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Decision

Matter of: NVT Technologies, Inc.

File: B-289087

Date: January 3, 2002

John R. Tolle, Esq., William T. Welch, Esq., and Jerome H. Gress, Esq., Barton, Baker, McMahon & Tolle, and Jeffrey A. Lovitky, Esq., for the protester.

Richard G. Welsh, Esq., and Scott W. Johansen, Esq., Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency decision to retain base operations and maintenance support services in-house as a result of a cost comparison pursuant to Office of Management and Budget Circular A-76, which alleges that the in-house cost estimate failed to use predetermined or “plug-in” material costs that private-sector offers were required to offer is denied, where the agency states that the proposed in-house material costs were derived from the same historical data from which the plug-in prices were calculated and it is undisputed that the in-house material costs were higher than the plug-in costs used by the protester.
 2. Agency’s determination, under a cost comparison pursuant to Office of Management and Budget Circular A-76, that the “most efficient organization” for in-house performance identified and stated costs for all positions necessary to perform the performance work statement requirements was reasonable.
 3. Protest challenging a cost comparison pursuant to Office of Management and Budget Circular A-76, which alleges that the amount of contract administration costs added to the protester’s proposed price was unreasonable because the grade structure of contract administrators was too high, is denied, where the protester did not show that the agency’s explanation for the grade structure was unreasonable.
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DECISION

NVT Technologies, Inc. protests the decision of the Department of the Navy not to award a contract to NVT under request for proposals (RFP) No. N68711-01-R-5101, but instead to continue in-house performance of base operations and maintenance

support services at the Marine Corps Recruit Depot (MCRD) in San Diego, California. The decision to retain the services in-house was a result of a cost comparison pursuant to Office of Management and Budget (OMB) Circular No. A-76, which compared NVT's proposal to perform the work against the quality assurance surveillance plan, transition plan, technical performance plan, and management plan of the agency's "most efficient organization" (MEO).¹

We deny the protest.

BACKGROUND

The RFP, issued as a small business set-aside, provided for the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for base operation and maintenance support services for a base year, four 1-year options, and three 1-year award terms.² The core services solicited included facilities maintenance and repair, utilities operations and maintenance, facilities planning, engineering, and environmental support services.

Offerors were informed that the RFP was issued as part of a government cost comparison to determine whether accomplishing the specified work under contract or by government performance was more economical. If government performance was determined to be more economical, then no award under the RFP would be made and the solicitation would be canceled.

The RFP provided that the private-sector competition would begin with the submission of "statements of qualifications" from interested offerors and that these submissions would be evaluated under two factors: corporate experience and past

¹ The procedures for determining whether the government should perform an activity in-house, or have the activity performed by a contractor, are set forth in OMB Circular A-76 and the RSH, which have been made expressly applicable to the Department of Defense and its military departments and agencies. *See* 32 C.F.R. § 169a.15(d) (2001). The MEO reflects the in-house management plan, which is prepared by a study team and sets out the changes that will be made to the current organization. Like the offerors' proposals, the MEO's in-house plan is required to satisfy the performance work statement (PWS) requirements. OMB Circular No. A-76 Revised Supplemental Handbook (RSH), app. 1, Definition of Terms, at 35.

² Award terms are an incentive to the contractor to motivate and reward high performance. The terms may be exercised unilaterally by the agency, provided that, at the time of each award term determination, sufficient funds are available, the requirements provided fulfill an existing need at a fair and reasonable price, and the contractor has earned at least a "very good" overall performance rating. RFP § G at 91.

performance. The solicitation provided that, after evaluating these statements, the Navy would tell each offeror whether it was considered “to be a viable competitor.” Whatever the agency’s advice, all firms submitting statements of qualification were permitted to continue in the competition. RFP §§ L, M at 118, 125.

Those firms that elected to continue to participate in the private-sector competition would be permitted to schedule a site visit to inspect where the contract services would be performed and determine the “general and local conditions that may affect the cost of contract performance.” RFP § L at 116. The RFP provided that, after the site visit, offerors would submit technical and price proposals and provide an oral presentation. The RFP stated that the successful private-sector offeror could be selected on the basis of a cost/technical tradeoff based upon the following factors: (1) the statement of qualifications factors, (2) technical and management approach, and (3) price. Factors (1) and (2) were stated to be of equal importance, and both factors combined were stated to be approximately equal to price. RFP § M at 126.

