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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Premiere Vending

File: B-256560

Date: July 5, 1994

Pamela J. Mazza, Esq., and Antonio R. Franco, Esq., Piliero, Mazza & Pargament, for the protester.
C. Joseph Carroll, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will consider a protest concerning procurement conducted by an agency's employees' association, a non-appropriated fund instrumentality, where protester alleges that agency is diverting vending machine requirements to employees' association in order to avoid applicable procurement statutes and regulations.

2. Protest contending that agency is improperly channeling vending machine requirement through employees' association in order to avoid applicable procurement statutes and regulations is denied where the employees' association is a distinct and separate entity from the agency; the vending machine requirement is not part of the agency's requirement but instead constitutes a benefit for agency employees and visitors which has been historically provided by the employees club; and any benefit to the agency is incidental and minor in nature.

DECISION

Premiere Vending protests any award by the Boron Federal Prison Camp Employees Club--a non-appropriated fund instrumentality (NAFI) of the Federal Bureau of Prisons (BOP), Department of Justice--under a solicitation issued by the Employees Club for servicing 11 vending machines located in the Boron, California, prison facility's employee and visitor lounges. Premiere contends that, by allowing the Employees Club to conduct these procurements, the BOP is circumventing the Competition in Contracting Act's (CICA) requirements for full and open competition.

We deny the protest.

Background

The Boron Federal Prison Camp has 17 vending machines located at its facility. Six of these machines are located inside the inmate area of the prison; the remaining 11 machines are located in the employee and visitor lounge areas and are the subject of this protest.

The six machines located inside the inmate area of the prison are for the primary use of the inmates; the BOP maintains and procures services for these machines as part of its agency mission and objective--to provide housing and rehabilitation for prison inmates. On September 20, 1993, the BOP issued request for proposals (RFP) No. 150-0076 to procure vending machine services for these six machines.[1]

On October 26, the agency held a preproposal conference for all prospective offerors under RFP No. 150-0076, which Premiere attended. The purpose of this conference was to provide contractors with an opportunity to view the inmate areas and learn the complex security procedures associated with providing inmate vending machine services. That same day--as contractors were leaving the preproposal conference--members of the Boron Employees Club distributed copies of the solicitation being challenged here.

On December 30, Premiere filed a protest with BOP agency procurement officials challenging the authority of the Boron Employees Club to conduct the employee and visitor lounge vending machine procurement. On February 21, 1994, the Boron Employees Club awarded a contract for the challenged vending machine services to R&M Vending; on March 2, Premiere filed this protest with our Office.[2]

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[1]Initially, Premiere also protested the award made under this RFP; however, after reviewing the agency report, Premiere withdrew this protest ground.

[2]Since Premiere failed to protest the Employees Club solicitation until after the solicitation's December 3 closing date, the protest is untimely. See 4 C.F.R. § 21.2(a)(1) (1994). Nevertheless, we are considering Premiere's protest under the significant issue exception to our timeliness rules, 4 C.F.R. § 21.2(c). In our view, the issue raised here--whether an agency is improperly diverting its requirements to a NAFI for noncompetitive acquisition--is one of widespread interest to the procurement community and one that has not been previously decided by this Office. Additionally, because the record shows that several BOP

(continued...)

Jurisdiction

The statutory authority of this Office to decide bid protests of procurement actions is set forth in CICA, 31 U.S.C. §§ 3551 et seq. (1988). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for the procurement of property or services, or a written objection by an interested party to the award or proposed award of a contract. 31 U.S.C. § 3551(1).

Since the passage of CICA, this Office's bid protest jurisdiction has not been based on the expenditure of appropriated funds or on the existence of some direct benefit to the government. Americable Int'l, Inc., B-251614; B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336. Instead, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Id.

In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 472 (1988). 31 U.S.C. § 3551(3). As defined therein, an executive branch federal agency includes any executive department or independent establishment, including wholly-owned government corporations. NAFIs, such as the Boron Employees Club, do not meet the statutory definition of federal agencies; although NAFIs are generally recognized as being associated and generally supervised by their respective government entities--in this case, the BOP--NAFIs operate without appropriated funds and are not part of a government agency. University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. As such, NAFIs are therefore beyond the jurisdiction of our bid protest forum and, consequently, we generally will not review procurements conducted by these entities. However, where the protester asserts that a NAFI is acting as a mere conduit for the agency in order to circumvent the CICA mandate for full and open competition, we will review the protest. Compare Americable Int'l, Inc., supra (we declined jurisdiction absent suggestion that procuring agency was somehow acting in concert with a NAFI to

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[2](...continued)
installations have simultaneous agency and employee club vending machine procurements pending, we believe this issue is one that can be expected to arise in future procurements. Consequently, we consider the issue raised here to be a significant one that should be treated on the merits. See Satilla Rural Elec. Membership Corp., B-238187, May 7, 1990, 90-1 CPD ¶ 456.

circumvent applicable procurement statutes) with Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 (we will review a protest that an agency is improperly using a cooperative agreement to avoid the requirements of procurement statutes and regulations).

Here, in light of Premiere's allegation that the BOP is channeling this requirement through the Boron Employees Club in order to avoid competitively procuring its vending machine requirements, we will invoke our bid protest jurisdiction to decide the merits of this protest. As discussed below, we deny the protest based on our conclusion that the BOP is not diverting its requirements for vending machine services to the Boron Employees Club.

Analysis

The protester asserts that the BOP is channeling this vending machine services requirement through the Boron Employees Club for procurement by that entity so that the agency may circumvent CICA and the implementing regulations. The crux of the protester's argument is that the agency has taken a larger 17-vending-machine requirement and improperly set aside 11 of the machines for procurement by the Boron Employees Club.

Contrary to the protester's assertion, the record here shows that the 11 vending machines which are the subject of this procurement are not part of the BOP's requirements. Rather, the only vending machines which the BOP requires for the inmate population at Boron are the six machines which were the subject of RFP No. 150-0076. The additional 11 machines are not to be used by the inmate population; these machines are located in the employee and visitor lounges rather than in the inmate area and have always been maintained and serviced by the Boron Employees Club. The BOP has permitted the Boron Employees Club to install these machines as a means to raise revenues for the club and simultaneously provide refreshments for prison employees; the BOP reports that this gesture is also intended to foster the morale of the Boron prison employees.

Since the record shows that these 11 machines do not represent or serve the agency's needs or objectives, we fail to see how the BOP can be said to be diverting a requirement to the Boron Employees Club. We therefore conclude that this procurement is a bona fide NAFI procurement, properly intended to serve the Boron Employees Club and its membership needs.

All profits generated by the six vending machines located in the inmate areas (RFP No. 150-0076) are collected by the BOP and transferred to an inmate trust fund; the trust fund

money is used by the BOP to purchase recreational items for the inmates--such as games or televisions. With respect to the profits generated by the vending machines located in the employee lounges, the agency reports that the Boron Employees Club keeps all of these profits, as well as 85 percent of the profits generated by the vending machines located in the visitor lounges. However, because inmates occasionally have access to the machines located in the visitor lounges, the BOP has arranged to have the Boron Employees Club donate 15 percent of the profits collected from the visitor area machines to the inmate recreational trust fund.

As a result of this financial arrangement--as well as the fact that inmates occasionally purchase goods from these machines--the protester argues that this portion of the visitor lounge vending machine services must be competitively procured by the agency instead of the Employees Club. We disagree.

Notwithstanding the fact that inmates may have limited access to buy items from the visitor lounge vending machines, as noted above, the record shows that these machines are not necessary to serve the BOP's mission of inmate care. The machines located in the visitor lounges exist for the benefit of the Boron Employees Club, and while these machines may provide incidental benefits to the inmates during prison visiting hours, this access by the inmates does not convert the machines into an agency requirement. Further, we think the involvement of another contractor--to provide the inmate portion of the visitors lounge vending machine requirement--would unnecessarily complicate the Boron Employees Club supervision of these machines and unnecessarily require the BOP to duplicate its administrative responsibilities and expenses, given the minor and incidental nature of the benefits to the inmates. See Departments of the Army and Air Force, Army and Air Force Exchange Serv., B-235742, Apr. 24, 1990, 90-1 CPD ¶ 410.

The protest is denied.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: North Central Construction, Inc.

File: B-256839

Date: July 5, 1994

Jon E. Cushman, Esq., Cushman & Miller, for the protester.
Robert P. Majerus, Esq., Stanislaw, Ashbaugh, Riper, Peters & Beal, for Trico Contracting, Inc., an interested party.
Sherry Kinland Kaswell, Esq., and Alton E. Woods, Esq., Department of the Interior, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid was properly rejected as nonresponsive where its certificate of procurement integrity identified one person as the certifier but was signed by a different person; the improperly executed certificate failed to unequivocally bind the bidder to perform in accordance with the substantial legal obligations imposed by the certificate.

DECISION

North Central Construction, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 1425-4-SI-10-06490, issued by the Department of the Interior, Bureau of Reclamation, for construction related to the Columbia River pumping plant on Lake Wallula, near Hermiston, Oregon. North Central contends that the agency improperly found its procurement integrity certification to be deficient.

We deny the protest.

The agency issued the IFB on December 20, 1993. The IFB contained the full text of the Certificate of Procurement Integrity clause, Federal Acquisition Regulation § 52.203-8. At bid opening on February 8, 1994, North Central's bid was apparently low. Upon review of the bid, however, the agency found a defect in North Central's execution of the solicitation's certificate of procurement integrity. Specifically, at the top of the certificate, North Central

had typed the name of one person as the "certifier," but a different person had signed the certificate. Finding the certification defective, the agency rejected North Central's bid as nonresponsive.

