



Comptroller General  
of the United States  
Washington, D.C. 20548

Benjamin

147163

## Decision

**Matter of:** Northwest EnviroService, Inc.  
**File:** B-247380.2  
**Date:** July 22, 1992

Gary G. Stevens, Esq., Ruth G. Tiger, Esq., and Kevin R. Garden, Esq., Bogle & Gates, for the protester.  
Grant E. Watts, Esq., Wade & De Young, for Asbestos General, Inc., an interested party.  
Jewel L. Miller, Esq., Defense Logistics Agency, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where agency determined that all three proposals received were reasonably priced and essentially equal, and that awardee's lowest-priced proposal represented the best value to the government, protester is an interested party under the General Accounting Office's Bid Protest Regulations to challenge the evaluation of proposals, despite the fact that protester submitted highest evaluated price, since if protest were sustained, there is no requirement that award be made to lowest-priced offeror under solicitation calling for award on the basis of the "best value" to the government.
2. Protest is sustained where the record lacks adequate documentation to show that the agency's source selection decision was reasonably based on the announced evaluation criteria.
3. Protest is sustained where solicitation for transportation and disposal of polychlorinated biphenyl waste specifically required offerors to submit evidence of "established working relationships" with proposed transporters and with treatment, storage, and disposal facilities, or written evidence of their willingness to provide subcontracting services, but the record does not support the agency's determination that the awardee's proposal complied with that requirement.

4. Allegation that contracting agency improperly allowed awardee to modify its proposal after the date set for receipt of best and final offers involves a matter of contract administration which the General Accounting Office does not review, since letter allegedly modifying proposal concerned only how awardee would perform the contract, and did not affect the evaluation results or selection decision which had been completed prior to agency's receipt of letter.

5. Allegation that offerors will not comply with applicable regulations as reflected by the "interim storage" requirement in solicitation for the transportation and disposal of polychlorinated biphenyl waste concerns the contracting officer's affirmative determination of responsibility which the General Accounting Office will not review absent a showing of fraud or bad faith on the part of procuring officials or that definitive responsibility criteria in the solicitation were not met; whether a successful offeror ultimately complies with requirement pertaining to environmental standards is a matter of contract administration which we will not review.

6. Although agencies may provide for a "cost realism" type analysis when soliciting firm, fixed-price proposals to measure an offeror's understanding of the requirements, where adequate competition is obtained, cost realism is generally not considered in the evaluation of such proposals since a firm, fixed-price contract provides for a definite price and places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss.

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#### DECISION

Northwest EnviroService, Inc., the incumbent, protests the award of a contract to Asbestos General, Inc., under request for proposals (RFP) No. DLA200-92-R-0063, issued by the Defense Reutilization and Marketing Service (DRMS), a field activity of the Defense Logistics Agency, for the removal, transportation, and disposal of polychlorinated biphenyl (PCB) waste from various DRMS sites in Alaska. Northwest alleges that DRMS failed to properly evaluate proposals.

We sustain the protest in part and dismiss it in part.

#### BACKGROUND

The RFP, issued on October 10, 1991, contemplated the award of a firm, fixed-price requirements contract for the removal, transportation, and disposal of PCB and PCB-contaminated materials for a base year and up to two 1-year options. Offerors were required to submit unit and extended

prices for all services necessary for the removal and disposal of different types and varying estimated amounts of contaminated materials listed in the RFP. The RFP required offerors to submit separate price and technical proposals. Technical proposals were to include a list of proposed treatment, storage, and disposal facilities (TSDf plan); a transporter matrix; and a management plan.

Section M of the RFP listed price and past performance, in that order of importance, as the only two factors DRMS would consider in evaluating proposals. The RFP explained that although past performance would not be numerically scored, an offeror's past performance would be "highly influential" in determining the relative merits of proposals. The RFP also stated that technical proposals would not be considered acceptable unless the TSDf plan, the transporter matrix, and the management plan all were acceptable. Award was to be made to the technically acceptable, responsible offeror whose proposal demonstrated the best value to the government.

