Decision

Matter of: Sodexho Management, Inc.

File: B-289605.2

Date: July 5, 2002

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DIGEST

Protest that contracting agency improperly used nonappropriated funds instrumentality (NAFI) employees to constitute the overwhelming majority--more than 80 percent--of the labor force in its "most efficient organization" (MEO) as part of an Office of Management and Budget Circular A-76 cost study is sustained; while the A-76 guidance does not explicitly prohibit the use of NAFI employees in an MEO and may, in fact, be read to permit at least limited use of NAFI employees, where, as here, the level playing field promised by the A-76 guidance is tilted toward the in-house plan in a way that could not be reasonably anticipated by a commercial offeror based upon the A-76 guidance and the solicitation, the agency deprived the commercial offeror of the ability to make an intelligent business judgment concerning whether, and how, to compete.

DECISION

Sodexho Management, Inc. protests the Department of the Navy's determination, pursuant to Office of Management and Budget (OMB) Circular A-76, that it would be more economical to perform various community support services in-house at the Pensacola Naval Regional Complex (PNRC)[1] in Pensacola, Florida, rather than contract for these services with Sodexho under request for proposals (RFP)

[1] The PNRC encompasses the Naval Air Station Pensacola (NASP); Naval Air Station Whiting Field (NASWF); Navy Technical Training Center, Corry Station (NTTC); Naval Education and Training Professional Development Command, Saufley Field;
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No. N00140-00-R-G513.[2] Sodexho primarily contends that the Navy improperly used nonappropriated fund instrumentality (NAFI) employees to constitute the overwhelming majority of the labor force in its "most efficient organization" (MEO).[3]

We sustain the protest.

BACKGROUND

The Navy issued the RFP on February 4, 2000, as part of a Circular A-76 commercial activities study, to determine whether it would be more economical to perform various community support services in-house, using government employees, or under contract with a private-sector firm.[4] The solicitation divided the requirements into separate "annexes" for support services associated with Navy family housing, bachelor housing, morale, welfare, and recreation (MWR), and public affairs.[5] Each

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tenant commands; and outlying airfields located in northwestern Florida and southern Alabama.

[2] Amendment No. 0012 to the RFP provided a conformed copy of the solicitation, complete with the performance work statement and all attachments. For ease of identification, the Navy numbered the conformed solicitation N00140-00-R-G513/0012. All references herein are to the conformed copy of the solicitation.

[3] The MEO refers to the government's in-house organization to perform a commercial activity and is the product of the management plan that details the changes that will be made to perform the commercial activity in-house and in accordance with the solicitation's performance work statement (PWS). It may include a mix of federal employees and contract support, and is the basis for all government costs entered on the cost comparison form. OMB Circular A-76, Revised Supplemental Handbook (RSH), app. 1, Definition of Terms, at 36.

[4] The process for determining whether activities should be performed in-house or with a contractor is set forth in OMB Circular A-76 and that Circular's RSH. The Department of Defense (DOD) and its military departments are required to use the Circular and its Handbook in performing commercial activities studies. See 32 C.F.R. § 169a.15(d) (2001). The required process includes preparation of a PWS outlining the task and performance requirements, preparation of a management plan for performance of the PWS tasks by the agency's MEO, a competition among private-sector proposals, and a cost comparison between the successful private-sector proposal and the MEO management plan.

[5] The solicitation also included a general annex intended to capture administrative support services that were indirect/overhead expenses that could not be identified with a single annex or might be related to the performance of services throughout
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PWS annex described the scope of work involved, including specific performance requirements and minimum standards, and provided historical workload data, lists of government-furnished material, facilities, and equipment, and other information. If a private firm was selected, the government planned to award a fixed-price contract with cost-reimbursable provisions over a 7-month base period, with up to four 1-year option periods and one 5-month option period.

Private-sector offerors were advised that a "best value" offer would be selected, with more consideration given to technical proposals than to price proposals. The past performance, management plan, and corporate experience technical evaluation factors were of equal importance, and each individually was significantly more important than the final technical evaluation factor, addressing the extent of participation of small businesses, small disadvantaged businesses, women-owned small businesses, and historically black colleges or universities and minority institutions in performance of the contract. The management plan factor was comprised of two subfactors, staffing plan and quality control overview. The former was more important than the latter, which would be evaluated on a pass/fail basis. RFP § M.(3).

Offerors were required to develop a staffing plan that demonstrated the ability to successfully accomplish and manage all requirements of the PWS, starting with the transition phase; addressed the ability to recruit and retain sufficient personnel to meet the PWS requirements; and described the risk associated with implementation of the offeror's proposed staffing plan, and steps to mitigate this risk. RFP § L.III.(1)(b)1. Offerors were required to provide an overview of their quality control plan containing various specified elements. Id. at § L.III.(1)(b)2.

The solicitation included Federal Acquisition Regulation (FAR) § 52.222-42, "Statement of Equivalent Rates for Federal Hires." In accordance with the Service Contract Act of 1965, as amended (SCA), the clause identified "the classes of service employees expected to be employed under the contract and state[d] the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. 5341 or 5332."[6] RFP at 32-35. This clause was immediately followed by a list of GS and FWS appropriated fund employee classes. Id.; 5 C.F.R. part 532.

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the PWS. PWS ¶ 1.1. The RFP also initially included requirements for family service center support services that were deleted after initial proposals were submitted.

[6] As discussed below, 5 U.S.C. § 5341 sets out the uniform pay-setting system, known as the Federal Wage Schedule (FWS), for appropriated fund and nonappropriated fund craft, trade, and labor--"blue collar"--employees, and 5 U.S.C. § 5332 sets out the General Schedule (GS) wage system, which covers most civil service "white collar" employees.

The solicitation also included FAR § 52.207-3, which states that the contractor shall give government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified. Directly below the provisions of FAR § 52.207-3, the RFP stated that the clause applied to both appropriated fund and NAFI employees, although the former should be given preference. RFP at 35.

In the meantime, a cost analysis team of Navy personnel, with contractor support, had developed the management plan and MEO, as well as a technical performance plan (TPP) describing how the MEO would accomplish the work required by the PWS. The cost of performing the MEO was included in the in-house cost estimate, and the management plan was forwarded to the independent review official (IRO) for certification. On September 13, 2000, the IRO, a member of the Naval Audit Service, certified that the management plan reasonably established the government's ability to perform the PWS with the resources provided. On June 14, 2001, the IRO recertified the management plan after it was revised to account for the removal of family center services support requirements and the alteration of the period of performance.

The Navy received proposals from two offerors, including Sodexho, by the RFP's closing date of September 29, 2000. The Navy's technical evaluation board (TEB) evaluated both offerors' initial proposals as unacceptable under every technical evaluation factor and overall. After including both offers in the competitive range, the Navy conducted discussions and received and evaluated final proposal revisions (FPR), finding that both offers were still technically unacceptable overall. The Navy established a second competitive range that included only Sodexho's offer, and conducted additional discussions with and received additional FPRs from the firm. The Navy ultimately found Sodexho's proposal to be acceptable under all of the technical evaluation factors and overall, but the contemporaneous evaluation record shows that the TEB identified no strengths or performance enhancements in the firm's proposal. On August 29, 2001, the contracting officer concluded that Sodexho's proposal, the only acceptable private-sector proposal, represented the best value to the government among the offers received from the private sector, at a price of $73,116,328.

By memorandum dated September 5, the contracting officer, acting as the source selection authority (SSA), memorialized his findings that the in-house management plan met the requirements established by the PWS and offered the same level of performance and performance quality as did the Sodexho proposal. First, the SSA noted that the TEB had not found that Sodexho's proposal offered changes to the solicitation's requirements or improvements beyond what was required by the PWS, and had rated the proposal merely acceptable. The SSA concurred with the TEB's findings. Second, the SSA reviewed the in-house management plan to ensure that it complied with the PWS requirements. He found several discrepancies which he

forwarded to the MEO's study team for explanation or clarification, as applicable, and, based upon the team's responses, concluded that the in-house plan was sufficient to meet the standards and to perform the PWS requirements. Third, the SSA compared Sodexho's offer with the in-house plan to ascertain whether they offered the same level of performance and performance quality. He acknowledged that the MEO and Sodexho's proposed staffing plan had very different staffing levels. Specifically, the Sodexho proposal offered a total of 459.9 full-time equivalents (FTE) comprised of full and part-time employees, while the MEO offered 421.8[7] FTE comprised of a mixture of full-time appropriated funds employees, full-time NAFI employees, and hourly or "flex-time" NAFI employees. He did not find this difference in staffing unreasonable considering their different approaches. In reviewing these respective approaches on an annex-by-annex basis, the SSA made specific findings that, while Sodexho proposed to perform the requirements using more staff, it did not offer to provide any of the required services at a level in excess of the minimum performance standards established by the PWS. The SSA ultimately concluded that neither Sodexho nor the MEO offered enhancements to what the solicitation required, and that both were capable of performing the PWS requirements with the resources proposed at the same level of performance and performance quality, albeit with differing staffing complements. SSA's Memorandum of Sept. 5, 2001 at 5.

