



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Park Systems Maintenance, Inc.

**File:** B-252453.4; B-253373.3

**Date:** November 4, 1993

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James C. Burkett for the protester.  
John J. Mahon, Esq., Department of the Army, for the agency.  
Catherine E. Pollack, Esq., and John M. Melody, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

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### DIGEST

1. Solicitation amendment deleting guaranteed minimum quantity for requirements contract is material as it greatly increases risk to contractor and can reasonably be expected to affect offered prices.

2. Agency's decision to amend solicitation and request revised proposals, notwithstanding exposure of offered prices in the course of a prior bid protest, was proper where amendment changed a material quantity provision, and failure to request revised proposals would have prejudiced offerors.

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### DECISION

Park Systems Maintenance, Inc. protests the U.S. Army Corps of Engineers' decision to reopen, amend the solicitation, and request revised proposals under request for proposals (RFP) Nos. DACW27-93-R-0027 and DACW27-93-R-0021 for operation and maintenance services at Nolin River Lake and Green River Lake, Kentucky.

We deny the protests.

The RFPs contemplated award of indefinite delivery, indefinite quantity contracts for a base year and 3 option years, primarily for recurring maintenance tasks such as janitorial service and mowing. The RFPs requested unit prices for the various items of work. Award was to be based primarily on technical factors.

Award was made under the Nolin River RFP to Josco Construction Company, the incumbent contractor at that location. Although Park Systems had offered the lowest

price, the Corps found Josco's proposal technically superior and worth its higher price. Park Systems protested the award, alleging that the agency improperly found its proposal deficient in certain areas. Subsequently, the Corps awarded the Green River contract to Josco, citing essentially the same technical basis for selecting Josco's higher-priced proposal as it did for the Nolin River award. Park Systems then protested the Green River award. Performance of both contracts was stayed while the protests were pending.

We sustained Park Systems' protest of the Nolin River award, essentially concluding that the agency's technical evaluation was unreasonable. Park Sys. Maint., Inc., B-252453; B-252453.2, June 16, 1993, 93-1 CPD ¶ 466. We recommended that the agency reevaluate all of the proposals, taking into consideration the concerns stated in our decision, and then perform a new technical/price tradeoff based on the new evaluation results.

Upon receiving our decision, instead of proceeding with a reevaluation of proposals for the Nolin River contract, the Corps issued amendments for both the Nolin River and Green River solicitations requesting revised proposals. The Corps claimed that the amendments were necessary to change the period of contract performance (as a result of the delay occasioned by the protests) and to delete the guaranteed minimum dollar amounts (\$200,000 for the Nolin River contract and \$150,000 for Green River). The Corps also found it necessary to incorporate the latest edition of the U.S. Army Corps of Engineers Safety and Health Requirements Manual, which primarily expanded an existing requirement for roll-over protective structures on riding mowers. As we had not yet issued a decision on the Green River protest, we dismissed that protest as academic based on the agency's corrective action.

Park Systems now protests the Corps' corrective action, alleging that the agency's reopening of the competitions after the firm's low prices were exposed lacks a legitimate basis and therefore gives rise to an improper auction. Specifically, Park Systems asserts that it was not necessary to amend the length of the basic performance period because the solicitation defined the period as running "from contract award through 31 December 1993," and because the prices offered under this requirements-type contract were unit prices which would not be affected by a change in the length of the performance period. Park Systems argues further that the guaranteed minimum amounts in the RFPs only applied to the stated period "1 January 1993 through 31 December 1993"; Park Systems contends that the minimum amounts necessarily were voided when the performance period became less than 1 year and therefore did not have to be

deleted by amendment. Finally, Park Systems maintains that the changes in the Safety and Health Requirements Manual do not provide a valid basis to amend the RFPs because the agency had the opportunity to incorporate the changes by amendment prior to the RFP closing dates, but did not do so. Park Systems concludes that the changes do not warrant amending the RFPs at the risk of a price auction.

It is the Corps' position, on the other hand, that it had to provide offerors the opportunity to change their prices in response to the revised performance period and deletion of the minimum quantities, as well as the new safety requirements; the Corps cites in support of this view Federal Acquisition Regulation (FAR) § 15.606(a), which states that an amendment must be issued ". . . when, either before or after receipt of proposals, the government changes, relaxes, or otherwise modifies its requirements. . . ."

Where a contracting agency proposes to reopen a competition after prices have been disclosed, the reason for the reopening and the prospective benefit to the competitive procurement system must be weighed against the risk of, and regulatory prohibition against, an improper auction. See BDM Int'l, Inc., 71 Comp. Gen. 363 (1992), 92-1 CPD ¶ 377. Since the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the risk of an auction, we consider the statutory requirements for competition to be more important than the regulatory prohibitions against auctions. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. Thus, reopening a competition after prices have been disclosed is proper where it corrects a material, prejudicial impropriety in the procurement process or a violation of procurement laws. See generally BDM Int'l, Inc., supra; Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67 (reopening competition after price disclosure was improper where it was not warranted by any material, prejudicial defect in procurement process or violation of procurement laws).

We think the RFP amendments and the requests for revised proposals here were necessary to maintain fair competitions, and therefore were proper notwithstanding the risk of an auction, because of the elimination of the first year guaranteed minimum quantities of work to be ordered under the RFPs. The first year minimum quantities were substantial--\$150,000 and \$200,000--and clearly could have had a material effect on the prices offered. Similarly, eliminating these guarantees reasonably could be expected to have a significant effect on offerors' prices, see Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276, since the guarantees affect the level of risk to the contractor; a variation in the amount of risk to be assumed by the

contractor is a material change to which offerors generally must be permitted to respond. See Dairy Maid Dairy, Inc., B-251753.3 et al., May 24, 1993, 93-1 CPD ¶ 404.

Park Systems asserts that it did not take the guaranteed minimum amounts into account in pricing its proposal because the 1-year performance period to which the amounts applied already had been changed to a 10-month period before proposals were due. Even if Park did not consider the guaranteed minimums, however, the fact that the minimums were retained in the RFPs even after the performance period was changed is the more significant consideration; other offerors reasonably could have relied on their continued applicability (in total or prorated on a monthly basis) and factored the guarantees into their pricing. The amendments were necessary to preclude offerors' consideration of the guaranteed minimums. We conclude that amending the RFPs and reopening the competitions was warranted notwithstanding the price disclosures.

The protests are denied.



 James F. Hinchman  
General Counsel

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We note that the agency has made an effort to minimize the auction atmosphere by prohibiting changes to the technical proposals other than those required by the new safety regulations. We do not agree with the Corps that the changes to its safety manual themselves warranted amending the RFP, as there is no evidence that the changes would have any material effect on the competition. However, since reopening the competition was necessary based on the deletion of the minimum dollar amounts, there is no reason why the agency should not include the safety manual changes in the amendments and permit corresponding technical proposal revisions.