The protester contends that its low bid should have been accepted, because the use of two names, although an error, was immaterial, since both persons have authority to bind the company. North Central also claims that the IFB was confusing in this regard because the signature block (where the second individual's name appeared) was on a separate page from the body of the certificate (where the first name appeared).

When the responsiveness of a bid is challenged, we review the bid to determine whether it represents an unequivocal commitment to perform the requirements stated in the IFB so that the bidder will be bound to perform in accordance with all the material terms and conditions. Contech Constr. Co., B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. The certification requirement of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423(e) (1988 & Supp. IV 1992), implemented in the Certificate of Procurement Integrity clause, imposes substantial legal obligations and is thus a material solicitation term which constitutes a matter of responsiveness. See Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342. Accordingly, a bid with an improperly executed certificate of procurement integrity is nonresponsive. Bootz Distribution, B-251155, Feb. 10, 1993, 93-1 CPD ¶ 123.

Where, despite an error in the execution of the certificate, there is no ambiguity or confusion about the identity and authority of the one individual certifying, the bid may nonetheless be responsive. Thus, in Woodington Corp., B-244579.2, Oct. 29, 1991, 91-2 CPD ¶ 393, our Office found a bid responsive, notwithstanding the bidder's failure to fill in the name of the certifier at the top of the form, because the typed name and signature appeared at the end of the certification and no other name was present which could raise doubt about the identity of the certifying individual. Similarly, the failure to date a certificate of procurement integrity is waivable as a minor informality where the certification's applicability to a particular bid is clear. See C.B.C. Enters., Inc., B-246235, Oct. 31, 1991, 91-2 CPD ¶ 416.

However, where the error creates doubt about whether one individual representative of the bidder has made an unequivocal commitment to satisfy all the solicitation requirements, the bid is nonresponsive. The absence of a signature on the certificate thus makes the bid nonresponsive. See, e.g., G. Penza & Sons, Inc., B-249321,

Sept. 2, 1992, 92-2 CPD ¶ 147. Here, North Central identified one person as the certifier, but a different person signed the certification. Thus, unlike in Woodington Corp., supra, it is not clear who the certifying individual is. Since the identity of the certifier must be clear if the certificate itself is to have validity, the agency properly concluded that North Central's certificate was fatally defective.[1]

The protest is denied.

for Ronald Berger
Robert P. Murphy
Acting General Counsel

[1]North Central argues that the IFB's having the signature line on a page separate from the body of the certification was confusing and misled the company into thinking that the signature was "unassociated" with the certificate of procurement integrity. While we see no basis to find that the IFB was confusing in this regard, North Central's argument effectively calls into question whether the person who signed the certificate understood that his signature related back to the OFPP Act requirements set forth on the previous page and represented a commitment to fulfill those requirements. North Central's argument thus demonstrates the reasonableness of the agency's position that having a different person identified as the certifier and the signer does not represent an unequivocal commitment to satisfy the certification requirements.

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Transportation Safety Board - Physical Examinations for Air Safety Investigators

File: B-256092

Date: July 6, 1994

DIGEST

The National Transportation Safety Board may use appropriated funds to reimburse Air Safety investigators for the costs of physical examinations for a Federal Aviation Administration (FAA) medical certificate performed by FAA certified private physicians where there are no FAA certified physicians at available public health facilities and the examination is performed for the sole purpose of obtaining a current FAA medical certificate.

DECISION

Pursuant to 31 U.S.C. § 3529, the National Transportation Safety Board (NTSB) asks whether appropriated funds may be used to reimburse approximately 70 Air Safety Investigators for part of the cost of non-mandatory physical examinations that are performed by private physicians who have been certified by the Federal Aviation Administration (FAA) to perform examinations for FAA medical certificates. For reasons set forth below, we conclude that NTSB may do so.

BACKGROUND

Air Safety Investigators of the NTSB Office of Aviation Safety investigate most aviation accidents and incidents, including all major ones. In order to qualify for an Air Safety Investigator position, applicants are required to have a valid FAA medical certificate. NTSB encourages investigators, once appointed to the position, to maintain the currency of their FAA medical certificates by having physical examinations performed every two years by FAA certified physicians.

The NTSB states that because of the physical demands of the job, the health of its investigators is a primary concern of the agency. The NTSB maintains a preventive health service program to assure that its employees are physically able to safely withstand the physical rigors of the job. This is necessary for several reasons. Of an estimated 2,200 aviation accidents the NTSB has investigated, the

circumstances of approximately 500 required that the investigators visit the wreckage site. This often means working under very unpleasant and demanding conditions, including exposure to extreme heat and cold, climbing rugged or mountainous terrain often at high altitudes, and working long hours in remote areas where emergency medical care is not readily available.

Additionally, the investigators participate in training that taxes their physical capacity. This includes flight proficiency training, water survival training, and "rides" in the altitude chamber. Participation in the altitude chamber requires an FAA medical certificate.

NTSB states that investigators need a current FAA medical certificate in order to attend the agency-sponsored flight training school. The credibility of the investigators is of paramount importance to the NTSB. The investigators are authorized to ride in the pilot's compartment of commercial aircraft and are often asked about their flight qualifications; and they frequently interact with airframe and component manufacturers, pilot unions, and airline executives. The NTSB feels that its credibility is enhanced if its investigators can show that they are fully qualified in the aviation field and meet the standards that are applicable to other persons within the aviation community. Thus, the NTSB encourages its investigators, who are also pilots, to be both current and proficient in the aircraft they are rated to fly. By doing so, the agency believes, the credibility of the Office of Aviation Safety will be maintained within the aviation community.

The NTSB also feels that the physical examinations are necessary "to prevent work-related medical events." In the past few years, the agency states, five investigators retired for medical reasons and two others had heart attacks during the field phase of investigations. The NTSB maintains that the prevention of the unnecessary loss of highly trained and motivated investigators is in the best interest of its employees, the agency, and the taxpayers.

The agency, therefore, would like to provide financial assistance to some of its investigators for examination costs incurred. The agency plans to have its investigators utilize FAA health facilities where available to reduce the cost of the physical examination to the government. In cases, however, where there is no FAA certified physician at an available public health facility, the NTSB proposes to reimburse investigators for part of the cost of physical examinations performed by FAA certified private physicians.

DISCUSSION

Under 5 U.S.C. § 7901, agencies are authorized to establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees. Under the statute, agencies may establish, by contract or otherwise, preventive programs relating to health. 5 U.S.C. § 7901(c). As part of such programs, agencies may provide physical examinations to their employees. 30 Comp. Gen. 493 (1951).

Appropriations are also available for payment of the costs of physical examinations performed by private physicians not associated with the agency's established health service program, where the employee's physical examination primarily benefits the government. See, e.g., 41 Comp. Gen. 531 (1962); 30 Comp. Gen. 387 (1951). In these cases, the examinations had to be performed by private physicians because there were no public health facilities available.

In this case, NTSB has a health service program providing medical examinations for its permanent employees in Washington, D.C., and there are public health facilities available to investigators located elsewhere. However, NTSB advises that not all public health facilities have FAA certified physicians. Therefore, in some cases, its investigators have the examination performed, at their own expense, by an FAA certified private physician.

In our view, NTSB's proposal is a reasonable extension of its existing preventive program relating to health that simultaneously supports agency program objectives. Apart from the fact that investigators perform their work under adverse conditions, NTSB encourages investigators to undergo training, requiring an FAA medical certificate, so that investigators will be able to meet aviation industry standards thereby enhancing the credibility of the agency. If investigators have a current FAA medical certificate, the agency is provided with some assurance that they will be physically able to safely withstand the rigors of their employment and training. Thus, we think the maintenance by investigators of current FAA medical certificates can reasonably be viewed as for the primary benefit of the government.

If a public health facility has no FAA certified physician, that facility, in effect, is not available to the investigator. In such cases, where the investigator would

have to use the services of an FAA certified private physician, NTSB may use appropriated funds to reimburse the investigator for the examination cost. 5 U.S.C. § 7901.

for Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

95287

Decision

Matter of: Tecom, Inc.

File: B-253740.3

Date: July 7, 1994

Theodore M. Bailey, Esq., and Garreth E. Shaw, Esq., Bailey, Shaw & Deadman, for the protester.
Paul Shnitzer, Esq., and Stephanie B. N. Renzi, Esq., Crowell & Moring, for ITT Federal Services Corporation, an interested party.
Jeffrey S. Dubois, Esq., Maj. Wendy A. Polk, and Col. Riggs L. Wilks, Jr., Department of the Army, for the agency.
Tania L. Calhoun, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly conducted cost comparison between the government's in-house proposal and protester's proposal to justify agency determination to convert a support services contract to in-house performance is denied where agency followed applicable procedures in conducting the cost comparison and protester fails to show that the methodology used was unreasonable or inconsistent with Office of Management and Budget Circular No. A-76 and other related guidelines.

DECISION

Tecom, Inc. protests the Department of the Army's decision to convert the logistics support services at Fort Leonard Wood, Missouri, to in-house performance by civilian employees, rather than to continue to contract for these services, as solicited under request for proposals (RFP) No. DABT31-91-R-0012. The Army based its determination on an Office of Management and Budget (OMB) Circular No. A-76 comparison of the estimated costs of Army performance with Tecom's offer to perform these services. Tecom contends that the cost comparison was flawed for various reasons discussed below.

