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DECISION

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

FILE: B-195183 DATE: October 24, 1980

MATTER OF: Serv-Air, Inc.; AVCO

DIGEST:

1. Protest against agency's determination to retain function in-house based on cost comparison with offers received in response to solicitation is sustained to extent that agency failed to follow prescribed guidelines in conducting comparison.

2. Where decision to retain function in-house is based on comparison of estimated in-house costs with offers received in competitive procurement, integrity of process dictates that comparison be supported by complete and comprehensive data, and that elements of comparison are clearly identifiable and verifiable.

Serv-Air, Inc. (Serv-Air) and AVCO Corporation (AVCO) protest the determination by the Department of the Air Force that the Military Aircraft Storage and Disposal Center (MASDC) at Davis-Monthan Air Force Base in Arizona would be operated at a lower cost to the Government through continued use of Government personnel rather than by awarding a contract based on proposals submitted by either of the two firms. The protesters contend that when comparing in-house costs and the costs of contracting, the Air Force failed to properly implement its own regulations, policies and procedures. AVCO also raises certain additional matters with respect to the solicitation of offers itself.

The protests are sustained to the extent that we find that the Air Force's determination is not supported by the agency's cost comparison as presented to our Office.

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Initially we point out that a dispute over an agency decision to perform work in-house rather than to contract for the services involves a matter of Executive branch policy which we do not generally review as part of our bid protest function. General Telephone Company of California, B-189430, July 6, 1978, 78-2 CPD 9. Nevertheless, when an agency utilizes the procurement system to aid in its decision-making by spelling out in a solicitation the circumstances under which a contract will or will not be awarded, we believe it would be detrimental to the system if, after the agency induces the submission of proposals, there is a faulty or misleading cost comparison which materially affects the decision in that respect. Therefore, we do consider protests which allege such a faulty or misleading cost comparison. Jets, Inc., 59 Comp. Gen 263 (1980), 80-1 CPD 152; Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD 38. However, we also point out that the burden is on the protester to show the inaccuracy of the cost comparison. Amex Systems, Inc., B-195684, November 29, 1979, 79-2 CPD 379.

FACTS

Request for Proposals (RFP) No. F04606-79-R-0150 to operate MASDC contemplated a fixed-price incentive fee contract with a ceiling price of 125 percent of the contractor's target cost. The contract term was one year, with options by offerors priced for two more years. Offerors were advised that once the offer most favorable to the Government was determined, the "phase-in price, plus total ceiling price, plus over and above contract line item prices" would be compared with the Government's three-year cost estimate of retaining the operation in-house. A contract would be awarded only if the in-house cost estimate were higher.

A pre-proposal conference for 15 firms was conducted, after which three firms submitted proposals. All were found technically acceptable. Discussions were held, and best and final offers were submitted. Serv-Air's proposal was the most favorable of the three.

The Government's in-house cost estimate of approximately $39,600,000 for three years was then disclosed to the offerors, and AVCO and Serv-Air submitted numerous questions with respect to certain of its elements. The protests were filed in our

Office based on the Air Force's responses to a number of the questions. The comparison of the in-house estimate with Serv-Air's cost proposal (as evaluated at approximately $39,900,000 for three years) showed that it would be more economical for the Air Force to keep the MASDC function in-house.

SERV-AIR PROTEST

Serv-Air requests that we focus on four areas of the Air Force's cost comparison:

(1) whether the Air Force should have escalated its estimate for civilian personnel costs for the second and third years if the MASDC function were retained in-house;

(2) the Air Force's computation of the personnel termination costs if the function were contracted out;

(3) the Air Force's estimated cost for a Project Management Office to, in part, oversee the contractor's performance; and

(4) whether the correct Federal tax rate was used in estimating the amount of taxes the Government would collect on the contract price if it awarded a contract to Serv-Air.

(1) Cost Escalation

Line item 10 of the Cost Analysis Worksheet used by the Air Force in its cost comparison is for the "Civilian Personnel Costs" payable if the in-house operation is retained. The Air Force's estimated first, second, and third year costs were $11,304,767, $12,064,213 and $12,569,405, respectively; the second and third year cost estimates were not escalated for possible civilian personnel cost increases, e.g., wage and General Schedule salary rate increases. Serv-Air protests that cost escalation was mandated by Air Force regulations.

Section 814(b) of the Department of Defense (DOD) Appropriation Authorization Act, 1979, Pub. L. No. 95-485, 92 Stat. 1611, 1625 (1978), prohibited DOD from contracting out

commercial or industrial functions unless performance by a private contractor began before the date of its enactment (October 20, 1978), or would have been allowed by the policy and regulations in effect before June 30, 1976. That prohibition was in effect until October 1, 1979, and is applicable to the instant procurement. See Tri-States Service Company, B-195642, January 8, 1980, 80-1 CPD 22. Therefore, the dispute on this issue concerns whether Air Force policy and regulations which were in existence prior to June 30, 1976, required salary escalation in the Government in-house cost estimate. The Air Force asserts that they did not.

