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Comptroller General  
of the United States

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## Decision

**Matter of:** MG Industries

**File:** B-283010.3

**Date:** January 24, 2000

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### DIGEST

1. Protest challenging source selection official's determination that offers were essentially technically equal is denied where evaluation record supports that judgment and source selection official reasonably made awards on basis of lower evaluated prices, notwithstanding solicitation's emphasis on technical merit over price.
2. Awardee's prices are not unbalanced where there is no evidence that prices are significantly understated or overstated.
3. Protest that agency improperly failed to evaluate spot pricing discounts is denied where solicitation did not provide for evaluation of spot pricing discounts, and neither awardee nor protester proposed any spot discounts; rather, spot pricing provision simply permits such discounts during contract performance.
4. Communication with awardee requesting awardee to clarify statement in alternate proposal involves clarifications, not discussions, where record shows that communication with awardee provided no opportunity to revise its offer and was not intended to permit submission of revised offer.

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### DECISION

MG Industries (MGI) protests the award of contracts to BOC Gases and Praxair, Inc. by the National Aeronautics and Space Administration (NASA) under request for quotations (RFQ) No. 10-99-0017, for commercially available liquid oxygen (LO2) and

liquid nitrogen (LN2).<sup>1</sup> MGI essentially contends that NASA did not evaluate offers and select the awardees in accordance with the RFQ's stated evaluation scheme. MGI also alleges that BOC's offer was unbalanced and should have been rejected.

We deny the protest.

The RFQ was issued under the commercial item procedures of FAR Part 12, for delivery of LO2 and LN2 to the Stennis Space Center (SSC) in Mississippi, and delivery of LN2 only to NASA's Michoud Assembly Facility (MAF) in Louisiana. RFP art. 1.B, at 3. LO2 is used at SSC as a propellant oxidizer during rocket engine testing; LN2 is used at SSC and MAF for pressurizing tanks, cold shock and purge gas operations. The agency intended to award two fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contracts for LO2, with annual minimum quantities of 10,000 tons and annual maximum quantities of 60,000 tons. RFQ art. 1.D, at 3-4, and amend. No. 1. For delivery of LN2 to SSC and MAF, the agency intended to award a single contract, with annual minimum and maximum quantities of 13,000 tons and 38,000 tons, respectively. Id. The contracts are to be performed over a 2-year base period, with 3 additional option years. RFQ art. 2, at 4.

Awards were to be made to the offerors whose offers were determined to be most advantageous to the government, price and other factors considered. The solicitation set forth three evaluation factors in descending order of importance: technical capability, price, and past performance. RFQ art. 27, at 20. As relevant to this protest, offerors were instructed to provide specific technical information, not to exceed five pages, such as production facilities, delivery equipment, storage capacity, and quality management systems; prices per ton for LO2 and LN2 for each base and option year; and relevant past performance data. RFQ art. 30, at 26.

Under the technical capability factor, the agency would assess the offeror's ability to produce and deliver products that conform to the solicitation requirements, quality management system, peak production capacity, peak distribution capacity, storage capacity, and the distance to the delivery points. RFQ art. 27, at 20. The past performance factor involved a review of data received from references for three current or former contracts with similar requirements. Id. As to price, offers for LN2 would be evaluated by multiplying the proposed price per ton times the best

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<sup>1</sup> Although the solicitation is denominated as an RFQ, the agency appears to have treated it as a negotiated procurement in accordance with Federal Acquisition Regulation (FAR) Part 15, and the entire record, including the RFQ provisions, refer to the submission and evaluation of proposals/offers and the resulting award of multiple contracts. In order to avoid confusion, this decision will use negotiated procurement terminology throughout.

estimated quantity (BEQ) as set forth in the solicitation.<sup>2</sup> For LO2 only, the proposed price would be multiplied by 75 percent of the BEQ to adjust for the dual contracting approach. In addition, the agency would evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. RFQ art. 27, at 20.

NASA received six offers in response to the RFQ by the May 6 closing date. BOC submitted an alternate offer which reduced its price per ton for LO2 if the firm was awarded a combined LO2/LN2 contract. A three-member evaluation board evaluated the offers using an adjectival rating of technically capable or not technically capable to meet the solicitation requirements. Written requests for technical clarifications were issued to each offeror, and the written responses were evaluated. Agency Report, Tabs 6-8. Under the technical capability evaluation factor, the awardees were rated technically capable. The evaluators found that each firm was capable of producing and delivering quantities of LO2 and LN2 that exceeded the agency's maximum requirements of these products. MGI was evaluated as technically capable; however, the evaluators noted that by itself, MGI's alternate plant did not have enough capacity to provide the maximum daily LO2 requirements for SSC. Agency Report, Tab 9, Technical and Past Performance Evaluation, at 2. Under the past performance evaluation factor, the evaluators rated each offer acceptable based on favorable past performance information. Id.

