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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Spherix, Inc.

File: B-294572; B-294572.2

Date: December 1, 2004

Eric J. Marcotte, Esq., Nathan C. Guerrero, Esq., and Scott A. Schipma, Esq.,
Winston & Strawn, for the protester.

Robert S. Metzger, Esq., Michael K. Murphy, Esq., Mary Ita Snyder, Esq., and Keith R.
Szeliga, Esq., Gibson, Dunn & Crutcher, for ReserveAmerica NY, Inc., the intervenor.
Daniel N. Hylton, Esq., Department of Agriculture, for the agency.

Henry J. Gorczycki, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's evaluation and source selection decision that found the awardee's staffing and proposed marketing approach to be significant proposal strengths and discriminators in the selection decision is sustained, where the protester and awardee both addressed staffing and marketing approach, though not specifically requested by the solicitation, and the agency did not fairly consider the protester's similar proposed staffing and marketing approach.
 2. Where the agency's evaluation identified significant weaknesses in the protester's proposal, but failed to identify them for the offeror during discussions, discussions were not meaningful.
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DECISION

Spherix, Inc. protests the award of a contract to ReserveAmerica NY, Inc. under request for proposals (RFP) No. WO-04-06VM, issued by the Department of Agriculture, Forest Service, for the National Recreation Reservation Service (NRRS). Spherix challenges the agency's conduct of discussions, evaluation of proposals, and source selection decision.

We sustain the protest.

BACKGROUND

Federal agencies and private concessionaires or lessees currently operate and maintain recreational facilities and activities for public uses; these facilities and activities are located on federal lands, National Recreation areas, Wilderness areas, water resource development projects, historic sites, and National Monuments. RFP § C, at 201.¹ Previously, the National Park Service operated the National Park Reservation Service (NPRS) to provide reservation and management services for National Park Service facilities; Spherix was the incumbent contractor for the NPRS. *Id.* at 202; Agency Report (AR), Tab 96, Spherix Project Agreement Response, at 1,908. The Forest Service, in partnership with the U.S. Army Corps of Engineers and the Bureau of Land Management, operated the NRRS, providing reservation services for other federal facilities and activities at 1,987 field locations; ReserveAmerica was the incumbent contractor for NRRS. RFP § C, at 202; AR, Tab 76, ReserveAmerica Project Agreement Response, at 967. These systems operated independently. Contractor Officer's Statement at 1.

As part of an "E-Government Initiative," the government seeks to consolidate its reservation systems for all federal parks and recreation facilities and activities into the NRRS with the goal of providing "one-stop" reservation shopping. Contracting Officer's Statement at 1; AR, Tab 5, NRRS Acquisition Plan, at 39. To accomplish this, the RFP provides for the award of a contract for the development, provision, and operation of a state-of-the-art reservation system with a web-based portal that would include multiple sales channels (telephone call center, Internet, and walk-up²), providing "one-stop" reservation shopping directly to the public for camping, tours, tickets, permits, activities, and recreation-related sales, as well as providing general recreation and trip planning information about all federal recreation areas. The system would also provide administrative and field personnel of federal land management agencies with the ability to access and manage reservation and recreation information. RFP § C, at 197-201, § M, at 332-34. Offerors were informed that the contract would be funded primarily by fees, such as reservation fees, service fees, and use fees, collected from the public. RFP § C, at 200.

In accordance with Federal Acquisition Regulation (FAR) § 15.202, the Forest Service established a two-step advisory process for this acquisition. The first step--the Project Agreement--sought capability information, such as past performance information, from potential offerors to allow the agency to advise those firms about their potential to be viable competitors under the RFP. Of the ten firms

¹ Pages in documents contained in the agency's report are sequentially, "Bates" numbered. When citing to these documents, we use the sequential numbers.

² A "walk-up" reservation sale occurs in the field when a customer arrives at a recreation facility or activity without a prior reservation. RFP § C, at 217.

submitting capability information, only three firms, including Spherix and ReserveAmerica, were invited to participate under the second step—the RFP. Contracting Officer’s Statement at 2-3.

