



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Apex International Management Services,
Inc.
File: B-228885.2
Date: January 6, 1988

DIGEST

1. Where an A-76 cost comparison showing that contractor performance would be more economical than in-house performance is appealed, the apparent successful offeror should be allowed a reasonable opportunity to raise and have considered cost comparison issues that could result in adjustments offsetting those urged in the appeals.
2. Protest of agency determination under Office of Management and Budget Circular A-76 to maintain in-house performance of various operations and maintenance functions is denied where it has not been shown that the agency conducting the cost comparison failed to comply with A-76 requirements.
3. Objections to A-76 cost comparison will not be considered in the context of a protest where the protester failed to advise the agency of its objections at the time the agency was considering appeals of the cost comparison determination.

DECISION

Apex International Management Services, Inc., protests a determination by the Navy to maintain in-house performance of various operations, maintenance, repair, and other services at the Naval Training Center Complex and other facilities in the Orlando, Florida, area. The Navy based its determination on a comparison under Office of Management and Budget (OMB) Circular A-76 of the costs of in-house performance of the services with the costs of contractor

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performance, as determined under invitation for bids (IFB) No. N62467-86-B-2651. We deny the protest in part and dismiss it in part.^{1/}

Three firms submitted bids in response to the IFB. When the agency opened bids on July 1, 1987, Apex's bid of \$12,394,993 was lowest. The government's in-house cost estimate was \$14,052,344. After the addition of amounts to Apex's bid to account for such items as the government's costs of converting to and administering a contract, and the subtraction of amounts attributable to the contractor's payment of federal income taxes, social security taxes, and certain pension contributions, the Navy calculated the costs of contracting for the required services to be \$13,992,476. On this basis, the preliminary cost comparison decision was to convert to contract.

The request for proposals (RFP) contained the Notice of Cost Comparison (Sealed Bid) clause prescribed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.207-1 (1986), and provided for a period of 15 working days during which directly affected parties could request review of the cost comparison result under the agency's appeal procedure. The solicitation stated that the appeal period would commence on the date the abstract of bids, completed cost comparison form, and detailed data supporting the estimate for government performance were available to interested parties. The agency reports that five sets of this material were available at bid opening, but that none of those present--including a representative of Apex--requested it at that time. Apex made such a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 553 (1982), by letter to the agency dated July 1. Apex received cost comparison material from the agency on July 14 pursuant to its FOIA request.

The agency received two cost comparison appeals prior to the expiration of the appeal period on July 23, one from the National Federation of Federal Employees, Local 1451, and

^{1/} Subsequent to filing its protest with this Office, Apex filed suit in the United States Claims Court seeking declaratory and injunctive relief based on essentially the same grounds as raised in the protest. Apex International Management Services, Inc. v. United States, No. 605-87C. The court has requested our decision on Apex's protest.

one from six individual government employees.^{2/} By letter dated July 24, the agency furnished Apex with copies of these appeals and invited the firm to comment by August 3. Apex transmitted its comments on the two appeals by letters dated July 30, 31 and August 1. In its comments, Apex addressed the issues raised by the appeals and also argued that other alleged errors in the cost comparison required further adjustments in either the cost of government performance or the cost of contractor performance.

The agency's reviewing official issued a decision on August 20. The decision did not address the matters raised by the union, reportedly because they did not involve costing issues. With respect to the issues raised by the individual employees, the reviewing official determined that adjustments to the cost comparison were needed in three areas. The net result of these adjustments was a decrease of \$58,485 in the cost of government performance and an increase of \$85,699 in the cost of contractor performance. As adjusted, the cost comparison indicated that government performance would be more economical by \$84,316. In deciding the two appeals, the reviewing official considered Apex' comments on the specific issues raised by those appeals, but did not consider Apex' other objections to the cost comparison, citing paragraph 490F of Navy Operations Instruction (OPNAVINST) 4860.7B, the Navy's manual for conducting commercial activity cost comparisons.^{3/} That provision states that while the agency must provide directly affected parties with copies of cost comparison appeals filed within the appeal period, and invite comments on the issues raised, this invitation does not establish an

^{2/} Apex speculates that the six individual government employees were not responsible for the appeal, but rather simply allowed the Navy to file the appeal over their signatures. Apex contends that the appeal essentially was an improper attempt by the agency to change the result of the cost comparison. The Navy admits that government time and resources were used to prepare the appeal, but maintains that the proponents of the appeal were indeed the individuals who signed it. Based on the record before us, we cannot conclude that the appeal in question was other than a bona fide request for review of the cost comparison filed by potentially affected government employees.