We deny the protest.

BACKGROUND

The solicitation, issued on March 6, 1992, contemplated award of a cost-plus-award-fee contract for these services, which include supply support, maintenance and repair of equipment, vehicle operations, rail transportation, troop issue subsistence support, and maintenance assistance and instruction. At the time the solicitation was issued, the services were being performed by a private contractor, ITT Base Services, Inc. (ITT BSI). However, since the result of an Army cost-effectiveness review indicated that it might be less costly to perform the services in-house, the solicitation was amended to inform offerors that the Army intended to conduct an A-76 transfer cost study for the services.[1] The amended RFP stated that the solicitation was part of a government cost comparison to determine whether accomplishing the specified work under contract or by government performance was more economical. If, after the comparison, government performance was determined to be more economical, no contract would be awarded.

The source selection evaluation board (SSEB) evaluated the seven proposals submitted and established a competitive range of three proposals, including Tecom's. After conducting discussions and evaluating best and final offers, the SSEB recommended the selection of Tecom's proposal for the cost comparison, based on its superior technical merit and competitive price.[2] Tecom's proposed cost, less award fees, was $45,791,118.

The Army completed the cost comparison pursuant to OMB Circular No. A-76 and other associated guidelines, and used its Commercial Activities Services (CAS) software to estimate the cost of the government's proposal. Tecom's price was adjusted by deducting the cost of federal income tax and adding the cost of contract administration and various additional costs, raising it to $47,618,246. Since this figure exceeded the Army's estimate of its in-house costs of $45,886,013 by $1,732,233, the Army decided to perform these services itself. On January 4, 1994, the Army

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[1]A transfer cost study "is prepared when a review of an existing contract concludes that in-house performance is likely to be less costly than commercial sources." Army Regulation (AR) 5-20, "Commercial Activities Program," § 4-8a (1986).

[2]A protest to our Office of the selection of Tecom for the cost comparison was filed by the second offeror in the competitive range, ITT Federal Services, Inc., (of which ITT BSI is a wholly-owned subsidiary), and denied. ITT Fed. Servs., Inc., B-253740.2, May 27, 1994, 94-1 CPD ¶ ___.

announced that it had selected Tecom for the cost comparison, and that it had decided to perform the services in-house. After Tecom's timely appeal of this decision to the administrative appeals board was denied, it filed this protest with our Office.

ANALYSIS

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of governmental functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel. Generally, such decisions are matters of executive branch policy that our Office declines to review. Base Servs., Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192. However, where, as here, 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 CPD ¶ 152. We do so because a faulty or unfair cost comparison would be detrimental to the procurement system. Apex Int'l Mgmt. Servs., Inc., B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9.

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. Alltech, Inc., B-237980, Mar. 27, 1990, 90-1 CPD ¶ 335. To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but also that its failure could have materially affected the outcome of the cost comparison. Id.; Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30. Here, Tecom primarily alleges numerous failures by the Army to include all costs of in-house performance. Our review indicates that the Army properly conducted the cost comparison pursuant to OMB Circular No. A-76 and Army Regulation 5-20, the Army's implementation of the Circular which sets forth the agency's procedures for conducting cost comparisons of in-house and contract performance.

Costs of In-House Performance

Tecom first contends that the Army's failure to prepare and price the same staffing labor proposal matrix included in the solicitation resulted in understated costs.

OMB Circular No. A-76 requires agencies to prepare in-house cost estimates on the basis of the most efficient and cost effective in-house operation (MEO) needed to accomplish the requirements. The Army's Draft Commercial Activities Study Guide requires the agency to use the MEO Staff Task Analysis chart to determine MEO staffing; the work load depicted must exactly match the work load exhibit in the solicitation's performance work statement (PWS) as to the listed tasks and work load. Army Pamphlet 5-XX, §§ 4-17d(7), 9-12c(1) (1992). While the Army agrees it did not prepare and price a matrix identical to that contained in the solicitation, it followed the guidance in the draft study guide and used the required staffing chart to determine MEO staffing.

Tecom argues that the matrix is more detailed than the staffing chart, and that without that additional detail the Army could not be certain that its staffing assessment was accurate. However, our review of both the matrix and the staffing chart does not show a material difference between the two. The solicitation's matrix lists each PWS task by paragraph number and description, assigns man-hours for each task, and allocates those man-hours to a specific worker. Likewise, the staffing chart lists each PWS task by paragraph number and description, the skill of the worker required to do the task, and the man-hours assigned for each task. Under the circumstances, we have no basis to object to the Army's use of the staffing chart rather than the matrix. See Raytheon Support Servs. Co., B-216898, Sept. 25, 1985, 85-2 CPD ¶ 334.

Tecom next argues that the Army improperly failed to allocate hours to certain PWS tasks that were annotated on the Army's staffing chart as being performed by government functional managers. Tecom asserts that since these managers will have their hours expended to do work that is not allocated to PWS tasks, the Army has understated its manpower and, thus, its costs.

In response, the Army points out that each functional area of the PWS has hours assigned to a manager to "manage and operate" the function. For example, paragraph C-5.2.1.1 of the staffing chart allocates 1,744 hours to a position to "manage and operate" the Ammunition Supply Point; the Army reports that this position includes various PWS tasks for the Ammunition Supply Point that are annotated to be performed by government functional managers. The Army states that 18 manager positions in the staffing chart fall into this category, comprising a total of 16.3 work-years; no PWS tasks with work-load-related hours are assigned against these manager positions; and all of the tasks annotated to be performed by government functional managers

will be performed by personnel in these managerial positions. As a result, these positions are in fact accounted for and costed.

In its comments on the agency report, Tecom does not dispute that these positions are accounted for and costed; rather, it now argues that since these managers are already full-time government employees fulfilling other governmental functions, the Army must account for the costs of hiring someone to do the work currently performed by these personnel. The record indicates that, in the current contract mode of operation, these personnel primarily perform contract administration functions, such as monitoring contractor operations and analyzing, preparing, or reviewing documentation related to contract modifications, government estimates, customer complaints, and contractor performance. They also serve as technical experts and provide policy advice and guidance, and some perform inherently governmental functions such as property accountability, forecasting, programming, and budgeting.

The Army reports that, in an in-house mode of operation, most of these positions would replace contractor functional managers or foremen, assume the responsibility for directing the activities of the functional area, and take on the supervision and management of the personnel who staff the function. Thus, the time required to perform these new tasks is now spent on contract management and related tasks. Since it appears that the functions now performed by these personnel will not be required if the services are performed in-house, we have no basis to find the Army's cost proposal objectionable on this ground.

Tecom next contends that the Army improperly failed to cost other PWS tasks that are annotated as "not applicable to government operations." These tasks include such things as security of classified material, property control system, and damage reports. Tecom argues that personnel providing these services will expend man-hours to perform these tasks whether the services are provided in-house or by a contractor, and that the Army's failure to allocate costs to these tasks resulted in an understatement of manpower and costs.

The Army explains that these tasks are unique to contract operations and will not be performed in an in-house operation, and our review of each task cited by Tecom shows that each is indeed specific to contractor operations. For example, the task concerning security of classified material requires the contractor's plan to comply with Department of Defense requirements; the task concerning the property control system requires the contractor's plan to be complete; and the task concerning damage reports requires

the submission of a report when a contractor's employee damages government property. For each of these tasks, if there is no contract, there is no necessity for a contractor's plan or report. While Tecom argues that, for example, it is unreasonable to believe that the Army will not maintain procedures for a property control system, the task at issue here strictly concerns a contractor's responsibility with regard to such a system. Finally, several of the tasks cited by Tecom are related to the conduct of contract phase-in or termination inventories, and the cost for these inventories was properly addressed in the Army's cost comparison.

Tecom asserts that the Army improperly listed many PWS tasks as performed by another government section outside the contract manning organization, and thus did not allocate man-hours or cost to perform these tasks in such areas as the energy conservation, physical security/crime prevention, fire prevention, occupational safety and health, and hazardous material/waste plans.

The Army reiterates that these tasks are, in fact, already being performed by other government staff outside the contracting organization, such as the plans and systems branch and the logistics operations division; that the Directorate of Logistics already provides input to several of the above listed plans; and that government activities are already required to prepare and review these plans. The Army asserts that the effort to incorporate the contracted functions into existing plans during the normal review and update process would be minimal, and Tecom has provided us no basis to find otherwise.[3] See generally Trend Western Technical Corp., B-221352, May 6, 1986, 86-1 CPD ¶ 437.

Finally, Tecom argues that the federal benefits cost in the Army's proposal improperly fails to include that portion of lifetime retirement costs earned during the contract period. However, the record shows that the federal benefits factor of 29.55 percent is loaded in the mandatory, automated CAS system and used for all full-time staffing--this percentage includes retirement costs in accordance with OMB Circular No. A-76, Part IV. In addition, our review shows that the difference between the federal benefits factor of

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[3]In a similar vein, Tecom's protest raised three other issues, concerning tasks to be performed by other government personnel, contract positions assigned to government-in-nature staff, and the individuals who prepared the cost estimate. The agency addressed these issues in its report, and Tecom's comments did not rebut the agency's position. As a result, we consider the issues to be abandoned. See EPD Enters., Inc., B-236303, Oct. 30, 1989, 89-2 CPD ¶ 393.