The Navy received statements of qualifications from three offerors, including NVT. NVT’s statement was evaluated by the agency’s quality evaluation board (QEB) as acceptable for corporate experience and past performance. Agency Report, Tab 4, Pre-Negotiation Business Clearance Memorandum, attach. A, QEB Report (Dec. 22, 2000), at 7. Only NVT was found to be a viable competitor, and only NVT elected to continue to participate in the remainder of the competition. Agency Report at 2.

Prior to the closing date for receipt of NVT’s technical and price proposals, the Naval Audit Service, as the independent review official (IRO), certified that the MEO study team’s management plan satisfied the PWS requirements and that the in-house cost estimate was reasonable. Agency Report, Tab 6, IRO Certification (Feb. 28, 2001). The management plan and in-house cost estimate were then sealed by the agency.

NVT’s technical and price proposals were submitted and evaluated by the agency’s technical evaluation board (TEB) and price evaluation board (PEB), respectively. The TEB found that NVT’s initial technical proposal was “marginal” overall and that NVT had “failed to address many of the RFP requirements in enough detail . . . to make a determination as to whether or not the Offeror could accomplish the work required.” Agency Report, Tab 4, Pre-Negotiation Business Clearance Memorandum, attach. D, TEB Report (Mar. 16, 2001), at 2. The PEB found that NVT’s price proposal lacked sufficient information to determine price reasonableness, completeness, and reasonableness. Agency Report at 2.

The Navy conducted two rounds of discussions with NVT, and received revised technical and price proposals. Agency Report at 2. NVT’s final revised proposal was found to be acceptable under the statement of qualifications factor and the technical and management approach factor and to have no evaluated strengths. Agency Report, Tab 10, Post-Negotiation Business Clearance Memorandum, attach. D, Source Selection Board Report (July 6, 2001) at 3-7. The PEB found NVT’s proposed

price to be realistic, complete, and reasonable. Id. at 6. NVT's proposal was selected as the private-sector offer to compete against the in-house plan.

After selection of NVT's offer, the in-house plan was evaluated by the agency's quality comparison team (QCT) "to ensure that the technical proposals of NVT and the government offered the same level of performance and performance quality." Agency Report at 3. The QCT reviewed the in-house team's quality assurance surveillance plan, transition plan, technical performance plan, and MEO. The QCT concluded that the in-house plan did not offer the same level of performance and quality as that offered by NVT.³ Agency Report, Tab 11, QCT Report (July 12, 2001).

Discussions were conducted with the MEO study team regarding the PWS requirements. For example, the study team was asked about the absence of a quality control manager (which the QCT found was required by the PWS), and the MEO team stated that the responsibility for quality control management would be provided by its production controller (a General Schedule (GS)-9 grade level position). Agency Report, Tab 11, QCT Report (July 19, 2001), encl. 1, Quality Comparison Questions, at 6. Subsequently, the QCT found that the in-house plan was "balanced in performance and quality to that proposed by [NVT]."⁴ Agency Report, Tab 11, QCT Report (July 19, 2001), at 1.

The agency then proceeded to the cost comparison, which concluded that performance by the MEO would cost less than performance by NVT. Specifically, the Navy found that the MEO's cost of performance would be \$39,087,140, as compared to the evaluated cost of performance by NVT (including the application of contract administration costs and the minimum conversion differential) of \$43,025,120, a difference of \$3,937,980. Agency Report, Tab 14, Initial Cost Comparison Form (July 26, 2001), at 1.

NVT appealed the agency's cost comparison decision to the administrative appeal authority.⁵ Among other things, NVT complained that the in-house cost estimate was

³ Although the QCT states that it was "balancing" the performance quality offered by the MEO and NVT, the record shows that the QCT actually was resolving inconsistencies within the in-house plan and ensuring that it satisfied the PWS requirements. See Agency Report, Tab 11, QCT Report (July 19, 2001).

