



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bionetics Corporation--Entitlement to Costs

File: B-270323.3

Date: August 16, 1996

Del Stiltner Dameron, Esq., and Thomas F. Burke, Esq., McKenna & Cuneo, for the protester.

Richard P. Castiglia, Jr., Esq., Department of the Air Force, for the agency.

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DIGEST

The General Accounting Office does not recommend payment of the costs of filing and pursuing protests where the Air Force amended the request for proposals (RFP) evaluation scheme after determining that the original evaluation scheme was flawed and that the requirements had changed due to planned closure of an Air Force base (*i.e.*, the user activity) rather than in response to the protest allegations. Moreover, to the extent that the amendment may have been in response to the protester's belated request (*i.e.*, made in its comments on the Air Force reports) that, the Air Force cancel the RFP if it doubted the accuracy of the RFP's quantity estimates, and resolicit on the basis of revised estimates, the Air Force acted promptly after the protester made the request and did not unduly delay taking corrective action.

DECISION

Bionetics Corporation requests that our Office recommend that the Air Force pay it the reasonable costs of filing and pursuing two protests. We deny the request.

On June 7, 1995, the Air Force issued request for technical proposals No. F04699-95-R-0084, initiating the first phase of a two-step, negotiated procurement to obtain preventive/remedial maintenance and calibration services for test measurement and diagnostic support equipment at McClellan Air Force Base; the solicitation contemplated award of a requirements contract for a 1-year base period with options for three additional 1-year periods. The technical proposals of Bionetics and four other offerors were evaluated and deemed technically acceptable.

During the second phase of the procurement, request for proposals (RFP) No. F04699-95-R-0084 was issued to the five offerors that had submitted technically acceptable proposals. The RFP required prices for servicing various quantity ranges

of equipment. For example, line item No. 0002 called for the contractor to staff, manage, and operate (including preventive and remedial maintenance and calibration) the test measurement and diagnostic support equipment at McClellan Air Force Base, required fixed prices for eight possible quantity ranges of units to be serviced each month (designated as sub-line items), and indicated the quantity range that was the government's best estimate of the most likely number of units to be serviced each month.¹ The RFP stated that the average of the eight quantity-range prices would be used for evaluation purposes, and the contract would be awarded to the offeror with the lowest overall price for the basic and all option periods.²

After evaluating price proposals, the contracting officer rejected Bionetics's proposal as both mathematically and materially unbalanced and awarded the contract to the next lowest-priced offeror, Kay and Associates, Inc. (Kay). After a debriefing was conducted, Bionetics filed its initial protest in our Office on October 26, 1995, alleging that the contracting officer improperly rejected its proposal as unbalanced. Bionetics asserted that the Air Force should terminate the contract with Kay and award Bionetics the contract under the RFP evaluation scheme.

In a December 4, 1995 report, the Air Force defended its rejection of Bionetics's offer. The agency's detailed analysis showed that Bionetics's offer was internally inconsistent with high prices for the basic and option years for a number of quantity ranges and extremely low prices for others. Likewise, Bionetics's prices were higher than Kay's (and other offerors) for the basic and option years for a number of quantity ranges and drastically lower for others. For example, for the basic contract period,³ the monthly prices of Bionetics and Kay for line item No. 0002 and its sub-line items were as follows:

¹Line items Nos. 14, 26, and 38 requested prices for the same services on eight quantity ranges of equipment to be serviced during the three option periods.

²Payment under the contract would be based upon the actual number of units serviced each month at the price quoted for that number of units.

³Similar pricing patterns were shown for the option years.

| LINE ITEM | QUANTITY | RANGE | PRICE ⁴ | |
|---------------------|----------|-------|--------------------|-------------|
| | | | <u>Low</u> | <u>High</u> |
| 0002AA | 2301 | 2450 | \$147,788 | \$112,386 |
| 0002AB | 2451 | 2600 | \$151,893 | \$119,483 |
| 0002AC | 2601 | 2750 | \$155,977 | \$126,579 |
| 0002AD | 2751 | 2900 | \$160,150 | \$133,676 |
| 0002AE ⁵ | 2901 | 3050 | \$155,997 | \$140,772 |
| 0002AF | 3051 | 3200 | \$134,805 | \$147,869 |
| 0002AG | 3201 | 3350 | \$ 99,254 | \$154,966 |
| 0002AH | 3351 | 3500 | \$ 46,225 | \$162,062 |

Based upon its review of Bionetics's offer and cost data Bionetics had given it⁶ regarding some of the line items and sub-line items, the Air Force reported, among other things, that:

- (1) Bionetics's monthly price to service 2,301 units was \$147,788 while its monthly price for servicing 3,500 units was only \$46,225; thus, it would cost the Air Force almost 350 percent more to have Bionetics service roughly 1,200 fewer units per month.
- (2) Bionetics's unit price was \$60.32 for servicing 2,450 units and only \$13.21 for servicing 3,500 units; thus, the unit price for the lower quantity was more than 450 percent higher than the unit price for the higher quantity.
- (3) If the actual number of units serviced each month is at or below the government's best estimate, acceptance of Bionetics's offer will result in the Air Force's paying hundreds of thousands of dollars more to have the work done.

⁴All prices are rounded to the nearest dollar.

⁵The RFP stated that this was the government's best estimate of the most likely number of units to be serviced each month.

