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## Decision

**Matter of:** SparkSoft Corporation

**File:** B-420156; B-420156.2

**Date:** November 15, 2021

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Pamela Waldron, Esq., and Lucy G. Mac Gabhann, Esq., Department of Health and Human Services, for the agency.  
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest challenging the terms of a solicitation as patently ambiguous is dismissed as academic where the solicitation has been amended to remove the ambiguous terms prior to the closing date for quotations.
  2. Protest arguing that the agency failed to provide adequate information about the evaluation of protester's quotation at stage one of the competition is dismissed for failure to state a valid basis of protest where the protester elected to participate in the next stage of the procurement after being informed that the firm was not likely to be a viable competitor because its quotation was unacceptable.
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### DECISION

Sparksoft Corporation, of Catonsville, Maryland, challenges the terms of the solicitation and the agency's actions in connection with Task Order Request for Proposals (TORP or RFQ)<sup>1</sup> No. TORP-CMS-2022-200631, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS), for website quality control. The protester alleges that the solicitation is patently ambiguous and that the agency failed to provide sufficient information about the evaluation of Sparksoft's quotation. The protester also requests that our Office recommend the reimbursement of costs in connection with the filing of its supplemental protest. We dismiss the protest.

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<sup>1</sup> The solicitation refers to itself as both a TORP and as a request for quotations (RFQ). See, e.g., RFQ, attach. J-2, Instructions to Offerors and Evaluation Criteria at 1 (herein referred to as the "RFQ").

## BACKGROUND

The solicitation, issued on May 24, 2021, as a small business set-aside pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, sought quotations from holders of CMS's multiple-award Strategic Partners Acquisition Readiness Contract (SPARC) indefinite-delivery, indefinite-quantity (IDIQ) contract. RFQ at 1.<sup>2</sup> The solicitation contemplated the issuance of a fixed-price task order with a 1-year base period and four 1-year option periods considering price and the following non-price factors: relevant experience, management approach and personnel qualifications, performance work statement, proposed quality assurance surveillance plan, and section 508<sup>3</sup> product accessibility template. *Id.* at 1, 12-16.

The solicitation advised vendors that quotations would be evaluated in two stages.<sup>4</sup> *Id.* at 3. In the first stage, vendors were to submit their quotations addressing only the relevant experience factor. *Id.* at 4. After the stage one evaluations were completed, the contracting officer would advise vendors found to have qualified relevant experience to participate in stage two. *Id.* at 3, 12. If, based on the information submitted at stage one, the agency found the vendor was "unlikely to be a competitor," the contracting officer would notify the vendor of such and the basis for that opinion. *Id.* at 3. The solicitation refers to this notification as the "advisory down-select." *Id.* The solicitation stated the agency intended this process to minimize development costs for vendors that had little or no chance of receiving award. *Id.* Those vendors notified as part of the advisory down-select, however, were allowed to participate in stage two if they so desired. *Id.* Vendors that intended to participate in stage two were required to inform the contracting officer of such within three business days after receipt of the advisory down-select notification. *Id.*

In the second stage, vendors would address the remaining evaluation factors (*i.e.*, those factors other than relevant experience). *Id.* at 6-11. Award would be made to the

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<sup>2</sup> References to the solicitation or RFQ are to attachment J-2, Instructions to Offerors and Evaluation Criteria that was included in the original version of the solicitation emailed to vendors on May 24, 2021. All citations to the record are to the consecutive numbering of pages in the Adobe PDF documents provided in the record.

<sup>3</sup> Section 508 of the Rehabilitation Act of 1973, as amended, requires federal agencies to ensure that their electronic and information technology (EIT) provides comparable access to people with and without disabilities whenever an agency develops, procures, maintains, or uses EIT. *Visual Connections, LLC*, B-407625, Dec. 31, 2012, 2013 CPD ¶ 18 at 1.

<sup>4</sup> Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors" who submit "quotations" and are "issued" task orders, the record and the parties' filings also use the terms "offerors," "proposals," and "award." For the sake of consistency, we use the terms to refer to the firms that will compete here as vendors who submitted quotations for the issuance of a task order.

responsible vendor whose quotation--from both stage one and stage two--provided the best overall value to the government, considering price and non-price (technical) evaluation factors. *Id.* at 11.

