

DECISION

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

FILE: B-208180.2

DATE: September 16, 1983

MATTER OF: Contract Services Company, Inc.

DIGEST:

1. Protest that revision of cost comparison by agency after bid opening, in response to an appeal by an affected party, was improper is denied. It would be incongruous to establish an appeal procedure but preclude cost comparison revisions based on the appeal or based on matters that become evident through the appeal process.
2. Decision by agency to recompute certain line items of cost comparison in response to initial appeal by interested union is subject to GAO review authority to the extent that such recomputation may have materially affected the comparison's ultimate outcome.
3. Protest that certain material line items in cost comparison were improperly excluded or miscalculated is denied, as GAO finds no evidence that such computations were not in accord with applicable cost comparison guidelines.

Contract Services Company, Inc. (CSC) protests the cancellation of invitation for bids (IFB) No. N62467-80-B-2441, issued by the Department of the Navy for transportation operations and maintenance services at the Naval Air Station, Jacksonville, Florida. Based upon a revised comparison of the Navy's estimate of in-house performance costs with CSC's bid price, the Navy determined that in-house costs would be less and accordingly canceled the solicitation. CSC protests that the Navy's revision after bid opening was improper; that the revision improperly recalculated certain line items not for consideration; and that certain other items in both the original and revised estimates were improperly excluded or miscalculated. We deny the protest.

The cost comparisons for this procurement were conducted in accord with applicable Navy procedures under OPNAVINST

4860.6C (February 5, 1982), which implements for the Navy the policies established in Office of Management and Budget (OMB) Circular A-76 and the related Cost Comparison Handbook. An initial cost comparison was prepared which calculated that in-house performance, estimated to cost \$5,568,789.00, would be more expensive than the evaluated contract costs offered by the low and second-low bidders under the solicitation. The low bidder, JAID, Inc., whose evaluated cost was \$5,291,501.00, was ultimately determined nonresponsive, making CSC, at \$5,451,251.66, the tentative awardee. However, prior to award, a timely appeal was filed by an interested union under the administrative appeals procedure in section 495 of OPNAVINST 4860.6C, challenging the cost comparison on the following bases:

- (1) the in-house estimate did not employ the most efficient organization of Government personnel;
- (2) the Direct Material estimate should have been reduced because the in-house estimate was based on a 6 percent vehicle downtime rate (the maximum allowable percentage of time that vehicles may be out of service before acceptable levels of contract performance will be adversely affected) whereas the solicitation's statement of work permitted a 7 percent rate;
- (3) the Direct Labor estimate should have been reduced because the salary escalators (expected labor cost increases during the first year of operation) were too high; and
- (4) the cost of terminating a related contract for a Contractor Operated Automotive Parts Store (COPARS) should have been included in the contracting estimate.

The Navy's Commercial Activities Administrative Review Panel sustained the union's appeal on issues (2), (3), and (4), but rejected the appeal on issue (1) on the basis that the Government's decision relating to organizing and staffing activities for the most efficient performance was not appealable. The cost comparison was then recomputed in accord with the Review Panel's decision, resulting in a new determination that in-house performance would now cost \$403,891 less than CSC's evaluated price (CSC: \$5,381,416; Government: \$4,977,525). The Navy informed CSC of its revised determination and limited the firm's right of appeal of the Review Panel's decision to "those elements of the Government Cost Study not reviewed in consideration of the first appeal."

CSC timely appealed, arguing that the Navy's limitation on its right of appeal was unfair because the firm had not been afforded an opportunity to comment on the merits of the union's appeal. The firm accordingly demanded the right to rebut the union's arguments for revision, to challenge the implementation of the Review Panel's decision, and to raise new issues with respect to the accuracy of both the original and revised cost comparisons. Specifically, CSC argued that:

(1) the Review Panel incorrectly perceived a correlation between vehicle downtime rate and Direct Material and Direct Labor, which led to improper adjustments in Direct Material and Labor based on the vehicle downtime rate adjustment;

(2) the Navy improperly adjusted Direct Labor costs in response to the adjustment in the vehicle downtime rate despite the fact that the union's appeal had not addressed that issue;

(3) the inclusion of COPARS termination costs in the contracting out estimate was improper; and

(4) in both the original and revised comparisons, the Navy failed to include costs for Material Overhead, General and Administrative (G&A) Expense, and increases in Direct Labor in years two and three of the contract, and miscalculated One-Time Conversion Costs.

