

DECISION



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

FILE: B-221352 **DATE:** May 6, 1986
MATTER OF: Trend Western Technical Corporation

DIGEST:

1. Office of Management and Budget Circular A-76 does not preclude a protest to GAO from an agency's administrative review of an offeror's appeal of the agency's in-house cost estimate.
2. Protester's objection to exclusion of six staff positions from Office of Management and Budget Circular A-76 cost comparison is denied. Agency's determinations that the six employees will perform governmental functions and not work required under the performance work statement (PWS) and that the staffing levels under the agency's proposed most efficient organization can perform the work required under the PWS is a management decision that will not be reviewed by GAO where not unreasonable.
3. Where contractor will be provided government furnished material required to complete job orders approved prior to the start of the contract and government staff will use the same material to perform job orders if the function under study is retained in-house rather than contracted-out, then the cost of the government-furnished material is a common cost not to be considered in an Office of Management and Budget Circular A-76 cost comparison.
4. Where the government must pay a contractor outside the contract for the labor required to complete unexecuted job orders approved prior to the start of the contract, but apparently could perform the job orders in-house at no additional labor cost, then GAO finds no basis to object to the agency's determination that the cost of labor is a one-time cost of conversion to contract performance.

Trend Western Technical Corporation (Trend Western) protests the determination made by the Department of the Navy (Navy) pursuant to Office of Management and Budget (OMB) Circular A-76 that the United States Marine Corps can provide base operating support at the Marine Corps Recruit Depot (MCRD) in San Diego, California, at a lower cost than Trend Western. We deny the protest.

In order to determine whether it would be more economical to contract for base operating support at MCRD or to continue to have the services performed by in-house personnel, the Navy issued request for proposals (RFP) No. N62474-83-R-3016. The RFP solicited offers to provide the services--the maintenance of the facilities and grounds at MCRD--for a base year and 4 option years at a firm-fixed price (part 1 services), at an hourly labor rate (parts 2 and 3 services), and on the basis of a fixed rate per square foot of surface to be painted (part 4 services).

The Navy found Trend Western's proposal to be the most advantageous to the government of the proposals received in response to the solicitation. Based upon a comparison of Trend Western's proposal with the most efficient organization (MEO) proposed by MCRD, however, the agency also found that the work could be performed by government personnel for \$19,043,084, or \$1,579,111 less than Trend Western's total proposed cost (including conversion differential) of \$20,622,195.

Trend Western then filed an administrative appeal of the agency's determination. Although the agency appeals board found some errors in the comparison, the consequent adjustments only reduced the estimated advantage of in-house performance to \$501,497. Trend Western thereupon filed this protest with our Office.

JURISDICTION

We initially note that the Navy challenges our jurisdiction to consider protests concerning cost comparisons undertaken pursuant to OMB Circular A-76, pointing out that the Supplement to OMB Circular A-76, part I, ch. 2, para. I, provides for an administrative appeals procedure, the resulting decision of which shall be final unless agency procedures provide otherwise.

This argument, however, has already been raised by the Navy and rejected by our Office in prior protests. See,

e.g., Contract Services Co., Inc., B-219430, Oct. 28, 1985, 65 Comp. Gen. _____, 85-2 C.P.D. ¶ 472; Alliance Properties, Inc., B-217544, Oct. 16, 1985, 85-2 C.P.D. ¶ 413, aff'd on reconsideration, Department of the Navy--Request for Reconsideration, B-220991.2, Dec. 30, 1985, 85-2 C.P.D. ¶ 728. As we indicated in Alliance, we recognize that the underlying determination involved in cost comparisons--whether work should be performed in-house by government personnel or performed by a contractor--is one which is a matter of executive branch policy and not within our protest function. However, where, as here, a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, a protest from a bidder alleging that its bid has been arbitrarily rejected will be considered by our Office. In such cases, we do not believe that OMB Circular A-76, insofar as it precludes further administrative review, can be interpreted to preclude an appeal to our Office. On the contrary, we will review such protests to determine if the agency conducted the cost comparison in accordance with applicable procedures. Alliance Properties, Inc., B-217544, supra, 85-2 C.P.D. ¶ 413 at 2. To succeed in its protest, however, a protester must demonstrate not only that the agency failed to follow established procedures, but also that this failure could have materially affected the outcome of the cost comparison. Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 C.P.D. ¶ 348.