Sparksoft timely submitted a stage one quotation. Based on the results of the agency's stage one evaluation, Sparksoft was informed on August 25 that the agency did not recommend that Sparksoft proceed to the next stage of the procurement. Req. for Dismissal, attach. 1, Down-Select Notification. On August 27, Sparksoft sent an email, notifying the agency that the firm intended to participate in stage two of the procurement. *Id.*, attach. 2, Commc'ns Between Agency and Sparksoft at 3. In that notification, the protester complained that the agency had not provided sufficient information about the evaluation of its stage one quotation and requested the agency "halt [the] evaluation process" until Sparksoft received the information it requested regarding the agency's stage one evaluation of its quotation. *Id.* at 2-3. Sparksoft also pointed out what it believed were inconsistencies within the solicitation and requested an extension of time to submit its stage two quotation. *Id.* at 2.

On August 31, the agency acknowledged receipt of Sparksoft's notice of intent to participate in stage two of the procurement. *Id.* at 1. In that communication, the agency informed Sparksoft that because the firm had elected to continue to stage two of the competition, a more detailed debriefing regarding the evaluation of Sparksoft's stage one quotation could not be provided at the point. *Id.* The agency, however, did inform Sparksoft that its stage one quotation had been assigned a rating of unacceptable and that the agency found its relevant experience to be "unqualified." *Id.* The agency also notified Sparksoft that the submission deadline for stage two quotations had been extended to September 15 for all vendors, and that the agency had not identified any inconsistencies in the solicitation. *Id.* In response, Sparksoft sent an email later that day, requesting additional information as to why the agency found the firm's stage one quotation "unqualified." Electronic Protest Docketing System (EPDS or Dkt.) No. 15, Agency Resp. to GAO Request for Information (RFI), attach. 1, Sparksoft Aug. 31 Response. The agency did not respond to this request for additional information. Protest at 5; Dkt. No. 15, Agency Resp. to GAO RFI at 1.

On September 14, prior to the deadline for the submission stage two quotations, Sparksoft filed this protest with our Office.

## DISCUSSION

The protester argues that the solicitation contains patent ambiguities and that the agency is unreasonably failing to provide Sparksoft with additional information about the evaluation of its stage one quotation. Sparksoft also requests that our Office recommend that HHS reimburse the firm its costs of filing the protest because the agency issued an amendment to the solicitation after the protest was filed. For the reasons discussed below, we dismiss Sparksoft's protest and request.

## Patent Ambiguities

Sparksoft argues that the solicitation contains patent ambiguities as to how the agency would consider the results of its evaluation of quotations under the non-price (technical) factors. Protest at 5-6. The protester contends that the solicitation states that the technical factors, when combined, are more important than price in one section and in another section states that they are significantly more important than price. *Id.* at 5. The protester also argues that the solicitation contains conflicting or inconsistent descriptions of the relative importance of the technical factors. *Id.*

On September 14, the same day the protest was filed, the agency issued an amendment that corrected the inconsistency with regard to the relative importance of the evaluation factors. Supp. Protest at 3; Dkt. No. 17, Agency Resp. to GAO RFI, Oct. 8, 2021, attach., Amended RFQ, Sept. 14, 2021, at 6. On September 27, the agency issued another amendment clarifying that the technical factors, when combined, were significantly more important than price. Supp. Req. for Dismissal at 1; attach. 2, Amended RFQ, Sept. 27, 2021, at 6. These amendments were issued before the due date set for the submission of the agency report.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Pacific Photocopy and Research Servs.*, B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4.

Here, the agency's actions in issuing solicitation amendments to address the ambiguities noted by the protester renders those challenges to the terms of the solicitation academic. The protester, itself, in its request for attorney's fees, expressly acknowledges that the agency addressed and corrected the ambiguous language raised in Sparksoft's first protest ground. Supp. Protest at 3. Protests of agency action become academic when contracting agencies grant the relief requested. *Best Foam Fabricators, Inc.*, B-274803, Oct. 28, 1996, 97-1 CPD ¶ 152 at 1. Accordingly, we do not consider academic protests because to do so would serve no useful public policy purpose. *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. As a result, this allegation is dismissed.

