

**DECISION**

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

**FILE:** B-210376

**DATE:** September 27, 1983

**MATTER OF:** Facilities Engineering & Maintenance  
Corporation

**DIGEST:**

Protest that contracting agency underestimated the cost of in-house performance and overestimated the cost of contracting is denied where protester has not shown that the cost comparison was inaccurate or violated OMB Circular No. A-76 and other applicable guidance.

Facilities Engineering & Maintenance Corporation (FEMCOR) protests the Department of the Army's decision to cancel request for proposals (RFP) No. DAAK21-82-R-9495 for the operation and maintenance of the utility systems, and the maintenance of plant equipment, buildings and grounds at the Harry Diamond Laboratories in Adelphi, Maryland. We deny the protest and the attendant claim for proposal preparation costs.

The RFP was issued as part of a cost comparison to determine whether it would be more economical to contract for the services or to continue to have the services performed with in-house personnel. The Army found FEMCOR's proposal to be the more advantageous to the Government of the two offers received in response to the solicitation. The Army canceled the solicitation, however, after determining that the work could be performed by FEMCOR at a total cost of \$7,893,260 and through continued use of Government personnel at a total cost of \$7,416,125.

FEMCOR filed a timely administrative appeal of the Army's decision. The Appeals Board found errors in the comparison, and consequent adjustments reduced the estimated advantage of in-house performance for the 5-year contract period from \$477,135 to \$152,123. Since in-house performance remained the lower-cost alternative, the Army denied the appeal.

FEMCOR now contends that despite the adjustments the Army made as a result of the appeal, the cost comparison

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remains inaccurate and inconsistent with Office of Management and Budget (OMB) Circular No. A-76 policy and procedures. FEMCOR argues that the Army understated the cost of in-house performance by omitting the cost of anticipated overtime hours, by omitting certain overhead costs, and by failing to apply an inflation factor to certain labor costs. FEMCOR also asserts that the Army overestimated the cost of contracting by including an improper amount of costs relating to severance pay and retention pay and by including transition costs that will be incurred in the month before the contract period. FEMCOR contends that it is entitled to contract award or proposal preparation costs.

Our review of a protest of an agency decision to perform services in-house rather than enter a contract for the services generally is limited to the consideration of allegations that the agency conducted a faulty or misleading cost comparison. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317. In the course of our review we will only question whether mandated procedures were followed, and not the procedures themselves, since the procedures are matters of policy within the province of the Executive branch. Midland Maintenance, Inc., B-202977.2, February 22, 1982, 82-1 CPD 150. We have carefully examined the Army's cost comparison and each of FEMCOR's contentions, and we conclude the comparison was not faulty or misleading and the Army did follow mandated procedures.

#### OVERTIME LABOR COSTS

FEMCOR complains that the Army failed to include the cost of anticipated emergency overtime hours of labor in the in-house calculation. The RFP requires the contractor to have qualified personnel available on call 24 hours per day for after-hours emergency work, and estimates, based on historical data, that 2,373 hours of after-hours emergency work will be required annually. FEMCOR based its price on 2,373 overtime hours and contends that the Army also should have included the cost of 2,373 overtime hours in the in-house estimate. FEMCOR asserts that by failing to do so, the Army held FEMCOR to a broader scope of work than the Government requires of itself. The Department of Defense Cost Comparison Handbook requires that both Government and contractor cost figures be based on the same scope of work. Handbook, Ch. II, para. C.

The record indicates that the Army has taken several steps to eliminate the overtime costs it has experienced in the past. Approximately 400 of the past emergency overtime hours were experienced in the carpenter/paint shop as a result of backlogs. To alleviate the problem, the Army added another carpenter to the shop and included the extra carpenter's salary in the in-house estimate. The Army anticipates that no carpenter/paint shop overtime will be necessary in the future.

More than 700 of the past overtime hours were attributable to the electronics shop. According to the Army, those overtime hours were for preventive maintenance which had to be performed after regular hours because the electrical equipment was in use during the day. To perform the work more efficiently, the Army scheduled employees to work night shifts. This shift differential, rather than overtime, was included in the in-house estimate. The Army also added an electrical mechanic whose salary, including shift differential, was included in the in-house estimate.

The remaining hours of overtime historically have been in the heat/chill plant, which operates three shifts, so that maintenance personnel constantly are present. The Army reports that it has improved its maintenance procedures and designed more efficient schedules to eliminate the necessity of overtime in this shop.

