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Decision

Matter of: The Bionetics Corporation

File: B-405145; B-405145.2

Date: September 2, 2011

Michael L. Sterling, Esq., and William M. Dozier, Esq., Vandeventer Black LLP, for the protester.

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DIGEST

1. Protest challenging the evaluation of offerors' past performance, technical proposals, and price is denied where the record demonstrates that the agency's evaluation was reasonable and consistent with the stated evaluation criteria.
 2. Protest that agency failed to hold equal and meaningful discussions with protester is denied where the protester has not shown that it was prejudiced as a result.
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DECISION

The Bionetics Corporation, of Yorktown, Virginia, protests the award of a contract to Priority One Services, Inc., of Alexandria, Virginia, under request for proposals (RFP) No. 11-223-SOL-00006, issued by the Department of Health and Human Services (HHS), Food and Drug Administration (FDA) for services for animal care, diet preparation, and veterinary care for the animal population housed at the National Center for Toxicological Research (NCTR). Bionetics challenges the agency's evaluation of its proposal under the technical, past performance, and price factors. Bionetics also argues and maintains that the agency failed to conduct meaningful discussions.

We deny the protest.

BACKGROUND

On December 21, 2010, the RFP was published in FedBizOpps as a small business set-aside and contemplated the award of a fixed-price contract for a base year and four option years. RFP ¶¶ V.1.2, V.1.3. The requirement was for technical services in support of animal research protocols. RFP ¶ II.2. Included in the requirement were three tasks. Task 1 was for veterinary care services for the animals. Task 2 was for animal care services to include, but not limited to feeding, watering, maintaining a clean environment, operating cage processing areas, making and recording observations, and breeding laboratory animals. Task 3 was for diet preparation services to include, but not limited to, receiving, storing, processing, and distributing animal diets as well as preparing diets, water, gavage solutions, and topical mixtures containing specific amounts of test articles. Id.

The RFP stated that the awardee would be selected on a best value basis considering relevant experience, technical approach and understanding, past performance, and price. RFP ¶¶ V.7.1, V.7.2. The relevant experience and technical approach and understanding evaluation factors were of equal importance, and all non-price evaluation factors combined were considered approximately equal to price. RFP ¶ V.7.2. Past performance was to be evaluated as performance risk and not as a weighted evaluation factor. Id.

With regard to the relevant experience evaluation factor, the solicitation required offerors to identify two to three recent projects that demonstrated their success on projects that were similar in size, scope, and complexity to this requirement. RFP ¶ V.7.2.1. The solicitation stated that the agency would evaluate the degree to which an offeror's proposal demonstrated existing knowledge of the challenges inherent in animal care, diet preparation, and veterinary services, as well as the capability to successfully manage those challenges. Id.

With regard to the technical approach and understanding factor, the solicitation required offerors to respond to two equally weighted technical subfactors: technical strategy and planning, and management approach. Id. The solicitation stated that the agency would evaluate each offeror's response to determine whether the offeror understood the work requirements and the likelihood that the proposed approach would lead to successful contract performance. Id.

With regard to past performance, the solicitation required offerors to provide past performance information with respect to the projects cited in response to the relevant experience evaluation factor. RFP ¶ V.5.3. In assessing past performance as a measure of performance risk, the solicitation stated that the government would focus on the past performance of an offeror as it related to all acquisition requirements. RFP ¶ V.7.2.1. The solicitation provided that the agency would assess the degree to which past performance reflected a trend or pattern of acceptable performance, considering completion of tasks, timeliness and quality of deliverables,

cooperativeness and teamwork with the government, and stewardship of government funds. Id.

With respect to the evaluation of price, offerors were to provide pricing for the three evaluated task areas (veterinary care, animal care, and diet preparation), as well as program management and approach, which were summed to reach an overall total price. See AR, Tab 12, Source Selection Decision, at 18. The solicitation stated that the government would evaluate price proposals for completeness and reasonableness, and that the government “may” evaluate price proposals for price realism as a measure of performance risk. RFP ¶ V.7.2.2.

