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DECISION



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

FILE:

B-216315.3

DATE: January 29, 1985

MATTER OF:

ISS Energy Services, Inc.--Request for
Reconsideration

DIGEST:

1. GAO affirms its dismissal of a protest against the propriety of a cost comparison performed pursuant to OMB Circular A-76 when the solicitation contained a provision setting forth an administrative appeals procedure that the protester did not exhaust. This administrative procedure is the final level of agency review afforded protesters, and until such time as this procedure is completed, the protester has not exhausted its administrative remedies.
2. Pre-opening protest to contracting officer, requesting that government's bid, prepared for cost comparison purposes, be rejected as nonresponsive because of alleged use of incorrect wage rates, is not a substitute for a timely-filed appeal of the cost comparison. Protests and cost comparison appeals are separate administrative procedures; the cost comparison appeal has nothing to do with bid responsiveness, but rather is used to determine the correctness of the figures used to decide whether an agency should contract-out or perform in-house.

ISS Energy Services, Inc. for a second time requests reconsideration of our decision ISS Energy Services, Inc., B-216315, Sept. 17, 1984, 84-2 CPD ¶ 305, aff'd on reconsideration, Dec. 4, 1984, 84-2 CPD ¶ _____, regarding contract No. GS-11C-40321.

We affirm our dismissal.

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ISS's protest concerned alleged deficiencies in a cost comparison performed by the General Services Administration in accord with Office of Management and Budget (OMB) Circular No. A-76. We dismissed the protest because ISS had not exhausted the administrative appeals procedure established by GSA. In its first request for reconsideration, ISS insisted that GSA had no such procedure and therefore the requirement for exhaustion was inapplicable. We pointed out, however, that GSA had indeed provided for an appeals procedure which was set forth in the solicitation. We therefore affirmed our dismissal of September 17, 1984.

ISS, in its second request for reconsideration, acknowledges that it did not file an appeal in accord with the procedure set forth in the solicitation. Before bid opening, however, ISS had written the contracting officer, stating that it believed GSA's bid, for cost comparison purposes, would be based on incorrect wage rates. If so, ISS requested that the bid be rejected as nonresponsive. Before the start of the 15-day period for public review of the cost comparison, however, GSA rejected this request. ISS argues that this exchange should satisfy the requirement for exhaustion of administrative remedies because the result of a later appeal, filed under the procedure set forth in the solicitation, would not have been any different.

The Federal Acquisition Regulation (FAR), in accord with OMB Circular No. A-76, requires that agencies establish appeals procedures for informal administrative review of cost comparisons. The regulations further provide that this type of procedure must afford prospective contractors an independent, objective review of the initial cost comparison result reached by the agency. FAR, § 7-307, 48 Fed. Reg. 42,102, 42,128 (1983) (to be codified at 48 C.F.R. § 7-307). The administrative appeals procedure established by GSA implements this regulation.

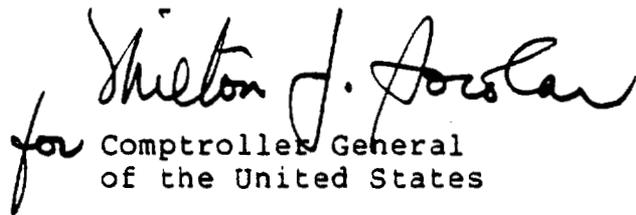
Although initially expressed in terms of bid responsiveness, ISS's allegation concerns the correctness of the figures used in the calculation of GSA's bid and consequently, the propriety of the cost comparison between this bid and the bids submitted by prospective contractors. This allegation therefore should have been raised under the

cost comparison appeals procedure, where the government's bid would have been adjusted, if appropriate, rather than rejected as nonresponsive.

While GSA's procedure does not preclude a prospective contractor from filing a protest, the regulatory scheme contemplates that such matters will be raised under the appeals procedure after an initial cost-comparison result is reached and publicly announced. In a formally advertised procurement, this occurs at bid opening. See FAR, § 7.306(a). We do not believe that the filing of a protest can be used as a substitute for the filing of a cost comparison appeal, as the appeal process is distinct from the protest procedures prescribed in FAR, § 14-407-8.^{1/} This process is the final level of agency review afforded prospective contractors and accordingly, administrative remedies are not exhausted until such time as it is completed.

ISS did not avail itself of GSA's appeals procedure. In addition to the solicitation provision advising bidders that such a procedure existed, the record shows that ISS received a letter from the contracting officer stating when the 15-day public review period would begin and end. ISS could have filed, but elected not to file, a timely challenge to the cost comparison results.

We again affirm our dismissal of September 17, 1984.


for Comptroller General
of the United States

^{1/} Protests and appeals of cost comparisons are two separate administrative procedures. They differ in a number of respects. Most importantly, protests may be decided by contracting officers, as was the case with ISS's protest, whereas cost comparison appeals are considered by officials other than contracting officers. This ensures that appeals are reviewed independently and objectively.