

**May 31, 2001**

**P.S. Protest No. 00-31**

**D.C.I. DANACO CONTRACTORS, INC.**

**Solicitation No. 33245-00-A-LNY02**

**DIGEST**

Construction contractor's protest of its failure to be prequalified for competition for contracts is denied. Firm was properly excluded from the prequalified list for lack of sufficient evidence of comparable project experience and for failing stated test for financial capability, making protester's objections to other aspects of the evaluation immaterial.

**DECISION**

D.C.I. Danaco Contractors, Inc., (Danaco) protests its failure to be prequalified for competition for large fixed-price construction contracts in lower New York (the five boroughs of New York City and Nassau and Suffolk counties).

The New York Facilities Service Office, Hoboken, NJ, requested contractor qualification statements under solicitation 33245-00-A-LNY02 on August 22, 2000. Contractors prequalified were to be considered for repair and improvement and new construction projects of between \$750,000 and \$5 million.<sup>1</sup>

The qualification statement was a 20-page questionnaire which solicited the contractor's response in twelve sections, each of which was to be scored either as pass/fail or assigned up to a specified number of points, as follows:

Contractor's Background	pass/fail
Judgments, Claims, and Lawsuits	pass/fail
Suspension or Debarment	pass/fail
Certification and Affirmation	pass/fail
Comparable Experience	45 points
Non-Comparable Experience	20 points
Contractor Capabilities	25 points
Safety	10 points

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<sup>1</sup> Some pages of the qualification statement contained references to other areas (upper New York, New Jersey) and to smaller projects (\$100,000 to \$750,000). Danaco was prequalified for smaller projects in lower New York under the contemporaneous solicitation 33245-00-A-LNY01.

Workload	pass/fail
Financial Capability	pass/fail
Bonding Information	pass/fail
Banking References	pass/fail

The qualification statement included the following:

#### The Qualification Statement Evaluation Process

The Postal Service is interested in selecting the most qualified companies. Meeting the minimum requirement established in the Qualification Statement will not guarantee qualification. Only those companies that provide superior Experience/Performance and Capabilities can achieve the maximum number of points and become prequalified.

An Evaluation Team, composed of qualified Postal Service employees, conducts an examination of each Contractor Qualification Statement. The Evaluation Team will review each Statement for compliance with the Evaluation criteria established in this Solicitation. In addition to the Qualification Statement, all other records concerning the contractor's prior performance with the Postal Service, including Performance Evaluations, the loss of eligibility to receive proposal requests, or prior loss of Prequalified status, will be used in the determination to award prequalification status.

The comparable and non-comparable experience sections of the questionnaire, section 5 and 6, requested information on at least 5 but no more than 10 comparable projects and as many as 10 non-comparable projects.<sup>2</sup> As to each project, specified information, including the original and final contract amount and duration, was to be provided. If the final amount or duration had increased by more than 5% from the original, an explanation was to be attached. Comparable experience was to be considered more desirable than non-comparable experience.

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<sup>2</sup> A comparable project had the following characteristics (paraphrased):

- Ongoing or completed within the last five years
- Located within New York, New Jersey, or Connecticut
- Construction cost of \$2.5 million or more
- The offeror was the prime contractor (single or multiple prime)
- Project scope was repair, restoration, expansion, alteration, or new construction
- Building type was, or was comparable to, industrial, manufacturing, commercial, retail, postal, or government (including military)

A non-comparable project had these characteristics (paraphrased):

- Ongoing or completed within the last five years
- Construction cost of \$1.5 million or more
- The offeror was the prime contractor (single or multiple prime)

Contractor capabilities, section 7, requested offerors to attach statements addressing three topics: contractor organization and personnel,<sup>3</sup> company resources,<sup>4</sup> and quality management.<sup>5</sup> Safety, section 10, required a copy of the company's safety program and a statement describing "safety procedures that will be implemented for a typical project," programs intended to improve company safety, and "[r]esumes of the individual(s) responsible to monitor, update, and enforce the company's Quality Management/Control Program. [Sic.]" The most recent two year's OSHA Forms 200, Log and Summary Occupational Injuries and Illnesses, and a chart of recent incident data were also requested.<sup>6</sup>

