



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bara-King Photographic, Inc.

File: B-231916

Date: October 20, 1988

DIGEST

1. In conducting cost comparison under Office of Management and Budget Circular No. A-76, agency had reasonable basis to exclude potential cost of retained pay for employees downgraded as a result of implementing most efficient organization for training support services.
2. Agency determination of the staffing level required to accomplish the performance work statement under cost comparison will not be questioned where the record does not show the determination was made in a manner tantamount to fraud or bad faith.

DECISION

Bara-King Photographic, Inc., protests a determination made by the U.S. Army Ordnance Center and School (USAOC&S), Aberdeen Proving Ground, Maryland, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that the agency can perform training support services at a lower cost than can the protester. The protester charges that the agency did not conduct the cost comparison in accordance with the applicable guidance that the Army committed itself to follow and that, as a result, the agency incorrectly concluded that continued performance by government personnel would be less costly than contracting with Bara-King.

We deny the protest.

On April 7, 1986, the Army issued request for proposals (RFP) No. DAAD05-86-R-5006, seeking firm, fixed-price offers for 1 year plus four, 1-year options, to operate training support services in support of USAOC&S and other designated agencies located at the Aberdeen Proving Ground. The performance work statement (PWS) included support services such as educational television, training aids and a graphics and audiovisual loan library.

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The RFP advised prospective offerors that in accordance with the OMB Circular as modified by Department of Defense (DOD) or Army implementation guidance, the agency would make a cost comparison between the lowest, technically acceptable proposal and a previously prepared estimate of the cost of government performance. The RFP further provided that the agency would award a contract only if, as a result of the cost comparison, it determined that contracting for the services would be more economical than continuing to have in-house personnel perform the services.

Two offerors submitted proposals. The protester submitted the only proposal that was considered susceptible of being made acceptable. On April 13, 1988, the protester submitted a best and final offer, which was found to be technically acceptable. Accordingly, the agency chose Bara-King's proposal for comparison with the estimate for in-house performance.

The agency determined that in-house personnel could perform the work for a total evaluated cost of \$8,172,663--\$113,516 less than the protester's cost of \$8,286,179. On May 25, the protester filed a timely administrative appeal, claiming that the agency had understated personnel costs for the in-house estimate by \$750,000 and overestimated one-time conversion costs by \$101,101. The Appeals Board (Board) upheld the agency's estimate of personnel costs, but agreed with the protester that one-time conversion costs were overstated, reducing the in-house cost advantage by \$101,101 to \$12,415. Since in-house performance therefore remained the lower cost alternative, the Board denied the appeal.

On July 7, Bara-King filed this protest with our Office, charging that despite the adjustments that the Board made as a result of the appeal, the cost comparison still failed to comply with the applicable guidelines.

The protester first argues that the agency is required to restructure the activity to conform to the most efficient organization (MEO) used in computing the in-house cost estimate.^{1/} The protester argues that in the course of restructuring the activity, several employees will be downgraded and that the Army failed to consider the right of

^{1/} Generally, a management study is mandatory under the OMB Circular; the study establishes the most efficient and effective in-house organization, or MEO, to accomplish the requirements and the in-house staffing estimate is based on the MEO.

these employees under Army regulations to retained pay or to include the cost of retained pay in its in-house cost estimate. Retained pay is pay granted to an employee whose rate of basic pay would otherwise be reduced as a result of grade reclassification. An employee entitled to grade retention retains that grade and pay for 2 years. The protester points out that 17 positions, one-third of the 51 affected positions in the MEO, will be downgraded by two or more grades under the MEO. The current incumbents of these positions are entitled to retain their former grades for a period of 2 years. Consequently, the protester argues that the in-house estimate, which ignores such costs, is understated by \$100,000 during the first 2 years of the cost comparison.

The agency argues that its cost estimate conforms to the requirements of OMB's Cost Comparison Handbook (Handbook). It argues that the retained pay is not required to be costed in the government estimate, but is specifically identified as a conversion differential cost which is added to the contractor cost.^{2/} The protester cites a paragraph entitled "Other Entitlements," which requires inclusion of entitlement costs that will earn fringe benefits such as night differential pay and premium pay for firefighters and law enforcement officers. He argues that retained pay is such a fringe benefit. Furthermore, the protester argues that it is unreasonable to ignore costs of such magnitude, which amount to "unusual or special" circumstances to be treated as an additional cost in line 5 of the government estimate in accordance with the Handbook.

Initially, we find that the Handbook language supports the agency's contention that the agency was not required to consider retained pay as a direct cost element in conducting a cost comparison. The Handbook specifically mentions that the 10 percent conversion differential reflects loss of production, temporary decrease in efficiency and effectiveness and the cost of retained grade and pay. The authors of the OMB Circular No. A-76 specifically mentioned retained pay as a conversion cost, not a direct in-house cost element and thus, the Army reasonably did not treat it as a direct cost item. OMB has orally advised our Office that this

^{2/} The conversion differential is the amount that must be exceeded before converting an in-house commercial activity to contract. An amount equal to 10 percent of in-house personnel related costs is charged against contractors and any cost advantage of contracting must exceed this 10 percent figure before a determination can be made that contracting is the cheaper alternative.

interpretation is correct, and we do not therefore find that by omitting consideration of retained pay, the agency deviated from the applicable OMB and Army guidance for conducting cost comparisons.

