



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: DynaLantic Corporation

File: B-274944.5

Date: August 25, 1997

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David S. Cohen, Esq., Cohen & White, for Marine Safety International, an intervenor.
Brian F. Zeck, Esq., Kathy B. Cowley, Esq., and Eric A. Lile, Esq., Department of the Navy, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where General Accounting Office sustained protester's original contention that its proposal had been improperly excluded from the competitive range, and recommended that the procuring agency issue discussion questions to the protester and solicit best and final offers from all competitors, subsequent protest challenging revised terms of original solicitation on the ground that the revisions nullify prior recommendation and preserve the original improper contract award by favoring the prior awardee's pricing approach is denied where: (1) on their face, the challenged revisions reflect reasonable procurement practices; and (2) any possible competitive advantage enjoyed by the original awardee is mitigated by the protester's opportunity to submit a revised proposal responding to the revised terms.

DECISION

DynaLantic Corporation protests several of the Navy's revisions to request for proposals (RFP) No. N00600-96-R-0749, issued for ship handling simulation services. The Navy made the revisions as a result of implementing our corrective action recommendation in DynaLantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101. In that decision, our Office sustained DynaLantic's protest that its proposal had been improperly excluded from the competitive range and recommended that the Navy conduct discussions with DynaLantic and solicit best and final offers (BAFO) from both DynaLantic and Marine Safety International (MSI), the only other offeror. In its current protest, DynaLantic contends that the Navy's removal of the original RFP's 35-percent maximum price premium provision, the incorporation of a present value evaluation factor, and the addition of a funding profile provision improperly

favor--and thus preserve the original contract award to--MSI, in contravention of our prior decision's recommended corrective action.

We deny the protest.

BACKGROUND

The original RFP was issued on February 7, 1996, and contemplated the award of an indefinite quantity fixed-price contract for a base year and 9 option years to the offeror whose proposal provided the best value to the government. The solicitation called for the contractor to perform essentially four tasks: (1) construct a facility to house the ship handling simulator complex on government-owned property within 9 months of award, (2) install and configure the simulator equipment and training stations, (3) provide all personnel and technical services necessary to run the ship handling simulator complex for a period of up to 10 years, and (4) "upon completion or termination of the contract [be] responsible for the removal of the building and restoration of the grounds to original condition at no additional cost to the government."

The solicitation required offerors to submit both technical and price proposals. Technical proposals were to be organized according to the following evaluation factors, which were listed in the RFP in descending order of importance: Technical Approach; Personnel; and Management Plan. For their price proposals, offerors were directed to complete and submit the fixed-price schedule set forth at section B of the RFP which required unit prices for estimated quantities of 3,360, 4,300, and 5,000 hours per contract year. Of significance to DynaLantic's current challenge, the RFP required offerors to propose one comprehensive hourly rate for performing any hour of required service; no separate contract line items were included for nonrecurring costs such as building construction or equipment expenses.

The original RFP also contained a maximum price premium provision which provided, in relevant part:

The Government may elect to pay a price premium of up to approximately 35 [percent] to select an Offeror whose non-cost/price evaluation factors (e.g. technical . . .) are superior.

Only two offerors--DynaLantic and MSI--submitted proposals. After evaluating DynaLantic's technical proposal as unacceptable, the Navy excluded it from the competitive range and awarded the contract to MSI--whose technical proposal was rated outstanding.

On October 7, 1996, DynaLantic filed a protest in this Office challenging the exclusion of its proposal from the competitive range on the ground that the Navy had improperly evaluated the proposal as technically unacceptable. By decision

dated February 25, 1997, we sustained DynaLantic's protest and recommended that "discussions be held with DynaLantic" and BAFOs "solicited from both competitors and evaluated by a new TEP [Technical Evaluation Panel]."¹

On March 17, the Navy convened a new TEP, which conducted a fresh evaluation of both DynaLantic's and MSI's initial proposals; from May 2 until May 9, written and oral discussions were conducted with both offerors. During this period, the Navy issued two amendments to the RFP, which incorporated the revised terms currently challenged by DynaLantic.