⁶After receiving Bionetics's initial protest, the Air Force requested that the protester supply it with cost data to support its prices for each of the quantity ranges for each year of the contract. In response, Bionetics submitted cost data only for those line items/sub-line items that it stated were priced below cost.

(4) If the Air Force consistently orders work in the best estimate range, then Bionetics's offer will represent a lower total cost than Kay's only if the basic contract and all three options are fully performed.

(5) Cost data provided by Bionetics showed the same number of management, quality, and support service employees to perform work in each of the five lowest quantity ranges. Since it should take fewer employees to service fewer units, the Air Force concluded that Bionetics had inflated its labor costs for the lowest quantity ranges and, therefore, Bionetics had overstated some of its prices in these quantity ranges.

After reviewing the agency's report on its initial protest, Bionetics filed a supplemental protest on December 13, 1995, alleging that the Air Force's price evaluation deviated from the evaluation scheme set forth in the RFP. Essentially, Bionetics argued that the Air Force's conclusion that award to Bionetics might cost significantly more than award to Kay were based upon assumptions that one or more of the options might not be exercised and that the Air Force most likely would order work at or below the "best estimate" quantity range. Bionetics argued that the assumptions were contrary to the RFP's evaluation scheme which indicated that the evaluated price would be computed using the average price for all quantity ranges rather than the "best estimate" price and would include the basic plus all option-year prices.

On December 14, the Air Force asked us to dismiss the supplemental protest as "frivolous." By letter of December 22, the protester responded to the dismissal request⁷ and complained that the Air Force had, in effect, evaluated the offers under several different hypothetical scenarios, none of which was set forth in the RFP. The protester also stated for the first time that, if the Air Force had doubts regarding the accuracy of the RFP's best estimates of the quantity of services that would be ordered during the base and all option periods of the contract, the Air Force should cancel the RFP and resolicit using revised estimates.

By letter of January 29, 1996, the Air Force restated its position that award of a contract to Bionetics would not likely result in the government's paying the lowest overall price for contract performance. The Air Force also asked us to dismiss the protests, stating:

"Because the Air Force has identified a flaw in the evaluation scheme used for this acquisition, we have decided to amend the solicitation to include a new evaluation methodology and will provide each competitor which previously

⁷Several rounds of comments were received from each of the interested parties.

had submitted an acceptable technical proposal the opportunity to submit a revised Best and Final Offer."

Because the agency proposed to amend the RFP's evaluation scheme and to allow offerors to submit revised best and final offers--essentially, the relief requested by the protester in its December 22, 1995 comments--we dismissed the protests as academic on January 30, 1996. Shortly thereafter, Bionetics requested that we recommend that the Air Force pay Bionetics its costs of filing and pursuing the protests.

Our Bid Protest Regulations provide that a protester may be entitled to reimbursement of protest costs where, prior to our issuing a decision on the merits of the protest, the procuring agency takes corrective action in response to a clearly meritorious protest. See 4 C.F.R. § 21.8(e) (1996); M.E.E., Inc., B-265605.3; B-265605.4, Feb. 22, 1996, 96-1 CPD ¶ 109. Where the agency's actions do not constitute corrective action in response to a protest, the protester is not entitled to reimbursement. Id. Moreover, we will determine the protester entitled to its protest costs only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. See LORS Medical Corp.--Entitlement to Costs, B-270269.2, Apr. 2, 1996, 96-1 CPD ¶ 171.

The Air Force's amending of the RFP's evaluation scheme was not corrective action taken in response to either Bionetics's original or supplemental protest. Bionetics asserted in both its initial and supplemental protests that the contracting officer improperly had determined that Bionetics's offer was unbalanced and that the Air Force should award it the contract in strict accord with the RFP's evaluation scheme. In defending the protests, the Air Force rejected Bionetics's allegation that Bionetics's offer was not unbalanced. Likewise, the Air Force rejected the assertion that Bionetics should be awarded the contract under the RFP's original evaluation scheme. However, during the course of investigating the allegations, the Air Force recognized that the evaluation scheme was defective because the contract probably would not be awarded to the offeror proposing the lowest cost for the performance levels that would actually be required. In addition, the Air Force reported that McClellan Air Force Base will be closed and, therefore, it is likely that not all of the options will be exercised; as noted above, Bionetics's proposal is the least costly alternative only if all options are exercised. Thus, it is clear that the Air Force took corrective action not in response to Bionetics's original protests but for reasons that arose and became apparent during its investigation and defense of Bionetics's protests. As the Air Force's corrective action was not in response to a clearly meritorious protest, Bionetics is not entitled to reimbursement of its protest costs. See 4 C.F.R. § 21.8(e); M.E.E., Inc., supra.

Bionetics's belated modification of its protests to include as a proposed remedy a request that the Air Force cancel the RFP and resolicit using its best estimates of

its actual needs does not entitle Bionetics to reimbursement of the costs of filing and pursuing its protests. As noted above, this suggested remedy was first made by Bionetics in its comments filed on December 22, 1995, and the agency notified our Office that it was taking corrective action on January 29, 1996. To the extent that the agency's corrective action may have been the result of the protester's suggestion rather than the Air Force's own investigation and changed circumstances, we believe that the Air Force's reaction to the suggested remedy was sufficiently prompt, especially considering the end of year holidays, and that there was no undue delay requiring further expense to the protester. See LORS Medical Corp.-- Entitlement to Costs, supra.

The request for costs is denied.

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