On that same day, the SSA opened the in-house cost estimate and completed the cost comparison form. He conducted the cost comparison by adding the minimum conversion differential, the one-time costs of conversion, and contract administration costs to, and by subtracting federal income taxes from, Sodexho's proposed price, for an adjusted total cost to contract for services of $82,641,457. Because the revised in-house plan's costs totaled $56,460,369 (a difference of $26,181,108), the agency made a tentative decision to perform the requirements in-house and so notified Sodexho.

Sodexho filed an administrative appeal on October 9, based on its review of the MEO's management plan, the TPP, and the in-house cost estimate. The agency's administrative appeal authority found merit in the appeal to the extent that the MEO's pricing was found to be understated by $1,667,660.80, but otherwise ratified the determination to perform the requirements in-house. The resulting revised cost comparison form reflected an adjusted total cost of contract performance of $82,791,377 and an adjusted total cost of in-house performance of $58,137,629, for a difference of $24,653,748. The appeal was denied on December 10, 2001. On December 27, Sodexho filed a protest in our Office challenging the administrative

[7] There are minor inconsistencies concerning the number of FTE proposed by the MEO as between the number listed in the transition plan (that used by the SSA) and the number used in the management plan. For the purpose of this decision, we will use the latter, 417.421 FTE. Management Plan General Annex at 4.

appeal decision. The parties subsequently agreed to handle the protest as a timely agency-level protest pursuant to FAR § 33.103, and Sodexho withdrew its GAO protest. The agency provided Sodexho with additional documents, and Sodexho filed a supplemental agency protest on February 25. After the agency submitted its response to Sodexho's agency-level protests on March 22, in which it found that the MEO's pricing was understated by approximately $250,000 but otherwise rejected Sodexho's allegations, Sodexho filed the instant protest.

PROTEST ISSUES

Sodexho's allegations fall under three categories. Sodexho first argues that the Navy's overall process was flawed and unfair because the cost comparison was based on an MEO that proposed to perform the requirements using NAFI employees as 82 percent of its in-house workforce. Sodexho next argues that the MEO failed to meet numerous PWS requirements, and that the IRO's certification of the MEO was inadequately documented and "directed" by external Navy forces. Sodexho finally argues that the agency improperly failed to adjust the in-house offer to equal the level of performance and performance quality offered by Sodexho. We sustain the protest in conjunction with Sodexho's first allegation for the reasons discussed below.

STANDARD OF REVIEW

Circular A-76 describes the executive branch policy on the operation of commercial activities that are incidental to performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private companies or in-house using government personnel. While our Office does not review internal agency decisions regarding matters not the subject of a solicitation, where, as here, an agency has issued a solicitation as part of an A-76 study, thereby 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 applicable statutes and regulations. 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 act properly, 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; Aberdeen Technical Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 5.

USE OF NAFI EMPLOYEES

The central issue in this protest is Sodexho's objection to the MEO's use of NAFI employees--at NAFI wage rates and benefits levels--as "government personnel" or "federal employees" as part of its in-house plan to perform the vast majority of the requirements. Sodexho contends that NAFI employees are neither "government

personnel" nor "federal employees" for the purpose of an A-76 cost study and that, even if they can be so construed, the cost of their wages and benefits must be based on the higher GS/FWS rates described in the RSH, and not on their actual, generally lower, NAFI wage rates and benefits levels.

Backdrop[8]

While most of the goods and services that the federal government purchases are acquired to carry out government business, other goods and services are acquired to support the efforts of government employees and officers to carry out the government's business by fulfilling their morale, welfare, and recreation (MWR) needs. The private sector can provide some of these MWR needs, but has been unable or unwilling to meet all MWR needs at every location. As a result, the government has often turned to nonappropriated fund instrumentalities (NAFI) or activities to supply MWR goods and services. NAFIs are related to the government and provide a wide range of government-related services and activities, but occupy a unique legal status.

NAFIs are not federal agencies or government corporations, and they are not typical private or commercial enterprises, although they may operate on a for-profit basis. Instead, they are "a special breed of federal instrumentality which cannot be fully analogized to the typical federal agency supported by federal funds." Cosme Nieves v. Deshler, 786 F.2d 445, 448 (1st Cir. 1986). Our Office views their operation with mainly nonappropriated funds as the defining characteristic of NAFIs. Principles of Appropriations Law, supra, at 17-224; Department of Agriculture Graduate School, 64 Comp. Gen. 110, 111 (1984). Another important characteristic that defines NAFIs, and distinguishes them from federal agencies or private commercial enterprises, is the purposes for which they are created: to meet the MWR needs of government officers and employees. Principles of Appropriations Law, supra, at 17-225. DOD articulates the importance of MWR programs, many of which are carried out by NAFIs, as follows:

> MWR programs are vital to mission accomplishment and form an integral part of the non pay compensation system. These programs provide a sense of community among patrons and provide support services commonly furnished by other employers, or other State and local governments to their employees and citizens. MWR programs encourage positive individual values, and aid in the recruitment and retention of personnel. They provide for the physical, cultural, and

[8] The following discussion of nonappropriated fund instrumentalities (NAFI) and activities, and their employees, is drawn from a more detailed examination of their history and legal status found in GAO's Principles of Appropriations Law, Vol. IV, GAO-01-179SP, ch. 17, part C, March 2001.

> social needs and general well-being of Service members and their families, providing community support systems that make DoD bases temporary hometowns for a mobile military population.

DOD Instruction 1015.10, Morale, Welfare, and Recreation (MWR), Nov. 3, 1995, ¶ 4.2.

Although they are defined as using nonappropriated funds, in cases where NAFIs have not been profitable or self-sustaining, the government has subsidized their operations with appropriated funds[9] in order to ensure the MWR needs are met.[10] Principles of Appropriations Law, supra, at 17-225. While the general rule under the early cases had long been that expenses associated with MWR could not be paid from appropriated funds unless specifically authorized by law, id. at 17-230, the current trend increasingly recognizes the use of appropriated funds for expenses related to MWR. Id. at 17-231 to 17-238. Congress has specifically authorized the use of certain appropriated funds for MWR expenses. See 10 U.S.C. § 2241 (2000) (authorizing the use of operation and maintenance appropriations for MWR). In 1987, at the direction of Congress, DOD divided its MWR activities into three categories receiving varying degrees of appropriated fund support depending upon how closely related the activities are to sustaining DOD's mission.[11] Id. at 17-237 to 17-238; see also DOD Instruction No. 1015.10, supra.

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[9] Appropriated funds are funds provided in a regular annual appropriation act or a continuing or permanent appropriation created when a statute authorizes the obligation and expenditure of funds and designates the funds to be used. Principles of Appropriations Law, supra, at 17-223.

[10] Because of the use of appropriated funds to pay NAFI employees (including many at issue in this protest), this decision uses the term "NAFI" throughout, even though we recognize that, in the record and elsewhere, reference is often made to "NAF employees" or "NAF wages and benefits."

[11] Category A, "Mission Sustaining Programs," are considered most essential in meeting organizational objectives and are to be supported almost entirely with appropriated funds. These programs promote the physical and mental well-being of the military member and include such things as physical fitness facilities, libraries, and unit level sports. Category B, "Community Support Programs," are closely related to Category A programs and should receive substantial amounts of appropriated funds support. These programs satisfy the basic physiological and psychological needs of service members and their families, and include such things as automotive skill development, youth activities, child development programs, arts and crafts skill development and outdoor recreation. Category C, "Revenue Generating Programs," have the business capability of generating enough income to cover most of their operating expense and, as a result, receive limited appropriated

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While this Office has questioned whether it is appropriate for a NAFI to provide services to federal agencies (since NAFIs exist to help foster the morale and welfare of military personnel and their dependents), In the Matter of Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures, 58 Comp. Gen. 94, 98 (1978), we have since stated that a NAFI may compete in, and be awarded a contract, under a competitive procurement, unless otherwise precluded by its charter from doing so. General Physics Fed. Sys., Inc., B-274795, Jan. 6, 1997, 97-1 CPD ¶ 8 at 3 n.3, citing Department of Agriculture Graduate School, supra.

