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## Decision

**Matter of:** Raytheon Company

**File:** B-417524.2; B-417524.3

**Date:** December 19, 2019

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Mark D. Colley, Esq., and Eric Valle, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

Paul Debolt, Esq., Chelsea Knudson, Esq., Ioana Cristei, Esq., and Taylor Hillman, Esq., Venable, LLP, for the intervenor.

Jonathan A. Hardage, Esq., Department of the Army, for the agency.

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### DIGEST

1. Protest alleging that the agency's price evaluation was flawed is denied, where the protester argues that the agency should have performed a price realism evaluation but the solicitation did not provide for one.
  2. Protest alleging that the pricing terms of the solicitation contained a latent ambiguity is denied, where the protester cannot demonstrate prejudice.
  3. Protest alleging that the agency improperly accepted the awardee's low rate for a certain labor category is dismissed, where the solicitation contained a patent ambiguity about whether the rate was fixed or would be negotiated after award.
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### DECISION

Raytheon Company, of Dulles, Virginia, protests the award of a contract to DynCorp International LLC, of McLean, Virginia, under request for proposals (RFP) No. W52P1J-18-R-0011 by the Department of the Army, on behalf of the Combined Security Transition Command - Afghanistan, for security assistance training and advice as part of the Security Ministries of Afghanistan Advisory Program. The protester alleges that the Army failed to perform a price realism analysis; performed an unreasonable price evaluation by allowing certain fixed-rate amounts to be attributed to the cost-reimbursable portion of the contract; and improperly issued a solicitation with a latent ambiguity regarding which elements were fixed or reimbursable. The protester argues that these errors resulted in a flawed best-value award decision.

We deny in part and dismiss in part the protest.

## BACKGROUND

The Army issued the RFP on June 25, 2018, using the procedures of Federal Acquisition Regulation (FAR) part 15. RFP at 1-2.<sup>1</sup> The solicitation anticipated award of a hybrid time-and-materials, cost-reimbursable, and fixed-price contract with a 1-year base period and four 1-year option periods to the responsible offeror whose proposal was determined to represent the best value to the agency, considering the following factors in descending order of importance: program management, past performance, and cost/price.<sup>2</sup> RFP §§ L.4.1, M.1.1- M.1.3. The combined non-cost/price factors were more important than cost/price, but as the relative merits of the proposals under the non-cost/price factors equalized, cost/price increased in importance. Id.

As relevant to the protester's challenges of the agency price evaluations, the RFP's contract line item numbers (CLINs) were as follows:

CLIN	Type	Item and Description
0001	Time & materials	Labor breakdown. Fully-burdened labor rate for the positions and hours specified by the agency.
0002	Fixed-price	Program management office (PMO)
0002AB	Time & materials	PMO security services - Labor rate for 150 full-time equivalent personnel (FTEs)
0003	Fixed-price	Housing: per-person monthly billeting rate
0004	Fixed-price	Transition in/out costs
0005	Cost-reimbursable	Other direct costs. Offerors to use placeholder figure of \$6,377,000 in calculating total evaluated price (TEP)
0006	Not priced	Contractor manpower reporting

AR, Tab 15, RFP Price Matrix, Instructions.

For time-and-materials CLIN 0001, labor breakdown, the agency specified all of the positions and hours required. Id., Labor Breakdown. Thus, for each performance

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<sup>1</sup> Citations to the RFP are as follows: the conformed RFP (Agency Report (AR), tab 4); performance work statement (PWS) (AR, tab 13); section L - instructions to offerors (AR, tab 19a); and section M - evaluation criteria for award (AR, tab 20a).

<sup>2</sup> The solicitation contemplated a two-phase evaluation, with phase I requiring an offeror to provide evidence of a SECRET-level facility clearance and approval of its accounting system. RFP § M. The phase I gateway evaluation factors are not relevant to this protest, which concerns only the phase II factors.

period, offerors were to only “fill in their proposed fully-burdened labor rate for each position.” Id., Instructions.

