Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Trajen, Inc.

File: B-284310; B-284310.2

Date: March 28, 2000

Jeffrey A. Stonerock, Esq., and Steven A. Alerding, Esq., Baker Botts, for the protester.
Anne Rathmell Davis, Esq., and Lori S. Chofnas, Esq., Department of the Navy, for the agency.
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DIGEST

Protest of agency appeal authority's cost comparison decision made pursuant to Office of Management and Budget Circular No. A-76 is sustained where the appeal authority lacked a reasonable basis for reversing the initial cost comparison conclusion that contractor performance was more economical than in-house performance.

DECISION

Trajen, Inc. protests the decision of the Department of the Navy's appeal authority, pursuant to Office of Management and Budget (OMB) Circular No. A-76, that it would be more economical to operate and maintain in-house the Defense Fuel Support Point (DFSP) Pearl Harbor, Hawaii, rather than to contract for these services under request for proposals (RFP) No. SPO600-99-R-0005, issued by the Defense Energy Support Center, Defense Logistics Agency (DLA). Trajen challenges the appeal authority's cost comparison decision on numerous grounds and argues that if the cost comparison is adjusted to correct errors, the cost of performance under a contract with Trajen would be lower than the cost of in-house performance.

We sustain the protest.

BACKGROUND

DLA issued the RFP on October 13, 1998 for the "operation, maintenance, product quality surveillance, shelf-life testing on packaged products, inventory control and accounting, security, safety, plant protection, and environmental protection of the [DFSP], Pearl Harbor." RFP § C-1.1, at C-PH-7. The RFP contemplated the award of a 2-year fixed-price contract with cost reimbursable provisions, plus one 3-year option. RFP Cover Sheet at 3. Offerors were advised that the procurement was to be conducted in accordance with OMB Circular No. A-76, "Performance of Commercial Activities," under which a cost comparison would be made to determine whether accomplishing the work with a commercial offeror or in-house by the government would be more economical. Id. at 1. Offerors were advised that if in-house performance was determined more economical, the RFP would be canceled and no contract would be awarded. Id.

On August 5, 1999, DLA selected Trajen's proposal as the most advantageous proposal for purposes of the cost comparison with the government's in-house cost estimate. Trajen's proposed contract price was $10,476,263. See Agency Report, Tab 8, Initial Cost Comparison Decision, Sept. 9, 1999, at line 9.

On September 9, the DLA contracting officer at Fort Belvoir, Virginia, completed the cost comparison form which showed that the adjusted total cost for Trajen to perform the contract was $1,848 lower than the adjusted total cost of in-house performance. Id. at line 19. In this regard, Trajen's proposed contract price was adjusted upward, from $10,476,263 to $12,711,615, taking into account contract administration costs, one-time conversion costs, and a minimum 10-percent conversion differential (based on 10 percent of the government's personnel costs) to ensure that the government would not be converting for marginal estimated savings; Trajen's price also was reduced to reflect estimated future tax payments to the government. Id. at lines 10, 12, 14, 16, 18. The adjusted total cost for in-house performance was $12,713,463. The in-house cost estimate consisted of costs for personnel, materials, "other costs," and overhead. Id. at lines 1-4, 17. Accordingly, after revealing the results of this cost comparison, the DLA contracting officer selected Trajen for award.

Pursuant to the administrative appeal procedures in OMB Circular No. A-76, Trajen and the National Association of Government Employees (NAGE) filed appeals, each alleging errors and omissions in the cost comparison form. Agency Report, Tab 2, NAGE Appeal, and Tab 3, Trajen Appeal.

On December 8, after considering the issues raised in the two appeals, the Navy's appeal authority in Mechanicsburg, Pennsylvania, made various adjustments to the

cost comparison.[1] According to the appeal authority's cost comparison decision, the cost of in-house performance was $103,613 lower than the cost if Trajen was to perform the contract. Agency Report, Tab 4, Administrative Appeal Authority Decision (Appeal Authority Decision), Dec. 8, 1999, at line 19. This time, Trajen's proposed contract price was adjusted upward, from $10,476,263 to $12,883,783, again taking into account contract administration costs, one-time conversion costs, a minimum 10-percent conversion differential, and a reduction to reflect estimated taxes to the government. Id. at lines 9, 10, 12, 14, 16, 18. The adjusted total cost for in-house performance was $12,780,170, and again included costs for personnel, materials, "other costs," and overhead. Id. at lines 1-4, 17. Accordingly, the appeal authority reversed the selection of Trajen for award.