Further, as part of the 1997 National Defense Authorization Act, Pub. L. No. 104-201, Div. A, Title III, § 341(a)(1), 110 Stat. 2488 (1996), codified at 10 U.S.C. § 2482a, Congress provided:

> An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system.

Pub. L. No. 104-201, supra, note 239.

Turning to the case before us, the Navy explains that, when this A-76 study was announced in January 1997, the Navy infrastructure in the Pensacola area was already in transition as the result of two Navy initiatives designed to streamline the organization and reduce costs. One was a regionalization initiative to consolidate selected Navy installation services, and the other was an initiative to transfer all military billets assigned to community support and absorb the associated workload into the civilian organization. This latter initiative, which began in 1994, was the result of a downsizing in the overall number of personnel in the armed forces, including the personnel that typically staffed bachelor housing performing front desk, custodial, and maintenance functions. Statement of Pensacola Regional Bachelor Housing Director at ¶ 7. In 1996, most of the military personnel assigned to bachelor housing at Chief of Naval Education and Training (CNET) activities such as the one at issue here were being assigned to fill fleet requirements, and bachelor housing military billets were being eliminated, leaving a critical shortage of personnel at the Pensacola facilities. Id. at ¶ 8. As these military billets were

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funds support. These programs include such things as golf courses, clubs, bowling, and boating activities. DOD Instruction No. 1015.10, supra at ¶ 4.3.

eliminated, the Pensacola organizations had to develop a strategy to handle the loss of those resources.

In February 1996, the CNET Command authorized the replacement of the soon-departing military personnel with NAFI civilians. Id. Bachelor housing managers worked with base comptrollers to put together a memorandum of understanding (MOU) with the bachelor housing NAFI identifying positions that would be covered by appropriated funds.[12] The first MOU, signed in 1996, addressed only front desk services. Subsequent memoranda of agreement (MOA) added additional areas of service, including maintenance and custodian services, and new MOAs were completed each year to reflect changing requirements. As the regional bachelor housing organization was established, civil service positions that were unencumbered, i.e., vacant, were transitioned to NAFI positions. Id. at ¶ 13.

An increasing use of NAFI personnel was also occurring in the MWR programs in Pensacola in response to the pressure to reduce military infrastructure costs. This change occurred following the implementation of a new DOD policy initiated in July 1997, the "Utilization, Support and Accountability Practice," or USA Practice, which provided a vehicle for MWR programs to convert unoccupied civil service billets to NAFI positions with more flexible personnel requirements, but to continue funding those positions with appropriated funds. In accordance with USA Practice, billets for Pensacola MWR personnel have been systematically converted to NAFI positions as they have become vacant and paid with appropriated funds. Agency Report (AR) at 22.

Accordingly, while the MEO in-house plan was being prepared, the Navy was pursuing parallel initiatives that resulted in a shift in the mix of appropriated fund and NAFI employees. In 1997, the positions initially part of this study included 755 positions consisting of 261 civil service positions, 55 military billets, and 439 NAFI positions. AR at 23. The Navy explains, however, that these numbers had diminished by the time the MEO was developed. When "the dust settled," the baseline used to develop the MEO was 682 positions, consisting of 192 civil service positions, 51 military billets, and 439 NAFI positions. Id.

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[12] Appropriated funds are the primary source of funding for the operation and maintenance of bachelor housing, but bachelor housing may establish a nonappropriated billeting fund, which consists of service charges collected from transient personnel residing in bachelor housing and from permanent personnel residing in bachelor housing who elect housekeeping services. These funds are expended to provide housekeeping services and in-room amenities for transient personnel only, and for the housekeeping service elected and paid for by permanent personnel. OPNAVINST 1103.1B, Policies and Procedures Government Bachelor Housing, Enclosure 11, "Financial Management," at ¶ 1 (Mar. 20 1997).

The bulk of the MEO's proposed FTEs fall under the two annexes where NAFI employees are proposed, MWR and bachelor housing.[13] Under the MWR annex, the MEO proposed a workforce comprised of 35.77 civil service FTEs and 83.30 NAFI FTEs, including a number of flex-time FTEs, for a total of 119.07 FTEs. See Management Plan Annex 4 at 129-136. Under the bachelor housing annex, the MEO proposed a workforce comprised of 18.67 civil service FTEs, 141.83 NAFI full-time FTEs, and 112.94 NAFI flex-time FTEs for a total of 273.44 FTEs. Management Plan Annex 3 at 1. Appropriated funds will be used to pay for all of these services save the housekeeping services under the bachelor housing annex, which are paid with nonappropriated funds.[14] See supra, note 11.

These NAFI positions were costed at their NAFI wage and benefit levels, which the parties agree are generally lower, often substantially, than civil service wage and benefit levels. Of particular interest to Sodexho are the NAFI flex-time or flexible employees. These employees serve in either continuing or temporary positions, on a scheduled or unscheduled basis, up to 40 hours per week, and are ineligible to participate in the relevant benefits program and not entitled to earn sick or annual leave. BUPERS INSTRUCTION 5300.10, Bureau of Naval Personnel Nonappropriated Fund Personnel Manual for Navy Nonappropriated Fund Instrumentality (NAFI) Employees, ch. 2, ¶ 202.b. (Dec. 1997).

Analysis

Circular A-76 and its RSH set forth the procedures for determining whether commercial activities should be performed under contract with commercial sources, in-house using "government facilities and personnel," or through interservice support agreements (ISSA).[15] Circular A-76 ¶ 1; RSH at 1. The MEO is defined as referring to

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[13] The MEO proposed to use a total of just 24 FTEs, all of which were civil service positions, for the family housing and public affairs annexes. Management Plan Community Support at 4, 7.

[14] Since these housekeeping services are paid out of the nonappropriated billeting fund consisting of service charges collected from transient personnel and permanent personnel who elect such services, it is not clear why they were included in this study or how the inclusion of their costs in the MEO accurately reflects the costs incurred by the government.

[15] We do not agree with Sodexho that the Navy should have used the RSH's procedures for an ISSA to obtain the services of these NAFI employees. In relevant part, the RSH provides that, in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 and the Economy Act, excess property and common administrative services available from other "federal departments or agencies" may be obtained via an ISSA. RSH Part I, Ch. 2, ¶ A.1. As a general matter, NAFIs are not "federal departments or agencies," Principles of

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the government's in-house organization to perform a commercial activity, and "may include a mix of Federal employees and contract support." RSH, app. 1, Definition of Terms, at 36. Since the parties agree that the NAFI employees in the MEO do not fall under the category of "contract support," the first substantive question we must consider is whether they can properly be viewed as "Federal employees" or "government personnel" for the purpose of an A-76 cost study.

As a threshold matter, though, the Navy asserts that the composition of its MEO is not a proper issue for appeal because it falls under the category of "Government management decisions involving the government's certified MEO," one of the categories of questions to which the agency's A-76 administrative appeal procedures do not apply. RSH Part I, ch., 3, ¶ K.6.c. Notwithstanding the fact that, when Sodexho raised this issue in its administrative appeal, it received a detailed response, the Navy argues that this was not a proper question for the administrative appeal process and, as a result, cannot be a proper question for a GAO protest. We do not agree.

Our bid protest jurisdiction is not defined by the scope of the administrative appeals process. The Competition in Contracting Act of 1984 (CICA) grants our Office jurisdiction to resolve bid protests concerning solicitations, cancellations of solicitations, and contract awards that are issued by a federal agency. 31 U.S.C. § 3551(1)(A) (2000). As explained above, we review agency decisions to perform services in-house instead of contracting for them in order to ascertain whether the agency followed the applicable procedures in its selection process and conducted an evaluation consistent with the solicitation criteria and applicable statutes and regulations. See Trajen, Inc., supra. Because Sodexho is arguing that the composition of the MEO, and the resulting costing of that MEO, do not comply with the A-76 rules as set forth in the Circular and RSH, this issue is appropriate for our review, even if the administrative appeal board should not have considered it. See Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 at 4 (holding that GAO was the appropriate place for a protester to pursue its challenge to the private-sector competition portion of the A-76 process notwithstanding the fact that the RSH expressly provided that the A-76 administrative appeals procedures did not apply to such questions).

