



The Comptroller General
of the United States

Washington, D.C. 20548

135867

Decision

Matter of: A.S.K. Associates

File: B-230132

Date: May 20, 1988

DIGEST

1. Agency determination to use temporary employees to accomplish portions of the Performance Work Statement under Office of Management and Budget Circular A-76 cost comparison is not objectionable where contractors were free to bid on the same basis.
2. Allegation that the inspection and acceptance procedures imposed on contractors under the Performance Work Statement of A-76 solicitation are not imposed by the agency on its own subcontractors is not supported by the record where the agency's in-house procedures are, in fact, more stringent.

DECISION

A.S.K. Associates protests the National Oceanic and Atmospheric Administration's (NOAA) determination to provide computer operations at the National Marine Fisheries Centers in Seattle and Miami in-house, rather than to contract out under solicitation No. WASC-87-00048. This determination was made as a result of a cost comparison that was conducted under the guidance of Office of Management and Budget (OMB) Circular A-76. Based on a projected savings of \$561,859 for in-house performance during the base year and 4 option years under the contract, NOAA made no award and retained the function in-house. A.S.K. contends that the agency's cost study was not based on the same statement of work and level of performance as was applied to the protester. A.S.K. contends that the in-house estimate is understated by \$1,026,463, and thus it should have been low when compared to a corrected in-house estimate. A.S.K. administratively appealed the agency decision, but its appeal was denied. This protest followed.

We deny the protest.

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In reviewing an A-76 cost comparison, our decision turns on whether the agency complied with the applicable procedures in selecting in-house performance over contracting. See Holmes & Narver Services, Inc., and Morrison-Knudsen Co., Inc., B-212191, Nov. 17, 1983, 83-2 CPD ¶ 585. In this respect, the OMB Circular A-76 Supplement requires that cost estimates for government and contractor proposals be based on the same outline of the scope of work and standards of performance, i.e., the solicitation's Performance Work Statement (PWS). The protester bears the burden of showing that the cost comparison was faulty. Serv-Air, Inc.; AVCO, 60 Comp. Gen. (1980), 80-1 CPD ¶ 317.

The protester alleges that NOAA's computation of costs deviated from the statement of work. The protester specifically alleges that, based on information not disclosed to commercial offerors, the agency improperly elected to use full-time temporary computer operators at the Seattle facility.

The agency proposed to use four temporary computer operators in the Seattle facility throughout the course of in-house performance, thereby saving the cost of fringe benefits that would have been incurred by permanent employees. A.S.K. contends that this decision was based on the agency's expectation that the current operation would be phased out sometime before the expiration of all the option years in the contract, and that bidders were at a disadvantage because they were required to prepare their offers based on the possibility that all of the option years would be exercised. The protester also contends that the use of temporary employees was not authorized under the Office of Personnel Management (OPM) guidelines and was therefore improper in any case. The protester contends that the government estimate is understated by \$84,475, if the additional cost of full-time workers is considered.

We find this protest issue without merit. The agency indicates that it initially determined to use full-time temporary employees based on the pending A-76 review. Because the temporary computer operators' performance was satisfactory, and because the use of these employees solved certain problems such as a high turnover rate for these positions and the possible replacement of the current computer system at an unknown date in the future, the agency decided to continue the practice.

Contrary to A.S.K.'s assertions, we find that the OPM guidelines support the use of temporaries. The OPM letter cited by A.S.K. specifically "gives agencies broad new authority to use temporary limited appointments in any

appropriate situation, as determined by the agency." Federal Personnel Manual Letter 316-21, January 2, 1985. Moreover, the determination to use temporary employees was a management decision, by nature requiring subjective judgments that generally are inappropriate for our review, so long as their use was consistent with the requirements of the PWS.

We do not see how the use of temporary employees deviates from the PWS, as the protester contends. The PWS does not specify that the required services must be provided by permanent computer operators. In addition, A.S.K. states that it "was aware that the activity could be phased out before completion of all option years on the contract." It therefore had the same information to consider in preparing its offer that the government had. In these circumstances, we have no basis to object to this aspect of the cost comparison. We therefore deny this portion of the protest.

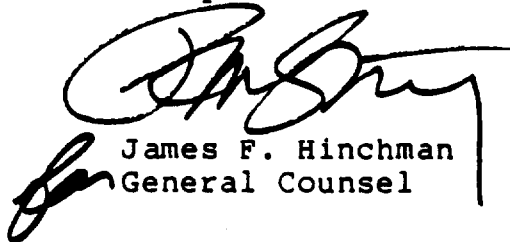
The protester also alleges that the agency decided to subcontract out the data entry services, and that the performance standards in these subcontracts do not meet the requirements of the PWS. In preparing its cost estimate for the data entry support services of the PWS, NOAA elected to subcontract these services. A.S.K. contends that the current blanket purchase agreement (BPA) that NOAA uses for this purpose does not contain the same inspection and acceptance procedures as the agency imposes on contractors under the PWS. The protester states that the government must increase its estimate by \$386,917 for complying with quality assurance standards.

The Performance Requirements Summary of the PWS specifies that the output records provided for data entry services shall be error-free and timely. The acceptable quality level for full payment is 99 percent error-free work, based upon random sampling. The Inspection and Acceptance portion of the BPA states that "final inspection and acceptance will be made by the responsible ordering activity at destination." NOAA's report states that the in-house inspection and acceptance procedures are what the agency used to formulate the quality assurance and inspection procedures in the PWS. Moreover, the agency states that the standards are more stringent under the BPA, since any BPA products containing errors are returned to the contractor for correction, whereas the PWS acceptable quality level is satisfied when 1 percent of the work is defective. The agency has provided a statement of the procedures it follows for ensuring the data entry and verification services will be error-free and timely. This document does contain basically the same procedures contained in the PWS standards. We cannot say, nor has the protester shown, that the

PWS inspection and acceptance procedures were not used by NOAA in preparing its estimate. In these circumstances, we do not believe that the protester has carried its burden of demonstrating that the cost estimates for government and contractor proposals were not based on the same scope of work and standards of performance.

A.S.K. raised two other issues concerning the cost comparison. However, we need not consider them. The protester admits that these alleged deficiencies in the cost comparison totaled \$555,071, which is less than the \$561,839 totaled difference between the cost of accepting A.S.K.'s offer and in-house performance. We therefore find the agency properly determined that operating the computer center operations in-house would be less costly to the government than contracting with A.S.K. Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500.

The protest is denied.



James F. Hinchman
General Counsel