STANDARD OF REVIEW

Where, as here, an agency has conducted a cost comparison under OMB Circular No. A-76, thus using the procurement system to determine whether to contract out or to perform work in-house, our Office will consider a protest alleging that the agency has not complied with the applicable procedures in its selection process or has conducted an evaluation that is inconsistent with the solicitation criteria or is otherwise unreasonable. See Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335 at 3-4; Base Servs., Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 at 2. To succeed in its protest, the protester must demonstrate not only that the agency failed to follow established procedures, but also that its failure could have materially affected the outcome of the cost comparison. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30 at 2. This is consistent with our position that our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald- Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

PROTEST ISSUES

In this decision, we resolve in Trajen's favor certain issues concerning the appeal authority's cost comparison decision which, when considered together, clearly have a material effect on the outcome of that cost comparison. One issue relates to the appeal authority's failure to recognize that the government did not propose personnel to perform the spot painting requirement contained in the RFP's performance work statement (PWS), the effect of which is that the government's

[1] The Navy certified the government's most efficient organization (MEO), prepared the in-house cost estimate, and executed the independent review certification. The Navy's appeal authority reviewed the DLA contracting officer's initial cost comparison decision.

in-house cost estimate was understated by $121,446. A second issue involves the appeal authority's improper application of a non-service industry classification which, when corrected, results in Trajen's price being lowered for cost comparison purposes by an additional $20,950, reflecting estimated future tax payments to the government. Another issue involves the unreasonableness of the appeal authority's calculation of one-time conversion costs, specifically relocation costs and health benefit costs, the effect of which is that Trajen is entitled to credits of $73,228 for relocation costs and $48,083 for health benefit costs.[2] With these four adjustments, Trajen's cost of performance becomes $160,094 lower than that reflected in the in-house cost estimate.[3]

Spot Painting

To preserve the integrity of the cost comparison, private-sector offerors and the government must compete on the basis of the same scope of work. OMB Circular No. A-76--Revised Supplemental Handbook (March 1996) (Supplemental Handbook), Part I, Ch. 3, ¶ H.3.e, at 12. See also DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543 at 4; Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166 at 3; EC Servs. Co., B-218202, May 23, 1985, 85-1 CPD ¶ 594 at 3. As explained below, we conclude that Trajen and the government were not competing on an equal basis since the government failed to account for staffing for performance of the PWS spot painting requirement.

Section C-2.4.1.1 of the RFP's PWS, captioned "Preventive Maintenance and Minor Repair--Facilities and Equipment," included several requirements for ensuring that all government property is preserved and maintained in a safe working condition. RFP § C-2.4.1.1, at C-PH-65. Section C-2.4.1.1.2 of the RFP's PWS, captioned "Minor Painting and Spot Painting," provides in relevant part as follows:

> The Contractor shall accomplish minor painting as part of its housekeeping requirements. Minor painting shall consist of proper

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[2] In the initial cost comparison decision, Trajen was not charged with one-time conversion costs for health benefits. In its appeal, NAGE challenged this omission, and the appeal authority upheld the challenge. In its supplemental administrative report responding to the protest, the Navy concedes that the health benefit costs added to Trajen's cost of performance by the appeal authority were overstated, and that Trajen was entitled to a credit of $48,083. Protester's Comments, Feb. 2, 2000, at 17; Supplemental Agency Report, Feb. 9, 2000, at 7.

[3] Trajen raises a number of other issues regarding the appeal authority's cost comparison decision. In light of our decision sustaining Trajen's protest on other grounds, we need not address these additional issues.

> surface preparation, painting pumps, valves and applying color code bands. . . .
>
> Spot painting is painting needed to protect equipment, pipes, tanks, buildings, fences, etc. or to keep the major portion of the paint in good condition. Spot painting is repainting of equipment, etc. when paint has chipped or loosened from painted surface. When more than 25% of the surface requires painting, this will not be considered spot painting. . . .

