



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay Tankers, Inc.

File: B-230794

Date: July 7, 1988

DIGEST

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.

DIGEST

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 the agency can maintain and operate five range instrumentation ships at a lower cost than can the protester under request for proposals (RFP) No. N00033-87-R-4001.

We deny the protest.

On February 4, 1987, the agency issued the RFP seeking offers for a firm, fixed-price (with some cost reimbursable items) contract to operate and maintain the five ships which provide platforms for use by sponsor agencies, such as the National Aeronautics and Space Administration, the Air Force Eastern Space and Missile Center and certain Navy commands, for support of missile and space vehicle flight testing. The RFP advised prospective offerors that the agency would make a cost comparison between the lowest technically acceptable proposal and a previously prepared estimate of the cost of government performance. The agency would award a contract only if the comparison indicated that contract performance would be more economical.

Five potential contractors submitted initial proposals on May 29; after a period of negotiation, offerors submitted their best and final offers on November 16. The protester

042649

submitted the lowest offer of \$49,344,663. The protester's proposed manning levels were considered low but feasible. Although the protester's proposal was rated unacceptable in some areas, the contracting officer found the protester's proposal technically acceptable based upon Bay Tanker's satisfactory performance of its ongoing Fast Sealift Ship contract and accordingly selected the protester's proposal for comparison with the agency's most efficient organization (MEO) cost.

The agency found that in-house personnel could perform the work for a total evaluated cost of \$33,218,449, nearly \$19 million less than the protester's evaluated cost of \$52,119,072.

The protester administratively appealed this determination. Although the agency appeals board found some errors in the comparison, the subsequent adjustments only reduced the estimated advantage of in-house performance to \$16,939,460. Bay Tankers then filed this protest with our Office, incorporating the grounds of its appeal to the agency board and alleging that the agency had underestimated the cost of in-house performance by an amount sufficient to make a material difference in the competition's result.

The protester argues that in-house personnel costs are understated by \$21,381,315, which includes \$11,556,195 in omitted costs of industrial assistance, that is, work performed by commercial shipyards, for example, rather than onboard personnel, necessary for preventive maintenance in accordance with the performance work statement.^{1/} Before the agency appeals board, the protester argued that the MEO should be adjusted to add the manpower necessary to perform this work.

As a general rule, we have held that an agency should be free to make its own management decisions on staffing levels and that our Office will not question an agency determination of the staffing level required to accomplish a performance work statement under a cost comparison where the record does not show the determination was made in a manner

^{1/} The protester's original submission to this office claimed that personnel costs were understated by \$18,752,671, that the in-house estimate as a whole was understated by \$27,588,203 and that contractor performance was cheaper by \$7,340,451. In its latest submission, these figures are changed to, respectively: \$21,381,315; \$24,477,958 and \$5,577,335. In our review, we have used the later figures.

tantamount to fraud or bad faith. See Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500. Our review of the application of OMB Circular A-76, procedures generally encompasses ensuring consistency between the management study and the government's in-house costs. Dyneteria, Inc., B-221089, Mar. 31, 1986, 86-1 CPD ¶ 302. The protester questions many aspects of the MEO derived from the management study, challenging the agency's ability to change work schedules, to require certain personnel to work overtime or to limit overtime through management controls. Having examined the protester's arguments in this regard, however, we find no evidence of fraud or bad faith in the preparation of the management study or the MEO; the protester demonstrates no inconsistency between that study and the government's in-house costs. Accordingly, we find no basis upon which to question the agency's determination that the MEO contains sufficient staffing to accomplish the performance work statement of the RFP.

The protester's attempt to add industrial assistance costs to the in-house estimate constitutes another way of asserting its proposition that the MEO is inadequate to accomplish the maintenance and repair work contained in the RFP performance work statement. The agency appeals board did adjust the MEO as a result of the protester's appeal. The board added personnel and other costs of more than \$2 million to reflect the government's obligation to perform the first 40 hours of minor repair without reimbursement as is required of contractors. Nevertheless, the board impliedly found that the MEO as modified will accomplish all fixed-price tasks specified in the performance work statement. As stated above, to the extent that the agency has determined that this manning is sufficient, we will not review the protester's assertion that either additional manpower or additional contractor assistance will be required, absent evidence of fraud or bad faith. See Bay Tankers, Inc., B-227965.3, supra.

The protester argues that historical preventive maintenance records establish that for four of the ships 12 more personnel are needed in the deck departments and 41 more personnel are needed in the engine departments.^{2/} Neither the protester nor the government, however, was required to base its costs on historical information alone. Contract Services Co., Inc., 65 Comp. Gen. 41 (1985), 85-2 CPD ¶ 472. Furthermore, insofar as historical costs such as sponsor

^{2/} One ship, the USNS Point Loma has been recently transferred to MSC operation and was treated as a new start in the cost comparison. No historical data was available regarding its historical workload costs.

agency assistance and maintenance and repair are cost reimbursable, they are not part of either in-house personnel costs or the protester's fixed-price bid. See Facilities Engineering & Maintenance Corp.--Request for Reconsideration, B-210376.2, July 31, 1984, 84-2 CPD ¶ 131. The management efficiency study discussed overtime reduction at length and recommended several measures to reduce overtime, measures that the agency will apparently implement; there is no basis to conclude that the government was required to compute its staffing solely on historical workload data without consideration of recommended management efficiencies or the apparent possibility that the historical data for at least one ship is based on management inefficiencies MSC expects to eliminate. Similarly, commercial offerors were not obligated to rely solely on historical information, since they also apparently considered possible management efficiencies. In fact, we note that a comparison of the staffing offered by the protester with government staffing shows negligible differences in the deck and engine departments. The protester proposes 63 deck personnel and 72 engine personnel for the four ships while the government proposes 59 deck personnel and 68 engine personnel, or one less person per department per ship.

The protester offers no basis for believing that any needed adjustment for overtime should not apply to its contract price as much as to the estimated cost of in-house performance. We find no basis for concluding that the agency appeals board was wrong in declining to revise the MEO further or in failing to add costs of industrial assistance to the cost of in-house performance alone.

The protester raises the additional allegation that the agency modified its MEO after receipt of initial proposals to incorporate the results of a study of overtime usage aboard the range instrumentation ships. The protester alleges that this study lasted until June 15, 1987, and must therefore have been incorporated into the MEO after the receipt of initial offers on May 29. The agency admits to modifying the MEO but has provided affidavits from its personnel establishing that the overtime study was conducted in October and November 1986, completed in February 1987 and incorporated into the MEO prior to receipt of initial offers. The protester has failed to provide any support for its allegation or shown how, assuming the validity of the study, such action prejudiced Bay Tankers. See Joule Maintenance Corp., B-224505, Nov. 24, 1986, 86-2 CPD ¶ 603, in which we denied the identical issue for lack of evidence. Accordingly, we deny this protest basis. Fairchild Weston Systems, Inc., B-229843, Apr. 1, 1988, 88-1 CPD ¶ 331.

Bay Tankers further asserts that there are a number of other deficiencies in the cost comparison. These remaining deficiencies total \$12,921,763, which is less than the \$16,939,461 difference between the cost of accepting the protester's 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 protester. See Bay Tankers, Inc., B-227965.3, supra.

The protest is denied.

 James F. Hinchman
General Counsel