The RFP, as amended, provided for the award of a fixed-unit-price requirements contract for a base period from the date of award until December 12, 2007, and included six 1-year award terms. RFP amend. 1, § B, at 187-93. A detailed performance work statement was provided, describing the services and capabilities required. RFP § C, at 197-246. Offerors were informed that award would be made on the basis of a cost/technical tradeoff, and identified the following five evaluation factors in descending order of importance:³

1. Technical approach;
2. Management approach;
3. Reservation system demonstration;
4. Past performance; and
5. Price.

RFP § M, at 332. The first four factors were stated to be significantly more important than price, and RFP informed offerors that the government intended to make award based primarily on technical merit, although price would become more important as the difference in technical merit narrowed. Id.

The RFP provided that price would be evaluated for realism, completeness, and reasonableness. Id. at 335. Section B of the solicitation, “Services and Prices/Costs” schedule, required offerors to propose unit prices for each service (e.g., reservations, ticketing, permits) provided to the public by telephone or Internet, or at field and kiosk locations, and provide prices for equipment and telecommunications connections provided to the government. RFP amend. 1, § B, at 187-93. As described by the contracting officer, the contractor would be paid “on a per reservation transaction basis,” which includes “all subsequent transactions related to the original reservation including changes, cancellations, and no shows.” Contracting Officer Statement at 4.

The solicitation schedule did not identify estimated volume levels but requested that offerors provide unit pricing at various estimated volume levels of their own choosing.⁴ RFP amend. 1, § B, at 187-94. Also, the schedule provided two alternate

³ For each technical evaluation factor, the RFP identified numerous subordinate evaluation criteria, which were stated to be of equal importance to each other.

⁴ The contracting officer states that offerors were requested to identify their own estimated volume levels to allow the government to rely on the offeror’s expertise in estimating the anticipated volume, to “see how a particular offeror projected their
(continued...)

pricing scenarios: scenario A, which was comprised of separate contract line item numbers (CLIN) for call center reservations and for Internet reservations, and scenario B, which combined the call center and Internet reservations into a single CLIN. See id. at 195. Scenario B was considered by the agency to be an incentive for Internet sales, which the agency viewed as less costly than call center sales. Contracting Officer’s Statement at 5. The RFP provided that award would be based on only one of these scenarios. RFP amend. 1, § B, at 195.

Detailed proposal preparation instructions were provided. See RFP § L, at 326-31. The RFP provided for both written proposals and oral presentations. In this regard, offerors were informed that the written proposals, “exclusive of Plans,” were limited to 50 pages. Id. at 328.

Proposals were received from four firms, including Spherix and ReserveAmerica. Following evaluation of the written proposals by the agency’s source selection evaluation team (SSET), one firm’s proposal was rejected. Contracting Officer’s Statement at 3. The remaining three offerors, including Spherix and ReserveAmerica, made oral presentations, which included reservation system demonstrations. Id. at 6. Following the oral presentations, discussions were conducted, and final proposal revisions received. Id. at 8. Spherix’s and Reserve America’s final proposals were evaluated as follows:⁵

Factor	Spherix	ReserveAmerica
Technical Approach	[DELETED]	[DELETED]
Management Approach	[DELETED]	[DELETED]
System Demonstration	[DELETED]	[DELETED]
Past Performance	[DELETED]	[DELETED]
Overall	Good/Moderate Risk	Excellent/Low Risk
Scenario A Price	\$(DELETED)	\$128,327,026
Scenario B Price	\$(DELETED)	\$(DELETED)

(...continued)

ability to grow transaction volumes,” and to allow the offeror to determine its own ceiling for transaction volume discounts. Contracting Officer’s Statement at 4.

⁵ The third offeror’s proposal received lower technical ratings and proposed higher prices than either Spherix’s or ReserveAmerica’s proposals and was eliminated from consideration for award. AR, Tab 17, Source Selection Decision, at 459.

Agency Report, Tab 17, Source Selection Decision, at 442, 455, 463-65. The offerors' evaluated prices were calculated by averaging the volume estimates from all three proposals and applying this average to each offeror's proposed unit prices.⁶

The SSET's evaluation results were presented to the agency's source selection authority (SSA).⁷ Hearing Transcript (Tr.) at 20-21; see AR, Supplemental Documents, Source Selection Briefing Slides, at 2970-92.⁸ The SSET identified numerous strengths for ReserveAmerica, including the provision of a [DELETED],⁹ dedicated staff, comprehensive quality control plan, and "[c]omprehensive and innovative marketing to grow the service," and no weaknesses. Id. at 2980-82. The SSET identified less strengths for Spherix and a number of "significant weaknesses," including "[quality control] plan was not comprehensive in approach," "[n]o marketing; no growth," and transition period staffing. Id. at 2984-85. The SSET recommended award to ReserveAmerica, despite Spherix's substantially lower price. Id. at 2992.