For time-and-materials CLIN 0002AB, PMO security services, the RFP provided a basis of calculation and offerors were to propose only a fixed hourly labor rate. Id., Base Period. However, the instructions to offerors stated that “[d]ue to the classified nature of the documents required to meet the security requirements of the PWS, the Government is hereby providing a surrogate quantity of 150 security personnel. Contractor shall propose associated labor rate for these duties, which will be negotiated after award.” Id., Instructions.

For cost-reimbursable CLIN 0005, other direct costs, the RFP advised offerors that it would not evaluate the cost to the agency, but would instead use a placeholder figure of \$6,377,000 in order “to ensure equal effect on offerors price proposals.”<sup>3</sup> Id., Base Period; RFP § L.6.5.3.

An offeror’s TEP would be the sum of: the hourly rate proposed for each labor category within CLIN 0001 multiplied by the specified hours; a fixed price for the PMO; the offeror’s hourly rate for CLIN 0002AB multiplied by 312,000 (40 hours/week x 52 weeks/year x 150 FTEs); the agency’s plug figure of \$6,377,000 for CLIN 0005, cost-reimbursable other direct costs; the fixed prices for housing per FTE; the fixed price for transition; and half of the price of the offeror’s final option year for the possibility of the 6-month extension. AR, Tab 15, Price Matrix, Base Period; RFP §§ M.6.5.3, M.6.5.4.

As relevant to the protest, the solicitation instructions advised offerors that:

The Price proposal must be consistent with the offeror’s Technical factor proposal. Inconsistencies between the offeror’s Cost/Price and Technical proposals reflect on the offeror’s ability to perform the effort required within the amount proposed. These inconsistencies, if unexplained, raise the fundamental questions as to the offeror’s inherent understanding of the work required and the ability to perform the contract.

RFP § L.6.5.9. In addition, the RFP permitted the agency to reject a proposal if it “fails to meaningfully respond to the Proposal Preparation Instructions specified in Section L of this solicitation,” for example by “propos[ing] exceptions to the attachments, exhibits, enclosures, or other RFP terms and conditions,” or when “[t]he Offeror’s proposal contains any inconsistencies between proposal volumes.” RFP § M.4.

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<sup>3</sup> The solicitation provided guidance that the category of other direct costs “may include non-fee bearing items such as . . . Pre-deployment, travel to, training and processing . . . , Afghan visas and work permits, materials, equipment, insurance, fuel and maintenance of . . . vehicles, semi-annual drug testing, and shipping expenses associated with hiring, training, and deployment activities.” RFP PWS § 1.24.1. In addition, the contractor was required to “obtain prior written approval from the KO [contracting officer] for all costs over \$1,000 before making any purchases.” Id.

The Army received three timely proposals by the November 13 due date. AR, Tab 48, Source Selection Decision (SSD) at 1-2.

On April 29, 2019, after discussions but prior to award, DynCorp filed a protest with our Office alleging that the discussions had created ambiguities with the cost/price factor as written. B-417524, Protest, at 1-3. Our Office dismissed the protest after the agency stated its intent to revise the RFP and allow offerors to submit revised proposals. DynCorp Int'l LLC, B-417524, May 10, 2019 (unpublished decision). All three offerors submitted revised final proposals by the new deadline of May 29. Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 12; AR, Tab 48, SSD at 3.

As to the offerors' price proposals, DynCorp stated that its fully-burdened labor rates in CLIN 0001 were "inclusive of all Base Salary . . . Fringe Benefits,<sup>4</sup> Indirect Costs, and Profit." AR, Tab 37, DynCorp Cost/Price Narrative at 1. DynCorp also offered completion bonuses of "[DELETED]% of total compensation" that would be paid to an employee at the completion of that employee's [DELETED]-month contract.<sup>5</sup> Id. DynCorp assumed that these "personnel completion bonuses are cost reimbursable," i.e., they would be paid out of CLIN 0005 but not be part of the TEP evaluated by the agency. Id. As to CLIN 0002AB, DynCorp proposed a rate of \$[DELETED] per hour, which was "the hourly rate of the lowest security labor category[,] with the understanding that the quantity and labor rates will be negotiated after award." Id. at 2.

For its part, Raytheon too proposed to pay "[e]mployee semi-annual completion bonuses." AR, Tab 28, Raytheon Cost/Price Narrative at 5. Like DynCorp, Raytheon did not include these costs in its fully-burdened labor rate under CLIN 0001, but instead in cost-reimbursable CLIN 0005. Id.

The Army evaluated offerors' proposals as follows:

<b>Factor</b>	<b>DynCorp</b>	<b>Raytheon</b>
<b>Program Management</b>	Good	Good
<b>Past Performance</b>	Substantial Confidence	Substantial Confidence
<b>Total Evaluated Price</b>	\$297,616,354.79	\$499,012,759.87

AR, Tab 48, SSD at 4.

On August 21, the Army made award to DynCorp as the firm with the proposal offering the best value to the agency. Id. at 7. The agency concluded that, while Raytheon's proposal offered "very slight advantages" over DynCorp's proposal, those advantages

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<sup>4</sup> DynCorp's proposal also stated that it would invoice its fringe benefits as reimbursable costs under CLIN 0005, other direct costs. AR, Tab 37, DynCorp Cost/Price Narrative at 3.

<sup>5</sup> The solicitation required offerors to have at least 90 percent of the positions filled throughout contract performance. RFP PWS § 1.21. In addition, monthly turnover was not to exceed 3 percent. Id. § 1.22.

did not justify paying a premium of over \$200 million. Id. Raytheon's debriefing concluded on September 5. AR, Tab 54, Raytheon Debriefing Govt. Responses at 1-7. This protest followed on September 10.

## DISCUSSION

Raytheon raises multiple challenges to the Army's price evaluation and, moreover to the Army's acceptance of DynCorp's proposed cost/price. First, the protester alleges that the Army failed to perform a required price realism evaluation. Protest at 32-34. Raytheon next asserts that the agency improperly allowed DynCorp to move employee compensation in the form of completion bonuses from the fixed-price, fully-burdened labor rates in CLIN 0001, where they would have raised the TEP, to cost-reimbursable CLIN 0005, where their cost to the agency was obscured by the agency's plug figure. Id. at 19-24. In addition, Raytheon argues that, to the extent that moving employee compensation to the cost-reimbursable CLIN was permitted, the solicitation contained a latent ambiguity about the definitions of the terms "fully-burdened labor rates" and "other direct costs." Id. at 25-32. Finally, Raytheon contends that DynCorp did not intend to honor its fixed rate for PMO security under CLIN 0002AB and improperly planned to renegotiate this rate during contract performance. Comments & Supp. Protest at 16-17. The protester contends that these errors resulted in a flawed award decision and prejudice to Raytheon.<sup>6</sup> Protest at 14-42.

### Price Realism Analysis

Raytheon first asserts that the RFP required the Army to perform a price realism analysis for the fixed-rate portions of the solicitation and that the Army failed to do so. Protest at 32; Comments & Supp. Protest at 33. Relying on the RFP's instructions to offerors, the protester contends that "the solicitation clearly notified offerors that low pricing would be evaluated and could form the basis for rejecting a proposal." Protest at 33. The protester appears to acknowledge that the solicitation does not contain an express commitment for the agency to perform a price realism evaluation. Id.; Comments & Supp. Protest at 35-36. Raytheon alleges that these provisions in the

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<sup>6</sup> The protester withdrew a protest ground alleging that the Army failed to evaluate proposals for unbalanced pricing. Comments & Supp. Protest at 1 n.1. The protester raises various other protest grounds in addition to those discussed below. Although they are not discussed here, we have considered them all and none provides a basis to sustain the protest.

Raytheon also raised several arguments that relied on the terms of the solicitation in effect prior to amendment 0003. See, e.g., Comments & Supp. Protest at 11-12. Amendment 0003, issued on August 23, 2018, made significant revisions to the solicitation, including the PWS, price matrix, section L instructions to offerors, and section M evaluation criteria. AR, Tab 7, RFP Amend. 0007 at 2. To the extent that the protester challenges the terms of the solicitation or modifications effected by amendment 0003, the protester's arguments are untimely and will not be considered further. 4 C.F.R. § 21.2(a)(2).

solicitation nevertheless “put offerors on notice that the Agency could reject proposals with low prices that reflect[ed] a lack of understanding or inability to perform the contract, i.e., that the [a]gency would conduct a price realism evaluation.” Protest at 36.

The Army contends that, “[i]n a [time-and-materials] contract such as this one, where offerors propose fixed, fully-burdened labor rates, offerors, not the Government, ultimately bear the risk of any increased costs, and offerors can, if they so desire, propose prices that pose a risk that they might perform at a loss.” COS/MOL at 18 (citing Earth Resources Tech., Inc., B-416415 et al., Aug. 31, 2018, 2018 CPD ¶ 312 at 9; PricewaterhouseCoopers Pub. Sector, LLP, B-415504, et al., Jan. 18, 2018, 2018 CPD ¶ 35 at 12; AGE Logistics Corp., B-412049, Dec. 9, 2015, 2015 CPD ¶ 386 at 6). The Army argues that the solicitation neither required, nor permitted, the agency to conduct a price realism assessment. COS/MOL at 29.

As noted above, the RFP’s instructions advised offerors that unexplained inconsistencies between the offerors cost/price and technical proposals “reflect on the offeror’s ability to perform the effort required within the amount proposed” and “raise the fundamental questions as to the offeror’s inherent understanding of the work required and the ability to perform the contract.” RFP § L.6.5.9. The RFP in section M did not provide for a price realism evaluation and informed offerors only that the agency “may reject any and or all proposals” for various reasons, including if “[t]he Offeror’s proposal contains any inconsistencies between proposal volumes.” RFP § M.4.

We find that the language in section L, even in the context of the section M language permitting proposals to be rejected for inconsistencies, does not create an obligation for the Army to conduct a price realism evaluation. In this regard, our decisions explain that an agency may conduct a price realism evaluation in awarding a fixed-price contract for the limited purposes of assessing whether an offeror’s low price reflects a lack of technical understanding only where the solicitation advises that the agency will conduct such an analysis. Interactive Gov’t Holdings, Inc., B-417133, Jan. 24, 2019, 2019 CPD ¶ 68 at 3; PricewaterhouseCoopers Pub. Sector LLP, B-415129.3, July 31, 2018, 2018 CPD ¶ 272 at 2.

In the absence of an express price realism provision, as here, we will conclude that a solicitation contemplates a price realism evaluation only where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and where the solicitation states that a quotation can be rejected for offering low prices. Id. Although the section L instructions refer to offerors’ “understanding” and “ability to perform” the contract, nothing in the evaluation criteria states that the agency planned to evaluate proposed prices to determine whether they were so low as to reflect a lack of technical understanding or that the agency could reject a proposal for offering low prices. It follows therefore that the agency was not required to conduct a price realism evaluation on this particular procurement. Interactive Gov’t Holdings, supra, at 4; DynCorp Int’l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9. Absent such a solicitation provision, agencies are neither required nor permitted to evaluate price realism in awarding a fixed-price

contract. DynCorp Int'l LLC, *supra*, at 9. Accordingly, this protest ground is denied. Interactive Gov't Holdings, *supra*, at 4.

Furthermore, we do not find Raytheon's argument persuasive because the cited provisions are part of the solicitation's instructions. Interactive Gov't Holdings, *supra*, at 4. Our Office has consistently stated that information provided in a solicitation's instructions to offerors section is not the same as evaluation criteria detailed in a solicitation's evaluation section. *Id.*; STAcqME LLC, B-417128, Feb. 25, 2019, 2019 CPD ¶ 95 at 4; *see also* Coastal Def., Inc., B-413890, Dec. 19, 2016, 2016 CPD ¶ 371 at 5. In this regard, rather than establishing minimum evaluation standards, an RFP's instructions to offerors section generally provides guidance to assist offerors in preparing and organizing their proposals. STAcqME LLC, *supra*, at 5. Thus, the provision at issue could not bind the agency to perform a price realism evaluation because it was not part of the evaluation criteria. *See id.* This protest ground is denied.

### Price Evaluation

Raytheon next argues that the agency's price evaluation overlooked offerors' different pricing structures, which prevented a comparison of the actual costs of contract performance. Specifically, Raytheon objects to DynCorp's proposal to pay its completion bonuses under cost-reimbursable CLIN 0005. The protester contends that the solicitation language differentiating the components of fully-burdened hourly rates under CLIN 0001 from the other direct cost elements in CLIN 0005 did not permit an offeror to charge employee compensation to CLIN 0005.<sup>7</sup> Comments & Supp. Protest at 8-16. The protester alleges that DynCorp improperly lowered its TEP by moving more than \$100 million in employee compensation to the cost-reimbursable other direct costs CLIN, where the true cost would be hidden by the agency's plug figure of approximately \$6 million. *Id.*

The Army asserts that its price evaluation was reasonable and consistent with the terms of the solicitation. COS/MOL at 15. The agency also contends that the protester must first show that "the agency was on notice that offerors' prices were based on different assumptions." *Id.* (citing Enterprise Servs., LLC, B-417329, *et al.*, May 30, 2019, 2019 CPD ¶ 205 at 17, 21). The agency argues that without such evidence, this protest ground should be denied. *Id.*

The interpretation of the solicitation now advanced by the protester, *i.e.*, that DynCorp's completion bonuses were "quintessential 'wages'" and were required to be included in

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<sup>7</sup> The protester relies on Lockheed Aeronautical Sys. Co., B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80 for the proposition that an "apples-to-oranges" evaluation is improper. Comments & Supp. Protest at 6-7. However, Lockheed is inapposite here because in that decision the protester challenged "the realism of [the awardee's] proposed costs." Lockheed Aeronautical Sys. Co., *supra*, at 2. In contrast, here the relevant CLINs are fixed-rate CLINs and, as established above, the solicitation did not provide for a price realism evaluation.

their fully-burdened labor rates, is at odds with the contents of its own proposal. Comments & Supp. Protest at 14. As described above, both DynCorp and Raytheon offer completion bonuses to their employees at the end of their 6-month contract periods. Both firms assumed that these would be paid on a cost-reimbursable basis.

Raytheon defends charging its “contract completion bonuses” under cost-reimbursable CLIN 0005 as different from DynCorp’s allegedly improper bonuses because Raytheon’s “bonuses would comprise just a small part of an average Raytheon employee’s total compensation.”<sup>8</sup> Protest at 17 n.8. But if Raytheon’s completion bonuses are excludable from “fully-burdened hourly labor rates” and reimbursable under CLIN 0005, then so are DynCorp’s.<sup>9</sup>

The protester’s current litigation position--that some completion bonuses should not be paid under the cost-reimbursable CLIN--differs markedly from its interpretation of the solicitation at the time of proposal submission. The integrity of the protest process does not permit a protester to espouse one interpretation or position during the procurement, and then argue during a protest that the interpretation or position is unreasonable or otherwise improper. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7-8; L&J Bldg. Maint., LLC, B-411827, Oct. 27, 2015, 2015 CPD ¶ 344 at 5. In sum, given its effect on its own proposal, Raytheon’s interpretation of the RFP in this litigation is unreasonable. This protest ground is denied.<sup>10</sup> Id.

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<sup>8</sup> Raytheon did not provide any details about the value of its completion bonuses and their size remains unknown. AR, Tab 28, Raytheon Cost/Price Narrative at 5.

<sup>9</sup> The RFP provides that “‘fully-burdened labor rates’ are calculated at an hourly rate,” as defined “in accordance with FAR 52.232-7,” whereby “hourly rates shall include wages, indirect costs, general and administrative expense, and profit.” RFP at 27; COS/MOL at 32-33. The Army finds “only one reasonable interpretation” for “these four components,” and concludes that “other direct costs” in CLIN 0005 cannot reasonably “include types of compensation not directly related to hiring, pre-deployment, training, and deployment activities.” Id. at 33-35.

<sup>10</sup> Even if DynCorp, in its business judgment, submitted an offer that included no profit, was below-cost, or attempted to buy-in to the RFP, that does not render the firm ineligible for award. Property Analysts, Inc., B-277266, Sept. 12, 1997, 97-2 CPD ¶ 77 at 6; McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Below-cost pricing is not prohibited, and the government cannot withhold an award from a responsible offeror merely because its low offer is or may be below cost. McDonnell Douglas Corp., supra. Section 3.501-1 of the FAR defines “buying-in” as submitting an offer below anticipated costs, expecting to either increase the contract amount after award or receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract. The FAR does not prohibit buying-in. FAR § 3.501-2. In this regard, the agency notes that, “[i]n the present contract with fixed, fully-burdened [time-and-materials] labor rates, the Army will pay exactly the rates proposed, regardless of what DynCorp pays its employees. In other words, the burden

## Ambiguity Relating to Categorization of Employee Compensation Expenses

Raytheon also contends that to the extent that DynCorp attempted to move employee compensation in the form of completion bonuses to the cost-reimbursement CLIN 0005, there was a latent ambiguity in the RFP language describing fully-burdened labor rates. Comments & Supp. Protest at 22-24. In this manner, Raytheon contends that the agency's acceptance of DynCorp's proposal indicates an ambiguity in the parties' interpretation of the composition of fully-burdened labor rates and other direct costs. Comments & Supp. Protest at 24. Yet as established above, with regard to the offerors' completion bonuses, the difference is only that DynCorp's proposal specified the percentage of base compensation that it intended to pay, while Raytheon's proposal left the amount undefined. Compare AR, Tab 28, Raytheon Cost/Price Narrative at 5 with AR, Tab 37, DynCorp Cost Price Narrative at 1.

Here, to the extent that Raytheon reasonably relied on its interpretation of the RFP, it received the same benefit as DynCorp for the purposes of the evaluation (i.e., its completion bonuses did not increase its TEP), and therefore the firm has not alleged how it was prejudiced by such an interpretation. In essence, Raytheon argues that the agency should have found that DynCorp's proposal took exception to a material solicitation term by excluding employee compensation in the form of completion bonuses from its fully-burdened hourly rates. But Raytheon cannot advance this argument as it too excluded its completion bonuses from its fully-burdened hourly rates. Further, Raytheon--like DynCorp--proposed to be paid for those expenses under the agency's cost-reimbursable other direct costs CLIN. As such, Raytheon cannot argue that it was in some way harmed or misled in proposing according to its own interpretation of the solicitation. Accordingly, we find nothing in the record to support a finding that the protester was competitively prejudiced. Marine Terminals Corp.-East, Inc., B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 10 (denying allegation of latent ambiguity where protester did not show it was prejudiced); Interactive Info. Sols., Inc., B-415126.2 et al., Mar. 22, 2018, 2018 CPD ¶ 115 at 10 (same).

## PMO Security

Finally, Raytheon claims that the Army improperly permitted DynCorp to ignore the fixed-price nature of PMO security CLIN 0002AB and propose a low hourly rate for the purpose of the procurement, despite indicating its intent to renegotiate a higher rate with the Army after award. Comments & Supp. Protest at 16; see also AR, Tab 37, DynCorp Cost Price Narrative at 2; AR, Tab 38, DynCorp Price Matrix, Base Period. The record confirms that DynCorp proposed a very low hourly rate--\$[DELETED]--for PMO security CLIN 0002AB.<sup>11</sup> The awardee explained that “[f]or purposes of evaluation, [DynCorp]

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of any increased costs during the course of performance will be on DynCorp, not the Army.” COS/MOL at 19.

<sup>11</sup> For its part, Raytheon contends that it “proposed a legitimate rate of \$[DELETED] per hour.” Comments & Supp. Protest at 17.

has provided the hourly rate of the lowest security labor category with the understanding that the quantity and labor rates will be negotiated after award.” AR, Tab 37, DynCorp Cost/Price Narrative at 2. In other words, DynCorp proposed the lowest rate possible and interpreted both the labor rate and duties as negotiable post-award. In Raytheon’s view, the agency erred in accepting DynCorp’s price proposal because DynCorp “propose[d] artificially low labor rates for security personnel in order to achieve a lower TEP.” Comments & Supp. Protest at 22. The protester claims that, to the extent that the Army accepted DynCorp’s low prices for evaluation purposes only, and higher prices for performance, then the solicitation contained a latent ambiguity that precluded meaningful comparison across proposals. Id. at 31-32.

The PMO security CLIN is a time-and-materials fixed labor rate CLIN. AR, Tab 15, Price Matrix, Base Period. The RFP instructed offerors that “[d]ue to the classified nature of the documents required to meet the security requirements of the PWS, the Government is hereby providing a surrogate quantity of 150 security personnel. Contractor shall propose [an] associated labor rate for these duties, which will be negotiated after award.” Id., Instructions.

The Army contends that, to the extent that Raytheon and DynCorp interpreted these instructions differently, the instructions contained a patent ambiguity that renders the protester’s objection untimely. Supp. COS/MOL at 25-26. The agency asserts that due to the absence of information “about the PMO security requirement that would allow offerors to develop a firm labor rate, the only reasonable interpretation of the instructions for CLIN 0002AB is that the duties and the final labor rates would be negotiated after award.” Id. at 26. In other words, offerors could not have reasonably been required to propose a fixed hourly rate because the Army withheld all relevant information about the duties of contract performance.

Our decisions provide that an ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id. We agree with the agency that the solicitation ambiguity here was patent. Even if the instructions are read narrowly to mean that only duties will be negotiated after award, there is an obvious conflict between the requirement to propose a fixed hourly rate and the lack of a basis for that rate. In this vein, offerors were instructed to propose a labor rate “associated” with certain unspecified duties; to the extent that the duties would be determined after award, the “associated labor rate” would be as well. Nothing in this structure is reasonably consistent with the fixed hourly rate required in the solicitation. This is an obvious error in the solicitation terms. Under our Bid Protest Regulations, a patent ambiguity must be protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); Democracy Int’l, Inc., B-415243, B-415243.2, Dec. 13, 2017, 2017 CPD ¶ 293 at 7. Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); Democracy Int’l, Inc., supra, at 7. Accordingly, Raytheon’s allegation that

the solicitation contained a latent ambiguity that precluded meaningful comparison across proposals is dismissed as untimely. Id.

We then turn to Raytheon's claims that the Army failed to hold DynCorp's price proposal to the terms of the solicitation. We concluded above that the instructions to offerors regarding PMO security CLIN 0002AB were in direct conflict with its characterization as a fixed-rate CLIN and therefore created a patent ambiguity. Our decisions provide that an offeror that chooses to compete under a patently ambiguous solicitation does so at its own peril and cannot later complain when the agency proceeds in a way inconsistent with its interpretation. Sygnetics, Inc., B-414649, Aug. 2, 2017, 2017 CPD ¶ 253 at 2-3; PriceWaterhouseCoopers Pub. Sector LLP, B-413316.2; B-413316.3, Dec. 27, 2016, 2016 CPD ¶ 12 at 9; Democracy Int'l, Inc., supra, at 8. Consequently, we dismiss this protest ground as untimely. Id.

Raytheon also argues that the flaws in the Army's evaluation resulted in an unreasonable best-value tradeoff decision. Protest at 37-38. However, this argument is predicated on the protester's contentions that the agency erred in its underlying evaluation, as described above. As discussed, there is no merit to Raytheon's claims. Therefore, on this record, we find no basis to question the agency's best-value tradeoff decision. Network Security Sys. Plus, Inc., B-416755, Dec. 6, 2018, 2019 CPD ¶ 4 at 8.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong  
General Counsel