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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Pacific Support Group, LLC

File: B-290467

Date: August 8, 2002

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Raymond M. Saunders, Esq., Lt. Col. Daniel K. Poling, Maj. Karl W. Kuhn, and Capt. Timothy J. Ryan, Department of the Army, for the agency.
Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against determination to retain in-house certain real property maintenance functions as a result of a cost comparison conducted pursuant to Office of Management and Budget Circular A-76, alleging that agency improperly failed to include costs for all of the personnel required to meet the requirements of the performance work statement (PWS), or to appropriately reduce the evaluated cost of contractor performance, is denied; the record provides no basis to question the reasonableness of the agency's finding that, as adjusted, the cost of in-house performance included all staffing necessary to meet the PWS requirements, and that after appropriate reduction to the evaluated cost of contractor performance had been taken as well, the cost of in-house performance remained low by a substantial margin.

2. Adjustment to the most efficient organization (MEO) staffing cost estimate as necessary to satisfy the performance work statement requirements, based on findings by the agency administrative appeals board after consultation with MEO study team, is an appropriate element of agency-level A-76 appeal process, the adoption of which does not provide a basis to object to the propriety of the cost comparison determination.

DECISION

Pacific Support Group, LLC (PSG) protests the Department of the Army's determination to retain in-house the real property maintenance support services for the U.S. Army Garrison, Hawaii, rather than to contract for these services with PSG under request for proposals (RFP) No. DAPC50-00-R-0007. The Army decided to retain the services in-house based on the results of a cost comparison conducted pursuant to Office of Management and Budget (OMB) Circular A-76, which compared PSG's proposal to perform the work against the government's in-house management plan, that is, its "most efficient organization" (MEO). PSG challenges numerous aspects of the agency's determination that in-house performance remained more economical than contractor performance, even after the agency had made certain adjustments to reflect the findings of the agency's administrative appeal board (AAB). Although the AAB had agreed with PSG with respect to parts of certain of the appeal issues that PSG had raised, as a result of which both the protester's evaluated cost and the in-house cost estimate (IHCE) had been adjusted, the resultant cost comparison did not change the agency's initial determination that it was more economical, by a substantial margin, to retain the services in-house. PSG argues primarily that the MEO is understaffed in numerous regards and does not include required costs for all of the necessary personnel under the PWS, and that there are various calculation errors that result in overstatement of PSG's evaluated cost and understatement of the IHCE. PSG also questions the propriety of the procedures followed by the AAB in reaching its determination.

We deny the protest.

BACKGROUND

In October 1997, the Army announced that the Directorate of Public Works (DPW) for the U.S. Army Garrison, Hawaii, which then employed approximately 400 civilian employees to perform real property maintenance activity support services for Army facilities in Hawaii, would be the subject of a commercial activities study. A performance work statement (PWS) for this function was prepared by the agency for inclusion in a solicitation to be issued as part of a public/private cost comparison under Circular A-76, in which the selected offeror's proposal to perform the work would be compared with the agency's MEO.[1]

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[1] The procedures for determining whether the government should perform an activity in-house or by a contractor are set forth in Circular A-76 and the Revised Supplemental Handbook (RSH) to it, which have been made expressly applicable to the Department of Defense (DOD) and its military departments. See 32 C.F.R. § 169a.15(d) (2002). The process set out in the Circular and the RSH broadly encompass the following steps in conducting the public/private competition. First, after the PWS has been drafted, the agency ensures, through certification by an independent reviewing official (IRO), that the government's in-house management plan satisfies the requirements of the PWS. See RSH, part I, ch. 3, § I. (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.) Second, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement. If that competition is done on the basis of a

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On January 17, 2001, the MEO and IHCE that had been prepared by the DPW management study team was submitted to the Army Audit Agency, which served as the IRO. The MEO was based on performing the PWS requirements under a plan which took into account the historical staffing levels adjusted to reflect "efficiencies that will streamline operations and fully utilize its smaller workforce," and reflected certain changes in "current business practices." Agency Report (AR), Tab 7, IRO Review and Adjustment Memorandum, at 764-65. The IRO evaluated the MEO and recommended certain adjustments to in-house costs, which were made with the agreement of the DPW study team, after which the IRO concluded that the MEO "reasonably establishes the Government's ability to perform work requirements of the performance work statement with the resources [indicated]," and that the IHCE "provides a reasonable estimate of government costs and has been completed in compliance with OMB Circular A-76, its supplement, and related DOD and Army Guidance." Id. at 758-59, 764.

