



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Dynamic Science, Inc.

File: B-270448.3

Date: May 1, 1996

Peter T. Fagan, Esq., Bryan Cave, for the protester.

Laura K. Kennedy, Esq., Grace Bateman, Esq., and Trisa J. Thompson, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Kay & Associates, Inc., an intervenor. Paul Fisher, Esq., and Russell P. Spindler, Esq., Department of the Navy, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency determination to disregard proposed discount that would render offer for indefinite delivery/indefinite quantity contract low is denied where proposal with discount was mathematically unbalanced and agency had a reasonable basis to doubt that award to protester would result in lowest overall cost to the government in light of the inherent unreliability of its estimates.

DECISION

Dynamic Science, Inc. (DSI) protests the Naval Air Systems Command's (NAVAIR) award of a contract to Kay & Associates, Inc., under request for proposals (RFP) No. N68936-95-R-0190, for aircraft maintenance support services at the Naval Air Warfare Center, China Lake, California. DSI argues that NAVAIR improperly disregarded DSI's proposed pricing discount that rendered its proposal low and did not conduct meaningful discussions with respect to the discount.

We deny the protest.

The solicitation contemplated the award of a time-and-materials, indefinite delivery/indefinite quantity contract for a 3-year base period, with 2 option years, to the low, technically acceptable offeror. The solicitation requested labor rates and included "estimated annual manhours per category" for 20 specified labor categories. It cautioned, however, that while the estimates represented the government's "best estimate of the requirements" and were to be used in preparing

cost proposals, "the Government can guarantee neither the estimated quantities of man-hours shown for individual labor categories nor the total estimated man-hours."

NAVAIR received three proposals by the closing time. Following discussions with all offerors, the agency requested best and final offers (BAFO). The agency initially determined that, based upon its eligibility for a small disadvantaged business (SDB) preference evaluation factor, JIL Information Systems had submitted the low, technically acceptable BAFO. The resulting award to JIL, however, was subsequently terminated after it became apparent that JIL was not in fact an SDB.

Of the two remaining offerors, DSI proposed higher hourly labor rates than Kay, but also offered a discount pursuant to which it generally would not charge for labor hours in excess of approximately 80 percent and up to 100 percent of the solicitation estimate for a specified labor category. The evaluated cost of DSI's BAFO with the discount (\$33,009,492) was approximately 14 percent lower than Kay's (\$38,481,284). However, NAVAIR determined that DSI's offer was mathematically unbalanced, on the basis that the prices for the initial labor hours were overstated, and that, since actual labor hour usage could vary from the solicitation estimates, it was unlikely that the government would benefit from the proposed discount. NAVAIR concluded that Kay's BAFO offered the lowest cost to the government and made award to Kay on that basis.

DSI essentially argues that, since its offer was low when evaluated with the proposed discount at the stated estimated labor hours, NAVAIR was required to make award to it. DSI specifically denies that its offer was unbalanced.

The solicitation incorporated by reference Federal Acquisition Regulation (FAR) clause "Contract Award ALT III," FAR § 52.215-16 (FAC 90-13), which cautioned offerors that the agency "may determine that an offeror is unacceptable if the prices proposed are materially unbalanced between line items or subline items." In this regard, there are two aspects to unbalancing. The first is a mathematical evaluation of the offer to determine whether each element of the offer carries its share of the cost of the work plus profit, or whether the offer is based on nominal prices for some work and enhanced prices for other work. The second aspect—material unbalancing—involves an assessment of the cost impact of a mathematically unbalanced offer. An offer is materially unbalanced where there is reasonable doubt that award based on the offer will result in the lowest ultimate cost to the government. USA Pro Co., Inc., B-220976, Feb. 13, 1986, 86-1 CPD ¶ 159. With regard to requirements contracts that involve the evaluation of estimated quantities, where the estimates are a reasonably accurate representation of actual anticipated needs, a low evaluated offer, even if mathematically unbalanced, is generally not materially unbalanced. See District Moving & Storage, Inc. et al., B-240321 et al., Nov. 7, 1990, 90-2 CPD ¶ 373. However, where the agency has substantial reason to believe that its actual needs may deviate significantly during performance from the estimates, it reasonably may view a mathematically unbalanced offer as not clearly

representing the lowest cost to the government and therefore as materially unbalanced. Outer Limb, Inc., B-244227, Sept. 16, 1991, 91-2 ¶ 248; Food Servs., Inc., B-243173; B-243173.2, July 10, 1991, 91-2 CPD ¶ 39.

NAVAIR reasonably determined that DSI's proposal was mathematically unbalanced. DSI's price (\$0) for the hours subject to the discount--those in excess of approximately 80 percent and up to 100 percent of the solicitation estimate for a specified labor category--clearly was nominal. Further, although DSI denies that it offered enhanced prices for any hours, we believe that the agency reasonably concluded otherwise. DSI specifically proposed to assure the existence of the financial resources needed to perform the contract, including any hours for which no charge was to be made, by establishing an escrow account funded first by company stock, and then by profit on the initial hours billed the government (at labor rates higher than Kay's). Since DSI's proposed profit rate ([DELETED] percent) was more than [DELETED] and more than [DELETED] the third offeror's (as well as the level of profit typically earned on aircraft maintenance contracts), the agency concluded that DSI was proposing to accumulate excess profit on the initial, paid hours in order to fund performance of any discounted hours. Further, as noted by agency evaluators, DSI stated in its proposal that

"[g]iven the uncertainties of the workload, we have analyzed the estimated workload and competitively structured our bid in such a way to ensure that overhead, [general and administrative], and reasonable profit are realized on the most probable hours worked throughout the contract."¹

This clearly suggested that DSI structured its offer to assure recovery, through the earlier hours expected to be ordered, of not only its total contract profit but also its total overhead. From this, we think, the agency could reasonably conclude that DSI had offered enhanced prices for the undiscounted hours to pay for any discounted hours it might be required to furnish. See generally General Instrument Corp., B-228053, Dec. 8, 1987, 87-2 CPD ¶ 564. It follows that the agency reasonably concluded that DSI's offer was mathematically unbalanced.

