



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Aspen Systems Corporation

File: B-228590

Date: February 18, 1988

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### DIGEST

Cost comparison showing that cost of the low commercial offeror exceeded the government's estimated cost of in-house performance is invalid, and protest on that basis is sustained, where the solicitation's performance work statement included the requirement for a staff position--program manager--that the government excluded from its estimate, and the probable cost for the omitted position (as shown by an agency-sponsored management study) exceeded the in-house cost advantage.

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### DECISION

Aspen Systems Corporation protests the determination made by the Department of Labor (DOL) pursuant to Office of Management and Budget (OMB) Circular A-76, that DOL can operate the DOL Library in Washington, D.C., at a lower cost than Aspen, under request for proposals No. L/A 87-2. We sustain the protest.

In order to determine whether it would be more economical to contract for operation of the main DOL Library in Washington or to retain the function in-house, the agency requested proposals to operate the Library for a base year and 2 option years. The agency found Aspen's proposal to be the most advantageous to the government of the proposals received in response to the solicitation. Based upon a comparison of Aspen's proposal to the cost of the most efficient organization (MEO) proposed by DOL, however, the agency also found that the services could be performed by government personnel for \$1,572,736, or \$17,775 less than Aspen's evaluated cost (including conversion differential) of \$1,590,511. Aspen then administratively appealed the agency's determination, alleging that DOL underestimated the cost of in-house performance by \$177,845. After its appeal was denied, Aspen filed this protest with our Office.

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Initially, DOL challenges our jurisdiction to consider this matter, asserting that a protest concerning an agency's failure to award a contract does not fall within the statutory definition of "protest" contained in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. III 1985). CICA defines protest as:

"A written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract."

DOL, in effect, is contending that by canceling the solicitation and deciding to retain the function in-house, the agency has eliminated any proposed award and, therefore, there is no statutory basis for our Office to consider Aspen's arguments as a protest.

As we have stated in prior decisions, we reject this position. In issuing a solicitation, an agency proposes to award a contract under the terms and conditions set forth in the solicitation, and offers are submitted on that basis. It is our view that a proposed award within the statutory definition is contemplated under these circumstances. Contract Services Co., Inc., 65 Comp. Gen. 41 (1985), 85-2 CPD ¶ 472. This interpretation is consistent with the CICA definition of an "interested party" as an offeror whose economic interest is affected by the award or failure to award a contract, 31 U.S.C. § 3551(2), and with the express purpose of the act to strengthen our existing bid protest function, H.R. Rept. No. 861, 98th Cong., 2d Sess, 1435 (1984), which already included the review of bid protests involving cancellation and faulty cost comparisons. See, e.g., Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD ¶ 38. Accordingly, where a contracting agency uses the procurement system to aid in its determination of whether to contract out, we will review a protest that a proposal has been arbitrarily rejected to determine whether the agency conducted the cost comparison in accordance with applicable procedures. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30.

Turning to the merits, Aspen challenges the cost comparison on the basis that DOL failed to include in its estimate the cost of filling a staff position equivalent to that of project manager. In this regard, the performance work statement (PWS) in the solicitation stated that the successful offeror would be required to furnish all personnel necessary to perform the work specified in the PWS, including positions for five key personnel, one of which was

a project manager, who had no specific tasks under the PWS, but was to have had 3 years in "top management," and the "ability to plan and execute a special library program, including related administrative activities, comparable in size, scope, and complexity to the DOL Library."

A management study to develop the MEO to perform the contract was prepared for DOL in 1985 by an outside consultant that had previously prepared the PWS. The study found that all of the current library director's time would be spent on PWS functions (apparently those of the project manager position), but in subsequently preparing the in-house cost estimate, DOL did not include a cost for the director or any other individual to fill the project manager position. DOL explains it excluded the director from its estimate on the basis that her position encompasses governmental-in-nature functions that would continue even if operation of the library were contracted out. Circular A-76 specifically excludes from its coverage governmental functions (functions so intimately related to the public interest as to mandate performance by government employees).

It is a fundamental requirement of federal procurement that, for cost comparison purposes, commercial offers and the government's estimate of in-house costs be based on the same statement of work. Contract Services Co., Inc., B-228931, Dec. 29, 1987, 67 Comp. Gen. \_\_\_\_\_, 87-2 CPD ¶ 638; Alliance Properties, Inc., B-217544, Oct. 16, 1985, 85-2 CPD ¶ 413, aff'd, Department of the Navy--Request for Reconsideration, B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728. It does not appear that DOL met this standard here.

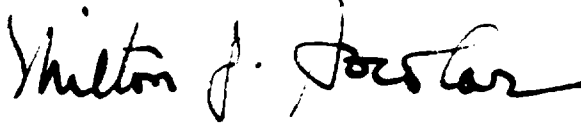
The PWS required offerors to include in their proposed organizations a project manager. Aspen complied with this requirement, but DOL did not, basing its cost estimate on an organization without a project manager. DOL's response to the protest is aimed at justifying excluding the library director from the MEO and, concomitantly, from the in-house estimate. This line of argument confuses the real issue, however, which is not whether the director should have been included in the in-house cost estimate, but whether DOL provided in its estimate for the cost of having the project manager's duties performed by any individual. Again, it appears from the record that, after removing the director from the MEO for costing purposes, DOL never added a replacement project manager, and thus never costed this position.

DOL seems to suggest that the only function of the contractor's project manager would have been to interface with the DOL administrators, and that Aspen thus could have met this requirement by merely naming "a corporate executive

from the G&A pool," instead of fully costing a project manager. If this was the case, however, the RFP should have so advised the offerors rather than present the project manager as one of five, presumably full-time, required key personnel. Because it did not do so, DOL and Aspen were not competing on an equal basis.

We conclude that DOL improperly either excluded the cost of a project manager from its cost estimate and thus understated its cost of performing the contract, or led Aspen into including this cost and overstating its cost of performing. Either way, since the cost advantage of in-house performance was only \$17,775, it appears that DOL's failure to comply with cost comparison procedures likely materially affected the outcome of the cost comparison; that is, adding the 3-year cost for a project manager to the in-house estimate (or subtracting it from Aspen's proposed cost) would result in a cost advantage for contracting out to Aspen. We therefore sustain the protest. By letter of today to the Secretary of Labor, we are recommending that the agency revise the cost comparison and, if appropriate, award Aspen a contract based on its lower proposed 3-year cost. If a contract is not awarded, Aspen is entitled to be reimbursed its proposal preparation and protest costs, including attorneys' fees. See Contract Services Co., Inc., B-228931, supra.

The protest is sustained.

*for*   
Comptroller General  
of the United States