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Comptroller General
of the United States
Washington, D.C. 20548

640194

Decision

Matter of: My Anh Company

File: B-252872

Date: April 19, 1994

DIGEST

In 1972, the United States Agency for International Development (A.I.D.) awarded a contract in Vietnam to the My Anh Company. On April 27, 1975, the My Anh Company requested that A.I.D. refund its security deposit on that contract. The My Anh Company states that before A.I.D. could do so, the personnel of the A.I.D. office in Saigon were evacuated on April 29, 1975. Since the claim accrued on or about April 27, 1975, and was not filed in the General Accounting Office until 1993, payment of this claim is time-barred by the 6-year Barring Act, 31 U.S.C. § 3702(b)(1) (1988).

DECISION

The United States Agency for International Development (A.I.D.) requests an advance decision as to whether it may pay the claim of the My Anh Company for failing to return that company's security deposit on or about April 27, 1975.[1] We conclude that this claim is barred by the 6-year statute of limitations in 31 U.S.C. § 3702(b)(1) (1988).

BACKGROUND

In 1972, the A.I.D. office in Saigon, Republic of Vietnam (RVN), awarded a contract for building cleaning services to a local South Vietnamese company called My Anh, which was owned by Mr. Pham Mong Hoang and his wife, Mrs. Nguyen Thi Anh. This contract required a deposit of 794,000 RVN Piasters as security for adequate performance of the

[1]This matter was submitted to our Office by Mr. David D. Ostermeyer, an Authorized Certifying Officer, Office of Financial Management, U.S. Agency for International Development, Washington, DC, pursuant to 31 U.S.C. § 3529 (1988). It is now under the cognizance of Ms. Pamela L. Callen, an Authorized Certifying Officer of that same office.

cleaning services.[2] On July 10, 1972, the My Anh Company deposited that amount of money by check with the A.I.D. cashier in Saigon.[3]

The A.I.D. office in Saigon negotiated the check and recorded the receipt of 794,000 RVN Piasters as a debt owed to the My Anh Company, payable upon satisfactory completion and termination of the contract, in A.I.D.'s account for performance bonds.[4]

The My Anh Company performed services under the contract until late April 1975. Due to the deteriorating military situation, Mrs. Anh requested a refund of the My Anh Company's security deposit by letter, dated April 27, 1975.[5] The letter was counter-signed by Mr. A. Maurice Pare, the A.I.D. Contract Office Representative, with the notation "[c]oncurrence" on the same day.

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[2]A.I.D. no longer has a copy of this contract. However, the contract number, A.I.D. 730-3512, and the name of the contractor, the My Anh Company, appear in the inventory of contracts issued by the Saigon Office, which was compiled by the A.I.D. Office of Contract Management in Washington, DC, in 1975. See also fn. 3, infra. We note that A.I.D. apparently no longer has the originals of several documents to which this decision will refer, and some of our statements are based on copies of various documents supplied by the My Anh Company.

[3]See copy of "Receipt for Payment," No. 254, dated July 10, 1972, issued by the A.I.D. cashier in Saigon. (Exhibit "A" to A.I.D.'s letter to the Comptroller General, dated March 16, 1993). Hereinafter, references to an "Exhibit" followed by a letter reference, will refer to the exhibits accompanying the foregoing letter.

[4]For procurement regulations in effect in July 1972, allowing an agency to accept a check in lieu of a surety bond, see 41 C.F.R. § 1-10.204-2 (1972). We note that, even under current procurement regulations, the government may accept checks, bank drafts, or currency from a contractor in lieu of a performance bond. See 48 C.F.R. § 28.204-2 (1992), and 48 C.F.R. § 28.203-2 (1992).

[5]See copy of letter from Mrs. Nguyen Thi Anh to A.I.D. Procurement Officer, Saigon, RVN, dated April 27, 1975, Exhibit "B".

The A.I.D. office in Saigon then commenced the ministerial actions needed to effect the return of the security deposit. An unsigned voucher, dated April 28, 1975, was prepared.[6] The cashier section of the A.I.D. office in Saigon ceased operations about noon on April 29, 1975, and the staff was evacuated that afternoon.

On October 7, 1991, Mr. Pham and Mrs. Anh asked A.I.D. to issue a refund of the My Anh Company's security deposit and to pay it to their daughter, Ms. Thu Pham.[7] Ms. Pham now resides in Columbus, Ohio; to the best of A.I.D.'s knowledge her parents still reside in the Socialist Republic of Vietnam. The claim was not received by this Office until March 31, 1993.

The request from A.I.D. states that the agency is referring the matter to our Office because, while on balance A.I.D. is inclined to accept the claimants' contention that the security deposit was not returned, the agency cannot be certain.

ANALYSIS

The threshold question is whether the claim of the My Anh Company is barred under the provisions of the Barring Act, 31 U.S.C. § 3702(b)(1) (1988), which, with exceptions not relevant here, provides that a claim against the United States government must be received by the Comptroller General within 6 years after the claim accrues.

Although the My Anh Company's claim was not received here within the 6-year period, A.I.D. notes that our Claims regulation allows a claim to be considered timely filed when filed within the 6-year period with the agency whose activities gave rise to the claim. See 4 C.F.R. 31.5(a) (1993). The agency suggests that the My Anh Company's letter of April 27, 1975, to its Saigon office can be considered as a timely filing with the agency.

The provision cited by A.I.D. was added as an amendment to the regulation, effective June 15, 1989. The regulation previously required that a claim had to be filed directly with GAO within the allowed 6-year period, and that claims filed with any agency other than GAO did not satisfy the filing requirements of the Barring Act. The preface to the 1989 amendment stated that the amendment only applied to

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[6]See copy of A.I.D. Voucher and Schedule of Payments, Schedule No. 730-75-4147, unsigned, but dated April 28, 1975, Exhibit "D".

[7]See copy of letter from Pham Mong Hoang and Nguyen Thi Anh, to A.I.D., dated October 7, 1991, Exhibit "G".

claims that were not yet barred, and that any claim that accrued before June 15, 1983, was time-barred unless it had been filed with GAO within the applicable 6-year period.[8] Since the My Anh Company's claim accrued on or about April 27, 1975, it is not timely filed under the 1989 amendment to the regulation.

Alternatively, A.I.D. asks if the Barring Act, 31 U.S.C. § 3702(b)(1) (1988), could otherwise be tolled. We are not aware of any authority for tolling the statute. See Soriano v. United States, 352 U.S. 270 (1957), where the court rejected the plaintiff's contention that hostilities with the Japanese tolled a statute of limitations. Also, in Hai Tha Truong, 64 Comp. Gen. 155 (1984), we held that the Barring Act could not be tolled for the claim of a Vietnamese refugee who had lived in the Socialist Republic of Vietnam after his claim had accrued. As stated there, the 6-year Barring Act is not a mere statute of limitations, but a condition precedent to the right to have the claim considered by our Office.

Accordingly, the My Anh Company's claim is time-barred under the provisions of 31 U.S.C. § 3702(b)(1) (1988).

for the Comptroller General
of the United States

[8] See 54 Fed. Reg. 51867-51868 (Dec. 19, 1989), and Janice B. Lopez, B-249968, Feb. 16, 1993; Captain Elias W. Covington, USA (Retired), B-244827, Sept. 9, 1992; Commander James H. Baker, USN (Retired), B-193856.4, June 19, 1992.

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Preston's Legal Support and Court Reporting Services - Reduced Rates and Liquidated Damages - Delay

File: B-254610

Date: April 20, 1994

DIGEST

An agency recommends remission of a portion of the liquidated damages it assessed against a court-reporting contractor for untimely delivery of transcripts. We concur because the agency acknowledges that one reason for the delay was that the agency awarded the contract only a few days before the first scheduled hearing.

DECISION

The National Labor Relations Board (("NLRB") has recommended that this Office remit certain amounts withheld from Preston's Legal Support and Court Reporting Services as liquidated damages. The NLRB also asks whether it may remit to Preston portions of fees withheld for late delivery of agency hearing transcripts.[1] Remission of $1,962.00 in liquidated damages is approved.

The contract called for Preston to deliver "ordinary" hearing transcripts within 10 days of the close of the hearing at a rate of $0.75 per page and "prompt" hearing transcripts within 3 days at a rate of $1.50 per page. Prompt transcripts delivered between 4 and 10 days after the hearings would be paid at the rate for ordinary transcripts. All transcripts delivered after 10 days would be assessed liquidated damages of either $10 per business day or $0.10 per page, whichever was greater each day.