RFP § C-2.4.1.1.2, at C-PH-68.

In its appeal, Trajen referenced the line 2 rationale for the initial cost comparison, where it was stated that "it is estimated that spot painting will require 2/3 of an FTE [full time equivalent]," which is equal to 1,172 hours, each year for performance of the PWS spot painting requirement. See Agency Report, Tab 8, Initial Cost Comparison Decision, Line 2 Rationale. Trajen argued, however, that staffing for the spot painting requirement was not scheduled within the preventive maintenance hours assigned to personnel in the government's MEO. As a result, Trajen maintained that an additional 2/3 of an FTE was required for each year of performance to accomplish required spot painting, for a total upward adjustment of the personnel costs in the in-house cost estimate by $121,446.[4] Agency Report, Tab 3, Trajen Appeal, at 5.

In his decision, the appeal authority denied Trajen's argument that personnel costs for performance of spot painting were not included in the in-house cost estimate, stating as follows:

> Finding: Review of the MEO reveals hours allotted to Preventative Maintenance match those required in the PWS. My review further determined that the Preventative Maintenance hours include spot painting. Hours allotted to the WG-02 Laborer for accomplishment of Preventative Maintenance are for spot painting. There was no omission from the MEO or the [in-house cost estimate].

Agency Report, Tab 4, Appeal Authority Decision, encl. 2, at 2.

In its protest, Trajen continues to argue that the in-house cost estimate failed to include staffing costs for 2/3 of an FTE each year to cover the spot painting requirement, as contained in the PWS. More specifically, Trajen contends that the government's position description for the WG-02 Laborer does not reflect any spot

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[4] The Navy does not dispute that Trajen addressed in its staffing proposal the PWS requirement for spot painting.

painting responsibilities and, therefore, provides no support for the appeal authority's finding that spot painting will be performed by the WG-02 Laborer as part of that individual's housekeeping duties. In this regard, the position description for the WG-02 Laborer, as contained in the government's technical performance plan, states as follows:

> **DUTY 1:** 65% **Performs housekeeping duties.** Checks, cleans, and services the facility as directed. Consistently operates hand tools and power equipment, i.e.[,] shovels, "weed eaters," chain saws, spray guns, etc. in a safe manner, applying established safety regulations to minimize minor violations and to avoid major violations due to employee error or negligence. Strictly follows safety and security instructions. Promptly informs supervisor of accidents and/or damages to supplies, equipment, or vehicles and of any observed unsafe practices in a timely manner in accordance with established policies and procedures. Continually maintains facilities, equipment, and areas in a clean condition in accordance with security, fire, and housekeeping regulations.
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> **DUTY 2:** 35% **Performs laborer duties as directed.** Carefully adheres to instructions concerning the task at hand. Safely performs duties as directed. Loads and unloads heavy boxes, bulky supplies and materials to and from trucks, dollies, etc[.]; moves heavy boxes, cartons, etc[.] by hand, handtruck or dolly; opens crates and boxes; stacks boxes and cartons as directed. Runs hand and power lawnmowers which do not require very heavy physical effort, clears small trees and bushes using hatchet, hand-saw or clippers. Moves and arranges furniture, boxes, etc[.] as directed. Picks up trash and paper from grounds and working areas; collects and empties garbage cans. Using a shovel, digs ditches where grading and sloping is not required; fills holes with dirt and levels bumps and low places using shovel, hand tamper and rake. Performs other duties as assigned.

Agency Report, Tab 7, Government's Technical Performance Plan, WG-02 Laborer Position Description.

