

Ayer



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Ameriko Maintenance Company

**File:** B-243728

**Date:** August 23, 1991

Chase C. Rhee for the protester.  
Donald R. Jayne, Esq., General Services Administration, for  
the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

## DIGEST

1. An agency is not required, in an Office of Management and Budget Circular A-76 cost comparison, to disclose to bidders the agency's determination that the agency's current operation is overstaffed where the solicitation described the services sufficiently to permit an intelligent competition on an equal basis.
2. Agency does not enjoy an unfair labor cost advantage in Office of Management and Budget Circular A-76 cost comparison even though the pay of federal employees is not subject to Service Contract Act requirements that are applicable to commercial bidders' employees; there is no requirement that an A-76 cost comparison include a factor to equalize any such inherent disparities in the agency's and bidders' legal obligations.
3. Protest against solicitation provision concerning contractor liability for maintenance repair work "up to \$10,000" is dismissed as untimely where filed after bid opening.

## DECISION

Ameriko Maintenance Company protests the General Services Administration's (GSA) determination to continue performing certain services<sup>1/</sup> in-house instead of contracting for the

<sup>1/</sup> Mechanical operation and maintenance services at the Alameda Federal Center, the Vallejo Federal Building and the Santa Rosa Federal Building in California.

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services under invitation for bids (IFB) No. GS-09P-91-KSC-0007. GSA based its determination on an Office of Management and Budget (OMB) Circular No. A-76 comparison of the estimated costs of GSA performance of the services with Ameriko's bid for these services. Ameriko contends that the cost comparison was flawed for four reasons discussed below.

We deny the protest in part and dismiss it in part.

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of governmental functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel. Generally, such decisions are matters of executive branch policy that our Office declines to review. However, we will review A-76 decisions growing out of an agency's issuance of a competitive solicitation for the purpose of comparing the costs of private and governmental operation of the commercial activity to determine whether the comparison was faulty or misleading. See Raytheon Support Servs. Co., B-228032.2, Dec. 30, 1987, 87-2 CPD ¶ 641.

Ameriko bid \$6,119,334 on the IFB,<sup>2/</sup> while GSA's estimate of the cost of continuing in-house performance was \$3,170,272.<sup>3/</sup> In light of the \$2,949,062 difference, GSA decided to maintain in-house performance and thus canceled the IFB. Pursuant to GSA's A-76 appeal process, Ameriko appealed GSA's decision. While GSA acknowledged the validity of some of Ameriko's complaints about the comparison, and made appropriate revisions to the GSA estimate of the cost of in-house performance, the adjustments were insufficient to justify placing a contract with Ameriko.

Our review of agency decisions to retain services in-house instead of contracting for them is solely to ascertain whether the agency followed the announced "ground rules" for the cost comparison. Pacific Architects and Eng'rs, Inc., B-212257, July 6, 1984, 84-2 CPD ¶ 20; Joule Maintenance Corp., B-208684, Sept. 16, 1983, 83-2 CPD ¶ 333. We will recommend corrective action when the record shows both that the agency did not follow the announced procedures and that this failure could have materially affected the outcome of the cost

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<sup>2/</sup> Ameriko was the only firm to submit a bid of the 25 firms solicited.

<sup>3/</sup> This estimate was prepared prior to bid opening, but pursuant to OMB Circular No. A-76 was not disclosed to prospective bidders.

comparison. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317.

First, Ameriko urges that GSA should have apprised bidders of its determination that the agency had overstaffed the offices providing the services--i.e., the agency currently provides the services using more personnel than the agency estimate found necessary to meet the requirement.

OMB Circular No. A-76 requires agencies to prepare in-house cost estimates on the basis of the most efficient and cost effective in-house operation (MEO)<sup>4/</sup> needed to accomplish the requirements, and not on the basis of the current operational staffing. Agencies are not required to disclose the bases of their cost estimates to other bidders. Pacific Architects and Eng'rs, Inc., B-212257, supra. While an agency generally must provide bidders with sufficient information to allow an intelligent competition on an equal basis, it need not provide bidders with historical data concerning staffing levels, if the solicitation provides sufficient information descriptive of the agency's requirements. Paige's Sec. Servs., Inc., B-235254, Aug. 9, 1989, 89-2 CPD ¶ 118.

It is true that access to GSA's internal assessment of the adequacy of its current staffing was clearly desirable to Ameriko, since it would have provided an insight on the incumbent's perception of efficient organization structure and staffing. However, we do not think that Ameriko's knowledge of the current overstaffing situation was a prerequisite to its ability to compete intelligently, since the IFB contained a detailed statement of work upon which Ameriko was to base its bid. That is, Ameriko could reasonably use its own business judgment to determine the staffing levels required to effectively perform the work described in the IFB. Id.

Ameriko next contends that it is unfair for GSA to require bidders to pay their employees at levels set by Department of Labor (DOL) wage determinations, when the government pays its employees less for the same work. The Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. § 351 et seq. (1982), requires contractors performing government service contracts to pay DOL determined minimum wages and fringe benefits. SCA is not applicable to employees of federal agencies. The fact that federal employees are not subject to SCA and the applicable wage determinations does not constitute a legally impermissible competitive advantage. This is so because there is no requirement in the A-76 cost comparison "ground rules" to include a factor equalizing such inherent relative

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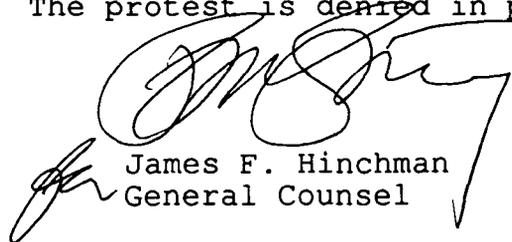
<sup>4/</sup> Management studies are used to determine the MEO's organization and staffing.

advantages and disadvantages of governmental and commercial entities. Paige's Sec. Servs., Inc., B-235254, supra.

Ameriko also objects to the liability imposed on the contractor by the IFB's service call provision,<sup>5/</sup> arguing that it improperly makes the contractor responsible for repair costs up to \$10,000. This ground of protest is untimely and is dismissed. Our Bid Protest Regulations require protesters to file protests concerning alleged improprieties apparent on the face of the solicitation before bid opening. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.2(a)(1)). Ameriko's protest, filed after the February 20 bid opening date, is untimely. See Pacific Architects and Eng'rs, Inc., B-212257, supra.

Ameriko's remaining argument concerns GSA's failure to include any amount in its estimate for "recurring overtime services." Ameriko argues that this was improper and misleading because the IFB included a blank for pricing this item, which indicates that bidders (and the government) were required to perform and price these services. However, even assuming Ameriko is correct on this point, the difference of more than \$2.9 million between GSA's and Ameriko's total cost figures is far greater than the alleged error. Therefore even if we were to resolve this issue in Ameriko's favor, it would not affect the cost comparison result. See Raytheon Support Servs. Co., B-228032.2, supra.

The protest is denied in part and dismissed in part.



James F. Hinchman  
General Counsel

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<sup>5/</sup> "The contractor shall be responsible for all service calls, including service calls which become maintenance repair work . . . up to \$10,000."