The Review Panel denied CSC's appeal, refusing to address CSC's arguments on issues (1), (2), and (3) on the basis that they had been resolved with finality in consideration of the union's appeal and were therefore no longer appealable. The Review Panel denied CSC's appeal on issue (4) on grounds that the exclusion of Material Overhead, G&A Expense, and increases in Direct Labor was fully in accord with applicable regulations, and that the calculations for One-Time Conversion Costs were based directly upon a mock reduction-in-force. Accordingly, the Review Panel held that no additional changes in the cost comparison were warranted.

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CSC now protests that an agency should not be permitted to revise a comparison after bid opening and the exposure of the competitors' prices; that the Review Panel's decision to sustain in part the union's appeal was erroneous, and in any event, that the revision exceeded the limited aspects of that decision; and that both the original and revised comparisons were inaccurate in terms of the exclusion or miscalculation of certain material line items.

Initially, we point out that this Office generally does not review an agency decision to perform work in-house rather than to contract for the services. We regard such decisions as matters of policy within the province of the executive branch. Crown Laundry and Dry Cleaners, Inc., B-194505, July 10, 1979, 79-2 CPD 38. Where an agency, however, uses the procurement system to aid its decision, specifying the circumstances under which a contract will or will not be awarded, we will review an allegation that the agency did not follow established cost comparison procedures, as a faulty or misleading cost comparison which would materially affect the decision whether or not to contract out would be abusive of the procurement system. MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. The protester must demonstrate, however, not only a failure to follow established procedures, but also that this failure could have materially affected the outcome of the cost comparison. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317.

(1) Revision of Cost Comparison After Bid Opening

We see no reason why the Navy could not revise the cost comparison after bid opening. Appeals of cost comparison decisions are filed after bids are opened and the Government's decision is apparent. See, e.g., D-K Associates, 62 Comp. Gen. 129 (1983), 83-1 CPD 55. Certainly, it would be incongruous to establish an appeal procedure but preclude cost comparison revisions based on the appeal or based on matters that become evident through the appeal process.

(2) Review Panel Decision

With respect to the Navy's failure to afford CSC an opportunity to comment on the union's appeal, the Navy's appeals procedure in this circumstance is set forth in OPNAVINST 4860.6C which, as stated above, governs this cost comparison, and which makes no provision under section 495 for notice to interested parties of the appeal of a cost comparison

by another party. However, as the review jurisdiction of this Office extends to an examination of cost comparisons that are alleged to be faulty or misleading, we will examine the decision of the Review Panel to the extent that the revision may materially have affected the determination to retain the services in-house. Mar, Incorporated, supra.

CSC asserts that there was no correlation between the adjustment in the vehicle downtime rate (from 6 to 7 percent) and the adjustments in both the Direct Labor and Direct Material estimates. On the Direct Labor issue, the Navy eliminated 7 out of 47 positions because a less stringent downtime rate would not require as many service personnel as would have been necessary under a 6 percent downtime rate. We cannot find that such an response to the Review Panel's decision was unreasonable. By eliminating those 7 positions, the Navy was able to reduce its annual man-hours requirement by 14,560, representing a total labor cost savings of \$340,939. We will not second-guess the Navy's perception of its own staffing requirements, and we therefore cannot conclude that the elimination of those 7 positions was unrelated to the downtime rate adjustment.

Our examination of the revised Direct Material estimate leads us to the same conclusion. Here, the Navy reduced its Direct Material costs by a total of \$234,351 to reflect the new 7 percent downtime rate. Although the Navy's methodology is less apparent on this issue, we do not think it unreasonable to conclude that a less stringent downtime rate would require fewer installations of vehicle replacement parts over a period of time. We therefore cannot find that the Direct Material revision was either excessive or unwarranted, lacking a reasonable relationship with the downtime rate adjustment.