⁴ The IRO reevaluated the in-house cost estimate and management plan as a result of the changes made in response to the discussions conducted by the QCT. The IRO certified that the MEO, as reflected in the in-house cost estimate, could satisfactorily perform the PWS requirements. Agency Report, Tab 13, IRO Recertification (July 25, 2001).

⁵ The American Federation of Government Employees (AFGE), on behalf of the affected federal employees, also filed an appeal. Agency Report, Tab 17, AFGE

(continued...)

understated because it did not include training costs associated with the transition to performance by the MEO, costs for implementing the required safety program, certain material costs, and costs for certain maintenance services. Also, NVT objected that adding the responsibility for quality control management to the production controller's responsibilities did not satisfy the PWS's quality control requirements and that the in-house cost estimate for several required tasks was based upon unrealistically low labor estimates. In addition, NVT complained that the cost for contract administration, which was added to its proposed price, was overstated, because it was based upon providing high-level government employees. Agency Report, Tab 16, NVT Appeal (August 27, 2001).

The MEO study team responded to NVT's appeal. In its response, the study team stated that it would add a separate quality control management position, at a GS-9 grade level, to its management plan, and acknowledged that it had omitted costs for certain services. The MEO study team provided a revised in-house cost estimate, which reflected an overall increase of \$949,489. Agency Report, Tab 19, MCRD Response (Aug. 31, 2001).

The appeal authority accepted the above-described changes to the in-house plan, which increased the MEO's cost of performance, and denied the remainder of NVT's and AFGE's appeal grounds. Agency Report, Tab 20, Administrative Appeal Authority Decision (Sept. 27, 2001). Even with the adjustments made to the in-house cost estimate (as a result of the MEO's changes), performance in-house was \$2.97 million less costly than the evaluated cost of performance by NVT, as shown by the following table:

	MEO	NVT
Total proposed costs	\$40,095,345	\$(DELETED)
Contract administration	0	(DELETED)
One-time conversion costs	0	(DELETED)
Federal income tax	0	(DELETED)
Total adjusted costs	40,095,345	(DELETED)
Minimum conversion differential	0	2,568,793
Final adjusted costs	\$40,095,345	\$43,071,352

Agency Report, Tab 21, Post-Appeal Cost Comparison Form (Oct. 1, 2001).

(...continued)

Appeal (Aug. 24, 2001). Among other things, AFGE complained that NVT's proposed price was unbalanced and understated in a number of regards.

Following notification of the results of the cost comparison, NVT protested to our Office. NVT raises numerous challenges to the in-house cost estimate and the cost comparison.

ANALYSIS

Where, as here, an agency has conducted a cost comparison under OMB Circular A-76, thus using the procurement system to determine whether to contract out or to perform work in-house, our Office will consider a protest alleging that the agency has not complied with the applicable procedures in its selection process, or has conducted an evaluation that is inconsistent with the solicitation criteria or is otherwise unreasonable. See Trajen, Inc., B-284310, B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61 at 3. To succeed in its protest, the 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. BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 at 19. From our review of the record, we find no basis to question the reasonableness of the agency's decision to retain the services in-house.

Material Costs

NVT complains that the comparison of its and the proposed in-house material costs was unfair and unequal. Specifically, NVT objects that private-sector offerors were required by section B of the RFP to propose a predetermined or "plug-in" price for certain indefinite-quantity materials and that the in-house cost estimate did not use the same plug-in prices for these materials. NVT contends that offerors should have been permitted to propose their own reasonable estimate for materials.

The Navy responds that the in-house cost estimate is not provided in the same format as that required by the RFP for private-sector offerors.⁶ Rather, the in-house cost estimate was calculated and presented using the Cost Comparison Software Program (COMPARE), which Department of Defense components, such as the Navy, are required to use. See DOD A-76 Costing Manual, Interim Guidance (Mar. 14, 2001), at C0.5.5. The Navy states that, in developing the material costs for the in-house cost estimate, the MEO study team used historical data derived from its

