed could document the impact of recomputation and request a waiver from implementing the TM-6 revised procedures. In early May of 1982, NCAD requested such a waiver, stating that recomputation of its in-house estimate would take approximately 600 man-hours. In response, the Army's Material Development and Readiness Command (DARCOM) granted NCAD's request for a waiver provided that the receipt of initial proposals did not extend beyond October 1, 1982, and specified that the waiver only applied to studies being conducted at NCAD. D&Z urges that it was improper for DARCOM to grant the waiver and that TM-6 was applicable to this cost comparison. We do not agree.

Our review role in protests such as this is limited to an examination of the agency's implementation of the cost comparison procedures that the solicitation announced would be used. MAR, Incorporated, supra. DARCOM's decision to grant NCAD's waiver request is not encompassed by this review role, and is simply the exercise of an executive agency's discretionary authority which we will not question. Crown Laundry and Dry Cleaners, Inc., supra.

Here, as indicated earlier, Amendment 0002 clarified the RFP's Executive Summary by notifying all offerors that Transmittal Memoranda Nos. 4 and 5 would be utilized; no mention was made of TM-6.² Therefore, some 7 months before the result of the cost comparison was announced, D&Z knew that TM-6 procedures would not be used. The firm raised no objection in that regard until well after the fact, when it appealed the cost comparison's outcome to

²In contrast, in our recent decision in Holmes & Narver Services, Inc. and Morrison-Knudsen Company, Inc., B-212191, November 17, 1983, 83-2 CPD 585, we concluded that failure to comply with TM-6 procedures was improper where TM-6 had been approved for use and the solicitation had not indicated that it would not be followed.

B-212017

the Army's administrative appeal board on April 15, 1983. Any protest by D&Z challenging the Army's failure to use TM-6, as indicated by the procedures announced in Amendment 0002, would have had to have been filed with either the agency or this Office prior to the September 17, 1982 closing date for receipt of initial proposals in order to be timely. See 4 C.F.R. 21.2(b)(1) (1983).

Moreover, because D&Z has not prevailed on the issues of whether the apparent ambiguity in the RFP's statement of work and the inclusion of underutilized personnel costs on line 24 materially affected the cost comparison's result, we need not address the firm's concerns regarding the Army's allegedly improper computation of certain other line items. Even if we were to conclude that those line items should be readjusted in D&Z's favor, noting, as D&Z admits, that certain readjustments would remain purely speculative, the total dollar amount involved in no way approaches the remaining \$4,639,632 difference between the firm's adjusted contract price and the Army's in-house estimate; therefore, the cost comparison's ultimate result favoring in-house performance would be unchanged. See TS Infosystems, Inc., B-209900, August 2, 1983, 83-2 CPD 155.

Appeal Board

Finally, regarding D&Z's assertion that the composition of the Army's administrative appeal board precluded objective review of its initial appeal to that body, we point out that neither the RFP nor any other document referenced therein set forth any criteria for the establishment or composition of the board. Therefore, we will not consider the matter. See Joule Maintenance Corporation, B-208684, September 16, 1983, 83-2 CPD 333.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States