The financial capability portion of the qualification statement, Section 10, directed offerors as follows:

Dunn [sic] and Bradstreet Report

Attach a copy of the following Dunn and Bradstreet Reports for your company(s) generated within the last six (6) months of the due date of the solicitation:

- Business Information Report
- Payment Analysis Report
- Credit Guide Report (Level II)

The following conditions will result in a *Fail* rating for Financial Capability:

Financial Condition	Poor
Paydex <sup>[7]</sup>	Less than 71

<sup>3</sup> Including an organization chart and firm profile, names and resumes of key personnel, and resumes (identifying comparable experience) of two project superintendents to be assigned to postal projects.

<sup>4</sup> Including expertise, capability, structure and resources to handle building construction, project management approach, approach to procurement of subcontracts and approximate percentage to be subcontracted, and a sample CPM or bar chart construction schedule.

<sup>5</sup> Including a copy of the company's quality management/control program, the process of assuring completion in accordance with specifications and deficiency correction, company or offered programs to improve construction policy performance, and resumes of the individuals who monitor, update, and enforce the quality management/control program.

<sup>6</sup> During the evaluation process, Danaco was advised that it needed to provide the resume of the person responsible for updating and enforcing the company's safety management/control plan and its OSHA Forms 200. Danaco provided the requested information, noting that the resume requirement had been misstated in the qualification statement.

<sup>7</sup> "Dun and Bradstreet [D&B] is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such reports are routinely used by contracting agencies in evaluating contractor responsibility." *International Shipbuilding, Inc.*, Comp. Gen. Dec. B-257071.2, December 16, 1994, 94-2 CPD ¶ 245. PAYDEX is D&B's registered trademark and its "PAYDEX score," a component of its Payment Analysis Report, is "a unique, dollar-weighted indicator [of

(Footnote continued on next page.)

Current Ratio	Less than 1.0
Date of Report	Not within the last six (6) months . . . .

As to bonding capability, section 11, offerors were to provide letters from their bonding companies demonstrating, *inter alia*, “your bonding capacity (aggregate dollar amount),” “the amount of bonding outstanding,” and “the amount of working capital required to maintain the bonding capacity.”

Danaco provided information as requested by the qualification statement. Its response was evaluated. By letter dated November 13, which it received on November 16, Danaco was advised that it had not been prequalified. It requested a debriefing, which it received on December 4. A memorandum to the file in the form of a checklist, completed after the debriefing, indicates that Danaco was told of the factors which it failed and of its scores. It also states that 13 of 40 applying firms were prequalified, and that the lowest point score of the firms prequalified was 44.

Danaco’s protest recites that it was told at the debriefing that it had received scores on various elements as follows:

Comparable Experience	14 points
Non-Comparable Experience	3 points
Contractor Capabilities	16 points
Safety	9 points
Financial Capability	fail
Bonding Information	fail

Danaco submitted information about five prior non-comparable projects, four of which it contends met the requirements of section 6. Danaco states that it received credit for two of the projects (Morgan P&D, \$2.2 million, 2 points; Metropolitan Transit, \$1.7 million, 1 point), but received no credit for the other two projects (Mid Island P&DC, \$2.1 million; Metro North Railroad Building, \$2.2. million). It asserts that the debriefer could not explain why those facilities were not counted.

Danaco contends that the debriefer similarly did not know why Danaco received its contractor capabilities score and did not receive full credit under the safety factor. The protester contends that it should have been scored higher on both items because “Danaco has an excellent quality control program and the USPS is quite familiar with it since Danaco is currently performing two projects in excess of eight million dollars for the New York Facilities Office” and “Danaco has no job related illnesses or injuries, in the last five years, it has only had two lost man days due to illness or injury; [and] it has not been cited by the state or federal OSHA representatives for any violations.”

