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DECISION

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

FILE: B-210376.2 **DATE:** July 31, 1984

MATTER OF: Facilities Engineering & Maintenance Corporation--Request for Reconsideration

DIGEST:

1. New issue raised in request for reconsideration is dismissed as untimely because the issue is based on information contained in the agency report on the original protest, but was not raised within 10 working days after receipt of the report.

2. Although it was unclear that a quantity estimate in the solicitation covered two different types of work, but protester only included the actual total estimated quantity of work in its proposal and has not alleged that its price would have been lower if the estimate's coverage had been broken down, the protester was not prejudiced.

3. Where exclusion of overtime costs from in-house cost estimate is initially justified on basis of planned changes to the agency's staffing and organizational structure, but it later appears that certain of the staffing changes will not take place, the original decision upholding the cost comparison will be affirmed where record supports the conclusion reached albeit for a different reason.

4. No merit is found to allegation that actual hours of overtime worked in a facility after the protest was filed demonstrate that the agency erred in excluding overtime hours from its in-house cost estimate. The actual overtime hours relied on by the protester

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include overtime functions not involved in the cost comparison, and were incurred before implementation of the more efficient organizational structure on which the cost comparison was based.

Facilities Engineering & Maintenance Corporation (FEMCOR) requests that we reconsider our decision in Facilities Engineering & Maintenance Corporation, B-210376, Sept. 27, 1983, 83-2 CPD ¶ 381. In that decision, we denied the firm's protest against the Department of the Army's decision to cancel request for proposals (RFP) No. DAAK21-82-R-9495 for the operation and maintenance of plant equipment, buildings and grounds at the Harry Diamond Laboratories in Adelphi, Maryland.

We affirm our decision.

The RFP was issued as part of a cost comparison to determine whether it would be more economical to contract for the services or to continue to perform them in-house. The Army canceled the solicitation after determining that in-house performance would be less expensive than contracting with FEMCOR, which submitted the most advantageous offer in response to the RFP. The difference in cost, as calculated after the Army Appeals Board resolved FEMCOR's administrative appeal of the cancellation decision, was $152,123.

FEMCOR protested that the in-house performance costs still were understated in that the Army omitted the cost of anticipated overtime hours, omitted certain overhead costs, and failed to apply an inflation factor to certain labor costs. FEMCOR also asserted that the Army overestimated the cost of contracting in a number of respects. In denying the protest, we found that the Army's cost analysis was consistent with applicable guidance, Office of Management and Budget Circular No. A-76 policy and procedures.

FEMCOR's request for reconsideration is limited to our finding that the Army was reasonable in not including the cost of anticipated emergency overtime hours of labor in the in-house calculation. The RFP required the contractor to have personnel on call 24 hours per day for after-hours emergency work, and estimated, based on historical data, that 2,373 hours of after-hours emergency work would be required annually. FEMCOR based

its price on 2,373 overtime hours and contended that the Army, by failing to include the cost of 2,373 emergency overtime hours in the in-house estimate as well, held FEMCOR to a broader scope of work than the government required of itself.

We noted that approximately 400 of the past emergency overtime hours had been experienced in the carpenter/paint shop as a result of backlogs; more than 700 were attributable to the electronics shop; and the remaining were incurred in the heat/chill plant. We found that the Army had taken steps to eliminate the overtime costs at each location, and the in-house estimate reflected the costs of these actions: the Army (1) added a carpenter to the carpenter/paint shop, and included his salary as an in-house cost; (2) scheduled a night shift in the electronics shop, and added an electrical mechanic, with both the shift differential and the mechanic's salary added to the in-house costs; and (3) both improved its maintenance procedures and designed more efficient schedules to eliminate the need for overtime in the heat/chill plant.

We concluded that the Army's treatment of overtime costs was reasonable and consistent with applicable guidance:

> "In effect, the Army believes that it will be able to eliminate overtime hours in the future but that FEMCOR, due to staff limitations, will not be able to avoid the overtime in performing the same tasks. This position is reasonable on its face. Although FEMCOR disagrees with the Army that Government overtime costs can be eliminated through staffing and other changes, FEMCOR has not presented any specific reasons why the Army's actions will not have their intended effect. Moreover, the Army included in the in-house estimate the extra costs (salary and shift differential) incurred to limit overtime.
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> ". . . the Army did not compare unequal scopes of work as FEMCOR alleges, but instead assumed that the Government, with a larger staff and greater resources dedicated to the task, could perform the work specified in the RFP without resort to overtime. This Office has recognized that the Government may have inherent advantages in organizing its manpower that a contractor cannot

> achieve in an A-76 exercise. . . . The fact that the Army relied on those advantages in estimating its costs does not invalidate the cost comparison."