In order to understand the basis for the appeal authority's finding that hours allotted to the WG-02 Laborer for the accomplishment of preventive maintenance also included the PWS requirement for spot painting, our Office conducted a hearing in which the appeal authority was given an opportunity to amplify his contemporaneous rationale. The appeal authority did not dispute that 2/3 of an FTE, or 1,172 hours, was required each year to perform spot painting under the PWS. (Page 1 of a 179-page printout of a Pearl Harbor preventive maintenance database confirms that 1,172 hours, or 2/3 of an FTE, is required for spot painting. Supplemental Agency Report, Tab 57.) The appeal authority explained that "[h]ousekeeping is a part of preventive maintenance. And spot painting is a part of housekeeping. I believe there [were] sufficient hours in the MEO or the in-house cost estimate to cover historical preventive maintenance requirements, and that would include spot painting." Hearing Transcript (Tr.) at 19-20. The appeal authority then deferred to his action officer, "who did the leg work on this," for further explanation of where 2/3 of an FTE, or 1,172 hours, for spot painting was

covered in the MEO and the in-house cost estimate. Id. at 21. The following exchange occurred:

> [Action Officer]: [T]he database identified 1,172 as the spot painting, so we have an exact match there [exhibits 55 and 64 of the MEO list a WG-02 Laborer at 1,172 hours for preventive maintenance] to show hours. In addition, the position description for the laborer defines two-thirds of [the] duties as housekeeping duties, which is how minor and spot painting is classified in the performance work statement.
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> [GAO]: Can you explain where in the position description for the WG-02 laborer that it says anything about painting, spot painting or minor painting? I don't see painting here.
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> [Action Officer]: It does not specifically identify painting, but it does specify housekeeping duties.

Id. at 22-23.

In response to another question, the appeal authority agreed that he "basically looked at the work description and concluded that there [were] sufficient hours to cover all the requirements," that is, "there were enough hours covered in maintenance for preventive maintenance for painting." Id. at 25.

While the appeal authority recognized that the PWS contained a requirement for spot painting, we conclude that he unreasonably determined that the WG-02 Laborer, whose responsibilities were defined in the government's technical performance plan, would perform spot painting as part of the enumerated housekeeping duties. Contrary to the view of the appeal authority and his action officer, there is nothing in the WG-02 Laborer's position description in the government's technical performance plan or in the in-house cost estimate that establishes that the individual assigned to this laborer position would perform any painting--spot or otherwise--as part of the housekeeping duties.[5] Accordingly, we sustain this ground of protest, concluding

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[5] The position description for the WG-02 Laborer shows that the laborer's time (1 FTE) will be devoted to housekeeping and laborer duties, which do not include any type of painting.

In addition, as quoted above, section C-2.4.1.1.2 of the PWS, captioned "Minor Painting and Spot Painting," distinguishes between minor painting, which is accomplished "as part of [the contractor's] housekeeping requirements," and spot painting. However, neither the appeal authority nor his action officer considered this distinction. Id. at 24, 29-30. To the extent the use of the term "spray gun" in the position description for the WG-02 Laborer's housekeeping duties could be construed as suggesting a requirement for some type of painting, then according to

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that the government failed to account for 2/3 of an FTE, totaling $121,446, for performance of spot painting over the term of the contract.

Federal Income Tax Adjustment

OMB Circular No. A-76 provides that the potential federal income tax revenue from contracting with a commercial offeror should be considered in the cost comparison. Supplemental Handbook, Part II, Ch. 3, ¶ G, at 27. Specifically, in an A-76 cost comparison, since contract performance will provide the commercial contractor with income subject to tax, the estimated amount of the tax payments should be subtracted from the net cost to the government. Id. To simplify the amount of the anticipated tax payments, the Supplemental Handbook provides an appendix, prepared by the Internal Revenue Service, that lists by industry type the appropriate tax rates in relation to business receipts. Id. To determine the amount of estimated tax, the commercial offeror's proposed price for each performance period (line 9 on the cost comparison form) is multiplied by the applicable tax rate, and the result is entered on the cost comparison form, line 14, as a reduction in the cost of contractor performance. In this case, line 14 of the initial cost comparison form showed a total reduction of $31,431, reflecting the application of a 0.3-percent tax rate based upon the assignment of industry code 61-35-5170 for "Petroleum and petroleum products" in the "Wholesale Trade" industry classification. Agency Report, Tab 8, Initial Cost Comparison Decision, at line 14; Supplemental Handbook, App. 4--Tax Tables, at 51-52.