⁶ NVT argues that the in-house cost estimate should be required to be prepared in the same format as that used by NVT, that is, the format provided in section B of the RFP. Protester's Supplemental Comments (Dec. 7, 2001) at 16. We are not aware of any requirement, nor has the protester directed us to any, that the in-house cost estimate use the costing format provided for private-sector offers. In resolving NVT's protest, we think that the more appropriate inquiry is whether the agency had a reasonable basis to conclude that the in-house cost estimate appropriately accounted for all costs necessary to satisfactorily perform the PWS requirements.

computerized maintenance management data base. The plug-in numbers that the private sector offerors were required to use were developed from the same set of historical data. Agency Report, Tab 23, Statement of the Deputy Maintenance Officer of the Facilities Maintenance Branch (Nov. 2, 2001).⁷

We think that as a matter of fairness, where a solicitation specifies the method by which private offerors' material costs must be treated (for example, the use of predetermined material costs), the treatment of those costs in the in-house cost estimate must be consistent with the solicitation requirements. See DOD A-76 Costing Manual, Interim Guidance (Mar. 14, 2001) at C2.1.2; see also DynCorp Technical Servs. LLC, B-284833.3, B-284833.4, July 17, 2001, 2001 CPD ¶ 112 at 8-10 (the in-house cost estimate and private-sector offeror's price proposal must be treated equally with respect to government-furnished material where it was a common cost item).

Here, that means that the in-house cost estimate was required to estimate material costs consistent with the predetermined material costs that NVT was required to use. In this regard, the Navy states that, although predetermined material costs were required for private-sector offerors to make this "a wash cost item," the material costs included in the in-house cost estimate are substantially the same as, and in some cases higher than, the predetermined material costs used by NVT. NVT does not dispute this. On this record, we have no basis to object to the in-house cost estimate's treatment of material costs, because it is undisputed that the in-house cost estimate was based upon at least the same amount of costs as that NVT was required to propose.⁸

⁷ The agency's Deputy Maintenance Officer of the Facilities Maintenance Branch retired on September 28, 2001. Agency Report, Tab 23, Statement of the Deputy Maintenance Officer of the Facilities Maintenance Branch (Nov. 2, 2001), at 1.

⁸ NVT also complains that it should have been given the opportunity to propose its own estimate of material costs. However, as noted, the use of predetermined material costs for private sector offers was intended to make this a "wash or common cost," not providing for individual approaches for these material costs. We have no basis to question the reasonableness of the agency's determination to treat these indefinite material costs as a wash or common cost item. See DynCorp Technical Servs. LLC, *supra*. To the extent that NVT now believes that the RFP should not have required offerors to propose these predetermined material costs, this complaint is an untimely post-award challenge to the solicitation requirements, which we will not consider. See 4 C.F.R. § 21.2(a)(1) (2001).

Safety Program

NVT also complains that the PWS established safety program requirements that the in-house plan did not adequately address. Specifically, NVT asserts that the position descriptions for the three positions that were proposed in the MEO to satisfy the safety program requirements (that is, the MEO's facilities manager, structural supervisor, and mechanical supervisor) do not demonstrate that the MEO will satisfy the PWS requirements in this respect. The protester contends that these position descriptions only show that the individual will be knowledgeable of safety requirements and that the in-house plan does not provide for an "independent safety plan." Protester's Comments at 12-15.

The PWS provided that "[p]rior to commencing work, the Service Provider [*i.e.*, the private-sector contractor or MEO representative] shall meet in conference with the Contracting Officer to discuss and develop mutual understandings relative to administration of the Safety Program." RFP PWS § C-1.9.1.1. Among other things, the "Service Provider" will be required to ensure that the work practices are in accordance with Occupational Safety & Health Administration standards, to report accidents, to submit damage reports, to "appoint appropriate numbers of employees to collateral safety positions," to provide employees with safety equipment, to provide initial indoctrination and continuing safety instruction, and to comply with the agency's emergency notification procedures. RFP PWS §§ C-1.9.1.2 –1.9.1.5.