29.55 percent used by the agency and the rate used by the protester is de minimis.[4]

Impact of Discussion Questions

Tecom argues that during discussions it was asked numerous questions concerning its ability to perform the PWS tasks with its proposed staffing. As a result, it adjusted its staffing upward to 268 full-time equivalents (FTE), based on 1,927 productive hours for each employee. Tecom asserts that since the Army's staffing used in the cost comparison was 258 FTEs, based on 1,744 productive hours for each employee, it was either misled into increasing its staffing, or the government has understated its manning requirements.

Our review of the discussion questions asked of Tecom does not indicate that they improperly led the offeror to increase its staffing; rather, the questions generally asked the firm to explain how it intended to accomplish various tasks with its proposed staffing, or to substantiate its staffing and methodology for determining productive rates and hours for various tasks.

As for the issue of the sufficiency of the staffing contained in the MEO, we have held that to the extent that the agency determines that staffing under the MEO is sufficient to accomplish all work included in the PWS, we will not review a protester's assertion that additional manpower will be required, absent evidence of fraud or bad faith. Bara-King Photographic, Inc., B-231916, Oct. 20, 1988, 88-2 CPD ¶ 377; Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18. The record shows that the Army's task analysis and staffing was audited by the U.S. Army Audit Agency, which concluded that the staffing levels were reasonable and sufficient to perform the tasks in the PWS. As the Army reports, not all of its staffing is based on 1,744 productive hours, as staffing with intermittent employees is based on 2,015 productive hours, and some of the differences in the number of productive hours are overcome by the consolidation of functions, the increased use of intermittent and temporary personnel, and the reduction in management and supervisory staff. Under the

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[4]In its comments submitted to this Office, Tecom also argued, for the first time, that the agency's cost comparison improperly failed to accurately consider the cost of wage increases and inflation. Since the protester did not raise this issue before the agency's appeals board, which is a prerequisite to our consideration of the issue, we will not consider the protester's arguments in this regard. Trans-Regional Mfg., Inc., B-245399, Nov. 25, 1991, 91-2 CPD ¶ 492; Dyneteria, Inc., supra.

circumstances, Tecom has provided us with no basis upon which to review the Army's MEO staffing levels.[5]

Costs of Contractor Performance

Tecom argues that the Army improperly added the costs of contract administration to its proposed cost, and did not add these same costs to its own cost estimate.

The Army's regulatory guidance for assessing the cost of contractor performance mandates the consideration of contract administration effort and defines such effort as all post-award functions necessary to assure that the contract is properly executed by both the government and the contractor. AR 5-20, § 3-3. These efforts include reviewing contractor performance and compliance with the terms of the contract (quality control plan), processing contract payments, negotiating change orders, and monitoring the closeout of contract operations. Army Pamphlet 5-20, 5-13. While contract administration is required for any contract, it is not required where the services are performed in-house.

The Army reports that its management study added to Tecom's price the cost of quality assurance personnel in the Directorate of Logistics, and contract administration personnel in the Directorate of Contracting. The Army further asserts that the quality assurance personnel will be retrained and placed in the MEO in accordance with Army guidance.

Although the protester asserts that reassigning these existing personnel to perform PWS tasks will require the Army to replace these individuals with employees who will perform their current work, and argues that these costs should be included in the Army's cost estimate, we disagree.

[5]As for Tecom's argument that the Army's cost estimate cannot be accurate because it far exceeded the proposed cost of the incumbent, one of the reasons for conducting the transfer cost study was the fact that performance by the incumbent had become too expensive.

As discussed above, the personnel identified here were assigned to administer the contract for these services and, absent a contract, there is no need to replace them--and no need to calculate a cost associated with doing so.[6]

The protest is denied.

Robert P. Murphy
Acting General Counsel

[6]Tecom also asserts that the costs of retraining these personnel should be included in the cost estimate. While we cannot discern from the record whether the Army has included such costs, Tecom has not given us any reason to believe that a failure to do so could have materially affected the outcome of the cost comparison.

Comptroller General
of the United States

Washington, D.C. 20548

1135157

Decision

Matter of: Pipeline Construction, Inc.

File: B-256799

Date: July 13, 1994

Bill Cosmas Giallourakis, Esq., for the protester.
Lucie J. McDonald, Esq., and Cynthia Guill, Esq., Department of the Navy, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly denied request for bid correction where bid remains low after correction, agency agrees that protester's bid reflected a transcription error, and there is clear and convincing evidence of the intended bid.

DECISION

Pipeline Construction, Inc. protests the denial of its request for bid correction under invitation for bids (IFB) No. N62472-93-B-0056, issued by the Department of the Navy, for roof truss replacement at Naval Weapons Station Earle in Colts Neck, New Jersey.

We sustain the protest.

Under the IFB, bidders were to submit prices for three contract line item numbers (CLINs).[1] Six bids were received by the February 15, 1994, bid opening date. Pipeline's bid of $381,660 was apparently low, and S&A Contracting Inc.'s bid was second low at $603,140. The revised government estimate for the project was $624,756.

[1]CLIN 1a encompasses all of the work described in the specifications, except for the work specified under CLINs 1b or 1c; CLIN 1b is for the removal and disposal of certain pipe insulation in the gymnasium area; and CLIN 1c is for removal and disposal of certain pipe insulation above the gymnasium stage area.

On February 16, the president of Pipeline Construction contacted the agency and informed it that he had made a clerical error in preparing Pipeline's bid, and that the intended bid was $588,660.

On February 21, Pipeline submitted a written claim of mistake in the amount of $207,000, and requested upward correction of its bid to $588,660. Pipeline's submission contained supporting evidence in the form of the original work sheet, subcontractor quotations, and an affidavit by the company president who had himself prepared the bid. The work sheet contained areas for entering component costs as well as quantities, and a "total" column to compute extended component costs as well as the total cost for CLIN 1a.[2] The work sheet included the following:

	Quantity	Material	Labor	Subcontract	Total
Structural Steel Trusses	9ea. @	$5,000	$15,000	$180,000	
Bracing for Bays	8ea. @	$1,250	$5,000	$50,000	
				$230,000	$23,000

Pipeline explained that it had inadvertently dropped a zero from the $230,000 figure when the amount was transcribed into the "total" column on the far right side of the work sheet. This transcription error resulted in Pipeline entering on its bid a total for CLIN 1a of $380,000, which reflects the work sheet total calculated on the basis of the erroneous $23,000 entry, rather than the correct total of $587,000, and an overall total bid of $381,660 for the three CLINs, rather than the intended $588,660.

At the request of the agency, Pipeline submitted an additional affidavit from the company president concerning the preparation of the bid work sheet, mainly with regard to the methods used to calculate profit and overhead. The protester's work sheet entries include profit and overhead, without any separate profit and overhead markup categories. The agency subsequently advised Pipeline that it could withdraw its bid but that correction was denied because of a lack of clear and convincing evidence to establish the intended price. Specifically, the agency determined that it was unable to determine Pipeline's intended price due to the apparently inconsistent underlying methods that Pipeline

[2]Pipeline's prices for the other CLINs were $1,500 for CLIN 1b, and $160 for CLIN 1c.

used to calculate profit and overhead based on subcontractors' quotes. This protest to our Office followed. The agency subsequently made award to S&A Construction based on urgent and compelling circumstances; however, there has not been any appreciable performance under the contract.

Pipeline points out that the only mistake alleged involves the transcription of one number and that correction of the transcription error clearly indicates the intended bid. Pipeline argues, therefore, that the agency erred in not allowing it to correct its bid because, through its work sheet, Pipeline provided the agency with clear and convincing evidence which establishes both its mistake and its intended bid.

Generally, under Federal Acquisition Regulation (FAR) § 14.406-3(a), a procuring agency may permit a low bidder to correct a mistake in its bid prior to contract award where the bidder submits clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended bid. Whether the evidence meets the clear and convincing standard is a question of fact, and our Office will not question an agency's decision unless it lacks a reasonable basis. P.K. Painting Co., B-247357, May 5, 1992, 92-1 CPD ¶ 424. So long as the bid remains low after correction, work sheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. Id.

Here, the agency acknowledges, and we agree, that the work sheet "clearly shows" that Pipeline made an error in transcribing numbers for CLIN 1a. Pipeline's bid remains low if the $207,000 upward adjustment is permitted. The only dispute concerns the sufficiency of the evidence indicating the intended bid. Since the only mistake alleged involves the transcription of one number--and the agency agrees that this figure was transcribed incorrectly--correction of the transcription error clearly indicates the intended bid. See J. Schouten Constr., Inc., B-256710, June 6, 1994, 94-1 CPD ¶ ___.

The agency does not directly dispute the authenticity of Pipeline's work sheet, and any unstated concern in this regard is not supported by the record. The record establishes that the work sheet was prepared prior to bid opening and that it formed the basis of Pipeline's bid, including the mistake in that bid. The work sheet for CLIN 1a identifies costs for 14 components and Pipeline has

presented supporting documentation such as subcontractors' quotations to explain how it arrived at various figures appearing on the work sheet, some of which were estimates based on the company's experience. The work sheet totals including the erroneous $23,000 entry are correctly added to arrive at the indicated overall $380,000 entry for CLIN 1a. Additionally, the work sheet was produced promptly along with an affidavit by the person who prepared it, in which he has sworn to its authenticity and explained how it was prepared, and how the error occurred. The record thus provides clear and convincing evidence establishing that the work sheet is authentic and that it was relied on in the preparation of the bid.