Turning to the merits, Sodexho's contention that NAFI employees are not "Federal employees" for the purpose of an A-76 cost study relies solely on 5 U.S.C. § 2105

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Appropriations Law, supra, at 17-224, and NAFIs are not "federal agenc[ies]" for the purposes of the Federal Property and Administrative Services Act of 1949. 40 U.S.C. § 472 (Supp. IV 1998). In addition, the Economy Act, 31 U.S.C. § 1535 (1994 Supp. IV) does not apply to nonappropriated fund activities. Department of Agriculture Graduate School, supra; Principles of Appropriations Law, Vol. IV, GAO-01-179SP, ch. 15, part B, at 15-31.

(2000). Section 2105 defines "employee" for the purpose of Title 5 of the United States Code, which governs government organizations and employees. Subsection 2105(c) provides that "[a]n employee paid from nonappropriated funds of . . . instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of -- . . . laws administered by the Office of Personnel Management," with various stated exceptions.

We do not read this provision of Title 5 as a per se bar to the inclusion of NAFI employees in an MEO. In enacting this provision, Congress was acceding to DOD's desire to make civilian employment with NAFIs as flexible as possible and not subject to then-existing civil service protections. Principles of Appropriations Law, supra, at 17-257; see generally S. Rep. No. 92-1341 (1952) and H.Rep. No. 82-1995 (1952), reprinted in 2 U.S.C.C.A.N. 1952 at 1520-1528; McAuliffe v. Rice, 966 F.2d 979, 981 (5th Cir. 1992). As a result of this provision, with a few exceptions not relevant here, NAFI employees are not covered by laws that apply to employees within the civil service. See McAuliffe v. Rice, supra, at 980-81. However, neither the Circular nor the RSH expressly define "Federal employees" as only those within the civil service or subject to its protections, and Congress has made NAFI employees subject to various laws applicable to government or federal employees by expressly including them within the coverage of specific statutes.[16]

Since neither the Circular nor the RSH expressly defines the term "Federal employee," and since neither mentions NAFI employees or NAFIs (except in the context of the FAIR Act, discussed below), we must make further inquiry into the guidance. As the following discussion indicates, the guidance is unclear in this respect and leaves room for interpretations that cut both ways. On balance, however, our review of the Circular and the RSH in their entirety leads us to conclude that they anticipate that an MEO will use civil service employees to constitute its in-house organization as a general rule, but leave open the possibility that at least some NAFI employees may be properly included.

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[16] Among other things, individuals employed in a NAFI under the jurisdiction of the armed forces are included as those employed by the government of the United States for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e)(2)(A)(iv) (2000); NAFI employees are government employees for the purpose of 5 U.S.C. § 7204, which prohibits discrimination because of race, color, creed, sex or marital status under various scenarios, 5 U.S.C. § 2105(c)(1)(A); under 10 U.S.C. § 1587 (2000), NAFI employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense; NAFI employees are entitled to maintain actions under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(a) (Supp. IV 1998); and NAFI employees are federal employees for purposes of Title II of the Family and Medical Leave Act of 1993. 5 U.S.C. § 2105(c)(1)(E).

Part II of the RSH contains generic principles and procedures for developing the cost of in-house performance to the government, RSH Part II, ch. 1, ¶ B.2, and standard cost factors to be used in calculating the cost of government performance. Id. at ch. 2, ¶ A.2. Among other things, the RSH sets forth considerations to be used to compute personnel costs. After identifying the job, the agency is required to "[i]dentify the appropriate GS/FWS grade for each position title or skill," and to "[i]dentify the FTE required for each grade, as well as the temporary and intermittent employee work years." Using current pay rates based on the "government-wide representative rate of step 5 for GS and step 4 for FWS employees," the agency is required to multiply that pay rate by the number of FTEs or actual hours. The agency must then multiply a series of government-wide standard factors by the appropriate basic pay to obtain the costs of fringe benefits or Federal Insurance Contribution Act costs. RSH Part II, ch. 2, ¶ B.6.

As discussed above, "GS" denotes the primary compensation structure for civil service personnel performing white-collar work in the federal government, 5 U.S.C. § 5331 et seq. (2000). "FWS" is a uniform pay system that covers federal appropriated fund and NAFI blue-collar employees, 5 U.S.C. § 5341 et seq. (2000), and, as a result, includes wage designations for blue-collar NAFI employees. 5 C.F.R. § 532.203(a),(b) (2001). The two wage systems mentioned in the RSH thus do not include white-collar NAFI employees.

While the MEO here included many NAFI employees with FWS grades (that is, blue-collar NAFI employees), the wages and benefits of many of the MEO's other NAFI employees (the white-collar ones) are not covered by the FWS system, but fall under the Navy's paybanding system for white-collar NAFI employees. See BUPERSINST 5300.10, supra, ch. 3, "NAF Personnel Pay Band System." The specific mention of these two wage systems could be read to mean that the RSH does not permit white-collar NAFI employees to be included in an MEO. Indeed, the Navy acknowledges that "NAF employees are not considered Federal employees so far as applying their labor related costs when they are included in an A-76 study," Navy MWR A-76 Fringe Benefit Rates Point Paper, NPC-65FF2/874-6662, Mar. 29, 1999, at http://www.mwr.navy.mil/mwrprograms/a76fringe.htm; the Chief of Naval Operations has established fringe benefit rates to be used for NAFI employees which differ from those in the RSH.

On the other hand, the RSH's specification of these two wage systems, and no others, may just as well reflect the fact that they cover most "government employees." The most recently available statistics show that approximately 1.2 million employees are covered by the GS wage system, and approximately 198,000 employees are covered by the FWS wage system. Federal Civilian Workforce Statistics: Pay Structure of the Federal Civil Service as of March 31, 2001, OPM, OWI01-04 (Sept. 2001) at 2. In contrast, DOD estimates that it has a NAFI workforce of approximately 140,000. DOD's Civilian Personnel Management Service, Nonappropriated Fund Personnel Policy Office, http://www.cpms.osd.mil/nafppo/homepage.html. It may simply have

made little sense for the A-76 guidance to establish general rules for such a unique set of personnel, whose role is generally limited by their employment in a NAFI, whose existence is usually characterized by its operation with mainly nonappropriated funds and for the purpose of meeting the MWR needs of government officers and employees.[17]

As a result, while we agree that the RSH's procedures and standard cost factors were designed for civil service employees under the GS and FWS wage systems, we cannot conclude that the RSH's specification of these two wage systems, and no others, must be read to prohibit the use of NAFI employees in an MEO, particularly since the FWS (which is referenced in the RSH) does include some NAFI wage designations.

In addition to the inferences that can be drawn from references to GS and FWS pay in the RSH, the question of the right of first refusal provides some indicia of whether NAFI employees should be viewed as "Federal employees" for purposes of inclusion in an MEO staffing plan. In describing various personnel considerations that arise in implementing the Circular, the RSH provides that "Federal employees and existing Federal support contract employees adversely affected by a decision to convert to contract or ISSA performance have the Right-of-First-Refusal for jobs for which they are qualified that are created by the award of the conversion." RSH Part I, ch. 1, ¶ H.2. Contracting officers are required to include the clause at FAR § 52.207-3 in A-76 cost comparison solicitations notifying potential contractors of this requirement, and the right of first refusal is afforded to "all federal employees adversely affected by the decision to convert to contract performance." Id. at ¶ H.2.a. The RSH defines these "adversely affected federal employees" as "employees identified for release from their competitive level by an agency, in accordance with 5 C.F.R. Part 351 and Chapter 35 of Title 5, U.S. Code, as a direct result of a decision to convert to contract, ISSA performance, or the agency's MEO." Id. at ¶ H.1.