NAVAIR also reasonably concluded that DSI's offer with the discount was materially unbalanced. The record indicates the existence of considerable uncertainty as to the agency's likely requirements. NAVAIR reports that, as a result of uncertainties with respect to base realignment and closure, funding levels, technology, acquisition philosophy and individual program requirements, the requirement for aircraft maintenance support services was difficult to predict; according to the agency, due to this uncertainty its actual requirements could fall anywhere between the stated

¹Likewise, DSI specifically justified its profit rate on the basis "of the uncertainty of the level of effort, skill mix and task duration."

solicitation estimates, which the agency considered its best estimate of its maximum requirements, and the labor hours guaranteed under the solicitation--20 percent of the maximum--which represented its best estimate of its minimum requirements. DSI does not dispute that the agency's actual requirements are likely to differ significantly from the solicitation labor hour estimates. To the contrary, DSI clearly recognized in its proposal that this was the case, stating that:

"In fact, in all probability, the actual hours will differ from the estimated level of effort, perhaps significantly. Additionally, the mix of labor categories required for each task also fluctuates, depending upon the nature of the workload."

The record indicates that the requiring activity anticipated, and that the agency assumed for purposes of evaluating DSI's discount, that the actual requirements would total between 60 and 80 percent of the estimated labor hours. Since DSI's discount generally would not become effective for a particular labor category until at least approximately 80 percent of the estimated labor hours for that category had been ordered, this had the effect of nullifying the discount for purposes of the evaluation. Further, even assuming no change in the distribution of hours among the different labor categories, DSI's offer would not become low until at least 85 percent of the estimated hours were ordered. Moreover, since the agency (and apparently DSI as well) considered it unlikely that its actual requirements would in fact conform to the specified labor distribution, and DSI's discount did not apply to hours in excess of the solicitation estimates, it appears that the crossover point at which DSI's offer would become low was likely to be even higher than 85 percent.

Under these circumstances--where the agency had substantial reason to believe that its actual needs may deviate significantly during performance from the solicitation estimates and DSI's proposal would only become low after substantially more than the most likely number of labor hours were ordered--NAVAIR properly concluded that there was reasonable doubt that the benefit from DSI's discount would be sufficient to offset DSI's higher unit prices, and thus result in the lowest ultimate cost to the government. See Outer Limb, Inc., supra.

DSI maintains that NAVAIR was required to advise it of the agency's concern with respect to the proposed discount during discussions.

Agencies are required to conduct meaningful discussions with all competitive range offerors, Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168, and in order for discussions to be meaningful, agencies must generally point out weaknesses, excesses, or deficiencies in proposals, unless doing so would result in disclosure of one offeror's technical approach to another offeror or technical leveling. See FAR § 15.610; Comarco, Inc., B-258204.6, Oct. 26, 1995, 96-1 CPD ¶ 12; Lone Star Fleischwaren Im-Export GmbH, B-259588.2, May 25, 1995, 95-1 CPD ¶ 263. Agencies are not required to conduct all-encompassing discussions, or to discuss acceptable

aspects of a proposal merely because they receive lower than the maximum possible score, John Brown U.S. Servs., Inc., B-258158 et al., Dec. 21, 1994, 95-1 CPD ¶ 35; they need only reasonably lead offerors into areas of their proposals which require amplification or correction. Medland Controls, Inc., B-255204; B-255204.3, Feb. 17, 1994, 94-1 CPD ¶ 260; Price Waterhouse, supra.

Although the record indicates that the agency's discussions with DSI focused on perceived unbalancing in the application of the discount (as initially proposed) between the base and option years, it also shows that DSI was advised that its pricing of \$0 for some labor hours was of concern to the agency and that the effect of the discount would be evaluated at levels of effort differing from the solicitation estimates. In a letter to the agency contract specialist dated September 18, 1995, DSI acknowledged that "[i]n our conversation of 15 September you indicated that the government might evaluate the bids at a number of hours other than the number of hours presented in the RFP." Further, in its September 26 response to DSI's question as to the basis for the agency's authority to do this, the agency cited language in FAR § 52.215-16 providing for rejection of a mathematically unbalanced offer where there is a reasonable doubt that the offer would be low. The agency specifically cautioned that:

"While the Government will evaluate based on proposed price for total hours, the Government has stated that neither the total quantities of man-hours for individual labor nor the total estimated man-hours are a certainty. It is difficult to determine how much work will occur under the contract, much less how much for any individual labor category. Therefore, in evaluating a "discount" based on a specific range of hours being obtained for each labor category, it is necessary to determine if it is reasonable that the discount offered is likely to occur or if it is not."

Thus, in our view, the discussions with the agency clearly placed DSI on notice of the agency's concern that the discount could render DSI's proposal unbalanced, depending on the actual likely level of effort, and of its intention to evaluate the effect of the discount at levels of effort differing from the solicitation estimates.²

The protest is denied.

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²DSI also questions the agency's failure to include in the solicitation an estimate of the most probable level of effort for use in the evaluation. This allegation is untimely under our Bid Protest Regulations. DSI was on notice not later than the close of discussions of the agency's view that the solicitation estimates did not necessarily represent the most probable level of effort and of the agency's consequent intention to consider the effect of the discount at other than the specified levels of effort. However, DSI did not first raise its argument in this regard until more than 1 month later, after award. Such protests must be filed prior to the BAFO closing time. 4 C.F.R. § 21.2(a) (1996).