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**Comptroller General  
of the United States**

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

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## Decision

**Matter of:** Enterprise Information System

**File:** B-401037.5; B-401037.6

**Date:** December 1, 2009

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Alexander J. Brittin, Esq., Brittin Law Group; and Jonathan D. Shaffer, Esq., and Mary Pat Gregory, Esq., Smith, Pachter, McWhorter, for the protester. John R. Tolle, Esq., and Bryan R. King, Esq., Barton, Baker, Thomas & Tolle, LLP, for Evolver, Inc., an intervenor. Lisa J. Obayashi, Esq., U.S. Patent and Trademark Office, for the agency. Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

1. Protest that statement by agency during discussions—that price below representative current contract price may create performance risk—misled protester into not lowering its price in revised proposal is denied; statement did not prohibit offerors from proposing a price below specified level but, rather, provided offerors with opportunity to explain how they would be able to perform at price below that level.
  2. Protester is not interested party for purposes of challenging evaluation of awardee’s proposal where record shows that, even if protest were sustained, an intervening offeror, not protester, would be next in line for award.
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### **DECISION**

Enterprise Information System (EIS), of Vienna, Virginia, protests the award of a contract to Evolver, Inc., of Reston, Virginia, under request for proposals (RFP) No. DOC52-PAPT-08-01009, issued by the U.S. Patent and Trademark Office for information technology support services. EIS argues that the agency failed to hold meaningful discussions and improperly evaluated Evolver’s proposal.

We deny the protest.

The RFP provided for a “best value” award based on an evaluation of the following factors (in descending order of importance): experience, technical approach, management approach, past performance, and price. Agency Report (AR) at 3. Four

offerors responded to the solicitation. Award was made to EIS. VMD Systems Integrators, Inc., an unsuccessful offeror, challenged the award in a protest filed with the Court of Federal Claims. The agency took corrective action in response to that protest; it held a new round of discussions and permitted offerors to submit new final proposal revisions (FPRs). *Id.* at 4. EIS's FPR, priced at \$91,491,055.13, was rated above average for all non-price factors, while Evolver's, priced at \$73,662,436, was rated above average for experience, technical approach, and past performance, and average for management approach. *Id.* at 6. Following a best value determination, the agency made award to Evolver.

## MISLEADING DISCUSSIONS

EIS maintains that the agency misled it during discussions. In this regard, during the reopened discussions, the agency advised EIS and all other offerors as follows:

In addition to the Independent Government Estimate (IGE) of \$118,755,530.58, the USPTO also utilized a Representative Current Contract Price (RCCP) comprised of labor rates from the incumbent contract and the same representative labor mix used for the IGE as part of its price analysis. The RCCP is \$90,864,828.

Recognizing the IGE and RCCP are both estimates, please provide rationale for being able to effectively meet the requirements of the RFP and effectively recruit, hire, and retain highly qualified employees with your proposed rate structure. When an offeror's evaluated price is below the IGE and the RCCP, the USPTO may interpret this as a risk to successful performance of the requirements under the RFP.

AR at 5.

In responding to this discussion question in its FPR, EIS lowered its price somewhat, from \$92,432,285 to \$91,491,055.13. EIS asserts that, because the discussion question advised that a proposed price below the IGE and RCCP could be interpreted as a performance risk, it was misled into believing that it could not lower its price, which was already approaching the RCCP.

A procuring agency may not coerce or mislead an offeror during discussions, including with respect to its price. See First Preston Housing Initiatives, LP, B-293105.2, Oct. 15, 2004, 2004 CPD ¶ 221 at 5.

The agency did not mislead EIS. The language of the discussion question, on which EIS's argument is predicated, did not prohibit offerors from submitting a price below the RCCP or indicate that a price lower than the RCCP would automatically be considered a performance risk. Rather, the plain language of the question alerted offerors that, if they proposed a price below the RCCP, they should explain how they would be able to perform and hire and retain qualified personnel at that price.

Rather than lowering its price and providing the invited justification, EIS chose not to significantly reduce its price in its FPR. This action was an exercise of EIS's independent business judgment and in no way suggests misleading or otherwise improper discussions.

#### EVALUATION OF EVOLVER'S PROPOSAL

EIS asserts that the agency unreasonably evaluated the performance risk inherent in Evolver's low labor and overhead rates, and that Evolver's proposal should not have been rated above average under the management factor.

Only an interested party may protest a federal procurement; that is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (2009). Where, as here, there is an intervening offeror that would be in line for award if the protester's challenge to the award were sustained, the protester's interest is too remote to qualify it as an interested party. Evans Sec. Solutions, Inc., B-311035, Mar. 19, 2008, 2008 CPD ¶ 58 at 2. The record clearly shows that EIS's and Evolver's FPRs were the highest and lowest priced, respectively, and were ranked second and third technically. AR at 10-11. A third offeror's proposal was the highest technically ranked--with two outstanding and two above average ratings--and also was priced lower than EIS's. AR at 10-11. This being the case, that offeror, not EIS, would be next in line for award if this aspect of EIS's protest were sustained. Accordingly EIS is not an interested party to challenge the award to Evolver.<sup>1</sup>

The protest is denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>1</sup> EIS argues that its proposal should have been rated outstanding, rather than above average, under the management factor because the fact that its price was slightly higher than the RCCP would make it easier for EIS to retain the incumbent work force. However, the ability to recruit and retain employees was just one of several considerations under the management factor--also considered were the quality, completeness, responsiveness, and credibility of the overall proposed program organization, and the proposed management plan, RFP at 72--so the alleged greater ability to hire and retain employees alone would not be a basis for finding that EIS's proposal should have received an outstanding rating under this factor. In any case, the third offeror's proposal--with two outstanding and two above average ratings--would remain in line for award even if EIS's rating in this area were increased, which would leave EIS with a single outstanding rating and a higher price. EIS thus was not prejudiced by the alleged error.