It is not clear that the RSH's definition of "adversely affected federal employee" encompasses NAFI employees. As indicated above, NAFI employees are not deemed to be government employees for the purpose of laws administered by OPM, with exceptions not relevant here. The terms "competitive service" and "preference eligible" are central to the civil service system but not used in connection with NAFI employees. See 5 U.S.C. §§ 2102, 2108 (2000); see also Perez v. Army and Air Force Exchange Service, 680 F.2d 779, 787 (1982). OPM, which administers the reduction in force laws, 5 U.S.C. § 3501 et seq. (2000), has stated that NAFI employees "[are] not covered by OPM's reduction in force regulations." Restructuring Information

[17] A discussion of varying pay systems for federal employees can be found in Federal Civilian Workforce Statistics: Pay Structure of the Federal Civil Service, supra, at app. C.

Handbook, Module 2, Human Resource Responsibilities in Restructuring," OPM Workforce Restructuring Office, Jan. 1999, at 26, http://www.opm.gov/rif/handbook/rih.htm.

The Navy appears to have interpreted the RSH provisions regarding the right of first refusal as inapplicable to NAFI employees. In its guidance to MWR program managers conducting A-76 cost studies, the Navy states:

> The legal opinion provided by the Office of General Counsel in Washington, DC dated 31 July 1998 indicates that the word 'employee' in OMB Circular A-76 and its supplement, for purposes of applying [right of first refusal] appears not to apply to NAF employees.
>
> Further, 'while we are not aware of any prohibitions on extending that right to NAFI employees, the priority must first apply to APF employees'. Therefore, to ensure that [right of first refusal] is offered to NAF employees, it must be written in as a requirement of the contract. This is the only way to ensure equitable employment protection for NAF employees.

COMNAVPERSCOM (PERS-6), MWR Division, "A-76 & MWR: MWR Program Manager Commercial Activity Guidance for an A-76 Study," Rev. 8/30/99, § 4.10, http://www.mwr.navy.mil/mwrprgms/a76guid.htm. As noted earlier, the RFP at issue here included the FAR's right of first refusal clause along with notice that a contractor would have to provide a lower-preference right of first refusal to NAFI employees. RFP at 35.

In our view, the fact that the RSH specifically includes the right of first refusal for civil service employees but is, at a minimum, ambiguous as to such rights for NAFI employees is additional evidence that the A-76 process was constructed with the expectation that "Federal employees" in the MEO will be, as a general rule, civil service personnel.[18]

A final indication of whether Circular A-76 permits an MEO to contain NAFI employees relates to the Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105-270, 112 Stat. 2382, Oct. 18, 1998, which directs federal agencies to issue annually an inventory of all commercial activities performed by federal employees. The requirements of the FAIR Act do not apply to a NAFI "if all of its employees are

[18] The Navy's guidance cited above appears to reflect the agency's recognition that, at least for the purpose of the right of first refusal, NAFI employees are not government employees when that term is used in the Circular and the RSH.

referred to in 5 U.S.C. § 2105(c)." [19] Pub. L. No. 105-270, 112 Stat. 2382, 2384, § 4(b)(3). By implication, then, the requirements of the FAIR Act do apply to NAFI activities staffed with a mix of NAFI employees and civil service employees. Consistent with this guidance, DOD's Commercial Activities Program Procedures Instruction states that it "is not mandatory for [commercial activities] staffed solely with DOD civilian personnel paid by nonappropriated funds, such as military exchanges," but "is mandatory for [commercial activities] when they are staffed partially with DOD civilian personnel paid by or reimbursed from appropriated funds, such as libraries, open messes, and other [MWR] activities." DOD INSTR 4100.33, Commercial Activities Program Procedures ¶ 2.3, Oct. 1995. The instruction further provides that "[w]hen related installation support functions are being cost-compared under a single solicitation, a DOD Component may decide that it is practical to include activities staffed solely with DOD civilian personnel paid by nonappropriated funds." Id.; see also OPNAV INSTRUCTION 4860.7C, Navy Commercial Activities Program Manual, part I, ch. 1, ¶ A.3(d), June 1999. This guidance indicates that DOD and the Navy have understood Circular A-76 to allow inclusion of NAFI employees in an MEO.

We thus conclude that the A-76 guidance was constructed with the expectation that an MEO will, as a general rule, be comprised of a civil service workforce covered by the two major wage systems discussed above, but leaves open the possibility that NAFI employees might be part of an MEO. The policies, procedures, and standard cost factors in the RSH are designed for the expected components of an A-76 cost study, and not for NAFI employees or any other employees under unique wage systems, but the generic nature of the guidance does not prohibit the inclusion of these employees. As a result, we cannot find that the Navy's inclusion of NAFI employees in its MEO violated the A-76 procedures.

As we explain below, we nonetheless believe that the Navy acted improperly here, and we sustain the protest on that basis. Before turning to the defect in the agency's action in terms of procurement law, though, we note that the construction of an MEO relying primarily on NAFI employees raises significant policy concerns, which are to be resolved, not by our Office's bid protest function, but by the executive branch, and by OMB, in particular, as the agency responsible for the Circular. We recognize that policy considerations may weigh in different directions. For example, since the A-76 process is designed to find the lowest-cost solution satisfying the government's needs, it may be sensible to allow an MEO to be composed largely (or even entirely) of NAFI employees as long as this strategy provides that lowest-cost solution. Such a strategy may, in fact, represent an innovative and desirable approach to the A-76 process. A countervailing consideration would be that the A-76

[19] As discussed above, 5 U.S.C. § 2105(c) provides that NAFI employees are not government employees for the purpose of laws administered by OPM, with various stated exceptions.

process is meant to compare the cost of contractor performance against performance by a civil service workforce, so that, if performance of a function by NAFI employees is anticipated, that function should simply be transferred to NAFI employees, and not go through the A-76 process at all. Because resolving these matters is properly reserved to the executive branch, by letter of today, we are suggesting that OMB issue guidance on the proper role of NAFI employees in an MEO.

In terms of the protest before our Office, we conclude that the Navy's wholesale use of NAFI employees in the MEO in the circumstances of this case resulted in an unfair competition, and we sustain the protest on that basis.

In conducting an A-76 competition, as in any competition for a federal contract, an agency must provide private offerors with sufficient information to allow an intelligent competition on an equal basis. Ameriko Maint. Co., B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191 at 3; see also Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 at 4. While we have held that agencies conducting an A-76 cost study are not required to disclose the bases of their cost estimates to private offerors, Ameriko Maint. Co., supra, that does not mean that the agency can withhold critical information from either the public or the private participants.

The ground rules by which a commercial offeror and its competitors must abide are among the factors a commercial offeror considers in deciding whether to participate in an A-76 cost comparison competition. The ground rules for the private-private competition are established by the terms of the solicitation and applicable statutes and regulations, and the ground rules for the public-private competition are the Circular and the RSH.[20] In this regard, the Circular was designed to, among other things, "provide a level playing field between public and private offerors to a competition." RSH, Introduction, at iii. As concerns the construction and costing of an MEO, this "level playing field" is created by the policies and procedures provided in the RSH. A commercial offeror examining these ground rules for the public-private competition would come away with the reasonable understanding that the government's MEO would be comprised, as a general rule, of civil service personnel at civil service wage and benefit levels. In this public-private competition, that commercial offeror would have been mistaken.

It is true that, while the government and offerors must compete on the same PWS, when a cost comparison is being considered they may be subject to different legal obligations regarding performance, which may cause offerors to suffer a cost disadvantage. Paige's Sec. Servs., Inc., B-235254, Aug. 9, 1989, 89-2 CPD ¶ 118 at 5.

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[20] Circular A-76 studies are essentially competitions between the public and private sectors, and they are so viewed by all sides. Department of the Navy--Recon., B-286194.7, May 29, 2002, 2002 CPD ¶ __ at 5.

Hence, we have held that the fact a commercial offeror is required to pay SCA wages and benefits, while civil service and military wages and benefits that the agency is required to pay may be lower, does not itself constitute a legally impermissible competitive advantage. Id.; Ameriko Maint. Co., supra. When conducting a cost comparison, agencies must ensure that all costs are considered and that these costs are realistic[21] and fair, Circular ¶ 5.a., but fairness does not extend to equalizing such inherent disparities. Paige's Sec. Servs., Inc., supra. In these cases, however, the ground rules of the competition--the fact that the agency intended to pay civil service and military wages--were evident from the A-76 guidance and the solicitation before the competition began. In the case at hand, neither the A-76 guidance nor the solicitation put Sodexho on notice of the possibility that the Navy would use NAFI employees for the great majority of its personnel requirements, at their NAFI wage and benefit levels.