In its appeal, Trajen argued that the 0.3-percent industry code was inappropriate because the RFP did not cover wholesale trade or sale (of petroleum or any other product), but rather, the provision of services for the operation and maintenance of a fuel depot. Accordingly, Trajen argued that industry code 80-57-8980 for "Miscellaneous services, not elsewhere classified" in the "Services" industry classification, with its 0.5-percent tax rate, should have been applied. Supplemental Handbook, App. 4--Tax Tables, at 52. In these circumstances, Trajen states that its line 14 price adjustment to reflect anticipated tax payments should be increased by $20,950 (for a total reduction of $52,381). Agency Report, Tab 3, Trajen Appeal, at 12.

In denying this aspect of Trajen's appeal, the appeal authority confirmed the application of a 0.3-percent tax rate, by correlating the Navy's commercial activities functional code for this procurement with what he believed to be the most appropriate industry code and applicable tax rate in the Supplemental Handbook's referenced appendix. The functional code for this procurement--T805, "Operation of

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the terms of the PWS, that painting would be classified as minor painting, not spot painting.

Bulk Liquid Storage" within the "Other NonManufacturing Operations" classification--was defined as including "commercial activities that operate bulk petroleum storage facilities." Agency Report, Tab 13, OPNAVINST 4860.7C (OPNAVINST 4860.7C), Navy Commercial Activities (CA) Program, June 7, 1999, App. J--Codes and Definitions of Functional Areas, at J-20, J-25. Based on the definition of the T805 functional code, which encompasses services to the government within the operation of a fuel depot, the appeal authority concluded that the most appropriate industry code would be "Petroleum and petroleum products" within the "Wholesale Trade" industry classification. The appeal authority made no adjustments to Trajen's price to reflect anticipated tax payments, that is, he continued to reduce Trajen's cost of performance by only $31,431. Agency Report, Tab 4, Appeal Authority Decision, encl. 2, at 6.

In choosing the appropriate industry code and corresponding tax rate, procuring officials have considerable discretion and we will examine the agency's choice only to ensure that it had a reasonable basis. Contract Servs. Co., Inc., B-231539, Sept. 15, 1988, 88-2 CPD ¶ 249 at 3. Here, we conclude that the appeal authority unreasonably selected an industry code corresponding to a wholesale trade or sale industry classification, as opposed to a services industry classification.

As indicated above, OMB Circular No. A-76 requires the federal income tax adjustment to be calculated based on the application of the industry classification that most closely describes the solicitation requirements. As previously stated, this RFP was issued for the "operation, maintenance, product quality surveillance, shelf-life testing on packaged products, inventory control and accounting, security, safety, plant protection, and environmental protection of the [DFSP], Pearl Harbor." RFP § C-1.1, at C-PH-7. The RFP also included the provisions of the Service Contract Act of 1965, 41 U.S.C. §§ 351-58 (1994). RFP § I100, at 32-35. In light of these solicitation provisions, which cover services for the operation and maintenance of a fuel depot, not the wholesale trade or sale of products, we conclude that the appeal authority unreasonably selected a non-service industry classification for purposes of calculating Trajen's line 14 reduction reflecting anticipated tax payments to the government as a result of contractor performance.

In response to this information, the appeal authority acknowledged during the hearing that he did not consider whether the work to be contracted out involved products or services, and neither he nor his action officer could meaningfully explain what aspect of this procurement supported the application of a tax rate involving the wholesale trade or sale of petroleum and petroleum products. Tr. at 66-72. The appeal authority responded that his team "used a process of elimination" to determine the industry code and applicable tax rate. Id. at 66-67. The action officer elaborated on this "process of elimination" by stating that "[w]e weren't in the retail trade. We weren't in manufacturing. We eliminated some things that obviously did not apply, and we felt that we were in the bulk business, which is wholesale." Id. at 70-71.

