



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Bionetics Corporation

File: B-280521; B-280521.5

Date: October 14, 1998

Del S. Dameron, Esq., and Jeffrey P. Hildebrant, Esq., McKenna & Cuneo, for the protester.

David R. Johnson, Esq., Kathleen C. Little, Esq., and Robert J. Rothwell, Esq., McDermott, Will & Emery, for Johnson Controls World Services, Inc., an intervenor. John E. Lariccia, Esq., Martin F. McAlwee, Esq., and Marian E. Sullivan, Esq., Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Allegation that contracting agency conducted misleading discussions which caused protester [deleted] is denied where the record shows that the protester was properly questioned about apparent shortcomings in its approach to meeting agency requirements with respect to processing, in response to which the protester made a business decision to [deleted].

DECISION

Bionetics Corporation protests the award of a contract to Johnson Controls World Services, Inc. (JCWS) under request for proposals (RFP) No. F08650-98-R-0013, issued by the Department of the Air Force for certain visual information end products and technical services in support of pre-launch, launch, post-launch, and non-launch operations, known as the Visual Information Technical Contract (VITC). Bionetics asserts that the agency improperly and inconsistently downgraded Bionetics's initial proposal on the basis that the [deleted] presented problems with respect to required facility clearances and a 4-hour delivery requirement, while JCWS's proposal was not downgraded for [deleted], and that the agency's criticism of Bionetics's initial proposal during discussions misled Bionetics into proposing in its best and final offer (BAFO) to perform this work [deleted], thereby substantially increasing Bionetics's evaluated price. In a supplemental protest, Bionetics also

asserts that JCWS engaged in impermissible "bait and switch" practices with respect to certain key personnel identified in its BAFO.

We deny the protest.

The RFP, issued on May 20, 1997, contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity, labor-hour contract for a base period with four 1-year options. The contract is to obtain visual imaging end products for launch and non-launch events for the 45th Space Wing and NASA's Kennedy Space Center. Offerors were to propose a fixed price per event for Basic Launch Image Acquisition Packages (camera/equipment setups and operations for missile launches and shuttle launches and landings), and Launch Image Acquisition Services (covering launches, landings, slips and scrubs). Additionally, offerors were to propose a price per hour for over and above image acquisition requirements (requested still, motion picture, and video coverage for non-launch activities and government equipment maintenance support). Film, digital images, and video processing and print products were to be proposed on a schedule identifying additional products with prices for each product. RFP § B. The VITC also contained five separately priced contract data requirements lists.

The RFP provided for a best value award to be determined by an integrated assessment of the cost criterion, the specific criteria, assessment criteria, proposal risk, performance risk, and general considerations. RFP § M-2.a. The RFP listed as the evaluation criteria technical/management factors (consisting of project management and image acquisition/processing/end products), cost, and general considerations. All technical evaluation factors, when combined, were approximately equal in value to cost. General considerations were of lesser importance but were to be an important consideration in the award decision. RFP § M-2.a. The RFP also provided that proposals would be evaluated for proposal risk, which would involve an assessment of the risk associated with the offeror's proposed approach to accomplish the requirements. RFP § M-2.d. Proposals were also to be evaluated for performance risk, which would involve an assessment of the probability of the offeror successfully accomplishing the proposed effort based on the offeror's demonstrated relevant present and past performance.¹ RFP § M.e. The RFP further provided that for the purpose of evaluating proposals, rental charges for the use of non-mandatory government-owned facilities and equipment which the contractor proposed to use would be added to the proposal price. RFP § M-900.

Five initial proposals were received by the June 20, 1997 closing date. After evaluation of the initial proposals, the Air Force determined that all proposals

¹The possible evaluation ratings for proposals risk and performance risk were high, moderate, and low.

contained informational deficiencies and format errors. Amendment No. 0003 was issued to clarify common problem areas and allow offerors an opportunity to revise their proposals. Amendment No. 0003 also added clause M-901, which established a revised methodology for computing the total evaluated price for award purposes.

Each offeror submitted a revised proposal by the September 19 closing date. Each revised proposal was evaluated for performance and proposal risk in addition to being evaluated under a color/adjectival rating scheme for each of the evaluation factors.² After evaluation of the revised proposals, a competitive range determination was made. Bionetics's proposal was initially excluded from the competitive range on the basis that it did not reasonably address the essential requirements of the RFP and that the extent and nature of the deficiencies were such that to remedy them would require the submission of virtually an entirely new proposal. Bionetics protested its exclusion to our Office, whereupon the agency took corrective action by including Bionetics in the competitive range.

Discussions were held with the four competitive range offerors, including Bionetics, and numerous clarification requests and points for negotiations were issued. On May 29, 1998, a request for BAFOs was issued to the competitive range offerors. BAFOs were received from all four offerors and were evaluated. Bionetics received a green (acceptable) rating and low performance risk rating in both the project management and image acquisition areas. JCWS received a blue (exceptional) rating and low performance risk ratings in the same evaluation areas. Bionetics's total evaluated price was [deleted] and JCWS's price was \$134 million. Another offeror, [deleted], also received a blue rating in both areas with low performance risk ratings, and had a total evaluated price of, [deleted].³ Three competitive range proposals, including those of JCWS, RMS, and another offeror (not Bionetics), were considered to represent significant technical strengths and low proposal risks, and were rated essentially technically equal (and therefore all superior to Bionetics's proposal). Because JCWS's price was significantly lower than that of the other offerors, the source selection authority (SSA) determined, on June 19, that JCWS offered the best overall value to the government and contract award was made to JCWS on June 26. Bionetics was provided a debriefing on June 30 and this protest was subsequently filed on July 6.

²The color/adjectival ratings were: blue/exceptional, green/acceptable, yellow/marginal, and red/unacceptable. Memorandum of Law at 5.

³Bionetics in its protest submissions was under the mistaken belief that [deleted] total evaluated price was approximately [deleted]. However, the agency report explains that there was an error in calculating [deleted] evaluated price and the actual figure is approximately [deleted]. Agency Report at Tab 8.

Bionetics argues that the agency misled it into proposing in its BAFO to perform certain work [deleted], which resulted in it being assessed a [deleted], substantially increasing its evaluated price. Bionetics contends that, based on the agency's determination and advice that its initial proposal to perform [deleted], and to [deleted], constituted substantial technical drawbacks, Bionetics corrected these drawbacks in its BAFO by [deleted], which increased Bionetics's evaluated price by [deleted]. Bionetics also suggests that the Air Force treated it and JCWS unequally because the agency failed to evaluate JCWS's proposed use of [deleted].

In negotiated procurements, procuring agencies are generally required to conduct meaningful discussions. In order for discussions to be meaningful, sufficient information must be furnished to offerors in the competitive range as to the areas in which their proposals are believed to be weak so that the offerors have a reasonable opportunity to address those areas of weakness which could have a competitive impact. The government does not satisfy its obligation by misleading an offeror or by conducting prejudicially unequal discussions. Lucas Place, Ltd., B-238008, B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398 at 4. Here, we do not find that the discussions were improper or misleading.

The record shows that Bionetics was downgraded initially because it relied on government-provided support not listed in the RFP, such as [deleted]. In addition, Bionetics's proposal described [deleted] but failed to provide their commitments to and capabilities for VITC. The proposal also failed to commit to 4-hour and 24-hour delivery requirements. Further, Bionetics improperly proposed to rely on [deleted] and proposed an improper [deleted] during initial contract performance. Agency Report at Tab 7. During discussions, Bionetics was asked to explain "how still and motion picture film processing will be performed to ensure that end products will be delivered to customers in the required timeframes." Bionetics Deficiency Report/Clarification Request (DR), DR-2 at 1. The agency also advised Bionetics that its proposal failed to demonstrate that 4-hour and 24-hour delivery requirements could be unconditionally met. Bionetics was also informed that it failed to "propose a proper procedure for handling and processing classified film in the event [deleted]."⁴ DR-5 at 1.

JCWS's proposal, on the other hand, demonstrated in detail how JCWS could meet the 4-hour and 24-hour delivery requirements, and though JCWS also proposed use of [deleted], the agency concluded that JCWS integrated the work processing both by quantity and technology. For example, for routine and priority jobs [deleted], JCWS proposed a courier service to transport raw imagery to the laboratories and

⁴For subcontractors unable to obtain required clearances before the contract start date, Bionetics proposed to provide cleared personnel to process the film in the subcontractor's uncleared facility until the necessary clearances could be obtained. This was considered an improper procedure for processing classified film.

either wait at or return to the laboratories as necessary to meet deliver schedule. JCWS proposed to perform the priority processing of launch and non-launch still and video requests at [deleted] during periods of severely congested traffic. JCWS also explained how the processing capabilities of [deleted] would enable it to meet the delivery requirements. While Bionetics attempts to discredit JCWS's delivery solutions, the record shows that JCWS provided a very detailed solution that the evaluators reasonably concluded would result in timely delivery. The fact that Bionetics disagrees with the evaluators' conclusions does not make the decision unreasonable. Accordingly, we conclude that neither the evaluation nor the conduct of discussions regarding the proposals evidenced improper unequal treatment of the two offerors.

In response to the agency's discussion questions raising the concerns set out above, Bionetics chose to change its proposed technical strategy of [deleted]. In making this change to its proposals, Bionetics made a business decision. Bionetics was not misled into doing so during discussions; Bionetics was properly advised of its proposal deficiencies and elected to correct these deficiencies with a solution that, while acceptable, raised its evaluated price and caused it to be less highly rated than those of the awardee and other offerors. Accordingly, the record provides no basis to conclude that Bionetics was afforded improper or misleading discussions.

Since we conclude that Bionetics was not misled during discussions and its proposal was properly evaluated, Bionetics is not an interested party to maintain its other protest issues concerning the awardee's proposal. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (1994), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award the contract. 4 C.F.R. § 21.0(a) (1998). Determining whether a party is sufficiently interested involves consideration of a party's status in relation to a procurement. Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of our Bid Protest Regulations. Panhandle Venture V; Sterling Inv. Properties, Inc.--Recon., B-252982.3, B-252982.4, Sept. 1, 1993, 93-2 CPD ¶ 142 at 2. The Law Co., B-248631, Sept. 10, 1992, 92-2 CPD ¶ 165 at 4. A protester is not interested if it would not be in line for award if its protest were sustained. Abre Enters., Inc., B-251569.2, Mar. 16, 1993, 93-1 CPD ¶ 239 at 4.

Here, Bionetics lacks the direct economic interest necessary to qualify as an interested party to maintain its other issues. As explained above, Bionetics's proposal received a green (acceptable) rating and had the third highest evaluated price. The proposal of another offeror, [deleted], was rated blue (exceptional) and its total evaluated price was lower than Bionetics's. Because Bionetics has not protested the evaluation of [deleted] higher-rated, lower-priced proposal, even if we were to sustain the protest with respect to the awardee's proposal, Bionetics would

not be next in line for award. Accordingly, Bionetics is not an interested party to protest JCWS's evaluation and award.

The protest is denied.

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