The contracting officer, who served as the source selection official (SSO), reviewed the evaluation report and concluded that there were no significant discriminators between the competing offers under the non-price evaluation factors. On that basis, he determined that the offers were essentially technically equal under the non-price factors and made his selection decision on the basis of low evaluated prices for each

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<sup>2</sup> Article 3 of the solicitation provided BEQs for LO2 quantities to be delivered to SSC as 75,000 tons for the first base year, 56,000 tons in the second base year, and 56,000 tons in each of the 3 option years. For LN2 delivered to SSC, the BEQs are 24,000 tons in each base year, and 24,000 tons in each option year. The BEQs for LN2 delivered to MAF are 6,800 tons in the first base year, 6,900 tons in the second base year, 6,800 tons in the first option year, 6,600 tons in the second option year, and 6,500 tons in the third option year. RFQ art. 3, at 5.

requirement.<sup>3</sup> Using various award scenarios, the SSO determined that awarding a combined LO2/LN2 contract to BOC and a LO2 contract to Praxair for a total estimated price of \$31,700,915, including all options, was more advantageous to the government than awarding the LO2 contracts to BOC and Praxair and the LN2 contract to MGI for a total estimated cost of \$31,717,408. Agency Report, Tab 11, Source Selection Decision, at 2.

Following notice of the awards and a debriefing, MGI filed an agency-level protest, which was denied by the agency. MGI subsequently protested to our Office (B-283010), challenging the evaluation of proposals and the determination that a combined LO2/LN2 award to BOC was more advantageous to the government. After reviewing that protest, NASA advised our Office on July 13 that it intended to take corrective action by reevaluating the previously submitted initial offers. Our Office dismissed MGI's protest as academic in light of the agency's corrective action.

The agency's evaluation team reevaluated the technical and price offers as initially submitted, that is, none of the offerors was permitted to revise its offer. However, the contracting officer asked BOC to clarify its alternate offer to ascertain whether the firm had proposed a change in the contract type. In response, BOC confirmed that its alternate proposal was based on the ID/IQ terms in the solicitation. Agency Report, Tab 19, Letter from Contracting Officer to BOC (July 28, 1999), and Letter from BOC to Contracting Officer (Aug. 1, 1999).

The agency's technical reevaluation focused on each offeror's ability to meet the solicitation requirements, including their proposed primary production plant, alternate plant, and available delivery equipment. All offers again were determined technically acceptable, although certain weaknesses were noted for some of the offerors including MGI, but none were identified for BOC or Praxair. The evaluators

<sup>3</sup> The evaluated prices were as follows:

	<b>LO2</b>	<b>LN2</b>
BOC (alt)	\$11,951,205*	\$7,546,985
Praxair	12,202,725	7,458,396
BOC	12,762,990	7,546,985
MGI	13,026,480	6,751,693
Offeror A	13,923,465	8,394,126
Offeror B	14,840,865	No bid

\*BOC's lower LO2 price was contingent on receipt of a combination LO2/LN2 contract.

Agency Report, Tab 10, Price Analysis, May 12, 1999, and Tab 23, Price Analysis, July 21, 1999.

then reviewed the past performance information provided by references listed in each offer and the competing firms were found to have acceptable past performance histories with no advantages noted for any firm. Agency Report, Tab 22, Technical Capability and Past Performance Reevaluation.

A technical reevaluation report, which summarized the evaluation findings for each offer, was presented to the SSO for consideration in his source selection decision. The following table summarizes these findings:

<b>Offeror</b>	<b>LO2 Capability</b>	<b>LN2 Capability</b>	<b>LO2 &amp; LN2 Concurrent</b>
Offeror A	Yes	Yes	Yes
Offeror B	Yes	No Bid	No
BOC	Yes	Yes	Yes
Praxair	Yes	Yes	Yes
MGI	Yes	Yes	No

Agency Report, Tab 24, Source Selection Decision Reevaluation Report, Sept. 29, 1999, at 3.

