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**Comptroller General  
of the United States**

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# Decision

**Matter of:** M.K. Taylor, Jr. Contractors, Inc.

**File:** B-291730.2

**Date:** April 23, 2003

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Robert E. Korroch, Esq., and James J. Reid, Esq., Williams Mullen Clark & Dobbins, for the protester.

Patrick H. O'Donnell, Esq., Terence Murphy, Esq., Stanley G. Barr, Jr., Esq., and Mary Elizabeth Anderson, Esq., Kaufman & Canoles, for Pembroke Construction Co., Inc., an intervenor.

Clarence D. Long, III, Esq., Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Where agency's required quantity of services increased substantially after issuance of solicitation, agency improperly failed to issue amendment notifying all offerors of the changed requirements; however, since, by protester's own calculations, increased quantities would not have led protester to reduce its price sufficiently to give it a substantial chance of receiving the award, protester was not prejudiced by agency's actions and there thus is no basis to sustain protest.

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## DECISION

M.K. Taylor, Jr. Contractors, Inc. protests the award of a contract to Pembroke Construction Company, Inc. under request for proposals (RFP) No. F44600-02-R0107, issued by the Department of the Air Force, 1<sup>st</sup> Contracting Squadron, Langley Air Force Base, Virginia, for repair of pavements at the base. Taylor argues that the agency improperly failed to amend the solicitation to reflect changed requirements and that Pembroke submitted unbalanced prices.

We deny the protest.

The solicitation, issued July 15, 2002, provided for the award of a fixed-price, indefinite-delivery, indefinite-quantity (ID/IQ) contract for a base year, with 5 option years. RFP at 34. The contractor was to maintain the paved areas on the base, including, among other things, excavation and hauling; surface preparation; repair of existing concrete sidewalks, curbs and gutters, and airfield pavement slabs and

spalls; repair of airfield box drains; painting of stripes on the airfield; resetting manholes and catch basins; and pothole repair. RFP, Specifications, § 01110, at 1. All services would be performed in response to negotiated delivery orders issued on a fixed-price basis. RFP at 10-11.

Offerors were to submit unit and extended prices for each of 70 contract line item numbers (CLINs) covering the various tasks for the base year and each option year. RFP at 3. Each CLIN contained an estimated quantity. Relevant here, for each of the 6 years, CLIN A001CQ, Remove and Replace 3 Foot Box Drain, listed an estimated quantity of 200 linear feet; CLIN A0001AC, Hauling, listed an estimated quantity of 1,920 cubic yards; CLIN A001CR, Precast Concrete Manholes, listed an estimated quantity of 10; and CLIN A001CW, Paint Runway Markings, listed an estimated quantity of 82,000 square feet. RFP, Bid Schedule, at 1-15. In addition to the estimated quantity for each CLIN, the solicitation provided a \$5,000 contract minimum guarantee for the base year and a \$25,000,000 maximum for the life of the contract. RFP at 3.

The RFP provided for award, without discussions, to the offeror whose proposal, conforming to the solicitation, was determined to be most advantageous to the government, based on a tradeoff between recent and relevant past performance and price. RFP at 38. Past performance included five subfactors, under each of which proposals were to be assigned a rating/confidence level; based on these subfactor ratings, an overall rating/confidence level then would be assigned for the factor (exceptional/high confidence; very good/significant confidence; satisfactory/confidence; neutral/unknown confidence; marginal/little confidence; or unacceptable/no confidence). RFP at 38-39.

Two proposals, Taylor's and Pembroke's, were received by the August 28 closing time, and both were rated exceptional/high confidence for past performance. Because the past performance ratings of the two offerors were identical, and Pembroke offered the lower price (\$21,739,615 versus \$23,082,599), the Air Force determined that Pembroke's proposal offered the best value to the government. It made award to Pembroke on September 23.

On September 28 and 29, the agency issued seven delivery orders under the awarded contract, several of which included CLIN quantities that exceeded the base year and/or estimated 6-year contract quantities that had been set forth in the RFP.

