



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Biospherics, Inc.

File: B-285065

Date: July 13, 2000

Eric J. Marcotte, Esq., Paul S. Ebert, Esq., and Adam B. Walker, Esq., Winston & Strawn, for the protester.
Gilbert J. Ginsburg, Esq., and Shlomo D. Katz, Esq., and Daniel B. Abrahams, Esq., Epstein, Becker and Green, for Aspen Systems Corporation, an interested party.
Charles Sides, Esq., and Thedlus L. Thompson, Esq., General Services Administration, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency conducted inadequate and prejudicially unequal discussions as between the two offerors in the competitive range is denied where the record shows that, with respect to the item at issue in the protest, the two proposals did not contain comparable deficiencies requiring comparable discussions, and the agency provided offerors an equal opportunity to revise their proposals while properly tailoring their discussions to each offer.

DECISION

Biospherics, Inc. protests the award of a contract to Aspen Systems Corporation under request for proposals (RFP) No. TQD-RC-98-0002, issued by the General Services Administration (GSA) to acquire the services necessary to manage and operate GSA's Federal Information Center (FIC). Biospherics primarily contends that GSA conducted inadequate and prejudicially unequal discussions.

We deny the protest.

BACKGROUND

The FIC is a single point of contact for people with questions about federal agencies, programs, and services. It currently responds to about 2 million calls annually, with the most frequent public inquiries concerning workplace issues, state government

matters, immigration and naturalization, federal taxes, federal employment, savings bonds, government publications, housing-related concerns, Federal Communications Commission matters, and disaster assistance. The FIC's information specialists answer inquiries directly, refer callers to the correct offices, or research the inquiries to provide suitable responses. FIC Web Site <http://fic.info.gov/fic/about_fic.htm>.

GSA issued this solicitation on November 16, 1998, to acquire the services necessary to continue managing and operating the FIC; Biospherics has performed these services since 1989. In addition to answering inquiries about federal government agencies, programs, services, and related issues, the contractor will also be responsible for maintaining supporting databases and web sites; conducting an agency liaison program and certain publicity efforts; creating and delivering activity and progress reports; and various other support activities. RFP § C.1.1.1. The "most critical element of the entire program" was the maintenance and support of the FIC's internal-use database. Post-Negotiation Memorandum at 17. Since the FIC's information specialists use this database to obtain the information required to answer public inquiries, the contractor must update, revise, and otherwise maintain the currency and accuracy of database entries as new resource information becomes available, currently-included information becomes outdated, or other changes are needed in database content or entry. RFP § C.5.2.1.1.

The solicitation contemplated the award of an indefinite-delivery, indefinite-quantity contract with a base period from the date of award through September 30, 2000, and four 1-year option periods. RFP amend. 2, § H.1; amend. 8, § B, at B-1; § L.3; § F.3. GSA planned to make award to the offeror submitting the lowest-priced, technically acceptable proposal. The agency was to first review unpriced technical proposals to determine which were technically acceptable or could, after discussions, be made acceptable. Section M.1.2 of the RFP set forth seven equally important technical evaluation factors to be evaluated on a pass/fail basis; a proposal was required to have a passing grade in all evaluation factors in order to be technically acceptable. Proposals evaluated as technically acceptable were then to be evaluated for price. RFP amend. 2, § M.1.1.

Offerors were required to provide pricing for a variety of services. While the most significant effort involved processing inquiries from members of the public, another service to be priced was the maintenance and support of the internal-use database. Section B of the RFP included a separate sub-line item for this service for the base period and for each option period. Pursuant to RFP § M.1.3, the total evaluated price of each offeror's proposal was to be the sum total of all categories of service for all contract periods, the price of using the government's inter-city telecommunications network, and an adjustment for small disadvantaged business concerns.

GSA received five proposals by the March 23, 1999 extended closing date. The Technical Evaluation Panel (TEP) concluded that all five were technically unacceptable, but that those of Aspen and Biospherics were capable of being made

acceptable without a major rewrite. Initial TEP Report at 1-4. The contracting officer noted the TEP's findings and found that the price proposals of Aspen and Biospherics compared favorably with the independent government cost estimate (IGCE).¹ The contracting officer established a competitive range comprised of the proposals of Aspen and Biospherics. GSA conducted technical discussions and received revised technical and price² proposals on October 26. The TEP concluded that the revised technical proposals were still technically unacceptable, and GSA conducted a second round of discussions. Both offerors submitted revised technical proposals on November 30. The TEP found both revised proposals to be technically acceptable, and notified the contracting officer of this finding.

