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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Science & Management Resources, Inc.

File: B-291803

Date: March 17, 2003

Larry McKee for the protester.

Michael L. Sterling, Esq., Vandeventer Black, for The Bionetics Corporation, an intervenor.

John C. Gatlin, Esq., and Milton D. Watkins, Esq., Department of the Air Force, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misevaluated awardee's past performance and price is denied where record shows that challenge to past performance evaluation is based on misunderstanding of the facts, and that price evaluation was legally adequate in context of a fixed-price contract.

DECISION

Science & Management Resources, Inc. (SMR) protests the award of a contract to The Bionetics Corporation under request for proposals (RFP) No. F34650-02-R-0035, issued by the Department of the Air Force for precision measurement equipment laboratory (PMEL) services at Tinker Air Force Base. SMR maintains that the agency misevaluated Bionetics's proposal.

We deny the protest.

The RFP sought fixed-price offers for a base year, with four 1-year options. Award was to be made to the firm submitting the proposal deemed to offer the best overall value to the government. Proposals first would be evaluated for technical acceptability and, among the technically acceptable proposals, the agency would make a "best value" selection based on an integrated assessment of past performance (rated as exceptional/high confidence, very good/significant confidence, satisfactory/confidence, marginal/confidence, unsatisfactory/no

confidence, or neutral/unknown confidence) and price, with past performance deemed more important than price.

After receiving and evaluating proposals, the agency rejected one as technically unacceptable and assigned SMR's and Bionetics's proposals a performance confidence rating of very good/significant. Agency Report (AR), exh. 6, at 2-3. Since both proposals had received the same performance/confidence rating, the agency selected Bionetics as the awardee based on its lower price (\$12,296,706.67, versus SMR's price of \$13,603,648.50). Id. at 3.

SMR asserts that the agency misevaluated Bionetics's proposal in the area of past performance. According to the protester, Bionetics was a subcontractor under a prior PMEL contract, and had its subcontract terminated by the prime contractor. SMR maintains that the agency was unaware of this termination when it performed its evaluation, and that Bionetics's proposal would have received a lower rating had the agency known all of the facts.

The evaluation of past performance is a matter within the discretion of the contracting agency, which our Office will review only to ensure that it was reasonable and consistent with the stated evaluation criteria and with procurement statutes and regulations. Sterling Servs., Inc., B-286326, Dec. 11, 2000, 2000 CPD ¶ 208 at 2-3.

The premise of SMR's allegation--that the agency was unaware of the termination--is incorrect. The record shows that the agency's evaluators were in fact aware of the termination, and that the agency went to some length to obtain information relating to it, as evidenced by a November 5, 2002 memorandum prepared by the agency's contract specialist. The agency conducted two conference calls with representatives of Bionetics relating to the subject, and also contacted the cognizant contracting agency personnel. As a result of these contacts, the agency concluded that the termination occurred principally as a result of a disagreement between the prime contractor and Bionetics as to whether Bionetics was entitled to an adjustment in its compensation under the subcontract as a result of an unanticipated workload increase. Memorandum, Nov. 5, 2002, at 1-2. The agency concluded that, because Bionetics had been the incumbent contractor for that requirement for 15 years prior to performing as a subcontractor,¹ and had performed without incident, and because performance under the other contract did not improve after Bionetics's subcontract was terminated, the termination did not warrant penalizing Bionetics in its past performance rating.

¹ The requirement had been performed by Bionetics as a large business, and the subsequent prime contractor received award pursuant to a small business set-aside procurement, under which Bionetics was ineligible to compete.

The agency based Bionetics's past performance rating on other materials. Specifically, the agency obtained eight past performance questionnaire responses and six Contractor Performance Assessment Reporting System (CPARS) reports, and found that Bionetics's performance had been rated very good to exceptional in the majority of cases. AR, exh. 7, at 5-6. On the basis of this information, as well as the results of its inquiries into the circumstances surrounding the subcontract termination, the agency determined that Bionetics's past performance warranted a rating at the second highest level, very good/significant. We see nothing unreasonable in the agency's actions or in its conclusions leading to its rating of Bionetics's proposal.

SMR also contends that the agency improperly failed to evaluate Bionetics's price for realism. According to the protester, had the agency done so, it would have determined that the price was unrealistically low in light of the RFP's requirements. In support of its position, the protester asserts that, as the incumbent for the requirement, it knows that the contract cannot be performed for less than its own proposed price.

The RFP provided that the agency would consider the realism of proposed prices in the context of assessing offerors' technical understanding of the requirement. RFP at 63. Assessing realism in this limited sense is appropriate in a fixed-price setting, since the risk of possible cost escalation during contract performance rests with the contractor, not the government; there is no reason to assess the potential likely cost of contract performance, since the government's liability is limited to the value of the fixed-price contract. PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 *et al.*, May 4, 1993, 93-1 CPD ¶ 366 at 5. The nature and extent of such an analysis are matters within the agency's discretion, which we will review for reasonableness and consistency with applicable laws and regulations. See Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4.

The agency evaluated Bionetics's price and determined, on the basis of adequate competition and comparison to the government estimate, that it was not only reasonable, but also "complete." AR, exh. 11, at 6. The agency further specifically determined, based on its technical review, that Bionetics's proposal was "realistic for the work to be performed." AR, exh. 11, at 6. Nothing in SMR's protest or elsewhere in the record brings this conclusion into question. The fact that Bionetics's price was lower than SMR's did not provide a basis for rejecting or downgrading Bionetics's proposal; there was no requirement that the agency base the price evaluation on such a comparison.

SMR asserts that the agency improperly failed to conduct the acquisition as a small business set-aside, since, according to SMR, there were at least two small businesses capable of performing the requirement.

Under our Bid Protest Regulations, protests of alleged improprieties on the face of a solicitation must be filed no later than the closing time for receipt of initial

proposals. 4 C.F.R. § 21.2(a)(1) (2003). SMR states that, after becoming aware of the sources-sought synopsis, it requested that the agency set the requirement aside for exclusive small business participation. The agency declined to do this, maintaining that there was inadequate small business interest, and thereafter issued the RFP on an unrestricted basis. Since the unrestricted nature of the acquisition was evident from a reading of the solicitation, SMR was required to raise this basis for protest no later than the deadline for submitting proposals. SMR maintains that its assertion is timely because it did not know that the agency had received an expression of interest from another small businesses until just prior to the filing of its protest. However, SMR states that this allegation was based on a discussion with another small business concern, and it is not apparent (SMR does not explain) why it could not have investigated in this manner prior to the closing time, as soon as it became aware that the requirement would not be set aside. Because SMR failed to do so, this aspect of its protest is untimely and will not be considered.

The protest is denied.

Anthony H. Gamboa
General Counsel