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DECISION | **THE COMPTROLLER GENERAL OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219664 **DATE:** December 6, 1985

MATTER OF: Dynalectron Corporation

DIGEST:

1. Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs or result from fraud or bad faith.

2. Protester's subsequent allegations that specific workload estimates and specific deduction categories--relating to deductions for unsatisfactory performance from the payments to the contractor--are defective are untimely where not received by GAO until after the closing date for receipt of initial proposals since GAO's Bid Protest Regulations require alleged improprieties apparent prior to the closing date to be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1985). Although the protester in its initial protest, filed prior to the closing date, generally alleged that many of the approximately 200 workload estimates and many of the approximately 84 deduction categories were defective, such general allegations do not render subsequent specific allegations timely since our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues.

3. Provision in the performance requirements summary which permits the government to deduct from the payment to the contractor an amount for the untimely delivery of preliminary audiovisual material for review and editing by agency officials does not impose an impermissible penalty. Although protester claims that the government will suffer no damage so

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long as the final print is delivered on time as required under the specifications, protester has failed to show that it was unreasonable for the agency to expect that in some instance, the government might suffer administrative inconvenience or insufficient time for a meaningful review if the preliminary materials are not delivered on time.

4. Protest that a provision in the performance requirements summary--which permits the government to deduct amounts for unsatisfactory services--imposes an impermissible penalty because the agency selected the same allowable deviation--the permissible number of defects--and the same method of surveillance, by random sampling, for several deduction categories is denied where the protester fails to show that the agency choices were arbitrary, unreasonable or otherwise improper.

5. Protest that solicitation requirement for timely performance of services notwithstanding variations in the workload is unduly burdensome because the provision for an adjustment in the delivery schedule in the event of saturation does not define when an adjustment is required is denied. The protester neither alleges nor shows that the general requirement for timely performance notwithstanding variations in the workload is not part of the agency's requirements; GAO is aware of no requirement that agencies set forth in their solicitation the precise basis for adjustments; and nothing in the provision interferes with the contractor's right to seek relief under the disputes clause in the solicitation.

6. Clause in solicitation for audiovisual services which imposes liability on contractor for the costs reasonably incurred by the government--the cost of reshooting the film--as a result of the loss of exposed film is not unduly burdensome. Although the agency failed to place a definite limit on the potential liability of the contractor, the Federal Acquisition Regulation, 48 C.F.R. § 45.103(a) (1984), generally provides that contractors

are responsible and liable for government property in their possession, and the solicitation included estimates of the agency's annual requirements for different types of audiovisual productions and required offerors to propose a specific cost for the most frequently used elements in audiovisual productions.

7. GAO is aware of no basis upon which to object to provision, in solicitation for audiovisual services, for adjusting downward the price for a particular audiovisual production in the event that the contractor utilizes fewer personnel than the number which it proposed to use when negotiating the price for that production and which formed the basis of the agreed price.

Dynalectron Corporation (Dynalectron) protests the terms of request for proposals No. DAVA01-85-R-0001, issued by the Defense Audiovisual Agency (DAVA) for the procurement of audiovisual services. Dynalectron alleges that the workload estimates in the solicitation are erroneous, that the liquidated damages provisions impose a penalty, and that the solicitation otherwise imposes undue risk and burden upon the contractor. We deny the protest.

The solicitation requested proposals for supplying audiovisual services at a firm, fixed price and for undertaking audiovisual productions on an indefinite-quantity basis, for a 9-month base period and 4 option years, in connection with DAVA's operations at Norton Air Force Base in California. The Air Force assumed the functions of DAVA after September 30, 1985. Under the audiovisual services portion of the solicitation, offerors were provided with estimates of DAVA's requirements for a number of audiovisual services (RS')--e.g., black and white and color prints, slides, research assistance, maintenance--and were required to propose a total price for providing all these services during each of the base and option periods. Under the audiovisual productions portion of the solicitation, offerors were provided with estimates of DAVA's annual requirements for 91 of the most frequently used elements of audiovisual productions--e.g., producers, videotape editors, video cassettes--and were required to propose a per unit cost to the government for each element. When DAVA requires an individual production during the contract period, the contractor will submit a contract pricing proposal setting forth the estimated usage of costed elements, as priced at the time of contract award, and any uncosted elements likely to be required. Based upon this proposal, the government and contractor will negotiate a fixed price for the production. The solicitation provided that proposals would be evaluated for purposes of award by adding the price for all option quantities to the price for the basic quantity and that award would be made to the responsible offeror submitting the low, technically acceptable offer.