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how a firm has paid its bills] . . . based on up to 875 payment experiences as reported to D&B by various vendors.” [library.dialog.com/products/aids/dnbpar.html](http://library.dialog.com/products/aids/dnbpar.html)

The Postal Service explained the basis for Danaco's financial capability score as involving its PAYDEX score as reported by Dun & Bradstreet (D&B). Danaco disputed the PAYDEX score and the accuracy of the D&B report.<sup>8</sup>

Danaco contends that its bonding capacity was \$26 million, over two and one-half times the Postal Service's \$10,000,000 requirement, but that the debriefer said it failed on that factor because Danaco was viewed as having outstanding amounts in excess of 50% of its bonding capacity, a criterion not discussed in the qualification statement.

The protest contends that the assignment of points for the omitted projects would bring Danaco at least to the level of the lowest scored qualified supplier and that the debriefer's failure to explain its contractor capability and safety information calls into question the reasonableness of those evaluations. With regard to its financial status, Danaco contends that its financial condition is excellent, and questions the Postal Service's reliance on the PAYDEX score to disqualify Danaco here although Danaco was qualified for smaller projects in lower New York on the basis of the same information. As to bonding, Danaco faults both the 50% requirement, discussed above, as well as the Postal Service's use of the total value of contracts in progress, rather than their cost to complete.

The protester views Danaco's evaluation as arbitrary, capricious, and not supported by substantial evidence. It urges that we direct its reevaluation, and its inclusion in the prequalified range "if it exceeds the forty four points of the lowest accepted contractor."

The contracting officer's statement responds to the protester's objections to its evaluation as follows:

- Because Danaco's submission did not number the projects submitted as non-comparable, confusion existed with respect to which projects were scored. Danaco actually received 2 points for the Morgan P&D project and 1 point for the Mid Island P&D project; it received no credit for the Metropolitan Transit and Metro North Railroad Buildings.<sup>9</sup> According to the contracting officer, the Morgan project received its points because it "did compare favorably to a typical Postal

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<sup>8</sup> Danaco had raised its objections to the D&B report in its prequalification submission, taking "strong exception" to the PAYDEX calculation because D&B had identified only \$306,000 in payments during a period when it had had \$15 million in gross sales and some \$11 million in payments to subcontractors and suppliers. Danaco had offered "to provide references documenting that our payment history is far superior to what the [D&B] report reflects."

<sup>9</sup> The contracting officer's statement refers to this as "USPS Morgan P&DC - CFC Retrofit," which the protester's rebuttal asserts was a \$300,000 project rather than the \$2.2 million dollar Morgan cooling tower project which was submitted. If the statement's description is incorrect, the error appears immaterial, since the Morgan project was evaluated at the \$2.2 million dollar price indicated; a \$300,000 project would not have met the \$1.5 million threshold for non-comparable projects nor have "compared favorably" to projects within the \$750,000 — \$5 million range being acquired.

Service project, and the submitted documentation sufficiently justified the increases to the contract amount and time.” Mid Island received one point because although it compared favorably to a typical project, “the submitted documentation did not sufficiently justify the increases to the contract amount and time.” The Metro North project received no points because it “was fairly specific to railroad work” and thus did not compare favorably to postal projects and the increases to its contract amount and duration were not substantially justified. The Metropolitan Transit work received no points because, as it was described, it involved work on ten different bus terminals, none of which individually met the \$1.5 million threshold. “The decision logic used . . . in awarding points for this section was explained . . . during the debriefing.”<sup>10</sup>

- Danaco was scored on contractor capabilities by comparing “the stated requirements against what the contractor actually submitted.” Its past performance as to quality control was scored in a later phase of the evaluation, and was not relevant here, where points awarded were “based upon the documentation submitted.” Similarly, Danaco’s points for safety were based on an evaluation of “the submitted safety program and the submitted documentation . . . .”
- Danaco’s D&B PAYDEX score, which was significantly lower than the cutoff score of 71 identified in the qualification statement, “indicates that, according to Dunn and Bradstreet, this firm does not pay its suppliers and subcontractors in a timely manner. This is a serious concern for the Postal Service . . . . The [supplemental] information . . . Danaco provided [regarding the D&B Report] did not reduce or eliminate the concerns of the Evaluation Team concerning its financial capability.” The evaluators also considered, adversely, the fact that Danaco “was in bankruptcy as recently as 1996”; “a history of bankruptcy . . . is not a typical characteristic of the most highly qualified firms” for projects of the contemplated dollar values. (Elsewhere, the statement asserts that the requirements for the smaller lower New York projects differed from the requirements here, and that each prequalification submission was evaluated independently. “The prequalification status of the same company for another solicitation is irrelevant.”)
- Danaco was erroneously “failed” as to its bonding capacity. “Nevertheless, the impact [of that rating] upon the final determination of prequalification status [was] relatively minor. . . . [Danaco] passed the other two [bonding] benchmarks . . . [and] had met the minimum aggregate bonding requirement . . . , therefore any