Prior to the SSET's evaluation briefing, the SSA received a draft source selection decision from the SSET, and the SSA was aware of Spherix's large price advantage. See Tr. at 27, 23. The SSA asked a number of questions to explore why the SSET believed that ReserveAmerica's proposal represented the best value and asked the SSET to quantify the "value" of a number of ReserveAmerica's evaluated advantages. See Tr. at 31-34, 78-83. For example, the SSA noted:

⁶ The agency intended to establish evaluated prices based on a government estimate of sales volume, which was not disclosed to the offerors and which the government expected would reflect a reasonable rate of growth over the full term of the contract, including option years. However, upon receiving the offerors' estimates, the agency determined that the government estimate overstated the growth rate in the out-years of the contract term. The agency determined that the offerors' estimates were more consistent with each other than with the government estimate, and the agency discarded its estimate in favor of an average of the offerors' estimates. Contracting Officer's Statement at 9-11.

⁷ The record is unclear as to exactly which evaluation documents were reviewed by the SSA. Apparently, the SSA reviewed a Proposal Evaluation and Analysis Report, a number of drafts of which are contained in the record, see Agency's Supplemental Document Production (Nov. 2, 2004), at 3166-42, and which eventually formed the basis of the source selection decision. See Tr. at 21, 223.

⁸ The agency did not produce these slides until just several days prior to the hearing conducted by our Office in this protest.

⁹ [DELETED] See AR, Tab 92, ReserveAmerica Final Proposal Revision, at 1492.

So the question that I was looking at was how to determine best value. One of the comments made was that the two companies looked differently at the marketing strategies. One of them saw a tremendous amount of growth and had an aggressive marketing strategy, one predicted very little growth and did not have a very aggressive marketing strategy.

Tr. at 32, and

[The SSET] made a big deal about [ReserveAmerica's] marketing plan [having a] \$[DELETED] million [value]. What's important to me is, does it have a \$[DELETED] million effect? Maybe it has more, that kind of thing.

Tr. at 79. The SSA accepted the SSET's evaluated strengths and weaknesses in the two firms' proposals and did not independently read or evaluate proposals.

Tr. at 18-19, 37.

The SSA concluded that ReserveAmerica's proposal reflected the best value to the government, finding that ReserveAmerica's proposal was technically superior to Spherix's under both the technical approach and management approach factors. Under the technical approach factor, the SSA cited, among a number of identified proposal strengths, ReserveAmerica's offer of a "technically advanced web-based reservation system . . . [which] provides the centralized system to deliver the multi-purpose services of the NRRS," "[DELETED] dedicated staff members for the NRRS that include [DELETED] agency specific program managers," and "marketing." Under the management approach factor, the SSA cited, among other things, ReserveAmerica's "exceptional and comprehensive" quality control plan. ReserveAmerica was also found superior under the reservation system demonstration factor. However, the two firms were found by the SSA to be essentially equivalent under the past performance factor. AR, Tab 17, Source Selection Decision, at 442-48.

To assess the value of ReserveAmerica's technical superiority against Spherix's nearly \$[DELETED] million (or [DELETED] percent) price advantage, the SSA noted that:

There are several elements of the ReserveAmerica proposal that go beyond the Spherix approach that can be quantified into dollars that bridge this gap, and there are also a number of non-quantifiable elements as well, as follows:

(1) Value of Dedicated Sales Staff - \$[DELETED]per year

ReserveAmerica is proposing dedicating [DELETED] call center staff to this effort. If using an annual salary of \$35,000 (the median

call center salary is \$37,000 in Arlington, Virginia) then this comes out to the annual cost noted. Spherix is certainly allotting personnel time for the call center as well; however, it is not the fully “dedicated” support ReserveAmerica is proposing. It is difficult to understand how many personnel will be working on the NRRS for Spherix; the value projected is [DELETED]% of that offered by ReserveAmerica.