The RFP was issued electronically on November 2, 2000, seeking proposals to provide all resources and management necessary to perform real property maintenance activity support services for the U.S. Army Garrison, Hawaii. The major functional areas included in the services to be performed were DPW business management, housing, environmental compliance and pollution prevention, engineering, plans and services, operations support, and maintenance and repair of facilities. The RFP contemplated the award (if the private sector offeror won the cost comparison) of a cost-plus-award-fee contract for a 9-month base period, with four 1-year options, plus phase-in/phase-out transition periods, and provided that the offeror with the lowest cost, technically acceptable offer after the most probable cost evaluation would be selected for comparison with the government IHCE. PSG was the only firm that submitted a proposal by the February 1, 2001 amended closing time. PSG's initial proposal was evaluated as technically unacceptable at an overall evaluated cost of $116,155,237.10. AR, Tab 23, Price Negotiation Memorandum, at 3. After discussions, PSG's revised proposal was eventually found technically acceptable, at an evaluated total cost of $119,204,215.49, id.,[2] and on October 9, 2001,

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comparative technical evaluation (that is, if a cost/technical tradeoff is contemplated--which was not the case here), the government's in-house plan is compared with the winning private-sector offer to assess whether or not they are based on a comparable level of performance and performance quality--and if not, to make all changes necessary to make the level of the in-house plan comparable to that of the private-sector proposal. Id. at § H.3.d.e. Finally, there is a cost comparison between the private-sector offer and the in-house plan. Id. at §§ H, J.

[2] PSG's evaluated total cost includes more than $30 million in "wash" costs, that is, costs for items such as government furnished supplies which are the same regardless
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PSG's proposal (the only proposal received) was selected to compete with the in-house plan.

The initial cost comparison, conducted on November 12, 2001, resulted in a determination that in-house cost for the 5-year performance period would be $78,588,438, while evaluated contractor performance cost was $88,490,058, plus a conversion differential of $6,797,325, for a total cost of $95,528,383. AR, Memorandum of Law, at 4. Thus, in-house performance would save $16,698,945. Id.

PSG appealed this determination to the agency on December 13, 2001, and an AAB was convened on January 7, 2002.[3] The AAB review was completed on April 26, 2002, and denied the majority of PSG issues, but sustained six issues in part, as well as one issue that had been raised by the union (IAMAW) in its appeal. Based on the AAB findings, the IHCE was adjusted to $76,041,899; the evaluated contractor performance cost was adjusted to $79,220,505 plus a minimum conversion differential of $6,683,861, for a total cost of $85,862,467, resulting in an evaluated total cost advantage of $9,862,467 for in-house performance. AR, Tab 4, AAB Decision, at 128. Accordingly, the agency determined that it was appropriate to retain performance in-house, and after receiving notice of this determination, PSG filed this protest with our Office.

A-76 REVIEW STANDARD

Where, as here, an agency has conducted a cost comparison under 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 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; Aberdeen Technical Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 8. The RSH requires that both the in-house offer and the private-sector proposals comply with the minimum PWS requirements. RSH, part II, ch. 2,

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of the eventual decision and, therefore, are eliminated from both the IHCE and contractor cost totals for purposes of performing the cost comparison.

[3] Hawaii Federal Lodge No. 1998 of the International Association of Machinists and Aerospace Workers (IAMAW) also filed an agency-level appeal, alleging that certain elements of the IHCE had been overstated. AR, Tab 38, IAMAW Appeal.

¶ A.1.b.[4] To succeed in its protest, the protester must demonstrate that the agency failed to follow established procedures and that this failure could have materially affected the outcome of the cost comparison. Aberdeen, supra, at 5.