The agency has raised various concerns regarding the underlying calculation of component costs which, in our view, do not affect the adequacy of Pipeline's evidence. Specifically, the agency is concerned about the way in which Pipeline reached the $180,000 and $50,000 figures for the trusses and bays, respectively. The agency notes that the work sheet figures do not correspond to the $150,000 that was quoted by the subcontractor for labor and equipment for the steel trusses. Pipeline has explained that it added overhead and profit to the subcontractor's quote, and that the figures inserted on the work sheet included these cost elements. This is consistent with the overall work sheet methodology, which does not utilize a separate markup category for profit or overhead. Pipeline explained that overhead and profit were estimated and were not uniformly applied throughout its work sheet, and that the varying percentages reflected differences in the nature of the work involved as well as business judgments. In the context of a sealed bid procurement, where cost and pricing data are not required, there is no basis to object to a bidder's estimates of indirect costs and profit, as was done here. Any inconsistency in such markups was entirely irrelevant to the mistake here, since the transcription error occurred after the overhead and profit had already been added to the subcontractor's quote. As the record provides no basis to question the authenticity of the work sheet, the agency's recognition of the error in transcribing the figure on the work sheet necessarily leads to the conclusion that there is clear and convincing evidence of the intended bid. J. Schouten Constr., Inc., supra.

Accordingly, we find that Pipeline's bid, which is low with or without correction, should be corrected to $588,660. We recommend that S&A's contract be terminated for convenience and that award be made to Pipeline, if otherwise appropriate. We also find that Pipeline is entitled to its costs of filing and pursuing the protest, including reasonable

attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Pipeline should submit its certified claim for its protest costs directly to the agency within 60 working days of the receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States

Comptroller General
of the United States

Washington, D.C. 20548

1243147

Decision

Matter of: Airgroup Express

File: B-256204; 256204.2

Date: July 15, 1994

DIGEST

Expired Guaranteed Traffic Tender cannot be used as basis for payment to carrier where unsigned extension sent to Military Management Traffic Command (MTMC), which MTMC argues extended the tender, was not accepted and distributed by MTMC until after the date the shipments were transported.

DECISION

Airgroup Express requests review of the General Services Administration's (GSA) deductions from current bills for overcharges assessed against Airgroup on various Government Bill of Lading (GBL) transactions. We reverse GSA's action.

Airgroup performed transportation services under the GBLs for the Department of Defense during February and early March 1993, from Defense Depot, Ogden, Utah, to various points in the continental United States, and billed for the charges on the basis of its Tender 16. In assessing overcharges, GSA, supported by the Military Traffic Management Command (MTMC), contends that the lower rates in Airgroup's Guaranteed Traffic Tender 600956 apply.

The record indicates that Airgroup's Tender 600956 was due to expire on January 29, 1993. MTMC states that on January 12, a conversation was held between MTMC and a responsible official of Airgroup and that Airgroup orally agreed to a 9-month extension. The next day, MTMC received a letter, by facsimile reproduction, that purported to agree to an extension. The letter was accompanied by Supplement No. 2 to Tender 600956, with a proposed expiration date of October 31, 1993. Neither the letter nor the tender supplement was signed by an Airgroup official. Airgroup has disputed the fact that issuance of the extension tender was authorized, and that a responsible Airgroup official had orally agreed to an extension.

On January 28, 1993, 1 day before the expiration of Tender 600956, Airgroup was advised by letter from the Defense Logistics Agency (DLA), Defense Distribution Depot, Ogden,

Utah, that it was to be removed from the guaranteed traffic program effective immediately because of poor service. MTMC did not officially remove Airgroup from the guaranteed traffic program until March 7, 1993, when it substituted another company, Right-O-Way, as the primary carrier.

Airgroup, in arguing that Tender 600956 does not apply here, points out that it was removed from the guaranteed traffic program before the shipments were effected, and that Tender 600956 had expired by then anyway. Airgroup argues that it thus had no obligation to continue to carry cargo pursuant to the expired Tender 600956.

GSA and MTMC contend that Airgroup orally agreed to a 9-month extension by telephone on January 12, which should bind the company. GSA further points out that the GBLs were annotated to the effect that Airgroup Tender 600956 applied, and the carrier's continued acceptance of shipments reflected an agreement to apply the rates provided in Tender 600956.

In addition, MTMC notes that pursuant to Item 44 of Airgroup's Tender 600956 Airgroup was obligated to honor its guaranteed traffic rates until MTMC removed it from the guaranteed traffic program on March 7, 1993. MTMC also contends that because the rates in Airgroup's Tender 16 are contract rates they cannot apply to guaranteed traffic shipments. Finally, MTMC points out that Item 32 in Airgroup's Tender 600956 provides that "alternation" with rates and charges in any other tender (e.g., Tender 16) for the same traffic are not permissible.

We find that GSA's deduction action taken on the basis of Airgroup's expired tender was improper. By the time the shipments were placed with Airgroup, DLA had removed the carrier from the guaranteed traffic program, and Airgroup's guaranteed traffic tender had expired prior to MTMC's assignment of a replacement carrier. The record is not conclusive on whether Airgroup actually did agree, orally, to extend Tender 600956, but the record does show that MTMC did not even time-stamp the unsigned extension tender until April 1, 1993, and then distributed it. This action postdates both the freight movements in issue, which occurred in February and early March 1993, and MTMC's replacement of Airgroup from the guaranteed traffic program with Right-O-Way on March 7.[1]

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[1]Airgroup protested the distribution of the tender by letter to MTMC in April 1993.

We have held that under MTMC's own procedures, shippers should not consider a tender to be a unilateral offer available for acceptance until MTMC accepts and distributes it. Starflight, Inc. - Reconsideration, B-212279, Sept. 2, 1986; see also, Riss International, 65 Comp. Gen. 912 (1986), for a further example of the necessity for approval by MTMC of a tender prior to the transportation being performed. While nothing precluded Airgroup from continuing to transport shipments after Tender 600956 expired, the offer reflected by that tender's rates no longer existed for shippers to accept. Airgroup's transportation of goods therefore should have been paid for in accordance with the applicable non-guaranteed tender, Tender 16.

Moreover, GSA's argument that the GBLs cited Tender 600956 as the rate authority for the shipments is not determinative of the parties' obligations. It is well-settled that the insertion of a tender number on a bill of lading is not conclusive as to the agreement and the government's obligations at law. Goulart Trucking, Inc., B-251140.4, Sept. 28, 1993; Sammons Trucking, B-241866, June 17, 1991; Double M Transport, Inc., B-236336, July 13, 1990.

We find no legal merit in MTMC's arguments regarding Items 44 and 32 of Tender 600956. As MTMC notes, Item 44 required the carrier to honor its guaranteed traffic rates until MTMC officially removed Airgroup from the guaranteed traffic program on March 7. Although that commitment may have existed had Airgroup's tender otherwise still been effective (i.e., during its initial period or while extended), we have held that the rates in a guaranteed traffic agreement remains in effect only until the expiration date or until MTMC assigns an alternate carrier with a definite start up date, whichever comes first. SEKO Air Freight, Inc., B-245855, Apr. 27, 1992. We do not believe Item 44 permits MTMC to hold a carrier to expired rates until a replacement is selected. Also, the non-alternating provision of Tender 600956's Item 32 is of no import in view of our conclusion that the tender was not in effect when the shipments took place.

GSA's settlement action is reversed.

for Seymour Efros
Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

954157

Decision

Matter of: Colonel Dexter V. Hancock

File: B-256270

Date: July 15, 1994

DIGEST

Where member and family used foreign flag vessel for permanent change of station transoceanic travel, rather than U.S. flag airline as member initially had elected, and transportation officer has certified that no U.S. flag vessel was available, member may be reimbursed based on the constructive cost of direct airfare from Europe.

DECISION

Colonel Dexter V. Hancock has appealed the settlement of our Claims Group denying his claim for the constructive cost of air transportation for himself and his dependents from Hampton, England, to New York City, New York, incident to his permanent change of station from Germany to Carlisle Barracks, Pennsylvania. We reverse the settlement.

Colonel Hancock's orders, dated April 2, 1990, noted that he had elected to travel by U.S. flag commercial carrier at his own expense and claim reimbursement at the current Military Airlift Command tariff rate. The orders stated that Colonel Hancock had to fly on a U.S.-owned airline to receive reimbursement. Transportation was also authorized for his wife and two dependent children.

However, Colonel Hancock and his family performed the transoceanic portion of the travel aboard the Queen Elizabeth II, a foreign flag vessel. The Defense Finance and Accounting Service denied Colonel Hancock's claim for the constructive cost of the travel as doubtful because he had not been authorized to travel by vessel but was to have performed the crossing aboard a U.S. airline; our Claims Group agreed.

Although Colonel Hancock's orders do not specifically authorize him to travel by vessel, they also do not require him to use air travel in order to be reimbursed. Rather, they simply recognize that he "elected to travel by U.S. Flag Commercial Carrier at [his] own expense and claim reimbursement at the [air] rate"; the orders then caution Colonel Hancock that he must fly a U.S.-owned airline in order to be repaid.

Paragraph U3130A, Volume 1, of the Joint Federal Travel Regulation (JFTR) in effect at the time of Colonel Hancock's travel, states that commercial ship transportation is not normally an authorized mode for transoceanic travel for members and dependents, so that in the absence of specific authorization the authorized mode is air "for the basis of reimbursement." The regulation thus contemplates that while the full cost of vessel travel that has not been authorized specifically will not be reimbursed, the traveler may be repaid based on the constructive airfare that would have been spent to complete the permanent change of station.