The contracting officer commenced a two-part price analysis of both proposals. First, he compared each offeror's base period unit pricing to the same information in the revised IGCE to identify any pricing that was significantly higher or lower than the IGCE. Second, he evaluated each offeror's proposed unit pricing from year to year to ensure that the pricing was balanced over the potential life of the contract. Pricing identified as significantly high or low, or as unbalanced, was to be raised with offerors during discussions. Pre-Negotiation Memorandum at 3-5.

GSA flagged Aspen's base period unit pricing to maintain and support the FIC's internal-use database as significantly lower than the IGCE, and flagged as excessive the variance in price between Aspen's base period unit pricing and its first option year pricing for this service. GSA did not flag Biospherics' pricing for this service at all.³ *Id.* On January 7, 2000, GSA conducted price discussions with Aspen and Biospherics consistent with its price analysis findings.

One week later, GSA issued amend. 0008, which adjusted quantities in the base period to reflect the projected period of performance. Along with this amendment, GSA closed discussions and asked both offerors to submit final proposal revisions (FPR). GSA's analysis of the FPR prices showed that several line item prices in both proposals were still significantly higher or lower than the IGCE pricing. GSA was particularly concerned about Aspen's proposed base period unit price to maintain and support the FIC's internal-use database; that price remained significantly lower

¹ The procurement record makes numerous references to "cost" despite the fact that the RFP anticipated the award of a fixed-price contract. For the sake of clarity, this decision will generally replace the term "cost" with the term "price."

² Revised price proposals were submitted, in part, due to the issuance of amendment 0007 to the RFP, which replaced section B of the solicitation with a new pricing schedule reflecting quantity changes. GSA revised its IGCE to reflect these quantity changes. Pre-Negotiation Memorandum at 3.

³ Both offers were flagged for various other pricing issues not relevant to this protest.

than both the IGCE and Biospherics' pricing. Post-Negotiation Memorandum at 17. On March 1, the contracting officer decided to reopen discussions, and GSA developed questions to determine if Aspen's proposal reflected "cost realism."

On March 2, both offerors were advised that discussions had been reopened. Biospherics was told that there were no pricing issues to discuss with the firm at that time. Aspen was told that there were pricing issues to discuss with the firm; GSA's questions were attached and Aspen was scheduled for face-to-face negotiations that afternoon. Based on these oral negotiations and Aspen's written follow-up, in which it added staff to its proposal, GSA ascertained the reasons for the price disparity and concluded that Aspen was offering a different, but technically acceptable, solution to maintaining the internal-use database. The TEP chairman stated that he considered Aspen's explanation of the technical approach set forth in its FPR to be reasonable, and found Aspen's plan to add staff to support the internal-use database reasonable as well. He advised the contracting officer that Aspen had provided an adequate response to any technical concerns that might have existed regarding the FPR price to maintain the internal-use database. Memorandum from TEP Chairman to Contracting Officer (Mar. 4, 2000).

On March 9, the contracting officer held a telephone conference with each offeror to advise them of various line items that remained significantly higher or lower than the IGCE. These conferences were followed by letters to each offeror closing discussions and requesting FPRs. Both offerors submitted FPRs on March 14. The TEP found Aspen's technical proposal revisions technically acceptable, and the contracting officer noted that the firm's price had increased primarily due to its addition of staff in connection with the internal-use database. Post-Negotiation Memorandum at 18-19.

Aspen's final proposed price was \$16,150,874, lower than Biospherics' final proposed price of \$[DELETED] and lower than the IGCE of \$17,791,666. Aspen was awarded the contract as the lowest-priced, technically acceptable offeror on March 21. Biospherics filed this protest after its debriefing.