(2) ReserveAmerica Marketing Plan

One area of their solution that clearly separates ReserveAmerica from Spherix is their marketing plans. Based upon experience under the current NRRS marketing program that is valued at over \$[DELETED] million in annual marketing value, ReserveAmerica’s proposed marketing plan will provide greater innovative features, focused on the customer. Their commitment to expand the NRRS is reflected in increased costs, and can be seen in the ReserveAmerica/Spherix Estimated Growth Comparison (see Attachment 4).¹⁰

(3) Other Value Considerations

There are many other aspects of ReserveAmerica’s proposal that provide significant value to the government and the customer, and are difficult to quantify. These include: a) [DELETED] b) [DELETED] c) Quality Control approach . . . d) An innovative implementation plan . . .

Agency Report, Tab 17, Source Selection Decision, at 456-57.

The SSA concluded that:

Because the intent of the NRRS is to provide high quality recreation reservation services to the public, features such as the quality control plan, [DELETED], and [DELETED] represent significant value to the Government. The smooth and effective operation of the NRRS is essential for the Government and its recreation cooperators and contractors to make recreation opportunities accessible to the public. For these reasons, the solicitation informed offerors that the technical approach was the most significant non-price factor,

¹⁰ This attachment is a table estimating and comparing the growth rates in the firms’ proposed volume estimates: ReserverAmerica (4-8 percent) and Spherix (0-1 percent). AR, Tab 17, Source Selection Decision, at 526.

management approach the second most significant non-price factor, and the system demonstration the third most significant non-price factor. The solicitation also informed offerors that the non-price factors were significantly more important than the price.

Thus, given the significantly better technical approach, the significantly better management approach, and the significantly better system demonstration, and in light of the essentially equivalent past performance, I conclude that, even at the significantly higher price, the ReserveAmerica scenario A offer provides the best value to the Government.

Id. at 460. Award was made to ReserveAmerica, and, following a debriefing, Spherix filed this protest.¹¹

DISCUSSION

Spherix challenges the agency's evaluation of both firms' proposals and the source selection decision based upon that evaluation. Specifically, Spherix argues that the agency's evaluation of ReserveAmerica's offer of dedicated staff and marketing plan as substantial technical advantages over Spherix's proposal is unreasonable, where the solicitation did not require the submission of, or provide for the evaluation of, proposed dedicated staff or a marketing plan. Moreover, Spherix argues that it, in fact, also offered dedicated staff and provided information regarding its marketing approach, which were not fairly considered by the SSA in his selection decision.

In reviewing a protest of an agency's evaluation and source selection decision, we will not re-evaluate proposals, but will review the record to determine whether the evaluation and selection decision are reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 at 6.

Dedicated Staff

As noted above, the agency's evaluation documentation and source selection decision specifically identified, under the technical approach factor, ReserveAmerica's offer of [DELETED] dedicated staff positions as a proposal strength, which was one of the SSA's bases for offsetting Spherix's price advantage.

¹¹ The protest was filed within 5 days of a required debriefing, and, as required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(3), (4) (2000), the agency suspended contract performance. Subsequently, the agency prepared a written determination that performance of the contract during the protest was in the "best interests" of the United States. 31 U.S.C. § 3553(d)(3)(C).

In this regard, the RFP's work statement provided that the contractor would be required to operate a contact center to receive phone calls for, or related to, reservations and recreation-related sales, and "shall provide all aspects of this service including, but not limited to: . . . trained staff, and experienced supervision." RFP § C, at 226. However, the RFP did not state specific staffing requirements, instruct offerors to provide their staffing levels in their proposals, or specifically inform offerors that such staffing would be evaluated.¹²

We find the agency's assessment of ReserveAmerica's offer of dedicated staff problematic in a number of regards. First, the SSA apparently believed that Spherix did not propose the "dedicated" support that ReserveAmerica proposed. In this regard, in the hearing conducted by our Office in this matter, the SSA testified that he understood from the SSET's briefing that Spherix's proposal had not committed to provide the level of effort needed to provide the call center services.¹³ Tr. at 97-100.