FEMCOR advances a number of arguments in support of its reconsideration request.

(1) FEMCOR argues that the 2,373 hours of overtime should not have been included in the RFP at all. FEMCOR alleges that the Army admitted, in its report to our Office on FEMCOR's original protest, that the hours represent a backlog of unscheduled work orders or preventive maintenance. FEMCOR contends that unscheduled work orders and preventive maintenance are covered elsewhere in the RFP. The firm therefore asserts that it was misled either into bidding twice on the same work or into bidding overtime rates for work that it might be able to accomplish during normal duty hours.

The Army, while admitting that overtime work historically has included, in part, backlogged work and preventive maintenance, contends that this allegation is untimely because it was not raised before the deadline for filing comments on the agency report, which is 10 working days after the receipt of the report. 4 C.F.R. § 21.3(d) (1984).

We believe the Army should have specified that the historical 2,373-hour figure included work on backlogs and preventive maintenance. Nevertheless, we will not review the issue with respect to what, if any, effect the matter has on the cost comparison. Since the issue was not included in FEMCOR's original protest, it must independently satisfy the timeliness requirements of our Bid Protest Procedures. See Air-Tech Industries--Reconsideration, B-211252.2, June 28, 1983, 83-2 CPD ¶ 37. Our Procedures provide that protests such as this must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(b)(2). The record shows that the information on which FEMCOR bases this contention was contained in the agency report. Since the issue was not raised within 10 working days after FEMCOR received the report, it is untimely and will not be considered.

(2) FEMCOR argues that the solicitation was misleading because the 2,373-hour estimate given for after-hours emergency work actually included regular overtime work as well as after-hours emergency work. FEMCOR bases this contention on information received with the agency report on its request for reconsideration, and we therefore consider it timely raised.

The RFP contained, at paragraph 10.2.e., a category of work entitled "Required (After Hours) Work" and at paragraph 10.2.f., a category entitled "Emergency Work." The required (after hours) work was described as tasks that could not be accomplished during normal working hours because they would disrupt work or because of saftey or pollution hazards. The contractor was required to include the cost of such work in its lump sum bid. Emergency work was defined as any work required to correct failures or deficiencies that would constitute an immediate danger or health hazard to occupants or a threat to property. The RFP stated that emergency work could be required during or after normal working hours.

Paragraph 10.2.g. of the RFP was entitled "Quantity" and contained the estimate that "2,373 man-hours of required after hours emergency work will be required . . . ." The Army's report states that this 2,373 hours included both the required (after-hours) work and emergency work categories, and not just emergency work that had to be performed after-hours. It contends that FEMCOR should have realized that paragraphs 10.2.e., f., and g. were intended to be read together but that even if it did not, FEMCOR was not prejudiced by the defect. This is because FEMCOR included 2,373 hours of overtime work in its proposal, all labeled as emergency work, and the proposal contained no additional costs for required (after-hours) work.

We agree with FEMCOR that the RFP was unclear regarding the fact that both required (after-hours) work and emergency work were included in the quantity estimate of 2,373 hours of required (after-hours) emergency work. Nevertheless, we also agree with the Army that FEMCOR was not prejudiced by this. The protester only included a total of 2,373 of hours of overtime in its proposal. While FEMCOR apparently believed that it was proposing to perform only emergency overtime work, it has not alleged that its price would have been lower had it known otherwise. Moreover, even if we assume that FEMCOR would have altered its price structure to some extent, we have no basis to conclude that any such change would have altered the outcome of the cost comparison, particularly in view of $152,123 cost advantage of in-house performance.

(3) The protester contends that we improperly relied on the Army's plan to restructure its staffing as a basis for concluding that the agency reasonably excluded any overtime hours from its in-house cost estimate. FEMCOR asserts that the representations concerning staffing changes contained in the agency report are

inconsistent with the staffing recommended by the management study performed to determine how the work covered by the RFP would be accomplished in-house. The staffing in issue is at the carpenter/paint shop, the electronics shop, and the heat/chill plant.

We stated in our decision that the Army added a carpenter to the carpenter/paint shop. FEMCOR contends that the Army only increased its authorized staff level from two to three carpenters, but not the actual number of employees. FEMCOR asserts that the Army was already operating over its authorized staff level with three carpenters at work. The protester argues that since there was no actual increase in staff, we had no basis to conclude that the need for overtime had been eliminated from the carpenter/paint shop.

