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Decision

Matter of: New Dynamics Corporation

File: B-401272

Date: July 8, 2009

Shay Humphrey, Esq., Rider, Weiner & Frankel, PC, for the protester.
Debra J. Talley, Esq., Department of the Army, for Frank Bloomer--Agency Tender Official, and Diana Price, Esq., American Federal of Government Employees, for Don Hale--Designated Employee Agent, intervenors.
Lt. Col. Vince T. Vanek, Department of the Army, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's decision to retain custodial services in-house based on results of a standard public-private competition conducted pursuant to Office of Management and Budget (OMB) Circular No. A-76 is sustained where the agency failed to reasonably consider whether agency tender's material and supply costs were realistic, as required by the solicitation and OMB Circular A-76.

DECISION

New Dynamics Corporation of Middletown, New York, protests the decision of the Department of the Army, based on the results of a standard competition conducted pursuant to Office of Management and Budget (OMB) Circular No. A-76,¹ to retain

¹ The Circular establishes the standard competition procedures at Attachment B, Section D. Under this process, the agency issues a solicitation, obtains offers from private-sector firms and an agency tender (which includes a staffing plan--referred to by the Circular as a most efficient organization (MEO)), performs a source selection, and then, based on the results of the competition, either makes an award to a private-sector offeror or enters into a letter of obligation with an agency official responsible for performance of the MEO. The agency tender is submitted by an agency tender official (ATO)--an inherently governmental agency official who develops, certifies, and represents the agency tender. OMB Cir. A-76, Attach. B, ¶ A.8.a.

in-house custodial support services requirements at the United States Military Academy, West Point, New York, rather than to award a contract for these services, under request for proposals (RFP) No. W911S0-08-R-0009. New Dynamics argues that the Army's realism evaluation of the agency tender's material and supply costs, as required by the solicitation and OMB Circular A-76, was unreasonable.

We sustain the protest.

BACKGROUND

In 2000, the Army conducted an A-76 competition for custodial services at West Point. As a result of this competition, the requirement was retained in-house for performance by the government's MEO, which has been providing these services since. On September 27, 2006, the Army announced a new A-76 study for the West Point custodial services, which is the subject of this protest. The study was to be completed within 30 months, with a final performance decision date of March 26, 2009. Agency Report (AR), Tab 9, Pre-Negotiation Objective Memorandum, Mar. 4, 2009, at 6.

As part of this second A-76 study, the Army issued the RFP on December 16, 2008 seeking a fixed-price proposal from an AbilityOne offeror,² and an agency tender (the in-house proposal),³ for performance of custodial support services for a 9-month base period (preceded by a 90-day phase-in period), followed by four 1-year option periods. The performance work statement set forth a specific description of the custodial services to be provided, which included periodic and routine custodial services at numerous buildings, facilities, and structures, emergency custodial services as needed, and very important event cleaning services (referred to as the "VIP" cleaning services). RFP § C.

According to the RFP, proposals would be evaluated under two factors: mission capability and price, and the agency would select the technically acceptable offer with the lowest price. The mission capability factor was divided into four subfactors: (1) management; (2) staffing; (3) phase-in; and (4) quality control plan.

² The AbilityOne program, formerly known as the Javits-Wagner-O'Day program, was established under the Javits-Wagner-O'Day Act and provides employment opportunities for people who are blind or have other severe disabilities through the award of federal contracts. 41 U.S.C. §§ 46-48(c) (2006); Federal Acquisition Regulation (FAR) Subpart 8.7.

³ The RFP and the parties to the protest consistently refer to the agency tender as a proposal. For ease of reference, we likewise use the term "proposal" throughout this decision to refer to both New Dynamics' offer and the agency tender. Similarly, we refer to both New Dynamics and the MEO as "offerors."

With respect to the management subfactor, the RFP explained that the “Government assessment will focus on the management methodology, organization, personnel recruitment/retention plan, and qualifications for key personnel.” RFP at 104. Under the staffing subfactor, the RFP indicated that the agency would focus on the “manning and rationale supporting the number of people, number of proposed labor hours, and types of skill classifications utilized to ensure it is adequate to perform all of the major areas of the PWS.” Id. at 105. As to the phase-in subfactor, the RFP provided that the agency’s assessment “will include evaluating the offeror’s mobilization plan, training, orientation and in-processing of workforce; organization and set-up of operating facilities, obtaining permits/licenses if required; distribution of Government-furnished equipment and materials; accomplishment of new requirements; and methods to meet security requirements without disruption of rotational training.” Id. at 105. Last, under the quality control plan subfactor, the RFP specified that the agency’s assessment would “concentrate on the offeror’s efforts and ability to provide and maintain quality services. Elements evaluated include methods to prevent deficiencies, identify and correct deficiencies; the relationship between his quality control personnel and the proposed organization including reporting requirements; and feedback.” Id.