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<sup>10</sup> The contracting officer’s statement makes similar contentions with regard to the protester’s other assertions about matters unexplained at the debriefing; in rebuttal, the protester forcefully disputes those contentions. We need not resolve the disagreement. Complaints about the conduct of debriefings are outside the scope of our review. *A-1 Masonry Construction and General Contractors*, P.S. Protest No. 00-14, September 6, 2000. The record concerning what transpired at the debriefing would have been more satisfactory had its documentation, which PM 4.2.8 d 3. requires, reflected more of what transpired.

other concerns regarding bonding capacity were minor . . . and did not greatly influence the determination of prequalification status.”

- Danaco’s prior prequalification and its status as an incumbent contractor were relevant “only . . . in terms of . . . past performance” and did not require its prequalification here.
- “The protester has incorrectly assumed that . . . prequalification status is entirely dependent upon the number of points awarded. . . . It is the overall evaluation that is considered [in determining] which firms are the most highly qualified.”
- The following information, in addition to that contested by the protester and discussed above, contributed to the decision not to prequalified Danaco:
  - Danaco’s failure to identify five qualified projects (it identified only two) “was a clear indication that D.C.I. Danaco did not have sufficient comparable experience and was therefore not one of the most highly qualified firms.”
  - Danaco’s responses to sections 2 and 3, judgments, claims, and lawsuits, and suspensions and debarments,<sup>11</sup> while not in themselves disqualifying, implied risks which were taken into account in the determination.
  - The review of Danaco’s performance evaluations, as contemplated by the qualification statement instructions, *supra*, p. 2, disclosed three evaluations, two of which were “fair,” and one of which was “unsatisfactory.” “[I]n the experience of the Evaluation Team, . . . the presence of ‘fair’ and ‘unsatisfactory’ evaluations is not a typical characteristic of the most highly qualified firms” for projects of this scope.

The protester submitted rebuttal comments which reiterated points previously made and the following new observations:

- The contracting officer’s assertion that “all of the ‘elements of a company’s qualification statement are utilized . . . in making a Best Value determination . . . .” (first ellipsis added) indicates that the evaluation was not in accordance with the stated evaluation scheme.
- It was not proper to limit Danaco’s score for failing to identify a sufficient number of comparable or non-comparable projects, since no relationship between number of projects and scores was identified in the qualification statement.

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<sup>11</sup> The information provided as to suspensions and debarments did not, in fact, address those items, but related to suits involving claims of Danaco’s wrongful terminations from specific projects.

- The evaluators ignored the nature of the work done on the Metro North tower project, which Danaco had described and which was similar to the work performed in postal renovation projects.
- The MTA bus depot projects should have been considered; the solicitation did not restrict submitted contracts to single projects.
- The Postal Service’s information concerning Danaco’s bankruptcy was incorrect; the chapter 11 reorganization was filed in 1989,<sup>12</sup> all its creditors were paid in full, and the bankruptcy was not considered disqualifying either with regard to the smaller projects here or in Danaco’s previous prequalifications.
- Danaco’s successful past performance “of the eight million dollar USPS project in Manhattan”<sup>13</sup> should have been sufficient to demonstrate its capabilities, so that it was arbitrary and capricious to failure to prequalify it
- Various of the contracting officer’s statements indicate that the evaluators deviated from the stated evaluation criteria and “made some overall rating different from the twelve [identified evaluation] items.”
- If Danaco was excluded for lacking enough large project experience, it is concerned “upon information and belief” that firms which were prequalified “did not have any comparable experience.”
- The three evaluations of Danaco’s prior performance cited by the contracting officer all related to the same \$400,000 project, and Danaco suspects that those evaluations are biased because it had criticized one evaluator, who had been the COR on that project, “for holding progress payments.” Danaco’s \$9 million of other postal projects were not evaluated.