ANALYSIS

The central issue in this protest is Biospherics' allegation that GSA conducted inadequate and prejudicially unequal discussions with respect to the pricing of the maintenance and support of the FIC's internal-use database. Biospherics asserts that the offerors' pricing on this service "mirrored" each other--Aspen's price was significantly lower than the IGCE and, according to Biospherics, its price was significantly higher than the IGCE. Biospherics complains that GSA told Aspen during discussions that its price was significantly lower than the IGCE, but improperly failed to tell Biospherics that its price was significantly higher than the IGCE. In a related matter, Biospherics argues that GSA improperly reopened discussions after receipt of FPRs to allow Aspen to raise its pricing for this service

and revise its technical proposal, thereby improperly favoring Aspen over Biospherics.

The Federal Acquisition Regulation (FAR) requires that contracting officers discuss with each offeror being considered for award “significant weaknesses, deficiencies, and other aspects of its proposal . . . that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award.” FAR § 15.306(d)(3). The statutory and regulatory requirement for discussions with all competitive range offerors (41 U.S.C. § 253b(d)(1)(A) (1994); FAR § 15.306(d)(1)) means that such discussions must be meaningful, equitable, and not misleading. While discussions must give offerors an equal opportunity to revise their proposals, the agency should tailor its discussions to each offeror’s proposal. FAR § 15.306(d)(1). The scope and extent of discussions are a matter of contracting officer judgment. FAR § 15.306(d)(3); Tritech Field Eng’g, Inc., B-255336.2, Apr. 13, 1994, 94-1 CPD ¶ 261 at 5. Although an agency may inform an offeror during discussions that its price is considered to be too high, FAR § 15.306(e)(3), the government has no responsibility to do so where the offeror’s price is not considered excessive or unreasonable. Akal Sec., Inc., B-271385, B-271385.3, July 10, 1996, 96-2 CPD ¶ 77 at 3; Applied Remote Tech., Inc., B-250475, Jan. 22, 1993, 93-1 CPD ¶ 58 at 3.

A fundamental premise underlying Biospherics’ allegation is its view that its pricing to maintain and support the internal-use database was “significantly higher” than the IGCE and should have been raised during discussions. The record shows that GSA did not share this view.

In conducting his price analysis, the contracting officer first compared each offeror’s base period unit pricing with that of the IGCE to discern any line items priced either “significantly higher” or “significantly lower” than the IGCE. A price was deemed to be “significantly low” if it was 50 percent⁴ or more below the IGCE pricing, and “significantly high” if it was 200 percent or more above the IGCE pricing. Pricing that was “significantly higher” or “significantly lower” than the IGCE was to be raised during discussions. Next, the contracting officer compared each offeror’s unit pricing year-to-year to see if prices were balanced. If the year-to-year variance was 10 percent or greater, such variance was to be raised during discussions. Pre-Negotiation Memorandum at 3-4.

GSA’s initial price analysis considered the offerors’ October 26, 1999 price proposals. Biospherics’ base period unit price (a monthly price) to maintain and support the internal-use database was \$[DELETED], approximately 9 percent lower than the

⁴ According to GSA, the Pre-Negotiation Memorandum misstated the “significantly lower” standard as 100 percent or more below the IGCE. Agency Report (AR) at 8 n.1.

IGCE of \$[DELETED]. Biospherics' year-to-year unit price variance for this service never exceeded [DELETED] percent. Pre-Negotiation Memorandum at 7-9. Since Biospherics' pricing for this service was well within GSA's price analysis parameters, GSA did not include it as a discussion item. That is, GSA did not believe that Biospherics' pricing for this service was significantly high--on the contrary, the firm's base period unit price was lower than the IGCE's base period unit price.⁵

In contrast, Aspen's base period unit price to provide this service was \$[DELETED], more than [DELETED] times lower than the IGCE of \$[DELETED]. See AR, exh. 67, Undated Price Analysis Worksheet. In addition, Aspen's first option year unit price varied from its base period unit price by approximately [DELETED] percent. Id. Since Aspen's pricing for this service was well outside of GSA's price analysis parameters, GSA did include it as a discussion item. That is, GSA did believe that Aspen's pricing for this service was significantly low. GSA's price analysis of the initial FPRs showed that Aspen's base period unit price had increased to \$[DELETED], still substantially lower than the IGCE. GSA's concern over this low price caused it to reopen discussions.

