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Decision

Matter of: IT Corporation

File: B-288507

Date: September 7, 2001

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DIGEST

Protest objecting to possible agency actions in response to the decision of an administrative appeal authority under Office of Management and Budget Circular A-76 is dismissed as premature, where the appeal authority upheld the protester's appeal and remanded the matter to the agency to take corrective action and the agency has not yet determined what action it will take.

DECISION

IT Corporation protests the actions of the Department of the Navy under request for proposals (RFP) No. N68711-00-R-4101, which provided for a cost comparison pursuant to Office of Management and Budget (OMB) Circular No. A-76 to determine whether to retain in-house or contract out performance of public works services at the Naval Air Weapons Station, China Lake, California.

We dismiss the protest as premature.

The RFP was issued as a part of a public/private cost comparison to determine whether accomplishing the specified work under contract by government performance was more economical than retaining the work in-house.¹ In response to

¹ The procedures governing decisions to transfer work from in-house to contractor performance (or vice versa) are set forth in OMB Circular No. A-76 and the Revised Supplemental Handbook, which have been made expressly applicable to the

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the RFP's performance work statement, agency personnel prepared an in-house plan consisting of a management plan, a technical performance plan, and an in-house cost estimate. The Naval Audit Service, acting as the "independent review officer," certified that the in-house plan provided sufficient hours to perform the performance work statement requirements. Offers were received from a number of private-sector offerors, including IT. Discussions were conducted, and best and final offers received. IT was selected to compete against the agency's most efficient organization (MEO). As a result of the cost comparison between the MEO and IT, the Navy tentatively decided that performance in-house would be less costly (after the appropriate adjustments were made) than performance by IT.

IT appealed the cost comparison to the agency's appeal authority. In its administrative appeal, IT complained that the MEO's technical performance plan did not address all the requirements of the performance work statement, that the in-house cost estimate did not include costs associated with performance commitments in the technical performance plan, that the in-house plan significantly understated the level of effort required to perform many of the performance work statement requirements, that the Navy "failed to level clear quality differences between the IT Corporation and the MEO," and that the Navy (in making the adjustments called for by Circular A-76) applied excessive contract administration and one-time conversion costs to IT's proposal and failed to provide sufficient credit to IT for federal taxes paid. Appeal of IT Corp. at 2.

The Navy's administrative appeal authority upheld IT's appeal, finding that "several of the questions raised by IT Corporation should be sustained in IT's favor." Appeal Decision at 2. The appeal authority, however, did not specifically identify the issues sustained or their cost impact. With respect to IT's complaint that the in-house plan

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Department of Defense and its military departments and agencies. See 32 C.F.R. § 169a.15(d) (2001). The process set out in the Circular and the Supplemental Handbook broadly encompasses the following steps in the conduct of a public/private competition. First, after the performance work statement has been drafted, the agency ensures that the government's in-house plan complies with that performance work statement. Supp. Handbook, part I, ch. 3, ¶ I. Second, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement is conducted. Third, if that competition is done on a "best value" basis (that is, evaluating non-cost factors on a comparative basis and allowing the possibility of a cost/technical tradeoff), the government's technical performance plan is compared with the winning private-sector offer to assess whether or not the same level of performance and performance quality will be achieved--and if it will not, to make all changes necessary to meet the performance standards of the private-sector proposal. Id. ¶¶ H.3.d, e. Finally, once the playing field is thus leveled, there is a cost comparison (with certain required adjustments) between the private-sector offer and the in-house cost estimate. Id. ¶¶ H, J.

significantly understated the level-of-effort required to satisfy the performance work statement requirements,² the appeal authority found that in 14 areas there were “large disparities in the bases that were used in judging what would be realistic levels of performance.” Id. at 3. That is, the appeal authority found that the independent review officer (in reviewing the in-house offer) and the evaluation board (in reviewing the private-sector offers) had used substantially different judgments as to realism of the proposed levels of effort. In one example, the appeal authority noted that, although IT proposed a higher level of effort than had the MEO (whose level of effort was found realistic by the independent review officer) to perform a particular function, the evaluators found IT’s proposed level of effort to be unrealistically low. As a result, IT was encouraged in discussions to substantially raise its level of effort for the function, which resulted in IT’s level-of-effort for this work being substantially higher (and therefore presumably far more costly) than that estimated in the in-house plan. Id. at 4. The appeal authority also found that, in addition to the evaluators’ and independent review officer’s application of different estimating methods and estimates of labor hours required to perform the work, there was “evidence of vast disparities that indicate that the requirements in the [performance work statement] were not understood by the offerors.” Id. at 5.