## Information Regarding the Evaluation of Sparksoft's Stage One Quotation

Sparksoft next argues that the agency's failure to provide additional information about its evaluation under stage one (relevant experience factor) is unreasonable. Protest at 6-7. The protester raises a number of arguments objecting to the agency's action here. By way of example, Sparksoft contends that the agency's failure to provide it with additional information is preventing it from making an "informed choice" as to whether

the firm should expend additional resources to proceed to stage two.<sup>5</sup> *Id.* at 7. Sparksoft also contends that the agency's actions (or inaction) prevent it from ever challenging the basis for the agency's unacceptable rating under the relevant experience factor. *Id.*

Underlying its objections to the agency's actions, is the firm's belief that the agency was obligated to "justify" its rating of Sparksoft's quotation as unacceptable because of statements in the solicitation about the purpose of the two-stage advisory notification process. *Id.* at 7. The solicitation advised vendors that, after stage one, they would be informed whether they would be a "viable competitor" and the basis for that conclusion. RFQ at 3. For the relevant experience factor (also referred to as the stage one quotations), the solicitation stated that quotations would be reviewed and assigning ratings of excellent, highly acceptable, acceptable, or unacceptable. *Id.* at 12. At the conclusion of the evaluation, vendors would be advised whether their relevant experience was found to be "qualified," which would inform vendors of their expected likelihood to succeed in stage two. *Id.* The solicitation provided that the two-stage approach was to "streamline the process for [vendors] and minimize traditional burdens associated with lengthy paper-based submissions." *Id.* at 3.

Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Tech., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

The agency informed Sparksoft on August 25 that the stage one evaluation was complete and the agency concluded that it was unlikely Sparksoft would be a viable competitor during stage two. Protest at 4; Req. for Dismissal, attach. 1, Down-Select Notification. On August 27, Sparksoft informed the agency that it intended to participate

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<sup>5</sup> As discussed above, Sparksoft notified the agency of its intent to continue to stage two of the competition before even filing its protest--and presumably without the information it needed to make an "informed choice" as to whether to participate in the next stage. Under these circumstances, even if we were to find the agency's actions here unreasonable, we cannot see how Sparksoft could have possibly been competitively prejudiced. Given that Sparksoft has already elected to proceed to stage two of the procurement process, the protester can hardly claim that the lack of information precluded the firm from competing for award. See *Draeger, Inc.*, B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 at 5 n.10 (finding that protester could not demonstrate competitive prejudice by an alleged out-of-scope purchase order for medical equipment where the protester's own IDIQ contract included--and under which purchase orders had been issued--the disputed equipment).

in stage two. *Id.*, attach. 2, Commc'ns Between Agency and Sparksoft at 2-3. In this email, Sparksoft requested, among other things, that the agency provide additional information about the evaluation of its quotation, asserting that the advisory notification Sparksoft received did not comply with the solicitation's stated intent "to minimize development costs for vendors that had little or no chance of receiving award." *Id.* at 2. On August 31, the agency confirmed receipt of Sparksoft's notice of its intent to participate in the second stage. *Id.* at 1. In that confirmation, the agency explained that because Sparksoft had elected to participate in stage two of the procurement, a debriefing that would have provided the vendor with the agency's assessment of strengths, significant weaknesses, and deficiencies in its stage one quotation could not be provided when the procurement was still ongoing and an award was yet to be made. *Id.* Sparksoft was informed, however, that the firm's relevant experience had been evaluated and assigned a rating of "unacceptable" for that evaluation factor. *Id.*

We find that this allegation fails to clearly state a legally sufficient ground of protest to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. 4 C.F.R. § 21.5(f). Here, the solicitation clearly advised vendors that they would be informed after stage one whether they would be a viable competitor and the basis for that conclusion. RFQ at 3. The agency's notification to Sparksoft on August 25 informed the firm that it had been assigned a rating that resulted in a recommendation to not move forward to stage two, and that the agency deemed it was unlikely the firm would be a viable competitor.<sup>6</sup> Req. for Dismissal, attach. 1, Down-Select Notification. The protester's argument here fails to state a legally sufficient basis of protest and is akin to a challenge to the adequacy of a debriefing under a FAR part 15 procurement, which we have repeatedly said, we do not review because debriefings are procedural matters that do not affect the validity of an award.<sup>7</sup> See, e.g., *Metric 8*

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<sup>6</sup> Specifically, the protester was informed of the following:

The Stage One evaluation included an assessment of Relevant Experience responses, to determine the capability and suitability of the respondent to perform the work required by the Statement of Objectives (SOO). Each proposal was independently evaluated against the objectives of the SOO and the Proposal Instructions/Evaluation Criteria. The Government evaluated the offeror's technical proposal using an adjectival rating methodology. Sparksoft was found to have a rating which resulted in the recommendation to not move forward to Stage Two. Based on the Stage One evaluation, CMS has determined that it is unlikely Sparksoft would be a viable competitor during Stage Two. The intent of this distinction is to minimize proposal development costs for vendors with little or no chance of receiving an award.