Since GSA did not consider Biospherics' price for this service to be excessive or unreasonable, it was not required to raise the issue during discussions. Akal Sec., Inc., supra, at 3. In contrast, since GSA did consider Aspen's price for this service to be excessive, it was appropriate for the agency to raise the issue with Aspen during discussions. GSA properly tailored its discussions to address its specific concerns with each offeror's proposal. See CHP Int'l, Inc., B-266053.2, Apr. 29, 1996, 96-2 CPD ¶ 142 at 7.

Biospherics' assertion that its price was significantly higher than the IGCE ignores GSA's use of unit pricing to conduct its price analysis and bases its comparison, instead, on the overall price for providing this service over the life of the contract. Depending upon which price proposal is used to make the comparison, Biospherics' overall price to perform this service is [DELETED] percent higher than the IGCE.

The FAR sets forth several price analysis techniques that may be used to determine whether prices are reasonable and realistic, one of which is a comparison of the prices received with an independent government estimate. FAR § 15.404-1(b)(2)(v). While GSA's methodology did obscure the substantial overall difference between Biospherics' price and the IGCE, we have no basis to conclude that the agency's price analysis was unreasonable. The depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion. The Cube Corp., B-277353, Oct. 2, 1997, 97-2 CPD ¶ 92 at 5. Even if GSA had compared the proposed overall

⁵ Biospherics' unit pricing for this service [DELETED]. The firm's overall price for this service changed slightly from proposal to proposal due to amended changes in quantity.

prices of line items with the IGCE, it still would not have deemed Biospherics' price to be significantly high; under GSA's price analysis methodology, only prices 200 percent or higher than the IGCE would have been considered "significantly high." That being the case, Biospherics objects that GSA's price analysis methodology was an improperly "mechanical" or "wooden" approach to making the price comparison. In support of its position, the protester cites several of our decisions, all of which concern cost-reimbursement contracts.

Where a cost-reimbursement contract is to be awarded, an offeror's estimated costs of contract performance should not be considered controlling since the estimates may not provide valid indications of the final actual costs which the government is required to pay. See FAR § 15.305(a)(1). Consequently, the contracting agency must perform a cost realism analysis to determine the realism of an offeror's proposed costs and to determine what the costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. FAR § 15.404-1(d)(1), (2); Roy F. Weston, Inc., B-274945 et al., Jan. 15, 1997, 97-1 CPD ¶ 92 at 16. Since the conduct of a cost realism analysis necessarily requires an individualized approach to analyzing each proposal, including a review of each offeror's cost elements and technical proposal, this Office has held that the "mechanical" or "wooden" application of a government estimate, such as the use of a percentage range into which a contractor's estimate must fall vis-à-vis that estimate, is improper. See, e.g., The Jonathan Corp.; Metro Mach. Corp., B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶ 174 at 10-12, recon. denied, B-251698.6, Oct. 19, 1993, 93-2 CPD ¶ 233.

It bears repeating that this RFP anticipated the award of a fixed-price contract, not a cost-reimbursement contract. Realism is ordinarily not considered in the evaluation of proposals for the award of a fixed-price contract because the government's liability is fixed, and the risk of loss is borne by the contractor. Human Resource Sys., Inc.; Health Staffers, Inc., B-262254.3 et al., Dec. 21, 1995, 96-1 CPD ¶ 35 at 5. An agency may provide for a price realism analysis in the solicitation of fixed-price proposals in order to measure an offeror's understanding of the solicitation requirements, but this RFP did not provide for a price realism analysis, did not include price as a consideration in the technical evaluation, did not require the submission of cost and pricing data, and did not provide for an evaluation of the offeror's understanding. East/West Indus., Inc., B-278734.4, May 28, 1998, 98-1 CPD ¶ 143 at 5. Instead, GSA used a price analysis technique sanctioned by the FAR in order to determine that the final agreed-to price for this fixed-price contract was fair and reasonable. See FAR § 15.404-1(a).