Shortly before the August 9, 1985, closing date for receipt of initial proposals, Dynalectron filed this protest against the terms of the solicitation.

<u>Workload Estimates</u>

Dynalectron alleges that the solicitation's workload estimates for the audiovisual services are erroneous and misleading because they differ substantially from the government's actual requirements. Dynalectron points out that the statistics concerning the workload under the current contract are reported weekly to DAVA as required under that contract. In its initial protest, Dynalectron identified 20 RS' for which the current, actual workloads under DAVA's contract with Dynalectron exceeded the estimated workloads set forth in this solicitation by at least 100 percent. In addition, Dynalectron generally alleged that the estimates for approximately 40 other unidentified RS' were overstated by at least 50 percent and that the estimates for approximately two-thirds of the RS' differed significantly from the current workload.

In the administrative report responding to the protest, DAVA conceded that figures for the actual workload experienced under the current contract were not considered in deriving the estimates in this solicitation. Rather, these estimates were instead based upon the estimates contained in the prior solicitation which resulted in the current contract so as to more easily compare the advantages of accepting an offer for a new contract with the government's option of extending the current contract.

Nevertheless, DAVA indicated that it would amend the solicitation to include revised workload estimates which took into account the actual workload experience under Dynalectron's current contract. Shortly thereafter, DAVA issued amendment No. 6, which, among other things, replaced many, but not all, of the original estimates with revised estimates. DAVA describes the revised estimates as the "fruit of the Government's best judgment based on the most current data," indicating that both actual workload figures through July 1985 and projections of the future workload after the Department of the Air Force takes over the functions of DAVA were considered.

In its September 30 comments, Dynalectron admits that the corrections to the workload estimates for the motion picture laboratory and the motion media depository, covering approximately 6 of the 20 RS' originally identified as defective, appear to be "fairly accurate and reflect experience." Dynalectron, however, contends that "for the most part," DAVA has failed to provide historical workload data and argues that in all areas other than the RS' related to the motion picture laboratory and the motion media depository, the corrections were "erratic to non-existent." In support of its contention, Dynalectron now provides what it claims to be the actual 1984 and 1985 workloads for all the RS'.

When the government solicits offers on the basis of estimated quantities to be utilized over a given period, the estimates must be compiled from the best information available. They must be a reasonably accurate representation of the anticipated needs, although there is no requirement that they be absolutely correct. See Fabric Plus, Inc., B-218546, July 12, 1985, 85-2 C.P.D. ¶ 46; cf. Ace Van & Storage Co., Windward Moving & Storage Co., B-213885, et al., July 27, 1984, 84-2 C.P.D. ¶ 120. A protester challenging an agency's estimates bears the burden of proving that those estimates are not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith. See D.D.S. Pac, B-216286, Apr. 12, 1985, 85-1 C.P.D. ¶ 418; Ace Van & Storage, supra, B-213885, et al., 84-2 C.P.D. ¶ 120 at 8.

Dynalectron has not met that burden. Dynalectron essentially argues that the estimates are defective because they deviate from the current, actual workload under Dynalectron's contract with DAVA. The differences, however, between the current workload figures and the estimates in the solicitation for the 20 RS' identified in Dynalectron's original protest have in fact been significantly reduced as a result of the substitution of the revised estimates. Moreover, we point out that workload estimates should represent the best estimates of the agency's anticipated future requirements, not merely parrot the current workload figures. This is particularly important here where (1) a comparison of the workload figures for 1984 and 1985 as provided by Dynalectron reveals significant fluctuations in the character and quantity of the work, thus calling into question a total reliance on the figures for 1985, (2) a new agency with potentially different priorities is assuming responsibility for these functions, and (3) a contract under this solicitation could be extended by exercise of the options to a period of nearly 5 years. Cf. Richard M. Walsh Associates, Inc., B-216730, May 31, 1985, 85-1 C.P.D. ¶ 621.