Both Spherix and ReserveAmerica addressed staffing in their proposals. ReserveAmerica's proposal identified "[DELETED] dedicated to serving the needs of the NRRS" that would include [DELETED] agency-specific program managers and [DELETED] contact center agents. AR, Tab 92, ReserveAmerica Final Proposal Revision, at 1491, 1500, 1526, 1541-42. As noted above, this offer was assessed as a proposal strength for ReserveAmerica. Spherix's proposal stated that Spherix would deliver [DELETED] call center seats and "a dedicated staff of Reservation Specialists and Customer Service Representatives" with experienced management, and specifically proposed key personnel that included [DELETED] dedicated to each major stakeholder Agency." AR, Tab 112, Spherix Final Proposal Revision, at 2522, 2583. This aspect of Spherix's proposal was not discussed in the SSET final consensus evaluation. See AR, Supplemental Documents, Final Consensus Evaluation Worksheets for Spherix, 2995-96, 3003-04.

From our review of the record, we find no reasonable support for the agency's conclusion that ReserveAmerica's promise of dedicated staff represented a significant proposal advantage over Spherix's similar offer. As noted above, both firms indicated in their proposals that dedicated staff would be provided. Although it is true that Spherix's proposal did not specifically identify the number of dedicated

¹² The RFP did identify "staffing for the transition period" as an evaluation sub-criterion under the management approach factor. RFP § M, at 333. However, the dedicated staffing identified as an evaluated advantage for ReserveAmerica's proposal under the technical approach factor was not part of the transition plan.

¹³ The SSA testified that he did not see significant value in dedicated call center agents per se, but that his concern was whether an offeror had committed sufficient labor hours to the contract for that purpose. Tr. at 84-88.

staff, as ReserveAmerica's proposal did, this specific information was neither requested by the RFP nor sought by the agency during discussions. Moreover, the record does not show that the SSA otherwise fairly considered Spherix's offer of dedicated staff. The SSA stated that he had not reviewed Spherix's proposal and the SSET's briefing left him with the understanding that Spherix's proposal had not committed to provide the level of effort needed to provide the call center services. Tr. at 97-100. This was neither a reasonable evaluation of Spherix's proposal, nor a reasonable assessment of the difference between ReserveAmerica's and Spherix's proposals.

Moreover, while we recognize that an agency is not required to "dollarize" the value of assessed proposed strengths, here the agency did that,¹⁴ and we find unreasonable the SSA's conclusion that quantified the value of ReserveAmerica's offer of [DELETED] dedicated call center staff to be \$[DELETED] per year. The agency calculated this amount by multiplying an estimated average annual salary by the number of staff that ReserveAmerica offered,¹⁵ and thus this value reflects only ReserveAmerica's estimated costs of providing these [DELETED] dedicated staff. The agency recognized that Spherix would be providing some amount of staff to perform this work, but because the agency did not know the amount of dedicated staff that Spherix would provide (and did not ask), the agency merely "projected" Spherix's staffing to be [DELETED] percent of ReserveAmerica's staffing. See AR, Tab 17, Source Selection Decision, at 456. Although the basis for this projection is somewhat uncertain, the recollection of one SSET member is that the percentage is based on comparing the size of Spherix's call center staff under its current NPRS contract with the [DELETED] dedicated staff stated in ReserveAmerica's proposal. Tr. at 242-43. That comparison is unreasonable, however, because, under the RFP, the NPRS is being consolidated with all of the other recreation reservation services, including the larger, existing NRRS. Given the substantial increase in reservation services under the RFP, the call center staff size under the NPRS could not reasonably be assumed to be similar in staff size for the consolidated system. In any event, the agency did not determine a value associated with its projection of the staff that it believed Spherix would provide. In short, the record does not establish reasonable support for the determination that ReserveAmerica's dedicated staff reflected additional value.

¹⁴ There is no requirement that a selection official, in performing a cost/technical tradeoff, quantify, or dollarize by calculating a precise value, the technical advantages offered. See KRA Corp., B-278904, B-278904.5, Apr. 2, 1998, 98-1 CPD ¶ 147 at 14.

¹⁵ The offerors did not provide salary information in their proposals, and therefore the salary estimate is not based upon ReserveAmerica's projected salaries for this staff.

