



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay Tankers, Inc.; Transoceanic Cable Ship Co.
File: B-224480.6; B-224480.7; B-224480.8; B-224480.9
Date: March 25, 1988

DIGEST

1. Agency determination of the precise extent and cost of training considered necessary to assure safe and efficient operation of cable ships will not be questioned where there is no showing that the requirement is unreasonable.
2. Agency properly excluded from in-house cost estimate the cost of support personnel whose positions would not be eliminated if a contract were awarded; cost comparison procedures require inclusion in estimate only costs for positions that would be eliminated.
3. Agency's cost of preparing the solicitation and most efficient organization study is not part of the cost of in-house performance for purposes of Office of Management and Budget Circular A-76 cost comparison; the costs are incurred prior to the contemplated contract period for services not included in the solicitation's performance work statement.

DECISION

Bay Tankers, Inc., and Transoceanic Cable Ship Company (TCS) protest the determination made by the Military Sealift Command (MSC) pursuant to Office of Management and Budget (OMB) Circular A-76, that MSC can operate and maintain five cable ships at a lower cost than a commercial contractor, under request for proposals (RFP) No. N00033-86-R-4006. We deny the protests.

The five cable ships transport, lay, retrieve and repair underwater cable and sensor arrays that provide intelligence to tactical anti-submarine warfare forces. MSC issued the RFP to determine whether it would be more economical to contract for operation and maintenance of the cable ships or to continue to have the services performed by in-house personnel. The solicitation requested proposals to operate and maintain the ships for a period of 3 years. MSC found that Bay Tankers had submitted the low, technically

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acceptable commercial offer, but after comparing Bay Tankers' proposal with the estimated in-house cost of the most efficient organization (MEO) for MSC, determined that the work could be performed by government personnel for a total evaluated cost of \$40,981,142, or \$23,616,083 less than Bay Tankers' total proposed cost (including conversion differential) of \$64,597,225.

Bay Tankers and TCS administratively appealed the agency's determination. Although the agency appeals board found some errors in the comparison, the consequent adjustments only reduced the estimated in-house cost advantage to \$19,174,895. Both firms then protested to our Office. Bay Tankers alleges that MSC underestimated the cost of in-house performance in several respects that had a cumulative cost impact of \$26,817,560, based upon which Bay Tankers concludes that contracting with the firm for the required services would cost MSC \$7,642,665 less than if they were performed by in-house personnel. TCS alleges that it, rather than Bay Tankers, submitted the low, technically acceptable commercial offer and that MSC underestimated the cost of in-house performance in several respects; according to TCS, contracting with the firm for the required services would cost MSC \$10,793,443 less than in-house performance.

Standard of Review

Where a contracting agency uses the procurement system to aid in its determination whether to contract out, we will review a protest that a proposal has been arbitrarily rejected to determine if the agency conducted the cost comparison in accordance with applicable procedures. To succeed in its protest, a protester must demonstrate not only that the agency failed to follow established procedures, but that this failure could have materially affected the outcome of the cost comparison. Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30.

Bay Tankers' Protest

Bay Tankers challenges MSC's determination to include as a one-time cost of conversion to contract performance approximately \$6,361,550 for the training and familiarization of contractor personnel.

The solicitation as initially issued, provided that certain key positions must be staffed by persons with experience aboard cable ships, the amount of experience varying by position. The solicitation originally also required offerors to include in their proposals the resumes of the proposed key employees and either to have such persons in their employ or to have firm written commitments from them.

These experience requirements were the subject of an unsuccessful bid protest in which it was alleged that they unduly restricted competition. See Marine Transport Lines, Inc., B-224480.5, July 27, 1987, 87-2 CPD ¶ 91. We denied the protest but, in order to broaden competition, MSC amended the solicitation to delete the requirement for offerors to provide resumes with their proposals, and to add a mandatory training and familiarization program, to be provided by MSC, in place of a requirement for contractor-furnished training. The amendment informed offerors that the cost to the government of providing the training and familiarization would be included in the cost comparison as a one-time conversion cost.

Bay Tankers maintains that MSC's estimate of training costs improperly assumes that the contractor's key shipboard personnel will have no cable ship experience, despite the requirement for the contractor to offer employment to MSC civilian mariners currently manning the cable ships and the existence in the maritime industry of a pool of personnel with extensive cable ship experience. Moreover, Bay Tankers argues, in effect, that training costs are not a one-time conversion cost, but instead are a common cost applicable to both commercial operation and government operation, because the same training is required for government and contractor replacement personnel.

Our Bid Protest Regulations require protests of alleged improprieties which are incorporated into the solicitation by amendment to be protested not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1987). Since the amendment advising offerors of the addition of training costs to the cost of contract performance was issued prior to the closing date for receipt of revised proposals, but Bay Tankers did not protest consideration of these costs until after the results of the cost comparison were revealed, this aspect of its protest is untimely and will not be considered. See Singapore Aircraft Industries, B-229751, Dec. 30, 1987, 87-2 CPD 647.

As for the propriety of requiring a fixed amount of training (rather than an amount based on each offeror's asserted circumstances) in the event of a contract award, this concerns MSC's judgment as to its minimum needs. The determination of the minimum needs of the government and the best methods of accommodating those needs are primarily the responsibility of the contracting agencies; accordingly, we will not question an agency's assessment of its needs unless the protester demonstrates that the determination is

unreasonable. See Apex International Management Services, Inc., B-212220.2, May 30, 1984, 84-1 CPD ¶ 584; Crown Laundry Cleaners, Inc.--Request for Reconsideration, B-204178.2, Aug. 9, 1982, 82-2 CPD ¶ 115.

We find nothing unreasonable in providing for a comprehensive contractor training program. In our prior decision concerning this procurement, we recognized that cable ship operations are sufficiently sophisticated and hazardous that specifying uniform minimum experience requirements for various crew members, regardless of a particular crew member's credentials, was a reasonable means of ensuring the safe, effective operation of the vessels. Marine Transport Lines, Inc., B-224480.5, supra. Although MSC subsequently eliminated the experience requirements, the agency added the uniform, comprehensive training and familiarization program to serve the same purpose. Even if a contractor would be able to hire some highly skilled crewmembers, the training could still be necessary for others and, moreover, a uniform, comprehensive training program would seem to be the only means of assuring that even experienced crewmembers definitely will have the knowledge and skills deemed necessary. (We note that none of the training programs submitted by the offerors under the original RFP was deemed adequate, and Bay Tankers indicated in its proposal that the firm had not previously operated cable ships).

The fact that a pool of experienced cable ship mariners may be available to a new contractor also does not establish that the training requirement is unreasonable, because the skill levels of the pool mariners are not determinable in advance; there is no guarantee that a contractor ultimately would be able to employ any pool mariners. We do not believe MSC was required to take this risk, and thus conclude that the training requirement, and addition of the concomitant cost factor, was a proper means of assuring that the crews provided by a new contractor would in fact be thoroughly familiar with the specialized cable ship operations conducted by the agency.

Bay Tankers also contends that MSC has underestimated the cost of overhead attributable to in-house performance by \$2,010,973. Although it is unclear precisely how the protester calculated the size of the alleged understatement, it appears to be based upon the argument that a pro rata share of the cost of all MSC shore-based personnel, in the same proportion as the number of shipboard personnel bears to the total number of MSC mariners for all MSC vessels, should have been included in the cost of in-house performance. We do not agree.

MSC reports that it included the cost of support positions in its estimate of overhead only if position would be eliminated by contracting out. OMB Circular A-76 provides that an agency need not include in the cost of in-house performance any overhead expenses reflecting support from outside the function under study where contracting out would not eliminate at least one position in the outside supporting office. Absent such an impact, the government's cost essentially is viewed as the same whether or not a contract is awarded. Supplement, part IV, ch. 2, section G (Aug. 4, 1983); see Apex International Management Services, Inc., B-22885.2, Jan. 6, 1988, 88-1 CPD ¶ 9; World Maintenance Services, Inc., B-217536, May 14, 1985 85-1 CPD ¶ 540. Since MSC's approach therefore is consistent with the cost comparison groundrules, we find the omission of on-shore personnel from the government estimate to be unobjectionable.^{1/}

Bay Tankers next alleges that MSC improperly failed to include in the cost of in-house performance \$500,000 the agency paid to a consultant for assistance in preparing the solicitation and MEO study. This allegation is without merit. The costs in question were incurred prior to the contract performance period for services not included in the solicitation's performance work statement; the cost comparison is based solely on the cost of performing the solicited tasks.

Bay Tankers alleges a number of other deficiencies in the cost comparison, but these remaining alleged deficiencies total no more than \$18,832,290 (when the conversion differential is considered), which is less than the \$19,174,895

^{1/} TCS, which also alleges that MSC's overhead cost is understated, maintains that the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3977, supersedes the overhead provisions of OMB Circular A-76 by requiring the Secretary of Defense to ensure in cost comparisons that "overhead costs are realistic and fair." This argument is untimely, however, since the solicitation provided that the cost comparison would be undertaken in accordance with OMB Circular A-76, and neither TCS nor Bay Tankers protested this alleged deficiency prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1); see Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 87-1 CPD ¶ 254. In any case, as we have previously indicated, our review is limited to examining whether the contracting agency followed established cost comparison procedures; we will not question the procedures themselves, which are matters of policy within the province of the Executive Branch.

difference between the cost of accepting Bay Tankers' offer and the cost of in-house performance. We therefore find that the agency properly determined that operating the vessels in-house would be less costly to the government than contracting with Bay Tankers. See Dyneteria, Inc., B-222581.2, supra.

TCS's Protest

MSC maintains that TCS is not an interested party entitled to protest the cost comparison because the solicitation provided for the low, technically acceptable proposal to be selected for comparison with the in-house cost estimate, and TCS submitted only the second low proposal. See 4 C.F.R. §§ 21.0(a) and 21.1(a). TCS, on the other hand, alleges that contracting with the firm would cost less than contracting with Bay Tankers, the apparent low offeror, because TCS' cable ship experience is so extensive that TCS would require substantially less training and familiarization than would Bay Tankers. We need not resolve this dispute since it is clear that even if TCS was entitled to have its proposal compared with the in-house cost estimate, TCS has not demonstrated that contracting with it would be less expensive than continuing in-house performance.

TCS alleges that MSC has underestimated the cost of overhead attributable to in-house performance by approximately \$19,235,163. The allegation of an understatement appears to be based upon the argument that a pro rata share of MSC's total overhead, in the same proportion as the number of cable ships bears to the total number of MSC ships, should have been included in the cost of in-house performance, essentially the same argument raised by Bay Tankers and rejected above. Again, since TCS's approach to calculating overhead does not conform to OMB Circular A-76 guidelines, and TCS has not demonstrated that MSC materially failed to follow those guidelines in estimating overhead, we will not question the in-house cost estimate in this regard. The remaining alleged deficiencies would not eliminate the cost advantage of in-house performance; accordingly, TCS' allegations provide no basis upon which to object to the cost comparison.

The protests are denied.



James F. Hinchman
General Counsel