We recognize that in its September 30 comments, Dynalectron has identified additional RS' for which the workload estimates in the solicitation are allegedly defective. The alleged defects in these specific RS', however, were apparent prior to the August 9 closing date for receipt of initial proposals and our Bid Protest Regulations require protests which are based upon alleged improprieties in a solicitation apparent prior to a closing date to be filed prior to that closing date. 4 C.F.R. § 21.2(a)(1) (1985). Moreover, since our Bid Protest Regulations are designed to give protesters and interested parties a fair opportunity to present their cases with the least disruption possible to the orderly and expeditious process of government procurements, they do not contemplate a piecemeal presentation or development of protest issues. See Pennsylvania Blue Shield, B-203338, Mar. 23, 1982, 82-1 C.P.D. ¶ 272. Accordingly, we consider Dynalectron's detailed allegations of September 30 concerning these additional, specific estimates to be untimely, notwithstanding the general allegation in its initial protest that the estimates for two-thirds of the RS' differed from the current workload. See also Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394; Pennsylvania Blue Shield, B-203338, supra, 82-1 C.P.D. ¶ 272 at 4-5.

Payment Deductions for Defective Performance

The solicitation incorporates by reference the standard clause "Inspection of Services--Fixed-Price." This clause provides that if any of the services do not meet the contract requirements, the government may require the contractor to perform the services again in conformity with the contract requirements. Where the defects cannot be remedied by reperformance, the government may reduce the contract price to reflect the reduced value of the services performed. Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-4 (1984). The solicitation further indicates that any reduction in the monthly payment to the contractor because of unacceptable performance will be based on the Performance Requirements Summary (PRS) included in the solicitation.

The PRS indicates that the government will use periodic inspections, review of customer complaints and random sampling to evaluate the contractor's performance. Prior to the issuance of amendment No. 6, the PRS apportioned a percentage of the contract price to each RS. The PRS provides that a part of the value for each RS the performance of which is unsatisfactory will be deducted from the payment to the contractor in the same proportion as the defective performance bears to the inspected lot, in the case of random sampling, or to the entire service in other cases. The PRS states that "up to a maximum of 25% of the total value of the service" may be deducted for late performance, at a rate of 1 percent for each time unit--which varies according to the RS in question--of untimeliness. Deductions from the remaining 75 percent of the total value of the service may be made for defects relating to quality. For most services, however, the PRS provides for an allowable deviation--a permissible number of defects--for which no deductions will be taken.

Dynalectron maintains that these provisions have been fixed without reference to the probable actual damages that would be suffered as a result of defective performance and, therefore, that they constitute an unenforceable penalty. In its initial protest of August 8, Dynalectron generally alleged that the deduction bases--the percentages of the contract value apportioned to each RS--bore no reasonable relation to the contractor's actual costs or to the prices upon which the contractor based its offer. In addition, Dynalectron identified the entries in the PRS relating to the three specific RS' discussed below as examples of its contention that the PRS imposes an unenforceable penalty.

First, Dynalectron noted that while the entry for RS-30 required the contractor to provide audiovisual review materials and approval screenings, meeting certain specifications, "within scheduled completion date," the entry for RS-30A required the contractor to provide those services within a "[r]esponse time in accordance with" the delivery schedule and specified a deduction of up to 25 percent of the total value of RS-30 for untimely performance. Dynalectron expressed concern that the references to timeliness in both entries permitted two deductions for the same period of lateness.

Dynalectron also alleged that the PRS permitted deduction of an amount representing the value of several different tasks where an inspection revealed a defect in only one type of task, citing RS-48 as an example. Although the solicitation includes separate workload estimates for 10 different tasks under RS-48, including providing presentation charts, briefing charts, blue line/black line prints, plaques, photoplates, nameplates, posters, displays, certificates and lobby displays, the PRS only provided for a single entry for these services, "[p]roduce quality Graphic Art work," a single deduction category based upon the defective percentage in the sample of any particular lot, and a single maximum payment percentage or RS value.

Dynalectron further contended in its initial protest that DAVA will suffer little or no damage if many of the listed products are late, citing RS-20 as an example. Under RS-20 and RS-20A, the contractor is required to provide in conformity with the delivery schedule--at least 24 workdays prior to the release print shipping date--a timed and color corrected print, a soundtrack, four video cassettes, and a script for the monthly film "Air Force Now" for screening and editing by DAVA and Air Force officials. Once these officials have drawn up a list of required corrections, the contractor will incorporate the corrections and will produce the final answer print at least 10 workdays prior to the release print shipping date as required in RS-21. Dynalectron argues that RS-20 merely relates to an intermediate review step and that so long as the actual delivery of the final print pursuant to RS-21 is timely, the government will have suffered no damage from the untimely performance of RS-20.

In response to the initial protest, DAVA issued amendment No. 6 revising the PRS. DAVA deleted the fixed percentage of the contract price apportioned to each RS, leaving that value to be subsequently negotiated. Where the PRS had included separate entries for both the quality and timeliness of performance, DAVA deleted any reference to timeliness in the quality entry.