In effect, the Army believes that it will be able to eliminate overtime hours in the future but that FEMCOR, due to staff limitations, will not be able to avoid the overtime in performing the same tasks. This position is reasonable on its face. Although FEMCOR disagrees with the Army that Government overtime costs can be eliminated through staffing and other changes, FEMCOR has not presented any specific reasons why the Army's actions will not have their intended effect. Moreover, the Army included in the in-house estimate the extra costs (salary and shift differential) incurred to limit overtime.

Last, we point out that the Army did not compare unequal scopes of work as FEMCOR alleges, but instead assumed that the Government, with a larger staff and greater resources dedicated to the task, could perform the work specified in the RFP without resort to overtime. This Office has recognized that the Government may have inherent advantages in organizing its manpower that a contractor cannot achieve in an A-76 exercise. Technicolor Graphic Services, Inc., B-205242, May 24, 1982, 82-1 CPD 486. The fact that the Army relied on those advantages in estimating its costs does not invalidate the cost comparison.

We find that the Army's treatment of overtime costs was reasonable and consistent with applicable guidance.

#### OVERHEAD COSTS

FEMCOR contends that the Army omitted operations overhead costs from the cost of in-house performance. Operations overhead costs are the indirect costs that are necessarily incurred to deliver the particular services in question, and which therefore must be included in the in-house estimate. Handbook, Ch. III, Para. D.2.

FEMCOR complains that the following work center positions provide supervisory and administrative support for the facilities engineering function, but were not included in the in-house estimate:

- Facilities Engineer Chief
- Industrial Engineer
- Administrative Officer
- Secretary
- Environmental and Energy Chief
- General Engineer
- Engineer Technician.

In FEMCOR's estimation, 25 percent of each employee's time is spent on activities that would be assumed by the contractor, and therefore 25 percent of the employees'

salaries and fringe benefits should have been included in the in-house estimate as operations overhead.

The Army determined that although the activities of these employees would diminish somewhat as a result of contracting, none of the positions could be eliminated. In this regard, under an alternate cost comparison method authorized by a memorandum of the Assistant Secretary of Defense (dated March 23, 1982), costs that will continue to exist whether the activity is performed in-house or by contract need not be considered. Additionally, the memorandum directs that "only whole manyears needed to support the activity under study" are to be included in operations overhead expense or general and administrative expense; "partial manyears are excluded because they would continue to exist for either in-house or contract performance."

FEMCOR argues that the Army has misinterpreted the "whole manyear rule" in that the rule should not be applied to each position on an individual basis, but rather to all positions on a collective basis. FEMCOR asserts that if 25 percent of the combined functions of the seven positions can be eliminated by contracting out, one or two of the positions should be eliminated; to retain all seven employees with only a 75 percent workload would be inefficient and would violate personnel regulations. In FEMCOR's view, the Army should have included the cost of one or two positions (25 percent of 7) in the in-house computation as operations overhead.

FEMCOR's position is clearly without merit. The Assistant Secretary of Defense memorandum unambiguously directs that costs that will continue to exist whether or not a contract is awarded need not be considered. The Army has provided documentation which demonstrates that no one position can be eliminated if a 25 percent across-the-board reduction in activity occurs. FEMCOR has not rebutted this position. We conclude that FEMCOR has not provided a basis for us to question the omission of the costs. See Contract Services Company, Inc., B-210756, August 29, 1983, 83-2 CPD

#### INFLATION FACTOR

The Handbook requires that a prescribed inflation factor be applied to the salary of Government employees to account for salary increases after the first year of operation. Handbook, Ch. III, Para. H. The Department of Defense's Appendix 4 to the Handbook states that the inflation factor is not to be applied to positions that would be subject to the Service Contract Act, 41 U.S.C. §§ 351 et seq. (1976), if the services were provided by contract. FEMCOR alleges that the Army improperly treated two positions, "secretary typist" and "physical science technician," as within the scope of the Service Contract Act and thus not subject to the inflation factor.

The determination whether a proposed contract is subject to the Service Contract Act is for the contracting agency and it will not be questioned by our Office unless shown to be unreasonable. NonPublic Educational Services, Inc., B-207306.2, October 20, 1982, 82-2 CPD 348. The Army's determination that the positions are subject to the Act is based on a detailed legal analysis and FEMCOR, despite several opportunities to do so, has not explained why it believes that the positions are exempt; rather, it merely makes a bare assertion that the positions are exempt. This mere disagreement with the Army's well-supported position does not meet the protester's burden to prove its case. See MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. Thus, we find that the Army properly regarded the positions as subject to the Service Contract Act and thus not subject to the inflation factor.

