



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atlantic Marine Services, Inc.

File: B-223913

Date: October 23, 1986

DIGEST

There is no basis to question an agency's decision to retain services in-house rather than to contract for them as the result of an Office of Management and Budget Circular No. A-76 cost comparison where the protester makes no credible showing that the cost comparison's outcome likely would have been different had the agency calculated the government's estimated costs for the insurance of vessels in the manner advanced by the protester.

DECISION

Atlantic Marine Services, Inc. (Atlantic) protests a determination made by the United States Army Corps of Engineers (Corps) pursuant to Office of Management and Budget (OMB) Circular No. A-76 that it would be more economical to retain certain operation and maintenance services in-house rather than to contract the requirement. Atlantic complains that the agency's cost comparison was based upon inaccurate calculations and was unfairly conducted in favor of retaining the work in-house. We dismiss the protest in part and deny it in part.

BACKGROUND

In order to determine whether it would be more economical to contract out the services or continue to have them performed by in-house personnel, the Corps issued invitation for bids (IFB) No. DACW61-86-B-0020, soliciting bids for a base year plus four 1-year options. Bids were to be evaluated on the basis of the total aggregate price for the full 5-year period adjusted in accordance with Circular A-76 procedures, and then compared to the government's estimate of the cost of in-house performance. The scope of work included the support of dredging in the Delaware River and entailed the contractor's use of government-owned vessels. Accordingly,

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the IFB provided, among other insurance requirements, that the contractor was to procure and maintain marine casualty ("hull") insurance for each vessel to be furnished by the government. Two bids were received in response to the IFB. Atlantic was the apparent low bidder at \$7,885,475 for the entire contract period. The bid was then adjusted in accordance with A-76 procedures to reflect a final contract price of \$8,281,602.^{1/} However, the government's estimate of the cost of performance by government personnel was significantly less at \$6,316,267, a difference of nearly \$2 million. Accordingly, the Corps determined to retain the services in-house.

Atlantic then filed an administrative appeal of the Corps' determination. The firm's principal complaint was that the government's estimate was significantly understated with regard to the calculation of marine casualty insurance costs, and, therefore, was not a fair basis for comparison with the cost of contracting. In this regard, Atlantic noted that the IFB required the contractor to obtain full replacement cost insurance (which Atlantic asserted would cost in excess of \$1 million), whereas the government's estimate established an insurance cost of less than \$5,000 for the entire 5-year contract period. Atlantic urged that the government's calculation was improperly made on the basis of both greatly undervalued equipment and application of the inappropriate insurance cost factor multiplier.

However, the Corps' appeals board found no material error in the cost comparison procedures. Atlantic's protest to this Office follows the agency's dismissal of the appeal.

ANALYSIS

Our Office will review protests concerning agency decisions to continue performing services in-house instead of contracting for them, solely to ascertain whether the agency adhered to the established procedures for the comparison of in-house/contracting costs. Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 CPD ¶ 348. We do so because we believe it would be detrimental to the procurement system if, after the agency induced the submission of offers, there were a faulty or

^{1/} As prescribed by the A-76 cost comparison procedures, Atlantic's total aggregate bid price was adjusted to reflect the estimated cost of contract administration and conversion (a total increase of \$490,753), and the payment of federal income tax (a deduction of \$94,626), resulting in a net increase of \$396,127 to the bid price.

misleading cost comparison which materially affected the agency's decision that in-house performance would be more economical than performance by contract. Dynateria, Inc., B-221089, Mar. 31, 1986, 86-1 CPD ¶ 302.

Accordingly, a protester challenging a cost comparison must demonstrate not only a failure to follow established procedures, but also that this failure had a material effect upon the outcome of the cost comparison--that is, a clear showing that the result likely would have been different had the improper calculation or other procedural error not been made. See American Operations Corp., B-217237, Aug. 27, 1985, 85-2 CPD ¶ 231. The protester may meet its burden by presenting sufficient evidence to raise a reasonable doubt as to whether the result of the cost comparison would be different under the correct procedures if the agency does not dispel that doubt. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317.