PROTEST

In its agency-level appeal and in this protest, PSG raised a wide array of issues. The issues before our Office, as refined by the protester's comments, fall into three core areas. First, PSG complains that "the integrity of the procurement process is undermined by the AAB's failure to properly fulfill its role under OMB Circular No. A-76." Protester's Comments at 2 (all upper case in original). Next, PSG asserts that the "MEO does not meet the PWS requirements" (all upper case in original) therefore, even the revised IHCE is understated. Id. at 6. Finally, PSG contends that "the AAB's revised cost comparison is inaccurate and mistaken" in various regards. Id. at 13 (all upper case in original). In addition, PSG has propounded a variety of less significant "additional issues." Id. at 18. We have carefully considered all of PSG's allegations, find each without merit and conclude that the cost comparison has not been shown to be unreasonable, and that there is no basis to conclude that it reflects any deficiencies that could have materially affected the outcome of the comparison. This decision will specifically address issues that are central to PSG's contentions, and are representative of all of its arguments.

PRIME VENDOR SUBCONTRACTING UNDER THE MEO

Propriety of the AAB Review

PSG's first two core issue areas focus on the MEO's use of a "prime vendor" concept, under which certain PWS maintenance and repair functions are to be performed by subcontract. PSG asserted in its agency appeal that this type of subcontracting was prohibited on the basis of the DoD Costing Manual (Manual) and the associated requisite software, win.COMPARE[2]. However, the AAB properly rejected this contention, finding that the government was not required to use the Manual and associated software here because it was only necessary to do so where the government management plan, including the IHCE, was submitted to the IRO after April 15, 2001. Here, the MEO and IHCE had been submitted on January 7, 2001, and

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[4] Here, because the RFP called for the agency to select the lowest-priced, technically acceptable proposal for the cost comparison, with no assessment or ranking of proposals based on "technical superiority" for purposes of making a best-value tradeoff, there was no requirement that the agency go through the "leveling" process called for where the solicitation entails a comparative technical evaluation. Johnson Controls World Servs., Inc., B-288636, B-288636.2, Nov. 23, 2001, 2001 CPD ¶191 at 11.

the IRO had actually completed its review by February 16, 2001, prior to the triggering date.[5] AR, Tab 4, AAB Decision, at 7. Accordingly, the agency was permitted to, and did use its then-current costing practices in compliance with the RSH, and the associated COMPARE software (a prior version). Id. at 7-8. Additionally, the AAB recognized that here, because the RFP had explicitly stated that COMPARE software would be used in developing the IHCE, any subsequent revision to the IHCE would be required to be prepared using the same software and associated costing policies. Id. at 8.

The AAB noted that use of prime vendor subcontractors to obtain furnishings, supplies and materials was permissible and a common practice, but the AAB went on to recognize the merit of the protester's contentions that here, the cost of staffing for requirements set forth in the PWS that went beyond the scope of procurement of supplies and materials had to be added to the MEO cost. Id. at 12. This was necessary because otherwise the cost would not be appropriately attributed to the government for comparison purposes because it had been included under the category of supplies and materials, a wash cost which is eliminated from consideration during the cost comparison process. The AAB concluded that the government must include in its MEO cost staff sufficient to perform the function. Id. at 10, 12. In order to estimate the appropriate cost, AAB sought input from the PWS study group, which in turn obtained input from IRO, and eventually recommended the addition of the cost of 8 full-time equivalent employees (FTE), along with the reallocation of 2 FTEs, as sufficient to perform the work at issue. The AAB identified the applicable work to be performed under the PWS and how it would be performed under this staffing, and adopted the finding that a total of 10 positions was a reasonable estimate of the number of in-house FTEs required to perform the furnishings and supply and material warehousings requirements, noting that PSG had proposed approximately 11.5 individuals to perform these functions. Id. at 14.

PSG contends that because of the use of prime vendor subcontracting, the MEO is "technically unacceptable," Protest at 8, and that the agency's adjustment of the MEO costs to reflect the cost of appropriate staffing reflects that "the AAB improperly took over the role of rewriting the [MEO]." Protester's Comments at 4 (all upper case in original). In this same regard, PSG objects that the AAB unfairly favored the MEO over PSG by providing the MEO opportunities to change both its approach and work standards, while PSG was excluded from participation in this process. Id. 4-5.