#### TRANSITION COSTS

The RFP requires that the contractor's personnel "be on board" 1 month before performance. The contractor is to include its price for this transition period as a separate line item in its cost proposal. FEMCOR's proposal contains a price of \$42,644.76 for the transition period, which the Army included as a cost of contracting.

FEMCOR asserts that by including the transition costs, the Army in effect compared the cost of the contractor performing for 61 months (a 60-month contract period plus a transition period of 1 month) to the cost of in-house performance for 60 months, contravening the requirement in the Handbook that both Government and commercial cost figures be based on the same scope of work. In FEMCOR's view, any transition costs associated with contracting are already included in the 10 percent personnel cost margin that is added to the total cost of contracting, which is designed to reflect the intangible cost of the conversion.

OMB Circular A-76 directs that any costs directly relating to the contracting of a function be added to the contractor side of the cost comparison form. More specifically, an implementing Army directive states that:

"When provisions in the contract solicitation package call for a separately priced contractor startup or phase-in period, this price will be added to the contractor's bid price for the first year of operation \* \* \* ."

Clearly, the inclusion of FEMCOR's transition price is consistent with applicable guidance. Moreover, contrary to FEMCOR's assertion, the inclusion of transition costs in the contract cost does not result in a comparison of unequal scopes of work. During the month before the inception of contract performance, the Government is exclusively responsible for performing the services in question and will bear all the costs of such performance. Contractor personnel are required to be on board only to receive training and familiarize themselves with operations, not to perform the operations. Thus, the contractor's participation during that month relates only to the performance of the 60-month contract period, and has nothing to do with the performance of actual operations the month before the contract period. The Army will, under the terms of the contract, compensate FEMCOR \$42,644.76 for its transition period costs. Clearly, this amount is an additional contractual cost of having the service performed for 60 months

by a private firm and, logically, this cost must be added to the contractor side of the equation in comparing the cost of in-house and contract performance.

It is also clear that transition costs are not included in the 10 percent adjustment to which FEMCOR refers. The Handbook directs that a cost margin equal to 10 percent of "in-house personnel-related costs" be added to the cost of contracting. There is no indication that the adjustment was intended to account for costs such as transition costs. Rather the purpose of the adjustment is to recognize certain unquantifiable costs of contracting, such as:

"\* \* \* the loss of production, the temporary decrease in efficiency and effectiveness and other unpredictable risks that result any time a change is made in the method of operation from in-house to contract. [The adjustment] also takes into consideration the personnel turbulence that results from such a change." Handbook, Ch. VI, Para. B.1.

FEMCOR alternatively challenges the inclusion of the \$42,644.76 on the basis that even if transition costs may be considered in the cost comparison, a fully staffed transition period of 30 days is not justifiable. FEMCOR believes that a more reasonable transition period would have been 2 or 3 days. This allegation, however, is untimely raised since the RFP unambiguously specified a transition period of 30 days, and FEMCOR formulated its proposal on this basis. Our Bid Protest Procedures require protests based on apparent solicitation improprieties to be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983). Thus, FEMCOR should have questioned the length of the period before the closing date rather than nearly 3 months later, when the firm filed its administrative appeal.

#### SEVERANCE AND RETENTION PAY

FEMCOR questions the Army's estimate of the amount of severance pay and retention pay the Government would be obligated to pay in the event of conversion from in-house to contract performance. Severance and retention pay is



provided to Government employees who are, respectively, terminated from Government employment or transferred to a lower-grade position as a result of a reduction in force.

The record indicates that 19 employees who would be adversely affected by a conversion were eligible for retirement at the time of the cost analysis. In formulating the initial cost comparison the Army estimated that none of these employees would opt to retire even if a contract were awarded and their positions eliminated. The Army added either severance or retention pay costs for each of the 19 employees to the cost of contracting.

In its administrative appeal, FEMCOR contested the assumption that no eligible employees would retire as unreasonable and inconsistent with the A-76 guidelines. The Appeals Board agreed with FEMCOR on this point. The Board noted that the normal retirement rate at the installation is 5 percent per year and determined that the installation could reasonably expect that 10 percent (7 employees) of the permanent adversely affected work force (65 employees) would retire. The severance and retention pay figures were adjusted to reflect the retirements anticipated by the Appeals Board.

FEMCOR now contends that applicable guidance requires the cost comparison to be formulated on the assumption that all eligible employees will retire.