Preston made late deliveries on a number of transcripts during the first two months of the contract, resulting in the withholding of $2,128.23 for reduced rates for late delivery of the "prompt" transcripts (from $1.50 to $0.75 per page) and $2,760.76 in liquidated damages.

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[1]The agency's request for a decision was joined by Ms. J. Gwen Preston, President, Preston's Legal Support and Reporting Services, the contractor in the case.

We have limited statutory authority to grant relief from some liquidated damages. Under this authority, upon the recommendation of the head of the contracting agency, the Comptroller General may remit the "whole or any part of such liquidated damages for delay" withheld by the agency "as in his discretion may be just and equitable." 41 U.S.C. § 256a (1988). This authority would extend to the liquidated damages assessed for delay in this case, but not to the reduced rate applicable for the late delivery of the "prompt" transcripts.[2]

In this case, the NLRB has recommended remission of the liquidated damages that accrued during the first 15 days of the contract ($1,962.00) on the grounds that the agency was able to provide only 1 day advance notice of the contract, rather than the normal 15-30 days notice.[3] In this regard, the record shows that, because of procurement delays, the agency notified Preston of contract award on December 31, 1992, and that the first scheduled hearing would be on the next business day, January 4.

In view of the agency's explanation and acknowledgement of some responsibility for Preston's untimely performance, we concur with the agency's recommendation and remit liquidated damages in the amount of $1,962.00.

for Comptroller General
of the United States

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[2]The NLRB states that it has no legal authority to grant relief regarding the contractually agreed reduced rate for late delivery. We agree. Absent consideration, which is not present here, agents and officers of the government may not modify existing contracts or surrender or waive contract rights that have vested in the government. Ray Phelps Company, B-160326, Jan. 30, 1967; 47 Comp. Gen. 170 (1967).

[3]The NLRB's Director of Administration consented to the recommendation on behalf of the agency.

Comptroller General
of the United States

Washington, D.C. 20548

120254

Decision

Matter of: Kevin Murphy

File: B-255791

Date: April 25, 1994

DIGEST

An employee performed international travel in excess of 14 hours through several time zones. He was authorized a return rest stop in London. He claimed an additional day as a rest stop in the London area in connection with the return flight. A rest stop authorized under section 301-7.11 of the Federal Travel Regulations is an approved enlargement of travel time, the purpose of which is to help the traveler overcome the effects of long, wearisome, and sometime arduous travel. Where flight scheduling is such that the employee has a stopover of more than 20 hours, including overnight, and has access to lodging and meals, the purpose of the authorized rest stop has been satisfied and an additional rest stop period at government expense may not be reimbursed.

DECISION

This decision is in response to a request from an authorized certifying officer, Centers for Disease Control, Public Health Service, U.S. Department of Health and Human Services,[1] concerning the entitlement of an employee to be permitted an additional rest stop period beyond the scheduled stopover period incident to international travel through several time zones where the flight duration was greater than 14 hours. We conclude that he is not entitled to an additional rest stop period, for the following reasons.

Mr. Kevin Murphy, an employee of the Centers for Disease Control and Prevention, Atlanta, Georgia, was authorized to perform temporary duty travel to Lome, Togo, and Kampala, Uganda, and return during the period June 7-26, 1993. He was authorized an outbound rest stop in Paris, France, on June 8, 1993, and a return rest stop in London on June 24, 1993.

[1]Mr. Claude F. Pickelsimer, Director, Financial Management Office.

Mr. Murphy arrived in Paris at 5:25 a.m. on June 8, 1993, and departed for Lome at 12:00 noon on June 9, 1993. The June 9 flight was the next available scheduled flight to Lome from Paris after he arrived there. Mr. Murphy's time on the ground at Paris was over 30 hours. The agency asks whether this constituted a rest stop or was it simply a stopover.

On Mr. Murphy's return flight, he left Kampala, Uganda, at 7:50 a.m. on June 24, 1993, and arrived at London Heathrow Airport at 4:55 p.m. the same day. He then traveled to a hotel near Gatwick Airport and he stayed there as a rest stop until he departed Gatwick Airport on June 26, 1993, at 11:00 a.m. Mr. Murphy's time on the ground there was about 42 hours.

According to the flight schedules, there were no appropriate connecting flights to the United States until June 25. Had Mr. Murphy remained in the Heathrow area, two flights were available to him on June 25. They were, (A) a United Airline flight which departed at 1:00 p.m., and (B) a United Airline flight which departed at 4:15 p.m. At Gatwick, he had three flights available to him on June 25. They were, (A) a Trans World Airline flight which departed at 1:00 p.m., (B) a Delta flight at 1:25 p.m., and (C) a Delta flight at 2:50 p.m. Thus, Mr. Murphy had 5 flights available to him on June 25, 1993, which would have provided him a minimum of 20 hours stopover time either at Heathrow or Gatwick during his return trip. The question asked is whether he is entitled to the additional period as a rest stop for expense reimbursement purposes.

The regulation governing per diem entitlement for travel to, from, between, or within locations outside the continental United States (CONUS), including permissible rest stops, is contained in section 301-7.11 of the Federal Travel Regulation (FTR).[2] Section 301-7.11(a) thereof provides, in part:

> "(a) When travel is direct between authorized origin and destination points which are separated by several time zones and either the origin or destination point is outside CONUS, a rest stop not in excess of 24 hours may be authorized or approved when air travel * * * exceeds 14 hours by a direct or usually traveled route."

We have held that government employees normally are required to perform official travel as expeditiously as if they were traveling on personal business, even though travel may have

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[2]41 C.F.R. 301-7.11 (1993).

to be performed on nonworkdays.[3] The purpose of authorizing a rest stop is to permit enlargement of travel time at government expense in certain instances to help the traveler overcome the effects of "jet lag" or other effects associated with long, wearisome, and sometimes arduous travel. Clearly, where international air travel through several time zones exceeding 14 hours is involved, and scheduling provides only minimal ground time for stopovers or connecting flight changeovers, it is appropriate to allow a rest stop, where possible, but the permitted additional period may not be "in excess of 24 hours." In contrast, where normal scheduling is such that the traveler must remain on the ground at an interim location for a protracted period, including overnight, and has access to lodging accommodations and meals, it is our view that the purpose for which an authorized rest stop is intended has been satisfied and an additional rest stop period at government expense is inappropriate.

In the present case, Mr. Murphy had a scheduled stopover in Paris that was over 30 hours. That period was part of normal scheduling and also satisfied the purpose of the rest stop authorized under section 301-7.11(a) of the FTR. On the return flight, Mr. Murphy arrived at Heathrow at 4:55 p.m. on June 24. Although there were no later connecting flights that day, he could have departed from either Heathrow or Gatwick airport on any one of five flights between the hours of 1:00 p.m. and 4:15 p.m. on June 25. Therefore, since he had at least 20 hours rest before the next available flight and had lodging accommodations and meals available to him during that time, he was not entitled to an additional day in London as a rest stop.

Accordingly, the agency acted properly in denying Mr. Murphy's claim for expenses for the evening of June 25 and all day June 26.

Robert P. Murphy
Acting General Counsel

[3] 46 Comp. Gen. 425 (1966).

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lederle-Praxis Biologicals

File: B-255996; B-255996.2

Date: April 25, 1994

Samuel D. Turner, Esq., Albert F. Cacozza, Esq., Elizabeth Goss, Esq., and Theresa Lauerhass, Esq., Fox, Bennett & Turner, for the protester.
Joel R. Fiedelman, Esq., James M. Weitzel, Jr., Esq., and James S. Kennell, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Connaught Laboratories, Inc., an interested party.
Michael Colvin, Department of Health & Human Services, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal failed to comply with solicitation licensing requirement which constitutes a definitive responsibility criterion is denied where the agency had sufficient evidence to reasonably conclude that the awardee had obtained the required license and to determine that this information satisfied the solicitation requirement.

2. Allegations that awardee was given an unfair competitive advantage are dismissed where the protester does not provide a sufficient legal or factual basis to conclude that the agency gave the awardee any such advantages.

DECISION

Lederle-Praxis Biologicals protests the award of a contract to Connaught Laboratories, Inc. by the Department of Health & Human Services, Centers for Disease Control and Prevention (CDC), under request for proposals (RFP) No. 93-133(N), to obtain an indefinite quantity of a pediatric vaccine. Lederle alleges that Connaught's product is noncompliant with material requirements of the solicitation and that CDC relaxed its requirements in order to make award to Connaught.

We deny the protest in part and dismiss it in part.

The RFP, issued on June 14, 1993, contemplated award of a firm, fixed-price requirements contract under which the government would issue delivery orders to obtain a combination diphtheria and tetanus toxoid with whole cell pertussis vaccine combined with hemophilus influenza type B vaccine (DTP/HiB).[1] The solicitation stated that a vaccine combination may be used instead of a single shot preparation of DTP and HiB. Section B of the RFP contained the schedule of contract line items for which fixed prices were sought for either 10-dose or 15-dose size vials for a total estimated quantity of 3,000,000 doses. No separate technical proposals were required.

With regard to contract award, section M of the solicitation, "EVALUATION FACTORS FOR AWARD," contains the following clause at issue in these protests:

> "M.1.a. The low responsible offeror must possess a current FDA [Food and Drug Administration] license for the proposed product and operate in accordance with the Current Good Manufacturing Regulations. IN ORDER TO BE CONSIDERED FOR AWARD, OFFEROR MUST SUBMIT EVIDENCE OF A CURRENT FDA LICENSE."

This language is essentially repeated in section H of the RFP, "SPECIAL CONTRACT REQUIREMENTS," which states in relevant part:

> "H.3 PRODUCT LICENSURE
>
> "The vaccines produced and delivered under this contract shall be manufactured under a current establishment and product license issued by the [FDA] as indicated below:
>
> "License Numbers: _____"

Only Lederle and Connaught submitted initial proposals by the July 30 extended closing date. Lederle's proposal offered to provide a pre-mixed vaccine marketed under the

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[1]The combination of these two separate pediatric vaccines, DTP and HiB, will provide immunization against the childhood diseases--diphtheria, tetanus, and pertussis (whooping cough) and hemophilus influenza type B (the leading cause of meningitis)--using four injections instead of the eight injections which are currently needed. Use of the combination vaccine may increase compliance with vaccination programs.

tradename TETRAMUNE[2] in a 10-dose size vial, and the protester included a copy of its FDA license for this product in its proposal. Connaught, on the other hand, submitted a proposal to provide a combination DTP/HiB vaccine in a 10-dose package consisting of one 10-dose size vial of DTP and 10 1-dose size vial of HiB vaccine which would be reconstituted prior to injection by the user, even though it had no current FDA license for this product. In its proposal, Connaught indicated that it had a product license application pending for this combined DTP/HiB vaccine. Discussions were held with both offerors; thereafter, best and final offers (BAFO) were received and evaluated. Lederle's BAFO price was $15.38 per dose while Connaught proposed a BAFO price of $9.63 per dose. On November 18, Connaught furnished information to the contracting officer to demonstrate that it had obtained the required FDA approval for its combination vaccine and the agency subsequently made award to that firm as the responsible offeror submitting the low-priced offer.

Lederle protests that the award to Connaught was improper on the grounds that Connaught did not possess a current FDA license for a combined DTP/HiB vaccine and was not operating in accordance with the current FDA manufacturing regulations as of the July 30 date for submission of initial proposals. According to the protester, the language in section M.1.a quoted above, unequivocally made compliance with the FDA license requirement a prerequisite to submitting an initial proposal.

We find no merit to this argument. Solicitation requirements, such as the licensing provision quoted above, which require a successful contractor to have a specific license, are definitive responsibility criteria. Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement to measure an offeror's ability to perform the contract; failure to meet a definitive responsibility criterion renders a firm nonresponsible and ineligible for contract award. Federal Acquisition Regulation (FAR) § 9.104-2; Stocker & Yale, Inc., B-238251, May 16, 1990, 90-1 CPD ¶ 475. Contrary to the protester's position, there is no language in section M which required that the license be furnished with the initial offer. Rather, the provision is silent as to the precise time when the license is required. It states only that the license is required for a firm "to be considered for award." While the provision states that the low responsible offeror must have a license, the

[2]On March 30, 1993, the FDA issued a license for TETRAMUNE, a combination DTP/HiB vaccine manufactured by Lederle. This is the first DTP/HiB vaccine to be licensed by the FDA.

responsibility of an offeror is determined after submission of offers and prior to award. Thus, we conclude that the license requirement is a precondition to an affirmative determination of responsibility and the receipt of an award, and that Lederle's interpretation of that provision (i.e., that a prospective offeror had to have an FDA license prior to submission of its proposal) is simply incorrect.

Moreover, since at the time the solicitation was issued, Lederle was the only firm that had an existing FDA license for a combination vaccine, the protester's argument is no more than a request by Lederle to read the solicitation more, not less, restrictively, and thereby minimize competition. We will not read solicitation provisions in a manner which restricts competition unless it is clear from the solicitation that such a restrictive interpretation was intended. See Impact Instrumentation, Inc., B-250968.2, Mar. 17, 1993, 93-1 CPD ¶ 241.

Regarding Connaught's compliance with the licensing requirement, the record shows that the agency properly concluded that the firm met the requirement prior to receiving the award. As stated previously, in a letter dated November 18, the FDA granted Connaught's request to amend its existing DTP and HiB licenses to allow the firm to combine these two vaccines.[3] Since the November 18 letter from the FDA evidenced compliance with the RFP's licensing requirement and nothing on the face of the information calls its verity into question, see generally Apex Envtl., Inc., B-241750, Feb. 25, 1991, 91-1 CPD ¶ 209, the contracting officer determined that Connaught was capable of successful performance and made award to that firm on November 30, 1993. Under these circumstances, we think the agency reasonably determined that Connaught furnished adequate evidence of compliance with the licensing requirement. Our Office has no basis to question this determination or the subsequent award to that firm. See Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48; T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235.

Lederle also argues that Connaught's product is not "DTP combined with the HiB vaccine," but, rather, is merely two distinct vaccines which may or may not be combined prior to use; it thus fails to meet the solicitation requirement for

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[3]As previously stated, the Connaught vaccine is packaged as a 10-dose pack consisting of a 10-dose vial of DTP and 10 single dose vials of HiB vaccine. Prior to injection by the user, the DTP would be withdrawn in 0.5 ml amounts and injected into a single dose vial of HiB to combine the two vaccines; the vaccine is then ready for delivery to the patient by a single injection.

a combination DTP/HiB vaccine. In negotiated procurements, any proposal which fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for award. See National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500 (1990), 90-1 CPD ¶ 530.

The record does not support Lederle's allegation that Connaught submitted a noncompliant offer since there is no question that Connaught's product is a combination DTP/HiB vaccine. The record shows that Connaught's vaccine contains the required FDA-approved DTP/HiB products, deliverable by a single injection, and is expected to provide protection against DTP and HiB diseases equivalent to that of previously licensed formulations of DTP/HiB vaccines. While the steps needed to administer the Connaught vaccine (which is to be combined before use), differ from those required to administer the Lederle vaccine (which is a pre-mixed vaccine packaged in the form of a single shot preparation), either approach results in a single injection of a combined DTP/HiB vaccine. Furthermore, the RFP specifically advised offerors that either a vaccine combination or a single shot preparation of DTP and HiB would meet the agency's needs; thus, the protester's assertion that Connaught's proposed vaccine combination was noncompliant with the solicitation is without merit.[4]

Lederle next asserts that CDC improperly relaxed the RFP's dosage requirements for Connaught, since Connaught was not required to provide the vaccine in 10-dose or 15-dose size vials. This argument also is without merit. The record shows that as approved by the FDA, the DTP offered by Connaught in a 10-dose size vial would be used to reconstitute and combine the single dose size vials of HiB vaccine (a freeze-dried preparation). Thus, as reconstituted, a single dose of the DTP/HiB vaccine offered by Connaught is equivalent to a single dose of the Lederle

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[4]Lederle also contends that the necessity for mixing the two separate products increases the likelihood of confusion, mistake, or waste in public health clinics thereby increasing the costs associated with reconstituting Connaught's products. Since the RFP allowed for a vaccine combination or a single shot, these allegations should have been raised prior to the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1993). In any event, the agency does not believe that these concerns have any basis in fact. According to the agency, this type of vaccine preparation is a routine office procedure and, given the cost savings, is worth any additional time needed to prepare the vaccine.

vaccine and the fact that Connaught's product is sold and priced in a 10-dose package rather than a single 10-dose size vial is immaterial. In any case, where no competitive prejudice is shown or is otherwise evident, our Office will not sustain a protest, even if a deficiency in the procurement is evident. See Latins American, Inc., 71 Comp. Gen. 436 (1992), 92-1 CPD ¶ 519; Anamet Labs., Inc., B-241002, Jan. 14, 1991, 91-1 CPD ¶ 31. While the RFP schedule sought fixed prices for 10-dose and 15-dose size vials, we find no evidence that Lederle was prejudiced by Connaught's use of a 10-dose package versus a 10-dose size vial. See Connaught Labs., Inc., B-235793, Oct. 11, 1989, 89-2 CPD ¶ 337.