CSC also asserts that the Navy improperly included the COPARS contract termination costs in the contracting estimate. We have recognized, however, that such costs may be properly included in accordance with chapter IV, section G.1 of the A-76 Cost Comparison Handbook, which allows for the inclusion of "Other Costs" encompassing "unusual circumstances which may be encountered in particular cost analyses." TS Infosystems, Inc., B-209900, August 2, 1983, 83-2 CPD ____. As the Navy states, the COPARS termination costs were based on payments

for material outlay by the COPARS contractor, costs for moving the contractor from his current location, and the contractor's incurred expenses in terminating related subcontracts. Further, the amount involved is insignificant in relation to the total difference between the in-house and contracting estimates.

As the result of our analysis, therefore, we do not feel that CSC has raised doubts sufficient enough for us to question whether the cost comparison's outcome was materially affected by the Review Panel's resolution of the union's appeal. See Midland Maintenance, B-202977.2, February 22, 1982, 82-1 CPD 150.

(3) Exclusion or Miscalculation of Material Line Items

CSC alleges that both the original and revised comparisons failed to include substantial costs for Material Overhead and G&A Expense. We find no problem with the agency's approach. We have recognized that such costs may be excluded when the agency reasonably determines, in accord with the January 26, 1982 revision to paragraph 9(3) of OMB Circular A-76, that such costs would be the same for either in-house or contract operation. TS Infosystems, supra. As the Navy has made such a determination here, based upon an analysis of both areas which concluded that no identifiable savings would be realized in either area if the transportation services were contracted out, we cannot find that the exclusion of these costs was improper.

CSC has further alleged that the Navy improperly failed to include in the in-house estimate costs for pay increases in years two and three of the contract. CSC cites our decision in Serv-Air, Inc.; AVCO, supra, where we sustained a protest which had challenged the Air Force's "straight-lining" of such labor costs. Our decision in that case was governed by the fact that the Air Force had failed to follow its own prescribed cost comparison guideline, whereas here, the Navy's guidelines do not specifically prohibit the use of the straight-line method, but only require (at section 460(E)(7) of OPNAVINST 4860.6C) that estimates based upon historical labor costs be adjusted to expected costs during the first year. No requirement for adjustments during subsequent years of the contract is stated. Regardless, we feel that CSC's position on this issue is essentially correct.

Circular A-76 and the related Cost Comparison Handbook emphasize that cost comparisons should be conducted in a realistic and equitable manner. Clearly, it would be inequitable, if not fundamentally unrealistic, for the Government to straight-line its Direct Labor estimate when the potential contractor has factored anticipated labor cost increases (not otherwise reimbursable under an economic price adjustment clause) into its bid price. In the present circumstance, however, we cannot conclude that the Navy's exclusion of such increases in years two and three of the contract had any material affect upon the cost comparison's ultimate outcome, given the difference of \$403,891 between the in-house and contracting estimates, or \$377,025 if the cost of terminating the COPARS contract is not included. In that regard, CSC would have to show that the Navy was required to anticipate labor cost increases of more than 20 percent in each of years two and three of the contract, a showing that CSC cannot reasonably make. Therefore, although the Navy's use of the straight-line method was erroneous, the error is not so significant as to cast doubt upon the comparison's outcome. Mar, Incorporated, supra.

Finally, CSC has alleged that the Navy miscalculated, in the in-house estimate, One-Time Conversion Costs, in that the firm's own experience under prior contracts has shown that such massive employee relocations as reflected in the cost comparisons in actuality do not occur. However, the Navy relates that it based its estimate of relocation costs upon a mock reduction-in-force which revealed that a large majority of those personnel affected by a contract award would choose to relocate. Such a methodology is expressly allowed by section 460(0)(2)(a) of OPNAVINST 4860.6C, which provides that "data used in estimating labor-related one-time costs should be developed locally; for example, through a mock Reduction In Force (RIF)." Therefore, we see no basis upon which to displace the Navy's methodology in favor of CSC's argument that such costs should reflect the actual reduction-in-force experiences of other contracting activities.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States