



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Biospherics, Inc.

File: B-278278

Date: January 14, 1998

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DIGEST

The contracting agency did not conduct meaningful discussions with the protester, where the agency failed to inform the firm that its cost/pricing was considered unrealistically low, but instead twice encouraged the firm to reduce its proposed price, and where the firm was not given the opportunity to comment on adverse past performance information considered during the evaluation.

DECISION

Biospherics, Inc. protests the award of a contract to Park.Net, Inc. under request for proposals (RFP) No. FS-WO-97-07, issued by the U.S. Forest Service for the development, implementation, and operation of the National Recreation Reservation Service (NRRS). Biospherics challenges the evaluation of proposals, conduct of discussions, and cost/technical trade-off decision.

We sustain the protest on the basis that the Forest Service conducted prejudicially inadequate and misleading discussions with Biospherics.

The RFP provides for the award of a fixed-price, requirements contract for a 9.5-year contract period to develop and operate a "state-of-the-art reservation service, complete with facilities, personnel, marketing, materials, equipment, communications, information distribution, and transaction record processing." The NRRS will allow the public to make reservations via telephone or internet, or at field locations, for federal recreation facilities; these facilities include campgrounds, picnic areas, group use areas, caves, cabins, lookouts, and wilderness access, and

are located on various federal lands, national recreation areas, wildernesses, water resource development projects, and historic sites.

As amended, the RFP sought pricing for five contract line items (CLIN): (1) operation of the national call center; (2) operation of the internet sales channel; (3) support for field location sales; (4) recording and tracking for field locations; and (5) support for future sales channels. An independent government estimate (IGE) was prepared that consisted only of unit prices for the CLINs.

Offerors were informed that award would be based on a cost/technical trade-off, and that technical evaluation factors were more important than price. The following technical evaluation factors were stated in descending order of importance: (1) soundness of approach, (2) technical experience, and (3) past performance.¹ The RFP also provided that price proposals would be evaluated in terms of "cost allowability, allocability, reasonableness, and realism, and by comparing prices proposed to other prices offered in terms of competitiveness."

Proposal preparation instructions informed offerors of the information required under each evaluation factor. Detailed cost and pricing data was required to support offerors' price offers. Among other things, offerors were to provide direct labor cost information, including hourly labor rates and escalation rates, cost breakdown of materials, equipment, and other direct costs, and automated data processing system costs.

Proposals were received from three offerors, including Biospherics and Park.Net. After an initial evaluation of technical and price proposals, all three offers were included in the competitive range. Biospherics' and Park.Net's proposals were determined to be "above average and demonstrated the ability to carry out the duties described in the solicitation." Written and oral discussions were conducted. Because all three offerors' CLIN unit pricing was higher than that of the IGE, the agency informed the offerors as follows:

Your pricing is rather high. We request that you review your cost elements to determine the best pricing scheme your firm can present under this proposal.

Revised technical and price proposals were received. Although the revised proposals were not scored, the agency evaluated these proposals "to identify issues for negotiation and to prepare for the site visits." Site visits with the offerors and another round of technical and price discussions were conducted. Also, the agency amended the solicitation to, among other things, provide for pricing against three estimates (high, most probable, and low) of the number of possible transactions

¹Subfactors were stated for each of the technical evaluation factors.

under the CLINs. Among the questions accompanying the request for best and final offers (BAFO), the agency asked Biospherics (as well as the other offerors) to "[p]lease review your entire price structure for any additional savings." BAFOs were received and technically evaluated as follows:²

	Biospherics	Park.Net
Soundness of Approach (45 pts.)	31	43.8
Technical Experience (32 pts.)	24.2	23.8
Past Performance (24 pts.)	14.2	18.8
TOTAL (101 pts.)	69.4	86.4

Biospherics' BAFO, which was scored substantially the same as its initial "above average" proposal, was not determined to be unacceptable. Its technical score, which was significantly lower than Park.Net's, reflected the evaluators' view that there were a number of weaknesses in Biospherics's proposed methodology. Among other things, the evaluators determined that Biospherics had proposed to [DELETED]; that Biospherics had provided little detail as to how the firm intended to implement its proposed plan; that Biospherics had failed to commit sufficient personnel to "develop, test, and implement their ambitious solution to this solicitation," particularly in relation to [DELETED]; and that Biospherics had a "serious customer service problem" in its performance of a Forest Service information-based call center contract and of another contract.

Park.Net's higher technical score reflected the evaluators' view that Park.Net, while having less than 1 year of technical experience operating a call center, offered a number of proposal strengths. Among other things, Park.Net, which had a long history of software development for call center management, offered [DELETED] and provided a detailed implementation plan.