^{3/} OMB's Cost Comparison Handbook is reproduced as Enclosure (4) of OPNAVINST 4860.7B.

additional appeal period. The provision states:
"Additional appeal issues will not be considered."

Apex first protests that the cost of government performance did not include costs the government would incur for automatic data processing (ADP). Second, Apex contends that the reviewing official improperly reduced the government's cost estimate by \$58,485 to account for social security taxes and thrift plan costs paid by the government's current motorpool contractor. (In the event the cost comparison favored in-house performance of the public works functions, the government intended to exercise a renewal option for continued contractor operation of the motorpool.) Finally, Apex complains that the reviewing official declined to consider the issues it raised in response to the two cost comparison appeals. Apex argues that since it did not receive the cost comparison material it requested from the agency under FOIA until July 14, the 15-day period for filing an appeal with the agency commenced no earlier than that date and extended at least through August 3, when the agency received the firm's comments. Apex has expressly incorporated in its protest with this Office the issues raised in the submissions received by the agency on August 3.

As a general rule, this Office will not review an agency's decision concerning whether work should be performed in-house or by a contractor because we regard this to be a matter of executive branch policy. Rice Services Ltd., B-227119, July 28, 1987, 87-2 C.P.D. ¶ 102. Where, however, an agency uses the procurement system to aid in this determination by spelling out in a solicitation the circumstances under which it will or will not award a contract, we will consider a protest alleging that the agency has arbitrarily rejected a bid or proposal. Jets, Inc., 59 Comp. Gen. 263 (1980), 80-1 C.P.D. ¶ 152. We do so because of our belief that a faulty or unfair cost comparison would be detrimental to the procurement system. In considering such protests, we require that a protester exhaust any appeal procedure provided by the agency conducting the cost comparison, and will not review any issue that was not specifically appealed to that agency. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 C.P.D. ¶ 30.

We reject the protester's argument that the A-76 appeal period did not begin to run until the firm received the cost comparison documentation on July 14. The solicitation provided that the appeal period would commence when the material was available to interested parties, which the agency reports was at bid opening on July 1. Nevertheless, we think the agency should have considered and addressed the objections to the cost comparison raised by Apex in its

comments on the two timely filed appeals. Until Apex received notice of the appeals, it had no reason to object to any aspect of the cost comparison since the initial comparison showed that contractor performance would be more economical. It serves no useful purpose to require the apparent successful offeror to seek review of a cost comparison that favors contractor performance. We recognize that the Navy's A-76 manual does not provide for consideration of issues first raised after the appeal period has expired, but we think that the apparent successful offeror should be provided a reasonable opportunity after learning of a challenge to the cost comparison decision to raise issues that could result in offsetting adjustments. As indicated above, Apex raised the issues in question almost immediately upon learning that the Navy's initial decision to contract had been challenged.

We have reviewed all of the arguments made by Apex in its various submissions to both the agency and this Office. As discussed below, Apex has not convinced us that the agency's cost comparison, as revised, failed to comply with applicable A-76 requirements.

ADP Costs

Apex bases its complaint that the Navy improperly did not include certain ADP costs as part of the in-house cost on an agency memorandum that, Apex argues, shows that ADP support to the public works activities being reviewed totals \$92,000 annually. The protester maintains that the cost comparison therefore should have included an additional \$276,000 representing the government's 3-year total cost for ADP.

OMB Circular A-76 requires that the government's overhead costs be entered on line 4 of the cost comparison form.^{4/} Overhead is defined as costs incurred in support of the function under study that are not entirely allocable to that function. Overhead incurred by the supervisory work center one level above the function under study is operations overhead, while all other overhead is general and administrative (G&A) overhead.

^{4/} The costs of government performance are entered on lines 1 through 6 of the A-76 cost comparison form. Lines 7 through 14 are for the prospective contractor's price and adjustments to that figure required by the Circular.