Marketing Approach

As explained above, the SSA assessed a significant proposal strength under the technical approach factor for ReserveAmerica's proposed marketing approach, finding that the awardee's marketing approach was more aggressive and offered the prospect of greater growth than Spherix's marketing approach. The SSA quantified the value of ReserveAmerica's marketing approach to be in excess of \$[DELETED] million per year. See AR, Tab 17, Source Selection Decision, at 456.

The RFP's work statement provided that the "Contractor shall develop a Marketing Plan to implement a nationwide, public information and awareness program to promote reservation and recreation related services . . . within the NRRS . . ." RFP § C, at 227. The RFP did not, however, identify that the offerors' approach to marketing plans would be evaluated under any of the evaluation factors, nor did the RFP instruct offerors to propose, or provide any information about, a marketing plan. In this regard, the agency, in answering offerors' solicitation questions, stated that the marketing plan is a contract deliverable, see AR, Tab 14, Answers to Industry Questions No. 51, at 354, and that "[a] detailed marketing plan is not a requirement of the proposal." Id. at 367.

In fact, though, both offerors addressed their approach to performing the marketing plan contract requirement. In this regard, ReserveAmerica stated [DELETED]. AR, Tab 92, ReserveAmerica Final Proposal Revision, at 1519-21. Spherix stated that [DELETED]. AR, Tab 112, Spherix Final Proposal Revision, at 2543-44.

The SSA's conclusion that ReserveAmerica's approach to the marketing plan was a significant proposal advantage is apparently based upon the SSET's statements to the SSA that ReserveAmerica had "[c]omprehensive and innovative marketing to grow the service," but that Spherix proposed "[n]o marketing; no growth." See AR, Supplemental Documents, Source Selection Briefing Slides, at 2981, 2985, 2991. This conclusion does not appear to be supported in the evaluation record; specifically, the SSET's final consensus evaluation of ReserveAmerica's proposal contains no discussion of that firm's approach to the marketing plan. See AR, Tab 94, Final Consensus Evaluation Worksheets for ReserveAmerica, at 1842-1902. With respect to Spherix's proposal, the SSET noted that the firm's "marketing plan [was] not comprehensive, lacking specifics and detail"¹⁶--rather than Spherix had not offered an approach to the marketing plan, as stated in the briefing slides provided to the SSA. AR, Supplemental Documents, Final Consensus Evaluation Worksheets for Spherix, at 2994. Spherix's approach to the marketing plan was not identified as needing discussions or clarifications by the SSET, and was not discussed with the protester. See AR, Tab 108, Negotiations, at 2375-86.

¹⁶ Neither firm provided a marketing plan, which, as described above, is a contract deliverable item.

The SSA did not independently review proposals; rather, he relied upon the SSET for its evaluation conclusions. The SSET, however, led the SSA to believe that, although Spherix proposed some level of marketing, its proposed approach was inadequate. Tr. at 58-59, 115-16. In fact, as noted above, the SSET's briefing slides to the SSA erroneously stated that Spherix offered "no marketing; no growth." In this regard, the SSA apparently believed that ReserveAmerica proposed higher costs for its marketing plan and that ReserveAmerica's larger estimated growth in volume over the term of the contract reflected that firm's commitment to its marketing plan. See AR, Tab 17, Source Selection Decision, at 456. There is no support for these conclusions. First, the RFP did not request, and the offerors did not provide, costing information that would have allowed the SSA to determine that ReserveAmerica's costs reflected any commitment to its marketing plan. In this regard, the SSA testified that he did not know how it was determined that ReserveAmerica was dedicating more costs to marketing than Spherix. See Tr. at 108-09. As to projected growth, while it is true that Spherix did not offer a growth projection in its transaction volumes for the award term years, as ReserveAmerica did, the RFP did not state that offerors should provide growth in their projected transaction estimates. Indeed, Spherix's final proposal revision advised the agency that the firm could provide growth estimates, if desired.¹⁷ The SSA was unaware, however, of the context of Spherix's decision not to provide projected growth estimates. See Tr. at 59, 61.

We also question how the SSA determined that ReserveAmerica's assertedly superior marketing approach would be worth \$[DELETED] million per year. Apparently, this amount was calculated from ReserveAmerica's current marketing plan for the incumbent NRRS contract, which was not provided as part of ReserveAmerica's proposal. See Tr. at 246-49. Nevertheless, no explanation has been provided by the agency or the SSA as to exactly how this amount was calculated.¹⁸ Nor does the record evidence any consideration of the value of Spherix's marketing approach.

¹⁷ In its proposal, Spherix stated that since the RFP provided no instructions or information related to growth, "[DELETED]." AR, Tab 112, Spherix Final Proposal Revision, at 2515-16.

¹⁸ The agency argues that how the SSA quantified the value of ReserveAmerica's marketing approach and dedicated staff is not material, because he otherwise determined that ReserveAmerica's proposal reflected the best value to the government. Although the agency now desires to disavow this part of the SSA's selection decision, the written decision documents the SSA's contemporaneous cost/technical tradeoff judgment, which included the dollarized values for ReserveAmerica's assertedly superior market approach and dedicated staff. In this respect, the SSA testified that the written source selection decision accurately reflected his thinking at the time of the selection decision. Tr. at 175. In any event the awardee's marketing approach and dedicated staff were identified as significant

(continued...)

In sum, there is simply nothing in the evaluation record provided by the agency that supports the SSA's conclusion that ReserveAmerica's marketing approach is superior to that of Spherix. In this regard, from our review of the firms' proposals, their approach to the marketing plan requirement appears similar, and there is no documentation in the record showing the agency had actually compared the firms' approaches to meeting this requirement. We also note that to the extent that the agency believed Spherix's approach to the marketing plan requirement was inadequate (the SSET's briefing slides identified this to be a "significant weakness"), this should have been, but was not, raised with Spherix during discussions.¹⁹

Given Spherix's substantial price advantage, any narrowing of the difference in perceived difference in technical quality between Spherix's and ReserveAmerica's proposal could result in a different selection decision. In this respect, the SSA admitted that he may have made a different selection decision if "ReserveAmerica [did] not provide sufficient value to bridge the gap between the cost differences."²⁰ See Tr. at 126. As a result, we conclude that the flaws in the evaluation of proposals prejudiced Spherix, and we therefore sustain this basis of Spherix's protest.

Meaningful Discussions

We also find that the Forest Service did not conduct meaningful discussions with Spherix. It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offerors

(...continued)

discriminators in the selection decision, apart from their quantified dollar value. See Agency Report, Tab 17, Source Selection Decision, 458, 459.

¹⁹ Although the SSA's decision suggests that Spherix's approach to the marketing plan requirement was inadequate, the agency now acknowledges that Spherix's proposed marketing approach meets the agency's requirements. Agency's Hearing Comments at 7.

²⁰ In its report, the agency argues that "[a]lthough some elements of the award decision may be flawed, the award decision as a whole was reasonable and should stand." Agency's Post-Hearing Comments at 19. Here, however, the SSA concluded that Spherix's substantial price advantage was outweighed by the perceived technical advantages in ReserveAmerica's proposal, some of which we have found unsupported in the record. Although other aspects of ReserveAmerica's proposal appear to have been reasonably found superior to Spherix's, reduction of any aspect of ReserveAmerica's perceived technical superiority could potentially lead the SSA to make a different tradeoff decision.

potential for receiving award. FAR § 15.306(d); Lockheed Martin Corp., B-293679 et al., May 27, 2004, 2004 CPD ¶ 115 at 7.

As described above, the SSET identified Spherix's marketing approach, including a lack of projected growth, to be a "significant weakness." See AR, Supplemental Documents, Source Selection Briefing Slides, at 2985. Spherix's approach to the marketing plan requirement was not discussed with the protester, and therefore we conclude that the agency failed to conduct meaningful discussions with the firm in this respect.

We also find that the agency did not conduct meaningful discussions with Spherix with respect to its proposed quality control plan, which was also determined to be a significant weakness. The RFP provided for the evaluation of offerors' draft comprehensive quality control plan "to include a Performance Work Summary (PRS) with Standards, Acceptable Quality Level (AQL), and Incentives." RFP § M, at 333. Spherix's initial proposal described its proposed quality control plan, see AR, Tab 103, Spherix Initial Proposal, at 2139-214, which the SSET evaluated to be a weakness, stating that Spherix's "overall quality control plan . . . is not a complete approach . . . Vendor must amplify a more thorough approach to quality control ensuring that [DELETED] are addressed." See AR, Supplemental Documents, Final SSET Evaluation Worksheets for Spherix, at 2997. The SSET also evaluated Spherix's proposed approach to the PRS and AQL requirements to be weaknesses. Id.