In his source selection decision document, the SSO expressly considered the results of the reevaluation under the non-price factors and concluded:

All offerors are judged technically capable of providing LO2 alone, and are essentially equal in that regard. All offerors, except [Offeror B], are judged technically capable of providing LN2 alone, and are essentially equal in that regard. Only [Offeror A], BOC Gases, and Praxair are judged technically capable of providing both LO2 and LN2 concurrently. These three offerors are essentially equal in their ability to provide both products concurrently, with a probable price adjustment applied to [Offeror A].

Id.

The SSO next reviewed the results of the price reevaluation and potential award combination scenarios to determine the most advantageous prices for dual LO2 contracts and a single source of LN2. From his review of these pricing scenarios, the SSO determined that a combined award to BOC at its contingent price for LO2 coupled with its price for LN2 was more advantageous to the government than a separate stand-alone award for LN2 to MGI at its lower price. The SSO decided to award a combination contract to BOC for LO2/LN2, and another contract to Praxair to supply LO2. Id. at 6.

After receiving a debriefing, MGI filed this protest on October 15 objecting to the result of the reevaluation, which was the same as the initial selection decision. MGI

raises four arguments: that the SSO ignored the stated evaluation scheme by failing to make a qualitative assessment of competing offers under the non-price factors; that BOC's alternate offer is mathematically and materially unbalanced and should have been rejected; that the agency failed to apply spot pricing discounts in evaluating competing price offers; and that the agency conducted improper discussions with BOC. We have examined each contention raised by MGI and find them to be without merit.

## ANALYSIS

### Technical Equivalence of Offers

MGI asserts that by failing to consider qualitative differences between offerors, the agency impermissibly converted the basis for award from a "most advantageous" or "best value" scheme as set forth in the RFQ, to a lowest-priced, technically acceptable scheme. Supplemental Protest at 5-6; Protester's Comments at 14-18. MGI argues that the offerors do not have equal capabilities in terms of peak production and distribution capacity, and distance to the delivery points. Initially, because the RFQ specified a commercial item and required only a minimal technical proposal, there is a question whether the RFQ contemplated a qualitative assessment of offers; thus, it is not clear that the agency was required to do more than it did. In any event, the record shows that the SSO had a reasonable basis to view the offers as essentially technically equal, making price the basis for his selection decision.

MGI provides no basis to question the agency's conclusion that the offerors were technically equal with regard to production and distribution capacity; it is only with regard to the other two areas--plant location and delivery turnaround time--that MGI provides any specifics. As noted by MGI, the technical reevaluation report indicates that in assessing the offerors' primary and alternate manufacturing plant sources that will produce and deliver the products, MGI's primary plant source is in fact the closest plant to both delivery points (SSC and MAF). It is also true that the turnaround time for MGI and BOC to deliver six tankers of LO<sub>2</sub> to SSC was 4 hours, and the turnaround time for Praxair to deliver the same quantity of LO<sub>2</sub> to SSC was 5 hours. Protester's Comments at 18. As previously stated, the reevaluation report was presented to the SSO for his consideration. The SSO found that each offeror was "technically capable of producing and delivering products that conform to the specification and in sufficient quantities, and the offers are . . . essentially equal" and that there was "no Technical Capability or Past Performance advantages" to support award to MGI at a higher price. Agency Report, Tab 24, Source Selection Decision Reevaluation Report, at 5, 6. Thus, the SSO concluded MGI did not have an advantage over BOC and Praxair simply because its primary plant was closer to the delivery points, and that as between MGI and BOC, neither firm's turnaround time for LO<sub>2</sub> delivery to SSC was a significant advantage over Praxair's turnaround delivery time. While MGI clearly disagrees with the SSO's judgment in this regard,

the protester does not explain why the SSO was unreasonable in finding that these discriminators, as discussed above, did not warrant paying a price premium.

### Price Evaluation

MGI protests that BOC's alternate offer was unbalanced, and could not be accepted for award, because its prices for LO2 were understated and its LN2 prices were substantially enhanced. Protester's Comments at 10. The concept of unbalancing may apply in negotiated procurements where, as here, price constitutes the basis for the source selection. Laidlaw Env'tl. Servs. (GS), Inc., B-261603, Oct. 11, 1995, 95-2 CPD ¶ 171 at 2.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly overstated or understated, as indicated by the application of cost or price analysis. FAR § 15.404-1(g)(1). While unbalanced pricing may increase the risk to the government, agencies are not required to reject an offer solely because it is unbalanced. Id. Rather, where the contracting agency receives an unbalanced offer, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the source selection decision, and consider whether a contract will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2).