#### INACCURATE ESTIMATES

Taylor cites the September delivery orders in arguing that the award to Pembroke under the solicitation as issued was improper because the delivery orders show that the solicitation did not reflect the agency's true minimum needs. Taylor notes, for example, that the solicitation estimated a quantity of 200 linear feet of box drain work for each of 6 years, but delivery order 0006 required 5,050 linear feet of box

drain work in the base year alone.<sup>1</sup> Protester's Comments, Feb. 24, 2003, at 4. Similarly, Taylor notes that, whereas the RFP included estimated quantities of 1,480 cubic yards of excavation, 1,920 cubic yards of hauling, 1,140 tons of aggregate base, 4,400 square feet of petrotac fabric, and 10 precast concrete manholes, delivery order 0006 required that Pembroke excavate and haul 3,910 cubic yards, apply 4,930 tons of aggregate base, use 25,330 square feet of petrotac fabric, and install 22 precast concrete manholes. Agency Comments on Telephone Conference, attach. 1, Revised, at 1. Taylor asserts that the fact that these increases were ordered just 6 days after the award demonstrates that the agency knew before award that its requirements far exceeded the estimated quantities in the RFP, and that, once the agency became aware of these changes, it was obligated to amend the solicitation and provide all offerors the opportunity to respond to the revised requirements. First Supplemental Protest, Jan. 14, 2003, at 3-4. Taylor states that, had the larger quantities been included in the RFP, it would have substantially reduced its prices.

In response, the agency explains that, in June 2002, immediately prior to issuance of the solicitation, it planned to include the box drain work under an existing contract with Pembroke. Agency Report (AR), Contracting Officer's Supplemental Statement of Facts, Tab 31, at 8. This decision reportedly reflected a change in the "funding philosophy" for box drain repairs, in that the agency decided to repair all box drains under a single delivery order rather than spread the work over several years. *Id.* Subsequently, however, it became apparent to the agency that Pembroke's contract's price ceiling would not accommodate all of the box drain work, and it thus decided to award the work to whichever firm was awarded a contract under the RFP here. The agency asserts that, although this would increase certain quantities substantially above the estimates in the RFP, there was no need to change the estimates because the increased quantities were not funded prior to the award, and thus were uncertain. *Id.* at 9. In this regard, the agency notes that it used an ID/IQ contract here precisely because it could not predetermine above a specified minimum the precise quantities of supplies or services that would be required; the agency claims it therefore properly used estimated quantities based on "the best information available to [the agency] at the time of solicitation preparation." AR, Memorandum of Law, Tab 30, at 6.

We disagree with the agency. While an ID/IQ contract does give the government flexibility when it cannot determine its needs above a minimum quantity in advance of contracting, the use of such a contract does not excuse the government from

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<sup>1</sup> While Taylor's protest cites the quantities ordered under four of the delivery orders, our discussion focuses on delivery order 0006, box drains, because it includes a large number of line items that substantially exceed the estimated quantities (7 of 10). Our discussion (below) of the potential price impact of the delivery orders is based on five of the delivery orders; although Taylor challenges only four, its calculations in arguing competitive prejudice include five.

actually identifying its needs. Where an agency's requirements change after a solicitation has been issued—even after the submission of best and final offers and up until the time of award—it is required to issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. Federal Acquisition Regulation (FAR) § 15.206(a); NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 17; Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. This requirement ensures that award decisions are based on the agency's most current view of its needs, Symetrics Indus., Inc., *supra*, and that proposals will be prepared on a common basis that reflects the agency's actual needs. Dairy Maid Dairy, Inc., B-251758.3 et al., May 24, 1993, 93-1 CPD ¶ 404 at 7-9.

As noted above, the record shows that the agency's funding philosophy concerning box drain repair had changed prior to issuance of the RFP, and that it was aware after issuance of the RFP that, if funding could be obtained, it would order the work under the contract awarded under the RFP. Under these circumstances, the quantity changes should have been communicated to all offerors through an RFP amendment. This is particularly the case under the circumstances here, since Pembroke had been made aware of the increased box drain quantities through the agency's attempt to include that work under its prior contract. Although Pembroke perhaps could not be certain that the additional work ultimately would be funded, Taylor should have been furnished with equivalent information, so that it would have had the same opportunity Pembroke had to factor this risk into its prices. It is undisputed by the agency that the quantity changes at issue were significant.

Notwithstanding this conclusion, we will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F. 3d, 1577, 1581 (Fed. Cir. 1996).

In response to our request that it address the issue of prejudice, Taylor asserts that, due to “economies of scale,” several of its CLIN prices—and, thus, its total price—would have been significantly lower if it had been advised of the contemplated increased quantities. Protester's Comments on Telephone Conference, at 2. However, Taylor's own calculations show that its evaluated price would have been reduced by only \$100,270, far less than Pembroke's \$1.3 million price advantage. Id., attach. 1, at 7. There thus is no basis for finding competitive prejudice as a result of the agency's failure to apprise Taylor of the increased quantities; it follows that there is no basis for sustaining this aspect of the protest.<sup>2</sup>

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<sup>2</sup> Taylor asserts that the agency may have materially understated other estimated quantities. However, the record does not support this conclusion. As discussed, the agency has explained that the anomaly in its requirement for box drain repair was triggered by its “changed philosophy” regarding this type of work. There is no

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## PRICING AMBIGUITY

Taylor maintains that the solicitation was ambiguous regarding the work that was to be included in the box drain CLIN, and that this led Taylor to overprice its offer relative to Pembroke's. Specifically, Taylor claims that it interpreted a sketch in RFP amendment No. 0007 as requiring offerors to include in the box drain CLIN costs for items related to the box drain work--such as hauling, excavating, and packing the drain area with stone--despite the fact that there were separate CLINs for these related items. Protester's Comments, Feb. 24, 2003, at 5. Taylor contends that, while it included these costs in the box drain CLIN, Pembroke did not. By the protester's calculations, its price would be lower than Pembroke's for the box drain work had it taken the same pricing approach as Pembroke under this CLIN. *Id.* We need not resolve this issue because, by Taylor's own calculations, this alleged ambiguity inflated its bid by only \$113,423 (Protester's Comments on Telephone Conference, at 3-4); even combined with the claimed effect (\$100,270) of the agency's failure to disclose the increased quantities, Pembroke's price advantage remains substantial. Taylor thus was not prejudiced by any ambiguity as to box drain pricing.<sup>3</sup>

## UNBALANCED PRICES

Taylor points to six CLINs in Pembroke's offer--four of which allegedly are understated, and two overstated--in arguing that the awardee's prices are unbalanced and present an unacceptable risk to the government. Second Supplemental Protest, Jan. 14, 2003, at 2.

Unbalanced pricing exists when the price of one or more contract line items is significantly overstated, with the price of one or more other line items understated, to obtain an overall acceptable or even low total price. FAR § 15.404-1(g)(1). Unbalancing typically arises either between base period prices and option period prices or, in a solicitation for an indefinite-quantity contract, between line items for different goods or services. In the latter, which is the kind of unbalancing primarily at issue here, the accuracy of the solicitation estimates is critical, since the unbalanced offer will become less advantageous than it appears if the government ultimately requires a greater quantity of the overpriced items and/or a lesser quantity

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evidence that the agency has changed its approach with regard to performing the work under other CLINs, and the protester has not established that there is a basis for assuming that the agency will do so.

<sup>3</sup> The protester states that, because it used this pricing methodology for all CLINs, it "believes that its subtotal for the remaining CLINs probably is overstated . . ." Protester's Comments on the Telephone Conference, at 2. However, since Taylor does not identify any specific CLINs that it overpriced, this assertion is insufficient to establish prejudice.

of the underpriced ones. Copy Graphics, B-273028, Nov. 13, 1996, 96-2 CPD ¶ 185 at 4. Even where prices appear unbalanced, an agency may lawfully award a contract on the basis of a proposal with unbalanced pricing, provided it has concluded that the pricing does not pose an unacceptable level of risk, and the prices the agency is likely to pay under the contract are not unreasonably high. FAR § 15.404-1(g)(2); Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7.

There is no improper unbalancing here. While Taylor asserts generally that the estimated quantities included in the solicitation are incorrect, it has provided no evidence that this is the case with regard to the estimates for the six CLINs as to which it alleges Pem4broke's prices are high or low. Moreover, in order for unbalancing to pose a risk to the government, there must be overpricing of items for which the quantity estimates are shown to be low, and underpricing of items for which the quantity estimates are shown to be unrealistically high. Here, Taylor has not articulated such a correlation, and our review provides no basis to question the agency's conclusion that Pembroke's pricing was "materially balanced and fair and reasonable." AR, Contracting Officer's Supplemental Statement of Facts, Feb. 24, 2003, at 11.

The protest is denied.

Anthony H. Gamboa  
General Counsel