For each subfactor, the proposals were to be rated as “acceptable”, “marginal”, or “unacceptable”, based on the following definitions:

Acceptable	Adequate quality and meets minimum [performance work statement (PWS)] requirements necessary for acceptable contract performance. Proposal contains no deficiencies or major weaknesses and any identified minor weaknesses do not impact the probability of meeting minimum requirements. Fair probability of success with low to moderate degree of risk.
Marginal	A proposal receiving a marginal rating is not an acceptable proposal. Proposal demonstrates shallow understanding of requirements and proposes an approach that does not clearly meet or, in some instances, falls below minimum PWS requirements. The proposal’s overall quality cannot be determined because of errors, omissions, deficiencies and/or major weaknesses, and does not meet the Government’s minimum requirements. The proposal’s deficiencies and/or major weaknesses may be correctable through discussions, but will not be eligible for award unless these deficiencies and/or major weaknesses are corrected. Moderate to High degree of risk.
Unacceptable	Significantly fails to meet minimum PWS requirements necessary for acceptable performance. Proposal could not become eligible for award without a substantial re-write to the proposal. Very high degree of risk.

RFP at 105.

Price was to be evaluated for “realism and reasonableness.” Id. In this regard, offerors were required to submit fixed prices for various contract line item numbers (CLIN) covering the custodial services requirements for the various periods of performance covered by the solicitation—there were two principal CLINs, one for routine custodial services and a second for VIP cleaning services. The RFP warned that “[i]ncomplete, unreasonably high or unrealistic prices may be grounds for eliminating a proposal from competition either on the basis that the offeror does not understand the requirement or the offeror has made an unreasonable/unrealistic proposal.” Id.

For the purpose of evaluating realism and reasonableness, each offeror was required to submit a separate “cost” proposal, which was to include extensive information concerning the underlying cost elements of their CLIN pricing (i.e., labor rates, overhead rates, indirect rates, other direct costs, etc.). In this regard, the ATO was specifically instructed to “develop and certify the agency cost estimate using COMPARE software.”⁴ RFP at 95. According to the RFP, the cost information was to be used to determine “cost realism” and “reasonableness.” Id.

Aside from the costs associated with labor, one component of each offeror’s total price was its cost for material and supplies. In order to assist offerors in determining the quantity that would be necessary for performance, the RFP provided a list of the materials and supplies used to perform West Point’s custodial services in fiscal year 2008 (FY08). RFP, Amend. 2. While the list identified 27,520 items, it did not include the prices paid by the Army for the individual items, nor did it include the total price the Army paid for the items in FY08.

In response to the RFP, the Army received proposals from New Dynamics, an offeror under the AbilityOne Program, and the ATO, who submitted the agency tender. The Army convened a Source Selection Evaluation Board (SSEB) for the purpose of evaluating the proposals. Based on its initial evaluations, the SSEB concluded that neither proposal was technically acceptable. The SSEB’s findings were as follows:

⁴ COMPARE is a cost estimating software program used in an A-76 competition to calculate an estimated cost of performance for an agency tender. OMB Cir. A-76, Attach. C. The program is also used to compare the cost of in-house performance (based on an agency tender) with the cost of private-sector performance. In this regard, the software adjusts the cost of in-house performance and the private-sector price to include, for example, the addition of a “conversion differential” to the private-sector price, calculated as the lesser of 10 percent of the MEO’s personnel-related costs or \$10 million. Id., Attach. B ¶ D.5.a(4)(c).

Mission Capability	ATO	New Dynamics
a. Management	Acceptable	Marginal
b. Staffing	Marginal	Marginal
c. Phase-In	Acceptable	Marginal
d. Quality Control	Marginal	Marginal
Total	Marginal	Marginal

AR, Tab 24, Post-Negotiation Memorandum, Mar. 25, 2009, at 3.