The protester also contends that the CDC deviated from its longstanding practice of purchasing only those vaccines recommended by CDC's Advisory Committee on Immunization Practices (ACIP) by awarding the contract to Connaught, whose product lacks ACIP recommendation. As we understand ACIP's role in the vaccine procurement process, ACIP identifies those diseases against which children should be inoculated and makes recommendations as to vaccine types that may be used in the national immunization program. However, in doing so, ACIP does not recommend or mandate the purchase of particular brands of vaccines. In any event, as the protester itself acknowledges and our review of the solicitation confirms, the RFP did not require ACIP recommendation or approval as a precondition for consideration and award. To the extent Lederle complains that it was somehow misled by CDC action into believing that an ACIP recommendation was required even though the RFP did not contain any such requirement, Lederle has not shown how such action could have prejudiced the firm; again, prejudice is an essential element of every viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

The additional issues raised by the protester concern allegations that Connaught was given an unfair competitive advantage. In particular, Lederle alleges that CDC did not inform it that Connaught was competing for the award. Had Lederle known that Connaught had submitted a proposal, the protester asserts, it would have used a different pricing strategy in preparing its proposal. Lederle has cited no law or regulation, and we know of none, to support its position that CDC had a duty to disclose the number of proposals received in response to an RFP during negotiations. To the contrary, the FAR sets forth specific instructions on safeguarding information contained in proposals before a contract award is made. FAR §§ 15.411(b), 15.413-1; W.R. Moore, Brokerage, B-245729.4, July 27, 1992, 92-2 CPD ¶ 53.

Finally, our review shows that Lederle's claim that the agency improperly engaged in post-BAFO discussions with Connaught regarding evidence of an FDA license for its product, to its prejudice, have no basis in fact.

The protest is denied in part and dismissed in part.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

335124

Decision

Matter of: Atlas Powder International, Ltd.--Entitlement to Costs

File: B-254408.5

Date: April 26, 1994

David P. Salley, Esq., Sessions & Fishman, for the protester.
Albert J. Joyce, Esq., Panama Canal Commission, for the agency.
Aldo A. Benejam, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester which challenged terms of solicitation for explosive cartridges as defective and unduly restrictive of competition is not entitled to award of the costs of filing and pursuing its protests even though agency did not take corrective action for nearly 2 months after protests were filed where, during a telephone conference between the parties, protester's numerous allegations were focused, complex technical issues were clarified, and protester's specific concerns regarding solicitation were explained, and agency promptly took corrective action within only 8 working days following that conference.

DECISION

Atlas Powder International, Ltd. requests that our Office declare the firm entitled, pursuant to 4 C.F.R. § 21.6(e) (1993), to recover the reasonable costs of filing and pursuing three protests concerning request for proposals (RFP) No. CNI-648750-03, issued by the Panama Canal Commission for detonating fuses and explosive cartridges to be used for submarine blasting during channel dredging operations in the Panama Canal.

We deny the request.

The agency issued the RFP on July 16, 1993, requesting proposals for the explosives by August 31. On August 5, Atlas filed a protest in our Office (B-254408) generally challenging various terms of the RFP as defective and unduly restrictive of competition. Atlas supplemented its protest on August 24 and 26 (B-254408.2 and B-254408.3), raising

numerous additional challenges to the terms of the RFP. The agency filed a consolidated report responding to all of the issues Atlas raised in its protests. Although in its comments on the agency's report Atlas expressly conceded several issues, the firm maintained its position that notwithstanding the agency's explanations, certain RFP provisions remained unduly restrictive of competition, ambiguous, or otherwise unreasonable or impossible to meet.

On October 12, a telephone conference was held with the parties to focus the protest allegations and to clarify several complex technical issues raised by Atlas. During the telephone conference the parties discussed at length the bases for the protester's allegations, including, for example, that the RFP did not explicitly include "emulsions" (a type of explosive) as an acceptable product; that the cartridge specifications were ambiguous or incongruent; and that the RFP's requirement that offerors certify to certain physical properties of the cartridges was unreasonable or impossible to meet. On October 22, within 8 working days of that telephone conference, the agency amended the RFP specifically revising or deleting the challenged provisions. Atlas withdrew its protests on November 1.

Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e); Metters Indus., Inc.--Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. We will find a protester entitled to costs only where an agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to a protest. Id.

Here, a telephone conference was required to focus the protest issues remaining after Atlas filed its comments on the agency report, and to afford the protester an opportunity to explain in detail its specific concerns regarding each of the challenged RFP provisions. Given the sheer number of allegations Atlas raised in its three protests, and the technical complexities underlying the protest issues, we do not believe that the agency's corrective action, which it took within only 8 working days after the telephone conference, constitutes undue delay. See KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443 (protester not entitled to award of protest costs even though agency did not take corrective action for nearly 2 months after protest was filed). Since under the circumstances here the agency took prompt corrective action, there is no basis for determining

that the payment of protest costs is warranted. See Dynair Elecs., Inc.--Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260.

The request for a declaration of entitlement to costs is denied.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

100535

Decision

Matter of: E. W. Bliss Company

File: B-255648.3

Date: April 26, 1994

Richard A. Degen, Esq., for the protester.
Irwin Ansher, Esq., and Barry E. Kearns, Department of the Treasury, for the agency.
Behn Miller, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that contract is void because solicitation's delivery order issuance period expired prior to contract award is denied where the contention is incorrect--i.e., the ordering period does not expire until approximately 1 year after the actual award date.

2. Protest that agency improperly made a partial award is denied where solicitation incorporated Federal Acquisition Regulation § 52.215-16 which expressly advises offerors that the agency may award a contract for any item or group of items set forth in the solicitation unless the awardee has qualified the acceptance terms of its offer, which is not the case here.

3. In procurement for retrofit of coin press machines, where awardee's proposal obligated it to replace existing crankshafts if required, agency reasonably interpreted proposal as complying with solicitation provision directing offerors to "address" need for new crankshafts.

DECISION

E. W. Bliss Company protests the award of a contract to Pressmasters of Delaware Valley, Inc. under request for proposals (RFP) No. USM 93-14, issued by the United States Mint, Department of the Treasury, to retrofit various coin pressing machines. Bliss contends that the award is void since the underlying order period expired before the agency completed the procurement, and because the agency awarded only part of an option year quantity. Bliss also contends that the agency improperly waived a part specification for the awardee.

We deny the protest.

On July 28, 1993, the Mint issued the solicitation as a total small business set-aside to 15 offerors. The purpose of this procurement was to determine the feasibility of refurbishing and remanufacturing the Mint's coin presses at a reasonable price.

On August 6, the agency conducted a pre-proposal conference which Bliss and several other offerors attended; on August 17, the agency issued amendment No. 0001 which responded to questions raised at the conference. Of relevance to this protest, the amendment provided that offerors "should address a new crankshaft" for each of the coin presses requiring repair. On August 24, in response to a contractor's inquiry, the agency issued a second amendment which listed two sources in the Denver area who were capable of transporting the coin presses.

Under the RFP, offerors were to submit both price and technical proposals. For their price proposals, offerors were to complete six pricing schedules requiring fixed-price estimates for nine equipment and related repair service contract line item numbers (CLIN). The first two pricing schedules required estimates for retrofit operations performed during a base 1-month period ending September 30, 1993; the second two pricing schedules required estimates for the same repairs during a 1-year period ending September 30, 1994 (option No. 1); and the remaining two pricing schedules required estimates for a 1-year period ending September 30, 1995 (option No. 2). In addition to the required repairs, offerors were invited to propose any additional equipment items or services which might improve the operation of the coin presses, or otherwise benefit the coin production process.

The solicitation provided that contract award would be made to the most advantageous offer, price and other factors considered. The RFP also incorporated Federal Acquisition Regulation (FAR) § 52.215-16, which states that the government may award a contract on the basis of initial proposals.

By the August 30 closing date, four proposals were received and forwarded to a technical evaluation panel (TEP) for review. On September 8, the agency issued amendment No. 0003 to all four offerors, extending the government's time period for issuing delivery orders under this solicitation from September 30, 1993, until September 30, 1994; each offeror signed and returned this amendment to the agency by September 14, 1993.

Shortly thereafter, the TEP completed its proposal evaluation and awarded both the Bliss and Pressmasters technical proposals an "Excellent" rating; however, Pressmasters received a slightly higher numerical score (81 points) than Bliss (78 points). The remaining two offers received an "Average" rating. On October 28, the contracting officer awarded a contract for six of the option No. 1 CLINs to Pressmasters because its proposal had a higher numerical score and was lower priced than the proposal submitted by Bliss. No discussions were conducted with any offeror. On November 4 and December 15, Bliss filed these protests with our Office.[1]

PROTESTER'S CONTENTIONS

Bliss first contends that the contract award to Pressmasters is void because the solicitation's delivery order period has expired. According to Bliss, the solicitation expressly provided that all delivery orders had to be issued to the awardee by September 30, 1993. Since no contract award was made until October 28, 1993--1 month after the alleged expiration of the solicitation's specified delivery order period--Bliss contends that the contract award is void. Bliss also argues that the award to Pressmasters is improper since the agency made an award for only 6 of the solicitation's 54 CLINs. Finally, based on information set forth in the agency report, Bliss contends that the agency waived a material specification for the awardee--i.e., the requirement that all offerors include a new crankshaft for the coin presses as part of the required retrofit procedures.

DISCUSSION

Expiration of Delivery Order Period

Notwithstanding Bliss's contention, the delivery order period has not expired. Rather, amendment No. 0003 extended the period for issuing delivery orders until September 30, 1994. In its arguments to the contrary, Bliss ignores the clear language of amendment No. 0003, which it signed and returned to the agency on September 14, 1993.

Propriety of Partial Award

Bliss next objects to the agency's decision to award only 6 of the RFP's 54 CLINs; as noted above, the 6 CLINs which Pressmasters was awarded were designated as Option No. 1

[1]On March 21, we consolidated these protests for resolution under B-255648.3.

CLINs in the solicitation and correspond to separate coin press repairs required at the Philadelphia and Denver Mint. Bliss contends that this partial option quantity award violates the terms and conditions of the RFP. We disagree.

The agency reports that it awarded only the first option quantity because by the time of contract award--October 28, 1993--the solicitation's specified base period had expired. The agency also explains that it awarded only six of the CLINs--procuring retrofit operations for two coin presses at the Philadelphia Mint site and two coin presses at the Denver Mint site--because it concluded that this number would provide an adequate basis from which to assess the feasibility of proceeding with future retrofitting procurements. The record also shows that funding concerns and time constraints further limited the agency's award quantity. The agency states that if it does not decide on a procurement strategy in the near future, it may lose the funds which were appropriated to address the problem with the aging coin presses.

As noted above, the solicitation incorporated FAR § 52.215-16 which provides that the government will award a contract to the "most advantageous" offer, and which further provides, in relevant part:

> "The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations . . . The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the offer." [Emphasis in original.] FAR § 52.215-16(d).

Although Bliss argues that it would have offered lower prices had it realized that limited quantity awards were contemplated, we think that in light of the incorporation of FAR § 52.215-16, the Pressmasters award is unobjectionable.[2] The FAR provision expressly advises offerors that the government may make award for lesser quantity amounts, and warns that "each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." Under these circumstances, offerors

[2]We note that Pressmasters did not qualify its proposal as an "all or none" offer.

are on notice to submit their best unit prices. See Essex Electro Eng'rs, Inc., B-238207; B-238207.2, May 1, 1990, 90-1 CPD ¶ 438. If Bliss failed to heed these warnings, it cannot now complain that it was prejudiced as a result.[3] Id.; Duracell, Inc.; Altus Corp., B-229538 et al., Feb. 12, 1988, 88-1 CPD ¶ 145. In this regard, Bliss has not explained--nor does the record suggest--why its pricing would have been any different had the firm been aware that no base month period CLIN would be awarded.

Awardee's Compliance with Crankshaft Specification

Bliss contends that the agency improperly waived the requirement, intended by amendment No. 0001, that offerors provide a new crankshaft as part of the retrofit effort here. As evidence of this waiver, Bliss points to Pressmasters' pricing proposal which sets forth the following statement at the bottom of each pricing schedule:

> "OPTIONAL: NEW CRANKSHAFT & CLUTCH BRAKE[:] $17,400"

Since the record shows that the award price does not include the above-referenced $17,400 option, and since the agency reports that this optional item is not part of the award, Bliss contends that Pressmasters did not propose a new crankshaft for each retrofit operation, as required by the RFP.

As a preliminary matter, we note that our review of the record reveals that notwithstanding the agency's apparent intent to require a new crankshaft for each coin press retrofit, in fact the specification requiring this item is ambiguously worded. In this regard, where a solicitation requirement is susceptible to two or more reasonable interpretations in the context of reading the solicitation as a whole, we consider the requirement to be ambiguous. See Pulse Elecs., Inc., B-243769, Aug. 2, 1991, 91-2 CPD ¶ 122.

Here, the specific language of amendment No. 0001 which purported to incorporate the new crankshaft requirement provided:

> "Q. How will we be able to determine if the crank shaft is good without disassembling the presses . . .?

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[3]We note that even if the agency had proceeded to award a contract for all 54 CLINs, Pressmasters would still have been the lowest-priced offeror by approximately 39 percent.

> "A. The proposal should address a new crankshaft to insure consistencies between the new remanufactured presses. All old components removed from the presses shall be returned to the Mint for use as spare parts."

Although the protester interpreted this amendment consistent with the agency's intent--that offerors provide a new crankshaft as part of each coin press retrofit--it is clear from the record that the awardee interpreted this amendment to require a new crankshaft only in the event that the existing crankshaft could not be refurbished. Thus, in the section of its proposal addressing this requirement, Pressmasters indicated that it would "[e]valuate all parts for remanufacture or replacement." Given the imprecise wording of the question and answer set out above, we think that Pressmasters' proposal reasonably could be interpreted to comply with the direction in amendment No. 0001 to "address" a new crankshaft.

The protester argues that as a result of the awardee's interpretation of the amendment, Pressmasters' offer was noncompliant with the requirement for a new crankshaft. The protester asserts that Pressmasters' separately priced crankshaft/brake/clutch assembly was offered in lieu of a new crankshaft for the routine refurbishing effort, and consequently, Pressmasters' base offer does not include a new crankshaft. The agency responds that notwithstanding the awardee's interpretation of amendment No. 0001, offering a new OEM crankshaft was nevertheless implicit in Pressmasters' base proposal, in addition to its separate offer of a crankshaft/brake/clutch assembly. We agree.

It is clear from the record that the $17,400 option referenced in Pressmasters' proposal was not intended by the awardee to constitute the only means of acquiring a new crankshaft. Rather, the $17,400 option was proposed in direct response to paragraph C.4.3 of the solicitation, which "encouraged" offerors "to provide recommendations that may improve equipment performance and/or schedule." In accordance with this provision, Pressmasters proposed an alternative clutch/brake/assembly designed by the firm to improve the speed of the coin press machines. Page 10 of Pressmasters' proposal explains that because its suggested clutch/brake assembly requires a different crankshaft than the crankshaft which might be required for a standard coin press retrofit, the awardee proposed an alternative crankshaft/brake/clutch assembly as a separate purchase option at the bottom of each of its pricing schedules. Thus, this option was proposed for the agency's consideration completely separate and distinct from the new OEM crankshaft part contemplated by the agency for the base retrofit operations.

We turn now to the question of whether Pressmasters' base proposal otherwise properly offered the new crankshaft sought by the agency. We conclude that it did.

At the outset, we note that Pressmasters properly acknowledged receipt of amendment No. 0001 on the cover of its proposal, thereby demonstrating its intent to perform in accord with the terms of the solicitation as amended. While Pressmasters' interpretation of amendment No. 0001 apparently led it to conclude that a new crankshaft would not be required if the current crankshaft was in good condition or otherwise capable of being successfully refurbished, the fact remains that Pressmasters' proposal took into consideration the possibility that a new crankshaft would be required for every coin press where the current crankshaft was irreparable. Thus, although Pressmasters did not use the term "new crankshaft" in its offer, it nevertheless obligated itself to provide a new crankshaft whenever the circumstances of the retrofit operations so required--either because the current coin press crankshaft had so deteriorated or to "insure consistencies" with the other coin presses, as referenced in amendment No. 0001.

Since the crankshaft is an integral component of each coin press, and since the awardee acknowledged amendment No. 0001 in its proposal, we think the agency reasonably concluded that Pressmasters' offer included a new crankshaft item for each coin press retrofit operation where appropriate. In fact, the agency reports that Pressmasters has already performed the coin press machine repairs, and has--consistent with its promise to replace irreparable parts--provided a new crankshaft as part of each coin press retrofit, for the base price submitted in its offer.[4]

Since Pressmasters was bound by its promise to replace irreparable parts such as the crankshaft with new items as part of its base price; four new crankshafts were required and provided; and Bliss has failed to allege--and the record does not otherwise suggest--that it would have reduced its price based on Pressmasters' interpretation of

[4]Because of urgent and compelling circumstances, the agency proceeded with contract performance in the face of this protest.

the solicitation's crankshaft requirement, we find the Pressmasters award to be unobjectionable.

The protest is denied.

Robert P. Murphy
Acting General Counsel

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MVM, Inc.; Burns International Security Services

File: B-255483.4; B-255483.5; B-256428.2; B-256430.2; B-256431.2; B-256433.2; B-256434.2

Date: April 26, 1994

Barbara S. Kinosky, Esq., Kinosky & Associates, for MVM, Inc.; Ronald K. Henry, Esq., and Daniel J. Culhane, Esq., Kaye, Scholer, Fierman, Hays & Handler, for Burns International Security Services, the protesters.
Robert A. Boonin, Esq., Eugene H. Boyle, Jr., Esq., and Butzel Long, for General Security Services Corporation, an interested party.
Joan M. Gibson, Esq., Department of Justice, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Using the protester's proposed unit prices and consistent with the solicitation, an agency properly calculated the protester's evaluated price as $45 million, rather than $38.7 million indicated in the protester's proposal, on a firm, fixed-price, indefinite quantity contract for security services where the protester's proposed total price did not include various items of work.

2. The Cost Accounting Standards do not require an offeror's proposed, fixed prices to encompass all estimated performance costs.

3. A solicitation provision requiring the offeror to submit evidence that it has the necessary business licenses for contract performance may be satisfied at any time prior to award.

4. Under a solicitation for security guard services, an agency properly determined that the awardee's proposal reflected an ability to limit employee turnover where the proposed wages and fringe benefits as described in the technical proposal reasonably demonstrated this ability.

5. The General Accounting Office denies reconsideration of prior protest dismissals, which were dismissed as untimely

since they were based on information that was not diligently pursued, where the requesting party merely expresses disagreement with the dismissals and provides evidence to support its protests' timeliness that was available during the initial consideration of the protests, but which was not presented at that time.

DECISION

MVM, Inc. and Burns International Security Services protest the award of a contract to General Security Services Corporation (GSSC) under request for proposals (RFP) No. MS-93-R-0032, issued by the Department of Justice, United States Marshals Service, for court security services in the 11th Judicial Circuit. MVM also requests reconsideration of our dismissal of its protests of five other contract awards to GSSC for court security services in other judicial circuits.

We deny the protests and requests for reconsideration.

The RFP, issued on March 8, 1993, required the contractor to provide a cadre of qualified court security officers for the 11th Judicial Circuit, which comprises nine judicial districts in Alabama, Georgia, and Florida. The mission of this security force is to deter and subdue any illegal or potentially life-threatening activities directed towards judges, jurors, witnesses, defendants, and other court personnel. In addition to the security officers themselves, the contractor was to provide all managerial and supervisory personnel, and any transportation, supplies, and equipment necessary to perform the court security services. The RFP contemplated the award of a firm, fixed-price, indefinite quantity contract for a base year with four 1-year options.

The RFP divided its requirements into six service categories. Category 1 security services were to be performed between the hours of 6:00 a.m. and 6:00 p.m. Category 2 security services were to be performed between the hours of 6:00 p.m. and 6:00 a.m., Sunday through Saturday, except federal holidays. Category 3 security services were to be performed on any of the 10 recognized federal holidays. Category 4 services were for training and qualifying new security officers, including orientation courses, background investigations, weapons qualification, medical examinations, and uniforms. Category 5 services were associated with incumbent security officers, including their annual medical examinations, weapons qualification, and uniforms. Category 6 security services consisted of overtime work. Unlike the "hourly" security services (Categories 1, 2, 3, and 6), the "employee start-up" services (Categories 4 and 5) were chargeable to the government only under certain circumstances--for example,

the government accepted responsibility for Category 4 services where the security officer to be replaced had been employed for at least 18 months in the same circuit, or had developed an illness which precluded his continuing employment, or had died; otherwise, the contractor was liable. The RFP advised offerors of the number of security officer positions and labor hour estimates required at each judicial facility, although the agency under the contract reserved the right to increase or decrease the positions/hours.

The RFP requested offerors to propose base year and option year fixed unit prices for each of the six service categories, relative to a specific 11th Circuit judicial facility. Categories 1, 2, 3, and 6 called for a price per hour, and Categories 4 and 5 called for a price per employee. The RFP requested offerors to support their hourly prices with cost breakdown information by location, e.g., direct labor rates, indirect rates, fringe benefit costs, and profit.[1] Offerors were asked to calculate their total prices for Categories 1, 2, 3, and 6, for each facility, while the agency assumed responsibility for calculating the total Category 4 and 5 prices.

The RFP provided for award to that offeror whose proposal represented the "best value" to the government. Price was worth 40 percent and technical factors were worth 60 percent of the offeror's total score. The RFP further provided that between substantially equal proposals, the agency would make award to the lower-priced offeror and that between acceptable proposals with a significant difference in technical merit, the agency would perform a cost/technical tradeoff to determine whether the technically superior proposal was worth the associated price premium.

The RFP set forth three technical evaluation factors in descending order of importance: (i) company management, (ii) past related experience, and (iii) qualifications of key personnel. Each technical factor included a set of detailed subfactors, for which specific information was requested from the offerors. As relevant to this protest, one of the six company management subfactors required the offeror to explain "[t]he method by which [it] intends to limit turnover in the [security officer] and supervisory workforce" and to characterize its success in limiting

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[1]The RFP incorporated provisions implementing the Service Contract Act, 41 U.S.C. §§ 351 et seq. (1988), which requires the contractor to pay its covered employees minimum wages and fringe benefits, as determined by the Department of Labor.

turnover in past contracts.[2] The RFP also requested the offeror's compensation and benefits plan, by locale, for all contract employees, which would be used to evaluate the offeror's ability to retain any proposed incumbent security officers and to attract a sufficient number of new security officers to replace expected turnover during contract performance.

The total evaluated price for each offeror was calculated by the agency as the sum of the evaluated prices for each category at each facility, which were determined by multiplying the applicable unit price by the estimated hours or employees in accordance with designated formulas for each category to reflect the anticipated contract requirements.

In its Source Selection Plan, the agency provided for a 40-point price evaluation, whereby the low-priced proposal would receive the maximum 40 points and the remaining proposals would earn a relative percentage of 40 points depending upon their price. The technical evaluation was worth 60 points, representing 25 points for company management, 20 points for past experience, and 15 points for key personnel.

The Marshals Service received 15 proposals by the April 19 receipt date, including the proposals of GSSC, Burns, and MVM. These proposals were evaluated by a technical evaluation board (TEB). Based upon the initial technical and price evaluations, GSSC received the highest overall proposal score of 97.37 points--39.12 price points plus 58.25 technical points for its "excellent" technical proposal. Although the agency did not consider MVM's proposal to be technically excellent, MVM did receive 53.5 technical points, plus 35.23 price points, for the third highest proposal score, 88.73 points. Burns received the seventh highest proposal score of 81.95 points--43.75 technical points plus 38.2 price points. The agency considered each of these proposals technically acceptable and included them in the competitive range, along with seven other proposals.

Technical and price discussions commenced on June 22, 1993. Technical discussions centered on those areas of the offerors' proposals that required amplification or clarification. The agency received best and final offers (BAFO) from all offerors by August 2.

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[2]A past experience subfactor also requested the offeror to identify its annual turnover rate for each contract listed as a reference in its proposal.

The agency performed a price analysis, as contemplated by the RFP,[3] and calculated the offerors' BAFO prices, utilizing their offered unit prices for each category. GSSC was the low-priced offeror at approximately $41.7 million, earning the maximum 40 price points; Burns was the third low-priced offeror at approximately $42.6 million, earning 39.12 price points; and MVM was the ninth low-priced offeror at approximately $45.1 million, earning 37 price points.

Not only was GSSC the low-priced offeror, it also earned the highest technical score, a near perfect 58.5 technical points out of 60. GSSC improved its technical score slightly during discussions based upon its elaboration of its company management proposal. In comparison, the agency maintained the technical scores of MVM (53.5 points) and Burns (43.75 points), whose discussion responses were not found to materially enhance their proposals' technical merit. MVM's technical score was the third highest and Burns's technical score was the seventh highest. Overall, GSSC ranked first with 98.5 points, MVM ranked third with 90.5 points, and Burns ranked seventh with 82.87 points.

The agency recommended GSSC's low-priced, technically superior proposal for award. In support of its selection decision, the agency recounted some of the awardee's numerous, documented technical strengths and observed that "GSSC displayed a thorough knowledge of all requirements as listed in the solicitation and provided the [agency] with an excellent technical proposal." The agency also emphasized that the awardee, which was currently performing guard services in 43 judicial districts, "has a proven track record for covering stations and safeguarding the interest of the [agency]," which would allow the agency "to continue receiving the benefits of superior service and outstanding performance" in this judicial circuit.

In finding GSSC's proposed price to be fair and reasonable, the Marshals Service noted that GSSC's labor rates were commensurate with the current labor rates in each judicial district, such that "[o]verall wages proposed should ensure retention of the majority of [security officers] for the beginning of the new fiscal year." In addition, the agency complimented GSSC's pricing strategy, which anticipated a degree of employee turnover over the life of the contract and factored in the lower wages to be earned by new

[3]For example, the agency ensured that the offerors were not proposing to pay guards at rates less than required by the Service Contract Act wage determinations.

personnel in the option years.[4] Although viewed as economical, this pricing strategy was not expected to compromise the effectiveness of GSSC's work force, since the wages proposed in each judicial district were reasonable and since the awardee possessed "extensive resources cited in [its] technical proposal for recruiting quality individuals." Finally, because GSSC's price was based upon adequate price competition, the agency did not require GSSC to submit certified cost or pricing data. See Federal Acquisition Regulation (FAR) § 15.804-3(a).

Shortly after the selection decision was made, the contracting officer initiated a review of GSSC's responsibility in accordance with the RFP, which required, among other things, evidence of current business licenses necessary for contract performance. In response to the contracting officer's request, GSSC submitted current business licenses for each state in the 11th Circuit, and otherwise satisfied the remaining responsibility criteria. Upon finding GSSC responsible, the agency made award to that firm and notified unsuccessful offerors on September 28. These protests followed.

In their initial protests, both protesters claim that the Marshals Service improperly calculated their BAFO prices and speculate that their prices may have been lower than the awardee's.[5] In making their arguments, neither protester has computed its overall price, notwithstanding that MVM's and Burns's counsel were admitted to a protective order issued by our Office and received all relevant evaluation documentation to permit such a price calculation. In any event, we have independently calculated MVM's, Burns's and GSSC's prices, and find that the agency's price evaluation was generally proper. In this regard, while the figures we

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[4]GSSC's option year prices increased at a lower rate than either MVM's or Burns's; in two judicial districts, GSSC's option year prices declined slightly from the base price.

[5]The protesters have alleged that the agency made cost realism adjustments to their proposed prices, which should have been the subject of discussions and which were improperly done. The record, in particular the TEB's spread sheets, shows that the agency did not adjust offerors' prices for cost realism--which would have been improper in the context of a firm, fixed-price contract. See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366. Rather, the record shows that the Marshals Service used each offeror's proposed base and option year unit prices with the hourly/person estimates stated in the RFP to calculate the total evaluated price for that offeror.

calculate are not identical to the agency's in all cases, they do reflect that MVM's BAFO price was approximately $3.3 million higher than the awardee's, and that Burns's BAFO price was approximately $900,000 higher, as found by the agency.

In its protest, MVM initially argued that its proposed BAFO price was $38.7 million dollars, which is the figure that appears on the Standard Form (SF) 1411 included in its BAFO. The agency responded that the SF 1411 price only represented MVM's Category 1 prices, not the prices for the remaining five categories specified in the RFP. MVM then conceded that the price on its SF 1411 did not represent all categories, but that it included both Categories 1 and 2. However, not only has MVM presented no evidence to support this contention, but our calculation confirms that MVM's SF 1411 price apparently is only for Category 1 services,[6] and that MVM's prices for the remaining categories generally account for the difference between the total price stated on its SF 1411 and the total price calculated by the agency.

Burns's objection to the price evaluation focuses on a computational error admitted by the agency in its protest report, with respect to the calculation of offerors' Category 4 prices. During the price evaluation, the agency computed each offeror's Category 4 price by multiplying its proposed rates by the number of positions at a particular judicial facility. In its agency report, the agency states that this formula should also have included a 15 percent multiplier, which represents the Marshals Service's estimated liability for Category 4 "start-up" services.[7] The agency discovered this error after award, but recalculated offerors' prices based upon the correct category 4 estimating model, multiplying each offeror's unit price by the number of personnel positions at that site by 15 percent. The agency states that, while this recalculation slightly altered the price differences among the offerors, it had no effect on the overall ranking.

Our computation confirms the agency's position. Since GSSC's category 4 unit prices were consistently much lower than Burns' (or MVM's), the use of the 15 percent multiplier slightly diminishes GSSC's overall price advantage.

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[6]The figure that we calculated for Category 1, based upon MVM's unit prices and the estimates stated in the RFP, matches almost precisely the total figure that appears on MVM's SF 1411.

[7]As noted above, the RFP limits the government's liability for Category 4 "start-up" services to particular circumstances.

Nonetheless, even with the recalculation of Category 4, GSSC's overall price remains below Burns's by more than $500,000 and below MVM's by $3.1 million. Thus, we agree with the Marshals Service that the Category 4 calculation does not affect GSSC's status as the low-priced offeror.

MVM and Burns argue that GSSC's proposal did not comply with the Cost Accounting Standards (CAS), FAR Part 30.[8] Allegedly, GSSC's fixed prices for each judicial district do not reflect the costs to be incurred in that district and therefore are not consistent with the CAS.

Contrary to the protesters' arguments, the CAS does not require an offeror's proposed, fixed prices to encompass estimated performance costs. See, e.g., Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202 (below-cost price caps on a negotiated, CAS-covered contract are not objectionable). The CAS requirements are designed to ensure that a CAS-covered contractor consistently follows its cost accounting practices in accumulating and reporting any cost data, see FAR § 52.230-2, not that the contractor base its pricing on a particular allocation of costs. Thus, we see no merit to this argument.

Both protesters argue that the agency should have rejected GSSC's proposal because it failed to include current business licenses necessary for contract performance. Section M of the RFP required offerors to submit the applicable business licenses with their proposals, but stated that the offeror's ability to obtain current business licenses would be evaluated as a matter of contractor responsibility prior to award.[9] A requirement that relates to the responsibility of the offeror, as does the licensing requirement in this case, may be satisfied at any time prior to award. Northcoast Redwood Tours, B-231770, July 6, 1988, 88-2 CPD ¶ 14. This is so, even if the solicitation calls for the submission of the licenses with the offeror's proposal. SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128. Thus, the absence of the business licenses

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[8]The RFP incorporated FAR § 52.230-2, which generally provides that, unless the contract is exempt from CAS coverage pursuant to 48 C.F.R. §§ 9903.201-1 and 9903.201-2, the contractor shall disclose its cost accounting practices and account for any costs incurred under the contract consistent with those cost accounting practices.

[9]Section H of the RFP, "Special Contract Requirements," stated that the proposed contractor shall furnish the licenses for the responsibility determination within 14 days after a request by the contracting officer, as occurred in this case.

in GSSC's proposal did not warrant the proposal's rejection. GSSC could, and did, produce all the necessary business licenses prior to award during the course of its responsibility determination.

Burns and MVM protest that the agency improperly evaluated GSSC's ability to limit employee turnover under one of the company management subfactors.[10] The protesters argue that, while the agency favorably reviewed GSSC's ability to limit turnover in the technical evaluation, GSSC's price proposal allegedly reflects an intent to encourage employee turnover. Specifically, the protesters note that GSSC's price proposal reflects only a slight rate of increase in option year prices, which indicates that GSSC intends to replace numerous incumbent security officers with new officers, and to pay the new officers "substantially lower wages," which will further encourage turnover.

The evaluation of proposals is within the discretion of the procuring agency, since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. Chaffins Realty Co., Inc., B-247910, July 8, 1992, 92-2 CPD ¶ 9. In cases where an agency's evaluation is challenged, our Office will not independently weigh the merits of a proposal; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. OPSYS, Inc., B-248260, Aug. 6, 1992, 92-2 CPD ¶ 83.

The agency found that GSSC's compensation plan shows that incumbent security officers will receive comparable payment and fringe benefits to those received under the predecessor contract, as well as appropriate wage increases. New security officers would be paid at a wage lower than incumbent wages, but not lower than the wages mandated by the Service Contract Act, and would receive annual pay increases at the same rate as incumbents. In addition, the agency found that GSSC had provided lucrative health and life insurance benefits for all employees, and had designed its retention plan around monetary incentives, awards programs, and a strict policy of promotion from within, which the agency considered invaluable in reducing turnover. Based upon the foregoing, the agency found that GSSC had demonstrated in its proposal its ability to limit

[10]Although MVM raised this issue in its initial protest, it did not substantively respond to the agency's defense of its actions in any subsequent protest filings.

turnover.[11] These findings, which are supported by the record and which are not rebutted by the protesters, belie that GSSC intends to encourage turnover or to pay new employees unreasonably low wages. Nor does GSSC's pricing necessarily suggest that high turnover will result, given GSSC's favorably regarded pay and benefits package for its employees as well as the agency's determination that this pricing will not compromise the effectiveness of GSSC's work force.

Burns protests that the agency overlooked certain weaknesses in GSSC's technical proposal, which were identified in the individual evaluators' worksheets, in developing its TEB consensus score. In addition, Burns claims that the TEB did not penalize GSSC's proposal for certain weaknesses identified by the individual evaluators, although Burn's proposal was downgraded for similar weaknesses.

The record refutes Burns's contentions. In deriving each offeror's consensus score, the TEB averaged the scores given by the individual evaluators under each subfactor. Any weaknesses identified by an individual evaluator resulted in a reduced individual score and, accordingly, a reduced overall score. Our review of the record reflects that the individual evaluators in fact reduced GSSC's proposal score for perceived weaknesses, which were then blended into GSSC's overall score. The evaluation of Burns's proposal was performed in exactly this manner, except that Burns's proposal was found to suffer from more weaknesses and deficiencies than GSSC's.

Although Burns complains that the TEB consensus report did not reflect the negative comments made by some evaluators with respect to GSSC's proposal, it is apparent from the record that the individual evaluators differed in some respects in their assessment of GSSC's proposal. For example, while one evaluator considered the awardee's retention plan to be "weak," the remaining three evaluators viewed that retention plan very favorably, documenting the numerous strengths that ultimately appeared in the consensus report. The same is true for GSSC's past experience; whereas one evaluator criticized GSSC's past performance as being confined to Marshals Service security contracts, the remaining evaluators considered GSSC's past performance--which included 43 Marshals Service contracts in 35 states--to be extensive. In our view, the TEB consensus report reasonably reconciles these difference of opinion and accurately characterizes the merits of GSSC's proposal.

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[11]The agency also evaluated GSSC's turnover rates for prior contracts as "extremely low" under the past experience subfactor.

See Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151; Schweizer Aircraft Corp., B-248640.2; B-248640.3, Sept. 14, 1992, 92-2 CPD ¶ 200. There is no basis in the record to find that GSSC's proposal did not deserve the excellent, near-perfect score it received.

The remaining issues raised in these protests involve MVM's allegation that the agency improperly evaluated its technical proposal and Burns's allegation that the discussions it received were inadequate.[12] Even assuming there is merit to these contentions, we do not believe that either protester suffered competitive prejudice. As competitive prejudice is an essential element of any viable protest, we will not address these issues on the merits. See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, supra.

For example, MVM questions the 2.25-point difference between its score and the awardee's under the past performance subfactor; the 1-point difference between their scores under the key personnel subfactor; and the Marshals Service's failure to increase MVM's company management score by 0.25 points following discussions, as it did with the awardee.[13] Even if MVM were given the benefit of every scoring increase, its technical proposal score would only increase by 3.5 points, which does not surpass the awardee's technical score. Given that GSSC's proposed price was also much lower than the protester's, MVM's disagreement with its technical evaluation would provide no basis for overturning the award. Id.

Similarly, Burns challenges the adequacy of discussions, but does not allege that more comprehensive discussions would have enabled it to achieve the same level of technical excellence which GSSC's proposal was evaluated to possess. Nor do we believe that Burns could have done so, given its more numerous relative weaknesses and the nature of the

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[12]In its initial protest, Burns protested in general terms that its proposal may have been misevaluated. Upon receipt of the agency report and documentation explaining the technical evaluation, Burns only contested that the discussions were not meaningful.

[13]MVM also argues that the TEB's failure to increase its proposal score demonstrates bias. MVM has not produced, nor can we find, any evidence to support this contention; we will not attribute bias in the evaluation of proposals on the basis of such inference or supposition. Smith Bright Assocs., B-240317, Nov. 9, 1990, 90-2 CPD ¶ 382.

discussion questions that it alleges should have been asked.[14] Since GSSC was the low-priced offeror, and Burns does not allege that it could have overcome GSSC's near-perfect technical score (which we found reasonably justified) had it obtained the more extensive discussions it states were necessary, Burns has failed to demonstrate competitive prejudice. Id.

In sum, based on our review, the protesters have provided no basis to sustain the protests of the GSSC award for the 11th Circuit security guard services.

MVM has also requested reconsideration of our dismissal of its protests of five separate contract awards to GSSC for security guard services under the following RFPs, issued by the Marshals Service: RFP No. MS-93-R-0030 (10th Judicial Circuit), RFP No. MS-93-R-0031 (6th Judicial Circuit), RFP No. MS-93-R-0033 (9th Judicial Circuit), RFP No. MS-93-R-0034 (8th Judicial Circuit), and RFP No. MS-93-R-0039 (3rd Judicial Circuit).

GSSC received these contract awards on various dates in September 1993, but MVM did not protest the awards until February 14, 1994. In support of its timeliness claim, MVM stated in its protests that it first discovered its protest bases on January 28, 1994, when it received a supplemental agency report in response to its 11th Circuit protest. This report addressed MVM's allegation, raised in a December 14 amended protest, that the agency improperly calculated its BAFO price at $45 million, not at $38.7 million, the figure appearing on its SF 1411.[15] MVM claimed that the information contained in this January report cast doubt upon the agency's price calculations under the other solicitations.[16]

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[14]For example, the protester argues the agency should have been more specific in asking Burns to "[e]laborate on relevant biographical information for contract and district managers," when the agency was actually concerned about the absence of law enforcement experience on the part of these key personnel. However, Burns does not argue that its contract and district managers in fact possess the requisite law enforcement experience specified in the RFP.

[15]As discussed above, this contention with regard to the present RFP had no merit.

[16]MVM also protested the awards based upon the agency's failure to evaluate GSSC's proposals for consistency with the CAS. MVM made no attempt to establish the timeliness of this issue, which it raised with respect to GSSC's 11th

(continued...)

We dismissed the protests as untimely on February 22, 1994, because MVM failed to diligently pursue the information forming the bases of protest. In dismissing the protests, we found that MVM had presented no evidence that it promptly inquired as to its proposal evaluation under the above solicitations. Indeed, MVM asserted that these protests were based upon information contained in a supplemental agency report, generated more than 4 months after the awards were made. This passivity, in our view, did not satisfy the protester's obligation to diligently pursue the bases for its protests.[17]

MVM concedes that it learned of the awards for four judicial circuits in September 1993, but now states that the agency did not notify it of the 9th Circuit award until December 20, 1993, and did not provide a debriefing on any of these protested awards until February 7, 1994. MVM thus argues that our decision was "factually in error" for failing to recognize the proper chronology of events, and that its protests should have been considered timely.

MVM did not furnish any information in its initial protest regarding its notification or debriefing in the 9th Circuit procurement. Nor did MVM mention that while it was notified of the other awards in September 1993, it only requested debriefings on all five of these awards on December 22.[18] Instead, MVM's exclusive claim to timeliness in its initial

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[16](...continued)
Circuit award on October 19, 1993, nor does MVM request reconsideration of our dismissal of this issue.

[17]In the alternative, we noted that the agency furnished MVM all price evaluation documentation for the 11th Circuit procurement in its first agency report, filed on December 1, 1993, such that MVM's February 14 protests were untimely, even if not dismissable for lack of diligent pursuit as described above. 4 C.F.R. § 21.2(a)(2) (1993). Specifically, the December agency report disclosed that the Marshals Service did not evaluate MVM's BAFO price at the price stated on its SF 1411, which prompted MVM to protest its price evaluation on December 14. Thus, we found that MVM could have protested its price evaluation in the other judicial circuits at least by that date, if not earlier, even assuming the information had been diligently pursued. While the protester expresses disagreement with this conclusion, nothing in MVM's reconsideration request persuades us that it was incorrect. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

[18]This too does not constitute diligent pursuit of its protest grounds.

protests was information it allegedly first learned of in the January 28 agency report. In sum, there was nothing in its protest from which we could divine the chronology of events to which MVM now refers in its reconsideration request.

Where, as here, a protest is untimely on its face, a protester, which does not satisfy its obligation to include in its protest all information necessary to demonstrate the protest's timeliness, will not be permitted to introduce such information for the first time in a reconsideration request. 4 C.F.R. § 21.2(b). Since MVM did not present the explanation purportedly justifying the timeliness of these protests in its initial protests, which were dismissed as untimely on their face, we decline to reconsider these dismissals.

The protests and the requests for reconsideration are denied.

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