We see no basis to find any impropriety on the part of the AAB or the agency in this regard. The extent of, or limits on, participation by the various sides in the agency appeal process are not matters for review by our Office. Johnson, supra, at 9 n.7.

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[5] In its protest to our Office, PSG does not dispute that this is the specified triggering date for the Manual.

Moreover, there is nothing wrong with the AAB requesting further explanations to assist in reaching its conclusion, and the fact that the request was made and information was provided by the DPW team after consultation with the IRO does not warrant a conclusion that the MEO was, as PSG frames it, "technically unacceptable,"[6] or otherwise inadequate to support the cost comparison. Id. Additionally, PSG's argument misconstrues the substance of the AAB process that was actually undertaken. As explained above, the AAB did not find that prime vendor subcontracting was prohibited, or that the MEO had to be rewritten. Rather, in order to fairly estimate certain costs that had been masked in the comparison by the way in which the prime vendor subcontracting costs had been treated, the AAB recognized the need to make a cost adjustment to account for the appropriate number of government FTEs needed to perform the work in question under the MEO, in order to permit an accurate cost comparison. This is directly consistent with the purpose of the A-76 cost comparison process, not an impropriety or defect.

Reasonableness of the Subcontractor Cost Adjustment

The AAB's cost adjustment associated with correcting the IHCE error that had been introduced as a result of the MEO's subcontracting approach is also central to PSG's second core argument. PSG contends that adjusting the IHCE to reflect the cost of 10 FTEs was insufficient and that the cost associated with 25 FTEs should have been added. PSG bases this on its allegation that the prime vendor subcontracting approach had called for performance by 25 individuals. Protester's Comments at 7. The agency has provided a detailed explanation of the functions encompassed and a rationale for the determination that 10 FTEs can perform the work in question, and points out that PSG itself proposed 11.5 FTEs to perform the work. PSG posits that the MEO's approach was radically different because of use of the prime vendor concept, and that PSG expected efficiencies as a result of the different approach under its proposal; therefore, PSG contends that the agency was required to add 15 FTEs to the MEO at a cost of $4,132,500. Protester's Comments at 7.

In our view, PSG's contention is without merit. The agency has provided a detailed explanation of its foundation for adjustment on the basis of the number of FTEs that it used, including particulars of how the PWS requirements in question are satisfied as a result. PSG's contention that the cost of 15 in-house FTEs must be added simply to remain consistent with what PSG claims is the total number of employees that is contemplated under prime vendor subcontracting is merely mechanical, and without any basis. PSG has not identified any particular efficiencies associated with its

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[6] The concept of technical unacceptability is inapplicable to the MEO; indeed, as explained above, in the first instance, it is the IRO's responsibility to certify that the MEO satisfies the PWS requirements, and the AAB review encompasses a determination that cost adjustments to the MEO are necessary to ensure that the PWS requirements can be satisfied under the MEO--as was done here.

proposal, nor has PSG provided any basis to question the reasonableness of the agency rationale for 10 FTEs. Accordingly, the allegation is without merit.

COLLECTIVE BARGAINING AGREEMENT

PSG also argues that the MEO fails to satisfy the PWS requirements because "[t]he Government's man-year used for purposes of calculating FTEs . . . is insufficient to comply with all the requirements of the [applicable] Collective Bargaining Agreement ('CBA')." Protester's Comments at 10. PSG recites a variety of nonproductive tasks provided for under the extant CBA, along with estimates of the time PSG posits will be associated with these tasks, and concludes that the government's use of 1,776 hours out of a 2,087 hour total as a productive staff-year for calculation purposes fails to allow sufficient time for nonproductive tasks for which time is required under the CBA. Id. PSG estimates that the impact of the shortfall is 33.41 FTEs over the life of the contract, or $9,508,458 in additional costs that must be added to the IHCE. Id. PSG would have it that "[t]he question is whether the AAB 'has done the math' to show that the CBA requirements can be met with the . . . nonproductive time remaining after holiday, leave, and sick time have been taken into account. The AAB has made no such demonstration." Id. at 11.

The protester's calculations are essentially based on plugging in estimated hours to cover CBA-provided non-productive tasks such as time for workers to vote in elections, tool issue time, and clean-up time. The agency has provided an explanation for its calculation of productive versus non-productive hours, on the basis of which it concludes that there are sufficient hours available to perform all non-productive tasks under the 1,776 productive hour calculation. More important, the protester's allegation is without merit because the RSH expressly provides for the productive hour calculation methodology used by the agency, as follows:

> For full-time and part-time positions, estimate the total hours required by skill and divide by 1,776 annual available hours to determine the number of FTE positions required . . . . The productive hours exclude annual leave, sick leave, administrative leave, training and other nonproductive hours.

RSH, Part II, chap. 2, ¶ b.5.

Because the agency's use of 1,776 hours per FTE in preparing the MEO reflects the direct application of express instructions of the RSH, PSG's objection in this regard is unfounded and PSG's remaining allegations in this second core area are similarly nonmeritorious.

ALLEGED CALCULATION ERRORS

Conversion Costs

PSG's third major issue area consists of what it characterizes as calculation errors, which show that "the AAB's revised cost comparison is inaccurate and mistaken." Protester's Comments at 13. Here, for example, PSG contends that the one-time conversion costs were miscalculated and overstated because the agency failed to apply the DoD Costing Manual and the COMPARE[2] software. Id. at 16. As explained above, the AAB correctly determined that the agency was not required to use this approach because the IHCE had been submitted to the IRO prior to the applicable date, and the RFP stated that guidelines consistent with the RSH and the older edition of the COMPARE software would be used. PSG contends that because the subcontracting revision to the MEO was substantial and occurred after the March 15, 2001 cutoff date, the agency was required to use the Manual and COMPARE[2]. Id.

As also explained above, this argument misconstrues the substance of the process that was actually undertaken. The AAB did not find that prime vendor subcontracting was prohibited, or that the MEO had to be rewritten. Rather, in order to fairly estimate costs that had been masked in the comparison, the AAB directed a cost adjustment to account for the appropriate number of FTEs needed to perform the work in question under the MEO. In addition, the AAB recognized that by its express transmittal terms, the Manual provided that if a revision to the government management plan, including the IHCE, was required after the initial IRO certification, the same software and associated costing policies must be used for the revision. AR, Tab 4, AAB Decision, at 8. Thus, it would have been improper for the agency to change the applicable software and costing policies in midstream.

Enhanced Personal Digital Assistants

Another PSG contention in this area concerns the personal digital assistants (PDA) that PSG had proposed. PSG asserts that it recognized that the 80 off-the-shelf Palm Pilot PDAs specified under the RFP as government-furnished property (GFP) were inadequate to meet the PWS computerized maintenance management system requirements and, therefore, PSG proposed upgraded PDAs in the form of [deleted] with appropriate software, at a cost of $963,953. Protester's Comments at 13-14. Since the AAB did not "level" up the MEO to match this enhanced PDA performance, PSG contends that its proposed costs should have been reduced by $963,953 to delete the proposed enhancement.

In our view, this is not an alleged calculation error. In the first instance, it constitutes an untimely protest that the RFP specifications are inadequate to satisfy the PWS. That is, PSG is actually contending that the specified GFP is deficient. Beyond that, this argument actually consists of a contention that PSG's proposed enhancements beyond the RFP requirements required leveling. As explained above, because this was not a best value RFP, such leveling was not required in the cost comparison conducted here. PSG's argument in this regard is without foundation or merit.

In sum, PSG's protest reflects assertions that a variety of adjustments are necessary to the IHCE because of features or FTE levels contained in PSG's own proposal, or in the MEO subcontracting plan, or based on PSG's unsubstantiated construct of what is necessary to satisfy the PWS work requirements; additionally, PSG questions the propriety of the agency cost comparison process on the basis of nonmeritorious contentions concerning the applicable requirements under A-76 cost comparison procedures. None of the issues presented by PSG raises any material question as to the reasonableness of the agency's determinations, or the propriety of its decision to retain performance in-house.

The protest is denied.

Anthony H. Gamboa
General Counsel