There simply is no support in the record for the appeal authority's application of a tax rate corresponding to a wholesale trade or sale industry classification.[6] The record clearly shows that Trajen will perform services for, not sell commodities to, the government. Therefore, we sustain this ground of protest, concluding that a tax rate corresponding to a services industry classification, as opposed to a wholesale trade or sale industry classification, reasonably describes the commercial activity which is the subject matter of this procurement. We agree with Trajen that, at a minimum, $20,950, based on a 0.5-percent tax rate resulting from the shift to a services industry classification, should be reflected as an additional reduction on line 14 of the cost comparison form.[7]

One-Time Conversion Costs

OMB Circular No. A-76 permits the government to add to the proposed price of the proposal of the most advantageous commercial offeror certain "one-time conversion" costs that would be incurred "as a result of the conversion" from in-house to contractor performance. One-time conversion costs may include such things as relocation costs and health benefit costs. Supplemental Handbook, Part II, Ch. 3, ¶¶ E.1, E.3, at 26. As relevant to this discussion, the relocation cost adjustment reflects the anticipated cost to the government of paying to move an employee to a new permanent duty station outside the current commuting area, where the employee was expected to hold a position as part of the MEO, but would lose his or her position if the commercial offeror is awarded the contract. See generally Agency Report, Tab 14, Department of the Navy Civilian Human Resources Competitive Sourcing Guide (Navy Guide), May 27, 1999, at 39-40. While the Supplemental Handbook states that relocation costs may be included as one-time conversion costs, nothing in the Supplemental Handbook suggests that a fixed percentage, or a certain number, of employees should be assumed eligible for relocation for cost comparison purposes.[8]

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[6] We fail to see how the T805 functional code supports the agency's position, since the reference in its definition to "operation of bulk liquid storage" suggests a procurement for services, not a procurement for the wholesale trade or sale of products.

[7] Trajen suggests that there may be a more appropriate industry classification, for example, the 0.6-percent "Trucking and warehousing" industry code in the "Transportation and Utilities" industry classification, which, if that tax rate was applied, would result in a larger reduction to Trajen's cost of performance on line 14 of the cost comparison form. Protest at 19-21; Protester's Comments at 26-27.

[8] It would appear more appropriate, at least in the context of an MEO comprising a relatively small number of individuals, to base the calculation of the number of employees eligible for relocation costs on a review of the skills and qualifications of

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Here, line 12 of the initial cost comparison form included as one-time conversion costs the costs to relocate three employees from Hawaii to California, which increased the estimated cost of Trajen's performance. In this regard, the Navy's commercial activities team at the Fleet Industrial Supply Center (FISC) Pearl Harbor assumed that 7.5 percent of 40.5 FTEs in the MEO would relocate outside of Hawaii (.075 x 40.5 = 3.04) if the commercial offeror was awarded the contract. Accordingly, for purposes of the cost comparison, Trajen's contract price was increased by $219,684 in relocation costs ($73,228 for each of the three employees). Agency Report, Tab 8, Initial Cost Comparison Decision, Line 12 Rationale.

In its appeal, Trajen challenged the number of FTEs for whom relocation costs should be counted; Trajen did not, however, challenge the in-house cost estimate's underlying 7.5 percent relocation figure. Specifically, Trajen contended that the calculation of three employees, based on the in-house cost estimate that 7.5 percent of the 40.5 FTEs in the MEO would relocate outside of Hawaii, was erroneous for two reasons--first, the 40.5 FTEs included one FTE for a military position, although relocation costs for military FTEs should not be included,[9] and second, the in-house cost estimate failed to consider the staffing decrease of 7 FTEs (from 39.5 to 32.5 FTEs) by the beginning of the third year of performance as proposed in the MEO. Trajen argued that the in-house cost estimate should only include relocation costs for two employees, not three (32.5 civilian FTEs x .075 percent = 2.43), and the relocation costs of $219,684 included in line 12 should be reduced by $73,228 (for one employee) to $146,456. Agency Report, Tab 3, Trajen Appeal, at 11.

In denying Trajen's argument that relocation costs were not correctly calculated, the appeal authority stated as follows:

> Finding: Appendix F to the "Competitive Sourcing Human Resources Guide" published [in] April 1999 provides a model for calculating relocation costs. This model states "assume that overall, 10% of those in the MEO will accept placement outside the commuting area with PCS [Permanent Change of Station]." Application of this assumption to the MEO results in a figure of four (39.5 x .1 = 4). The number derived is to be multiplied by the cost per PCS. My review revealed that

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the individual employees. See Space Mark, Inc. v. United States, 45 Fed. Cl. 267, 275 (1999) (Air Force based estimated number of employees to be relocated on review of employees' skills, qualifications, and experience).

[9] The appeal authority agreed that Trajen should not be assessed with relocation costs for the challenged military FTE. See Agency Report, Tab 13, OPNAVINST 4860.7C, Part II, Ch. 3, ¶ E.3.a(1), at II-6; and Agency Report, Jan. 21, 2000, at 11 n.5.

> $73,228 is an appropriate number for a PCS move originating in Honolulu County. Application of the model results in an increase of the relocation costs entered on line 12 by $73,228 to a new total of $292,912.

Agency Report, Tab 4, Appeal Authority Decision, encl. 2, at 5.

Rather than defend the 10-percent relocation figure used in the appeal authority's decision to deny Trajen's appeal with respect to relocation costs, during the course of the protest, the Navy argued that under a correct application of the model in the Navy guide, relocation costs should have been assumed for an even higher percentage--approximately 15 percent--of the MEO employees.[10] Agency Report at 12-14. Thus, the Navy's current position is that Trajen's proposed price should be adjusted upward to account for the relocation of not three employees, as the initial cost comparison reflected, nor for four employees, as the appeal authority determined, but for five employees.

We agree with Trajen that the appeal authority did not have a reasonable basis to reject the 7.5-percent relocation figure developed in the initial cost comparison. First, there is some question whether the appeal authority had a basis to review the 7.5-percent figure at all, since neither Trajen nor NAGE challenged that figure in their respective appeals. In this regard, OMB Circular No. A-76 states that the appeal authority "will not review any item not formally challenged by an eligible appellant." Supplemental Handbook, Part I, Ch. 3, ¶ K.5, at 13. Second, while it is not clear from the record how the initial 7.5-percent relocation figure was developed locally by FISC Pearl Harbor, the record reflects that the appeal authority made no meaningful effort to learn the basis for this figure.[11]

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[10] Specifically, the Navy argued in its post-protest submission that, according to its revised interpretation of the model in the Navy guide, five of the 39.5 FTEs in the MEO, and even five of the 32.5 FTEs that would remain in the MEO after the second year of performance, should be assumed to be entitled to relocation costs if a private contractor performs the work. Agency Report at 14. This equates to nearly 13 percent of the 39.5 FTEs and to approximately 15 percent of the 32.5 FTEs.

[11] During the hearing, when asked why he rejected the 7.5-percent relocation figure, the appeal authority stated that "10 percent is the number cited for the Navy." Tr. at 77. The action officer stated that the Navy was "unable to find any substantiation for [the 7.5-percent figure] anywhere else, and we had guidance provided . . . [that] indicated there was a better number [10 percent] to use." Id. at 77-78. The action officer also stated that the Navy's appeal authority "did not have access to [historical data for Hawaii]," despite attempts to obtain such information from the local Navy human resources office in Hawaii. Id. at 78, 83.

Further, in view of the need to protect the integrity of the A-76 cost comparison process, we are concerned that the Navy has shifted from one position to another in this matter, each time finding a basis to adjust Trajen's price even higher for cost comparison purposes. The Navy has not provided a persuasive basis for any of its changes of position. In particular, we do not believe that the Navy could reasonably rely on its guide to justify either the appeal authority's 10-percent relocation figure or the even higher, post-protest 15-percent figure. That guide does not purport to be mandatory for Navy A-76 cost comparisons; instead, it is described simply as providing human resources personnel with a "road map" for the competitive sourcing process. Agency Report, Tab 14, Navy Guide, at 1. The only specific reference in the guide to relocation percentages is found in an appendix labeled "Model for Personnel Costs and One-Time Conversion Cost," with no indication that this is a model that must be followed. Id. at F-1. Moreover, within this model, there are repeated references to the need to adjust the calculations to reflect the circumstances in each particular cost comparison. For example, the model refers to the "precedent of the NAWC Indianapolis [where] [t]his activity was privatized with contractor positions offered to most employees." Id. at F-3. The model refers to "fine-tun[ing] Indy's placement percentage by comparing against the national [Priority Placement Program] placement [percentage] outside the commuting area."[12] Id. In other words, consistent with the Supplemental Handbook, the model in the Navy guide does not mandate that a fixed percentage, or a certain number, of employees be assumed eligible for relocation for cost comparison purposes.

