

Uzereme for
PC-II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

B-219430

FILE:

Contract Services Company, Inc.

DATE:

October 28, 1985

MATTER OF:

DIGEST:

1. Protest challenging agency's decision not to award a contract under a solicitation issued in accordance with the procedures set out in OMB Circular A-76 falls within the definition of protest in the Competition in Contracting Act since the act does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition is contemplated when a solicitation is issued for cost comparison purposes. Review of such a protest is consistent with congressional intent to strengthen existing GAO bid protest function.
2. The fact that historical data contained in an IFB may have been inaccurate and thus not suitable alone as a basis for estimating performance costs is not a sustainable protest where it is not shown that data provided was not the best objective data available at that time.
3. Neither government nor bidders are required to base their costs on historical data alone since both may rely on the experience and expertise of their employees and managers to determine the least costly method of performing the statement of work.
4. Government is not bound to utilize historical cost data for materials where estimate of additional savings generated by switch to new procurement method is not found unreasonable.

Contract Services Company, Inc. (CSC), protests the Department of the Navy's determination to retain in-house the Transportation, Special and Heavy Equipment Operations and Maintenance function at the Public Works Center, San Francisco Bay, Oakland, California. This determination,

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made in accordance with Office of Management and Budget (OMB) Circular A-76 procedures, was based on a comparison of CSC's bid submitted in response to invitation for bids (IFB) No. N62474-85-B-1655, with the Navy's cost estimate. The cost comparison showed that continuing in-house performance would cost the government approximately \$124,000 less than contracting with CSC. CSC argues that the Navy's computation of its in-house estimate contains several errors which warrant the reversal of this determination. We disagree, and deny the protest.

Jurisdiction

Initially, we note that the Navy has not submitted a substantive report addressing the issues raised by CSC. Rather, the Naval Facilities Engineering Command (NAVFAC) responded to our request for an agency report by asserting that our Office lacks jurisdiction to consider this matter. NAVFAC argues that a protest concerning an agency's failure to award a contract does not fall within the statutory definition of "protest" contained in the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1187 (1984). The Navy contends that any objection to the cancellation of a solicitation, including those issued in connection with an OMB Circular A-76 cost comparison, is no longer within our jurisdiction, therefore, and should not be considered.

CICA defines protest as:

". . . a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551(1), as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199.

NAVFAC, in effect, is arguing that by canceling a solicitation or deciding to retain a function in-house, there is no longer a "proposed award" and, therefore, there is no statutory basis to consider the protest. However, we do not interpret CICA so narrowly as to require that an award be proposed at the time a protest is filed in order to be considered by our Office. In issuing a solicitation, an agency proposes to award a contract under the terms and conditions set forth in the solicitation and bids are

submitted on that basis. In our view, a "proposed award" within the statutory definition is contemplated under these circumstances and, therefore, a timely protest of an agency's action concerning the solicitation, including its cancellation, will be considered.*

Furthermore, we believe that in enacting the bid protest provisions of the Competition in Contracting Act, Congress intended that our Office continue to decide protests involving the cancellation of solicitations in general as well as those involving A-76 cost comparisons. We note that CICA defines an interested party as a bidder or offeror whose economic interest is not only affected by an award, but also by the failure to award a contract. See 31 U.S.C. § 3551(2) as added by CICA. Before the enactment of CICA, our Office routinely reviewed bid protests involving cancellations and faulty cost comparisons and one of the express purposes of the act was to strengthen our existing bid protest function. See e.g. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD ¶ 38; H.R. Rept. No. 861, 98th Cong., 2d Sess. 1435 (1984). In view of the continuing potential for adverse impact on the competitive system if, after an agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the award decision, we

*NAVFAC also asserts that it is precluded from implementing any corrective action recommendation issued by our Office because, by regulation based on the Supplement to OMB Circular A-76, part I, ch. 2, para. I, the A-76 appeal decision is not subject to negotiation, arbitration or agreement. We have previously concluded that this provision does not preclude our Office from considering a protest from a bidder alleging that its bid has been arbitrarily rejected. Alliance Properties, Inc., B-219407, Sept. 18, 1985, 85-1 CPD ¶ _____. Moreover, the Navy decision to follow our recommendation is irrelevant in defining our authority to hear the matter. Furthermore, we do not believe that the regulation can be applied to prevent agencies from acting in accordance with our recommendation. Under CICA, agencies are required to consider our recommendation and file a report with our Office within 60 days if they are not followed. 31 U.S.C. § 3554(e)(1) as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, 1202. In our view, this provision obligates agencies to consider our recommendation in good faith and a regulation cannot be construed to relieve agencies of this responsibility.

will continue to review such matters. Cf. Alliance Properties, Inc., B-219407, Sept. 18, 1985, 85-2 CPD

¶ ____.

Cost Comparison

CSC first questions the Navy's estimate for personnel staffing and overtime. CSC states that its cost estimate was based on the historical data provided by the Navy in the IFB. CSC asserts that the data showed that in fiscal year (FY) 1983 the Navy had 28 full-time employees (FTEs) in the Crane Rigging Branch (CRB), 13 FTEs in the Construction Equipment Branch (CEB) and needed 17.25 percent in additional overtime hours to meet the requirements in the CRB. CSC states that the Navy's estimate included only 20 FTEs in the CRB, 5 FTEs in the CEB and estimated 6.58 percent for overtime in the CRB. CSC argues that as a result, the Navy's estimate was not based on the same statement of work (SOW) that bidders utilized to calculate their costs.