The agency responds that, as the appeal authority found, the three positions included within the MEO adequately satisfy the PWS safety requirements. Specifically, each position description provides that the individuals will have knowledge of safety regulations and will ensure compliance with safety regulations and requirements through the management of a safety program and will be responsible for appropriate administrative reports. *See, e.g.*, Agency Report, Tab 12, Revised MEO, Position Description for Mechanical Supervisor, at 98-102. In addition, the mechanical supervisor is responsible for training and instructing subordinates in proper work methods and proper use of tools and equipment, and for ensuring adherence to all safety requirements. *Id.* at 99. The position description of the facilities manager, who supervises the day-to-day operation of the Facilities Division, requires this individual to administer the safety management program and to "provide an aggressive on the job-training program in all aspects of Facilities Maintenance management with emphasis on safety." *Id.*, Position Description for Facilities Manager, at 8.

We cannot find that the agency's determination that the MEO adequately demonstrated compliance with the PWS's safety plan requirements was unreasonable. The position descriptions for the facilities manager, mechanical supervisor, and structural supervisor not only demonstrate that knowledge of safety requirements is required (as acknowledged by the protester), but also provide for training, reporting, and ensuring compliance with safety requirements. Moreover,

we disagree with NVT's apparent belief that the PWS required an independent safety function, or required that the responsibility for safety compliance and reporting must be outside of these three positions.

Quality Control

NVT also complains that the in-house plan did not adequately address the PWS quality control requirements. Specifically, NVT asserts that the MEO, as revised during the appeal, provided for a quality control manager at only a GS-9 grade level, which NVT argues is too low a grade level to satisfy the required quality control requirements. NVT contends that the in-house plan must provide a quality control manager at a GS-12 grade level, and that the in-house cost estimate should be adjusted to reflect a manager at this higher grade level.

The PWS provided that the "Service Provider shall establish and maintain a complete [quality control] program," and that the provider would provide to the contracting officer a quality control plan within 15 days after award. RFP PWS §§ C-1.3, C-1.3.1. The plan to be provided after award was required to describe the provider's quality control system; the names, qualifications, and authority of the individuals responsible for performing quality control inspections; provisions for recording inspections and corrective actions taken; and provisions for revision of the plan during contract performance. RFP PWS § C-1.3.3.

We find that the appeal authority reasonably found that the addition of a quality control manager at a GS-9 grade level satisfied the PWS requirements. See Agency Report, Tab 20, Appeal Authority Decision (Sept. 27, 2001), at 4. The position description for this quality control manager indicates that the individual will have overall responsibility for developing, implementing and managing the quality control program, which will include inspections, reporting requirements, and authority to direct corrective action. In this regard, the quality control manager will report directly to the facilities manager. See Agency Report, Tab 22, Position Description for Quality Control Manager. Although NVT disagrees with the agency's judgment that a GS-9 grade level position can satisfy the quality control manager requirements, the protester has not shown that the agency or the appeal authority acted unreasonably. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 at 5 (protester failed to show that selected grade level for contract administrator was unreasonable).

Roof Leak Repairs

NVT also complains that the in-house cost estimate failed to include costs for certain required services, specifically that emergency services necessary to repair roof leaks were not fully priced. As noted by the protester, the RFP indicated that the projected workload for repairing roof leaks was 50 jobs annually. See RFP, attach. J-C2(a)(7). Although the in-house cost estimate estimated \$70,000 annually to

perform the emergency roof leaks, NVT contends that this amount was apparently based upon only 25 jobs per year. Thus, NVT contends that another \$70,000 annually should be added to the in-house cost estimate.

The Navy responds that the in-house cost estimate was actually based upon performing 67 emergency roof repairs in a year and that the quantity of 25 jobs identified in the in-house cost estimate was an error. Agency Report at 13. In support of its contention, the Navy has provided a copy of its Roof Leak Log, which shows 67 jobs during fiscal year 1998. Agency Report, Tab 25, Roof Leak Log. The Navy contends that the estimate of \$70,000 to perform 67 jobs per year is correct.

NVT replies that the Navy's "evidence in this area is not clear and certainly not conclusive" and requests that we add \$70,000 per year to the in-house cost estimate. Protester's Comments at 25. We find that the protester's arguments provide us with no basis to object to the treatment of emergency roof leaks in the in-house cost estimate. Although NVT would have us disbelieve the agency's statement, it provides us with no basis to do so. Significantly, NVT does not argue that the amount estimated by the in-house plan for the annual emergency roof leak work is insufficient to perform this work.

Contract Administration

NVT also complains that the contract administration costs that were added to its proposed price were excessive, because these costs are based upon providing three full-time equivalents (FTE) at GS-13, GS-12, and GS-11 grade levels, respectively. NVT argues that the three FTEs should all be at a GS-11 grade level.

The RSH provides the following guidance for determination of contract administration costs:

Contract administration costs are incurred in administering a contract or [interservice support agreement]. It includes the cost of reviewing compliance with the terms of the contract, processing payments, negotiating change orders, and monitoring the closeout of contract operations. It does not include inspection and other administrative requirements that would be common to contract and Government performance to assure acceptable performance.

RSH, part II, ch. 3, ¶ C.1.

The agency responds that the nature of the contract work and the contract proposed require the grade structure proposed for the contract administrators. The agency states that the three positions require technical knowledge and experience in base operations and maintenance, and that each position includes broad responsibility for contract administration, including reviewing contract changes, cost estimating,

negotiating contract claims, and monitoring termination inventory and other close-out activities. In addition, the agency notes that the contract that would be awarded to NVT (if it were selected for award) includes award term incentives that would require extensive monitoring and documentation throughout the contract term. Agency Report at 11. The agency also notes that, as required by the RSH, the three positions were properly certified by the agency's personnel management specialist as being in compliance with applicable personnel regulations. See Agency Report, Tab 24, Contract Administration Position Grade-Level Certifications (Aug. 17, 2000).

We will sustain a challenge to an agency's judgment as to the appropriate grade levels required for contract administration only where that judgment is shown to be unreasonable. See RTS Travel Serv., supra, at 5. Here, the agency's judgment as to the grade-level positions required for contract administration is not unreasonable on its face. Therefore, it is incumbent upon NVT to demonstrate that the agency's judgment is without any reasonable basis. NVT's mere disagreement with the agency's judgment does not demonstrate that the agency's determination was unreasonable.⁹

Other Issues

NVT also asserts that the in-house cost estimate is understated in three other areas. Specifically, NVT complains that the in-house cost estimate did not provide costs for training associated with transition to performance by the MEO or for performing ceramic tile repair in mess halls, and that the in-house cost estimate was based upon unrealistically low labor estimates for preventive maintenance and preventive maintenance inspection in five areas.¹⁰ We need not address these contentions

⁹ NVT also complains that the MEO study team did not certify the grade structure as being in compliance with all applicable personnel regulations. Protester's Comments at 20-21. The RSH does not specify who must certify the grade structure, only that the "[c]ontract administration organization and grade structure should be certified as being in compliance with all applicable personnel regulations." RSH, part II, ch. 3, ¶ C.4. Here, the Navy's personnel officials certified the contract administration grade structure, and we have no basis to find that this is inconsistent with the RSH guidance.

¹⁰ NVT also complains that its proposed overall staffing represented low risk and that this is a strength for which the agency failed to level the in-house plan. This argument was first raised in NVT's comments, is untimely, and will not be considered. 4 C.F.R. § 21.2(a)(2). We disagree with NVT's position that its initial protest allegation that the in-house cost estimate's level of effort was understated encompasses this argument. NVT's protest (and appeal) did not assert that NVT's proposal had evaluated strengths that the agency was required to consider to determine whether to "level the playing field."

because the cost impact asserted by the protester would not change the outcome of the cost competition between NVT and the in-house team. That is, NVT asserts that for these three protest contentions the in-house cost estimate should be increased by \$2,914,232 (\$419,576 for training costs; \$394,122 for ceramic tile repair; and \$2,100,534 for unrealistic labor estimates). Protester's Comments at 10, 19, 25. This amount, however, is not sufficient to displace the in-house cost estimate, which was found, in the cost comparison after the administrative appeal, to be less costly than NVT's proposal by \$2,976,007.¹¹

We deny the protest.

Anthony H. Gamboa
General Counsel

¹¹ We also note that NVT's asserted increases in the in-house personnel costs would increase the amount of the minimum conversion differential (which is calculated as a percentage of the in-house personnel costs that is added to NVT's proposed costs), thus offsetting part of the adjustment NVT advocates.