

19389 Mr. Martin

DECISION



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

FILE: B-203739, B-203782 DATE: September 15, 1981

MATTER OF: Logistical Support, Inc.

DIGEST:

GAO dismisses protests contending OMB Circular A-76 is inconsistent with agency format for procurement of mess attendants, which format requires bidders to use specified hours and labor rates, since provisions of Circular establish Executive policy rather than legal rights and responsibilities and therefore compliance therewith is not an issue within protest decision function of GAO.

Logistical Support, Inc., (LSI) has submitted two protests concerning two different procurements which raise the identical issue. The first solicitation was No. N00140-81-B-Bj31 (B-203782) and was issued by the Naval Regional Contracting Office, Philadelphia, Newport Division, and the other was solicitation No. F08637-81-B-0016 (B-203739) issued by Tyndall Air Force Base, Florida. These protests have been combined for purposes of this decision and for the reasons discussed below, each is dismissed.

LSI protests the format used by the agencies for the procurement of mess attendant services. The format used by the agencies establishes an estimated maximum quantity of service units (mess attendant man-hours) needed to perform the contract. This quantity is then multiplied by a minimum service unit rate which is based on the applicable Department of Labor Wage Determination and other factors estimated by the agency to be part of a contractor's labor expense and this service unit rate becomes the agency's billing rate. After these two numbers have been multiplied together, the figure reached fixes the agency's maximum labor costs under the contract. Each bidder is required to use this figure in its bid.

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By using a maximum number of manning hours plus a fixed-service unit rate, the agencies hope to ensure that any successful bidder will be able to meet the minimum acceptable performance standards required for the contract as well as comply with the wage provisions of the Service Contract Act, 41 U.S.C. §§ 351-358 (1976). If a bidder should want to pay its employees higher wages or fringe benefits than those required by the appropriate Department of Labor Wage Determination, those increased costs are to be incorporated in the bidder's "Management and Support Price." The general purpose of the management and support price is to allow bidders an opportunity to include in their bids a sum to cover their management costs, overhead, and profit. Thus, price competition occurs only under the item for management and support.

LSI has previously protested this format on several different grounds and each protest was denied. Logistical Support, Inc., B-197488, November 24, 1980, 80-2 CPD 391; Logistical Support, Inc., B-199933, February 10, 1981, 81-1 CPD 87; Logistical Support, Inc., B-200030, B-200051, B-200052, May 5, 1981, 81-1 CPD 342. In these decisions, we held that the imposition of a mandatory service unit rate on the bidders was not improper since bidders were given sufficient flexibility to price the item for management and support to adjust bids to fit particular needs. We also rejected the argument that the solicitation was so structured that a service contract was transformed into an unauthorized personal service contract. We further stated that there was no requirement for an agency to procure at a lower price without intelligent reference to the particular needs to be served and that LSI had not shown that the decision to use the experimental procurement format was unreasonable. We believe these decisions adequately treat LSI's current contentions that the format subverts the competitive bidding system, results in increased contract costs and additional administrative costs to the agencies and encourages abuse and waste.

LSI now contends that the bidding format is inconsistent with the policies expressed in Office of Management and Budget Circular A-76 because (1) there can be no meaningful comparison of "relative cost"; (2) the format removes "freedom and initiative" from the bidding process; and (3) the format dictates that such services be performed by the Government in-house because the cost by the private sector cannot be at least 10 percent below the Government's cost of providing the same services.

Both the Navy and Air Force question the relevance of Circular A-76 to the present protests. As the Air Force states:

"[Circular A-76] provides guidance where the contracting procedure is used in determining whether it is most cost effective to perform a service in-house or by contract. In this instance, there is no intent to compare an in-house estimate and a contract bid. The service has been provided by contract and the Air Force proposes, in expectation of receiving fair and reasonable prices in response to the solicitation of bids, of continuing to contract for the service."

In any event, the scope of our review in this area is quite limited. Under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981), we consider an agency's compliance with applicable statutes and regulations which impose certain legal obligations and responsibilities. The provisions of Circular A-76, which, in general, encourage agencies to contract with private firms, only set forth Executive policy and do not establish legal rights and responsibilities. Consequently, we do not review compliance therewith as within the protest decision function of our Office. Local F76, International Association of Firefighters, B-194084, March 28, 1979, 79-1 CPD 209; 53 Comp. Gen. 86 (1973). The only exception to this general position is that we will review a cost comparison between performing work in-house and contracting the work out when the cost comparison is involved in a competitive solicitation issued to determine the cost of contracting. This exception does not apply here because these solicitations were not issued for the purpose of comparison with a estimate of cost for in-house performance. Career Consultants, Inc., B-200506.2, May 27, 1981, 81-1 CPD 414.

The protests are dismissed.

Harry R. Van Cleve

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Acting General Counsel