First, the Air Force states that Air Force Regulation 26-12, "Use of Commercial or Industrial Activities" (published on January 29, 1974), made no provision for escalation of either personnel or material costs. On March 5, 1976, Air Force Regulation 26-12 was replaced by an advance draft copy of Chapter 1 of Air Force Manual (AFM) 26-1, "Manpower Utilization," which was to be implemented upon receipt. AFM 26-1 prescribed in paragraph 1-16(e):

> " * * * All recurring costs such as contract cost (line 8) and civilian personnel cost (line 10) will be straight lined for the three year period unless there are known changes for the second and third year (i.e., line 12; maintenance of facility). * * * No adjustments will be made in the in-house cost estimate for the second and third year recurring cost items for such things as inflation, price escalation and/or projected wage increases, except where the contractor has estimated such costs in the second and third year of a multi-year contract or in priced options for the second and third year." (Emphasis added.)

The Air Force points out that possible civilian personnel wage increases for the second and third years were not "known" at the time the analysis was done, i.e., prior to the receipt of offers, nor was it known at that time whether or to what extent an offeror for a fixed-price incentive fee contract would consider possible increases in computing a price proposal.

Second, the Air Force asserts that "Monthly Messages" of March and April 1976 issued to supplement AFM 26-1 provided examples of second and third year personnel cost estimate computations which do not appear to escalate those costs from the first year.

Third, the Air Force asserts that it never has escalated second and third year civil servant costs in a cost estimate where, as here, the contractor would be eligible for annual contract adjustments under a "Fair Labor Standards Act and Service Contract Act" contract clause. The clause provides for a contract price adjustment when the contractor implements a change issued by the Department of Labor in either the minimum prevailing wage determination or the Federal minimum wage from that initially applicable to the contract. The Air Force evidently assumes that since minimum wage increases would be payable as contract price adjustments in any event, offerors do not escalate proposed personnel costs for option years.

Fourth, the Air Force cites post-1976 communications from the Air Force Directorate of Manpower and Organization, which has primary responsibility in the Air Force for cost comparison policy and regulation, clarifying the pre-June 1976 policies and which the Air Force contends do not authorize cost escalation.

Serv-Air argues that the Air Force practice of straight-lining the second and third year estimated costs in a cost comparison, where an offeror in fact escalated its costs, simply perpetuates a misinterpretation of the agency's pre-June 1976 policies. Serv-Air focuses on the language in paragraph 1-16(e) of AFM 26-1 requiring adjustment in the in-house estimate "where the contractor has estimated such costs in the second and third years." In this connection, Serv-Air asserts that as a matter of economics an offeror certainly escalates his estimated costs in this area for those years.

Serv-Air also points to paragraph 1-18(a), which requires the Air Force to project in its estimate additional pay increases for Government employees for the second and third years of a multi-year contract or a contract with pre-priced options where there are no economic adjustment clauses in the contract. Serv-Air asserts that there are

no economic adjustment clauses in the proposed contract as contemplated by that provision for personnel, material, maintenance, overhead and similar costs.

Serv-Air also asserts that the "Monthly Messages" referenced by the Air Force at best are not clear on the issue, and that any post-1976 clarifications of the pre-June 1976 policies in any event are "nothing more than one Air Force organization's interpretation."

We consider that the Air Force's practice here was contrary to the requirement in paragraph 1-18(a), and also failed to properly give effect to all of the language in paragraph 1-16(e).

We point out here that in our view the RFP, by clearly advising offerors that the cost comparison and the contract award would be made "in accordance with AFM 26-1," effectively established the pre-June 1976 manual as the groundrule mandated by section 814(b) of the 1979 DOD Appropriation Authorization Act, supra. Since in preparing their proposals offerors therefore were entitled to rely on the explicit provisions of AFM 26-1, we would view a cost comparison based on a selective reading of the document, i.e., one incorporating only certain of its instructions and substituting post-June 1976 practice for others, as precisely the type of misleading comparison contemplated in our decisions in Jets, Inc., supra, and Crown Laundry and Dry Cleaners, Inc., supra.

Also, we do not find support for the Air Force's view in either the 1976 "Monthly Messages" or the post-1976 Air Force policy "clarifications," since neither addresses the situation where an offeror escalated second year civilian personnel costs, and then further escalated such third year costs.

We find that paragraph 1-18(a) of AFM 26-1 is dispositive of the matter. The paragraph specifically provides for second and third year Government employee pay escalation in the Government estimate when making decisions of the type here in issue if prices are requested for more than one year and there are no economic adjustment clauses. The economic price adjustment clause regarding labor rates for inclusion in contracts is at Defense Acquisition Regulation

(DAR) § 7-107 (1976 ed.). It allows for contract price adjustments whenever the contractor's labor costs increase during performance, if otherwise appropriate. This clause did not appear in the RFP.

The results of the Air Force's approach, which essentially ignores paragraph 1-18(a), are that (1) the Air Force estimate simply does not reflect the actual cost of performing the function in-house, since that cost certainly increases in the second and third years, and (2) the Air Force is comparing two figures that were prepared on two different bases, i.e., the offeror's escalation of second and third year personnel costs, and the agency's straight-lining of them for in-house estimating purposes.