The record reflects some question about the effect of Colonel Hancock's use of a foreign flag vessel on his entitlement to reimbursement. Colonel Hancock, however, has submitted a statement from his transportation officer that no U.S. flag vessels were sailing from Europe at that time. We note that JFTR paragraph U5116E, which addresses reimbursement when a member makes a personal decision to perform permanent change of station travel over a circuitous route, permits an allowance for the cost of transoceanic transportation on a foreign flag vessel if the transportation officer certifies that U.S.-flag vessels are not available.[1] The circuitous-route allowance for land and transoceanic travel combined just cannot exceed the amount to which the traveler would have been entitled for direct travel, which in this case is the constructive air travel cost as stated above.

Accordingly, Colonel Hancock is entitled reimbursement of his transoceanic travel costs based on the constructive cost of direct air travel.

Seymour Efros

for Robert P. Murphy
Acting General Counsel

[1]See also, JFTR paragraph 5116D.3, which permits reimbursement for direct travel at personal expense on a foreign flag vessel, with the same qualification.

Comptroller General
of the United States

Washington, D.C. 20548

452217

Decision

Matter of: QualMed, Inc.

File: B-254397.13; B-257184

Date: July 20, 1994

Richard S. Ewing, Esq., James A. Dobkin, Esq., J. Robert Humphries, Esq., Sharon L. Taylor, Esq., and Edward H. Sisson, Esq., Arnold & Porter, for the protester.
Alan C. Brown, Esq., Kevin C. Dwyer, Esq., Ross W. Branstetter, Esq., and Mandy Jones, Esq., Miller & Chevalier, for BCC/PHP Managed Health Company and CaliforniaCare Health Plans; Thomas P. Humphrey, Esq., Frederick W. Claybrook, Jr., Esq., Robert M. Halperin, Esq., and Peter J. Lipperman, Esq., Crowell & Moring, for Foundation Health Federal Services, Inc.; Roger S. Goldman, Esq., David R. Hazelton, Esq., Penelope A. Kilburn, Esq., Katherine A. Lauer, Esq., and Edward J. Shapiro, Esq., Latham & Watkins, for Aetna Government Health Plans, Inc., interested parties.
Kenneth S. Lieb, Esq., Ellen C. Callaway, Esq., and Karl E. Hansen, Esq., Office of the Civilian Health and Medical Program of the Uniformed Services, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation provisions requiring that healthcare utilization review be conducted in a particular way are reasonably related to the agency's need to protect beneficiaries' access to appropriate health care.

2. Although solicitations must provide sufficient information to enable offerors to compete intelligently and on an equal basis, they are not required to disclose the government cost estimate or the precise details of the proposal evaluation process.

DECISION

QualMed, Inc. protests the terms of two requests for proposals (RFP) issued by the Office of the Civilian Health and Medical Program of the Uniformed Services.[1] RFP No. MDA906-91-R-0002 covers managed health care services for CHAMPUS beneficiaries in California and Hawaii, while RFP No. MDA906-92-R-0005 covers the same services in Washington and Oregon.[2] CHAMPUS beneficiaries include military service retirees, their dependents, and dependents of active duty members. QualMed contends that the two solicitations (1) establish requirements that exceed the agency's minimum needs, (2) include unreasonable specifications, and (3) fail to adequately explain how the agency will evaluate proposals.[3]

We deny the protests.

We briefly describe here the relevant aspects of the solicitations as of the time QualMed filed the instant protests.[4] Offerors are required to propose three health care options, featuring increasingly managed health care accompanied by decreasing costs to the beneficiary. Specifically, the RFPs require offerors to propose a health care system under which CHAMPUS beneficiaries could opt to obtain services: (1) from providers of their own choosing on a fee-for-service basis (referred to as TRICARE

[1]We refer to the program as CHAMPUS and the agency as OCHAMPUS.

[2]Although they cover two separate procurements, the solicitation provisions are essentially identical in the areas challenged.

[3]QualMed's protests initially raised a number of additional issues. Following telephone conferences conducted by our Office both before and after the agency filed its reports, QualMed withdrew those additional protest grounds, and we therefore do not discuss them here.

[4]The solicitations at issue in these protests reflect changes implemented by the agency following our Office's decision that an earlier award decision under the California/Hawaii solicitation was inconsistent with the RFP evaluation criteria. Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3. The relevant background and statutory framework are set forth in that decision, and are not repeated here.

Standard), (2) from members of the contractor's preferred provider organization (TRICARE Extra), or (3) from a contractor-established health maintenance organization (HMO) (TRICARE Prime).

The RFPs require the contractor to operate a comprehensive utilization management program to ensure that medically necessary care is provided in the most cost effective manner. Among the key aspects of the required utilization management program is utilization review, which is the review by the contractor of treating physicians' requests for care, an issue of particular importance in the case of such high-cost care as hospital admissions and the services of specialist physicians.[5]

The RFPs require the contractor to maintain two tiers of utilization review: the first-tier review is to be staffed by nurses or doctors, and may either approve the treating physician's determination or forward the matter to second-tier review, which must be performed by a doctor. Where the treating physician is a specialist, the second-tier reviewer must be a specialist in the same field. Reviewers are required to use sets of criteria published by InterQual, Inc., a private company, although those criteria sets need not be applied rigidly and reviewers are free to use professional judgment in their decisions. If both tiers of the contractor's reviewers conclude that the care requested by the treating physician is not appropriate, the care is denied, unless the treating physician or the beneficiary successfully appeals to certain independent bodies, under procedures set forth in the solicitations.

The RFPs state that the government intends to award a fixed-price contract subject to later price adjustment based on certain criteria. Two of the limits on the fixed-price nature of the contract are at issue in these protests. One is a solicitation provision stating that the price paid to the contractor will be reduced as the number of "nonavailability statements" (NAS) per capita for inpatient services declines. An NAS is issued by a military treatment facility (MTF), where the MTF is unable to timely provide health care services needed by a beneficiary; the NAS permits the beneficiary to go to a civilian health care provider. The agency's rationale for reducing the contract price as the number of NASs per capita drops is that, because an NAS represents an instance of the contractor

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[5]As discussed in a recent report by our Office, this sort of external utilization review is nearly universal in managed care arrangements. See Managed Health Care: Effect on Employers' Costs Difficult to Measure, GAO/HRD-94-3, October 1993.

having to pay a civilian provider for services, a decline in NASs can be expected to translate into lower costs for the contractor, since care will either be provided by the MTF or not at all (that is, a beneficiary, or his or her doctor, may decide the treatment initially requested is not necessary).

The second modification to the fixed-price nature of the contract that is relevant to this protest is the risk-sharing arrangement, a key characteristic of these solicitations. Under that arrangement, in the event of health care cost overruns, the government will at some point absorb part of the excess cost. Once the contractor has absorbed overruns equaling the amount of equity that the company put at risk in its proposal (and certain other conditions, not relevant here, are met), the contract will begin to function as a cost-reimbursement contract, with the government paying for all additional health care costs. An offeror's putting more equity at risk thus postpones the time at which the contract would convert to a cost-reimbursement arrangement.

We first address QualMed's contention that the RFPs exceed the government's needs by imposing OCHAMPUS's particular approach to utilization management. QualMed alleges that this approach will force the contractor to incur unnecessary costs (costs which QualMed suggests will be passed on to the government through higher proposed prices) and will prevent the contractor from effectively managing health care.

Specifically, the protester points out that, while two-tiered review is common, some utilization review organizations, including QualMed, use a single-tier review structure, with physicians performing the review. The RFPs require any offeror that normally uses one-tier review to add an extra level of review, thus increasing costs. In addition, QualMed argues that, under the RFP scheme, treating physicians' requests that services be provided are shielded from meaningful review, and the RFPs thus skew the review process in favor of approving those services. The first tier is expected to approve a request if it is consistent with the InterQual review criteria; in any event, the first tier is not allowed to deny the request but may, at most, forward the request for second-tier review; and the second-tier reviewer must practice in the same specialty as the treating physician, where similarity in approach will allegedly increase the likelihood that the request will be approved. Overall, QualMed is in essence arguing that, while the RFP recognizes that utilization management involves both ensuring access to medically appropriate care and containing costs, OCHAMPUS is so zealously protecting beneficiaries' access to the care their treating physician

recommends that it has effectively abandoned the goal of cost containment.

The governing statutes and regulations allow contracting agencies broad discretion in determining their minimum needs and the appropriate method for accommodating them. See 10 U.S.C. § 2305(a)(1) (1988); Federal Acquisition Regulation (FAR) §§ 6.101(b), 7.103(b). However, because full and open competition is generally required, agencies may include provisions restricting competition in solicitations only to the extent necessary to satisfy the legitimate needs of the agency. 10 U.S.C. § 2305(a)(1)(B)(ii). See National Customer Eng'g, 72 Comp. Gen. 132 (1993), 93-1 CPD ¶ 225. Where a protester challenges a solicitation's provisions as unduly restrictive of competition, our Office will review the record to determine whether the provisions are reasonably related to the agency's legitimate minimum needs. Tek Contracting, Inc., B-245454, Jan. 6, 1992, 92-1 CPD ¶ 28.

