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DECISION



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

FILE: B-198361

DATE: May 16, 1980

MATTER OF: Direct Delivery Systems

4673

DIGEST:

[Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A-76 is dismissed until review under formal administrative procedure has been completed. GAO bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted.]

The Department of the Army has ²⁰requested an expedited decision from our Office on a jurisdictional question incident to a protest by Direct Delivery Systems challenging a cost comparison which led to a determination by the Army to perform certain functions in-house rather than by contract. The cost comparison was conducted under the guidance of Office of Management and Budget Circular No. A-76 (A-76), Revised March 29, 1979. Direct Delivery Systems' challenge to the propriety of the cost evaluation has been both filed with our Office as a protest and appealed under cost evaluation review procedures newly established by the Army. For the reasons stated below, Direct Delivery Systems' protest is dismissed without prejudice and may be reinstated after completion of the Army's review.

The new edition of A-76 referred to above, published at 44 Fed. Reg. 20556, April 5, 1979, establishes a more comprehensive and systematic cost evaluation scheme to be used in governmental make-or-buy decisions than that prescribed by prior editions of the circular and also requires that agencies establish an administrative review procedure to protect the rights of affected parties and provide for the expeditious determination of appeals. The Army established its review procedure in Department of the Army Circular No. 235-1, dated February 1, 1980, which provides for the appointment of a three-member board to perform an independent and objective study of

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challenges by affected parties to A-76 cost studies and issue a written decision within 30 days.

Generally, the outcome of the make-or-buy decision is determined by a comparison of the costs of Government performance (in-house) with the costs of contractor performance (contracting out). The cost of contracting out is determined by the responses of potential contractors to a solicitation for the services in question; the cost of performance using Government employees is estimated. Essentially, if the cost of contracting out is lower, then a contract is awarded to the lowest cost acceptable offeror and the affected Government employees may be reassigned or released; conversely, if the evaluation shows the cost of in-house performances to be lower, then the solicitation is canceled and action taken to retain or hire the employees necessary to perform the function. Direct Delivery Systems is the incumbent contractor for a portion of the work called for by the solicitation which an A-76 cost evaluation showed could be performed in-house at lower cost.

We review A-76 cost evaluations to assure that bidders are not induced to prepare and submit bids only to have them arbitrarily rejected as the result of an erroneous cost evaluation. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38; Jets, Inc., 59 Comp. Gen. ____ (B-195617, February 21, 1980), 80-1 CPD 152. We believe that where, as here, a relatively speedy review procedure is formally included as part of the administrative decision-making process, the administrative decision is not final until that review procedure has been exhausted, cf. Sanders Company Plumbing and Heating, B-196075, February 6, 1980, 80-1 CPD 99, and a protest filed with our Office prior to this final decision would be premature. Constantine N. Polites & Co., B-189214, October 18, 1979, 79-2 CPD 267. Therefore, we will no longer consider protests challenging A-76 cost evaluations unless the administrative appeal process, if available, has been exhausted.

We reach this result mindful that prior decisions of our Office might have implied a contrary result. See Jets, Inc., supra; Tri-States Service Company, B-195642, January 8, 1980, 80-1 CPD 22; Amex Systems, Inc., B-195684, November 29, 1979, 79-2 CPD 379. However,

we distinguish these cases on the basis that the implementation of the revised A-76 had been delayed by section 814 of the Department of Defense Appropriation Authorization Act, 1979, Pub. L. 95-485, 92 Stat. 1611, 1625, and no formal administrative review process was available in any of these cases.

Accordingly, the protest is dismissed but may be reopened after completion of the Army's review.



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General Counsel