Three offerors--the protester, Environmental Management, Inc., and Asbestos General--responded to the RFP by the November 12 date set for receipt of initial proposals. DRMS separately evaluated the technical proposals and the offerors's past performance.<sup>1</sup> The three offerors were rated "good" overall on past performance and all three were considered reasonably priced. DRMS considered the initial technical proposals submitted by Asbestos General and Environmental Management unacceptable but reasonably susceptible of becoming acceptable. Accordingly, the agency included the three offerors within the competitive range, conducted discussions with all three, and requested best and final offers (BAFO) by December 31. BAFOs, including options, were as follows:

Offeror

Asbestos General	\$5,960,397
Environmental Management	8,067,500
Northwest	8,726,723

Following an evaluation of BAFOs, DRMS concluded that all three proposals were technically acceptable, and that the three offerors were essentially equal. On January 12, 1992,

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<sup>1</sup>The RFP stated that offerors with "preapproved" technical proposals were required to submit only prices and any revisions to their preapproved proposals. In accordance with these instructions, Northwest submitted only a price proposal and several changes, not relevant here, to its preapproved proposal.

the contracting officer determined that based upon its low price, Asbestos General's proposal represented the best value to the government, and awarded the contract to that firm. This protest followed.<sup>2</sup>

The protester contends that had DRMS properly evaluated its past performance, Northwest would have been rated higher based upon its exemplary history. Specifically, Northwest challenges the agency's conclusion that all three offerors' past performance is equal. Northwest also alleges that DRMS improperly considered Asbestos General's proposal technically acceptable.

## DISCUSSION

### Interested party status

DRMS initially argues that the protest should be dismissed because Northwest is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1992). Relying on our decision in Federal Info. Techs., Inc., B-240855, Sept. 20, 1990, 90-2 CPD ¶ 245, DRMS contends that since Northwest's proposal was ranked third and was the highest priced, even if its protest were sustained Northwest would not be next in line for award because there is a lower-priced intervening acceptable offeror.<sup>3</sup>

Rather than ranking technical proposals, DRMS found that, except for price, all three proposals were essentially equal. The agency's arguments here overlook the substance of Northwest's challenge---that the agency improperly concluded that proposals were equal. Specifically, Northwest contends that had the agency properly evaluated past performance, its proposal would have received a higher rating, making it the best value to the government. Under a solicitation like the one here that calls for award on the

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<sup>2</sup>In accordance with Federal Acquisition Regulation (FAR) § 33.104(c)(2)(ii), the head of the contracting activity determined that urgent and compelling circumstances that significantly affect the interests of the United States did not permit waiting for our decision, and authorized continued performance of the contract.

<sup>3</sup>In the cited case, we found that the fifth ranked offeror with the highest evaluated cost was not an interested party to challenge the highest ranked offeror's eligibility for award. Since none of the protester's claims would have affected the relative standing of the unsuccessful offerors between the protester and the awardee if the protest were sustained, we found that the protester would not have been in line for award.

basis of the "best value" to the government, there is no requirement that award be made on the basis of low price. See Vicor Assocs., Inc., B-241496, Feb. 6, 1991, 91-1 CPD ¶ 127. Thus, unlike the situation in Federal Info. Techs., Inc., if we found that Northwest's arguments had merit and sustained its protest, it is entirely possible that the agency could determine that the protester's proposal represents the best value to the government, despite its higher price. See SAMCO dba Advanced Health Sys., Inc., B-237981.3, Apr. 24, 1990, 90-1 CPD ¶ 413. We therefore consider Northwest an interested party to maintain the protest. See Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

#### Evaluation of Proposals

The evaluation of technical proposals is the function of the contracting agency, and our review of an allegedly improper evaluation is limited to determining whether the evaluation was reasonable and consistent with the stated evaluation criteria. See Donald D. Jackson, B-230194 et al., Apr. 29, 1988, 88-1 CPD ¶ 419. Agencies are required to document their selection decisions so as to show the relative differences among proposals, their weaknesses and risks, and the basis and reasons for the selection decision. FAR § 15.612(d)(2); Department of the Army--Recon., B-240647.2 Feb. 26, 1991, 91-1 CPD ¶ 211. Where there is inadequate supporting rationale in the record for the source selection decision, we cannot conclude that the agency had a reasonable basis for its decision. See American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53. Here, we find that the record fails to show that the agency reasonably concluded that all three offerors were essentially equal.

#### Past Performance Evaluation

##### Asbestos General

In evaluating Asbestos General in this area, the DRMS evaluator relied on a list the firm submitted of eight projects completed during 1991. None of the contracts listed involved DRMS, and there is no indication in the record whether the firm performed any contracts for comparable services prior to 1991. With two exceptions, all of the projects listed were brief, one-time emergency responses to clean up spills, or were otherwise short-term, relatively low dollar value contracts; involved the immediate removal and disposal of wastes; and most were completed within 1 or only a few days. The evaluator contacted only three refer-

ences listed, and was unsuccessful in contacting a fourth.<sup>4</sup> The evaluator assigned a rating of "good" for Asbestos General's past performance on each of the four projects (on a scale ranging from unacceptable to superior).

The evaluation documents list no features of Asbestos General's performance in support of a rating of "good" for each project.<sup>5</sup> For each of the three, the documents simply contain a conclusory "highly recommended" notation; an occasional "recommended for future award" notation; or a cursory "no problems" notation, without describing any relative strengths, risks, or weaknesses, in Asbestos General's performance in support of those comments. Except for briefly describing the fourth project for which a rating of "good" was also assigned, the evaluation document for that project is blank in its entirety.

Another factor relevant to the reasonableness of the agency's evaluation of Asbestos General's past performance is the experience of its proposed manager, Mr. Jerry Schreiner. The record shows that Mr. Schreiner had been employed by another contractor (B&R Environmental) as its foreman in connection with a hazardous waste disposal contract DRMS had terminated for default.

The contemporaneous evaluation and source selection documents do not contain any evidence that the contracting officer considered Mr. Schreiner's prior involvement with DRMS during the past performance evaluation of Asbestos General, or during the source selection decision. In a

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<sup>4</sup>The forms DRMS used to evaluate past performance contained several sections, each requesting specific information concerning the offeror's adherence to contract schedules; administrative aspects of performance; deficiencies noted and corrective action taken; reputation for reasonableness, and cooperativeness; and commitment to customer satisfaction. A "narrative justification of rating" requested the evaluator to describe any exceptional features and benefits related to the offeror's performance.

<sup>5</sup>The evaluation documents DRMS submitted define a rating of "good" as: "Approach sound and well supported. Meets specified requirements or capabilities. Good probability of success. Some clarifications are usually required. Risks concerning potential contract performance and schedule compliance are moderate."

statement submitted in response to this protest,<sup>6</sup> the contracting officer states that he was aware that Mr. Schreiner was the president of B&R, and that the DRMS contract in question had been terminated for default. He explains, however, that since Mr. Schreiner was not an officer of Asbestos General, and since the termination for default involved a different contractor, and concerned an old contract (1988), he determined that Mr. Schreiner's previous involvement with DRMS was insufficient to adversely affect Asbestos General's record of good past performance.

In appropriate circumstances--i.e., where there is other evidence in the record clearly supporting a favorable evaluation of the offeror's past performance--the contracting officer could decide effectively to discount Mr. Schreiner's prior involvement with a firm that DRMS terminated for default for substandard performance on a similar contract. Given the lack of any specific information in the record regarding Asbestos General's own past performance, however, we find that the record here does not support the contracting officer's decision to give the firm a rating of "good" in that area.

#### Environmental Management

As with the evaluation of Asbestos General, the record does not contain sufficient information to support the agency's rating of "good" for Environmental Management in the area of past performance. It appears that for this firm, DRMS relied on the results of a past performance evaluation DRMS conducted in connection with another RFP.<sup>7</sup> Out of

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<sup>6</sup>While we consider the entire record, including statements and arguments made in response to a protest in determining whether an agency's selection decision is supportable, see Burnside--Ott Aviation Training Center, Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158, we accord greater weight to contemporaneous source selection materials rather than documents, such as the contracting officer's late statement and other statements DRMS submitted with its report, which were prepared in response to protest contentions. See DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575.

<sup>7</sup>The agency submitted what appears to be the results of a past performance evaluation of Environmental Management in connection with RFP No. DLA200-91-R-0031. The copy DRMS submitted to our Office shows a line written through the characters "92-R-0031," and the figures "92-R-0063," representing the protested RFP, hand-written immediately above. Although that document is undated and does not otherwise indicate when that performance evaluation was conducted,

approximately nine references submitted, the contracting officer received substantive comments from only one. The remaining references were either not contacted at all, or were not familiar with the firm.<sup>8</sup>

Regarding the one reference contacted, the evaluation document simply states that the firm met contract requirements and delivery schedule, and is able to "handle large projects." That document contains no information on the type of project involved; contains no specific information on any substantive areas of Environmental Management's performance, or the extent of the firm's involvement on that project; and provides no narrative justification explaining the evaluator's conclusion that the firm is capable of handling "large projects."

In response to this protest, the contracting officer states that often small businesses, such as Environmental Management, operate as second-tier subcontractors on small contracts as part of larger projects, and therefore prime contractors may not always be aware of who is actually performing the contract. The fact that Environmental Management may have listed as references prime contractors for whom the firm performed as a subcontractor, however, does not explain why they were totally unfamiliar with the firm; belies the contracting officer's conclusion that the firm can handle large volume contracts; and did not satisfy the agency's obligation to conduct, and adequately document, its evaluation of the firm's past performance on contracts for comparable services.

Given the paucity of information concerning Asbestos General and Environmental Management, there simply is insufficient evidence in the record to conclude that DRMS's overall past performance rating of "good" for those two firms is reasonable. The inadequacy of the record relating to the agency's evaluation of Asbestos General and Environmental Management is highlighted by the thoroughness of the agency's review of the protester's performance history. The record contains three evaluators' extensive comments justifying their rating of Northwest's performance on several contracts as "good" and "superior." Each rating is supported by a narrative specifically explaining the strengths and

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DRMS has informally advised us that it was conducted during December 1991.

<sup>8</sup>Next to the names of several references provided by Environmental Management appear the evaluator's hand-written notations such as "not able to vouch for firm;" "not familiar with them;" "no one else familiar with" the firm; and "never heard of them."

weaknesses of Northwest's performance, and the contracting officer based his final overall rating of Northwest on the narratives.

#### Evaluation of Technical Approach

Northwest argues that DRMS improperly found Asbestos General's and Environmental Management's proposals technically acceptable because the firms failed to comply with section L.49(a)(4) of the RFP. That section required offerors to provide evidence of "established working relationships" with the TSDFs and transporters listed in their proposals, or "written evidence" of their willingness to provide subcontracting services.

As with the evaluation of the offerors's past performance, the record is unclear as to what evidence DRMS relied upon to determine that Asbestos General and Environmental Management had complied with the section L.49(a)(4) requirement. Following the initial evaluation of technical proposals, the agency found that neither Asbestos General nor Environmental Management had provided any evidence of working relationships, and rated that portion of their proposal only "RS" (reasonably susceptible of being made acceptable). In response to that deficiency, DRMS states that Asbestos General submitted letters and documentation establishing working relationships with transporters and TSDFs; DRMS is silent in this regard concerning Environmental Management. The record is unclear as to what evidence DRMS relied upon to then upgrade their proposals from RS to acceptable.

Although Asbestos General listed six different firms in its "transporter matrix" and four additional firms in its TSDF plan, it is clear that DRMS only considered letters from Alaska Railroad and Hydro-Train--two firms listed in the transporter matrix--as evidence of their commitment to provide transporter services,<sup>9</sup> and upgraded from RS to acceptable that portion of Asbestos General's proposal. There is no indication that DRMS gave any consideration to Asbestos General's arrangements with TSDFs. In response to

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<sup>9</sup>The evaluator's hand-written comments clearly state ". . . and proof provided for Alaska RR & Alaska Hydrotrain." Immediately above that comment appears the notation "#3 (Envirosafe)." The evaluation document does not explain that notation, nor is there any indication of its meaning in the record.

a direct inquiry from our Office requesting that the agency support its rationale, the contracting officer stated:

"The requirements of L.49(a)(4) . . . do not mandate that the offeror provide written evidence of an existing working relationship with their TSDFs or transporters. L.49(a)(4) states that the offeror should provide such documentation. Such documentation may consist of various types of acceptable evidence to establish [the TSDFs and transporters's] willingness to provide subcontracting services under the solicitation."

The contracting officer then simply concludes that Asbestos General submitted acceptable evidence of established working relationships with their TSDFs and transporters. Even if we were to adopt the contracting officer's interpretation of the RFP's requirements, and even assuming that DRMS traditionally accepts "various types" of evidence, the record does not show, and the contracting officer does not explain, upon what documentation DRMS relied to conclude that Asbestos General complied with the RFP's L.49(a)(4) requirement.

Our review of the record leads us to reach the same conclusion regarding the evaluation of Environmental Management's proposal. The results of the final technical evaluation of Environmental Management show that except for the notation "previously approved," DRMS simply upgraded the firm from RS to acceptable on L.49(a)(4), without any explanation for doing so. The evaluation documents are confusing, since the results of the initial and final technical evaluation DRMS submitted concerning Environmental Management contain the evaluator's notation "not technically acceptable," even though it appears that the transporter matrix, TSDF plan, and each factor under the management plan, including L.49(a)(4), were rated acceptable.

In summary, the evaluation and source selection documents reveal that DRMS awarded a contract to the low-priced, allegedly "technically acceptable" offeror, without adequately documenting its evaluation of the offerors's past performance or technical approach. In arriving at his conclusion that all offerors's past performance were equal, the contracting officer had before him an extensive, well documented, past performance evaluation of Northwest. In contrast, the record contains little or no information concerning Asbestos General's or Environmental Management's performance history. The evaluation documents concerning those two firms do not explain their relative strengths or weaknesses, and what does appear is so limited that we cannot conclude that the contracting officer reasonably

found that all three offerors's past performance were essentially equal. The record is equally unclear as to what evidence DRMS considered in support of its conclusion that Asbestos General and Environmental Management had complied with the requirements of section L.49(a)(4) of the RFP.

Details of the reasons for the selection decision are particularly significant in this case, where DRMS announced to all potential offerors that past performance was so related to the probability of successful performance of the contract that it warranted a separate evaluation, and was to be "highly influential" in the award decision. The type of evidence DRMS required in section L.49(a)(4) of the RFP (i.e., established working relationships with planned subcontractors) for technical acceptability further established for firms that might submit offers the significance of their experience to the competition. The agency's failure to evaluate past experience may reflect the fact that such experience is not as important as announced in the RFP. Thus, the RFP may not reflect the agency's actual minimum needs, and may have prejudiced the competitive system since potential qualified firms may have been dissuaded from competing, and actual offerors may not have competed on the government's actual requirements. See General Projection Syst., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308.

While judgments concerning the evaluation of proposals are by their nature often subjective, the exercise of judgment in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced evaluation criteria upon which competing offers are selected. See Waddel Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269. Implicit in the foregoing is that the rationale for these judgments must be documented in sufficient detail to show that they are not arbitrary, and that there was a reasonable basis for the selection decision. See, e.g., TRW, Inc., 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584. Such is not apparent here. The record submitted in this case fails to show that the agency's source selection decision was reasonably based on the announced evaluation criteria as reflected in the offerors's proposals. See S&M Prop. Mgmt., B-243051, June 28, 1991, 91-1 CPD ¶ 615. Accordingly, we sustain the protest.