The Army acknowledges that the actual level of staffing in the carpenter/paint shop did not increase. It asserts, however, that the management study team recommended that the shop be put under the direct supervision of the Grounds & Structures Branch Chief. The agency states that prior to the study, there was no close supervision in the shop, and the management study team concluded that closer supervision would eliminate the need for overtime.

Although this rationale was not contained in the agency report on FEMCOR's original protest, we normally will accept a subsequent statement justifying agency action if the statement would have supported the action if provided initially. See Human Sciences Research, Inc.--Reconsideration, B-201956, Sept. 23, 1981, 81-2 CPD ¶ 246. Here, we note that the rationale now advanced is supported by the management study team's written recommendations, and we believe that it reasonably supports the agency's exclusion of overtime costs for the carpenter/paint shop from the in-house estimate. Accordingly, we find no basis to reverse our prior decision in this respect.

FEMCOR also questions the statement in our decision that the Army added an electrical mechanic to the electronics shop. The protester asserts that the management study shows that the staff was actually reduced by two persons, rather than increased by one.

The mechanic we referred to, however, was not an addition to the staff, but was an employee placed on the night shift to perform preventive maintenance that could not be done during the day because equipment was in use.

This work previously had been performed by employees working overtime. In addition, the Army states that the electronics shop staff was reduced by one person, not two as alleged by FEMCOR. The agency states that the reduced staff, including one mechanic working night shift, is adequate to eliminate the need for overtime.

We find nothing in this information that warrants reversing our prior conclusion that the Army reasonably excluded overtime for the electronics shop from its in-house cost estimate. In our decision, we primarily relied on the fact that one employee had been scheduled to work night shift to perform work that had previously been done on overtime. We also noted that the cost of shift differential for the employee had been included in the government cost estimate in lieu of overtime. We continue to believe that these facts provide a reasonable basis for the Army's position.

FEMCOR next argues that we erred in concluding that the Army reasonably excluded any overtime for the heat/chill plant, where overtime historically had been required. FEMCOR contends that we improperly accepted the Army's position that no additional staffing was necessary to eliminate overtime because the plant was already staffed around the clock. FEMCOR believes that if the staff could not operate the plant without overtime in the past, the same staff cannot do so in the future.

FEMCOR's position ignores the rationale actually advanced by the Army, and which we relied on in our decision, that improved maintenance procedures and more efficient scheduling would eliminate the need for overtime. FEMCOR has presented no reasons why these actions will not prove effective, and therefore we find no merit to its reconsideration request on this issue.

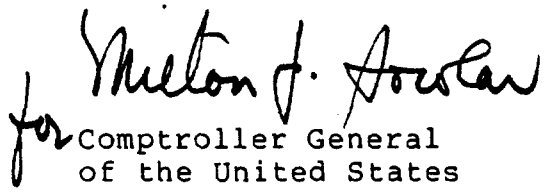
(4) In support of its general assertion that the Army erred by not including any overtime costs in its in-house estimate, FEMCOR has submitted information obtained from the Army under the Freedom of Information Act. This information shows that over a 7-month period, after FEMCOR filed its protest here, 6,019 hours of overtime work were actually performed in the facilities engineering element of the Harry Diamond Laboratories.

The Army points out, however, that the 6,019 hour figure represents overtime for the entire facilities engineering office, including functions that were not covered by the A-76 cost comparison. Specifically,

the agency states that the custodial shop and the roads and ground shop were not included in those activities covered by the cost comparison, but accounted for much of the 6,019 hours of overtime. Moreover, the Army notes that the 7-month period cited by FEMCOR runs from March 1, 1983 through September 30, 1983. During that period, the shops that were included in the cost comparison were not operating under the "most efficient organization" recommended by the management study team. In fact, permission to cancel the RFP for the services was not received until October of 1983 (shortly after our original decision was issued). Consequently, the organization recommended by the management study team, and the one on which the cost comparison was based, was not in place until March of 1984.

It is apparent that the information FEMCOR relies on does not support its assertion that the Army improperly excluded overtime from the in-house estimate. The cited 6,019 hours of overtime includes functions not included in the cost comparison, and covers a period before the Army implemented the organizational structure on which the cost comparison was based. Accordingly, we find no merit to FEMCOR's contention in this regard.

For the reasons stated above, our prior decision is affirmed.



for Comptroller General
of the United States