Req. for Dismissal, attach. 1, Down-Select Notification.

<sup>7</sup> The protester does not dispute that the RFQ seeks quotations from holders of CMS's SPARC contract, using the procedures set forth in FAR subpart 16.5. Sparksoft,

*LLC et al.*, B-419759.2 *et al.*, July 29, 2021, 2021 CPD ¶ 299 at 9; *Symplicity Corp.*, B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 4 n.4.

Finally, Sparksoft's assertion that the agency's actions prevent it from ever challenging the basis for the agency's unacceptable rating under the relevant experience factor also fails to state a valid basis of protest. Here, the solicitation stated that task order award will be based on evaluations of quotations from stage one and stage two. RFQ at 11. The RFQ clearly explained that any firm notified after stage one that it would not be a viable competitor in stage two was still eligible to continue in the procurement, *i.e.*, was not automatically eliminated from the competition. RFQ at 3. Therefore, firms--such as Sparksoft--that elect to participate in stage two of the procurement would have an opportunity to challenge the agency's evaluation of its quotation under both stages once an award has been made. See *Bastion Techs., Inc.*, B-418432, May 5, 2020, 2020 CPD ¶ 163 at 7. Any challenges to the evaluation of Sparksoft's quotation at this time would be premature as the procurement is ongoing. See *Systems Implementers, Inc.*, B-418963.4, Apr. 19, 2021, 2021 CPD ¶ 174 at 3-4.

In sum, Sparksoft's arguments challenging the reasonableness of the agency's actions in connection with the information provided regarding the firm's stage one evaluation are dismissed as premature or failing to state factually and legally sufficient bases of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); *Bastion Techs., Inc.*, *supra*.

#### Request for Recommendation for Reimbursement of Costs

In response to the agency's issuance of amendments to the solicitation after Sparksoft filed its initial protest, the protester submitted a "supplemental" protest requesting that our Office recommend the reimbursement of costs for filing its initial protest. Supp. Protest at 3. The supplemental protest simply observes that within hours of Sparksoft filing its initial protest, the agency issued a solicitation amendment correcting an error alleged by the protester. *Id.* Based on that observation, the protester requests that we "sustain the first count of Sparksoft's protest" and recommend "CMS reimburse Sparksoft the cost of pursuing this protest count, including . . . attorneys' fees. . . ." *Id.*

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however, contends that the agency intended to conduct the procurement consistent with the procedures outlined in FAR section 15.202, Advisory multi-step process. Protest at 3, 6-7. Under the advisory, multi-step process, the agency is permitted to publish a presolicitation notice providing a general description of a procurement and invite potential offerors to submit the requisite information in order for the agency to evaluate whether the respondent would be invited to participate in the resulting acquisition or if the respondent was unlikely to be a viable competitor. FAR 15.202. Even if the agency intended to use the process outlined in section 15.202 of the FAR--of which we express no opinion--we fail to see how the agency's action here was inconsistent with that process, which merely requires the agency to provide "the general basis" for finding the respondent unlikely to be a viable competitor. FAR 15.202(b).

Under our regulations, if the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). Our regulations require that the protester's request be filed no later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. *Id.*

At this time, Sparksoft's request for recommendation for reimbursement of costs is premature. If the protester wishes to seek a recommendation for reimbursement of costs, such request may be filed after the closing of this protest, per our regulations.<sup>8</sup>

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel

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<sup>8</sup> Because the request is premature at this juncture, we express no opinion on the merits of the request. We note, however, that when an agency takes corrective action in response to a protest, we may recommend the agency reimburse the protester its protest costs if, under the circumstances, we determine the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(e); *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2-3.

In other words, to prevail in its request, the protester must show (1) the agency unduly delayed taking corrective action, and (2) its protest was not only meritorious, but clearly meritorious. *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. Given the facts here, and if the amendments correcting the ambiguities identified by Sparksoft were viewed as corrective action, the agency's actions were taken prior to the due date for the agency report. Generally, such actions would not be considered "unduly delayed" as contemplated by our regulations. *AdaRose Inc.--Protest & Costs*, B-299091.2, Jan. 14, 2008, 2008 CPD ¶ 18 at 3-5.