We agree with the Navy that Sodexho was on notice that the MEO might include some NAFI employees. The RFP included right of first refusal requirements for NAFI employees and an MWR annex, and MWR activities are often staffed with NAFI employees. The problem here is that neither Sodexho nor any other commercial offeror could have known that the MEO would staff the bachelor housing annex, where the bulk of the labor force was required, almost exclusively with NAFI employees, at their lower wage rate and benefits levels.

It is one thing for a commercial offeror to enter a competition understanding that its labor costs might not be competitive under one of six annexes comprising approximately 25 percent of the labor force (that is, the MWR annex), since this disadvantage can be offset by the labor costs in the other annexes. It is quite another thing for a commercial offeror to enter a competition without knowing that its labor costs will not be competitive under annexes comprising approximately 80 percent of the labor force.[22] In this regard, in one of the few points of agreement evident in these proceedings, the Navy agrees that Sodexho "simply could not compete with the wage structure for NAFI personnel as reflected in the wages that were being paid

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[21] Because the costs used in the public-private cost comparison are to be realistic, we reject Sodexho's contention that, even if NAFI employees can be included in an MEO, the in-house cost estimate must calculate their wages and benefits in conformance with the GS/FWS rates established by the RSH and in accordance with FAR § 52.222-42. The Navy's costs for these NAFI employees are not based on GS/FWS rates but on current NAFI wage rates and benefit levels; it would be antithetical to the purpose of the study to require the Navy to cost such personnel at unrealistic wage rates and benefits levels.

[22] These approximate percentages are derived from Sodexho's Initial Technical Proposal, Management Plan, at 10-27, based upon the six annexes initially required by the RFP.

to the Navy's ongoing NAFI workforce," and "the use of NAFI personnel results in significant cost savings to the Navy over any cost savings that might be gained by issuing a private sector contract that must comply with the Service Contract Act." AR at 88, 89; see also Navy's May 23, 2002 Submission at 14.

As Sodexho explains,

> The handicap created by requiring commercial sources to comply with the SCA, while allowing the cost of the Navy MEO to be calculated at the wages paid NAFI flextime employees, made it absolutely impossible for Sodexho to be cost-competitive in this procurement. All Navy officials aware of the extensive use of NAFI employees and NAFI wages in the MEO and [in-house cost estimate] had to know that no commercial source could come close to being cost-competitive. Whether conducting such a procurement constitutes bad faith may be debatable, but there can be no doubt it was not fair. If Sodexho had known the Navy was going to stack the deck in this fashion, Sodexho would certainly have challenged the legality of this practice under an A-76 procurement before preparing a proposal. If it had been determined by the GAO that it was proper for the MEO and [in-house cost estimate] to be based upon NAFI employees at NAFI compensation, no commercial contractor would have bothered to respond to such a Solicitation.

Sodexho May 29, 2002 Comments at 3 n.2.

While there is ample evidence that the Navy knew its extensive use of NAFI employees gave it a cost advantage here, there is no basis for us to conclude that the Navy set out to conduct an unfair competition. Nonetheless, since the Navy knew when it issued the solicitation that the mix of its employees in the bachelor housing annex had shifted to a largely NAFI employee population and that the list of employee classes and their wages and benefits provided in the solicitation pursuant to FAR § 52.222-42 "did not give Sodexho a clear indication of the wage grades that would be included in the MEO," AR at 69, and since the A-76 guidance does not anticipate the use of NAFI employees for the majority of the MEO workforce, we believe that fundamental fairness dictates that the Navy should have provided commercial offerors adequate notice of its intentions.

Where, as here, the level playing field promised by the A-76 guidance is tilted toward the in-house competitor in a way that cannot be reasonably anticipated by a commercial offeror, the commercial offeror is deprived of the ability to make an intelligent business judgment concerning the competition. If, as the parties agree, "the use of NAFI personnel [resulted] in significant cost savings to the Navy over any cost savings that might be gained by issuing a private sector contract that must comply with the Service Contract Act," AR at 89, Sodexho was entitled to know that fact prior to entering the competition. The Navy's failure to give commercial

offerors adequate notice of its intent to use NAFI employees for the great majority of its in-house workforce improperly and unfairly deprived those offerors of the ability to make an informed decision about whether, and how, to compete.

We now turn to Sodexho's allegations that the MEO improperly failed to meet the PWS requirements and that the agency improperly failed to adjust the in-house offer to equal the level of performance and quality provided by Sodexho's proposal.

COMPLIANCE WITH THE PWS

Sodexho contends that the MEO improperly failed to meet the PWS requirements in 41 separate areas, and that the in-house cost estimate is, as a result, understated by approximately $14 million.

To preserve the integrity of the A-76 cost comparison, private-sector offerors and the government must compete on the basis of the same scope of work. See RSH, part I, ch. 3, ¶ H.3.e.; see also Aberdeen Tech. Servs., supra, at 8. In the first instance, the RSH requires that both the in-house plan and the private-sector proposals must comply with the minimum PWS requirements. RSH, part II, ch. 2, ¶ A.1.b.

It is the IRO's responsibility prior to sealing the government's in-house plan to ensure that it satisfies the minimum PWS requirements and that any adjustments necessary to satisfy the PWS requirements are made.[23] See RSH, part I, ch. 3, ¶¶ H, I, J. Even after completion of the private-sector competition, the agency must ensure the compliance of the in-house offer with the PWS requirements. BAE Sys., supra, at 20. If an SSA determines that the in-house offer does not satisfy the PWS requirements, that deficiency must be resolved before the agency can proceed to the public/private cost comparison. Id. We have reviewed each issue raised by Sodexho, along with the agency's response and other documentation in the record, and summarize our findings as follows.

First, during the course of the various administrative appeals and protest proceedings involved here, the Navy conceded various errors in the amount of

[23] We have carefully reviewed Sodexho's allegations that the IRO's certification was not independent but was, instead, improperly "directed" by external Navy forces, and find them unpersuasive. The record does show vigorous dispute and disagreement on some details of the MEO and its costing between the IRO and Navy policymakers, much of which stemmed from the imperfect fit between OMB's A-76 guidance and the Navy's method of using NAFI employees. While these disagreements underscore our conclusion that the A-76 guidance was not designed for the wholesale use of NAFI employees, particularly NAFI flex-time employees, they do not contradict the IRO's declarations, made both contemporaneously and during the course of this protest, that he independently certified the MEO.

approximately $1.5 million, and we need not address these matters further. Second, numerous items in Sodexho's protest were not raised in its administrative appeal and will not be considered by this Office. With respect to challenges to cost comparisons under Circular A-76 procedures, we have adopted a policy, for the sake of comity and efficiency, of requiring protesters to exhaust the available administrative appeal process. As a result, we have held that where, as here, there is a relatively speedy appeal process for the review of the agency's cost comparison decision, we will not consider objections to the cost comparison that were not appealed to the agency. See Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 at 3; Direct Delivery Sys., B-198361, May 16, 1980, 80-1 CPD ¶ 343 at 2. It is true that there is no statutory or regulatory requirement that an offeror exhaust available agency-level remedies before protesting to our Office, and that we retain the discretion to waive the policy requiring the exhaustion of the Circular A-76 appeals process where good cause is shown. BAE Sys., supra, at 17-18. Here, however, the agency is correct that Sodexho had sufficient information to have raised numerous bases for challenging the cost comparison after its review of the MEO's management plan, TPP, and in-house cost estimate made available during the public review period following the cost comparison, but failed to raise them at that time.[24] There is nothing in the record that would warrant waiving our policy requiring exhaustion of the appeals process in these instances.[25] Johnson Controls World Servs., Inc., B-288636, B-288636.2, Nov. 23, 2001, 2001 CPD ¶ 191 at 18.

Our review of the remaining issues shows that Sodexho disagrees with the way the agency calculated workload and documented the MEO. Sodexho has demonstrated

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[24] The fact that the agency has both argued that these issues are untimely raised and addressed them on the merits does not change our opinion; we view the Navy's approach as responsible and helpful. Also, given the specificity of the allegations to the procurement at hand, we decline to consider them under the "significant issue" exception to our timeliness requirements. 4 C.F.R. § 21.2(c) (2002); Crown Support Servs., Inc., B-287070, Jan. 31, 2001, 2001 CPD ¶ 33 at 3 n.1.