In its discussions with Spherix, the agency addressed only the firm's proposed approach to the PRS and AQL requirements, and Spherix's proposal revisions sufficiently addressed those aspects of its proposal such that the agency no longer identified them as proposal weaknesses. Id. The agency did not otherwise address Spherix's quality control plan during discussions. Id. In its final evaluation, the SSET noted that Spherix had not changed its proposal with respect to its proposed quality control plan, and stated that discussions were not conducted on this weakness because Spherix "had a plan[; the] plan was simply weak." Id. Ultimately, this aspect of Spherix's proposal was identified by the SSET identified to be a "significant weakness." See AR, Supplemental Documents, Source Selection Briefing Slides, at 2985. We therefore find that the agency failed to conduct meaningful discussions with Spherix with respect to its proposed quality control plan.

We also find that Spherix did not receive meaningful discussions with respect to its proposed transition period staffing, which was evaluated as a part of the proposed project implementation plan under the management approach factor. See RFP § M, at 333. Spherix's response to this requirement was evaluated as a weakness, because the SSET found that Spherix did not provide detailed information; SSET did not conduct discussions on the matter with Spherix because it concluded that Spherix's proposal "spoke to staffing but weak in identification." See AR, Supplemental Documents, Final SSET Consensus Evaluation Worksheets for Spherix, at 2999. This

aspect of Spherix's proposal, which was identified by the SSET as a "significant weakness," see AR, Supplemental Documents, Source Selection Briefing Slides, at 2985, also should have been raised with Spherix during discussions, but was not.

Other Issues

The protester challenged a number of other aspects of the agency's evaluation, which we need not address, given our decision sustaining Spherix's protest. Specifically, Spherix challenged the agency's price evaluation because of the agency's averaged quantity estimates. Although we do not address this issue, we note that a substantial portion of this protest basis arises from, though not based upon, the fact that the RFP did not state quantity estimates in the price schedule. The agency may wish to consider identifying total estimated quantities for calculating total prices, thereby allowing offerors to prepare their price proposals on the same basis.²¹

Spherix also challenged the agency's evaluation of the firms' past performance. We note that, although the SSA was informed that the offerors were equivalent under the past performance factor, he was not informed of one of the few evaluated weaknesses in ReserveAmerica's final proposal, *i.e.*, [DELETED], nor was he aware of the substance of the offerors' past performance histories. See Tr. at 119-25. Because we have recommended that the competition be reopened and a new selection decision prepared, the agency will have the opportunity to inform the SSA of the evaluated differences in the firms' past performance and potentially related weaknesses and risks, such as the one identified here.

Spherix also complains that the Forest Service accepted ReserveAmerica's [DELETED] implementation plan, which [DELETED]. AR, Tab 92, ReserveAmerica Final Proposal Revision, at 1530-31. The protester argues the Forest Service improperly relaxed the solicitation requirements, which provided for [DELETED]. The agency disputes this and argues that this protest ground is untimely. Although we do not decide the matter, we note that neither the SSET nor the SSA considered the impact of [DELETED] on the other evaluated strengths of ReserveAmerica's proposal and further note that the approach appears inconsistent with the stated goal of the acquisition to consolidate all the many systems into a single system.

²¹ The RFP could still request that offerors propose the quantity levels at which their lower unit prices for higher volume levels would take effect.

RECOMMENDATION

Because we find unreasonable the agency's evaluation of proposals, conduct of discussions, and source selection decision, we sustain the protest. We recommend that the agency amend the solicitation, if appropriate, reopen discussions, request revised proposals, and make a new source selection decision. If an offeror other than ReserveAmerica is selected for award, the agency should terminate ReserveAmerica's contract and make award to that other firm.²² We also recommend that the agency reimburse the protester its cost of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2004). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

²² Consistent with the requirement of CICA regarding the impact of an agency's decision to override the automatic stay of performance on "best interests" grounds, as occurred here, our recommendation is made "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." See 31 U.S.C. § 3554(b)(2).