Although Atlantic's administrative appeal and subsequent protest to this Office challenged certain elements of the cost comparison besides the calculation of marine insurance costs, such as the government's proposed staffing and estimation of overhead costs, it is clear from the record that Atlantic has never asserted that any miscalculations or errors with respect to those elements had a material effect upon the cost comparison's outcome. Indeed, since Atlantic did not respond to the agency's position on those issues in its comments on the agency's report, those particular issues of protest are deemed to be abandoned and will not be considered. See American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ _____; The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

To the extent Atlantic complains that the IFB's requirement for the contractor to obtain replacement cost insurance was unnecessary and represented an undue restriction on its ability to compete with the government, the protest is untimely. Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals must be filed (received) prior to bid opening or the closing date for initial proposals in order to be considered. 4 C.F.R. § 21.2(a)(1) (1986). Here, bid opening occurred on May 29, 1986, but Atlantic did not file its protest with this Office until July 31. The marine casualty insurance requirement was clear from the face of the IFB, and, contrary to Atlantic's assertion, we do not regard the insurance requirement per se as an issue directly related to the Corps' proper conduct of the cost comparison under A-76 procedures.

In any event, we see no legal basis for Atlantic's protest against the requirement. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.306(a) (1985), expressly provides, with respect to fixed-price contracts such as contemplated by the subject IFB, that although the government ordinarily is not concerned with the contractor's insurance coverage under a fixed-price contract, contracting agencies nevertheless may require insurance in special circumstances such as where: (1) the contractor is principally engaged in government work; (2) government property is involved; or (3) the work is to be performed on a government installation. As the Corps states, all of those circumstances were reasonably present here with respect to contractor performance of the work. Moreover, the FAR also provides that when contract performance involves the use of vessels, the contracting officer shall require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance. 48 C.F.R. § 28.307-2(e).

In view of the discretion afforded to contracting agencies by the FAR with respect to insurance requirements, we see no indication that the marine casualty insurance requirement here was either unnecessary or imposed an unreasonable burden upon potential contractors.

Therefore, we believe the only question for consideration under our Circular A-76 review function is whether the Corps properly calculated the government's marine insurance costs for cost comparison purposes.

The Supplement to OMB Circular No. A-76 (August 1983) recognizes at part IV, chapter 2, section F.6, that the operation of any government activity involves potential costs from casualty losses and liability claims, noting that the government is primarily self-insured and must pay for all losses incurred. For the purpose of computing the government's estimated insurance costs, section F.6.a. provides that casualty losses shall be determined by multiplying a factor of .0005 times the net book value (estimated acquisition cost and any betterments less accumulated depreciation) of government equipment and the average value of material and supplies, whereas casualty losses for facilities and minor items will be determined by multiplying .0005 times the estimated replacement cost.

Therefore, we find no merit in Atlantic's assertion that the Corps improperly used the .0005 multiplier in computing its casualty insurance costs, since that factor is specifically

mandated by the A-76 cost comparison procedures. Rather, we believe Atlantic's fundamental argument is that it was inequitable for cost comparison purposes for the government to compute its marine insurance costs on the basis of the net book value of the equipment, as provided by section F.6.a. of the A-76 Supplement, while at the same time requiring the contractor to provide insurance on the basis of the replacement cost of the vessels.

However, Atlantic's argument notwithstanding, it is clear that any computation of the government's insurance costs on the basis of the replacement value of the vessels, rather than on their remaining book value--even though the latter is the basis prescribed by the A-76 procedures--would have had no effect upon the cost comparison's outcome. In this regard, as provided in the RFP, the total replacement value of the vessels to be insured under any contract was \$11,106,383. If this figure is multiplied by the .0005 casualty insurance factor, the estimated insurance cost to the government, when extended over the anticipated 5-year contract term, would be less than \$28,000. Given the nearly \$2 million difference between the estimated costs of in-house and contractor performance, this different basis for the computation of the government's marine insurance costs would have had a wholly de minimis impact upon the result of the A-76 cost comparison. See Samsel Services Co., B-213828, Sept. 5, 1984, 84-2 CPD ¶ 257. Accordingly, we conclude that Atlantic's protest against the propriety of the agency's decision to retain the services in-house has failed to meet the required burden of proof. Id.

The protest is dismissed in part and denied in part.

for 
Harry R. Van Cleve
General Counsel