#### SUPPLEMENTAL PROTEST ALLEGATIONS

In a supplemental protest, Northwest argues that DRMS improperly allowed Asbestos General to modify its proposal after the submission of BAFOs. Asbestos General indicated during a technical responsibility review (TRR) that it planned to use a "drain and flush" procedure if awarded the contract. The DRMS official who conducted the TRR found that procedure unacceptable because it would violate several

federal regulations controlling the transportation and disposal of hazardous materials. In a January 13, 1992, letter, Asbestos General informed DRMS that it would not use that procedure, and that every other aspect of its proposal, including prices remained unchanged. Northwest maintains that the letter constitutes an improper late modification to Asbestos General's previously unacceptable proposal.

The record shows that prior to receipt of that letter, DRMS had completed the evaluation of proposals; the contracting officer had determined that Asbestos General's proposal was acceptable and represented the best value to the government; and he decided to award the contract to that firm. Since the January 13 letter concerned how Asbestos General would perform the contract, and clearly did not affect the evaluation results or award decision, it involves a matter of contract administration which our Office does not review. See 4 C.F.R. § 21.3(m)(1); Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86.

Northwest also alleges that neither Asbestos General nor Environmental Management provided any evidence that they, or the TSDFs they proposed, could satisfy the "interim storage" requirement of the RFP and applicable regulations.<sup>10</sup> Questions regarding the offerors's capability to meet the RFP's requirements are encompassed by a contracting officer's subjective responsibility determination, to which we will object only where the protester shows possible fraud or bad faith on the part of procurement officials, or that the solicitation contains definitive responsibility criteria that allegedly have not been applied. 4 C.F.R. § 21.3(m)(5). Neither exception applies here. In any case, whether a successful offeror ultimately complies with the RFP's requirement pertaining to environmental standards is a matter of contract administration which is within the

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<sup>10</sup>Northwest also alleges that Environmental Management's initial proposal was "fatally defective" and therefore should have been rejected as technically unacceptable because the firm initially failed to submit the TSDF plan and transporter matrix called for by the RFP. The record shows that Environmental Management did not submit a TSDF plan or a transporter matrix with its initial proposal, but that it did so prior to the date set for receipt of BAFOs. We view this to be a minor deficiency--consisting of only a list of potential transporters and TSDFs--which did not require major revisions to the initial proposal. Compare Source AV, Inc., B-234521, June 20, 1989, 89-1 CPD ¶ 578 (proposal properly excluded from competitive range where material informational deficiencies would have required major revisions in order to make proposal acceptable).

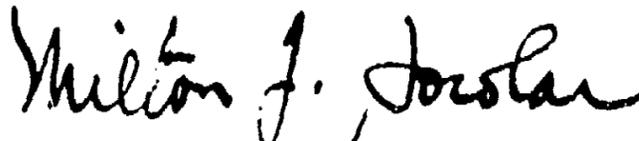
discretion of the contracting agency, and not for review under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1); Hillview Farms Fertilizers, Inc., B-187900, Dec. 28, 1976, 76-2 CPD ¶ 540.

Northwest also argues that the agency failed to properly analyze prices to determine whether they were realistic and reasonable. Where, as here, firm, fixed-price proposals are solicited, "cost realism" ordinarily is not considered in the evaluation since a firm, fixed-price contract provides for a definite price and places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 CPD ¶ 552. Agencies may provide for a "cost realism" type analysis when soliciting firm, fixed-price proposals for such purposes as measuring an offeror's understanding of the requirements. Since three offerors competed for award, DRMS reasonably found that adequate price competition existed; the extent to which DRMS would conduct a price analysis was therefore a matter left up to its discretion. Sperry Corp., B-225492; B-225492.2, Mar. 25, 1987, 87-1 CPD ¶ 341.

#### RECOMMENDATION

Since nearly 50 percent of the first year of the contract has been completed, we believe that the best remedy is to allow Asbestos General to complete the basic term of the contract. We recommend that the agency resolicit for its requirement, reflecting its actual minimum needs if the original solicitation did not do so. If following a resolicitation, Asbestos General is found to offer the best value to the government, DRMS may exercise the firm's options under Asbestos General's existing contract, if lower priced and otherwise available. We find that Northwest is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Northwest should submit its claim for such costs directly to the agency.

The protest is sustained in part and dismissed in part.

*for*   
Comptroller General  
of the United States