The firms' BAFO price proposals were evaluated as follows:

	Biospherics	Park.Net	IGE
Most probable estimate (10 year projection)	\$24,802,924	\$36,828,672	\$[DELETED]

²The third offeror's proposal is not relevant to the protest and therefore will not be addressed further in this decision.

The agency determined that Biospherics's BAFO price was unrealistically low, and indicated a lack of understanding of the magnitude and complexity of the contract effort. Among other things, the agency's cost/price analyst questioned Biospherics's estimated costs for computer equipment and software/hardware maintenance, estimated staff-hours of effort and associated labor rates, and proposed profit margin. For example, the cost/price analyst noted that Biospherics had only estimated \$[DELETED] for its computer equipment and software/hardware maintenance costs, while Park.Net had estimated costs of approximately \$[DELETED] for these items. The cost/price analyst also expressed concern that Biospherics's proposed profit margin of [DELETED] percent was insufficient because the firm appeared to be in a "loss contract" situation.

Overall, the Forest Service determined that Park.Net's higher-rated, higher-priced proposal represented the best value to the government. In the source selection documentation, the agency expressly noted that Biospherics's BAFO was priced so unrealistically low as to evidence a lack of understanding and that the negative past performance reports on Biospherics were a concern to the agency.³ In concluding that Park.Net should be selected for award, the agency determined:

The Government gains several advantages by awarding to Park.Net. First, a demonstrated software solution with only minimal development required. There is absolutely minimal risk that Park.Net would not be fully functional as required on January 15, 1998, which is less than four months after award. Award to Biospherics poses high unacceptable risk that Biospherics would not be functional on the deadline date as they are [DELETED]. Second, to compound the risk of not meeting deadline dates, Biospherics prices were determined to be unrealistically low. With less revenue from low prices, Biospherics cannot afford [DELETED]. Third, the superior approach and superior technical and management abilities of Park.Net ensure success over the life of the contract even if confronted with unexpected contingencies. The most important evaluation factor is the Soundness of Approach and most of the point difference in the evaluation between Park.Net and Biospherics is in this factor. The price of the contract will be approximately \$3.6 million per year. For the difference in the price between Biospherics and Park.Net of approximately \$1.2 million [per year] the government receives superior technical and management ability and services that will assure a fully

³In its reply to the protester's comments, the agency claims that past performance was immaterial to its award decision. These post-protest arguments are not consistent with the evaluation record and are entitled to little weight. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

functioning campground reservation system will be in place by January 15, 1998. The cost to the agencies of not having the service in place January, 1998, cannot be quantified, but is very significant.

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In summary, Biospherics program is [DELETED] whereas Park.Net has [DELETED]. Biospherics pricing is questionable as to cost realism, whereas, Park.Net's pricing has proven, known costs. This firm offers an operational, proven solution to providing recreation reservation services at a known, reasonable cost.

Award was made to Park.Net. Biospherics received a debriefing and filed this protest.

Biospherics challenges the agency's cost evaluation, asserting that "Biospherics proposed pricing for over 70 [percent] of the anticipated transactions was squarely within the parameters of the Government estimate With regard to the remainder of the transactions, the Forest Service had no basis to reject Biospherics's explanation of its pricing." Biospherics also complains that the agency's discussions with Biospherics regarding its proposed pricing were inadequate and misleading. In this regard, not only did the agency not inform Biospherics during discussions that it viewed the firm's pricing as unrealistically low, but the agency informed Biospherics that its "pricing is rather high" and that the firm should review its proposal "for any additional savings." Moreover, Biospherics asserts that it was not provided an opportunity to respond to certain negative comments regarding its past performance that the agency considered in making the award selection.

The Forest Service argues that Biospherics's BAFO pricing was unrealistically low for the reasons documented in its report, that it was only after receipt of BAFOs that the agency concluded that Biospherics's proposed pricing was unrealistically low, and that Biospherics's pre-BAFO price proposals were not considered unrealistically low.⁴ The agency admits, however, that it "did not perform a complete cost realism analysis on the interim proposals." Also, the agency admits that it did not conduct discussions regarding Biospherics's past performance, but asserts that this contention is untimely and that Biospherics was not prejudiced by this failure.

In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range.

⁴In fact, according to the agency, the CLIN unit pricing in Biospherics's initial proposal was considered too high.