OCHAMPUS contends that, in requiring a two-tiered review process and mandating the use of InterQual criteria and same specialty second-tier reviewers, the RFP reflects the agency's need to ensure that CHAMPUS beneficiaries are not denied appropriate medical care. The agency does not deny that QualMed as well as other companies routinely use a one-tiered structure for utilization review and that such a structure may be adequate for other users; nor does it deny that forcing such companies to establish a two-tiered system for OCHAMPUS may result in increased staffing and administrative costs. OCHAMPUS also does not dispute that its insisting on a second tier of review, reliance on InterQual review criteria, and use of same-specialty reviewers may decrease the number of instances in which treating physicians' requests for care are ultimately denied. The RFP requirements may thus affect the ability of the contractor to contain health care costs.

While the fixed-price structure and other provisions of the RFPs demonstrate the agency's commitment to reduce costs, the challenged requirements in the solicitations do indicate that OCHAMPUS may have elected, in the area of utilization review, to sacrifice some potential cost savings in order to avoid inappropriate denials of health care. QualMed views this choice as an unwise policy decision that will increase health care costs without ensuring better health care for OCHAMPUS beneficiaries. Our Office's role in considering protests of solicitation provisions, however, is not to review contracting agencies' policy choices, but solely to determine whether the challenged provisions, which may result from those choices, restrict competition and, if so, whether the specifications are reasonably related to a legitimate need of the agency.

Here, QualMed has not established that the specifications at issue restrict competition. QualMed argues, at most, that those specifications force companies to incur unnecessary administrative costs which erode their ability to limit health care costs. QualMed concedes, however, that it was able to, and did, submit proposals that it believes fully comply with the solicitation provisions that it challenges. The restrictions thus did not preclude QualMed from competing, and any impact on QualMed's competitive position appears marginal and, in any event, speculative.

Indeed, QualMed scarcely mentioned the question of prejudice to itself in its submissions to our Office; instead, it focused primarily on the company's views about government health care policy. For example, while QualMed argued that reliance on InterQual review criteria is unwise, it did not explain how the company's chances of winning this competition could be adversely affected by the agency's insistence on the use of those criteria.[6] Similarly, it is not clear how QualMed believes that the company would suffer any disadvantage as a result of the RFP requirement that second-tier reviewers practice the same specialty as the attending physician.

Even if the cumulative impact of the challenged RFP provisions were considered to restrict competition, those provisions are still proper if they are reasonably related to a legitimate agency requirement. We find that they are.

There is no dispute that OCHAMPUS has a legitimate need to protect beneficiaries' access to appropriate medical care. Rather, the dispute concerns whether the constraints that OCHAMPUS has placed on the contractor's ability to manage utilization of health care services are arbitrary, or whether they are reasonably related to the need to ensure the access of CHAMPUS beneficiaries to necessary health care. Put another way, the dispute concerns the risks and benefits of having an outside contractor reviewing the treating physician's judgment about the appropriate treatment for a CHAMPUS beneficiary.

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[6]We should note that OCHAMPUS initially appeared to be treating the InterQual criteria as definitive, thus supplanting the professional judgment of reviewers, and QualMed's protest focused on this aspect. Subsequently, however, the agency changed its position and agreed that the InterQual criteria were to serve as guidelines, which could be supplemented by the reviewers' medical judgment. QualMed did not withdraw this protest ground, however, and appears to contend that the RFP should not mandate any use of InterQual criteria.

Utilization review is a sensitive and controversial area: advocates argue that it can lead to substantial cost savings, while critics respond that utilization review interferes with treating physicians' clinical decision-making and may impede patients' access to care. Managed Health Care: Effect on Employers' Costs Difficult to Measure, supra. Moreover, it is not clear that utilization review necessarily leads to large savings, particularly in light of the higher administrative costs required to implement that review. Id. In light of the sensitiveness of this area, we find reasonable the agency's concern that its contractor may so aggressively review and manage utilization as to unduly restrict beneficiaries' access to health care. The challenged RFP restrictions are thus reasonably related to the agency's need to protect beneficiaries' access to appropriate health care.

Specifically, the requirement that a two-tiered review structure be used is reasonably related to that need. While QualMed correctly points out that some utilization review organizations rely on a single-tier-review structure, the fact is that most do not. Utilization Review: Information on External Review Organizations, GAO/HRD-93-22FS, November 1992. In any event, it is not unreasonable for the agency to prohibit the contractor from denying the care recommended by the attending physician unless two tiers of reviewers agree that the care is inappropriate. While QualMed may feel that this approach demonstrates excessive caution, the decision about how much caution is appropriate in utilization review is properly left to the agency's discretion.

With respect to the requirement that second-tier reviewers practice in the same specialty field as the attending physician, QualMed is not alone in its concern that same-field specialists may approve care more readily than generalists or related-field practitioners, whether out of similarity of approach or other reasons. Nevertheless, it is not unreasonable for the agency to decline to permit a doctor outside the specialty field to deny care that a specialist has determined is appropriate. In this regard, we note that accepted practice appears to be use of same-specialty practitioners to perform review, particularly in higher levels of review or appeal, based on the expectation that a specialist in the same field as the attending physician will be knowledgeable in the area of expertise at issue and thus will be able to provide an informed opinion about the appropriateness of the recommended care. Id. We therefore conclude that the requirement for same-specialty review is reasonably related to the agency's legitimate needs.

Concerning the requirement that InterQual criteria sets be used in the review process, OCHAMPUS argues that it has a legitimate need to have a uniform set of criteria used throughout the country. Although there will be differences in care recommended by attending physicians and approved (or denied) by reviewers due to the differing judgments of individual practitioners, it is reasonable for the agency to require that all reviewing personnel initially turn to the same guidelines. Doing so may be expected to facilitate the supervision of the contractor, the handling of appeals of denials (which, as explained above, are adjudicated by personnel independent of the CHAMPUS contractor), and the defense of decisions challenged by dissatisfied beneficiaries.

Among criteria sets, the choice of InterQual appears reasonable. While some review organizations have developed their own criteria for making utilization review decisions, commercially available criteria sets are widely relied upon, and InterQual appears to be among the most widely used of those commercial products. Id. We therefore conclude that mandating reliance on one criteria set is reasonably related to the agency's need for uniformity nationwide and that, among such sets, the choice of InterQual is reasonable.

We next turn to the question of nonavailability statements and the RFP methodology for reducing the contract price as the number of NASs issued per capita for inpatient services declines. As explained above, NASs are issued when care is needed that an MTF is unable to provide, either because it does not offer that care at all or because, while it generally offers the care, its work load does not allow it to provide the care to the beneficiary at the time needed. QualMed alleges that the bulk of the reduction in the number of NASs will be due to the contractor's utilization management efforts, and that it is "perverse" for OCHAMPUS to punish the contractor for such efforts by reducing its compensation.

The protester and agency agree that, at least in theory, reduction in the number of NASs issued could be due to the efforts of either the contractor or the MTFs. The parties also agree that, in the past, MTFs have performed little utilization management and that reducing the contract price due to a decline in NASs assumes that MTFs will now be responsible for progress in this area. OCHAMPUS defends its expectation of a change in MTF practice by explaining that it has shifted from a system under which MTF budgets were tied to work load (thus removing budgetary constraints on the amount of care provided) to a system of capitation under which the MTF must live within a fixed budget (thus creating an incentive for effective utilization management). The agency also notes that MTFs provide approximately two-thirds

of the care to CHAMPUS beneficiaries, and that the MTFs, not the contractor, are in the best position to implement utilization management for that care.

QualMed does not advocate simply increasing the compensation to the contractor for each decrease in the number of NASs. Instead, the protester argues that OCHAMPUS should establish a mechanism to keep track of each NAS that is avoided and decide, as to each "avoidance," whether the contractor or the MTF should receive credit for it; the contract price will be adjusted accordingly (upwards, if the contractor deserves credit; downwards, if the MTF's efforts led to the reduction). When pressed by the agency to explain how this mechanism would work, QualMed stated that "an independent professional (e.g., a major accounting firm) could decide (this would be a binding, nonchallengeable determination) how much of the reduction should be credited to the MTF and the awardee."

Based on our review of the record, we conclude that reducing the contract price where the number of NASs drops is reasonable, since NASs can be expected to translate into contractor costs for health care provided by civilian providers, and fewer NASs should thus mean lower costs for the contractor. Irrespective of who was responsible for the decrease in the number of NASs, the decrease should result in lower costs to the contractor. The resulting reduction in the contract price will thus not reduce the contractor's net income and will, at most, pass through to the government savings that may be attributable to the contractor's efforts. Although QualMed argues that reducing the contract price due to a reduction in the number of NASs will "punish" a contractor for effective utilization management, the protester has not shown that the provision will, in fact, penalize the contractor in any way.

What we are left with, again, is QualMed's disagreement with the agency's approach to utilization management. Based on Department of Defense policy decisions designed to encourage MTFs to engage in more aggressive utilization management, OCHAMPUS chose a particular mechanism to link the number of NASs to the contract price adjustment process. QualMed's skepticism about future MTF utilization management is speculative and cannot serve as the basis for finding the challenged RFP provision unreasonable. Moreover, the alternative mechanism that QualMed advocates--having an outside accounting firm review reductions in NASs to decide who should receive credit for them--risks making the process yet more complicated, without necessarily reaching a more

equitable result or satisfying any party.[7] We conclude that the challenged NAS provision in the RFPs is not improper.