[25] In addition, Sodexho alleges that the MEO failed to include transition costs despite the fact that the schedule included a line item for such costs. As the Navy points out, the RFP specifically advised offerors that this line item was provided merely as a convenience for payment purposes if the resulting service provider was other than the government, and explicitly stated that "for cost comparison purposes, [this line item] will be considered as part of the contractor's cost to perform recorded on line 7 of the cost comparison form. Moreover, the government's in-house cost estimate will not include any costs related to this line item." RFP at 14. To the extent Sodexho believed the MEO should have been required to include transition costs, it was required to protest that alleged solicitation impropriety prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Sodexho's failure to raise this matter until after the cost comparison was completed renders it untimely.

that the agency paid less than careful attention to detail when preparing the management plan and TPP, but has not shown that the MEO failed to meet the minimum requirements of the PWS.[26] See Del-Jen, Inc., B-287273.2, Jan. 23, 2002, 2002 CPD ¶ 27 at 14. The following examples from each annex are provided for illustrative purposes.

Under the family housing annex, PWS ¶ 2.4.4.2. requires the service provider (SP) to maintain an accurate inventory of all government-owned appliances and equipment (such as stoves, refrigerators, water heaters, and lawnmowers) located in each housing unit and in storage at NASWF only. The appeals authority denied Sodexho's appeal allegation that the MEO failed to document the workload for this requirement, citing to the portion of the MEO accounting for such workload. Sodexho now argues that the number of hours called for in the MEO only permits 33 minutes per property for the inventory, asserts that this is not enough time, and argues that a more realistic time would be 1 hour per property. The agency correctly observes that Sodexho cites no basis for its conclusion that 1 hour per property is more realistic than 33 minutes per property, and we have no basis to conclude that the MEO failed to meet the PWS requirements.

Also under the family housing annex, Sodexho's appeal argued that the current Family Activity Management Information System databases were separate and not networked between NASP and NASWF, and that the management plan proposed to provide read-only joint access at both locations to eliminate inefficiencies but did not include any costs for required changes in hardware and software configuration. The appeals authority's denial of this issue indicated that no technology improvements were planned and stated that PWS ¶ 2.4.2.6 required data entry at NASP and NASWF and the MEO included data entry hours for both locations. In its protest, Sodexho primarily argued that the MEO under-resourced the requirements based on the number and type of employees used in the past. The agency provided a detailed rationale supporting its allocation of resources which Sodexho has not addressed, and we have no basis to conclude that the MEO did not meet the minimum requirements of the PWS.

Under the bachelor housing annex, Sodexho's appeal argued that the MEO calculated the staffing required for room cleaning using a lower number of transient rooms than provided by the PWS. The appeals authority agreed with Sodexho that the bachelor officer housing was underbid by three rooms, and increased the IHCE by $25,455.02. The appeals authority explained, however, that the disparity concerning bachelor enlisted housing was based on the parties' different methods of

[26] We do agree with Sodexho that the Navy has failed to adequately explain why it did not comply with guidance in effect when the MEO was certified regarding the cost of a one-time inventory, and that the resulting one-time conversion costs were overstated by approximately $50,000.

calculating the number of rooms in one building. With respect to that building, the PWS described the 314 room units as follows: "314 E5-E6 TP (each individual guest occupies 2 rooms: 628 rooms)." PWS attach. 3-3 at 4. The appeals authority explained that these are small 220 square feet suites (a bedroom and a living room), that the MEO considered the 628 rooms to be 314 rooms for cleaning and analysis purposes since they are both very small, and that the MEO cleaning time was based on a study of observed cleaning times. We are not persuaded by Sodexho's argument that the MEO must base its proposal on cleaning 628 rooms because Sodexho did so. All offerors had an opportunity to view room sizes and configurations during the site visit, and it was up to each offeror how to calculate the workload. The agency has provided substantial detail regarding how it arrived at its workload estimates, and Sodexho has given us no basis to conclude that the MEO failed to meet the minimum requirements of the PWS.

Also under the bachelor housing annex, Sodexho's appeal provided specific examples in support of its argument that the MEO's custodial calculations omitted part of the requirements. Sodexho also asserted that the MEO stated its analysis showed that the median square footage cleaned by a custodian throughout PNRC was 7,479 square feet, but failed to use this factor in calculating workload. The appeals authority found that mistakes had been made with respect to the specific examples cited by Sodexho, and increased the in-house cost estimate by $461,120.28 using Sodexho's calculation of square footage for these locations and the 7,479 square foot factor cited by Sodexho. In its agency-level protest and here, Sodexho argues, among other things,[27] that the agency should apply the 7,479 square feet factor to all of the square footage in the requirements, not just what had earlier been omitted. The Navy has explained that the MEO did not use the 7,479 square foot factor for all of the required square footage because it recognized that the square footage provided in the PWS was not all for the same types of surfaces and did not require the same levels of service. Moreover, where the existing crew was cleaning in excess of the median, the MEO chose to maintain the higher level. Sodexho has not challenged this explanation or otherwise shown that the staffing levels provided in the MEO are insufficient to meet the minimum PWS requirements.

Under the MWR annex, Sodexho's appeal argued that the MEO failed to include the workload for one of the four locations of athletic fields and facilities, Saufley Field.

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[27] In its agency-level protest and here, Sodexho cites new examples of square footage that was allegedly not included in the MEO. Since these examples could have been raised in the administrative appeal but were not, we decline to consider them. Sodexho cannot rely on its citation to some examples in the administrative appeal to extend to new examples in subsequent filings; such a practice would circumvent our timeliness requirements and, in the context of an A-76 procurement, our requirement for the exhaustion of administrative remedies. See Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215 at 3 n.3.

The appeals authority denied this issue, pointing out that the workload for Saufley Field was incorporated into that for the Corry Station location. In its agency-level protest, Sodexho disputed this response and argued that, for example, both locations each had two trails to be maintained and the Corry workload of 504 inspections was the same as two inspections per day or one per trail at Corry, leaving no workload for Saufley Field. The agency explained that PWS ¶ 4.7.1.5. required the SP to perform operational maintenance of jogging trails and tracks including, but not limited to, weekly inspections. The MEO proposed 189 annual hours for trails inspection at Corry and Saufley, which amounted to 1.8 hours per base to inspect the two trails located at each facility and to do what little operational maintenance was required. As a result, the agency stated, inspections on a weekly basis would take only 78 hours, so 189 hours was more than enough to meet the PWS requirements. In its protest to our Office, Sodexho does not renew the objections it has already raised, but instead provides new examples of workload allegedly unaccounted for by the MEO. Again, since Sodexho could have raised these objections in its administrative appeal but failed to do so, we will not consider them.

Also under the MWR annex, Sodexho's appeal argued that the frequencies used by the MEO to develop operational maintenance staffing had little relation to the quantities and frequencies set forth by the PWS, and that entire categories of equipment and facilities are omitted. The appeals authority denied this issue, finding that the MEO directly corresponded to the operational requirements in the PWS, and provided a detailed explanation. In its agency-level protest, Sodexho raised specific examples for the first time, and received a detailed response from the agency, which it has failed to address. Under the circumstances, Sodexho has given us no basis to find that the MEO failed to meet the minimum requirements of the PWS.

Under the public affairs annex, Sodexho's appeal argued that the MEO failed to allocate staff to lay out advertisements for the "Whiting Tower," one of two newspapers, as required by the PWS. The appeals authority denied this issue, and the record shows that the MEO specifically states that the writer/editor at NASWF will "write, edit, and layout" the newspaper. Management Plan Annex 6 at 10; see also TPP Annex 6 at 3 ("[t]he MEO will layout advertisements in the Whiting Tower only.") Sodexho's subsequent argument that there is insufficient workload accounted for to meet this requirement is untimely since it could have been raised in the administrative appeal. Moreover, the agency report provided a detailed explanation to account for the workload, which is unrebutted by the protester. Under the circumstances, we have no basis to conclude that the MEO failed to meet the minimum requirements of the PWS.

Finally, also under the public affairs annex, Sodexho's appeal argued that the lead photographer/audiovisual specialist was not allocated time for the development of programming and writing for programs and shows of the closed circuit television station. The appeals authority denied this issue, stating that the PWS did not require the SP to develop programming or write scripts for shows, but merely required the SP to operate the internal cable network and produce the programs and shows. The

appeals authority explained that the lead photographer/audiovisual specialist will produce live broadcasts from prepared programs and scripts provided by customers or guests. Sodexho's assertion that the PWS does not say programs and scripts are prepared by customers is an attempt to read more into the PWS than is there, and there is no basis for us to conclude that the MEO did not meet the minimum requirements set forth by the PWS.