The Handbook provides only that the first step of determining labor-related conversion costs is to "estimate the number of personnel who will voluntarily resign or retire from Government employment." Handbook Ch. V, Para. E.4.C., as amended by OMB Circular A-76 Transmittal Memorandum No. 6, January 26, 1982. The estimate is to be based on consultation with management and the personnel department, and historical data from the agency or other agencies. Consistent with this guidance, the Board, in making its estimate, used historical data from the installation, informal advice from another installation which had more experience in conversions, opinions of personnel specialists and information concerning the current work force and general economic conditions.

In our view, estimates of this kind involve complex and somewhat subjective judgments, which we are not in a position to second-guess. In this case, FEMCOR has

simply manifest disagreement with the Army's judgment. This mere disagreement simply does not meet the protester's burden to prove its case. See MAR, Incorporated, supra.

FEMCOR further questions the severance and retention pay calculations on the basis that the Army assumed too few current employees would accept employment with FEMCOR in the event of conversion. In the initial cost comparison, the Army assumed that no member of the current work force would accept employment with FEMCOR. The Appeals Board found this assumption to be unsupported and estimated that 9 of the 47 qualified employees (20 percent) would accept employment with FEMCOR.

FEMCOR believes that this estimate is unsupported and unreasonable. FEMCOR argues that few skilled employees would accept a downgraded nonskilled position at the current pay level or a termination rather than continue to perform their skilled task at the slightly lower wage and benefit level offered by FEMCOR. FEMCOR alleges that, based on its trade practices and experience, 50 percent of the affected employees would become employed by FEMCOR. The protester cites as an example a recent conversion at Fort Gordon, Georgia, in which 53 percent of the work force accepted employment with the contractor.

The record indicates that, due to the lack of relevant historical data at the installation, the Appeals Board requested from the Army statistics upon which an estimate could be based. The Army reported that statistics from various installations indicated that between 12 and 60 percent of the affected population can be expected to become employed by the contractor and cautioned that there are too many variables to use a specific percentage as a standard.

Again, we point out that we are constrained to recognize a considerable degree of agency discretion in making judgments such as these. Based on the Army statistics, it would appear that the level of employment with the new contractor varies greatly depending on the installation and contractor involved. Thus, FEMCOR's reference to Fort

Gordon's 53 percent rate does not demonstrate that the estimate of a 20 percent rate at the Harry Diamond Laboratories is unreasonable. As the Army points out, the Fort Gordon conversion involved 718 employees at an installation located in an isolated area with few other Government job opportunities, whereas conversion being considered here involves fewer than 50 employees in the Washington, D.C. area with innumerable Government installations. The Army also points out that contrary to FEMCOR's assertion, many employees would accept a downgraded position in order to retain current pay and benefits, priority placement rights and retirement benefits. Under the circumstances, we cannot question the Army's position. See Jets, Inc., 59 Comp. Gen. 263 (1980), 80-1 CPD 152.

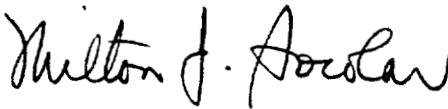
Last, FEMCOR argues that the Army acted improperly by basing its severance and retention pay calculations on the employees in the current work force who would have to be terminated or downgraded to reduce the work force to the staff level needed in the event of conversion. FEMCOR asserts that using the employees in the current work force as a starting point erroneously inflated the costs chargeable to the contractor. In FEMCOR's view, the Army should have used as a starting point the employees in the "most efficient organization."

We need not consider this contention. We have determined that the amount of severance and retention pay costs attributable to those employees in the current work force who, FEMCOR contends, would not be in the most efficient organization is insufficient to overcome the \$152,123 cost advantage of in-house performance. FEMCOR itself concedes that this issue could be material to the result of the cost analysis only if we found that the Government committed other errors. In view of our findings on the other matters, even if we agreed with this contention FEMCOR would not have established that the cost analysis was faulty. Therefore, we perceive no useful purpose in considering this issue.

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In conclusion, we find that the Army's cost analysis was consistent with applicable guidance. Accordingly, we cannot find that FEMCOR has been subjected to arbitrary or capricious treatment, a showing of which is a prerequisite to entitlement to proposal preparation costs, and therefore the protester is not entitled to recover such costs. See D-K Associates, Inc., B-206196, January 18, 1983, 83-1 CPD 55. ✓

The protest and claim are denied.

*for*   
Comptroller General  
of the United States