In addition, DAVA increased the number of RS deduction categories from 66 to 84, not counting the separate entries for timeliness. Thus, RS-48 for graphic art services was broken out into 10 separate tasks or deduction categories.

DAVA, however, maintains that a further breakout of tasks is inappropriate here. It contends that the remaining categories are comprised of work which is similar in regards to both the manpower and material required for performance and explains that, in any case, it lacks the personnel required to conduct separate quality assurance surveillance for each of the approximately 200 tasks for which the solicitation includes separate workload estimates.

DAVA has also refused to delete the separate deduction provisions--RS-20 and RS-20A--relating to the delivery of the initial print, soundtrack, video cassettes and script for the monthly film "Air Force Now" for purposes of screening and review. DAVA maintains that even if the final "Air Force Now" print required under RS-21 is delivered on time, the untimely delivery of the initial print and other material for screening and editing by DAVA and Air Force officials will increase the administrative burden on the government by compressing the review period and may cause a decline in quality by depriving the government of an opportunity for a full review and discouraging changes in order to regain schedule.

The provisions here for deductions in case of defective performance constitute liquidated damages, that is, predetermined amounts fixed in the contract which one party to the contract can recover from another for a contract violation without proof of actual damages sustained. Eldorado College, B-213109, Feb. 27, 1984, 84-1 C.P.D. ¶ 238. FAR provides that liquidated damages should be used only where both the government may reasonably expect to suffer damage if the delivery or performance is delinquent and the extent or amount of such damage would be difficult or impossible to ascertain or prove. Moreover, the rate of liquidated damages must be reasonable since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR § 12.202(a) and (b).

Before our Office will object to a liquidated damages provision as imposing a penalty, the protester must show that there is no possible relation between the liquidated damages rate and the reasonably contemplated losses. Richard M. Walsh Associates, Inc., B-216730, supra, 85-1 C.P.D. ¶ 621 at 3.

DAVA's deletion of the percentage of the contract price apportioned to each RS and its deletion of any reference to timeliness in the quality entries in the PRS render Dynalectron's allegations in these regards academic. See TeOcom, Inc., B-218512, May 2, 1985, 85-1 C.P.D. ¶ 495.

Likewise, the breakout of the work under RS-48 into 10 separate deduction categories as requested by Dynalectron renders Dynalectron's initial allegation in this regard academic. We recognize that Dynalectron, apparently referring to the fact that all 10 of the categories have the same allowable deviation and the same method of surveillance by random sampling, now argues that each of the 10 tasks should have its own allowable deviation and own method of surveillance. Since, however, Dynalectron has presented no evidence demonstrating that DAVA's selection of the allowable deviation and method of surveillance for each RS was arbitrary, unreasonable or otherwise improper, we find no basis upon which to object. See also Eldorado College, B-213109, supra, 84-1 C.P.D. ¶ 238 at 3.

Nor will we object to the provision for a payment deduction if the contractor fails to deliver on time the preliminary "Air Force Now" print, soundtrack, video cassettes and script for screening and editing by DAVA and Air Force officials. We recognize that Dynalectron argues that the government will suffer no damage from an untimely delivery of the preliminary materials since the review period is "simply the amount of time it takes to project and review the film, which is nominally 30 minutes in length." The possibility, however, that the review of the preliminary materials might in a particular instance require only a relatively short period of time in no way demonstrates that it was unreasonable for DAVA to expect that in other instances the government might suffer administrative inconvenience or insufficient time for a meaningful review should there be an untimely delivery of preliminary materials requiring more than a cursory review. See also Eldorado College, B-213109, supra, 84-1 C.P.D. ¶ 238 at 3.

We note that Dynalectron, in its September 30 comments, identifies (1) additional RS' which contain dissimilar tasks, (2) additional RS' which are only intermediate steps in the creation of a final product and the defective performance of which allegedly may have no relation to the timeliness and quality of the final product, and (3) other alleged defects in the surveillance procedures. Dynalectron did not, however, identify these additional, specific RS' and additional, specific alleged defects in the surveillance procedures until after the August 9 closing date for receipt of initial proposals, even though they were apparent prior to that closing date. Since, as previously indicated, improprieties apparent prior to the closing must be protested prior to closing, 4 C.F.R. § 21.2(a)(1), and our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues, we consider these additional allegations to be untimely.

<u>Undue Risk and Burden</u>

Dynalectron alleges that the provisions of the solicitation relating to workload assignment, compensation for variations in workload and the contractor's liability for the loss of exposed film impose an undue risk and burden upon the contractor.