Finally, we turn to QualMed's contention that the RFP fails to adequately explain how the agency will evaluate proposals. In particular, the protester alleges that the RFP does not identify the relative importance, for purposes of proposal evaluation, of the amount of equity that offerors agree to put at risk, and does not disclose the independent government cost estimate (IGCE) for health care costs, detail the way in which the IGCE was calculated, or explain when the agency evaluators will base their evaluated cost for a proposal on the offeror's estimate of expected health care costs rather than the IGCE.

A solicitation must clearly advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of the various evaluation factors. This does not mean, however, that a solicitation must disclose the precise numerical weights that will be used in the evaluation. A.J. Fowler Corp.; Reliable Trash Serv., Inc., B-233326; B-233326.2, Feb. 16, 1989, 89-1 CPD ¶ 166. Rather, the solicitation must contain sufficient information to enable offerors to compete intelligently and on an equal basis. University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210.

In our view, the RFP language provides offerors with sufficient information relating to the evaluation factors, the relative importance of those factors, and the evaluation methodology. The agency concedes that the RFPs do not precisely identify the weight that will be assigned to an offeror's proposed amount of equity at risk, and that the importance of equity at risk will vary, depending on the agency's determination of the proposal's cost realism.[8] Whatever the uncertainty about the precise weight to be assigned, however, we find that, in the context of these

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[7]For example, QualMed does not explain why, under the scheme it advocates, the contractor will be precluded from challenging the independent professional's determination about how much of the credit for reducing NASs should go to the contractor.

[8]That is, where the agency judges a proposal to be realistic as to anticipated health care costs, the amount of equity that the offeror proposes to put at risk may play a minor role in proposal evaluation; while the amount of equity put at risk may be significantly more important where the agency has concern about the proposal's cost realism.

procurements, the solicitations provide adequate guidance about the evaluation of equity at risk to allow offerors to prepare proposals intelligently.

As for the IGCE and its use in the evaluation of proposals, we note initially that there is no obligation that an agency make public its estimate of expected costs, or explain precisely how it was calculated, and that such information is generally not disclosed in solicitations. These RFPs do detail the cost factors that form the components of the IGCE and explain that the IGCE will be constructed based on the government's estimate of those cost factors, including the ones over which the contractor is likely to have control as well as those over which the contractor is likely to have little or no control. The RFPs also commit the government to evaluating the realism of each proposal's cost estimates for factors under the contractor's control, based on a comparison with the government estimate for those factors and the government's judgment about "the likely trends under the offeror's approach." That is, the government will not simply substitute its IGCE figure for cost factors for the offeror's; instead, the government will judge the realism of each proposal's estimates for the various controllable cost factors based on the technical approach set forth in the proposal.[9] In the context of these solicitations and their description of the evaluation factors and subfactors, this guidance should enable offerors to compete intelligently and on an equal basis.

The protests are denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel

[9]One of the grounds for our sustaining the earlier protests in the California/Hawaii procurement was the agency's unexplained rejection of offerors' estimates for all cost factors, and their replacement by the government's estimates in the calculation of expected overall health care costs; this represented an unsupported assumption that total health care costs would be identical for every offeror. Foundation Health Fed. Servs., Inc.; QualMed, Inc., supra.

Comptroller General
of the United States

Washington, D.C. 20548

257207

Decision

Matter of: Pershield, Inc.

File: B-256827

Date: July 27, 1994

Ronald A. Schechter, Esq., Drew A. Harker, Esq., and Michael E. Lackey, Jr., Esq., Arnold & Porter, for the protester.
Jeffrey I. Kessler, Esq., and Capt. David B. Freeman, JAG., Department of the Army, for the agency.
Christine F. Davis, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A procuring agency properly considered a misplaced bid modification that resulted in the low bid, where the record establishes that the modification arrived at the proper office of the procuring agency 2 days before bid opening and remained in the agency's possession until it was discovered before award.

DECISION

Pershield, Inc. protests the proposed award of a contract to Eastern Canvas Products, Inc., under invitation for bids (IFB) No. DAAA09-93-B-0499, issued by the Department of the Army, for the procurement of 256,400 chemical and biological hoods. Pershield objects to the Army's acceptance of Eastern's allegedly late bid modification, which made Eastern's bid lower than Pershield's.

We deny the protest.

The IFB was issued on September 10, 1993, with an October 26 bid opening date. The IFB advised bidders to submit their bids to a specific location, depending upon the delivery method selected. Bidders using an express mail delivery service were to send their bids to the following address at the headquarters of the issuing activity:

HQ AMCCOM, Procurement Directorate, Mailroom
Attention: AMSMC-PAM-AS
Building 350, 4th Floor NE Bay
Rock Island, IL 61299-6000

The IFB also directed all bidders to affix to their outer bid envelopes an enclosed red label identifying their bid. Specifically, bidders were directed to enter on the label a description of the supplies for which the bid was submitted, the solicitation number, and the time and date of bid opening.

The agency subsequently issued five amendments to the IFB, the first of which extended the bid opening date indefinitely. On February 17, 1994, the Army issued amendment No. 0004, which set bid opening at 2 p.m. on March 10. On March 9, the day before bids were due, the Army issued amendment No. 0005, which extended bid opening to 2 p.m. on March 17.

Seven bidders, including Eastern and Pershield, submitted bids by the 2 p.m., March 17 bid opening. The contract specialist reviewed the bid packages and recited the prices to the recorder. As recited, Pershield submitted the apparent low bid at $11.84 per unit, and Eastern submitted the apparent next low bid at $12.90 per unit.[1]

In an affidavit submitted to our Office, the contract specialist explained that, shortly after bid opening, he received a telephone call from an Eastern representative asking for the bid results. When the contract specialist advised that Pershield submitted the low bid at $11.84 per unit, the Eastern representative responded that he had sent a bid modification on March 14 via U.S. Postal Service Express Mail, lowering Eastern's bid price to $11.33 per unit. The contract specialist states that he then reexamined the Eastern bid documents present at bid opening, and that these documents included a letter from Eastern, dated March 14, which acknowledged receipt of amendment No. 0005 and also reduced Eastern's bid to $11.33 per unit. The contract specialist states that he glanced at this letter at bid opening, but mistook it for a cover letter acknowledging amendment No. 0005 and did not realize that it contained modified pricing.[2] The agency wishes to make

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[1]More accurately, Pershield bid $11.84 per unit, including the costs of first article testing, and $11.83 per unit, assuming it qualified for a waiver of the first article testing requirement under the IFB. Eastern did not differentiate its price to account for first article testing costs.

[2]The contract specialist's account is corroborated by an affidavit submitted by a student aid present at bid opening, who states that she saw the letter, and the modified pricing, but did not alert the contract specialist to his

(continued...)

award to Eastern based upon this bid modification, arguing that there was no late receipt, only late discovery, of the bid document.

A misplaced bid may be considered for award where (1) the bid was received at the installation prior to bid opening, (2) it remained under the agency's control until discovered, and (3) it was discovered prior to award. Kuhnel Co., Inc., 70 Comp. Gen. 131 (1990), 90-2 CPD ¶ 455. In determining whether such a bid may be considered, the time of receipt at the installation must be established. Id.; Isometrics, Inc., 71 Comp. Gen. 88 (1991), 91-2 CPD ¶ 477. Federal Acquisition Regulation § 14.304-1 provides that the only acceptable evidence to establish the time of receipt is the time/date stamp of the installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

The Army has produced the two express mail envelopes used by Eastern to transmit the Eastern bid documents. Eastern addressed both envelopes to the proper address at the issuing activity and affixed completed red labels to both envelopes identifying its bid, the solicitation, and the bid opening date. The first envelope, which was submitted in response to the March 10 bid opening, bears a U.S. postage label dated March 7, and two stamps showing receipt of the document on March 8. In his affidavit, the contract specialist states that this envelope contained Eastern's bid of $12.90 and all amendments issued to date. The second envelope, which was submitted in response to the amended March 17 bid opening, bears a U.S. postage label dated March 14, and two stamps showing receipt of the document on March 15. The agency states that one of the March 15 "received" stamps, which notes a time of 7:30 a.m., is that of the agency mailroom; the other "received" stamp, which notes a time of 12:30 p.m., is that of the Bid Opening Section of the agency's Procurement Directorate. The contract specialist states that this envelope contained the Eastern bid modification.

We find that the Army properly considered Eastern's bid modification. The time/date stamps on the envelope of Eastern's bid submission for the March 17 bid opening establish that the bid modification was received in the Bid Opening Section of the Procurement Directorate by 12:30 p.m. on March 15, 2 days before bid opening. Thus, the record establishes that the bid modification arrived at the proper

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[2](...continued)
oversight when he recited Eastern's bid price as $12.90 in deference to his experience.

office prior to bid opening and remained within the agency's control until its discovery prior to award. See Kuhnel Co., Inc., supra.

Pershield argues that, even if the bid was timely, "the integrity of the sealed bidding system requires that a bid that is not read at bid opening must be treated as presumptively late." We fail to see how the competitive system would be compromised by acceptance of a bid which was present at bid opening, but mistakenly overlooked. See Leland and Melvin Hopp, Partners, B-211128, Feb. 15, 1984, 84-1 CPD ¶ 204. Finally, while Pershield suggests that the bid envelope might not have contained Eastern's bid modification, the envelope was labeled as containing a bid in response to the March 17 bid opening, and there is no evidence to suggest that it contained other than the modified Eastern bid documents.

The protest is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel

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