The appeal authority remanded the cost comparison back to appropriate Navy officials with instructions to make corrections and complete the competition within 1 year. Among other things, the team that prepared the performance work statement was directed to review that work statement to ensure that it accurately and unambiguously stated the requirements of the public works function. If modified, the performance work statement was to be re-certified, and the private-sector offeror(s) were to submit new proposals and the in-house team was to prepare a new plan. The procuring activity was also directed to “formulate a process which will preclude the use of disparate evaluation techniques,” and ensure a level playing field and a fair and reasonable competition. Finally, the source selection authority was to ensure that the level of performance and quality proposed by the contractor was achieved by the MEO.

IT protested to our Office, complaining that the appeal authority had failed to specifically decide the issues raised in IT’s administrative appeal and had improperly decided to reopen the private-sector competition.

The Navy requests that we dismiss the protest because the agency has not yet determined what “corrective action” it will take in response to the appeal authority’s decision. Specifically, the Navy notes that, depending upon the results of its review of the matter, and in accordance with the appeal decision, the agency may take one of three different courses of action.

² This protest allegation identified 16 separate performance work statement functions where IT asserted that the in-house cost estimate was unrealistically low.

(1) If, from its review, the Navy determines that the solicitation and performance work statement were defective in a way that materially affected the underlying private-sector competition, the agency will cancel the solicitation and issue a new one incorporating the necessary changes.

(2) If the Navy determines that the solicitation and performance work statement were not defective in any material way, so that the private-sector competition was not affected, but that the public/private cost comparison was significantly flawed, it may conduct a new public/private competition, making any needed non-material changes to the solicitation and performance work statement, obtaining a revised proposal from IT and a revised plan from the in-house team, and conducting a new cost comparison.

(3) The agency may decide that the solicitation and performance work statement were not defective and that the problems in the cost comparison identified in the appeal decision do not require further competition between IT and the MEO, and, in this case, the Navy will correct the problems in the cost comparison and issue a new tentative decision.

The Navy states that it will decide within 30 days which course of action it will pursue.

IT objects to dismissal of its protest, contending that the Navy's statement of possible corrective actions does not provide "any hint of what the Navy actually intends to do as corrective action (if anything). . . . Thus[,] we remain where we were at last week--with no representations about what the Navy needs or plans to do regarding the Performance Work Statement that merits dismissal of this action as premature." Letter from IT to GAO (Aug. 31, 2001) at 1-2. IT also complains that, with respect to the Navy's second possible course of corrective action, if the performance work statement does not need to be materially amended, there is no reasonable basis to allow the MEO to prepare a new in-house plan. IT also argues that the Navy personnel, reviewing the performance work statement and deciding upon the corrective action to be taken, may have an organizational conflict of interest.

Protests that merely anticipate improper agency action are premature. See Saturn Indus.--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5. Here, the Navy has, as the protester acknowledges, not yet decided what action or actions the agency will take in response to the appeal authority's decision, so that there is no agency action for our Office to review. We share the protester's concern about the process being drawn out unnecessarily, and in this regard it is helpful that the Navy appears committed to moving forward expeditiously. We recognize, however, that the issues

identified by the appeal authority are significant, and we believe that the agency should have a reasonable opportunity to review the appeal authority's decision to determine its course of action. Once the Navy decides what action to take in response to the appeal authority decision, that decision may form the basis for a valid bid protest, which IT or another interested party may file with our Office at that time.

The protest is dismissed.

Anthony H. Gamboa
General Counsel