The solicitation warns that the estimated annual workload for each RS "will not necessarily be assigned to the contractor equally over a twelve month period" and requires the contractor to "adjust resources and work force during peak periods to maintain [the] response times" required under the delivery schedule.

Dynalectron objects that this provision makes the contractor responsible for accomplishing an unlimited amount of work in a finite period of time, with any untimeliness in performance resulting in reductions in the contract price pursuant to the deduction provisions of the PRS.

DAVA denies that the solicitation leaves the contractor unprotected against significant fluctuations in workload. The agency points to the "WORKLOAD VARIATIONS" clause, which provides, in pertinent part, that:

> "[d]uring workload peaks when the Contractor determines that the full capacity of the Government's supplied equipment or facility is or will be used, he will notify the Contracting Officer to discuss the delivery times or other solutions. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time . . . . Upon the receipt of a written request for an extension, the Contracting Officer will ascertain the facts and may make an adjustment for extending the

completion date as, in the judgement of the Contracting Officer, is justified."

We note that Dynalectron considers the Workload Variations clause to be insufficient protection, arguing that it does not define when saturation occurs, that the contracting officer may deny a request for an adjustment and that the clause may not take into account the capacity of Dynalectron's personnel as opposed to the capacity of the equipment or facility.

We are, however, aware of no requirement that agencies set forth in their solicitations the precise basis for adjustments. Cf. Capitol Services, B-217505, Aug. 1, 1985, 85-2 C.P.D. ¶ 112. Moreover, nothing in the provision interferes with the contractor's right to seek relief under the disputes clause incorporated in the solicitation by reference. See FAR, § 52.233-1. Finally, we note that some risk is inherent in most types of contracts; the mere fact that a solicitation may impose a risk does not render the solicitation defective. See Richard M. Walsh Associates, Inc., B-216730, supra, 85-1 C.P.D. ¶ 621 at 7; Edward E. Davis Contracting, Inc., B-211886, Nov. 8, 1983, 83-2 C.P.D. ¶ 541. Offerors are instead expected to allow for such risk in formulating their offers. Edward E. Davis Contracting, Inc., B-211886, supra, 83-2 C.P.D. ¶ 541 at 9.

Since Dynalectron has neither alleged nor shown that the general requirement for timely performance notwithstanding variations in workload is not part of the agency's requirements, and, in view of the provisions for an adjustment to the performance schedule where the variation in quantity is such as to cause an increase in the time required for performance, we find no basis to object. See Richard M. Walsh, B-216730, supra, 85-1 C.P.D. ¶ 621 at 7 (requirement to perform despite fluctuations in workload); see also Ray Service Company, B-217218, May 22, 1985, 64 Comp. Gen. ____, 85-1 C.P.D. ¶ 582 (GAO will not object to agency determination of actual minimum needs in the absence of a showing that the determination has no reasonable basis).

Dynalectron also objects to those provisions of the Workload Variations clause providing for an equitable adjustment in the contract price to the extent that the actual workload exceeds 115 percent or falls below 85 percent of the estimated workload. In particular, Dynalectron objects to the provision for determining the net variation in workload by dividing the actual workload for each RS by the workload estimate and multiplying the result by the value apportioned to that RS in the PRS, since it believes that those RS values bear no relation to the contractor's costs or price. Dynalectron also complains that the use of the allegedly defective workload estimates in conjunction with the Workload Variations clause "virtually assures" that the government will receive up to 15 percent of the services free.

Since DAVA has deleted the percentages apportioned to each RS in the PRS, leaving the relative value of each to be determined by subsequent negotiation, we consider Dynalectron's allegation in this regard to be academic. As for the use of the allegedly defective estimates, Dynalectron, as previously indicated, has not demonstrated that the specific workload estimates which it timely protested were in fact defective. Finally, we point out that the intent of such variation in workload clauses is to enable the contractor (or the government) to seek an equitable adjustment in the event of a catastrophic, as opposed to a merely normal, variation in workload. Cf. Talley Support Services, Inc., B-209232, June 27, 1983, 83-2 C.P.D. ¶ 22.

Dynalectron further objects to the provision in the solicitation imposing liability on the contractor for film lost during processing.

The solicitation provides that:

> "[i]n the event the contractor destroys or loses exposed film, the contractor is liable for costs reasonably incurred by the Government as the result of this loss or destruction."

In response to a question as to whether the contractor would be responsible for the cost of relaunching a missile where the film of the original launch was lost, DAVA clarified the contractor's liability, stating that:

> "[w]e do not expect you to restage an event but it is the intention of the Government that the contractor will be responsible for the cost of re-shooting film due to loss of film during processing if it is the Government's desire to take this action."

Dynalectron objects that DAVA has neither placed a definite ceiling on the liability of the contractor nor specified the value of the film to the government. Dynalectron argues that the failure to limit or quantify the potential liability prevents the contractor from making adequate provision for the potential liability, such as by purchasing insurance. Dynalectron points out that FAR, § 45.505-2(b)(2), requires that "[t]he Government shall determine and furnish to the contractor the unit price of Government-furnished property."

FAR generally provides, however, that contractors are responsible and liable for government property in their possession unless otherwise provided by the contract. FAR, § 45.103(a). Moreover, we point out that FAR, § 45.505-2(b)(2), cited by Dynalectron, also provides that:

> "[n]ormally, the unit price of Government-furnished property will be provided on the document covering shipment of the property to the contractor. In the event the unit price is not provided on the document, the contractor will take action to obtain the information."

Assuming this provision is applicable to the situation where the government furnishes exposed film to the contractor for processing, since the government has neither chosen the new contractor nor provided it with any exposed film, Dynalectron's argument that the government has failed to furnish the unit prices of the exposed film as required under FAR, § 45.505-2(b)(2), is premature at best.

We recognize that FAR also provides that:

> "[s]olicitations shall specify material that the Government will furnish in sufficient detail . . . to enable offerors to evaluate it accurately." FAR, § 45.303-2.

DAVA, however, has provided estimates in the solicitation as to its annual requirements in minutes of different types of productions and offerors are required to propose a specific cost for each of the 91 most frequently used elements in completing such audiovisual productions.

Dynalectron has failed to demonstrate that it was unreasonable for the government not to have also specified the total cost of reshooting film for productions for which no production orders have been issued. There is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties or address every possible eventuality. As previously indicated, the fact that the solicitation may impose some risk on the contractor does not render it improper. See also Richard M. Walsh Associates, Inc., B-216730, supra, 85-1 C.P.D. ¶ 621 at 6-7.

In any case, we question the extent to which Dynalectron may have been prejudiced by any failure to provide more detailed information since the protester, as the incumbent contractor, would have a special knowledge of the nature of the productions. Cf. Linda Vista Industries, Inc., B-214447, B-214447.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 380.

Minimum Manning Requirements

The solicitation provides that the price negotiated for an individual audiovisual production will be subject to an equitable adjustment downward if the contractor in fact fails to meet the minimum manning requirements agreed to during the negotiations, that is, fails to use the number of personnel which it proposed to use during negotiations and which formed the basis of the agreed price for the audiovisual production.

Dynalectron argues that the provision for a downward adjustment in the production price penalizes the contractor for management efficiencies and ignores the fact that a fixed price had been negotiated for the audiovisual production.

DAVA, on the other hand, defends the provision as necessary to protect the government from being overcharged. The agency claims that Dynalectron, under its contract with DAVA, has consistently utilized fewer resources and less time than it had originally insisted were necessary when negotiating a price for a particular audiovisual production. In support of its contention, DAVA has provided our Office with documentation relating to a number of productions where Dynalectron allegedly used fewer personnel and took less time than it had originally estimated were necessary.

We are aware of no basis for objecting to a provision for adjusting downwards the price of a production order where that price is based on the use of one level of resources and the use of a different level of resources, not previously foreseen by the agency, subsequently proves necessary.

We recognize that Dynalectron denies that it has overestimated the required resources. Nevertheless, we conclude that Dynalectron has not shown that DAVA was unreasonable in determining that, given the prior history of disputes with the contractor in this regard, it was necessary in order to accommodate the agency's minimum needs to include provisions reducing the incentive for the contractor to overestimate its requirements when negotiating production orders. Cf. Eldorado College, B-213109, supra, 84-1 C.P.D. ¶ 238 at 3-4.

Finally, we note that DAVA has not only amended the solicitation to provide that the "cost of support personnel for production periods . . . may entitle the contractor to an equitable adjustment," but, in addition, has also amended the solicitation to permit alternate offers excluding the disputed provision.

Production Carryover Program

Dynalectron also objects to a provision in the solicitation requiring the contractor to subcontract completion of certain productions during the last 2 months of the contract to the successor contractor. Since, however, DAVA has stated that it will delete this provision, we consider Dynalectron's protest in this regard to be academic.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel