

June 23, 1994

P.S. Protest No. 94-08

CORDANT, INC.

Solicitation No. 104230-93-A-0030

DIGEST

Protest against award of contract for order fulfillment services for expedited mail products is dismissed in part where certain allegations were untimely raised; denied in part where the contracting officer's determination that the two highest-ranked proposals were technically equivalent was reasonable; and sustained in part where the contracting officer failed to analyze the awardee's award fee proposal as required by the solicitation.

DECISION

Cordant, Inc., protests the award of a contract for order fulfillment services for expedited mail products to DDD Company.

Solicitation 104230-93-A-0030 was issued on May 6, 1993, by the procurement office at Postal Service Headquarters. The Statement of Work (SOW) described the requirement for a contractor to "warehouse, distribute and track Express Mail and Priority Mail products.

The contractor will be responsible for all phases of the Expedited Mail products fulfillment process." Postal facilities as well as large business customers require frequent delivery of supplies of products such as Express and Priority Mail envelopes, labels, boxes, and mailing tubes.¹ The contractor was to provide a database management system, which would track orders, develop customer profiles and records, control inventory, and generate information for developing new accounts; process orders, which would include written and telephoned orders, and provide on-line screens for electronic orders; manage inventory, a service described as managing Express and Priority Mail product inventory; manage

¹ Formerly, contract printers would ship products to postal distribution centers, an approach which the contracting officer states "has proven to be both fragmented and without overall coordination."

vendor orders and deliveries; verify vendor performance; distribute products to Postal Service facilities and customers from contractor's warehouse; and maintain transaction histories on a regular and ad hoc basis. The contract was to be for three years, with options for a fourth and fifth year.

Pertinent provision of the solicitation were:

J.2 Alternate Proposals Based on Other Contract Types

The resultant contract will have three deliverable support tasks with contract types as follows:

Task I: Database Management System
Firm Fixed Price^[2]

Task II: The Fulfillment Services
Fixed Price Award Fee

Task III: Task Orders^[3]

Alternate proposal(s) based on other contract types will be considered ONLY for TASK II. Alternate proposals based on other contract types for any other task WILL NOT be accepted.^[4]

The technical evaluation criteria and their numerical weights were as follows:

Technical Capability	50%
Warehouse Facility and Inventory Operation	33%

² At section C.1, the solicitation stated that delivery of the database management system was required "within 120 calendar days from the contract award date. However, delivery is desired earlier in accordance with the set calendar as stated in [several items] of Section A." For example, Item 01b of Section A (Items and Prices) was: "Contractor completes the database management system and it is accepted between 61 and 90 calendar days from contract award."

³ Although the solicitation identified no contract type for Task III, we note that Procurement Manual (PM) 5.1.9 describes "task order contracts" as a type of contract "suitable for use when purchasing services that can only be described in general terms at the time of contract award. . . . Each task order describes and establishes a price for the task to be performed." The solicitation did not provide any mechanism to establish prices for Task III, and thus it did not play a role in the price evaluation of offers. The contracting officer explains that "TASK III [provides for] task orders issued for special ad hoc reports or nominal changes to the database system within the general scope of work as required."

⁴ Section J.7 a.2 discussed alternate proposals generally:

Offerors may, at their discretion, submit "alternate" proposals or proposals deviating from the requirement; provided, that the offeror must also submit a proposal for performance of the work as specified in the statement of work. Any alternate proposal may be considered if overall performance would be improved or not compromised, and if it is in the best interest of the Postal Service. Alternate proposals, or deviations from any requirement of this solicitation, must be clearly identified.

Experience and Qualifications of
Administrative, Technical, and Telephone Staff

17%

Section J.3, Award Fee, stated:

The award fee will be for superior/excellent performance in accordance with Section 8.2 of the SOW and inventory control. Offerors may elect to adopt the Postal Service's proposed award fee allocation model (See the Model Award Fee Plan, Attachment 2).^[5] Offerors are invited to propose an alternative incentive or award fee plan that rewards performance meeting or exceeding the 95% performance level (as measured by the formula in Attachment 2), required by the Statement of Work.

Section M.4 Contract Award and Proposal Evaluation, provided:

a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service (i.e. a combination of price, price-related factors, and/or other factors). The technical approach proposal is more important than price in the evaluation process. . . .

b. Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price. The Postal Service's consideration of cost/price for TASK II will include:

- (1) the maximum cost to the Postal Service, including the maximum proposed award fee pool,
- (2) the reasonableness of the contractor's allocation of cost to accomplish TASK II,
- (3) the degree of performance risk accepted by the contractor evidenced by the allocation of amounts to cost and the award fee pool as well as the method proposed for allocating award fee pool amounts.

The Postal Service considers the placement of performance risk on the contractor to be more advantageous to the Postal Service. Acceptance of risk by the contractor will be evaluated, in part, by the allocation of the total price between estimated cost and award fee pool. Offerors are reminded the reasonableness and the allocation of cost will be evaluated and considered

⁵ Attachment 2 set out procedures by which a four-member award fee panel would determine the contractor's level of performance. Paragraph 3 set out the formula for determining the award fee. Paragraph 4 explained how the formula would be applied using calculations based on assumptions of a \$1,000,000 annual fixed price for Task II and a \$120,000 annual fee pool. Paragraph 4 included a table which showed the award fees (based on the assumed figures) that the contractor would receive for performance which was greater than or equal to 90% through 98% of requests fulfilled in a timely manner.

in any award decision.^[6]

Three amendments to the solicitation were issued and the offer due date was extended from July 2 to July 30. A four-member evaluation panel conducted technical evaluations of eight firms' proposals in August and September, and reached a consensus that gave Cordant the highest technical score, rated its risk [to the Postal Service] factor as "low" and found its price offer, including award fee, to be second lowest. DDD was ranked second technically (score 9.8% lower than Cordant's), rated "low" for risk and ranked lowest in price. DDD's price proposal did not include an award fee pool amount or a model to allocate the pool to its performance.