EXCLUDED STAFF POSITIONS

Trend Western first challenges the agency's determination to exclude six staff positions (the facilities maintenance officer, assistant maintenance officer, operations officer, budget analyst, budget assistant, and secretary) from the cost comparison on the basis that the work performed by those staff members involves governmental-in-nature (GIN) functions related to the determination of work to be performed and budgeting for it. The effect of this alleged improper omission of staff positions was to underrepresent the cost of in-house performance by \$1,129,860.

Trend Western points out that the Navy included the six staff positions in the proposed organizational chart for the Maintenance Branch which was set forth in the MEO study. In Trend Western's opinion, this demonstrates that these employees will be performing work included under the solicitation's performance work statement (PWS), rather than governmental functions, and that they should be included in the in-house cost estimate. Trend Western also points out

that the PWS requires the contractor to "establish general management and administrative programs/systems to provide a central control and operations support for the work effort" and includes in the range of administrative and management duties:

". . . the establishment of procedures for work reception, work control, identification and classification of work, financial administration, job order accounting and reporting, general administration, integrated facilities management, control inspection services, technical and planning/estimating services, material/supply purchasing and control, scheduling, subcontract administration, report development, establishment and maintenance of records and inventories, warranty enforcement, quality control and any other services and controls necessary to fully accomplish the tasks described herein."

Thus, Trend Western concludes that employees in these staff positions will be required to do work set out in the PWS and should be recognized as a cost of having the work performed by Navy personnel.

We have recognized, however, that the projection by an agency of personnel changes resulting from a conversion is largely a judgmental matter. Dwain Fletcher Co., B-219580, supra, 85-2 C.P.D. ¶ 348 at 3; World Maintenance Services, Inc., B-217536, May 14, 1985, 85-1 C.P.D. ¶ 540; Mercury Consolidated, Inc., 63 Comp. Gen. 411 (1984), 84-1 C.P.D. ¶ 612. Likewise, we have indicated that a determination by an agency of the size of a GIN residual staff and the number of employees required to generally accomplish the PWS is largely a management decision involving judgmental matters that are inappropriate for our review. Rather, we think the agency should be free to make its own management decisions on staffing levels so long as they are not made fraudulently or in bad faith and so long as the subsequent cost comparison is done in accordance with the established procedures. Dwain Fletcher Co., B-219580, supra, 85-2 C.P.D. ¶ 348 at 3.

The Navy denies that the six employees will perform work included under the PWS and the appeals board determined that the work required under the PWS could be accomplished by the personnel costed in the in-house cost estimate. Further, the Navy maintains, and the appeals board confirmed, that these six employees will perform GIN

functions rather than work required under the PWS. The Navy reports that, in addition to deciding what work is to be performed and how to budget for that work, these six employees direct the total maintenance effort (including all maintenance work which is not covered by the present solicitation) whether it is supplied through an in-house work force or by an out-of-house contractor. According to the Navy, almost 65 percent of the maintenance budget is outside the scope of the PWS for this solicitation. Moreover, we note that although the proposed table of organization for the Maintenance Branch included the six staff positions in question, it specifically indicated that they would be performing GIN functions and were therefore excluded from the cost comparison.

Paragraph 7 of OMB Circular A-76, as revised Aug. 4, 1983, specifically excludes governmental functions from its coverage. Such functions, which are so intimately related to the public interest as to mandate performance by government employees, include activities which require either the exercise of discretion in applying government authority or the use of value judgments in making decisions for the government. OMB Circular A-76, para. 6, cites as examples of such government functions the management of government programs requiring value judgments, the selection of program priorities, the direction of federal employees, the responsibility for monetary transactions, the control of treasury accounts, and the administration of public trusts.