To the extent that the Air Force views the contract's "Fair Labor Standards Act and Service Contract Act" clause as the type of economic adjustment clause contemplated by paragraph 1-18(a), that clause only provides for contract price adjustments if the contractor is compelled to increase employees' wages to comply with a change mandated by the Department of Labor. Thus, if a contractor is already paying its employees more than the minimum wage when an increase in the minimum wage becomes operative, there will be no contract price adjustment unless the new wage exceeds the one being paid. Further, offerors certainly may plan to increase proposed personnel costs in years two and three based on business judgment independent of the minimum wage. We do not view the existence of that clause here as invoking the exception to the cost escalation mandate in paragraph 1-18(a).

Regarding paragraph 1-16(e), we recognize that, as a practical matter, at the time an estimate is prepared there are no "known" changes in Federal civilian personnel costs for the years after the initial performance year, since historically Federal employee pay increases are not definitized until shortly before the beginning of the fiscal year in which they are to take effect.

However, we believe that the only reasonable reading of paragraph 1-16(e) in light of the direction in paragraph 1-18(a) as to how to compare costs in these specific circumstances, is that where offers for three years are solicited

on a fixed price basis without an economic adjustment clause, the Government must adjust the in-house estimate by escalating second and third year costs.

Accordingly, we believe that the Air Force's in-house civilian personnel cost estimate should have been adjusted on a reasonable basis for the second and third years.

As indicated above, the Air Force's three year estimate to continue the MASDC function in-house was $39,600,000, which included $35,938,385 in civilian personnel costs. Serv-Air's offer was evaluated at approximately $39,900,000 for three years. Since even a minimal escalation in the second and third year civilian personnel costs would have resulted in a three-year in-house estimate exceeding Serv-Air's offer, under the published award criteria a contract should have been awarded to Serv-Air.

Therefore, it is unnecessary to consider the other issues raised by Serv-Air.

The protest is sustained.

AVCO PROTEST

In addition to joining Serv-Air in protesting the matters noted above, AVCO has raised a number of additional issues. Certain of them involve the accuracy of the Air Force's in-house estimate, and thus are academic in view of our conclusion above.

However, AVCO also raises matters relevant to the preparation of its own proposal: that it was improper to invite proposals on a fixed-price plus incentive-fee basis rather than a fixed-price one; that the RFP improperly required the offeror to include in its proposal costs to secure and provide facilities and equipment that already were on the installation and thus were not included in the Government in-house estimate; and that the labor rates prescribed by the Secretary of Labor for use in the RFP were excessive.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), requires that protests based upon alleged improprieties apparent from an RFP as issued be filed prior to the closing date for the receipt of initial

proposals. The protest on these issues involves alleged improprieties within the meaning of that provision, but was filed in our Office over two months after initial proposals were due. Accordingly, the issues will not be considered on the merits.

In any event, we point out with respect to the prescribed labor rates that the courts have held that the correctness of a prevailing wage determination made by the Secretary of Labor is not subject to judicial review. See United States v. Binghamton Construction Co., 347 U.S. 171 (1954); Nello L. Teer Co. v. United States, 348 F. 2d. 533 (Ct. Cl.1965). We have construed the former decision as precluding this Office from reviewing the correctness of a wage determination in situations such as we have in the present case. See International Union of Operating Engineers, B-182408, February 12, 1975, 75-1 CPD 90. The appropriate manner in which to challenge wage determinations is through the administrative process within the Department of Labor as established by 29 C.F.R. part 7 (1979). Associated General Contractors of America, Inc., Arkansas Chapter, B-190775, January 17, 1978, 78-1 CPD 40.

Finally, AVCO disagrees with certain of the procedures prescribed in AFM 26-1 for use in calculating various costs. This matter also is untimely under section 20.2(b)(1) of our Bid Protest Procedures, since as stated above the RFP clearly advised offerors that AFM 26-1 would be the groundrule for the cost comparison. Nonetheless, consistent with our limited review role in this area as stated at the outset, we will question only whether mandated procedures were followed, not the efficacy of the procedures themselves.

RECOMMENDATION

The protests are sustained to the extent discussed above.

The Air Force originally determined to compete the MASDC operation and to contract it if the low evaluated offer were less than the Government estimate. We presume that another competition thus would not be inappropriate.

Accordingly, by separate letter we are recommending to the Secretary of the Air Force that since the first

performance year has ended he consider having a new solicitation issued as soon as possible with a new Government cost comparison made on the basis of any offers that are received in response. That comparison in turn should form the basis for a new Executive branch decision with respect to the performance of the MASDC operation.

We point out that the comparison would follow the guidelines set out in Office of Management and Budget Circular A-76, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," which applies to DOD solicitations issued after October 1, 1979 (when the prohibition in section 814(b) of the DOD Appropriation Authorization Act, 1979, expired).

We are also recommending that as a general matter the Secretary insure that cost comparisons with respect to contracting-out decisions are supported by complete and comprehensive data, and that the elements of the comparisons are clearly identifiable and verifiable.

Milton J. Socolar

For the Comptroller General
of the United States