GSA explains that the contracting officer established a range of numbers from the IGCE that could be considered acceptable; any price outside that range was far enough away from the IGCE to deserve discussion. GSA believed it was reasonable for the range to extend less on the downside and more on the upside. According to GSA, proposed prices below the IGCE would raise concerns about the lack of a clear understanding of the requirements, but the dynamics of competition would drive

prices down to their lowest possible point, which meant that proposed prices above the IGCE were of less concern. Supplemental Agency Report (SAR) at 5. In the context of a price analysis, we cannot conclude that GSA's use of a percentage range to conduct its price analysis and determine items for discussions was improper. Biospherics next alleges that the IGCE was arbitrary and not a proper basis for comparison. While GSA has invited this allegation by failing to substantiate its IGCE with documentation,⁶ we cannot conclude that the IGCE with respect to the internal-use database, the only line item at issue here, is arbitrary. GSA states that the IGCE was derived from the prices currently paid under Biospherics' existing contract for the same or similar services, as well as numbers substantiated over the years through the government's observation of the contractor's plant, equipment and labor mix used to perform the various categories of service. SAR at 2. This statement is confirmed by the comment in a preaward e-mail that indicates the "Government's estimate was based on the incumbent's solution." TEP Chairman's E-Mail to Contracting Officer (Mar. 1, 2000). Biospherics' assertion that the IGCE is not the price being paid presently for this service does not mean that the IGCE was not derived from the current prices. Moreover, the fact that Biospherics' base period unit price was within [DELETED] percent of IGCE, and its overall price was within [DELETED] percent of the IGCE, buttresses our conclusion that the IGCE was not arbitrary. Even if the government estimate were considered to be unrealistic, the price of a current competitor may be an appropriate measure of the current market price. See CardioMetrix, B-256407, May 27, 1994, 94-1 CPD ¶ 334 at 3.

We turn our attention to GSA's reopening of discussions. As discussed above, the agency's review of the initial FPR pricing showed that several line items in both proposals were still significantly outside the range established by GSA's price analysis methodology. Of particular concern, however, was Aspen's price to maintain and support the FIC's internal-use database; the firm's base period unit price was still only [DELETED] percent of the IGCE and [DELETED] percent of Biospherics' price. Post-Negotiation Memorandum at 17. Since this service is the most critical element of the FIC program, and since Aspen was the low-priced technically acceptable offeror in line for award, the contracting officer decided to reopen discussions.

In the process of writing discussion questions for Aspen, the TEP Chairman told the contracting officer that the answer to the question whether Aspen's low price indicated a lack of understanding of the requirement lay in the nature of Aspen's proposal, and not in the government estimate, which was based upon the incumbent's solution. The TEP Chairman explained that Aspen's approach was to [DELETED]. In contrast, the incumbent's approach [DELETED]. Both solutions

⁶ In response to Biospherics' request that GSA provide documentation of the IGCE, GSA stated that it did not possess any such documentation. GSA's Response to Protester's Request for Additional Documents (May 11, 2000).

were reasonable, but could lead to a very different attribution of costs. TEP Chairman's E-Mail to Contracting Officer 1 (Mar. 1, 2000).

During the face-to-face negotiations set up to discuss these questions, GSA asked Aspen to explain why its price was so low. The contemporaneous meeting notes show that Aspen explained that it had [DELETED]. Among other things, the approach allowed Aspen's [DELETED]. GSA indicated that its concern was focused on the [DELETED]; Aspen said it would look at [DELETED]. GSA advised Aspen that it was not asking the firm to change its price but to support its price. GSA's Notes of Negotiations with Aspen (Mar. 2, 2000). In written confirmation of its answers to GSA's questions, Aspen reiterated its oral responses and said it had added [DELETED]. Letter from Aspen Regarding Discussion Questions (Mar. 3, 2000).

The TEP Chairman analyzed Aspen's oral and written responses to the discussion questions and concluded that the difference between Aspen's proposal and GSA's price model was based on Aspen's different approach. The primary reduction in cost had nothing to do with the [DELETED], but, rather, the [DELETED]. The TEP Chairman concluded that both Aspen's approach and the existing approach complied with the RFP's requirements. He found the firm's initial approach and its new approach--with additional staff--technically acceptable. Memorandum from TEP Chairman to Contracting Officer (Mar. 4, 2000).