## DISCUSSION

This office plays a limited role in reviewing the technical evaluation of pre-qualification or similar information submitted by a potential offeror. Such a review affords considerable discretion to the contracting officer and the evaluators. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. The protester bears the burden of overcoming the

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<sup>12</sup> The protester misstates the contracting officer as asserting that the bankruptcy *occurred* in 1996. Instead, as quoted above, he recited that the firm *remained* in bankruptcy reorganization in that year, a fact we do not understand the protester to challenge.

<sup>13</sup> This is apparently a reference to the Manhattan P&D Center listed as one of Danaco’s two comparable experience projects, although there it is listed with an original contract value of \$4.2 million and a final contract value of \$6.2 million.



“presumption of correctness” which accompanies the statements of contracting officers.

*W. M. Schlosser Co., Inc.*, P.S. Protest No. 93-30, March 9, 1994 (citations omitted).

It appears that Danaco was told at the debriefing that it had been found not to be eligible for prequalification for two reasons; first, it failed two of the pass/fail tests set out in the qualification statement (bonding capacity and failure to demonstrate a PAYDEX score of 71 or more), and second, that its overall point score was insufficiently high to warrant prequalification. In the course of the protest, the contracting officer has conceded that one of the pass/fail failures was incorrect, but restated his reliance on the second failure, undertook to justify the point scores assigned to Danaco, and offered additional bases why Danaco was not among the most qualified suppliers. Danaco has responded with objections to that justification and those new bases.

Although, as discussed below, there are problems with the way various items were handled in the course of Danaco’s evaluation, those flaws did not erroneously prevent the protester’s prequalification. In the course of the protest, the contracting officer has noted section 5’s requirement that suppliers “[s]ubmit a *minimum* of five (5) comparable projects . . . .” (Emphasis added.) Danaco concedes that it submitted only two. The failure to meet that requirement was a sufficient basis for Danaco’s exclusion from the prequalified list:

The solicitation requested evidence of previous experience with at least two industrial-type design/build projects of a specified minimum size; Morganti [the protester] demonstrated design/build experience with respect to correctional, not industrial, facilities, only one of which met the size standard. Its contention that those projects were considered with respect to an earlier postal project have been adequately rebutted by the contracting officer, who has demonstrated that the prequalification requirements stated for the earlier project were different from the requirements stated for this one. Accordingly, neither Morganti's previous qualification for other postal projects nor its status as a large firm with substantial design/build and construction experience are appropriate substitutes for the experience with specific projects requested here.

*Morganti Incorporated, Giordano Construction Co., Inc.*, P.S. Protest Nos. 94-01; 94-03, March 4, 1994 (footnote omitted).

Danaco was also properly failed for submitting an unsatisfactory PAYDEX score. The requirement for a score of 71 or better was established in the qualification statement. Danaco’s objections to the basis on which Dun & Bradstreet calculated that score was a matter which would have been better put to the rating firm than to the contracting officer, since the firm is responsible for the basis on which it makes its calculation. Danaco’s contention that it made other payments more timely than those which D&B reported does not contest the accuracy of the reporting firm’s conclusions about those reported payments. To the extent that the protester’s complaint involves an objection to the use

of the PAYDEX score or the particular passing score which was selected, it challenges a term of the solicitation and may not be considered after submissions are due. PM 3.6.4.b.<sup>14</sup>

Some aspects of the evaluation were less than satisfactory. For example, the manner in which points were assigned to non-comparable experience was faulty. The evaluation scheme weighted comparable experience more than twice as favorably as non-comparable experience (45 points to 20 points), and distinguished the latter from the former in four specific ways (location, dollar amount, project scope, and building type). As the evaluation of Danaco's Metropolitan Railroad project indicates, however, the evaluators further diminished the weighting for non-comparable experience which they found excessively dissimilar to the sort of work contemplated for future solicitations. That further diminution was incorrect as inconsistent with the terms of the qualification statement, which gave no indication that projects would receive even less credit for an excessive degree of non-comparability.<sup>15</sup>

Further, the contracting officer's statement that the concerns occasioned by Danaco's purported failure to demonstrate an adequate bonding capacity "were "minor . . . and did not greatly influence the determination of prequalification status" is flatly inconsistent with the stated prequalification criteria, which included eight explicit pass/fail elements; the only logical construction of the document is that suppliers who "failed" any one of those elements would be removed from further consideration.<sup>16</sup> Concluding that Danaco

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<sup>14</sup> Whatever different requirements the contemporaneous qualification statement for smaller projects in lower New York may have had (the contracting officer enumerates no specific differences), it included the same prerequisites for financial capability as this one, including a minimum PAYDEX score of 71. It is thus difficult to understand the basis on which Danaco was prequalified for those smaller projects. However, there was no requirement that any leniency afforded in that instance be afforded here. See, e.g., *NJCT Corporation*, Comp. Gen. Dec. B-219434, 64 Comp. Gen. 883; 1985. ("Responsibility determinations are based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental and the fact that different conclusions may be reached as to a firm's responsibility does not demonstrate unreasonableness or bad faith. This is true even where the same contracting officer has made an earlier affirmative determination of [the same firm's] responsibility." (Citations omitted.))

<sup>15</sup> The diminution of credit for projects for which offered explanations of cost growth or delay were not satisfactory was not objectionable. *W M. Schlosser & Company, supra*.

<sup>16</sup> Such a result is often stated explicitly, See, e.g., *Carlson Wagonlit Travel*, Comp. Gen. Dec B-287016, March 6, 2001, 2001 U.S. Comp. Gen. LEXIS 41 ("NSA planned to use a pass/fail evaluation system . . . . To be considered for award, offerors' proposals were required to pass all criteria; a proposal failing one criterion would not be considered for award."); *ENMAX Corporation*, Comp. Gen. Dec. B-281965, May 12, 1999, 99-1 CPD ¶ 102 ("[I]n the narrative . . . , the RFP explained, in relevant part, that: Each factor, identified below, will be considered equally important and be rated as either pass or fail. . . . Only those offerors which receive a 'pass' evaluation on all three factors will be eligible for award. The offeror shall ensure that each and every area of each factor has been addressed. Since the technical area is rated as pass/fail, failure to do so may result in failure of the technical proposal.")

met, rather than failed to meet, the bonding capacity requirement thus removed that impediment to its consideration for prequalification.

The remainder of Danaco's objections are without merit:

- Its challenges to the evaluation of its quality and safety programs are unpersuasive. It is the submissions which are evaluated, and past performance cannot substitute for them. *Morganti Incorporated, Giordano Construction Co., Inc., supra*.
- It was neither illogical nor inconsistent with the solicitation not to consider Danaco's work on multiple bus depots for the Metropolitan Transit Authority as non-comparable experience. The prequalification statement sought information on "projects" with a stated minimum construction value. That Danaco's contract for work at a number of sites had that value did not make it a single "project" for the purposes of postal evaluation.
- The contention "upon information and belief" that other suppliers who were prequalified may not have met the stated requirement for comparable project experience fails for want of proof. In the absence of evidence to support the allegation, it amounts to mere speculation, which is insufficient alone to provide the basis for sustaining a protest. *Automated Data Management, Inc.*, Comp. Gen. Dec. B-234549, March 2, 1989; 89-1 CPD ¶ 229.
- Danaco's assumption that the evaluation of its prior contract performance was affected by bias is similarly unsupported. "[C]ontentions of bias must be supported by more than surmise." *Pitney Bowes Corporation*, P.S. Protest No. 00-16, December 1, 2000.

The protest is denied.

William J. Jones  
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Contract Protests and Policies