In any event, our Office has recognized that this area is largely a judgmental one. Estimates regarding retained pay involve complex and somewhat subjective judgments on an agency's part that our Office is not in a position to second-guess. Raytheon Support Services Co., B-216898, Sept. 25, 1985, 85-2 CPD ¶ 334. Although implementation of the MEO will require downgrading a significant portion of the workforce, the agency does not believe that retained pay costs will be either unusual or special since sufficient vacancies are available within the agency to absorb most downgraded personnel without an extended period of retained pay. Where the MEO allows for 51 positions, the activity's current on-hand strength is 25 employees; at most, four employees will be entitled to retained pay, and this will be for a limited time. We have no basis upon which to challenge this judgment, and we cannot therefore conclude that the retained pay costs encountered in in-house performance will be "unusual or special."

Second, the protester contends that the five positions which the Army has retained as full-time government employees (residual staff performing governmental in nature (GIN) functions) are performing work within the PWS. Since the protester believes that it was required to provide staffing to perform these functions, it argues that the five GIN staff should be included under in-house personnel costs. Furthermore, the protester asserts that the agency otherwise lacks adequate staffing to accomplish all areas of work required by the PWS. It further charges that the agency had no basis to exclude these positions from review under the OMB Circular; it argues that the personnel are not in fact performing governmental functions.3/

3/ In its initial submission, the protester also argued that the five GIN positions exceeded the number allowed by Table 3-1 of the Handbook; this table however prescribes a formula for establishing the number of contract administration positions required in the event a decision is made to contract. The cost of these positions is charged against the contractor's offer, and they have no applicability to GIN positions treated as a "wash" cost. GIN positions are a cost which exists whether the function is contracted out or remains in-house.

The management study from which the MEO was derived established a staffing of 56 personnel, of whom 5 were identified as performing GIN functions. Regarding the decision to exclude the GIN positions from the cost comparison, we have recognized that the underlying determination in cost comparisons--whether work should be performed in-house by government personnel or performed by a contractor--is one which is a matter of executive branch policy and not within our protest function. Trend Western Technical Corp., B-221352, May 6, 1986, 86-1 CPD ¶ 437. Our Office will review protests concerning agency decisions to continue performing services in-house instead of contracting for them, solely to ascertain whether the agency adhered to the established procedures for the in-house/out-house cost comparisons. Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 CPD ¶ 348. To succeed in its protest, a protester must demonstrate both that the agency failed to follow established procedures and that this failure could have materially affected the outcome of the cost comparison. Winston Corp., B-229735.2, July 26, 1988, 88-2 CPD ¶ 85.

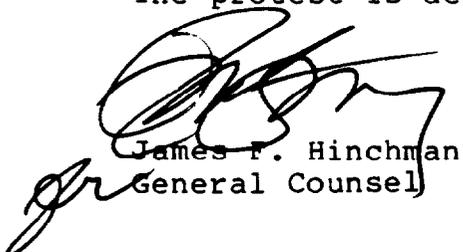
The agency asserts that the determination of the number of GIN staff and the number of total employees needed to accomplish the PWS was the result of a detailed management study, conducted in accordance with the OMB Circular, to identify the least costly manner of performing the work in the PWS. The agency states that none of the GIN staff is performing any work included in the PWS; in addition, it believes that the number of employees assigned to accomplish the PWS is adequate.

While the protester's disagrees with the agency's determination as to the staffing necessary to perform the work in-house, we have consistently recognized that the determination by an agency of the size of a GIN staff and the number of employees required to accomplish the PWS is largely a management decision involving judgmental matters that are inappropriate for our review. Trend Western Corp.--Request for Reconsideration, B-221352.2, July 9, 1986, 86-2 CPD ¶ 47. To the extent that the agency determines that staffing under the MEO is sufficient to accomplish all work included in the PWS, we will not review a protester's assertion that additional manpower will be required, absent evidence of fraud or bad faith. Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18.

The protester has presented no evidence to rebut the agency's assertion that the GIN staff will not in fact perform any tasks covered by the PWS, beyond its argument that without the GIN staff, the MEO is insufficient to perform all work included in the PWS. In this regard,

however, we note that while the protester charges that 51 government personnel cannot perform all work in the PWS, the protester proposes to perform that work with 42 personnel. Accordingly, the protester has not shown that the agency acted improperly or in bad faith in determining that the staff positions included in the in-house estimate are sufficient to perform the work required under the PWS.

The protest is denied.



James F. Hinchman
General Counsel