On March 9, the contracting officer advised each offeror by telephone of the line items in their proposals that remained significantly outside of the IGCE range established by GSA. Post-Negotiations Memorandum at 17. These conferences were followed by letters to each offeror closing discussions and requesting FPRs. Biospherics was told that its proposal was technically acceptable and was cautioned that any changes to the technical proposal might render it unacceptable. Aspen was told that its proposal was technically acceptable but that if the information it provided during the March 2 discussions caused changes to its technical proposal, the firm should provide these changes as replacement pages. Aspen was also cautioned that changes in its technical proposal might render it unacceptable. Letter from GSA to Competitive Range Offerors (Mar. 9, 2000). On March 14, Aspen submitted a revised price proposal and replacement pages for its technical proposal consistent with its written responses to the discussion questions. Biospherics submitted a revised price proposal.

Biospherics complains that GSA's actions here, "in a sense," present a form of "leveling" that is expressly prohibited by the FAR because it favors one offeror over another. Protester's Comments at 20.

Solicitations issued after January 1, 1998, such as the one here, are governed by the FAR, as amended by Federal Acquisition Circular (FAC) No. 97-02. The FAR part 15 rewrite included in this version of the regulation revised the provisions that apply

when an agency is contracting using negotiated procedures, including those provisions governing exchanges with offerors after the receipt of proposals, as set forth in FAR § 15.306. The prior version of the FAR contained provisions that could be read to limit the extent to which agencies could conduct ongoing discussions with an offeror. For example, agencies were prohibited from engaging in technical leveling (helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal). See FAR § 15.610(d) (June 1997); Professional Servs. Group, Inc., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 at 5. Agencies were also cautioned against reopening discussions after receipt of best and final offers unless it was clear that the information already available was inadequate to reasonably justify contractor selection and award. FAR § 15.611(c) (June 1997). These restrictions were eliminated by the FAR part 15 rewrite. Dynacs Eng'g Co., Inc., B-284234 et al., Mar. 17, 2000, 2000 CPD ¶ __, at 4.

We assume Biospherics is aware that the concept of technical leveling is no longer part of the regulatory framework governing federal procurements and is referring solely to the FAR's prohibition against favoring one offeror over another, found at FAR § 15.306(e)(1). Our review of the record leads us to conclude that GSA did not improperly favor Aspen over Biospherics in this procurement.

As discussed above, the record does not support Biospherics' premise that the offerors' proposals "mirrored" each other with respect to the price to maintain the internal-use database, and thus should have received comparable discussions. Cf. Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61 at 8. As a result, the fact that GSA raised the issue with Aspen but not with Biospherics is evidence not of improper favoritism, but of the agency's appropriate tailoring of discussions to the particular areas of concern in each proposal.

By the time initial FPRs were requested, GSA had already concluded that both firms' technical proposals were technically acceptable. Prior to this time, GSA had only told Aspen that its price for the internal-use database was significantly lower than the IGCE--it never asked the firm why its price was so low.⁷ It was not until after analysis of the initial FPR pricing, and the realization that Aspen had not raised its price to a level well within the IGCE range, that GSA had a basis for concern about this issue. As the contemporaneous evidence makes clear, GSA thought that the low price might be reasonable based upon Aspen's different technical approach, but it was not entirely certain. In an abundance of caution, the contracting officer reopened discussions to clarify the issue and obtained answers that satisfied his concerns. In our view, the contracting officer acted within his discretion in

⁷The TEP evaluated the offerors' unpriced technical proposals.

reopening discussions to verify Aspen's understanding of the most critical aspect of the program.

Biospherics complains that GSA's request for Aspen's second FPR led Aspen to revise its technical proposal, while the request for Biospherics' second FPR discouraged the protester from revising its technical proposal. This complaint is based upon the presence in Biospherics' letter of the phrase, "You are cautioned that any changes to your technical proposal may render it unacceptable . . ." However, this phrase, a standard cautionary statement made in such requests, is also present in Aspen's letter. The fact that Aspen's letter also advised the firm to provide replacement pages for its technical proposal if the information provided during discussions made technical changes does not mean GSA was favoring Aspen, but merely reflects the nature of the discussions held with Aspen after the reopening.⁸

Biospherics also asserts that GSA's discussions improperly guided Aspen into providing additional staffing to make its proposal technically acceptable. However, the record is clear that GSA did not tell Aspen, explicitly or implicitly, to add more staff to its technical proposal, and that Aspen's technical proposal was considered to be acceptable either with or without the additional staff.