In the course of preparing the cost comparison in this case, the Naval Training Center prepared the subject memorandum, which addresses G&A overhead. The memorandum listed two ADP projects that support public works functions: a "memorandum accounting program" with an annual machine operations cost of \$36,000, and the "scheduling report," with \$56,000 in machine costs. The agency reports that when the commercial activities team reviewed the memorandum, handwritten notations were added to the document indicating that there would be no impact on either of the \$36,000 or \$56,000 items, since the "machines would remain on board" even if the public works functions were converted to contract. The original author later initialed the memorandum as revised.

We do not agree with the protester's position that the memorandum indicates the Navy improperly failed to include a total of \$92,000 (or \$276,000 over 3 years) in ADP costs. The subject of the memorandum was G&A overhead, which is required to be entered on line 4 of the cost comparison form. The A-76 Cost Comparison Handbook's instructions for line 4 (Part IV, cl. 2, G, 1) state: "Include only those costs that will not continue in the event of contract performance." (Emphasis in the original.) The instructions provide further that "G&A overhead is zero" if there would not be at least one position eliminated as a result of conversion to contract. Here, the memorandum on which Apex relies states that there would be no personnel impact on ADP functions as a result of conversion and that at least some of the ADP machine costs component of G&A overhead would continue to be incurred in the event of contractor performance. (Preparation of the scheduling report was to be "dropped from the NAVDAF services," according to the memorandum, regardless of the cost comparison outcome.) The protester has not challenged these conclusions. Since it appears the agency complied with applicable A-76 instructions concerning the calculation of G&A overhead, we have no basis on the record before us to question line 4 of the cost comparison form.

Motorpool contract

As indicated earlier, if the cost comparison showed that government performance would be more economical, the Navy planned to exercise an option contained in an existing contract in order to provide for operation of the motorpool. Accordingly, the agency included the cost of the motorpool contract on line 3 of the cost comparison.

Apex initially complained, among other things, that inclusion of the cost of contracted work on the in-house side of the comparison was contrary to A-76 procedures. We do not agree. The Cost Comparison Handbook specifically

provides in the instructions for line 3, "Other Specifically Attributable Costs," that an example of costs that should be included on line 3 is "any work currently performed under contract that has been included in the [performance work statement]." The protester's position is therefore without merit.

While Apex raised a number of issues concerning the motorpool costs in its comments to the agency on the two appeals, the firm has focused in its protest on an adjustment made concerning the motorpool contractor's contributions for social security and certain employee benefits. Briefly stated, the Chief of Naval Operations (CNO) issued a message in February of 1987, outlining the changes in the federal retirement system under the Federal Employees Retirement System Act of 1986, Pub. L. No. 99-335. The message explained that the government's revised standard retirement cost factor of 21.7 percent did not include social security or thrift plan contributions on behalf of its employees and that these contributions were not included elsewhere in the cost comparison. The message stated that in order to provide for consistency in the comparison, there should be a deduction on the contractor side for social security contributions and the costs of any defined contribution plan of the prospective contractor. The agency in this case complied with the CNO message, and this deduction, which results in the comparison not including any social security or retirement plan costs for government or contractor employees, is not in issue.

The appeals filed with the Navy, however, pointed out that the price the government would pay the motorpool contractor if the government were to retain the public works function included that contractor's social security and retirement plan contributions. The reviewing official reasoned that an adjustment to the cost of the motorpool contract thus was necessary in order to make a fair and balanced comparison. The reviewing official determined that element of the contract cost to be \$58,485, and reduced the estimate of government performance by that amount.

The protester does not agree with the reviewing official's method of adjusting the cost comparison. Rather than isolating and deducting the motorpool contractor's social security contributions and thrift plan costs--the method used by the reviewing official--the proper adjustment, argues Apex, is to deduct from the motorpool contractor's price an amount attributable to labor costs and add that amount, plus a 21.7 percent retirement factor, to the government's personnel costs on line 1.