PARTIES' POSITIONS

Under the prior competition, there were two principal differences between MSI's and DynaLantic's proposals. First, MSI's technical proposal was rated "outstanding" while DynaLantic's was found technically unacceptable. The second principal difference between the offerors' proposals was their prices--DynaLantic's offered price was [deleted]. In this regard, whereas DynaLantic relied on a pricing strategy [deleted].

In its current protest, DynaLantic contends that the revised RFP "ha[s] the effect of frustrating" our corrective action recommendation because "the Navy has attempted to re-write the basis on which the evaluation was conducted, to the advantage of MSI and the prejudice of DynaLantic." According to the protester, each of the challenged solicitation revisions favors MSI's [deleted], or otherwise prejudices DynaLantic's. By removing the original RFP's 35-percent maximum price premium provision, the protester asserts, the agency has guaranteed its ability to select the technically superior MSI proposal, regardless of the offered price. DynaLantic similarly objects to the agency's incorporation of a present value evaluation factor because, according to the protester, this formula [deleted] which favors MSI's competitive position. DynaLantic also objects to the incorporation of a funding profile provision--which sets out the dollar amount allocated to each fiscal year (FY) of contract performance and advises offerors that "the solicitation may be unawardable" if the offeror's proposed contract year "minimums are more than the dollars per year in the funding profile"--because this provision penalizes DynaLantic's [deleted].

The Navy responds that the challenged revisions "reflect sound business practice" and do not nullify the corrective action recommendation in our decision since, consistent with that recommendation, the agency has apprised the protester--through discussions--of the deficiencies in its initial proposal and is soliciting

¹By decision dated July 15, we denied the Navy's request to modify our corrective action recommendation. See Department of the Navy--Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16.

BAFOs from both DynaLantic and MSI. The Navy further explains the rationale for the challenged revisions as follows. First, the Navy reports that its decision to remove the 35-percent price premium clause from the RFP reflects a procurement policy decision that was made prior to our decision in DynaLantic; according to the Navy, the Navy decided to discontinue its use of price premium limitations because such provisions unnecessarily restrict a contracting agency's "flexibility . . . to make a true best value award," thereby contradicting the rationale behind using a best value procurement approach. With regard to the present value evaluation factor, the Navy maintains that this provision was incorporated into the RFP to enhance the accuracy of the Navy's pricing evaluation and to ensure that different pricing strategies are evaluated on an equal basis--the present value of the estimated cost to the government over time. The agency also reports that the challenged funding profile provision was added to the RFP to ensure that any subsequent contract award would not exceed available funds.

ANALYSIS

The details of implementing our protest recommendations for corrective action are within the sound discretion and judgment of the contracting agency. OMNI Int'l Distribs., Inc., 67 Comp. Gen. 123, 124 (1987), 87-2 CPD ¶ 563 at 2. We will not question an agency's ultimate manner of compliance, so long as it remedies the procurement impropriety that was the basis for the decision's recommendation.² QuanTech, Inc., B-265869.2, Mar. 20, 1996, 96-1 CPD ¶ 160 at 2. In this regard, it is well established that contracting agencies have broad discretion to amend the terms of a solicitation, see Singer Co., Librascope Div., B-227140, Sept. 8, 1987, 87-2 CPD ¶ 225 at 2, and to make these revisions at any time prior to contract award--so long as offerors are advised and provided an opportunity to amend their proposals in a BAFO. See Federal Acquisition Regulation (FAR) § 15.606; PI Constr. Corp., B-270576.2, Dec. 15, 1995, 95-2 CPD ¶ 270 at 2.

In its protest, DynaLantic relies heavily on our decision in Ford Aerospace Corp. et al., B-239676.2 et al., Mar. 8, 1991, 91-1 CPD ¶ 260, wherein our Office concluded that a contracting agency's implementation of a prior recommendation--to remedy

²To the extent DynaLantic suggests that the Navy could not revise the terms of the RFP because this was not one of the express recommendations set forth in our prior decision, the protest is without merit. The issue is whether the corrective action approach remedies the prior procurement impropriety, even if it does not precisely track our recommendation. See Tolen Info. Servs., B-246647, Mar. 23, 1992, 92-1 CPD ¶ 303 at 2 (agency's alternative corrective action of revising solicitation to incorporate new licensing requirement and solicit new offers was unobjectionable since further competition was conducted, consistent with prior decision's recommendation).