As relevant to this protest, BOC and MGI submitted the following unit prices:

[DELETED]

Agency Report, Tab 3, MGI's Proposal, at 29, and Tab 5, BOC's Proposal, at 27.

The agency performed a price analysis and reviewed the unit pricing in BOC's alternate proposal for LO2 and LN2 in each of the contract years. The evaluator noted that BOC escalated its LO2 and LN2 unit prices after the 2-year base periods, but that for the last 2 option years (option Nos. 2 and 3), the firm maintained its prior year pricing for both products. There was no indication that BOC's prices were significantly overstated or understated. Based on its evaluation of prices, the agency concluded that BOC's pricing was fair and reasonable and consistent with the prices received from the other firms. Contracting Officer's Statement at 7; Agency Report, Tab 12, Price Analysis.

The protester alleges that BOC's alternate offer contains understated LO2 prices and enhanced LN2 prices; the protester also implies that there is chronological unbalancing, i.e., that BOC's prices are overstated for the earlier periods of performance and understated for the later ones. We see no indication of either understated or overstated prices in BOC's unit pricing. The difference among offerors' prices and among the various periods of performance in BOC's offer were minor; they certainly were not so significant as to require a finding of unbalanced

pricing. Accordingly, there is no support for the contention that NASA should have concluded that BOC's pricing posed an unacceptable risk to the government.

Next, MGI complains that the agency's price evaluation was arbitrary and unreasonable because spot pricing discounts for LO2 offered by the competing firms were not evaluated.<sup>4</sup> Protester's Comments at 19-23. This argument is without merit. As stated previously, the RFQ called for prices to be determined by multiplying the BEQs by the price per ton quoted. There was no provision for evaluating spot pricing discounts for award. In any event, neither the awardees nor the protester offered any spot pricing discounts in their offers. To the extent MGI argues that spot prices should have been evaluated by the agency, this argument is untimely and will not be considered when filed subsequent to the closing time for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. §21.2(a)(1) (1999).

Finally, MGI's allegation that NASA held improper discussions with BOC centers around an exchange of correspondence between the agency and BOC during the period in which proposals were reevaluated. The agency letter to BOC provides, in relevant part, as follows:

Reference your May 3, 1999 offer, Appendix 2, "BOC Alternate Bid Proposal." Please clarify the intent and scope of the following statement:

BOC Gases proposes that it will reduce the price of oxygen proposed on its enclosed RFO Bid Sheet dated May 3, 1999 by \$3.62 per ton should NASA award BOC Gases a combination award for the total supply of [liquid nitrogen] to SSC and MAF and for [liquid oxygen], either as "A" or "B" supplier under the dual supplier award system being bid in this solicitation.

Specifically, you should clarify whether the foregoing statement either accepts the fixed price, indefinite delivery, indefinite quantity contract terms stated in the RFQ with respect to liquid nitrogen . . .

Agency Report, Tab 19, Letter from Contracting Officer to BOC (July 28, 1999).

BOC responded as follows:

The BOC Gases proposal with respect to the supply of liquid nitrogen was/is based on the terms shown in the contract. This

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<sup>4</sup> The spot pricing discount provision in the RFQ specified that, during contract performance, either supplier of LO2 "may offer spot prices that are less than the contract price . . . to increase their share of orders." RFQ art. 3, at 5.

means that BOC Gases accepts the fixed price, indefinite delivery, indefinite quantity contract terms and does not propose any modification of those terms.

Agency Report, Tab 19, Letter from BOC to Contracting Officer (Aug. 1, 1999). The agency's question apparently sought confirmation that BOC's reference to the "total supply" of liquid nitrogen was not intended to convert the award into a requirements contract.

FAR §15.306(d) defines "negotiations" or discussions as "exchanges . . . between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal." The record here clearly shows that the agency's communication offered BOC no opportunity to revise its offer and was not intended to permit submission of a revised offer. The agency's letter merely requested clarification of information already presented in BOC's offer, and did not constitute discussions. See FAR 15.306(a)(1). Therefore, the award decision was made without discussions, consistent with the RFQ, which indicated that the agency intended to make award without discussions. RFQ art. 25(A), at 19.

The protest is denied.

Comptroller General  
of the United States