We need not decide whether the proper social security and thrift plan adjustment was made here. Apex did not argue in its comments on the cost comparison appeals that the adjustment formula it now urges should have been used. Thus, Apex is not entitled to raise that argument in a protest to the Office. Dyneteria, Inc., B-222581.3, supra.^{5/} Further, while Apex did argue to the agency that no adjustment at all should be made, there would be no difference in the cost comparison result even if we were to agree that the adjustment of \$58,485 should not have been made since that amount is less than the cost comparison difference of \$84,316. We therefore dismiss the protest on this issue.

Materials Costs

In its comments on the appeals filed with the agency, Apex argued that an increase of \$287,764 was required to be made to the government's cost of materials (line 2) based on a handwritten worksheet contained in the agency's cost comparison back-up materials. The worksheet is titled "06/07 Adjustments." Our understanding is that 06/07 refers to two categories of indefinite quantity work required under the RFP, and that the 06 category involves work requiring between 17 and 40 manhours while the 07 category involves work requiring more than 40 manhours. The worksheet listed a number of items, each with a dollar value, and, with respect to some of the items, contained a notation: "These items must be deleted before percentages of total monies are determined." From this, Apex concludes that the Navy understated its materials cost on line 2 by not including some of the items listed on the worksheet.

We are not persuaded that the worksheet relied on by the protester shows that the amount entered on line 2 by the agency was in error. While the agency has not responded to the protester's contention, it appears that the worksheet itself contains satisfactory explanations for not including some of the listed items in materials costs calculations. One of the major items on the list, "Equipment purchase" (\$114,838), is accompanied by a notation indicating that the cost incurred was a one-time purchase of equipment with a

^{5/} In any event, the formula espoused by Apex, which, in effect, treats the motorpool contractor's employees as government employees, would be inconsistent with the agency's determination that its most efficient organization requires having the motorpool function performed by contract, not by government employees.

useful life in excess of 5 years. Such an item generally would be considered a capital expense (accounted for elsewhere in the cost comparison) rather than a materials expense. The next highest item, costs incident to a category of labor called "self-help" (\$72,954), apparently was eliminated from line 2 calculations because "self-help is not under study," which we take to mean that this work was not included in the performance work statement and, therefore, properly not costed in connection with the A-76 cost comparison. The remaining items on the worksheet have a relatively low dollar value, but, in any event, the protester's latest position concerning the worksheet is that it "suggests that materials have been understated to some degree" and that this Office therefore should audit line 2 for accuracy. We have consistently declined, however, to use the resources of this Office to substantiate speculative allegations made in connection with a bid protest. In sum, the record before us provides no basis for concluding that line 2 of the cost comparison was understated.

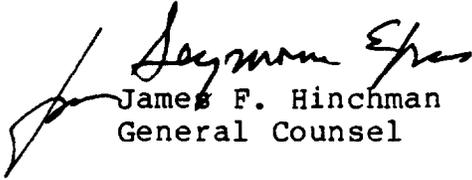
In a conference on the protest to this Office and in its subsequent comments, Apex argued for the first time that the agency failed to make two adjustments to the cost of materials. First, Apex contends that the agency did not increase by six percent the cost of 03/05 materials as it had for other categories of materials. Category 03 refers to preventive maintenance work, while category 05 is an estimate of work under standing job orders. Second, Apex contends that the agency did not apply a source-of-supply markup to the 06/07 materials. We will not consider these issues, however, because Apex failed to raise them in connection with the agency's A-76 appeals procedure. Dyneteria, Inc., B-222581.3, supra. In this regard, the issues now raised by Apex are based on material received by the firm on July 14, yet the firm did not raise the issues in its comments to the agency on the two A-76 appeals.

Contract Administrators

In its comments on the appeals, Apex pointed out that guidelines contained in the Cost Comparison Handbook indicate that normally five government personnel would be needed to oversee contractor performance of the PWS. The costs of these personnel are charged to the costs of contractor performance. Here, the agency sought and obtained a waiver to the A-76 guidelines and conducted the comparison based on 11 administrators. While the protester disputes the need for more than five administrators, it has not alleged that the agency did not comply with prescribed procedures in obtaining the waiver. Because that is the only basis on which we consider protests concerning waivers

of contract administration guidelines, this issue is dismissed. Raytheon Support Services Co., B-228032.2, Dec. 30, 1987, 87-2 C.P.D. ¶ ____; Dyneteria, Inc., B-222581.3, supra.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel