**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Dynamac Corporation

File: B-252800

Date: July 19, 1993

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the decision.

DIGEST

Protest against issuance of delivery order under existing
contract is sustained where the order for support of agency
computerized information system was not within the scope of
the existing contract which was intended to provide
engineering support for agency's information resources
management systems, and the original solicitation for this
contract did not adequately advise offerors of the potential
for this type of delivery order.

DECISION

Dynamac Corporation protests the Environmental Protection
Agency's (EPA) decision to issue a delivery order to Science
Applications International Corporation (SAIC) under contract
No. 68-W1-0055, for various tasks in support of the Label
Use Information System (LUIS). Dynamac contends that the
delivery order is beyond the scope of the SAIC contract and
that the EPA should have conducted a competition for the
acquisition.

We sustain the protest.

The LUIS is a computer-based scientific reference database
on registered uses of pesticide products and the active
ingredients contained in those products. LUIS was developed
for three purposes: (1) to serve as a repository for
detailed use information about individual products for use
by the EPA's registration program; (2) to contain
information resulting from EPA's reregistration decisions
under of the Federal Insecticide, Fungicide, and Rodenticide

Act (FIFRA), as amended, 7 U.S.C. § 136 _et seq._ on acceptable use sites, methods of applications, and use limitations associated with active ingredients in eligible products; and (3) to replace a predecessor EPA Index on registered pesticide chemical uses and limitations.

Dynamac has been the data extraction contractor for LUIS for a number of years, first as a prime contractor, and since January 1992, as a subcontractor to Computer Science Corporation (CSC), under the "Technical and Operational Support Services" (TOSS) contract.[1] Dynamac received this subcontract as the result of a competition conducted by CSC for performance of a LUIS data extraction delivery order. CSC itself performed another delivery order for support of LUIS automated database programming.

In July 1992, the EPA determined not to exercise the next option on the TOSS contract and to phase out performance of all existing delivery orders by September 1993. Under this plan, Dynamac's subcontract was expected to terminate on March 31, 1993. The EPA determined that the 9-month period between July 1992 and March 1993, was insufficient to conduct a competitive procurement and still meet FIFRA deadlines. After considering various options, the EPA decided to issue a delivery order to obtain the required LUIS support services under an existing Mission Oriented Systems Engineering Support (MOSES) contract, held by SAIC.[2] This delivery order consists of 15 tasks. Tasks 2-10 are comparable to the TOSS delivery order held by Dynamac while Tasks 1 and 12-16 are generally comparable to the TOSS delivery order performed by CSC.[3]

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[1] The TOSS contract was established to provide cost-effective information resources management (IRM) support to EPA.

[2] The MOSES contract, awarded September 30, 1991, was intended to function as a "mission oriented" contract to support EPA's systems engineering by providing EPA with a Systems Development Center (hereinafter "Center"). The Center was required to perform functions associated with any and all stages of the IRM systems life cycle as well as significant corollary work such as system documentation and data base administration.

[3] Task 11, "Development of Recommendations for Improvements in the Presentation of Use Information on Product Labeling," was deleted as being beyond the scope of the MOSES contract. Dynamac had performed this same task under the delivery order to the TOSS contract.

In late January 1993, Dynamac learned of EPA's intention to issue a delivery order to SAIC and, after meeting with EPA officials, wrote to the EPA on February 3, asserting that issuance of a delivery order under MOSES was inappropriate. Dynamac argued that awarding the delivery order to SAIC without full and open competition would circumvent the intent of the Competition in Contracting Act of 1984 (CICA). 31 U.S.C. § 3551 et seq. (1988). As an alternative, the protester recommended that the agency place the work in Dynamac's current EPA contract for review and evaluation of product and residue chemistry data on pesticides.

In reply letters, the EPA advised that it had considered a number of options, including Dynamac's recommendation, but had concluded that placing a delivery order under the MOSES contract would best meet the agency's needs. The agency also advised that the EPA intended to issue a future competitive solicitation for the requirement.[4] By letter of March 24, Dynamac filed this protest with our Office.

As a preliminary matter, the EPA argues that this protest is untimely because it was filed more than 10 working days after February 3, the date by which Dynamac knew or should have known of its protest grounds. Dynamac argues that prior to its receipt of the EPA's letter to its Senator, it had not received final notice of the agency's decision on the delivery order. In the alternative, Dynamac contends that its February 3 letter should be considered an agency-level protest, the denial of which it protested to our Office within 10 working days. We believe that Dynamac's February 3 letter served as a protest of the agency's action. The fact that it was not specifically denominated a protest is not relevant since it clearly conveyed an expression of dissatisfaction and a request for corrective action. See American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183. Since the instant protest was filed within 10 working days of Dynamac's receipt of the agency's response to its February 3 protest, it is timely.

Dynamac contends that the data extraction related requirements (which we note are primarily in Tasks 2-10), using scientists for analysis, are beyond the scope of the MOSES contract and that the MOSES solicitation did not adequately advise offerors that such work could be ordered under the resulting contract. The EPA argues that the work is encompassed by various provisions in the MOSES contract and that the MOSES solicitation sufficiently placed all offerors on notice of the contract's broad scope.

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[4]The record indicates that the EPA expects to make a competitive award by September 1994.

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The EPA also argues that this protest should be dismissed since a delivery order is a matter of contract administration which our Office will not review. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1993). While this is generally true, we will consider a protest that a delivery order issued under an existing contract is beyond the scope of that contract, changing the nature of the contract originally awarded. This is so because the work covered by the delivery order would be subject to requirements for competition absent a valid sole-source determination. Astronautics Corp. of Am., 70 Comp. Gen. 554 (1991), 91-1 CPD ¶ 531. In determining whether a delivery order is proper, we look to whether there is a material difference between the contract, as modified by the delivery order, and the original contract. Indian and Native Am. Employment and Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432. In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period, and costs between the modification and the original contract, as well as whether the original contract solicitation adequately advised offerors of the potential for the type of delivery order issued. See CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342. Here, we find that the delivery order was outside the scope of the MOSES contract, and in particular, that the original solicitation did not adequately advise offerors of the potential for such a delivery order.

The MOSES statement of work states the contract's intent as follows:

> "[To] support the . . . EPA in . . . IRM systems engineering by providing the Agency with a Systems Development Center. The [Center] shall perform functions associated with any or all stages of the systems life cycle in support of the EPA mission. The [Center] shall also perform significant corollary work including, but not limited to, methodology and standards development; researching, testing and implementing emerging software development and maintenance productivity tools; system documentation; support for an IRM technical library; data base administration; and user training."

The stated purpose of the delivery order at issue is to obtain contractor services to provide system development and implementation support to the program office for a wide variety of information management efforts related to LUIS. The contractor is required to provide "programming expertise to further develop, enhance, and maintain" the automated pesticide systems and the "expertise of biologists to

extract, compile, analyze and standardize the EPA biological use information from EPA specified registered pesticide products and enter" the information into the LUIS. In addition to a listing of the requirements under each of the 15 tasks, the delivery order contains a cross reference between sections of the MOSES contract and the delivery order tasks.

Prior to issuing the delivery order, the agency conducted multiple reviews of the respective scope of MOSES and of the delivery order, dropping one task as being beyond the scope of the MOSES contract (see footnote 3, supra). It is plain from the record that the reviewers were most concerned with the appropriateness of the use of biologists for data extraction, compilation, analysis, and standardizing, prior to data entry. For example, the contracting officer considered the programming expertise to be "traditional IRM" but believed that the biologist's work was IRM only in the sense of data entry. Although the agency ultimately concluded that these activities were within the scope of the MOSES contract, there is no explanation for how it arrived at this conclusion, apart from identification of certain portions of the MOSES contract which ostensibly encompassed the delivery order work. We have reviewed the tasks, the MOSES contract sections, the SAIC project plan, and a description of the activities involved in "data extraction" and we conclude that the majority of the tasks under the delivery order are beyond the scope of the MOSES contract.

For example, Task 2, "Initial Extraction of Product Use Information and Entry into LUIS," calls for extraction of use pattern information from all product labeling for specific chemicals designated by the agency in accordance with EPA furnished technical guidance. This guidance includes directions for obtaining product labeling; information extraction and entry software specifications; standard vocabulary terms; rules for interpreting label use information; and rules for identifying issues. As noted in the order's purpose statement, biologists are required to extract, compile, analyze and standardize the information before entering it into the database. Task 3, "Maintenance of the Product Use Information in LUIS," entails keeping database information current on a daily basis for every registered pesticide product once information for a pesticide chemical has been entered into LUIS. Task 5, "Development and Maintenance of Standard Vocabularies and Guides for Coders," requires the contractor to use knowledge such as that concerning crops/sites, pests, types of application methods, application equipment, timing of applications, and use pattern limitations. It also requires the contractor to develop and maintain the standard vocabularies and rules for interpreting label information contained in the "EPA furnished" guidance mentioned in

Task 2, as well as develop an automated crop/site thesaurus, showing the relationship of the approximately 20,500 site label terms with the approximately 1,500 preferred-site vocabulary terms.

While the EPA asserts that Tasks 2, 3, and 5 (as well as other tasks) are covered by MOSES contract sections, our review of those sections discloses only a superficial and ultimately unpersuasive connection.

For example, the EPA relies on MOSES tasks associated with management and operation of the Center, including "documentation" (Section 4.2.4) and "data management" (Section 4.2.6). We find that while these tasks include editing and abstracting of documents, and data collection and entry, the context of these activities is that of typical IRM work which does not include the substantive judgment and analysis involved in the LUIS data extraction. The delivery order biologists' extraction and entry activities go well beyond the MOSES described tasks. They include initial verification of the correctness of the label and other use information; ensuring that the information is correctly interpreted and reported to be consistent with the system as a whole; and use of their expertise to identify "issues," i.e., instances where required information is not found either on the labels or in the registration jacket, or where information is apparently inaccurate, or otherwise unsatisfactory.

Similarly, the EPA's reliance on "ad hoc information analysis" (Section 4.3.5) is misplaced. These MOSES tasks are described as:

> "retrieval, manipulation and reporting on an as required basis . . . [including] comparison of data from different data bases, summarization of raw data, statistical analysis of data, and presentation of data in . . . formats such as reports, charts, graphs and maps."

These activities are not reasonably related to the LUIS tasks. Another MOSES section, "miscellaneous specialized services" (Section 4.3.7) includes independent verification and validation, expert system consultation, development, and implementation, data collection forms consolidation and design services. Again, none of these activities, fairly construed, encompass the LUIS tasks.[5]

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[5]The agency cites a number of other MOSES contract sections which it believes support its finding that the delivery order is within the MOSES scope. While we have not discussed them all here, we have reviewed each of these, in

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The agency also contends that the LUIS tasks are within the scope of the MOSES contract because an appropriate labor category, "scientific information systems specialist," is available under the contract. The agency also observes that Dynamac used the same type of category for its LUIS delivery order under the FOSS contract. The availability of this labor category does not change our conclusion.

Although the MOSES contract provides for "scientists," we do not agree that those scientists were intended for the data analysis and entry work covered by the delivery order. In this regard, we note that the educational requirement for a "data entry operator" is a high school diploma and that his/her duties include data input to computer systems or data logging and storage devices based on detailed instructions provided by the agency. Science specialists require a masters (senior specialist) or bachelors degree in engineering, mathematics, or the natural or physical sciences. Their duties include: planning research programs, analyzing results, and developing solutions to highly complex technical problems; developing and analyzing appropriate research models; planning principles and procedures for accomplishing unique customer studies; giving expert professional analysis of documenting and substantiating research findings; providing consultation to customers and software systems specialists to design efficient IRM systems; and using computer technology as a tool to solve problems of an advanced nature. While the scientist's activities are broad and varied, they do not reasonably include the exercise of substantive judgment over data and data entry.

While delivery order Tasks 1 and 12-16 are more traditional IRM work[6], we conclude that the majority of the order's effort is contained in Tasks 2-10 which involve scientific analysis tasks. This conclusion is supported by the fact that the science specialists comprise some 6,240 hours, or roughly 62 percent of the estimated total effort of 10,040 hours over 6 months. Thus, scientific analysis is not simply a minor aspect of performance of this delivery order.[7]

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the context of the entire contract, and conclude that they do not fairly support a finding that the delivery order is "in scope."

[6]For example, Task 13, "Software Development, Enhancement, and Maintenance" and Task 15, "Technical Analyses and Recommendations."

[7]In this regard, we note that in order to perform the required scientific analysis, SAIC has added former Dynamac employees to its staff.

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Even if EPA may have intended for MOSES to encompass data analysis tasks such as those in the LUIS delivery order, the original solicitation did not place potential offerors on adequate notice of that intent. The agency relies on the broadly stated requirements in the MOSES solicitation, references to EPA mission support including FIFRA activities, as well as the minutes of the MOSES preproposal conference as evidence that potential offerors were aware of the potential for a LUIS data extraction delivery order. This material does not constitute proper notice. While the requirements are broadly stated, as described above, the clear thrust of the MOSES contract was IRM systems engineering and creation of the Center, and not the intensive data analysis, such as that involved in LUIS data extraction and related tasks. Thus, we do not agree that work with the various EPA data bases and computer systems could be reasonably interpreted by prospective offerors as covering the substantive data analysis aspects of an existing, developing data base. Further, mere references to the FIFRA and support of EPA missions are insufficient to place offerors on such notice. With regard to the preproposal conference, we do not find that the LUIS tasks were reasonably implied by references to the MOSES contract being considerably broader than predecessor contracts and going "well beyond" development and maintenance of software to include engineering environmental and administration systems.

The past history of competition in this particular program supports our conclusion. The original LUIS data extraction work was the subject of a competition and the contract was still being performed by Dynamac at the time of the MOSES procurement. Further, a primary reason for issuing this delivery order was the perceived lack of sufficient time to conduct a competition; however, the agency intends to conduct a competition in the future for this requirement. This history of competition is persuasive evidence of the EPA's recognition that the LUIS data extraction tasks are unique and separate from general IRM tasks.

We also note that even though the MOSES solicitation identified the contract as the "Contract of Preference" for any IRM systems engineering work performed by the agency, it also stated that the EPA had other IRM-related contracts which might be the preferred vehicle for some of the areas of support. The MOSES solicitation also states that the EPA utilized these other contracts as preferred sources for support of selective requirements and may expand their utilization in the future. Thus, an offeror such as Dynamac could reasonably infer that the MOSES contract would not encompass its existing LUIS data extraction contract. Under these circumstances, we conclude that the majority of the delivery order is beyond the scope of the MOSES contract.

Indian and Native Am. Employment and Training Coalition,
supra.

The issue then becomes whether, in effect, a sole-source
award to SAIC was appropriate. A sole-source acquisition is
authorized when the legitimate needs of the government so
require, e.g., when time is of the essence and only one
known source can meet the agency's needs within the required
timeframe. Id. Here, the agency explains that, in order to
meet FIFRA deadlines, it did not have sufficient time to
conduct a competition in the 9 months between July 1992,
when it decided not to continue the TOSS contract, and
March 1993, when the TOSS delivery order expired. However,
it does not argue that this claimed lack of sufficient time
justified a sole-source contract to SAIC and our review of
the record discloses no such justification. Administrative
expediency or convenience itself provides no basis for
restricting competition, id., and SAIC does not appear to
fit the description of "only known source." We therefore
sustain the protest.

Accordingly, we recommend that the agency terminate the
delivery order (Tasks 2-10) for the convenience of the
government and conduct a competition for future LUIS data
extraction work. As explained above, Tasks 1 and 2-16
involve more traditional IRM work which could appropriately
be ordered under the MOSES contract, and thus, need not be
terminated. Further, Dynamac is entitled to recover its
reasonable costs of filing and pursuing its protest
including reasonable attorneys' fees. 4 C.F.R.
§ 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f)(1),
Dynamac's certified claim for such costs, detailing the time
expended and costs incurred, must be submitted directly to
the EPA within 60 working days of receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

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