Cordant, DDD and a third offeror, Output Technologies, Inc., (OTI), whose technical proposal was scored lower than Cordant's and DDD's, and whose price was higher, comprised the competitive range. Discussions were held with those offerors from October 18-21 and best and final offers (BAFOs) were requested October 26 to be received by November 3. The written discussions with DDD included a request that it propose an award fee. In response, DDD's BAFO contained the statement, "DDD Company proposes to utilize the award/incentive fee as described in Solicitation J.3. . . ." but did not set out any dollar amount for the award fee pool.

After BAFOs were evaluated, DDD received a technical score that was 1.1% higher than that of Cordant, whose score had been reduced by 3.4% because the evaluators understood its BAFO not to incorporate an alternate warehouse, a feature which had improved its original score.

The contracting officer considered the proposals of Cordant and DDD to be technically equivalent⁷ and proceeded to analyze costs. DDD continued to have the lowest cost as evaluated, but that evaluation did not include any award fee pool amount. The evaluation thus compared DDD's price without an award fee to Cordant's price which included the total amount of the proposed award fee pool for each of the three years. As so evaluated,

⁶ The contracting officer describes the rationale behind the award fee requirement as follows:

To encourage excellence in performance, the solicitation also provided an extra award fee which operates in the following manner. The solicitation established a performance level rating system which is basically a ratio of timely completed requests to all requests received. A Postal Service official is designated the "umpire" to determine the contractor's award fee "batting average." Performance is expected to be high, with an expected "batting average" of 95%. Offerors then bid an annual award fee pool amount and a plan or model for determining what portion of the award fee pool will be allocated to the contractor at different levels of performance.

⁷ The contracting officer's selection memorandum of November 16, explained the rationale behind her determination that the technical proposals of DDD and Cordant were "about equal." One of the strong points which the contracting officer listed for Cordant was its alternate warehouse proposal, which she said would "more than meet our needs" and would improve customer satisfaction in one geographic area.

The selection memorandum also noted the strong points of DDD's proposal, including its drop shipping proposal, discussed *infra*.

DDD's price was more than 10% less than Cordant's. However, Cordant's price without its award fee pool was about 30% less than DDD's price.

Although the selection memorandum indicates that DDD's higher technical score and lowest price provided an "excellent scenario" for award and "represents the best overall value to the USPS," the memorandum also indicates that overall cost to the Postal Service was the primary factor in the award.

The memorandum stated that DDD's award fee pool "will be negotiated. . . . Negotiations are warranted." A pre-negotiation memorandum dated December 7 had stated the contracting officer's belief that \$1 million was "the target for the award fee pool amount for each year." On December 9, after DDD had been selected, but before award, the contracting officer negotiated with DDD for an award fee pool amount of \$325,000 for year 1.

On February 3, 1994, DDD was awarded the contract.⁸ Cordant was debriefed on February 9, and its protest was received February 24. On March 10, Cordant's contract was modified to reflect its agreement to a maximum award fee pool of \$325,000 for years 2 and 3.

Cordant alleges that the Postal Service failed to consider its BAFO's proposal for an alternate warehouse location, a proposal allowed by solicitation section J.7. According to the protester, the contracting officer admitted at its debriefing that the protester's technical evaluation score would have been higher if the alternate had been considered. Cordant contends that the omission vitiates the conclusion that Cordant's and DDD's proposals were technically equivalent.

Cordant further alleges that the evaluations were not made in accordance with solicitation section M because award was made solely on the basis of DDD's lower evaluated price when the solicitation gave more weight to the technical factors. "By failing to look behind the technical scores of Cordant and DDD for the real comparative *value* of the two proposals, USPS effectively ignored the requirement of Section M that award would be made 'to the responsible offeror whose proposal offers the best value to the Postal Service.'" (Emphasis in original.)

Cordant also asserts that the contracting officer did not conduct the price evaluations for Task II in accordance with section M because she did not consider the offerors' proposed award fee in her determinations, basing her evaluation only on direct charges to the Postal Service rather than on the risk assumed by the offeror. Cordant alleges that its proposal is more valuable to the Postal Service than DDD's because Cordant assumes greater risk with the award fee component of the price offer. According to the protester, the price evaluation also was improper because while the solicitation's evaluation quantities were constant for three years, the cost analysis of Cordant's proposal was based on the erroneous perception that its prices would increase, an analysis which used projected quantities not stated in the solicitation. The protester concludes that the mistakes in the

⁸ The protest record does not explain the delay between the selection of the contractor and the contract award.

evaluations were "highly prejudicial" to Cordant and precluded a proper best value determination.

In a "supplement" to its protest received March 10, Cordant states that it learned through documents obtained pursuant to the Freedom of Information Act that the Task II cost evaluation "was even more seriously flawed than Cordant had originally realized."⁹ Cordant now understands that the Postal Service did not consider award fees in the price evaluations because DDD proposed no maximum amount. Cordant understands section M.4, quoted *supra.*, to mean that the Postal Service would consider the maximum proposed award fee pool for each offeror; since DDD proposed no maximum, the Postal Service did not evaluate the price offers in accordance with the solicitation. Cordant cites *Domino Amjet*, P.S. Protest No. 91-54, October 8, 1991, for the proposition that the Postal Service cannot ignore an announced evaluation factor without informing the offerors. The protester also asserts that since DDD's proposed pricing structure was contrary to the solicitation, and consequently "prevents meaningful comparison of offers," DDD's proposal must be rejected as "nonresponsive." The supplemental protest requests that DDD be disqualified and award made to Cordant as "the offeror next in line for award."

The contracting officer's report responds to the protest and the supplement. The contracting officer states:

Although the evaluators did not score Cordant's [alternate] proposal, I considered it in my evaluation of the two proposals. Basically I reasoned that . . . although Cordant has an existing and proven database and inventory management system, DDD had proposed both a new flexible database system and [a] state of the art inventory management purchasing system with great promise.

The contracting officer disputes Cordant's claim that its alternate proposal would have been more economically advantageous to the Postal Service because "DDD had proposed an innovative ['drop shipping'] operating system that proposed fulfilling orders from postal installations and large customers directly from our printing contractors. While Cordant's [alternate] proposal improved response time to [customers near its alternate warehouse], DDD's plan saves money by eliminating transportation costs from the printer to the warehouse for postal installations and large customers." The contracting officer also asserts that both offerors had similar experience, but DDD "proposed the least overall cost to the USPS."

The contracting officer explains her interpretation of DDD's award fee proposal:

DDD's BAFO stated its election to use the USPS Model Award Fee Plan for TASK II as its award fee proposal. When I made my selection decision, I interpreted [that] to commit them to offering an award fee pool amount to be negotiated, but not to exceed \$1 million per year of the basic three year

⁹ To the extent that its supplement constitutes new ground for protest, Cordant alleges that it is a protest amendment and timely because it was raised within 10 working days after Cordant received the documents.

contract term. I also interpreted the award fee allocation as stated in the USPS Model Award Fee Plan to be \$1 million.

The contracting officer admits that when she received Cordant's supplementary protest she realized that her interpretation of DDD's award fee as not to exceed \$1 million "could be challenged" and "immediately negotiated a fixed maximum award fee pool amount for Years 2 and 3 with DDD Company by modification to the contract. . . . DDD agreed to maximum award fee pool amounts for Years 2 and 3 of \$325,000 each, which is equal to that previously negotiated for Year 1." Nevertheless, she reiterates her position that her interpretation of DDD's award fee proposal as not to exceed \$1 million per year was reasonable because the Postal Service model "establishes \$1 million annually as the maximum fee," citing Solicitation Attachment I, Tab 1. She asserts that even if that interpretation was incorrect, Cordant was not prejudiced because DDD in fact negotiated lesser award fee pools per year, and she "would not have considered accepting any annual award fee proposals from DDD exceeding \$1 million." She concludes by stating that even if her use of \$1 million as a maximum fee was improper, "that error was in Cordant's favor and therefore is no basis for relief."

The contracting officer asserts that Cordant's belief that the offers were evaluated on the basis of increasing quantities is based on a misunderstanding of her statement at the debriefing. "I merely pointed out that because DDD's unit prices are generally lower than [Cordant's], DDD's price advantage will increase if our actual purchase quantities increase. . . . However, all price comparisons made in my selection decision were based upon the prices calculated on the basis of solicitation quantities."

Finally, the contracting officer challenges the timeliness of Cordant's original and supplemental protests. She claims that Cordant "knew all the details of its own proposal" as well as DDD's lower price as soon as it was advised of the contract award. Since its initial protest was filed February 24, more than 10 working days following the February 3 award, its initial protest is untimely.

According to the contracting officer, the supplemental protest is untimely because it raises new grounds for protest more than 15 working days following contract award. The contracting officer requests that the protest be dismissed as untimely or denied on its merits.

On March 31, Cordant submitted what it terms the second supplement to its protest in response to the contracting officer's statement and other documents since released, stating:

We wish to emphasize that we do not consider the information in this letter to constitute a new protest or to contain new grounds of protest. The information is . . . truly supplemental to our original grounds of protest, and therefore not subject to the timeliness rules that apply to protests. It is well settled that supplemental submissions that simply "expand upon and provide additional support for" earlier, timely protest grounds are not subject to the timeliness rules for protests. *Jameson & Gibson Construction Co., Inc., P.S. Protest No. 85-54, September 17, 1985.*

The protester claims that the changes made to DDD's proposal constituted improper, post-BAFO discussions which would have affected the basis of selection if made before award, violating PM 4.1.5 g.5.(a).¹⁰ Cordant claims that "[t]here is now additional information suggesting that the inexplicable downgrading of Cordant's technical proposal, and USPS's failure to quantify or otherwise consider the obvious benefits of Cordant's proposal" may have been "part of a general pattern of conduct by USPS whose purpose and effect was to justify an otherwise unjustifiable award to DDD. . . . USPS had deliberately refused to consider Cordant's alternative warehouse proposal and had erroneously treated Cordant's and DDD's technical proposals as equal when in fact Cordant's was clearly superior." Cordant asserts that the following "recently disclosed information" supports its contention regarding "this pattern of conduct":

-- The Postal Service accepted DDD's proposal despite its failure to propose a maximum award fee pool for any year of Task II.

-- The Postal Service accepted DDD's proposal despite its failure to propose prices for the 60-day or 120-day completion options for Task I. This allegation is based on the fact that DDD's contract contains no price for the 60-day option and the contracting officer's statement shows no price for the 120-day option where it compares the offerors' prices.

-- "It . . . appears . . . that USPS may have elected the 90-day option because DDD had failed, in violation of the RFP's mandatory requirements, to commit to or propose a price for either [option]." Therefore, the Postal Service "may have deliberately evaluated the proposals on the basis of the 90-day option for the sole purpose of being able to make an award to DDD."

-- Since DDD's contract contains a price for the 120-day option, that price also may have been negotiated after selection in violation of PM 4.1.5 g.5.(a).

In specific response to the contracting officer's statement, Cordant reiterates its position on the various issues plus raises the following points:

-- If Cordant's technical score had not decreased as a result of the evaluators' erroneous omission of credit for its alternate proposal, and if, in fact, it had increased "as it logically should have been" then Cordant's final score would have been 4.46% higher than DDD's, which Cordant claims would have been "significantly higher."¹¹

¹⁰ That PM section states:

Any uncertainties or deficiencies remaining in the proposal selected must be clarified or corrected through negotiations leading to a definitive contract. Negotiations must include the disclosure and resolution of all deficiencies and all unsubstantiated areas of cost and price, but no changes may be made in the Postal Service's requirements or in the proposal that, if made before contractor selection, would have affected the basis for selection.

¹¹ Cordant reaches this conclusion by adding the 3.4% credit subtracted from its BAFO score to its technical score from its initial evaluation.

-- This "significant evaluation error" had a "material effect not only on the technical scoring of proposals but also on the relative standing of offerors." The determination that the proposals of Cordant and DDD were technically equivalent was erroneous.

-- "While it is true that the Contracting Officer's November 16 selection memorandum contains a brief reference to Cordant's [alternate] proposal, the record of this procurement read as a whole clearly confirms that USPS did not fully and fairly consider [it]."

-- Further, the contracting officer's " cursory consideration" of the alternate proposal is not an adequate substitute for the "review and analysis . . . by knowledgeable technical evaluators." Cordant was prejudiced by the contracting officer's substitution of her views for those of the technical evaluators who initially had considered Cordant's alternative "extremely beneficial to USPS."

-- The contracting officer's best value determination also was erroneous because she failed to give Cordant credit for "the considerable transportation cost savings that USPS would realize" from Cordant's proposal. "A procuring agency in a best value procurement is required to consider the overall impact of competing proposals on the agency's mission objectives and costs of performance," citing *Lockheed, IMS*, Comp. Gen. Dec. B-248686, September 15, 1992, 92-2 CPD 180.

-- The contracting officer's determination of equivalency was based on an erroneous evaluation of DDD's proposal, in that drop shipping would not save the Postal Service money unless the printers were located far from the contractor's warehouses. "[P]rinting is a localized service that for cost reasons tends to be performed in close proximity to the warehouses to which the printed supplies are delivered." Also, costs under the Postal Service's printing contracts would increase substantially, offsetting DDD's advantage.

-- Cordant suggests that DDD's BAFO is contrary to the requirements of the solicitation, because the contracting officer's comment that DDD's proposal will reduce storage requirements and associated costs implies that DDD lowered its price for its BAFO by ignoring the requirements of the solicitation described in question and answer 20 of Amendment A02, which Cordant states are "irreducible unless DDD simply fails to observe them."¹²

¹² Question 20 had three parts:

--Approximately how many skids of material must be warehoused? Can you provide the quantity of material on each skid by inventory item?

--Can you tell us the average inventory turns (or how much inventory) we should plan to store?

--Minimum Safety Stock required by USPS for each PSIN?

The answer was stated as follows:

-- Cordant concedes that the contracting officer properly based her arithmetical calculations on the solicitation's evaluation quantities; however, "the fact remains that [she] expressly took into account, in making her selection decision, projected quantities of the items in question that were significantly different from the evaluation quantities in the RFP. This is a clear evaluation error that must be corrected by re-opening the procurement and allowing Cordant to submit a proposal that will be evaluated solely on the basis of the announced evaluation criteria in the RFP."

On the award fee issue, the protester responds to the contracting officer's statement as follows:

-- The selection memorandum confirms what Cordant was told in its debriefing, that the award fees were not considered in the evaluation of Task II prices. The contracting officer engaged in improper post-selection negotiations with DDD in order to establish its fee pools.

-- The \$1 million maximum fee is "a totally fictional figure that apparently resulted from the Contracting Officer's misreading of the Model Award Fee Plan in the RFP." That model contains "purely by way of example" a figure of \$1 million for the "Fixed Price/Year of Task II. It is not a real figure, but only an example. Moreover, it is an example of the Task II fixed price and *not* the maximum award fee pool" which was \$120,000.

-- Cordant's award fees "provided USPS with much greater value in the form of substantially higher incentives for superior performance." By "ignoring the offerors' proposed award fees and their allocation, USPS improperly eliminated . . . any consideration of the critically important performance incentives that the award fee . . . is designed to create. In so doing, USPS [violated] Section M and severely penalized Cordant for assuming the performance risk that DDD refused to undertake."

Finally, the protester states that the contracting officer's "first timeliness argument is patently frivolous," since it knew of the information on which its protest is based only after its February 9 debriefing, which makes the initial protest timely. Cordant claims that its supplements simply "expand upon and provide additional support for earlier, timely protest grounds" relating to improper evaluation of award fees and are therefore timely. Cordant also suggests that it was the contracting officer's "deliberate evasiveness" at the debriefing which prevented Cordant from including its supplemental protests with its original.¹³

ANSWER To All 3: It is the contractor's responsibility to determine how many skids of material must be warehoused. The volume of inventory should be a minimum of three accounting periods to a maximum of four accounting periods' worth of volume. How material is presently being warehoused is found in Attachment 18. After the initial shipment from our supply warehouses, the contractor will work with USPS Printing Procurement to determine the desired packaging for contractor's needs.

¹³ The protester also claims that no valid contract was formed with DDD until March 10, the date on which the contracting officer modified DDD's contract to contain the award fee terms for years 2 and 3, because essential elements of the contract did not exist on February 3, the award date. According to

Two offerors have commented on this protest. OTI, the third offeror in the competitive range, alleges that its BAFO was improperly rejected and that its questions regarding evaluation quantities went unanswered, and complains about the contracting officer's failure to disclose information about DDD's proposal, and asks that a new evaluation be performed in order to "provide a fair . . . decision."

Awardee DDD asserts that the evaluators properly considered the reduction in transportation costs associated with its drop shipment proposal. "This will not only save transportation costs but will also reduce storage requirements and associated costs. In respect to this matter, the Contracting Officer clearly looked beyond technical scoring to determine the best value award for this procurement." DDD also affirms that it "proposed to adopt the award fee allocation model furnished in the solicitation. This was in accordance with provisions of the solicitation [paragraph J.3]. It was our expectation that this amount would be applicable for each contract year"

In rebuttal, the contracting officer states that "[n]othing Cordant has presented in either its Second Supplement . . . or its Comments on Contracting Officer Statement . . . has changed" the "fundamental facts" that "DDD offered a technical proposal equal to that of Cordant and a significantly lower price. Consequently, DDD was clearly the best value for the Postal Service."

In response to the protester's assertion that its proposal was technically superior, the contracting officer states:

-- Cordant's "assumption" that its initial score did not include consideration of the [alternate] proposal "ignores the reality of what the evaluators did" The consensus after the initial evaluations was to score Cordant 31.11% out of a possible 33% [in the warehouse category] because the evaluators thought they could take advantage of the alternate proposal.¹⁴ After BAFOs, the evaluators decreased the protester's score by 3.4% because they thought that the alternate was not proposed in the BAFO.

-- Cordant's contention that it was both not credited during the first evaluation and improperly downgraded during the BAFO evaluations "continues to create [Cordant's] own view of reality. . ." in concluding that its BAFO score should have gone up to a perfect 33.33% in the warehouse category. Cordant gave itself this "invented score" and then asserted that it should have a significant technical advantage to receive award "without any technical/price tradeoffs or consideration of the value of the underlying proposal features; a completely self-serving argument."

Cordant, any elements of its protest filed within 15 working days of March 10 would be timely.

¹⁴ The contracting officer suggests that Cordant's alternate proposal received more consideration than a proposal "so defectively submitted" merited. According to the contracting officer, the alternate proposal "appear[ed] in its separate cost proposal" as two sentences, which "is not the best way to submit an alternative proposal."

The contracting officer asserts that if the 3.4% reduction were added to Cordant's technical score, the scores would remain at "a virtual dead heat" with Cordant 2.3% ahead. Even if Cordant's arguments were accepted, the technical difference would be no more than 4.5 or 4.6%, which the contracting officer still would interpret as equivalent. The contracting officer stands by her opinion that DDD's proposal has the "greater potential for [transportation] cost savings" and disputes Cordant's allegation that DDD has not complied with the inventory volume requirements of the solicitation. Footnote 12, *supra*. She also emphasizes that Cordant's allegation that she considered only the evaluation scores while failing to adequately analyze the features of the competing proposals "ignores the record. My selection memorandum includes comparisons of the features of both proposals."

Regarding Cordant's allegations of an improper price analysis, the contracting officer asserts that all prices "used for price comparisons and price/technical tradeoffs were the prices calculated based on the solicitation quantities. There simply are no other calculated prices in the selection memorandum."

Regarding the protester's allegation of improper post-selection negotiations, the contracting officer states:

-- The protester untimely raised this issue in its March 10 supplement, which was more than 15 working days following the February 3 award.

-- The negotiation of DDD's award fee amount, which was substantially lower than \$1 million per year, "complies with [PM 4.1.5 g.5] because it does not affect the basis of selection. This is because . . . [o]nly an agreement which exceeded this \$1 million annual amount upon which I based the selection decision would violate [the PM]."¹⁵

-- Cordant's argument that proposals without "full fixed prices" are unacceptable is not correct; a proposal with indefinite prices may be accepted as long as it "reasonably appears" that the "maximum price the government will pay is lower than that of the other offerors," citing *Homemaker Health Aide Service*, Comp. Gen. Dec. B-188914, September 27, 1977, 77-2 CPD 230. The post-selection negotiations did not change DDD's proposal from unacceptable to acceptable.¹⁶

The contracting officer concludes:

¹⁵ On the first page of her rebuttal, the contracting officer seems to concede Cordant's point that she erroneously assumed the solicitation's award fee model limited offerors to \$1 million, but again calls that assumption "harmless error."

¹⁶ The contracting officer distinguishes this case from one cited by the protester *Burroughs Corporation*, Comp. Gen. Dec. B-186313, December 9, 1976, 76-2 CPD 472, in which she states that the awardee's proposal did not meet the requirements of the statement of work and its acceptance "constituted an unfair relaxation of standards for one offeror." In contrast, "DDD has fully complied with the statement of work and is clearly the best value." The contracting officer also states that in *Burroughs*, the GAO "had no knowledge concerning the limits of the price adjustment proposed by the awardee," whereas DDD has commented for this protest record that it "never intended to request more than \$325,000 as a maximum award fee pool amount."

I would have never accepted any proposal from DDD that exceeded the \$1 million figure upon which selection was made DDD never would have proposed an amount even close to \$1 million. This is clear because DDD quickly accepted maximum award fee pool amounts of \$325,000 annually for years 2 and 3. Moreover, DDD states that it believed that \$325,000 annually was the ceiling for year 2 and 3 award fee pool amounts. . . . Consequently, the intentions of the two parties as demonstrated by their actions and statements set an effective limit for the maximum award fee pool amounts of \$325,000 annually.

The contracting officer also asserts that Cordant's allegations in its second supplement that DDD's proposal for Task I was unacceptable because it failed to propose all options¹⁷ and that her choice of the 90-day option "was improperly motivated" were untimely raised. She alleges that the first supplement "is similarly unrelated to its initial protest [which] asserts that I failed to consider the level of risk assumed by DDD and Cordant in my selection decision. In its March 10 Supplement . . . it asserts that DDD failed to propose a maximum contract price. The nature of these two assertions is totally different. Cordant's vague assertion that they both concern award fee proposals does not make them the same."

The contracting officer dismisses the protester's argument that no contract was formed until March 10, stating that this case "is no different from a contract containing unpriced option years or a letter contract which agrees to leave terms to be determined later. Such contract forms are found to be binding despite an agreement to resolve certain matters later," citing *Saul Bass and Associates v. United States*, 505 F.2d 1386 (Ct. Cl. 1974). Finally, she states that this case does not fall in the exception to timeliness requirements explained in *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991, in which the contracting officer prevented the filing of a timely protest by failing to notify offerors of the award. Here, the contracting officer asserts that she "properly discharged my duty to timely inform Cordant of the day of award. I merely requested that Cordant seek documents it wanted by making a Freedom of Information Act (FOIA) request. This procedure is routine." She points out that protest deadlines will not be delayed by the FOIA process, citing *Cordova Air Service, Inc.*, P.S. Protest No. 92-86, January 22, 1993.

Responding to OTI's comments, the contracting officer states that OTI lacks standing to challenge the award because it was a "distant third" in technical scores, proposed "by far the highest price" and failed to challenge Cordant's offer. She also states that OTI "is simply incorrect in its assertions that I did not consider its BAFO proposal" and that OTI received the "same information concerning order volumes and storage requirements as the other offerors, all of which were able to prepare complying proposals."

In a protest conference, Cordant reiterated its allegations and made the following points:

¹⁷ The contracting officer argues that this allegation also is without merit because the solicitation "does not require the offeror to submit a proposal to complete the Task I database system in any time period shorter than 120 days," citing solicitation section C.1., *supra.*, footnote 2.

-- The specific allegations against the award fee analysis raised in its protest supplements are timely because they relate to an issue "squarely raised in initial protest." It would be "egregious" if these allegations were dismissed as untimely.

-- Cordant stands by its allegation that the contracting officer stated that she did not consider DDD's award fee in the evaluation and selection process.

-- Cordant realizes that this office must give deference to both the contracting officer's determination of technical equivalence and her best value determination. However, deference should not be given if those determinations were irrational, as where she claims DDD's drop shipment idea would save transportation costs. According to the protester, the Postal Service has to pay delivery charges from printers to warehouses with DDD's proposal as well as Cordant's. In fact, DDD's proposal includes indirect costs which were not considered, such as the necessity to maintain increased volumes on trucks if shipments are made directly to customers. Therefore, the contracting officer's determination amounts to bad business judgment.

Cordant submitted post-conference comments in which it also replied to the contracting officer's rebuttal statement. The protester claims that the contracting officer's assertion that she considered its alternate proposal is belied by her statement that it was defective. Cordant alleges that she also made that statement in its debriefing. That the contracting officer "has returned to the issue of form and stated so clearly her disposition to reject Cordant's proposal . . . tends to support Cordant's belief that the *substance* of its proposal was given very short shrift." (Emphasis in original.)

The protester also alleges that:

-- The best value analysis was flawed because the contracting officer did not consider the "substantial transportation cost savings" that would result from Cordant's alternate proposal. The contracting officer admitted to that in the debriefing.

-- It was inconsistent for the contracting officer to give DDD credit for the alleged transportation cost advantages of its proposal while not doing the same for Cordant.

-- There is no evidence on the record that the contracting officer considered the increased shipping costs in Postal Service printing contracts which would result from DDD's drop shipment proposal or that DDD's proposal "appears to be inconsistent with the requirements of the RFP"

-- The contracting officer "does not understand the award fee concept" in that "the offer with the lowest overall cost (including award fee) is not necessarily the best offer" for the Postal Service because the "larger the award fee, the greater the incentive for the contractor to perform well, and the greater assurance that performance will be the best possible." In contrast, "an offer that proposes a low award fee, or no award fee, has little or no incentive to perform well on the contract, and raises doubts at the evaluation stage whether performance will be acceptable,"

citing *Technical Micronics Control, Inc.*, Comp. Gen. Dec. B-206843, September 13, 1982, 82-2 CPD 221.

-- The selection memorandum shows that the contracting officer selected DDD "without considering the maximum award fee at all -- either its amount or its relationship to offerors' proposed costs" in violation of section M. The only statement that refers to a \$1 million fee for DDD is an attachment to the selection memorandum, not the memorandum itself.

-- Even if the contracting officer "subjectively" believed that DDD's maximum award fee was \$1,000,000, "that subjective belief is legally irrelevant" because the contracting officer "had no right to set the contract price unilaterally. . . ." citing *CACI, Inc.*, 64 Comp. Gen 439 (1985) for the proposition that the government's only choices are to accept an offer or reopen negotiations.

The protester concludes that not only was the best value analysis superficial, logically inconsistent, and contrary to the RFP" but that there was no award fee analysis performed that was "consistent either with Section M or the fundamental concept of award fee contracting." The protester emphasizes the impropriety of the contracting officer's assertion that there was no prejudice to Cordant because DDD in fact negotiated maximum award fee pool amounts of \$325,000 for each year. "In effect the contracting officer was arguing that two wrongs added up to a right -- that her error of failing to consider award fee in her evaluation was cured by her error of engaging in post-selection discussions with DDD."

The protester asserts that it would be "improper and grossly inequitable to allow the contracting officer to 'cure' the deficiencies in the award to DDD by simply re-opening the procurement and allowing all offerors to rebid." Cordant asks that DDD be disqualified and award be made to Cordant as the offeror next in line for award.

DISCUSSION

We first discuss the various allegations regarding timeliness. PM 4.5.4 d. requires that "protests [other than protests based upon alleged deficiencies in a solicitation] must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question." *Cordova Air Service*, 92-86, January 22, 1993; *Barber-Coleman Company*, P.S. Protest No. 90-34, December 5, 1990.

Cordant's original protest was received February 24, which was within 10 working days of its February 9 debriefing and within 15 working days of the February 3 award. We do not agree with the contracting officer that Cordant should have been aware of its grounds for protest before its debriefing; therefore, the original protest is timely. Cordant's allegations in its first supplemental protest concerning the lack of a proper award fee analysis also are timely because they merely expand upon a specific issue that was raised in its original protest. *Cf. Cabletron Systems, Inc.*, P.S. Protest No. 93-23, December 23, 1993. However, certain allegations within its subsequent submissions have been untimely raised.

Newly raised grounds for protest are measured from the date they are presented; they do not "relate back" to the initial protest. *Cordova Air Service, supra*. By the latter standard, Cordant's allegations regarding a "pattern of conduct" in favor of DDD, and about the option pricing for TASK I, first raised in its second supplement, are untimely.¹⁸

Turning to Cordant's protest against the determination that its and DDD's proposals were technically equivalent, we note that the contracting officer is afforded considerable discretion in making such judgments:

It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. We will not overturn the determinations of a contracting officer unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. Similarly, we will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action. *Mid Pacific Air Corporation, P.S. Protest No. 92-62, November 23, 1992.*

Timeplex Federal Systems, Inc.; Sprint Communications Company, P.S. Protest Nos. 93-22; 93-24, February 2, 1994. The protester bears the burden of proving its case affirmatively. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position. *Id.*

Here, the offers were scored on the technical factors set out in the solicitation, and were assigned percentage points as allocated in the solicitation. The evaluations ended with DDD having a 1.1% advantage. From initial to BAFO evaluations, Cordant's scores remained the same except in the warehouse category, where, as no party to this protest disputes, Cordant lost 3.4% because the evaluators did not score the alternate proposal in its BAFO. The subtraction of that 3.4%, even if erroneous, does not negate the contracting officer's finding of technical equivalency because those lost points would have given Cordant only a 2.3% advantage, which still may be equivalent.¹⁹

¹⁸ These allegations are without merit as well. There is no evidence either that DDD failed to propose prices required by the solicitation for TASK I or that warehousing requirements were ignored by DDD. The record also falls far short of containing the "irrefragable evidence" required to prove a biased "pattern of conduct." See, e.g., *A-1 Transmission, P.S. Protest No. 93-14, October 29, 1993.* Finally, Cordant's argument that timeliness should be counted from March 10, the date DDD's contract was modified, rather than from the date of award, is both incorrect and unnecessary, as Cordant's original protest against the award fee evaluation process made its subsequent expansions on that topic timely.

¹⁹ Cordant's allegation that it was doubly penalized by a lack of consideration of its alternate warehouse is not persuasive. Cordant received a score of 31.1% out of 33.33% initially for its warehouse proposal, and the record clearly indicates that the evaluators did credit Cordant with its alternate warehouse in that initial evaluation. Cordant's BAFO score went down to 27.7% only because the evaluators thought the alternate was no longer being proposed. The most to which Cordant would be entitled, therefore, would be a restoration of its warehouse score to 31.1%.

While we agree with Cordant that the scores are not the only legitimate indication of technical equivalency,²⁰ the evidence here, contrary to the protester's contention, reasonably supports the contracting officer's substantive conclusions. *Cf. Air Freight, Inc.*, P.S. Protest No. 87-43, August 7, 1987.

The November 16 selection memorandum indicates that the contracting officer did credit Cordant for its alternate proposal even though the evaluators did not.²¹ While she recognized that Cordant has a proven database and inventory management system and its alternate warehouse proposal would have improved customer service in one geographic area, she concluded that DDD's new and flexible database system and "state of the art" inventory management system were at least as advantageous. Further, her conclusion that DDD's drop shipping system, whereby products would be sent directly from printers to customers (including postal installations), would be more economical than Cordant's system, whereby the products would be transported from printers to warehouses and then to customers, clearly is reasonable.²²

Based on this record, we cannot say that the contracting officer's weighing of the advantages associated with each proposal lacked a reasonable basis, nor can we conclude that her determination of technical equivalence was arbitrary, capricious or unsupported by the evidence. *Timeplex Federal Systems; Sprint Communications, supra*. Accordingly, this part of Cordant's protest is denied.

The award fee pool analysis in this case is more troublesome. Since the contracting officer

²⁰ As the Comptroller General has noted:

Whether a given point spread between offerors indicates the actual superiority of one proposal over another depends on the facts and circumstances of each procurement. While technical point scores, when used, must be considered by selection officials in arriving at their conclusion, they are not bound thereby; rather selection officials must decide whether the point scores show technical superiority and what the difference may mean in terms of contract performance. Thus, our analysis of the selection decision . . . focuses on the significance that the . . . selection official gave to the scores received by [the awardee and the protester] and to the actual differences between the proposals. We do not rely on a mechanistic view of the numbers themselves.

JJH, Inc., Comp. Gen. Dec. B-247535.2, September 17, 1992, 92-2 CPD 185 (citation omitted).

²¹ In asserting that it has been deprived of the evaluators' technical expertise in evaluating its proposal, Cordant seems to be arguing that we should disregard not only the evaluators' BAFO scoring but the contracting officer's selection analysis in which she, unlike the evaluators, credited Cordant with its alternate warehouse proposal. Cordant cannot have it both ways, however, and it is the contracting officer's determinations which we review, and only to ensure that they are supported by the record. See *AMR Distribution Systems, Inc.*, P.S. Protest No. 92-36, October 2, 1992; *Grey Advertising, Inc.*, Comp. Gen. Dec. B-184825, May 14, 1976, 76-1 CPD 325.

²² It is the protester which makes unwarranted assumptions about transportation costs; for example, its argument that drop shipping will cost more is based on the unsupported belief that the locations of the Postal Service's printing facilities will change.

reasonably considered Cordant's and DDD's technical proposals to be essentially equal, cost legitimately became the determinative factor for award even though the solicitation's evaluation criteria assigned technical factors more importance than price. *Id.*; see also, *Government Contract Advisory Services, Inc.*; *B & B General Contracting, Inc.*, P.S. Protest Nos. 93-21; 25; December 16, 1993; *Transportation Research Corporation*, Comp. Gen. Dec. B-231914, September 27, 1988, 88-2 CPD 290.

The contracting officer made several errors in her analysis of the award fee pools--errors which are more significant than they would have been if the proposals had not been technically equivalent and award had not been determined by cost factors. Section M of the solicitation indicated that the award fee pool and the risk assumed by the contractor were to be part of the TASK II price analysis to be conducted before selection. The contracting officer, however, decided that DDD's award fee pool was "to be negotiated" after the selection process. At the same time, she failed to give the same leeway to Cordant and counted its award fees in with its direct prices, causing an unequal price evaluation.²³

The contracting officer claims that she interpreted DDD's BAFO statement that it would use the Postal Service model to mean that at most, it was proposing an award fee pool of \$1 million per year. Although she admits that the model in reality set no such limit, she claims that the example figures in the Postal Service model, her intent to limit DDD to \$1 million per year, plus the fact that the actual pools negotiated with DDD were much less, combined to prove that DDD's still was the most advantageous cost proposal. Since the Postal Service came out of the negotiations in a better position with the selected contractor than the contracting officer thought it was in before the negotiations, the contracting officer believes that PM 4.1.5 g. was not violated and Cordant was not prejudiced.

We disagree with the contracting officer's rationalization in that the post-selection discussions did affect her award decision because she entered into them with an assumption that DDD's award fee amounts would, at worst, be more advantageous than Cordant's; therefore, to the extent that she improperly attributed to DDD an advantage that directly affected her award decision, PM 4.1.5 g. was violated.

The question of prejudice, or whether Cordant would have won without the contracting officer's improper assumptions, is more difficult to resolve. It is axiomatic that a protester must have suffered quantifiable harm in order to be the beneficiary of a directed remedy. *TRW Financial Systems, Inc.*, P.S. Protest No. 91-19, May 29, 1991; *Cohlmlia Airline, Inc.*, P.S. Protest No. 87-41, October 30, 1987. Here, although the contracting officer's actions with regard to the award fees were improper and Cordant's protest against them is sustained, we are unable to offer a remedy because it is not clear that absent the contracting officer's errors, DDD's would not have offered the most advantageous proposal. There is no evidence that DDD did not propose in good faith²⁴ to use the Postal Service

²³ That it was an "apples and oranges" price evaluation is uncontested; the contracting officer has not claimed that she considered DDD's award fee proposal to be \$0., which also would have been improper under a fixed price plus incentive award fee solicitation. *Technical Micronics Control, Inc.*, *supra*.

²⁴ In negotiated procurements such as the one at issue here, it was not required that the contracting officer reject DDD's proposal as "nonresponsive" because it did not offer specific award fees. *Handling*

"model," which suggests that without the contracting officer's erroneous assumption of a \$1 million fee, DDD might have considered proposing a yearly pool equal to the actual sample number of \$120,000 (and assumed a risk ratio as set out in the model), or might have proposed the \$325,000 pools which were negotiated, or other figures connected with the model which would have been more favorable than Cordant's. The proper course of action during the selection process would have been to ensure--even if it meant reopening discussions with the offerors in the competitive range--that the offerors proposed actual award pool dollar amounts and provided specific risk allocation proposals. Since that did not happen, it is impossible for us to know what figures DDD would have proposed on its own. As we stated in *AMR Distribution Systems, supra*:

Since award has been made and performance begun, we are limited in the relief we can grant. When contract performance is underway, whether to require termination of the contract depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirements, and the impact of termination on the accomplishment of the agency's mission.

Id., citing *Cummins-Allison Corporation*, P.S. Protest No. 91-18, June 4, 1991. In this case, Cordant itself has observed that a resolicitation of the requirement would prejudice all the offerors. Since we cannot know that DDD would not have prevailed anyway, we cannot order that DDD's contract be terminated, which would harm DDD for no fault of its own and involve considerable administrative disruption and costs, delays, and other expenses for the Postal Service. While it is regrettable that we cannot direct any relief to Cordant, the degree of prejudice to the competitive procurement system can be mitigated provided the lessons of this procurement are observed in future procurements. *C.D.E. Air Conditioning Company, Inc.*; *Coastal Mechanical Corporation*, P.S. Protest Nos. 92-11; 92-18, April 2, 1992; *Domino Amjet, Inc.*, *supra*.

Systems, Inc., P.S. Protest No. 89-70, December 19, 1989; *CFI*, P.S. Protest No. 88-82, February 17, 1989. The ambiguity in DDD's price proposal did not render its offer technically unacceptable because it could and should have been a subject for clarification during discussions under PM 4.1.5 g.2. and PM 4.1.5 g.3.

The protest is dismissed in part, denied in part, and sustained in part to the extent indicated.

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