On January 25, 2011, initial proposals were submitted by three offerors, including Bionetics¹, and Priority. Based on the evaluation of initial proposals, the agency established a competitive range consisting of Bionetics and Priority. With respect to the Bionetics and Priority proposals, the initial evaluation results were as follows:

OFFEROR	OVERALL RATING	PRICE²
Bionetics	Acceptable	\$19,537,034
Priority	Good	\$23,238,587

Agency Report (AR), Tab 12, Source Selection Decision, at 55.

In March and April, the agency held two rounds of discussions with the offerors. During the initial round of discussions with Priority, the agency stated that the firm’s proposal demonstrated a good understanding of the requirements and contained no weaknesses. However, the agency advised that, although the technical proposal was sound, costs appeared to be higher than expected in the areas of program management and support, diet preparation, and animal care. Id. at 40. In response to discussions, Priority eliminated some positions, merged the program director and animal program manager positions, and reduced its price. AR, Tab 7, Priority Discussions and Proposal Revisions.

During the initial round of discussions with Bionetics, the agency identified several proposal weaknesses, including concerns about the firm’s staffing plan, ability to provide certified personnel, and past performance. AR, Tab 8, Bionetics Discussions and Proposal Revisions. Although Bionetics’ proposed price for the veterinary care task area was higher than the IGCE for that task, the agency did not hold any discussions concerning price with Bionetics. Id. In response to discussions, Bionetics made staffing changes, affirmed that only qualified and

¹ Bionetics is the incumbent contractor.

² The Independent Government Cost Estimate (IGCE) was \$23,036,433. AR, Tab 12, Source Selection Decision, at 18.

certified employees would be hired, and provided additional information regarding past performance. Along with changes to its technical proposal, Bionetics increased its proposed price. Id.

During the second round of discussions, Priority was advised that its revised proposal contained a significant weakness due to the merger of the positions for project director and animal care program manager. In response, Priority separated these positions in its final revised proposal. AR, Tab 7, Priority Discussions and Proposal Revisions.

During the second round of discussions with Bionetics, the evaluators advised the company that several of the previously identified weaknesses still remained. In addition, evaluators informed Bionetics that its proposed use of three assistant technical specialist positions in an undefined role was considered unnecessary, and that the associated additional cost with these positions was considered a weakness. The evaluators also informed Bionetics that its use of lesser qualified individuals was a significant weakness. In response to the agency's concerns, Bionetics made further changes to its proposal, including some staffing changes. AR, Tab 8, Bionetics Discussions and Proposal Revisions.

Both offerors submitted their second revised proposals on April 18. The final evaluation ratings were as follows:

OFFEROR	OVERALL RATING	FINAL PRICE	PAST PERFORMANCE RISK RATING
Bionetics	Acceptable	\$19,989,303	Slightly Higher Than Expected
Priority	Good	\$19,559,416	Minimal

AR, Tab 12, Source Selection Decision, at 55.

In reviewing the revised proposals, the evaluators concluded, Priority had eliminated its single identified proposal weakness, and that Bionetics had eliminated the majority of its identified weaknesses. Id. at 43, 45. However, Bionetics did not alleviate the agency's concern about the three unnecessary assistant technical specialist positions, or about Bionetics' past performance record and its inability to provide certified personnel. Id. at 45, 56.

The source selection authority (SSA) found that Priority's proposal was technically superior to the Bionetics' proposal, as reflected in Priority's good rating compared to Bionetics' acceptable rating. Id. at 55. Some of the strengths the SSA associated with Priority's proposal included the firm's expertise with zebrafish, its enhanced quality control program, and its training program; the SSA also noted that the proposal contained no weaknesses. Id. In contrast, the SSA found that Bionetics'

proposal offered only one strength due to the firm's elimination of one administrative assistant position, and two weaknesses relating to unnecessary positions and past performance. AR, Tab 12, Source Selection Decision at 45. The SSA also doubted Bionetics ability to provide the required number of certified personnel, as shown by its proposal's reliance on a training plan that had not been successful in the past in producing highly-credentialed individuals to fill critical positions. Id. at 56. The SSA determined that the technical superiority, lower performance risk, and lower total cost associated with Priority's proposal represented the best value to the government. Id. at 62.

Priority was awarded the contract on May 23, and Bionetics elected not to participate in a debriefing. Instead, Bionetics filed a size status protest with the Small Business Administration (SBA) and a bid protest with our Office.

DISCUSSION

Bionetics protests the evaluation of its and Priority's proposals under multiple evaluation factors. First, the protester argues that its proposal was misevaluated under the technical approach and understanding and past performance factors. Second, the protester contends that the agency failed to conduct a proper price evaluation. Third, the protester maintains that the agency conducted unequal and misleading discussions. Although, we do not specifically address all of Bionetics' arguments about the evaluation of proposals and other agency actions, we have fully considered all of them and find that they afford no basis to sustain this protest.

Technical Evaluation

Bionetics argues that its proposal was misevaluated under the technical approach and understanding factor because the agency failed to consider numerous strengths in the proposal that should have led to an overall rating of at least good.³ Comments and Supplemental Protest at 16-19.

³ The protester also initially asserted that the agency improperly downgraded its proposal because the firm's proposed project director lacked experience. Protest at 7. In apparent recognition of the fact that the record does not support this contention, Bionetics claimed in its comments that Priority's proposal unreasonably received a higher rating than Bionetics' (good versus acceptable) even though it offered the same project director. Comments and Supplemental Protest at 22. However, the record does not show that the experience of the project director was a discriminator in the evaluation; the proposal ratings were based on numerous other strengths and weaknesses considered by the agency.

Where a protester challenges an agency's technical evaluation, this Office will review the evaluation record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Rome Research Corp., B-291162, Nov. 20, 2002, 2002 CPD ¶ 209 at 4. A protester's mere disagreement with an agency's judgments does not render the evaluation unreasonable. Id.

Based on our review of the record, we find that the agency's evaluation of Bionetics' proposal under the technical approach and understanding factor was reasonable. In this regard, the agency report specifically responded to each alleged strength identified by Bionetics, and explained why the alleged strength merely met the requirements of the solicitation, did not exceed the requirements in a manner that justified a strength, or were items outside the stated evaluation criteria. Supplemental Report at 9-11. For example, Bionetics argued that the agency failed to credit as a strength its proposal to retain the incumbent veterinarian, but the agency found that the proposed veterinarian was merely "representative of the norm" and not a strength. Id. at 9. Bionetics also asserted that its proposal should have received a strength for maintaining and managing equipment, but the agency noted that this was also expected as the "norm." Id. Bionetics contended that its proposal to achieve 92 percent certification for eligible employees should have been recognized as a strength, but the agency found that this approach did not exceed the RFP's requirement by a sufficient amount to warrant a strength. Id. Bionetics also argued that its experience working with unions should have been evaluated as a strength, but the agency noted that this was not an evaluation criteria that could be considered.⁴ Id.

In sum, the contemporaneous record shows that the evaluators reasonably concluded that Bionetics' proposal contained only one strength, which involved the elimination of an administrative assistant position. Bionetics' argument that its self-identified strengths mandated a higher rating is unpersuasive, and it represents mere disagreement with the well-documented judgments of the evaluators. Accordingly, we find no basis to sustain this protest ground.

⁴ Bionetics also cites three areas where it believes that the proposals were evaluated inconsistently: corporate oversight of quality control, presence of certified personnel, and hiring personnel. Comments and Supplemental Protest at 18-19. However, the agency has explained the basis of its evaluation of both proposals, and the protester has not shown these evaluation conclusions to be unreasonable or unequal.

Past Performance

Bionetics challenges the agency's evaluation of its proposal under the past performance factor. The protester argues that instead of evaluating its pattern of good performance, the government improperly focused on isolated incidents of poor performance that were cured and inappropriately characterized these prior cured incidents as a weakness. Protest at 8; Comments and Supplemental Protest at 27.

An agency's evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror's performance history, as well as consideration of actions taken to resolve prior problems, is a matter of agency discretion which we will not disturb unless the agency's assessments are unreasonable, inconsistent with the solicitation criteria, or undocumented. See, e.g., Yang Enter., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5. Further an agency's past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether that contractor, or another offeror, disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of corrective actions. See, e.g., Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5. In short, we will not substitute our judgment for that of the agency, and a protester's mere disagreement with such judgment does not provide a basis to sustain a protest. Id.; Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

As noted above, the RFP required the agency to consider the offeror's trend or pattern of acceptable performance. RFP § V.7.2.1. As part of this review, the agency considered Bionetics' performance history and identified a weakness associated with Bionetics' "substandard" management performance of one contract, and Bionetics' receipt of a cure notice in connection with its performance of its incumbent contract. The agency raised both of these issues with Bionetics during the first round of discussions. AR, Tab 8, Bionetics Discussions and Proposal Revisions.

In response to the agency's concerns, Bionetics disputed the findings that its management was substandard, and stated that the issues raised in the cure notice had been corrected to the government's satisfaction. Id.; AR, Tab 12, Source Selection Decision, 35-36.

With respect to the finding of substandard management performance, the agency concluded that Bionetics had satisfactorily addressed its concern and this issue was removed as a weakness. AR, Tab 12, Source Selection Decision, at 35. With respect to the cure notice, the agency acknowledged that Bionetics had resolved many of the performance issues; however, the agency noted that Bionetics had not resolved staffing issues, specifically the lack of certification for certain employees.

Therefore, this weakness remained. AR, Tab 8, Bionetics Discussions and Proposal Revisions.

In addition, the agency again points out that it raised this weakness with Bionetics during the second round of discussions, and the firm reiterated its commitment to having qualified personnel in all positions under the contract. Id.; AR, Tab 12, Source Selection Decision, at 36. However, based on Bionetics' prior performance, especially its difficulty in providing staff with the appropriate certifications, the agency concluded that Bionetics' response did not mitigate or eliminate the weakness. AR, Tab 12, Source Selection Decision, at 37.

We have reviewed the entire record, including the past performance information and based on our review, we conclude that the agency reasonably evaluated Bionetics' proposal. The record shows that the agency meaningfully recognized both positive and negative aspects of Bionetics prior performance record; took into consideration Bionetics' explanations and corrective actions in response to prior problems; and contemporaneously documented its evaluation. Although Bionetics argues that the past performance evaluation was to focus on an offeror's pattern of acceptable performance and not on isolated incidents of bad performance, see Comments and Supplemental Protest at 23, the RFP does not require the agency to ignore instances of poor performance, particularly where, as here, the record shows that the staffing certification issues that arose under Bionetics' earlier contract were not fully resolved. From this record, we cannot conclude that it was unreasonable for the agency to assign a slightly higher risk rating to Bionetics' proposal.

Price Evaluation

Bionetics maintains that the agency failed to conduct a price realism analysis and performed a defective price reasonableness evaluation. Specifically, Bionetics complains that the agency did not reasonably evaluate Priority's proposed approach to employ fewer workers and pay incumbent employees reduced salaries. Comments and Supplemental Protest at 11-12.

The RFP contemplated that the agency would evaluate price proposals for reasonableness and realism as a measure of performance risk. RFP § V.7.2.2. In this regard, realism was to be evaluated only to determine whether proposed prices reflected a clear understanding of the requirements and were consistent with the offeror's technical proposal. Id.

While the agency recognized that Priority reduced staffing from its initial to final proposal, Priority's final proposal offered a total of 58 employees, which is only 3 fewer than are currently working on the incumbent contract. Supplemental Report at 5; AR, Tab 12, Source Selection Decision, at 51. The agency also reviewed Priority's labor rates and found them to be reasonable and realistic because the majority of the rates were close to those used under the existing contract and other

rates were set by a collective bargaining agreement. Supplemental Report at 5. Although the protester contends that it proposed higher salaries for eight labor categories, Supplemental Comments at 10, the most significant salary difference between these proposals appears arise in the veterinary care task area. AR, Tab 12, Source Selection Decision, at 58. In that area, the agency specifically found Priority's rates to be reasonable and Bionetics' rates to be high. Id. at 58-59. The agency further compared the prices of both offerors for all tasks and found them to be "very similar," with only a 2.1 percent difference separating the firms in terms of overall total price. Id. at 58. Based on this record, we find no basis to question the agency's evaluation of price or the risk associated with Priority's staffing approach.

Misleading Discussions

Finally, Bionetics argues that the agency misled it to increase staffing and price, and that discussions were unequal. Protest at 12; Comments and Supplemental Protest at 4-10, 32.

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7.

We find no basis to question the adequacy of the discussions provided to Bionetics with regard to its proposed staffing. During both rounds of discussions, the agency not only advised Bionetics where its staffing was insufficient and proposed a performance risk, it also advised Bionetics where its staffing was overstated. For example, during the second round of discussions, the agency specifically advised Bionetics that its proposal to retain three assistant technical specialists in an undefined role seemed unnecessary, and that the associated additional cost for these positions was a weakness. AR, Tab 8, Bionetics Discussions and Proposal Revisions. The record simply does not support Bionetics' allegation that it was misled.

With regard to unequal treatment during discussions, the protester argues that the agency engaged in improper price discussions with Priority, which allowed Priority to significantly reduce its price. Supplemental Protest at 4. The protester contends that, in contrast to its treatment of Priority, the agency did not engage Bionetics in discussions about its price and failed to discuss with Bionetics the areas of its proposal that exceeded the government's estimate.

In conducting discussions with offerors, agency personnel also may not "engage in conduct that . . . favors one offeror over another," Federal Acquisition Regulation (FAR) § 15.306(e)(1); in particular, agencies may not engage in what amounts to

disparate treatment of the competing offerors. Front Line Apparel Group, B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4. Although discussions may not be conducted in a manner that favors one offeror over another, discussions need not be identical among offerors; rather, discussions are tailored to each offeror's proposal. FAR § 15.306(d)(1), (e)(1); see M. Matt Durand, LLC, B-401793, Nov. 23, 2009, 2009 CPD ¶ 241 at 5.

During discussions each offeror was warned that "there is a significant amount of interest and competition related to the requirement, and it would be in the Contractor's best interest to provide its best possible price." AR, Tab 7, Priority Discussions and Proposal Revisions; Tab 8, Bionetics Discussions and Proposal Revisions. During discussions with Priority, the agency specifically advised Priority that its proposed prices were higher than expected in the areas of program management, diet preparation, and animal care. In contrast, the agency did not inform Bionetics that its price for the veterinary care task was higher than the IGCE and Priority's price for this task.⁵

The agency's decision to highlight areas where Priority's prices were higher than expected, but not to provide similar guidance to Bionetics, presents a close call on the issue of unequal discussions. On balance, however, we think Bionetics has not established that it was prejudiced by any alleged impropriety in the conduct of discussions. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7.

The protester here does not argue that it would have reduced its veterinary care price had the agency held discussions. Rather, it argues only that it would have explained to the agency that the IGCE and Priority's price for veterinary care were in error, so that the agency would have been able to conduct a proper price evaluation and determine that Priority's proposed price was unreasonable and unrealistic. Comments and Supplemental Protest at 9. Since Bionetics does not argue that it would have changed its proposal had discussion on the price issues occurred, it has not established competitive prejudice. Therefore, its protest of this aspect of discussions is denied.

In conclusion, the record here reflects a well-reasoned evaluation of the proposals of Bionetics and Priority, and Bionetics has not shown that it was competitively harmed by the agency's actions in not raising during discussions Bionetics' higher prices in

⁵ Bionetics' overall price was lower than IGCE and the total price of Priority. AR, Tab 12, Source Selection Decision, at 18, 55.

the veterinary care task area (within its initially overall lower-priced proposal). In short, we see nothing improper about the agency's selection of a higher-rated, lower-risk--and ultimately lower-priced proposal. In addition, we see no basis to conclude that improper actions by HHS--rather than a less competitive proposal from the protester--resulted in the selection decision here.

The protest is denied.

Lynn H. Gibson
General Counsel