COMPARABLE LEVEL AND QUALITY OF PERFORMANCE

Sodexho finally contends that the Navy improperly failed to adjust the in-house offer to equal the level of performance and quality provided by Sodexho's proposal.

The RSH provides that where, as here, a "best value" approach is taken in evaluating private-sector proposals, the agency must compare the in-house management plan to the successful private-sector proposal to determine "whether or not the same level of performance and performance quality will be achieved," and, if not, to make "all changes necessary to meet the performance standards accepted" in the private sector proposal. RSH, part 1, ch. 3, ¶¶ H.3.d, e. This "leveling of the playing field" is necessary because a "best value" solicitation invites the submission of proposals that exceed the RFP requirements, together with the higher prices that often accompany a technically superior approach. Failure to ensure that the in-house management plan offers the same level of performance as the "best value" private-sector proposal selected to be compared with the in-house plan can lead to an unfair situation where the very technical superiority that led to the private-sector proposal's selection would cause it to lose the public/private comparison. The Jones/Hill Joint Venture--Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62 at 10.

The starting point for this analysis is the agency's own evaluation, during the private-sector competition, of the proposal that is ultimately selected for comparison with the in-house plan. If an agency identifies strengths in that proposal, or if it identifies areas in which that proposal exceeds the RFP requirements, the agency should consider those strengths in comparing that proposal with the in-house management plan. RSH, part I, ch. 3, ¶¶ H.3.d, e; The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194 at 20; Rice Servs., Ltd., B-284997, June 29, 2000, 2000 CPD ¶ 113 at 7-8. A generalized comparison of quality, such as simply stating that the private offeror and the in-house management plan were given the same adjectival ratings, cannot substitute for the consideration of whether the in-house plan offers a level of performance comparable to that of the selected private-sector proposal. DynCorp Technical Servs. LLC, B-284833.3, B-284833.4, July 17, 2001, 2001 CPD ¶ 112 at 13. However, the agency may ultimately conclude that the two offer comparable levels of performance and performance quality, despite some differences and, potentially, despite identified strengths. See, e.g., NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 14-17.

As discussed above, the TEB evaluated Sodexho's proposal as merely acceptable under all of the technical evaluation factors and acceptable overall (with a passing

grade under the quality control subfactor). The TEB identified no strengths, no performance enhancements, and no improved performance standards in Sodexho's proposal. Instead, the documentation shows that the TEP merely found Sodexho's proposal to be "sufficient" or "adequate" to meet the PWS requirements. Technical Evaluation of Proposals, June 25, 2001; Technical Evaluation of FPRs, Aug. 13, 2001; Contracting Officer Memorandum to the File, Aug. 29, 2001. As discussed above, by memorandum dated September 5, 2001, the contracting officer memorialized his determination that the in-house proposal offered the same level of performance and performance quality as did the Sodexho proposal. He concurred with the TEB's findings that the Sodexho proposal offered no changes to the solicitation requirements or improvements to the level of performance or performance quality beyond what was required by the PWS. The contracting officer went on to analyze the differences between the two proposals, on an annex-by-annex basis, focusing on the differences in staffing levels, differing approaches, and the minimum standards set forth in the PWS. The contracting officer found that the Sodexho proposal did not offer to provide any of these services at a level in excess of the minimum standards. Contracting Officer's Memorandum, Sept. 5, 2001.

Sodexho generally argues that the quality of service it proposed is higher than that of the MEO because the fact that the majority of the workforce is earning compensation substantially less than the compensation paid by Sodexho must have a dramatic impact on the quality of service, retention, and recruitment. Sodexho simply has not demonstrated that this is the case. Sodexho's focus appears to be on the NAFI flextime employees, who work on an an-needed basis for an hourly rate that includes few benefits. As the Navy explains, however, the reality of life on a military installation is that a substantial pool of labor, largely military spouses who have benefits through their spouses, wants additional income with flexible hours and does not need additional benefits. Sodexho's allegations that these positions unfairly take advantage of military spouses does not address the Navy's explanation, and gives us no evidence upon which to base a conclusion that the Navy's longtime use of flextime employees to perform many of the tasks at issue here has compromised the Navy's quality of performance or its ability to recruit or retain employees.

Many of Sodexho's allegations merely reflect differing approaches to staffing the requirements.[28] In this regard, however, higher level of staffing, or a different mix of staffing, does not necessarily offer any commensurate increase in performance or performance quality. Just as two competing private-sector offerors may reasonably propose different levels of staffing and different staffing mixes, depending on each

[28] The Navy is also correct that one of the two issues raised in detail in Sodexho's comments, which concerns the different staffing levels between Sodexho and the MEO under the public affairs annex, is untimely. Sodexho should have known these differences based on the management plan, TPP, and in-house cost estimate when it filed its administrative appeal, but did not raise the issue at that time.

offeror's technical approach and proposed efficiencies, so, too, the in-house plan may be based on a level of staffing or staffing mixes different from that offered by the private-sector proposal. Neither the SSEB nor the SSA should impose the private-sector proposal's staffing levels or approach on the in-house team. BAE Sys., supra, at 15. Our review of Sodexho's proposal shows that it contains little, if any, narrative indicating that its staffing approach ipso facto indicates an enhanced level of performance quality.[29]

In this regard, Sodexho argues that the MEO must add at least 20 additional full-time housekeepers in order to approximate the level of service provided by Sodexho. The protester argues that its calculations of the number of workers required was based on its experience and various time and motion studies, and that the MEO provides fewer FTEs and less worker time per task. However, the agency has explained that it, too, has supported its staffing levels with workload analysis that appears to be reasonable; there is no indication that Sodexho's minimum qualifications for these positions are particularly demanding or that the MEO's approach would result in inferior performance, and no indication that Sodexho will otherwise exceed the PWS requirements. While the differing staffing levels and mixes reflect different approaches, Sodexho has not demonstrated that its approach represents a performance enhancement.

The same is true for Sodexho's allegations that the MEO must add staff to meet its own staffing levels for the administrative support requirements within the general annex. The Navy explains that the MEO's approach was to maintain the status quo and operate stovepipe operations for family housing, bachelor housing, MWR, and public affairs; each organization operates independently and provides all management, supervision, labor, and administrative support required. The Navy explains that the MEO looked at establishing a centralized community support management and support office but found no compelling reason to do so. The MEO team discussed what, if any, directly operational support the current community support director provided to the organization and concluded that it was minimal. The MEO's staffing for the general annex is consistent with this approach and

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[29] As an example, Sodexho argued in its appeal that the in-house cost estimate improperly omitted the costs of photo processing under the public affairs annex. The appeals authority denied the issue because PWS ¶ 6.2.2. stated that "[p]rocessing will be provided by an outside vendor and the processing costs will be reimbursed to the SP by the Government." Sodexho now argues that its provision of photo processing in-house might result in faster processing and the ability to meet last minute deadlines and, as a result, it provided a higher level of service that the MEO should have been required to meet, but its proposal contains no such statement and there was no basis for the agency to conclude that Sodexho provided a higher level of service.

Sodexho has not persuaded us that its approach represents a performance enhancement.

We need not address Sodexho's remaining contentions. After the appeals process, and considering all of the concessions made by the agency,[30] the in-house cost estimate is still less costly than Sodexho's proposal by approximately $23 million. Even where Sodexho has calculated that adjustments for leveling will result in a cost increase to the in-house organization, the sum of those figures does not approach an amount sufficient to displace the in-house cost estimate.

CONCLUSION AND RECOMMENDATION

As explained above, we sustain the protest because we find that the Navy's failure to give commercial offerors adequate notice of its intention to use NAFI employees resulted in an unfair competition. Because we do not find, however, that it was unlawful for the Navy to rely so heavily on NAFI employees, and because Sodexho has indicated it would not have competed if it had been given notice in this regard, we have no basis to conclude that Sodexho would participate in a recompetition. As a result, we recommend that Sodexho be reimbursed the costs of preparing its proposal to participate in this competition. 4 C.F.R. § 21.8(d)(2); see also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 at 4. We also recommend that Sodexho be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Sodexho should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

[30] In addition to the concessions described above, the appeals authority added approximately $120,000 to the IHCE in response to Sodexho's leveling allegations.