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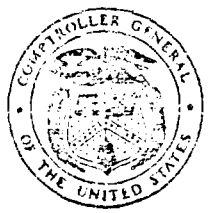
DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-208684 DATE: September 16, 1983

MATTER OF: Joule Maintenance Corporation

DIGEST:

1. GAO sustains protest challenging agency decision to perform services in-house, based on comparison of Government estimate with protester's offer, since agency failed to comply with procedures for conducting the cost comparison identified in the request for proposals, and that failure casts doubt on the validity of the outcome of the comparison.

2. An agency's compliance with an internal directive providing that labor costs should be included in the Government estimate only for a portion of the first year of performance is improper where the cost comparison procedures identified in the solicitation expressly state that full labor costs will be included for the first year.

3. A statement of work in the solicitation is inadequate where it states that offerors are only to include the cost of work being performed by the in-house work force, but does not indicate that the in-house work force is not performing certain work which seems to be encompassed by the statement of work.

Joule Maintenance Corporation protests the Department of the Army's decision to cancel request for proposals (RFP) No. DAAK10-82-R-0083 which solicited offers to provide staffing, operation, and maintenance for base operations such as interior electrical, sanitation, paint and preventive maintenance work and fire and security services at the Picatinny Arsenal in Dover, New Jersey. The Army issued the RFP to determine whether it should

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continue performing this work in-house with Government personnel. Based on a comparison of the Government estimate with Joule's low offer, the Army determined that it would be less costly to retain the function in-house than to contract with Joule. It thus canceled the solicitation. We sustain the protest.

The RFP advised offerors that the cost comparison would be conducted in accordance with Supplement 1 (March 1979) of Office of Management and Budget Circular A-76 (A-76), as implemented by Department of Defense Handbook DOD 4100.33H (April 1980). Joule states that the Army deviated from these policies and procedures in conducting the comparison and that a proper comparison would have resulted in an award to Joule. Joule initially appealed the matter to an administrative appeal board convened by the Army. The board denied the appeal, although it adjusted the comparison to reduce the advantage of in-house performance for the 3-year contract period (including 2 option years) from $1,196,594 to $614,001. Joule subsequently filed this protest, reasserting the grounds raised in its appeal and also challenging the qualifications of the appeal board members.

Our role in reviewing protests concerning agency decisions to contract for services or to continue to perform them in-house is limited to ascertaining whether the agency adhered to the procedures, or "ground rules," set forth in solicitations issued by the agency to obtain offers which provide the basis for the in-house/out-house cost comparison. See D-K Associates, Inc., 62 Comp. Gen. 129 (1983), 83-1 CPD 55. Most protests involve a challenge to the efficacy of the actual cost comparison made, although on occasion other matters, allegedly inconsistent with the announced procedures, are challenged. See D-K Associates, Inc., supra. Therefore, Joule's challenge to the cost comparison is appropriate for our consideration. However, neither the solicitation here nor any document referenced therein provides any criteria for the establishment of the appeal board. Therefore, we will not consider the allegations concerning the composition or competence of the appeal board.

Joule first contends that the Army understated its direct labor costs by approximately $260,181 ($780,300 for 3 years) in preparing the estimate for continued in-house performance by failing to fully cost direct labor for fiscal year 1983, the first year of contract performance. More specifically, although cost of living (COL) raises

for civilian personnel were to take effect on March 28 and October 10, 1982 (for wage board and general schedule employees, respectively), the Army's estimate escalated the wages of employees performing Service Contract Act (SCA)-type work only for the first 3 months of the first year of performance, i.e., October, November and December 1982.[1] For the remaining 9 months of the first year (i.e., January through September 1983), the Army costed these SCA-type employees using the wages applicable prior to the March 28 and October 10 COL raises.

This methodology was based on guidance issued by the U.S. Army Materiel Development and Readiness Command headquarters, which is set forth in a January 1982 letter:

> "* * * The first year in-house cost estimates for occupational categories subject to the Service Contract Act (SCA) will be calculated using the approved pay rates (DOD rates) in effect for the same "period" as the latest DOL [Department of Labor] labor rates. In other words, instead of escalating the in-house cost for occupations subject to the SCA up to the first year of the study, these costs are now only going to be escalated up to the end of the period for which the latest DOL rates are applicable."

The DOL wage rate applicable here was in effect for calendar year 1982, so the Army escalated wages for its SCA-type employees only for the 3 months of the first year of performance which fell within 1982.

Joule maintains that this method of calculating first year labor costs is contrary to the Handbook and clearly illogical since it is based on the "ridiculous" assumption that wages for the Army's civilian employees would decline as of January 1, 1983. Joule further states that the methodology used is not justified merely because it was based on higher headquarter's guidance, since that guidance was contrary to the Handbook.

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[1]The Government is not subject to the minimum wage requirements applicable to contractors under the Act, 41 U.S.C. § 351 et seq. (1976), but in preparing its estimate here, the Army divided its employees into those which do and do not perform types of work encompassed by the Act.

The Army's failure to escalate wages for the entire first year of performance was contrary to specific provisions of the Handbook. Page 21 of the Handbook, under the section entitled "Direct Labor--Line 2," states as follows:

> "* * * When a salary increase for Government employees is expected during the first year of performance, the amount of the increase should be included in the direct labor estimate."

Similarly, pages 49-50, under the heading "Inflation Of Out-Year Costs--Line 8," states that:

> "In preparing the Government's estimate, all known or anticipated increases in costs to be incurred in the first year of operation should be provided for in each element of cost, as stipulated by the instructions contained in this Handbook, including any expected salary increases for government employees. * * *"

We previously have pointed out that agencies may not materially deviate from the cost comparison procedures established in a solicitation since it clearly is unfair, and thus detrimental to the procurement system, to advise offerors that one standard will be applied in determining the Government's cost of in-house performance and then apply a different, undisclosed standard which results in a lower Government estimate. See Serv Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317; MAR, Incorporated, B-205635, September 27, 1982, 82-2 CPD 278. The documents furnished by the Army indicate, however, that the approach used here was intended to provide a more equitable cost comparison of in-house versus contractor performance. Although the Army never states so explicitly, we understand that the use of lower wages on the Government side was to compensate for the fact that price proposals did not include an amount for higher wages that supposedly would be payable in January 1983 because higher wages would be taken care of through a contract price

adjustment under an economic price adjustment clause in the RFP.[2]

The Army, however, misconstrues the application of the SCA. The contractor would get an economic price adjustment only if higher wages had to be paid. We are not aware of any reason why higher wages would have to be paid during the first year of the contract. DOL regulations clearly provide that wage determinations issued or revised after contract award do not apply to the initial performance period of the contract. See 29 C.F.R. §§ 4.5(a), 4.164(c) (1982). Therefore, even though a new wage determination was anticipated for calendar year 1983, the new rates would not automatically be applicable to the contract during the first year (through September 1983) and the Government would not have to absorb any additional costs under the price adjustment clause. Therefore, there appears to be no basis for the offsetting reduction in the Government's estimated labor costs. Thus, we agree with Joule that the Army improperly failed to fully cost its direct labor for the first contract year as required by the Handbook.

Joule also contends that the Army has significantly understated its in-house estimate by failing to include the cost of contracts with private firms covering work encompassed by the statement of work (SOW). It specifically cites a few contracts (of which it became aware through documents made available by the Army during its appeal) to illustrate this allegation: a contract for installation of vinyl wall covering; a contract for rewinding a 250 horsepower electric motor; and a contract for installation of seamless monolithic industrial flooring. Joule submits that as it reads the RFP, the work under these contracts was encompassed by the SOW, that it provided for performing such work in its price proposal, and that the cost of these contracts therefore had to be included in the Government's in-house estimate.

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[2]The RFP contained the clause specified at Defense Acquisition Regulation § 7-1905 which provides for adjustment of the contract price if the contractor is compelled to increase its wages to comply with a change mandated by the Department of Labor. These increases would include SCA wage rate increases.

The Army states that the only task in the SOW which was being performed under contract was a $22,709 snow removal contract, the cost of which was included in its estimate. The Army concedes that the work under several contracts, including those cited by Joule as well as $1.5 to $3 million annual open-ended requirements contracts, is of the same type as that described in the SOW, but maintains that this work falls outside of the SOW because the SOW is limited to maintenance and repair while the work in question entails more than maintenance and repair. In other words, states the Army, "the difference is not in the nature of work but in the quantity." To illustrate, the Army points out that while the in-house work force repairs portions of roofs, it does not replace complete roofs; it replaces tiles in ceilings and parts of floors, but does not replace entire ceilings and floors. The Army states it intended to continue contracting this work out to other firms even if Joule had received the award here, and that the SOW clearly did not encompass these more major tasks.

We find no basis for disputing the Army's claim that it did not intend to include major tasks under the SOW. In fact, the SOW advised offerors in several places that they were to price their proposals based on performance of work currently being done by the in-house work force. This being the case, however, we find that the RFP did not adequately apprise offerors of the types of major tasks which were performed by contract rather than by the in-house employees, and that this deficiency could have misled the commercial offerors.

Despite the Army's statement that its work force does not replace ceilings, floors and roofs, we believe a reasonable reading of portions of the SOW would lead an offeror to assume that it could be called on to perform some work of this kind. The SOW for Carpentry and Masonry, for example, required the contractor to perform all related "repair, replacement, maintenance, new work and other services and support accomplished by installation personnel." "New work" was defined under the SOW as encompassing minor construction, which in turn was defined as "any new work up to $100,000 limit." Thus, while the Army may have intended to exclude more extensive work from the tasks in the SOW, it appears to us that a contractor

could have been required to perform new work of relatively major proportion. The RFP nowhere contained information which rendered this interpretation unreasonable.

Further, the Army's restrictive reading excluded not only large jobs from the SOW, but also relatively minor contracts such as those cited by Joule. In our view, an offeror would assume from a reasonable reading of the SOW that it would be required to perform the work covered by these contracts. Although relatively minor in terms of cost the contracts apparently were considered by the Army to fall outside the SOW because they entailed the replacement of entire "systems" rather than mere repair or maintenance. Again, this distinction is not set forth in the RFP and there are specific task descriptions which encompass the work under these contracts. The Carpentry and Masonry SOW stated under paragraphs 6.2.1.4.2 and 6.2, respectively, that "wall covering which has been ripped or otherwise damaged shall be repaired or replaced as necessary," and that the tasks shall include "installing floors such as Vestex * * *" (Joule indicates that this is seamless monolithic flooring). We also read paragraph 6.2 of the Interior Electrical SOW ("rewind motors fractional through 250 horse-power * * *") as including the work under the third contract cited by Joule.

The Army argues that Joule should have been able to determine from the historical labor hours included in each portion of the SOW that the in-house work force was performing only repair and maintenance, and not the more extensive work performed under contract. Whether these historical hours were helpful to offerors in estimating the amount of work to be performed is not clear. It is clear, however, that these hours were not an adequate substitute for the precise, unambiguous description of work to which, we have held, offerors are entitled. See Klein-Sieb Advertising and Public Relations, Inc., B-200399, September 28, 1981, 81-2 CPD 251. As the Handbook recognizes at page 5, a comprehensive SOW is necessary "to ensure comparability and equity in the cost analysis." Certainly, it was not equitable to require Joule and other offerors to divine the extent of the work to be performed from historical hours while the Army knew precisely what work to include in its in-house estimate.

The Army also calls our attention to portions of the transcript from the pre-bid conference (which was attended

by a Joule representative) indicating that offerors were told they would not be required to perform major work in excess of maintenance and repair, and that major work would be contracted out when it arose. The offerors in attendance still were not told, however, the type of work the Army considered major. In this regard, since "minor" construction encompassed work up to $100,000, perhaps the Army did not consider such work of the type it planned to contract out. This is not clear from the transcript. Even if offerors disregarded the plain terms of the RFP, however, and did not include the cost of some large new work projects in their proposals, they still could not have determined from the RFP that minor wall covering installation work, as well as the work under untold other relatively minor contracts, should be excluded from their proposals.

Given our conclusion that the Army improperly failed to escalate its first year labor costs and failed to clearly differentiate between work included in the SOW and that which historically had been contracted out, we must consider whether the cost comparison remains valid. We will invalidate a cost comparison where the protest establishes the existence of defects which cast reasonable doubt on whether the correct result was reached. See MAR, Incorporated, supra.

Initially, although the appeal board determined the difference between the Army estimate and Joule's offer to be $614,001, the Army now claims the board ignored posting errors it made and that these errors would increase the advantage of in-house performance to $1,633,666 for 3 years. One alleged error consisted of the failure to charge against Joule $319,255 in existing contracts for sand, gravel and other materials the Army was obligated to supply as Government-furnished property. The second alleged error was the improper inclusion in the Government's estimate of $700,410 of contracted-out work, outside the solicitation's statement of work (SOW).

Joule maintains it would be improper at this juncture to permit the Army to alter its bid based on these alleged errors. We disagree. The Army has fully documented the errors and Joule has offered no evidence or argument in rebuttal. Our Office's concern under the A-76 procedure is whether the cost comparison accurately reflects the

least expensive method of performing the work under review. It is for this reason that we will increase the in-house estimate where it is shown to be understated. For the same reason, we consider it appropriate to reduce the in-house estimate where, as here, the agency shows by adequate documentation that the estimate was inflated due to calculation errors and the protester does not show otherwise.

According to Joule, the Army's failure to fully cost first year labor resulted in an understatement of the in-house estimate by approximately $780,300 for 3 years, reducing the in-house advantage, as adjusted above, to approximately $853,300. The impact of the SOW deficiencies is not easily assessed since the record does not include a detailed breakdown of the work the Army traditionally has contracted out. The record indicates, however, that the impact on Joule's proposal could have been significant. The Army states that it annually lets $1.5 to $3 million in contracts for work it characterizes as the same type as that described in the SOW. Although it also maintains that all of this work fell outside the SOW as other than maintenance and repair, we note that the Army argued in its report that the three contracts specified by Joule fell outside the SOW for the same reason. In view of our conclusion that the Army was wrong about these three contracts, we find it reasonable to believe the Army may be wrong about a significant portion of the remainder of the $1.5 to $3 million in contracted out work. It is equally reasonable to assume that Joule was misled into overstating its bid by some corresponding amount.

The Army argues that the fact that Joule's proposed material and labor costs already were lower than the Army's indicates that Joule in fact was not misled by any deficiencies in the SOW. This is not a premise, however, from which we can conclude that Joule's price could not be overstated; Joule's already low price could be attributed to material discounts and unknown other economies not available to or not taken advantage of by the Army. We would agree with the Army that Joule's pricing supports the proposition that Joule likely was not grossly prejudiced by the SOW deficiencies. The outcome of the cost comparison here would be different, however, if Joule's first year price was reduced by less than $300,000 ($900,000 for 3 years). This represents only 4 percent

of Joule's offered first year price of approximately $7.4 million, and as little as 10 percent of the total contracts awarded. While, again, the record does not clearly establish that Joule's offer was overstated by this amount, such a conclusion is not unreasonable and we have been presented with no clear evidence to the contrary. We therefore conclude that there exists significant doubt as to whether the Army's cost comparison would have yielded the same result absent the discussed deficiencies.

Under these circumstances, we believe the only appropriate remedy to be the initiation of a new cost comparison with a solicitation which clearly indicates to offerors what work covered by the SOW will be performed by separate contract and should not be costed in offerors' proposals. Also, if the Army plans to calculate first year wages using guidance contrary to the Handbook, it should clearly so indicate in the solicitation. By letter of today, we are so recommending to the Secretary of the Army.

We have reviewed the numerous other alleged improprieties raised by Joule, but find no other areas where the Army has been shown to have deviated materially from the Handbook procedures.

We sustain the protest.

This decision contains a recommendation that corrective action be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, as adopted by Public Law 97-258 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

Milton J. Socolar

for Comptroller General
of the United States