CSC also contends that the 12-percent discount used by the Navy in calculating its material costs for FY 1985 was excessive. CSC argues that the value of this discount is approximately \$200,000, that it was based on only one vendor's estimate and that there is not sufficient evidence to show that the required material can actually be purchased at that cost. In addition, CSC argues that the Navy improperly deducted the residual value of assets from asset acquisition costs, that the Navy did not include an estimate for the repair and maintenance of certain vehicles and that the Navy unreasonably attributed no general and administrative (G&A) overhead to the cost of in-house performance. CSC asserts that a recalculation will clearly demonstrate that it was the low bidder and that it should be awarded the contract.

Due to NAVFAC's failure to submit a report addressing the issues raised by CSC, our review is confined to the record established by the protester, which consists of CSC's agency appeal, the Navy's response and limited additional documentation. However, the protester still bears the burden of proof and must demonstrate not only that the agency failed to follow mandated procedures, but that the failure materially affected the cost comparison's outcome. JL Associates, Inc., B-218137, May 6, 1985, 85-1 CPD ¶ 501; Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317. Although under these circumstances the protester may meet its burden by presenting sufficient evidence to raise a reasonable doubt as to the validity of the cost comparison's result, see e.g. MAR, Inc., Sept. 27, 1982, 82-2 CPD ¶ 278,

we find that CSC has not met this burden and are unable to conclude that the Navy's cost comparison deviated materially from applicable cost comparison procedures.

The record shows that the Navy's personnel estimates were based on the most efficient organization (MEO) necessary to accomplish the requirements of the SOW. Also, the decreased overtime percentage was based on FY 1984 data derived from MEO tracking reports. Although the Navy's estimate for both categories differed from the historical estimates provided in the IFB, neither CSC nor the Navy was required to base its cost on historical information alone. Pacific Architects and Engineers, Inc., B-212257 July 6, 1984, 84-2 CPD ¶ 20. The Navy is not prohibited from using available techniques to calculate the most efficient, least costly organization for performing the SOW and the record indicates that this was the approach utilized by the Navy. Concerning the 1983 overtime percentage which was provided CSC, although it may have been inaccurate, there is no evidence that it was not the best estimate available. The SOW, not historical data, is the principal tool for use in calculating contract costs and CSC has not shown that the in-house estimate in these areas does not accurately reflect the in-house costs which will be incurred by the Navy to perform the SOW. See E.C. Services Co., B-218202, May 23, 1985, 85-1 CPD 594; Joule Maintenance Corp., B-208684, Sept. 16, 1983, 83-2 CPD ¶ 333.

With respect to the 12-percent discount for material costs, the Navy states that the savings were generated by a switch to a more efficient method of procurement. The record shows that the Navy intends to use an indefinite-delivery-type contract and that two major vendors were surveyed and responded by providing signed written quotes as to the discounts which would be applicable. Based on an analysis of the information obtained, the Navy determined that the 12-percent discount for materials was justified. Although CSC argues that the Navy should be required to utilize historical data, the Navy need not use such data where it would not accurately reflect the costs which would be incurred. E.C. Services Co., B-218202, supra. CSC has submitted no evidence which disputes the Navy's determination and, based on the record, we cannot conclude that the estimate of the savings generated by the new procuring method is inaccurate.

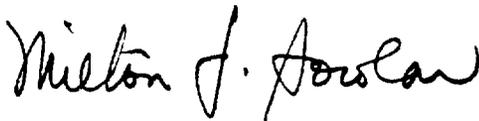
We also find the remaining issues raised by CSC to be without merit. The Cost Comparison Handbook, Page IV-20, para. F.2.c, only states that the residual value of assets

may be carried at zero, but does not prohibit its calculation. The Navy states that the assets in question are normally sold by auction and the Useful Life and Disposal Value Table, appendix "C" of the Cost Comparison Handbook, was used to calculate residual value. That table indicates the disposal value as a percent of acquisition cost for a variety of assets, and we find nothing improper in the Navy's estimating the residual value of its assets or in using appendix "C" as a basis for its calculations.

Concerning CSC's contention that the in-house estimate did not include certain maintenance and repair costs, the Navy states that these costs were included in the estimate for personnel and material costs. In addition, the Navy may properly attribute no G&A to the cost of in-house performance unless it is determined that contracting out would eliminate a whole man-year of work from the outside supporting offices. Samsel Services Co., B-213828, Sept. 5, 1984, 84-2 CPD ¶ 257. Absent such an impact, the government's cost essentially is viewed as the same whether or not a contract was awarded. The Navy states that all affected departments that would provide support were surveyed and in every case there was not one position which could be eliminated. While CSC argues that this determination is unreasonable, we have no basis to take legal objection to the Navy's computation of its G&A as zero. Samsel Services Co., B-213828, supra.; Facilities Engineering & Maintenance Corp., B-210376, Sept. 27, 1983, 83-2 CPD ¶ 381.

Finally, we note that we have also reviewed the other areas of disagreement between CSC and the Navy as evidenced by CSC's appeal and the Navy's appeal decision. However, in no case are we able to conclude that the Navy deviated materially from the applicable cost comparison procedures.

The protest is denied.

for 
Comptroller General
of the United States