



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Bay Tankers, Inc.

File: B-227965.3

Date: November 23, 1987

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### DIGEST

1. Agency determination of the staffing level required to accomplish the performance work statement under Office of Management and Budget Circular A-76 cost comparison will not be questioned where the record does not show the determination was made in a manner tantamount to fraud or bad faith.

2. Even though a firm may include in its offer a price factor to protect itself from payment deductions stipulated in the solicitation for defective performance by a contractor, Office of Management and Budget Circular A-76 does not require that the competitive positions of the government and a commercial offeror be equalized by adding a similar factor to the government estimate.

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### DECISION

Bay Tankers, Inc., protests the determination made by the Military Sealift Command (MSC) pursuant to Office of Management and Budget (OMB) Circular A-76, that MSC can operate and maintain two hospital ships--USNS Mercy and USNS Comfort--at a lower cost than Bay Tankers, under request for proposals (RFP) No. N00033-86-R-4004. We deny the protest.

### BACKGROUND

The ships are former commercial tankers that have recently been converted to serve as hospital ships, providing care for up to 1,000 patients with a medical staff of up to 1,200 persons when fully operational. MSC issued the RFP to determine whether it would be more economical to contract for operation and maintenance of the hospital ships or to have the services performed by in-house personnel. The solicitation requested proposals to operate and maintain the ships for a period of 3 years. MSC found that Bay Tankers had submitted the low, technically acceptable commercial offer but that, based upon a comparison of Bay Tankers' proposal with the most efficient organization (MEO) cost for

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MSC, the work could be performed by government personnel for a total evaluated cost of \$8,147,255, or \$6,284,039 less than Bay Tankers' evaluated cost of \$14,431,294.

Bay Tankers then administratively appealed 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 \$3,943,986. Bay Tankers thereupon filed this protest with our Office, alleging that MSC underestimated the cost of in-house performance in several respects that had a cumulative cost impact of \$6,580,172.

The underlying determination involved in cost comparisons--whether work should be performed in-house by government personnel or performed by a contractor--is a matter of executive branch policy and not within our bid protest function. However, where a contracting agency uses the procurement system to aid in its determination whether to contract out, we will review a protest that a proposal has been arbitrarily rejected to determine if the agency conducted the cost comparison in accordance with applicable procedures. To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but that this failure could have materially affected the outcome of the cost comparison. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 C.P.D. ¶ 30.

Bay Tankers alleges that the size of the ships' crew specified in the in-house cost estimate is insufficient to perform required maintenance and repair tasks. Specifically, Bay Tankers maintains that that MSC's estimate was understated because it was based on the manning of the Fast Sealift Ships (FSS), a class of freighters operated and maintained under commercial contracts with MSC, rather than on the Performance Work Statement (PWS) for the hospital ships. The protester maintains that the preventive maintenance required for the FSS ships is approximately only 50 percent of the preventive maintenance required for the hospital ships, and calculates that MSC thereby understated the cost of maintenance and repair by at least \$2,642,034.

MSC denies that the proposed maintenance and repair effort is insufficient. Although MSC concedes that it took into consideration the staffing under the contracts to operate the FSS ships, the agency maintains that its estimate was based first of all on an analysis of the requirements of the PWS. Moreover, MSC defends considering its experience with the FSS ships, pointing out that because it did not have any prior experience in operating the newly converted hospital ships, the FSS ships provided the most relevant data due to similarities in ship and operating characteristics.

The determination of the number of employees required to accomplish the PWS is largely a management decision involving subjective judgments that generally are inappropriate for our review. It is our view that an agency should be free to make its own management decisions on staffing levels so long as they are not made in a manner tantamount to fraud or bad faith and so long as the subsequent cost comparison is performed in accordance with the established procedures. Trend Western Technical Corp.--Request for Reconsideration, B-221352.2, July 9, 1986, 86-2 C.P.D. ¶ 47; Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 C.P.D. ¶ 348.

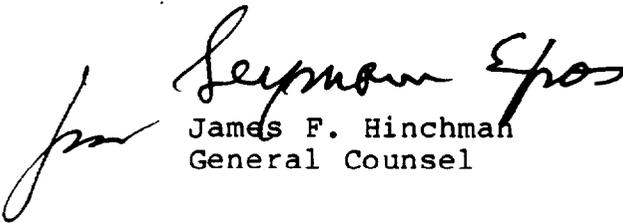
Here, the record contains no evidence that MSC violated any mandatory procedures in formulating the in-house manning estimate and, contrary to Bay Tankers' position, there is no indication that manning estimates were made without regard to the actual vessels covered by the solicitation. The record shows that MSC analyzed the PWS and specifically based the MEO on its requirements. Under these circumstances, Bay Tankers' allegations provide no bases upon which to question the adequacy of MSC's proposed maintenance and repair effort. While MSC took into consideration its experience with the FSS ships, and Bay Tankers attempts to distinguish the manning requirements for these vessels from the hospital ships in question, there are at least some similarities between the two types of vessel. We thus see nothing improper in MSC's reference to the FSS ships as a good source of information concerning operating needs.

Bay Tankers also contends that the government's estimate of in-house performance costs failed to include a factor for inevitable instances of defective performance by in-house personnel. The solicitation provided for payment deductions to be made in the event of defective performance by the contractor; if the number of discrepancies in the contractor's performance exceeds the maximum allowable degree of deviation set forth in the solicitation's Performance Requirements Summary, then the government may reduce the contract price to reflect the reduced value of the services performed. Bay Tankers maintains that it is virtually certain that some deductions will be made and that good business practice therefore requires an offeror to include in its proposed price a reserve for payment deductions. Bay Tankers argues that, based upon the rate of defective performance by commercial contractors operating and maintaining other ships for MSC, \$118,356 should be added to the in-house cost estimate in order to retain "parity of bidding" between MSC and commercial offerors, and to reflect the cost to the government when the hospital ships are not properly maintained and operated.

Although the government and commercial offerors must compete on the basis of the same PWS, they may be subject to different legal obligations regarding performance that cause the commercial concerns to suffer a cost disadvantage, as here, where the contractor is subject to payment deductions for defective performance while the government is not. There is no requirement that the cost comparison include a factor to equalize such inherent disparities. See generally SMC Information Systems, B-225815, June 1, 1987, 87-1 C.P.D. ¶ 552; Samsel Services Co., B-213828, Sept. 5, 1984, 84-2 C.P.D. ¶ 257. In our view, including a price factor in a cost proposal to offset potential payment deductions in the event of defective performance is something a commercial offeror elects to do at its own risk as a matter of business judgment. There is no requirement under A-76 cost comparison procedures that the agency add a similar factor to the in-house estimate.

Bay Tankers asserts there are a number of other deficiencies in the cost comparison. These remaining deficiencies, however, total \$3,819,782, which is less than the \$3,943,986 difference between the cost of accepting Bay Tankers' offer and in-house performance. We therefore find that the agency properly determined that operating the vessels in-house would be less costly to the government than contracting with Bay Tankers. See Dyneteria, Inc., B-222581.3, supra.

The protest is denied.

 James F. Hinchman  
General Counsel