Turning to the remainder of Biospherics' allegations, the firm contends that GSA inadequately evaluated the offerors' compliance with the Service Contract Act (SCA)⁹ wage determinations applicable to their proposals and failed to ensure that all parties were competing on an equal basis in this regard.

GSA advised offerors prior to the initial closing date that it did not intend to verify whether offerors bid pursuant to applicable wage determinations. RFP amend. 003, Question and Answer No. Q.2.43. GSA properly explained that an offeror proposing prices based on wages lower than those in the applicable wage determination did so at its own risk. Id. In this regard, on a fixed-price contract, where the awardee is required to pay the actual SCA wages and benefits out of whatever price it offers and

⁸ In a related matter, GSA's letter to Aspen reopening discussions stated that it had advised the firm in prior discussions that its price for this service was significantly lower than the IGCE; the letter referred not to the evaluated October 26, 1999 price but to the firm's initial, higher, March 23, 1999 price. Biospherics contends that this statement improperly guided Aspen to the price level it should propose. However, GSA's contention that it mistakenly referred to the initial proposal is supported by the record. Moreover, Biospherics was not prejudiced by this mistake because even Aspen's highest price was always lower than Biospherics'.

⁹ This RFP was subject to the Service Contract Act of 1965, 41 U.S.C. §§ 351-58 (1994) (SCA), which establishes the minimum wage rates and fringe benefits to be paid to service employees based on those prevailing in the locality. RFP § I.8.

where the proposal contains no indication that the company will not meet its statutory obligations, labor rates or benefits that are less than the SCA-required rates or benefits may constitute a below-cost offer but one which is legally unobjectionable. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339 at 9-10.

Aspen did not take exception to the SCA requirements, but specifically confirmed that it had used the appropriate wage determination in developing its price proposal. Letter from Aspen to GSA (Feb. 10, 2000). As a result, Biospherics' contention that GSA should have used some method to ensure that other offerors who complied with the SCA's requirements are not prejudiced, citing our decision in SSDS, Inc., B-247596.2, Aug. 7, 1992, 92-2 CPD ¶ 90, is inapplicable.¹⁰ As for the protester's complaint, based upon its experience as the incumbent, that [DELETED], we merely note that Aspen has taken a new approach to providing this service.

Finally, in its initial protest, Biospherics argued, without detail, that Aspen had inadequately staffed the project or had submitted a proposal that will not meet the solicitation's minimum technical requirements. In response to the first issue, GSA's report explained that Aspen had taken a different approach with different staffing requirements from that of Biospherics, and that Aspen's approach had been determined technically acceptable. GSA's report correctly asserted that the agency could not respond to the second issue in the absence of any supporting detail. AR at 17-20.

In its comments on the agency report, Biospherics argued that GSA improperly found Aspen's proposal technically acceptable, again suggesting, with no detail, that Aspen proposed inadequate staffing. Despite having access to the entire agency report, which included various iterations of Aspen's proposal and the evaluation documents, Biospherics did not support this allegation with anything specific except the fact that there was a significant deviation between the IGCE and Aspen's price for this service. It was not until its response to the agency's supplemental report that Biospherics fleshed out this argument with details. We find the issues raised in this latter response to be untimely. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their bases. 4 C.F.R. § 21.2(a)(2) (2000). The regulations do not contemplate the piecemeal presentation or development of protest issues; where a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed to adequately review the matter,

¹⁰ In that decision, we held that where there is an indication in an offer that the offeror does not intend to be bound by the terms of the SCA, there must be some method to ensure that other offerors who have complied are not prejudiced. SSDS, Inc., *supra*, at 5.

these later issues will not be considered. Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215 at 2; Management Sys. Applications, Inc., B-259628, B-259628.2, Apr. 13, 1995, 95-1 CPD ¶ 216.

The protest is denied.

Comptroller General
of the United States