41 U.S.C. § 253b(d) (1994); Federal Acquisition Regulation (FAR) § 15.610(b) and (c)(2) (June 1997). Although discussions need not be all-encompassing, discussions are required to be meaningful; that is, an agency is required to point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result in technical transfusion or technical leveling. E.L. Hamm & Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156 at 3. In general, agencies must lead offerors into areas of their proposals that require amplification or correction, Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424 at 7-8, and discussions should be as specific as practical considerations will permit. E.L. Hamm & Assocs., Inc., *supra*, at 4; Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300 at 6. The government has not satisfied its obligation to conduct meaningful discussions if it misleads an offeror or conducts prejudicially unequal discussions. Pan Am World Servs., Inc., et al., B-231840 *et al.*, Nov. 7, 1988, 88-2 CPD ¶ 446 at 11.

Here, the record establishes that the Forest Service did not conduct meaningful discussions with Biospherics regarding pricing or past performance. As more fully described below, the agency did not inform Biospherics during discussions that the agency considered its cost/pricing to be unrealistically low, but instead encouraged Biospherics to reduce its pricing to what the agency ultimately found was an unrealistic level. Also, the Forest Service admittedly did not inform Biospherics during discussions of the negative comments regarding that firm's past performance.

With regard to Biospherics's unrealistic BAFO pricing, the agency's source selection documentation reflects that the Forest Service had "grave doubts" concerning whether Biospherics could accomplish the [DELETED] necessary to support the contract at its price. Specifically, the agency questioned Biospherics's proposed labor rates, contract staffing, hardware/software costs, and profit. The agency concluded that "Biospherics's prices are unrealistically low and that the company will not be able to develop or sustain the level of services required by this solicitation."

The Forest Service does not contend that it informed Biospherics of these concerns with the firm's proposed cost/pricing. Rather, the agency argues it had no reason to be concerned with Biospherics's pricing until the protester lowered its price in its BAFO.⁵ In this regard, the agency contends that Biospherics's pricing in its initial and revised proposals was realistic.

However, the particular cost elements in Biospherics's BAFO cited by the agency's cost/price analyst and evaluation board as indicating Biospherics's lack of

⁵The agency did conduct meaningful discussions with regard to Biospherics's very low unit price for CLIN [DELETED]. These discussions, however, did not suggest that Biospherics's other CLIN pricing was considered too low, and in fact the agency's question encouraging "additional savings" suggested the opposite.

understanding or performance risk--that is, Biospherics's proposed labor rates, hardware/software costs, and profit--did not materially change from its initial and revised proposals.⁶ For example, Biospherics estimated \$[DELETED] in computer equipment and software/hardware maintenance costs in its initial price proposal, \$[DELETED] for these costs in its revised price proposal, and \$[DELETED] for these costs in its BAFO price proposal. Similarly, Biospherics proposed a [DELETED]-percent profit rate in its revised and BAFO price proposals. Also, Biospherics's labor rates were identical in its initial, revised, and BAFO price proposals. Moreover, according to the protester, using the agency's most probable transaction estimates to calculate Biospherics's total probable price, Biospherics's revised proposal price was already \$[DELETED] million below the IGE at the point that the agency requested that Biospherics, in preparing its BAFO, review its pricing proposal for additional savings.⁷

The apparent explanation for the agency's failure to raise any concern it had with how low the protester's pre-BAFO proposals were for any of these cost elements is that the Forest Service did not evaluate the cost elements of the offerors' price proposals until after receipt of BAFOs. Thus, during the conduct of discussions, the agency had little basis on which to judge the realism of the unit pricing it received under each CLIN (except in comparison to the IGE, which estimated only CLIN unit prices without supporting cost estimates). Nevertheless, as noted above, the agency twice encouraged Biospherics to reduce its pricing.⁸

⁶The agency also questioned the realism of Biospherics' estimated labor hours in its BAFO. The record shows that, while it is true that Biospherics reduced these hours in its BAFO, these hours had also been reduced in the firm's revised proposal.

⁷The protester states that, using the agency's most probable transaction model, Biospherics's revised evaluated price was \$[DELETED] and the IGE was \$[DELETED]. This calculation is not rebutted by the agency.

⁸Park.Net contends that Biospherics could not reasonably have been misled by the Forest Service's instructions to Biospherics (as well as the other offerors) to examine their price proposals for additional savings; the intervenor contends, citing Jacobs Serv. Co.; International Tech. Corp., B-262088.3, B-262088.4, Jan. 29, 1996, 97-1 CPD ¶ 220 at 6, that this was a "cautionary reminder" and "not a directive to lower prices." We disagree. In Jacobs, the agency merely informed offerors that technical changes to BAFOs could render the proposal unacceptable. Here, the Forest Service's direction to examine price proposals for additional savings, viewed in the context of the agency's earlier warning that Biospherics's price was too high, was reasonably understood by Biospherics to mean that the agency continued to be concerned with the high level of Biospherics's pricing.

Discussions cannot be meaningful where, as here, the agency fails to advise the offeror, in some way, of material proposal deficiencies. See CitiWest Properties, Inc., B-274689.4, Nov. 26, 1997, 98-1 CPD ¶ __ at 5; Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9. Additionally, an agency may not mislead an offeror during discussions into responding in a manner that does not address the agency's concerns. Price Waterhouse, *supra*. We find that the Forest Service conducted inadequate and misleading discussions regarding Biospherics's pricing.

Biospherics also complains that the Forest Service failed to inform it of adverse past performance information during discussions. Specifically, Biospherics states that, although it is an experienced call center operator, it received only 14.2 points of a maximum possible 24 points under the past performance factor. The agency's source selection documentation states:

[DELETED]

Biospherics argues that it was not informed of the agency's concerns regarding its past performance, disagrees with the agency's assessment of its past performance, and offers information that it states would have materially influenced the agency's assessment of its performance. For example, Biospherics argues that its difficulties in the performance of the Forest Service contract were the result of "data problems traceable to the previous contractor in combination with call volumes that exceeded the estimates" and that Biospherics ultimately received "an equitable adjustment in its contract price that, in part, compensated it for the cost of fixing the problems inherited from the prior contractor."

Under FAR § 15.610(c)(6) (June 1997), competitive range offerors must be provided with "an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment." An agency does not satisfy its obligation to conduct meaningful discussions with competitive range offerors, where the agency fails to inform an offeror of adverse past performance information. McHugh/Calumet, a Joint Venture, B-276472, June 23, 1997, 97-1 CPD ¶ 226 at 6-7.

Here, the Forest Service admits that it did not inform Biospherics during discussions of negative past performance information considered in the agency's evaluation as required by FAR § 15.610(c)(6). The agency and intervenor argue, however, that this protest issue is untimely because Biospherics was informed during its debriefing that it had been ranked lower than Park.Net under the past performance factor and that Biospherics had not received a perfect score under this factor. The agency and intervenor contend that, once Biospherics knew that it had not received all the possible points under the past performance factor and had not received discussions concerning its past performance, this provided the protester with the basis of its allegation that it had not received meaningful discussions concerning its past performance.

We disagree. Even accepting the agency's account of the debriefing, Biospherics was not informed of its technical score under this factor, did not know the degree to which its proposal was downgraded, and did not know the specific adverse past performance information being considered by the agency. Biospherics has also provided us with affidavits from company officials who attended the debriefing, as well as contemporaneous notes of the debriefing, and this information indicates that Biospherics was not informed of the agency's ranking under this factor and was told by the agency that the firm had scored well and had no problems under the past performance factor. The record shows that it was not until Biospherics receipt of the agency's report on the protest that Biospherics was aware of the specific adverse past performance information considered by the agency and disputed by the protester. Biospherics's protest of this issue, which was filed within 10 days of its receipt of the report, is therefore timely. 4 C.F.R. § 21.2(a)(2) (1997).

In sum, the Forest Service did not conduct meaningful discussions with Biospherics, because the agency failed to inform the firm of deficiencies in its proposal. These deficiencies were specifically considered by the agency in its cost/technical trade-off analysis that resulted in the selection of Park.Net's proposal for award. That is, while it is true that the Forest Service was concerned about Biospherics' riskier approach involving the [DELETED] and appropriately penalized Biospherics' proposal in the technical evaluation, the record shows that the agency did not consider Biospherics' low-priced proposal to be unacceptable, but discounted it based upon the agency's view of the realism of Biospherics' low price and Biospherics' past performance. We cannot conclude from this record that Biospherics would not have had a reasonable possibility of receiving award but for the agency's failure to conduct meaningful discussions. See McHugh/Calumet, a Joint Venture, *supra*, at 8. Rather, we think that it is reasonably possible that Biospherics could have improved the standing of its proposal *vis-à-vis* Park.Net's proposal, by improving its past performance score and either demonstrating the realism of its proposed price or offering a more realistic price. Accordingly, we conclude that the agency's actions prejudiced the protester. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

We recommend that the agency reopen discussions with Biospherics and Park.Net, request new BAFOs, and reevaluate proposals.⁹ If, as a result of this reevaluation, Biospherics's proposal is selected for award, the agency should terminate Park.Net's contract for the convenience of the government and make award to Biospherics. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The

⁹Given our recommendation to reopen negotiations, which will result in a new evaluation and source selection decision, we need not address Biospherics's remaining protest allegations.

protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States