New Dynamics' total proposed price, based on using [DELETED] full time equivalent (FTE) employees, was \$30,145,730.44, and the ATO's total proposed price was \$35,122,181, based on using [DELETED] FTEs. AR, Tab 8, Price Analysis Report, Feb. 23, 2009, at 2. Using the COMPARE software cost estimating program, and as directed under the A-76 rules, the ATO was required to specify its cost for supplies and materials under what is referred to as the MEO's Line 2 costs. Regarding its Line 2 costs, the MEO explained that the "Material and Supply Costs have been taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED]. This base number is used for each annual performance period and inflated by the model." AR, Tab 5-A, ATO Initial Cost Proposal, Jan. 16, 2009, at 17. The ATO's total Line 2 cost for materials and supplies (calculated based on an annual cost of [DELETED] for each performance period and a 4.5 percent yearly inflation rate) was [DELETED]. Id. at 35.

After completing its initial evaluation, the Army held its first round of discussions with both offerors regarding weaknesses identified in their technical proposals as well as issues regarding their cost proposals. As it relates to the protest, during this first round of discussions with the ATO, the Army asked various questions regarding the MEO's staffing and quality control plan. Specifically, regarding its staffing, the Army asked the ATO to: (1) provide labor hours by work breakdown structure; (2) provide skill classifications for the various grades of custodians; (3) provide a matrix (or equivalent) to show which staff member performs which tasks; (4) explain an inconsistency between a table in its proposal and the staffing narrative; (5) clarify whether the staffing rationale utilizes [DELETED] per facility or [DELETED]; and (6) clarify whether supervisors or work leaders move throughout [DELETED] and how often. AR, Tab 10-A, Initial Discussion Questions for ATO, Mar. 4, 2009, Encl. 1, at 3.

Regarding its quality control plan, the Army asked the ATO to: (1) provide the MEO's mitigation procedures for poor performance; (2) indicate whether the quality control coordinator will be devoted [DELETED] to quality control; (3) provide the MEO's proposed staffing (via staffing matrices) for the MEO's quality control system; (4) address the fact that the MEO's plan did not include sample checklists to indicate

what is going to be inspected during random and routine inspections performed by MEO personnel; and (5) explain how [DELETED] will perform or assist with quality control performance measures. Id. at 4.

As part of its initial price evaluation, the Army noted that “the ATO’s price for Material and Supply costs was taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED],” but also indicated that the cost for materials and supplies was “not broken out.” AR, Tab 8, Initial Price Analysis Report, Feb. 23, 2009. As part of its discussions, the Army asked the ATO to provide further clarification regarding this matter. AR, Tab 10-A, Initial Discussion Questions for ATO, Mar. 4, 2009, Encl. 1, at 4. The agency also raised the same issue with New Dynamics, noting that it had not provided a breakdown of its costs for materials, supplies, and equipment, and requested further clarification in this regard. AR, Tab 10-B, Initial Discussion Questions for New Dynamics, Mar. 4, 2009, Encl. 1, at 7.

In early March, both the ATO and New Dynamics submitted revised proposals, including their responses to the agency discussion questions. The ATO’s revised proposal included a separate response addressing each of the technical questions posed by the agency with respect to its staffing and quality control plan. With regard to the agency’s request for further clarification regarding its cost for materials and supplies, the ATO responded as follows: “Costs for supplies and materials were based upon actual [DELETED] cost [DELETED] disbursement for requirements identified in [the RFP].” AR, Tab 11-A, ATO Revised Proposal, Responses to Initial Discussion Questions, Mar. 11, 2009, at 9.

In addition, in its cost proposal, the ATO reduced the Line 2 costs for supplies and materials. Specifically, the ATO’s revised cost proposal stated that the “Material and Supply Costs have been taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED]. This base number is used for each annual performance period and inflated by the model.”⁵ AR, Tab 11-B, ATO Revised Cost Proposal, Mar. 11, 2009, at 17. As a result, the total cost for Line 2, Materials and Supplies, was reduced to [DELETED] (based on an annual cost of [DELETED] for each performance period and a 4.5 percent yearly inflation rate). Id. at 47. Notwithstanding this reduction for Line 2, the ATO’s total price increased to \$37,728,016. AR, Tab 11-B, ATO Revised Cost Proposal, Mar. 11, 2009, at 52.

New Dynamics also responded to the agency’s concerns regarding its technical proposal and the Army’s request for further clarification of its cost of supplies and materials. In clarifying its cost for supplies, New Dynamics indicated that the costs were based on [DELETED] for the supplies and that the cost detail, with supporting

⁵ As noted above, the ATO’s initial cost proposal used the same language in discussing its material and supply costs, but listed a higher number which it used to calculate its total Line 2 cost.

documentation, had been provided to, and reviewed by, the Defense Contract Audit Agency (DCAA) in the context of an audit conducted in connection with the A-76 competition.⁶ New Dynamics' price remained unchanged.

Upon concluding its evaluation of the revised proposals, the SSEB concluded that the ATO's proposal was acceptable under each of the mission capability subfactors. The SSEB concluded that the ATO had provided acceptable responses to the discussion questions regarding the identified staffing concerns by furnishing "updated man-hour information, skill levels for custodians, customer service tasks matrix, and clearly defin[ing] the roles and responsibilities of staff." AR, Tab 24, Post-Negotiation Memorandum, Mar. 25, 2009, at 12. In addition, the SSEB concluded that the ATO's quality control plan was acceptable, noting that the revised proposal addressed the relationship between quality control staff and the proposed organization, and that the plan addressed the inspection system, method for identifying defective services, corrective measures, prevention of future re-occurrences of defective performance, and documentation. Id.

The Army also prepared a "price analysis report" for the purpose of evaluating whether the ATO's proposed costs were realistic and reasonable. In the report, the Army confirmed that the ATO used fringe benefit amounts and overhead rates required by OMB Circular A-76. The report does not address the agency's questions regarding the ATO's Line 2 costs or the ATO's response, nor does it address the downward adjustment for the Line 2 costs incorporated in the ATO's revised cost proposal.

The Army subsequently held a second round of discussions with New Dynamics regarding its staffing plan—all other aspects of New Dynamics' proposal were deemed acceptable. After this additional round of discussions, which included the submission of an additional response from New Dynamics, the agency concluded that New Dynamics' technical proposal was acceptable under each mission suitability subfactor, and acceptable overall. AR, Tab 17, SSEB Evaluation of New Dynamics' Interim Discussion Responses, Mar. 24, 2009. Again, New Dynamics' price did not change as a consequence of discussions.

⁶ The record reflects that the Army requested and obtained a March 4, 2009 DCAA audit report, which examined New Dynamics' cost proposal for "realism and possible understatement" of its costs "to assist the contracting officer in performing a cost realism analysis." AR, Tab 14, DCAA Audit Report of New Dynamics' Cost Proposal, Mar. 4, 2009, at 1. In its audit report, DCAA indicated that it had obtained New Dynamics' detailed item listing of expendable supplies that had been incorporated in the proposal, traced selected high-dollar value items on the listing to actual [DELETED], and accepted New Dynamics' cost for supplies without adjustment. Id. at 6.

On March 24, the Army requested final proposal revisions from New Dynamics and the ATO. New Dynamics did not submit any changes. The ATO, however, reduced its staffing from approximately [DELETED] FTEs to [DELETED] FTEs. In addition, the ATO again revised its Line 2 costs for materials and supplies. Notwithstanding the fact that the ATO's final cost proposal included the same statement from its prior proposal explaining how its Line 2 costs were calculated--"Material and Supply Costs have been taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED]. This base number is used for each annual performance period and inflated by the model"--the ATO's final cost proposal in fact used [DELETED] as the base amount for calculating its Line 2 costs for materials and supplies. AR, Tab 20-B, ATO Final Cost Proposal, Mar. 25, 2009, at 47. As a consequence, the total Line 2 cost for the MEO was further reduced in the ATO's final cost proposal to [DELETED]. *Id.* No explanation was provided regarding this change. As a consequence of the changes made by the ATO in its final proposal, the total cost for the MEO was reduced to \$35,057,648. *Id.* at 52.

The Army concluded that notwithstanding the staffing changes contained in the ATO's final proposal, it remained overall technically acceptable. In addition, the agency determined that the ATO's material and supply costs were "realistic and reasonable based on using [DELETED] actual incurred costs, escalated in the option years." AR, Tab 24, Post-Negotiation Memorandum, Mar. 25, 2009, at 18. Thereafter, utilizing the COMPARE software, the Army compared the cost of in-house performance (based on the ATO's final proposal) with the cost of private-sector performance (based on the price proposed by New Dynamics). New Dynamics' total price, as adjusted under COMPARE, was \$36,102,192, which was more than the ATO's price of \$35,057,648 (a difference of \$1,044,544). Based on these results, the Army selected the MEO to perform the West Point custodial services. The Army provided New Dynamics with a debriefing and this protest followed.

ANALYSIS

Where, as here, an agency has conducted a cost comparison under OMB Circular A-76 and, in the process, used the procurement system to determine whether to contract out or to perform work in-house, our Office will consider a protest alleging that the agency has not complied with the applicable A-76 procedures in its selection process, or has conducted an evaluation that is inconsistent with the solicitation criteria or is otherwise unreasonable. *Frontier Tech., Inc.*, B-294061, Aug. 12, 2004, 2004 CPD ¶ 176 at 4.

In its protest, New Dynamics argues that the agency failed to reasonably evaluate the MEO's Line 2 costs for materials and supplies for realism as required by the solicitation and the A-76 procedures.⁷ We agree.

As noted above, the solicitation required the ATO to submit a cost proposal using the A-76 COMPARE software. The RFP provided that the information contained therein was to be used to assess whether the MEO's costs were realistic. This is consistent with the requirements set forth in OMB Circular A-76, which requires contracting officers to perform price analysis and cost realism analysis with respect to MEO costs, including, among other costs, the MEO's Line 2 costs for materials and supplies. OMB Cir. A-76, Attach. B, ¶¶ D.5.b(1), c(4).

In its initial cost proposal, the ATO represented that the MEO's Line 2 cost for materials and supplies was based on the incumbent MEO's [DELETED] material and supply costs for [DELETED]. The ATO calculated its total Line 2 cost as [DELETED] using an annual cost of [DELETED] as the base for calculating the cost of each performance period as well as a 4.5 percent yearly inflation rate. Notwithstanding the fact that the Army sought further clarification regarding the ATO's Line 2 cost--the Army noted during discussions that there was no specific breakdown of the ATO's Line 2 cost as it related to the supply list provided in the solicitation--in its second cost proposal, the ATO merely reiterated the fact that its cost was based on the incumbent MEO's [DELETED] costs and, without any explanation, reduced its annual base cost from [DELETED] to [DELETED]. As a result, the ATO's total cost for Line 2 was reduced to [DELETED]. In its final cost proposal, the ATO again changed its Line 2 cost without explanation, reducing the total cost to [DELETED].⁸ In this regard, the ATO used an annual cost for materials and supplies of [DELETED] to calculate its total cost. This amount, however, was inconsistent with the narrative section of the ATO's cost proposal, which indicated that the base amount used to calculate the MEO's Line 2 costs was [DELETED].⁹

⁷ New Dynamics also argues that the ATO's cost proposal was unacceptable because the ATO, in effect, did not provide a price for VIP cleaning. In this regard, the solicitation instructed offerors to identify any CLIN not priced as "Not Separately Priced" or "N/A." In its initial proposal, the ATO listed [DELETED]. AR, Tab 5-A, ATO Initial Cost Proposal, at 7-11. In its subsequent proposals, the ATO, with respect to the VIP cleaning CLINs, wrote [DELETED]. We agree with the protester that this statement does not constitute a proper response to the agency's request for fixed-price CLINs.

⁸ We note that the ATO's final Line 2 cost amount [DELETED] was significantly less than New Dynamics' cost for materials and supplies [DELETED], which had been audited by DCAA, at the Army's request, and accepted without exception.

⁹ The Army contends that the ATO's use of [DELETED] as the base for calculating its Line 2 costs and the narrative statement referencing [DELETED] are not necessarily
(continued...)

The documentation in support of the Army's price evaluation reflects the Army's conclusion that the MEO's Line 2 costs were realistic. The sole basis for this conclusion was the ATO's representation that the Line 2 costs were based on [DELETED] actual costs—the Army did not have any independent knowledge of the [DELETED] material and supply costs, nor was this information provided in the ATO's cost proposal or through its response to the Army's request for additional information during discussions. As noted above, when the Army sought additional information regarding the ATO's Line 2 costs during discussions, the ATO simply reiterated the representation from its initial proposal that the costs were based on [DELETED] costs, and proceeded to reduce its Line 2 costs without explanation. Without any insight into the actual [DELETED] costs, it was not possible for the Army to have reasonably assessed the validity of the ATO's representations. Rather, the Army simply assumed that the ATO's assertions were accurate, notwithstanding the fact that they were entirely unsupported as a consequence of the ATO's failure to provide additional information concerning the Line 2 costs, as the agency had requested during discussions.

The Army's assumption in this case was also inherently unreasonable given the puzzling nature of the reduction to the ATO's Line 2 costs with each revision of its cost proposal. Since the costs were purportedly based on a historical figure, a value that presumably would have been fixed, and because there were no changes to the solicitation requirements with respect to materials or supplies which could have supported any Line 2 cost changes, one would not have reasonably expected the ATO's Line 2 costs to change each time it submitted a new cost proposal. Moreover, the ATO's Line 2 costs in its final proposal were internally inconsistent—the narrative section specifies that they are calculated using a base value of [DELETED], while the Line 2 costs were in fact calculated using the lesser amount of [DELETED].

(...continued)

inconsistent. The operative sentence is the statement by the ATO that "Material and Supply Costs have been taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED]. This base number is used for each annual performance period and inflated by the model." According to the Army, the statement that material and supply costs were "taken from the actual costs incurred in [DELETED] by the current MEO, [DELETED]" can be read to mean that the [DELETED] amount reflected the actual MEO costs, which the ATO used to derive some other unstated base number, which in turn was ultimately reflected in the ATO's actual cost calculation. In each of its prior cost proposals, however, the amount identified in the narrative portion of the ATO's cost proposal matched the amount used as the base for calculating ATO's total Line 2 costs. This fact, coupled with the accompanying statement that "[t]his base number was used for each annual performance period," in our view, renders the Army's interpretation unreasonable. In any event, as discussed above, we sustain the protest based on the Army's failure to reasonably evaluate the ATO's Line 2 costs, regardless of how the number was derived.

In sum, the Army had no independent knowledge of the [DELETED] actual material and supply costs and therefore had no basis to conclude that the ATO's Line 2 costs were actually based upon or consistent with the [DELETED] costs and therefore realistic. Nor do we believe it was proper or reasonable for the agency's realism evaluation to have relied entirely upon the ATO's assertion that the MEO's Line 2 costs were based on [DELETED] costs. The ATO's assertion was unsupported, notwithstanding the Army's request for further clarification of the matter; the Line 2 costs changed significantly without any explanation or obvious reason in each subsequent submission of its cost proposal; and, in its final proposal, the ATO's proposal contained an internally inconsistent statement regarding the MEO's Line 2 cost, which was never in fact considered by the Army. Under these circumstances, we conclude that the Army did not reasonably evaluate the ATO's Line 2 costs for realism as required by the solicitation and OMB Circular A-76.¹⁰

New Dynamics also challenges various other aspects of the agency's evaluation of the ATO's proposal, which we deny.¹¹ Specifically, New Dynamics notes that the

¹⁰ If the total Line 2 cost from the ATO's initial proposal [DELETED] is substituted for the total Line 2 cost in the ATO's final proposal [DELETED], New Dynamics would become the lowest-priced technically acceptable offeror by more than [DELETED]. Thus, the record demonstrates a reasonable possibility that New Dynamics was prejudiced by the agency's unreasonable evaluation of the ATO's Line 2 costs. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

¹¹ We also rejected New Dynamics' argument that, under 10 U.S.C. § 2461 (2006), the Army was precluded from applying the 10 percent conversion differential to the proposal submitted by New Dynamics since New Dynamics is a qualified nonprofit agency under the AbilityOne Program. Section 2461 mandates that agencies utilize a standard competition under the A-76 process, including the 10 percent conversion differential, when determining whether it is more cost-effective to have an activity or function performed in-house or by the private sector. When the Department of Defense plans to have a function performed by an AbilityOne contractor, however, it is exempt from the requirements of § 2461. 10 U.S.C. § 2461(d). While the statute exempts the Department of Defense from having to use the A-76 standard competition process (and to apply a conversion differential) when converting from in-house performance to an AbilityOne contractor, it clearly does not preclude the Department of Defense from doing so. This is consistent with OMB's interpretation of a similar provision set forth in section 739 of Division D of the Consolidated Appropriations Act, Fiscal Year 2008, Pub. L. No. 110-161, which applies to non-Department of Defense agencies. OMB Memorandum, M-08-11, Feb. 20, 2008. In that guidance, OMB expressly indicates that agencies may continue to use standard A-76 competitions to decide whether it would be more economical to have a function performed in-house or by an AbilityOne contractor. Id. at ¶ 4.

ATO's staffing and quality control plans, as initially submitted, were evaluated as unacceptable. According to New Dynamics, it was improper for the Army to have considered the information contained in the ATO's revised proposal which addressed these issues since the ATO's changes did not conform to the format required for proposal revisions. Among other things, offerors were instructed to include change pages on blue paper with a vertical line in the right margin annotating the specific paragraph/sentence to be revised. AR, Tab 10A, Initial Discussion Questions for ATO. Because these instructions regarding change page formatting did not pertain to material solicitation requirements (*i.e.*, they did not concern price, quantity, quality, or delivery schedule), the Army properly waived any such flaws as minor informalities. Kuhana-Spectrum Joint Venture, LLC, B-400803, B-400803.2, Jan. 29, 2009, 2009 CPD ¶ 36 at _____. New Dynamics also argues that the Army erred in considering other changes to the ATO's proposal where they were not specifically the subject of discussions. We disagree. In response to discussions or a request for final proposal submissions, offerors, as a general matter, may revise any aspect of their proposals they see fit—including portions of their proposals which were not the subject of discussions. Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3.

In addition, New Dynamics argues that the ATO's proposal was unacceptable because its staffing plan failed to account for increased cleaning requirements associated with future buildings at West Point, and because the ATO's Line 1 personnel costs failed to include any transit and preparation time for its workers. These arguments also do not provide a basis for our Office to sustain the protest. The record reflects that the agency considered the ATO's failure to specifically address the additional buildings in its proposal, but concluded that the ATO's [DELETED] plan would allow it to address this minimal additional workload in an acceptable manner. AR, Tab 24, Post Negotiation Memorandum, Mar. 25, 2009, at 16. While the protester may disagree with this assessment, it has not demonstrated that the agency's determination in this regard was unreasonable. A protester's mere disagreement with an agency's judgments does not provide a basis to sustain a protest. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

Similarly, we deny New Dynamics' assertion regarding the ATO's alleged failure to account for transit and preparation time for its workers. First, New Dynamics has not cited any requirement in the solicitation requiring the ATO to expressly account for such time. Second, New Dynamics has failed to explain or demonstrate how the ATO's staffing plan, which was based on a [DELETED] number of FTEs and [DELETED] overall [DELETED] hours than New Dynamics, was insufficient to perform the requirement. Absent any such showing, we have no basis to conclude that the agency's evaluation was unreasonable.

RECOMMENDATION

Ordinarily, in sustaining a protest challenging an agency's evaluation of proposals, we recommend that the agency review the procurement and take appropriate actions to rectify any improprieties. Under the specific circumstances here, our recommendation would be for the Army to implement a process to reasonably assess the ATO's proposed Line 2 cost for realism and document its findings, including reopening discussions. If, after performing this assessment, the cost comparison resulted in New Dynamics being the lowest-priced technically acceptable offeror, the agency then would make award to New Dynamics.

Implementation of such a recommendation in this case appears to be barred by the plain language of section 8023 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, which states as follows:

None of the funds appropriated by this Act shall be available to perform any cost study pursuant to the provisions of OMB Circular A-76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 30 months after initiation of such study for a multi-function activity.

Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. C, title VIII, 122 Stat. 3619, 3626 (Sept. 30, 2008). As relevant here, the effect of the provision is to bar the Army from using funds appropriated under the statute to perform any multi-function study more than 30 months after the study was initiated. It is undisputed that the 30-month deadline has passed for this competition.¹² Accordingly, because any recommendation by our Office to rectify the Army's failure to perform a meaningful realism evaluation of the ATO's Line 2 cost for materials and supplies would result in the Army expending funds to continue to perform the study at issue, we will not make such a recommendation. See Rosemary Livingston--Agency Tender Official, B-401102.2, July 6, 2009, 2009 CPD ¶ _____. Instead, we recommend that the Army reimburse the protester for its proposal preparation costs and the cost of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2009). The protester's certified claim for costs, detailing the time

¹² For standard competitions, as in this case, the start date is the day that the agency makes a formal public announcement, and the end date is the day that all SCF certifications are complete, signifying a performance decision. OMB Circular A-76, Attach. B, B.1, B.2. The Army announced the competition on September 27, 2006, and completed the certifications on March 25, 2008.

expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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Acting General Counsel