Here, the Navy indicates that the six excluded positions are responsible for determining what work is required and for setting program priorities for that work. In addition, the Navy indicates (1) that the facilities maintenance officer--a military officer--also acts as the contracting officer's representative for all on-site maintenance service contracts, requests engineering services for projects other than those in the PWS, monitors compliance with Occupational Safety and Health Administration regulations, acts as the Depot Fire Marshal, and evaluates assigned enlisted personnel, (2) that the assistant maintenance officer also acts as the maintenance officer in the latter's absence, represents the Maintenance Branch on base committees, and coordinates special construction projects with the Public Works Branch, (3) that the budget analyst also administers the real property maintenance funds, (4) that the budget assistant also verifies all billings for services rendered by contractors, arranges for the billing of nonappropriated fund activities, and acts as

the clerk for the real property maintenance funds, and (5) that the operations officer--a military officer--also acts as Depot Police Officer, prepares specifications for service contract work and oversees military personnel supervising recruit working parties. Finally, the Navy indicates that the Naval Audit Service sent a team of auditors to the work site for 1 month before it certified that all staff positions which actually would do the work required by the PWS were fully costed in the government's in-house cost estimate.

In view of the above circumstances, we conclude that Trend Western has not shown that the agency acted improperly or in bad faith in determining that the six staff positions are responsible for performing GIN functions and that the remaining staff positions included in the in-house cost estimate are sufficient to perform the work required under the PWS.

COST OF MATERIAL LABOR

Trend Western also questions the in-house cost estimate as it relates to the cost of material--in lists or bills of material (BOM)--required to complete job orders approved in a prior performance period but not yet executed.

The execution of job orders approved under the contract normally will be delayed pending receipt of any material required to complete the job and the scheduling of the job. Thus, at the end of each performance period there will remain unexecuted job orders for which approval has been received and the material has been ordered.

The solicitation indicates that at the start of the first contract year the government will provide to the contractor at no cost to the contractor the BOM material necessary to complete previously approved job orders awaiting scheduling. Further, the solicitation warns offerors not to include in their offers the cost of the labor required to complete the previously approved job orders since the contractor will be paid outside the contract for such costs. Generally, however, the solicitation provides that the material necessary to accomplish the tasks designated in the PWS, but not listed therein as furnished by the government, must be provided by the contractor. Moreover, the solicitation requires the contractor to complete within the time specified on the job order any job order issued during the effective period of the contract but not completed within that time.

Trend Western argued in its administrative appeal that since 5 years of BOM material must be purchased during the contract to complete the job orders approved during the contract whether the maintenance function is performed in-house or contracted-out, the cost of all 5 years of BOM material--including the cost of the material for the overlapping job orders--should be included in the in-house cost estimate just as it was required to be included in Trend Western's proposal. The agency appeals board ruled that the cost of the overlapping BOM material for the second, third and fourth contract years should be added to the in-house cost estimate. Therefore, Trend Western now requests that the cost for the first and fifth contract years--\$289,379--be added to the in-house cost estimate.

The Navy now agrees with Trend Western that the \$289,379 should be added to the in-house cost estimate. MCRD, however, maintains that the cost of the material to be turned over to the contractor free-of-charge at the start of the contract should be added to the evaluation cost of Trend Western's proposal as a one-time cost to the government of contract conversion. In addition, since Trend Western would be paid outside the contract for the cost of the labor to complete the approved job orders awaiting scheduling at the start of the contract, MCRD argues that the cost of the labor--approximately \$188,730--should also be added to the evaluated cost of Trend Western's proposal as a one-time conversion cost.

The Supplement to OMB Circular A-76, part I, ch. 2, section "D," provides that cost comparisons shall include all significant costs of both government and contract performance except common costs, i.e., costs that would be the same for either in-house or contract operation. The Supplement, part IV, ch. 2, section "E," subsection 1, further indicates that while material and supply costs are incurred in each period of performance, "[m]aterial costs are calculated only if the materials are used solely by the function under study and are not provided to the contractor; otherwise they are common cost."

If the maintenance function is performed in-house, the BOM material for job orders previously approved but not yet executed would be expended in performing the jobs. If the maintenance function is performed by a contractor, the BOM material would be provided free-of-charge to the contractor. In either case, the government would bear the cost of the material; thus, the material is a common cost and should not be considered in the cost comparison.

We agree with MCRD, however, that the cost of the labor to complete the job orders previously approved but not yet executed at the start of the contract should not be similarly disregarded in the cost comparison. MCRD, heeding the encouragement in the Supplement to OMB Circular A-76, part III, ch. 1, section "E," to streamline operations, proposes to reduce its staff to the level required under the MEO to perform the maintenance function. The normal workload for the maintenance function, however, includes the labor required at the beginning of each performance period to perform the previously approved but not yet executed job orders. MCRD indicates that its MEO therefore necessarily already includes the labor costs for the staff required to perform the job orders previously approved but not yet executed at the beginning of the contract.

Thus, since the MEO already includes the cost of labor to perform previously approved job orders, if MCRD performs the maintenance function in-house, there will be no additional labor cost to the government. If, on the other hand, MCRD contracts out the maintenance function, then the government will be required to pay the contractor approximately \$188,730 over and above the contract price as payment for the additional labor. Accordingly, we see no basis upon which to question MCRD's determination that a conversion to contract performance will result in an additional, one-time conversion cost to the government of approximately \$188,730.

Therefore, if we add \$289,379 for BOM materials to the in-house performance estimate and add \$188,730 to the cost of contract performance for additional contractor labor not covered by Trend Western's proposal, this reduces the cost advantage of in-house performance from \$501,497 to \$400,848.

CONTRACT ADMINISTRATION COSTS

Trend Western contends that the Navy improperly added the cost of eight contract administrators to Trend Western's proposal in spite of the fact that the "Cost Comparison Handbook" (Supplement to OMB Circular A-76, part IV, ch. 3, table 3-1) provides that only 4 contract administrators are to be used on a contract with this size staff for cost comparison purposes. Trend Western initially raised this issue with the administrative appeals board which agreed in part with Trend Western and concluded that the number of contract administrators to be charged to Trend Western's proposal should be reduced to six. Trend Western now requests that our Office further reduce the number of contract administrators to four as provided in the "Cost

Comparison Handbook" and states that deleting two additional contract administrators will decrease the cost of its proposal by an additional \$328,409.

Part IV, ch. 3, section C of the "Cost Comparison Handbook" specifically provides that the cost of contract administration is to be charged to the contractor's proposal and is to be based upon the number of administrators shown in table 3-1 of the Handbook. However, this section of the Handbook also specifically states that cost data shown in table 3-1 are based upon a "representative sample" of agencies' contract administration costs and that the actual number of administrators necessary for a particular contract may be higher or lower based upon the workload and specific circumstances of the function under study. If the function under study is "technically specific or geographically dispersed" and, therefore, requires more contract administrators than represented in table 3-1, the Handbook provides a mechanism by which the table 3-1 limit may be waived and a higher number of administrators substituted.

The record shows that MCRD applied to the proper agency authority (the Commandant of the Marine Corps) for a waiver of the four contractor administrator limit. Because the Western Division of the Naval Facilities Engineering Command--the usual Navy administrators for this type of contract--is not located near MCRD and, therefore, Navy Public Works Center personnel would administer the off-site contract functions in conjunction with MCRD personnel who would administer the on-site contract functions, a waiver was granted. Essentially, MCRD, the Commandant of the Marine Corps, and the administrative appeals board, all agreed that this particular contract would require more than four administrators because the contract requirement encompassed both on-site and off-site administration. While the protester disagrees with this conclusion, the protester's mere disagreement with the contracting agency officials over the number of administrators necessary to assure that the contract would be faithfully executed provides no basis for our Office to overturn the appeals board's finding that the waiver was at least in part valid.

PARTIAL MAN-YEARS

Trend Western also challenges the cost comparison in connection with the manner in which certain partial man-years were omitted from the in-house estimate while similar charges were added to the cost of contracting out. If we were to resolve this issue in favor of the protester, this

would reduce the cost advantage of in-house performance by no more than \$63,592 (according to Trend Western's own calculations), and it would remain more advantageous to perform the function in-house. Therefore, the alleged errors would not affect the evaluation result and will not be considered. See Dwain Fletcher Co., B-219580, supra, 85-2 C.P.D. ¶ 348 at 4.

CONCLUSION

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel