

ER 5-1-3
1 Dec 87

firms. The assessment may indicate that further solicitation is unwarranted. If so, FOA may request permission through channels to CDR USACE (CERM-MC) WASH DC 20314-1000 to cancel the solicitation. HQUSACE will then issue clearance to end the CA study and retain the function in-house (see paragraph 2-5b).

3-43. Confidentiality of the Government's In-house Cost Estimate.

a. Confidentiality of the Government's in-house cost estimate will be protected until the CA study is ended. If another CA study might be made within two years of the conclusion of the study in which no valid bids or offers were received, the Government's in-house cost estimate will not be released. Its confidentiality will be maintained until announcement of the initial decision and release of documents in the second study (see AR 340-17 and FOIA, section 552, Title 5, U.S.C. for additional guidance on release of information).

b. A previously studied CA may be included in a package of activities for CA study if required for economic or operational reasons. However, a new CA study should not be made until the Government's in-house cost data made public during the first study has changed enough to preclude compromising the confidentiality of the Government's in-house cost estimate and independence of commercial bids. Proposals to conduct a CA study before the fifth fiscal year must be justified in the CPAS (paragraph 3-10).

Section VIII. Appealing the Initial Decision

3-44. Appeals Procedures.

a. Who may appeal. Any interested party may appeal the initial decision made in a CA study. "Interested party" includes employees of the activity under study, unions and other employee organizations representing affected Federal employees, and bidders or offerors who responded to the solicitation.

b. How to appeal. Appeals must be in writing and are to be filed with the Contracting Officer.

c. Effect of appeal. The appeals process is intended to safeguard the interests of all interested parties. The appeals board makes an informal administrative review of the issues raised in appeals of the initial cost comparison decision. The appeals procedure is not judicial in nature and does not provide for judicial review or for further levels of appeal. The decision of the appeals board is final. Decisions on appeals are not subject to negotiation, arbitration, or agreement.

d. What may be appealed. Only the following may be appealed:

(1) The initial decision in a cost comparison, i.e., to contract out or to retain performance in-house; or

(2) Decisions to convert directly to contract performance based on a direct conversion proposal. (See paragraph 3-48.)

e. What may not be appealed. Concerns about decisions or issues other than those in subparagraph d above do not provided a basis for appeal, e.g., the decision to conduct a CA study, the relative merits of the particular organizational structure and staffing established by an approved management study, the PWS, the choice of one contractor over another, or the effect of a conversation to contract on the local community. Management decisions are not subject to appeal.

f. What must be included in an appeal. An appeal will not be considered unless:

(1) It alleges that a material deviation has been made from the cost comparison guidance contained in Appendix E, and

(2) The alleged deviation is of sufficient magnitude to affect the cost comparison decision (whether to contract out or to perform in-house), and

(3) It identifies specific line items on either ENG Form 4843A-R or ENG Form 4843B-R and elements of the Government's in-house cost estimate and sets forth specific reasons for challenging those elements.

g. Appeals period. The Contracting Officer will establish and announce the appeals period (i.e., the times and dates for the beginning and ending) when the initial decision is announced. The appeals period will not begin until the cost comparison and all supporting documents are available to interested parties. The appeals period will normally be 15 working days and may not exceed 30 working days.

h. Rebuttal period. Interested parties may request in writing from the Contracting Officer a copy of any or all timely appeals as a basis for submitting rebuttals. The Contracting officer will establish and announce the rebuttal period, which will commence at the end of the appeals period and will not exceed 5 working days. Any interested party may file a rebuttal. Only timely written rebuttals will be considered. Only issues raised during the appeals period may be addressed in rebuttals.

3-45. Receipt of Appeals. When the Contracting Officer receives an appeal, it will be datestamped, and copies will immediately be sent to:

- a. The FOA CA Program Manager,
- b. The division CA Program Manager, who will immediately distribute it to the appeals board,
- c. CDR USACE (CERM-MC) WASH DC 20314-1000,
- d. Any interested parties who have requested copies of appeals.

3-46. Appeals Board Decisions on Appeals. The appeals board will make the final decision in a CA study based on the initial decision, taking into consideration all timely appeals and rebuttals. No further appeals will be considered, even if the initial decision is reversed. Appeals will be answered within 30 calendar days after receipt.

a. In making its decision, the appeals board has access to all resources and documents involved in the CA study.

(1) The appeals board may require Government personnel involved in the CA study to provide more information or explanation of the CA documents.

(2) The appeals board may also request any interested party who has submitted an appeal or rebuttal to provide additional information.

b. The CA Program Manager who is consultant to or member of the appeals board will develop the file for the appeals board. The file should include:

(1) An analysis of each appeal and rebuttal, with a synopsis of each issue raised, an explanation of which line items on either ENG Form 4843A-R or ENG Form 4843B-R are involved, a discussion of the CA rules pertinent to each issue and how they were applied in formulating the Government's in-house cost estimate, and the FOA's position on each issue.

(2) The detailed Government's in-house cost estimate and all supporting documentation for each cost element of the Government's in-house cost estimate.

(3) A copy of each appeal and rebuttal and any other correspondence concerning appeals or rebuttals.

(4) The audit report prepared by USAAA or DAEN-AO.

(5) The approved management study and PWS.

(6) The solicitation.

(7) The abstract of bids.

(8) Applicable regulations and guidance, other than OMB Circular A-76, AR 5-20, and this regulation.

(9) The file upon which a final decision is based should include a detailed legal review by the FOA Office of Counsel.

c. The appeals board will prepare a written decision on each appeal, taking any rebuttal specifically into consideration. Two or more appellants may submit appeals on the same or similar allegations. If so, the appeals board, at its discretion, may consider the appeals concurrently and prepare a single written decision.

(1) Dismissed appeals. Any appeal that is determined to be materially not in compliance with the requirements for appeals in paragraph 3-44 may be dismissed by the board, with a statement of the reason for its dismissal, without discussion of its allegations.

(2) Denied appeals. If the decisions of the appeals board on the appeals or rebuttals do not reverse the initial decision, a final decision in accordance with the initial decision will be made.

(3) Sustained appeals. If the appeals board sustains an appeal, thus changing the outcome of the cost comparison, the board chairperson will direct the revision of the CCF. The decision will be reported immediately to CDR USACE (CERM-MC) WASH DC 20314-1000. The revised computations are to be revalidated by USAAA or CEAO, as appropriate. Only after the revalidation will the decisions of the appeals board be distributed in accordance with subparagraph d below.

d. A copy of the decision on each appeal will be:

(1) Given to the appellant and to other interested parties, the Contracting Officer, and the FOA CA Program Manager;

(2) Attached to the Final Decision Report (paragraph 3-55);
and

(3) Placed in a library or reading room for public review.

3-47. Establishment of Appeals Board. Each division (or CDR USACE, for division-level, laboratory, or separate FOA studies) will appoint appeals boards as necessary to address all appeals and rebuttals. A board may be appointed to consider appeals of a specific initial decision or to consider appeals of all initial decisions during its tenure or in its assigned area. A board need not be appointed until at least one appeal has been received, but potential board members should be identified earlier.

a. The board will be composed of at least three members. Members should be senior civilian or military personnel who as a group have experience or training in all of the following: CA program requirements, contracting, management, and cost estimating. One of the board members should be an attorney from the Office of Counsel.

b. Board members must be impartial and avoid even the appearance of a conflict of interest. The following persons may not serve as members of the appeals board:

(1) Those who took part in the CA study that is the subject of the appeal;

(2) Those having any direct association with the activity under study;

(3) Those working or who have spouses, children, parents, siblings, or household members working in the activity under study; and

(4) Those working for the organization having direct jurisdiction or control over the activity under study.

c. At least the chairperson of the appeals board will be:

(1) From an organization that neither supports nor receives support from the organization being studied;

(2) From another FOA or command;

(3) Of the same or higher grade or military rank (or its equivalent) as the official who approved the initial decision.

3-48. Appeals of Decisions to Convert Directly to Contract Performance.

a. Any interested party may appeal decisions to convert directly to contract performance.

b. An appeal under this paragraph must comply with the requirements of paragraphs 3-44 through 3-47, except as provided in subparagraphs c and d below.

c. An appeal under this paragraph must address reasons why the Government's in-house cost estimate is erroneous or reasons why fair and reasonable prices will not be obtainable.

d. Appeals must be timely:

(1) For mixed-funded or DOD-funded activities, the appeal must be filed within 30 days of the date of a CBD notice of the decision to convert to contract.

(2) For civil works funded activities, the appeal must be filed within 30 days of the date of a CBD notice of the decision to convert to contract or 15 working days of bid opening, whichever is later.

3-49. GAO and Agency Protests. GAO and agency protests are subject to FAR Part 33 and EFARS Part 14 and are not covered in this regulation.

Section IX. Personnel Considerations

3-50. Reduction-in-force (RIF). The goal of RIF planning is to place all affected employees. Every reasonable effort will be made to avoid involuntary separation through planning, placement and retraining efforts. Separation by RIF may be unavoidable in some instances even after all reasonable efforts have been exhausted. In that event every effort will be made to help separated employees find continuing employment elsewhere, particularly through first refusal rights with the CA contractor.

a. General guidance for RIF planning is contained in Federal Personnel Manual (FPM), Chapter 351; and AR 690-300, Chapter 351. These regulations apply to USACE employees regardless of their method of funding. In planning a RIF based on conversion of in-house activities to contract operation, the factors in subparagraphs b through g must be considered:

b. The conduct of several CA studies over an extended period of time at an FOA may result in successive RIFs. When feasible, CA study milestone planning should be coordinated to permit a single RIF action to reduce the turbulence created by separate RIF actions.