DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO 6 Jan 00

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 00-09, Protest Involving Past Performance Information as an Evaluation Factor

1. We provide the enclosed sustained protest that discusses evaluation of past performance. The General Accounting Agency determined that an agency is not required to impute to the protester the totality of its proposed mentor's experience and past performance, where the mentor is not proposed to play a major role in the performance of the contract.

2. For additional information, please contact Irene Hamm hammi@forscom.army.mil or 404/464-5632.

Encl

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BioGenesis Pacific, Inc.
B-283738
December 14, 1999

DIGEST

In evaluating the protester's experience and past performance, an agency was not required to impute to the protester the totality of its proposed mentor's experience and past performance, where the mentor was not proposed to play a major role in the performance of the contract.

DECISION

BioGenesis Pacific, Inc., protested the award of three contracts to Index Builders, Inc., Alan Shintani, Inc., and Nan, Inc., d/b/a Ocean House Builders under request for proposals (RFP) issued by the Department of the Navy, for repair, alteration, construction and demolition work at government facilities on Oahu, Hawaii.

Protest Denied

The RFP was set aside for small disadvantaged businesses under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (94). The solicitation contemplated the award of one or more indefinite-quantity contracts for a base year with four option-years. The solicitation advised that the government would order supplies or services under the contract(s) by issuing task orders for specific projects. The RFP notified offerors that the task orders might entail "multiple trades" within the construction industry, such as road paving, roofing, welding, masonry, or asbestos removal.

The RFP contemplated award based on a tradeoff between the equally important price and technical areas. The three technical factors were (1) technical capability, (2) experience, and (3) past performance, each of equal importance.

Under the experience factor, the government would evaluate the offeror's performance qualifications based on its experience in performing "contracts similar to the solicitation" or, if the offeror lacked such experience, in performing "other construction projects."

Under the past performance factor, the government would evaluate the quality of the offeror's performance on prior construction contracts, especially those of similar size and complexity to that solicited. If an offeror lacked a relevant past performance record, the RFP stated that the government would evaluate the relevant past performance of the offeror's proposed "key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement." If neither the offeror, its key personnel, nor its subcontractors possessed relevant past performance experience, the RFP stated that the government would rate the offeror's past performance as neutral.

The agency received nine proposals and included seven in the competitive range, including the protester's and the awardees'. The agency received revised proposals and rejected one proposal as technically unacceptable. Among the remaining proposals, those submitted by the awardees had the three lowest evaluated prices (i.e., $15 million, $15.87 million, and $16.2 million), and the protester's had the highest evaluated price (i.e., $18 million).

In its proposal, BioGenesis identified several contracts as the basis for its experience and past performance evaluation. Virtually all of these contracts were for environmental remediation work. Although BioGenesis, as a corporate entity, was essentially an environmental contractor, it offered both key personnel and a mentor with construction experience. Id., Resumes of Key Personnel, Mentor's Experience and Relevant Past Performance. In particular, the protester's proposal included a mentoring agreement with the incumbent contractor for these services. Id., Letter from Incumbent Contractor to Protester; see also id. Mentor's Contractor Performance Survey. This mentoring agreement stated that BioGenesis would "drive 100 percent of the solicitation and contract," but that the project manager for the incumbent contractor would be available to BioGenesis as a "Point of Contact."

Although BioGenesis was not a construction contractor, the agency rated its proposal "low risk" under the experience factor based on the construction experience of its proposed key personnel and its mentor. Conversely, under the past

performance factor, the agency disregarded the experience of the protester's key personnel and mentor, and gave the protester a neutral rating based on its lack of independent construction experience. Id.

Unlike the protester, each awardee had satisfactorily performed numerous construction contracts in a variety of trades relevant to the RFP, although none had performed a multiple trade, task order contract, as had the protester's mentor. Nevertheless, in consideration of each awardee's varied construction experience, the agency rated each awardee's proposal "low risk" under the experience factor, the same rating assigned the protester's proposal. Under the past performance factor, the agency assigned a "satisfactory" rating to one awardee's proposal and "very good" ratings to the other awardees' proposals, in comparison to Biogenesis's neutral proposal rating

At the time of award, the agency concluded that it needed three contracts to meet its needs. Because Index's, Ocean's, and Shintani's proposals received equivalent or better ratings than the other higher priced, acceptable proposals, the agency made awards based on these three proposals.

The protester received a written debriefing, at which the agency disclosed the technical and price evaluation results for the protester's and the awardees' proposals. BioGenesis responded with an agency-level protest and argued, among other things, that the agency improperly evaluated its own and the awardees' past performance and experience. In particular, BioGenesis disputed its neutral past performance rating because it did not reflect the past performance of its mentor, the incumbent contractor. Further, BioGenesis argued that its mentor's experience as the incumbent contractor was more relevant than the awardees' experience and should have rendered BioGenesis' proposal superior to the awardees'.

In response to the agency-level protest, the agency agreed that the protester's neutral past performance rating was improper because it did not reflect the relevant past performance record of the protester's key personnel and mentor. The agency reevaluated the protester's proposal taking this experience into account and changed the protester's rating to "satisfactory" under the past performance factor. The agency decided; however, that the

corrected past performance rating did not alter the selection decision. Even with a "satisfactory" past performance rating, the technical ratings of the protester's proposal remained the same as or lower than the technical ratings of the awardees' proposals, which were lower-priced. The agency confirmed its selection decisions, and denied and dismissed all other issues raised in BioGenesis' agency-level protest. This protest followed.

BioGenesis protested that the Navy should have regarded the protester's experience and past performance as superior to the awardees' because only the protester's mentor has performed a multiple trade, task order construction contract similar to this solicitation. The protester observed that the RFP favored experience in performing "contracts similar to the solicitation" over general construction experience under the experience and past performance factors. In view of this preference, the protester argued that its mentor's performance of the incumbent contract should have received greater credit under these evaluation factors than the awardees' general construction experience.

The evaluation of proposals is a matter within the discretion of the contracting agency. The GAO will question the agency's evaluation only where it lacks a reasonable basis or conflicts with the stated evaluation criteria for award. SC&A, Inc., B-270160.2, Apr. 10, 96, 96-1 CPD ¶ 197.

The agency was not required to rate the protester's experience and past performance as superior to that of the awardees—all of which are established construction contractors--simply because the protester's mentor performed the incumbent contract for these services. In this regard, the Navy assigned the protester's proposal a "satisfactory" past performance rating and a "low risk" experience rating, despite the fact that the protester is a fledgling construction contractor. These ratings depended in part upon the experience and past performance of the protester's mentor, which the Navy evaluated with particular attention to the mentor's performance of the incumbent contract. Based on its review, the agency concluded that the protester's mentor had a solid performance record and had successfully performed the incumbent contract. Id.

While acknowledging the expertise of the protester's mentor, the agency also evaluated the degree to which the mentor had agreed to participate in performing the instant contract. Based on its review of the mentoring agreement--which stated that BioGenesis would "drive 100 percent of the solicitation and contract" with the mentor's project manager available simply as a point of contact--the agency reasonably concluded that the mentor would play a relatively limited role in performing the contract. Nevertheless, the Navy concluded that the mentoring arrangement would provide the protester the necessary expertise to perform the contract satisfactorily, despite the protester's dearth of independent construction experience.

GAO found no basis to object to this evaluation judgment. Although the RFP permitted inexperienced contractors, such as the protester, to rely upon the credentials of "subcontractors that will perform major or critical aspects of the requirement," the RFP did not require the Navy to impute to the protester the totality of its mentor's experience under the circumstances here. The fact is that the protester did not perform the incumbent contract, its mentor did, and its mentor's proposed role in the performance of the instant contract was relatively limited. In comparison, each awardee possessed varied and successful construction experience in its own right. GAO found no basis to object to the agency's relative evaluation of the protester's and awardees' proposals under the experience and past performance factors.

BioGenesis also protested that it should receive the award because it believed that the acceptance period of all proposals but its own expired during the course of this procurement. In particular, BioGenesis believed that it was the only offeror, which voluntarily extended the 120-day proposal acceptance period specified by the RFP before its expiration on Jun 16, 99. Thereafter, on Jun 17, the agency issued amendment No. 0004 to extend the proposal acceptance period of all offers acknowledging the amendment, among other things. The protester essentially asserted that the amendment could not properly revive any offers that had already expired.

GAO Bid Protest Regulations provide that protests of alleged improprieties, which do not exist in the initial solicitation, but which are subsequently incorporated into

the solicitation must be filed no later than the next closing date for receipt of proposals following the incorporation. To be timely, BioGenesis should have protested this issue by the June 29, 1999 revised proposal receipt established by amendment No. 0004. Instead, BioGenesis waited to raise the issue until its post-debriefing, agency-level protest filed on August 13. Although the protester argued that, until its debriefing, it assumed that the agency issued amendment No. 0004 only to offerors whose proposal acceptance periods had not expired, the protester admittedly obtained no information at its debriefing regarding other offerors' proposal acceptance periods. See Restrepo Enters., Inc., B-228233.2, Dec. 8, 1988, 88-2 CPD ¶ 570 at 3. In any case, this protest's contention lacks merit. Even assuming the other proposals expired before the issuance of amendment No. 0004 and BioGenesis' unsolicited extension of its offer, a revival of expired offers (if it occurred here) was not prejudicial to the competitive system, given that all proposals offered the minimum 120-day proposal acceptance period. See Krug Life Sciences, Inc., B-258669.2, Feb. 22, 95, 95-1 CPD ¶ 111 at 4.

Notes

1. The possible experience ratings were "low," "moderate," and "high" risk.
2. The possible past performance ratings were "exceptional," "very good," "satisfactory," "marginal," "unsatisfactory," and neutral
3. BioGenesis' agency-level protest omitted an allegation that later appeared in its protest to our Office, i.e., that the Navy's price evaluation methodology improperly deprived BioGenesis' proposal of a price advantage in the price/technical tradeoff. Although GAO's review indicated that this allegation lacked merit, GAO did not address it in detail because it was untimely raised. BioGenesis obtained from its debriefing the information needed to raise this issue in its agency-level protest. Because BioGenesis did not do so, but waited to raise the issue with GAO more than 10 days after it's debriefing, the allegation is untimely. See 4 C.F.R. § 21.2(a)(2) (99).
4. GAO similarly declined to consider other alleged defects in amendment No. 0004, for example, the deletion of the requirement for a bid guarantee.