the agency's improper relaxation of a mandatory solicitation specification by amending the RFP to reflect the agency's actual needs and requesting BAFOs from all offerors in the competitive range--was improper because one of the solicitation revisions effectively prevented any competitor except the original awardee from winning the competition. In that case, as part of its purported corrective action, the contracting agency incorporated a new evaluation factor into the RFP which added \$13.1 million--the agency's estimated cost of terminating the improper contract award--to every offeror's price except that of the firm which had been improperly awarded the contract. We found the pricing factor improper because, on its face, this provision lacked "any justification in law, regulation, or policy" and otherwise operated as a \$13.1 million "penalty" and essentially guaranteed that "no offeror other than the incumbent ha[d] a reasonable chance of winning the competition." Id. at 4.

We think the case at hand is wholly distinguishable from Ford Aerospace. Unlike in Ford Aerospace, none of the challenged revisions or omissions in this case expressly favors MSI. Instead, as explained below, each contested revision reflects a reasonable procurement practice.

First, we see no basis to question the Navy's determination that the original RFP's 35-percent price premium clause constituted an unnecessary restriction on the agency's authority to select the proposal which represents the best value to the government. See 10 U.S.C.A. § 2305(b)(4)(C) (West Supp. 1997) (agency is to make award "to the responsible source whose proposal is most advantageous to the United States"). While DynaLantic suggests that the removal of the price premium limitation from the solicitation gives the agency unbridled discretion to select MSI, we note that any source selection decision must be reasonable and consistent with the solicitation's evaluation criteria, and supported by a well-documented, rational explanation. See TRW, Inc., B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11 at 3-4. Moreover, despite DynaLantic's suggestion to the contrary, removal of the premium price limitation does not automatically preclude the government from determining that a less highly rated technical approach is the "best value" based on that approach's significantly lower price. See ICF Kaiser Eng'rs, Inc., B-271079.3 et al., July 15, 1996, 96-2 CPD ¶ 15 at 4 (although solicitation stated that technical considerations were more important than price, agency reasonably determined that greater technical merit of protester's proposal was not worth its significantly higher cost).

Next, where, as here, the government is purchasing goods or services over time--and particularly where significant nonrecurring costs are expected, and thus disparate pricing strategies may be employed--a present value dollar analysis is a well-recognized and useful evaluation tool for determining the actual cost in current dollars--or present value--of each year of contract performance. See Engineered Air Sys., Inc., B-220392.4, July 8, 1986, 86-2 CPD ¶ 43 at 3. By performing a present value evaluation, the government can convert each offeror's proposed yearly price

to a current dollar value, enabling the comparison of all offerors' prices on a common basis--the present value of future money--even though different pricing approaches were used. The present value analysis being used in this case--applying a 6.1-percent discount factor over a 10-year period--is adopted from the Office of Management and Budget (OMB) Circular No. A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," whose approach has been recognized by our Office as a reliable source for present value evaluation factors and their application. See, e.g., Fort Wainwright Developers, Inc. et al., 65 Comp. Gen. 572, 579-580 (1986), 86-1 CPD ¶ 459 at 10, recon. denied, B-221374.9, Aug. 11, 1986, 86-2 CPD ¶ 172 at 6 (referring to the predecessor Circular No. A-104); City of Nenana, B-214269, June 21, 1985, 85-1 CPD ¶ 708 at 5 (same).

Finally, the funding profile provision likewise is unobjectionable. Contracting agencies cannot award contracts which exceed available funds. See 31 U.S.C. § 1341(a)(1)(A) (1994); FAR § 32.702; Cellular Prods. Servs., Inc.--Recon., B-222614.2, Aug. 18, 1986, 86-2 CPD ¶ 196 at 2. Given the Navy's funding limitations, and the agency's desire to make award within the parameters of its known funding, we think the new funding profile provision constitutes a reasonable method of achieving this goal.³

In sum, unlike the \$13.1 million "penalty" in the Ford Aerospace case, the three solicitation revisions discussed above all reflect reasonable procurement practices which do not on their face result in a preference for or against any particular offeror.

Although we agree with the protester that certain evidence in the record shows that the agency recognized the impact of the challenged solicitation revisions on DynaLantic's initial proposal--i.e., [deleted]--given the reasonable and proper rationale for each revision,⁴ as well as the protester's opportunity to respond to the

³DynaLantic also contends that this provision is ambiguous because the "fiscal year" funding profile is "hopelessly inconsistent" with the RFP requirement to propose prices on a "12 month" basis. However, beyond this general statement, DynaLantic does not explain its objection, and we see no basis to conclude that any such "inconsistency" constitutes a material defect in the RFP. Consequently, we will not consider this argument further. See Imaging Equip. Servs., Inc., B-247201, Jan. 10, 1992, 92-1 CPD ¶ 50 at 2 (unsupported assertion that solicitation specifications are overly restrictive does not constitute a legally sufficient basis of protest).

⁴The record contains a November 8, 1996, agency memorandum which was prepared to justify the agency's "best interests" decision to override the statutory stay on contract performance triggered by DynaLantic's prior protest. See 31 U.S.C.

(continued...)

revisions in its BAFO, we do not think that the concerns underlying our decision in Ford Aerospace arise here. In Ford Aerospace, one of the key reasons for objecting to the \$13.1 million pricing evaluation factor was the provision's clear impact on the competition; because every offeror but the original awardee was assessed with a \$13.1 million penalty, each began the competition with a \$13.1 million handicap. Thus it was clear that this provision improperly steered the outcome of the competition to the original incumbent. This case is different.

Here, none of the revisions on their face automatically favor or otherwise preserve contract award to MSI, nor do any of the revisions impose an insurmountable penalty on DynaLantic. While DynaLantic's competitive standing could suffer as a result of the solicitation revisions, we think improvement is equally possible. This is because, unlike the \$13.1 million fee in Ford Aerospace, which imposed a virtually insurmountable restriction on offerors' BAFO pricing, the revisions at issue in this case do not force DynaLantic to adopt any specific approach or strategy in its BAFO. Significantly, DynaLantic does not argue that it cannot change its pricing method or technical strategy; instead, it objects to the timing of the agency's decision to change the rules of the competition. However, as noted above, an agency can change its requirements at any time during the competitive process--so long as the amendments serve a legitimate government purpose and ensure that offerors are provided with a full opportunity to respond to the new requirements.⁵

⁴(...continued)

§ 3553(d)(3)(C)(i)(I) (1994). The memorandum recognizes that DynaLantic's [deleted].

⁵In its comments on the agency report, DynaLantic argues that, instead of amending the solicitation, the requirement should be resolicited as a new requirement, consistent with FAR § 15.606(b)(4) which provides, in relevant part:

If a change [to a solicitation] is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

Solicitation amendments that do not significantly alter the nature and scope of the contract to be awarded, or the obligations of either party, are not "so substantial [as to] warrant complete revision of the solicitation." See Loral Fairchild Corp., B-242957.2, Aug. 29, 1991, 91-2 CPD ¶ 218 at 4. Despite DynaLantic's contentions to the contrary, we do not agree that the above-referenced amendments substantially changed the nature of the ship handling requirement; although offerors may be inclined to revise their pricing strategies or otherwise improve the technical merit of their offers, the underlying requirement--to provide four stages of ship handling simulator services--remains unchanged.

In sum, since the challenged solicitation revisions otherwise reflect proper procurement practices, and since DynaLantic can respond with any BAFO revisions it deems appropriate under the circumstances, we do not think the agency's solicitation revisions circumvent our prior decision's recommendation or are otherwise improper.⁶

The protest is denied.

Comptroller General
of the United States

⁶DynaLantic also challenged the RFP's description of the construction site as a "vacant lot" because this description does not reflect the presence of MSI's partially completed facility. As such, DynaLantic maintains that the "vacant lot" description is an improper "fiction" that inures in a competitive advantage to MSI, since only MSI will not have to account for potential construction delays otherwise attributable to the removal of the building. The Navy reports that DynaLantic will not be required to begin contract performance until MSI has removed the building from the construction site; since the Navy would thus provide DynaLantic with the "vacant lot" described in the solicitation, this protest ground is denied for lack of basis.