In this case, the Navy's appeal authority recognized that the relocation model in the guide was a "generic model that you have to fine-tune, depending upon the location," and that relocation costs "from Indianapolis, I would probably venture, [are] different than [those] in Hawaii." Tr. at 76-77. In fact, the appeal authority rejected the permanent change of station relocation cost figure used in the model ($36,000 per employee) and instead used a figure more than twice as high ($73,228 per employee based on cost estimates from the local Navy human resources office for a move from Hawaii to California). However, when it came to the percentage of employees expected to have the right to relocate at government expense, the appeal authority and the Navy, for reasons which appear both inconsistent and self-serving, viewed the guide's relocation model as essentially binding. There was no meaningful consideration given to how the model would apply to the specific circumstances of relocations from Hawaii for specific employees there, for example, the possibility that employees might be reluctant to leave Hawaii or that individuals in specific labor categories might have difficulty finding eligible positions in the continental United States. Further, as Trajen notes, no consideration was given to the effect on relocation costs as a result of a reduction in the number of FTEs in the MEO after

[12] The Department of Defense's Priority Placement Program is intended to help, among others, employees affected by a reduction in force. See Department of Defense Priority Placement Program, http://cpol.army.mil/permiss/6313.html.

the first two years of contract performance. Any of these matters could have justified the initial figure of 7.5 percent, yet none of them was given meaningful consideration by either the appeal authority or the Navy in its post-protest submissions.

Because the appeal authority had no reasonable basis, as discussed above, to reject the 7.5-percent relocation figure used in the initial cost comparison, and in light of the appeal authority's acknowledgment that it was improper to include the cost of relocating a military FTE, we conclude that the highest amount that could reasonably be added to Trajen's proposed price for cost comparison purposes was the estimated cost of relocating three employees (39.5 FTEs x .075 = 2.96). Accordingly, we conclude that Trajen is entitled to a credit of $73,228 on line 12 of the cost comparison form for relocation costs.

CONCLUSION

In light of our analysis, set out above, we conclude that the appeal authority unreasonably determined that in-house performance would be more economical than contracting with Trajen. Our review indicates that the government was understaffed for the spot painting requirement, and therefore, the in-house cost estimate was understated by $121,446. We also conclude that the appeal authority understated Trajen's federal income tax adjustment by at least $20,950. In addition, we believe the appeal authority had no reasonable basis to change the underlying relocation figure, and therefore, his calculation of relocation costs for Trajen was overstated by $73,228.[13] Finally, as we previously noted, the Navy acknowledged that the appeal authority miscalculated health benefit costs, entitling Trajen to a credit of $48,083. (At the hearing, the Navy confirmed these monetary amounts. Id. at 119-21.) If these adjustments, totaling $263,707, are made, the $103,613 cost advantage to the government, as determined by the appeal authority, will be offset by $160,094, representing a cost advantage in favor of contracting with Trajen. Therefore, since contract performance by Trajen appears more economical than in-house performance, we conclude that Trajen should have been determined the winner of the appeal authority's cost comparison.

By letter of today to the Secretary of the Navy, we are recommending that the appeal authority revise the cost comparison for the reasons discussed above, and if otherwise appropriate, that the award be made to Trajen based upon its lower proposed cost. We also recommend that Trajen be reimbursed the reasonable costs

[13] Even if we accept the appeal authority's calculation that Trajen should be charged with relocation costs for four employees, based on the other adjustments discussed in our decision, Trajen's adjusted cost of performance remains low by $86,866.

of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999).[14] Trajen's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.

Comptroller General
of the United States

[14] By separate letter of today to the Director of the Defense Logistics Agency, we are advising the agency of our decision and recommendations.