



United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: LCPtracker, Inc.; eMars, Inc.

File: B-410752.3; B-410752.4; B-410752.5

Date: September 3, 2015

Jacobson, Esq., and Colleen Downes, Esq., Jacobson & Associates, for LCPtracker, Inc.; and Lawrence P. Block, Esq., and Elizabeth Leavy, Esq., Reed Smith LLP, for eMars, Inc., the protesters.

Stuart B. Nibley, Esq., and Amy M. Conant, Esq., K&L Gates LLP, for Elation Systems, Inc., an intervenor.

Margaret R. Baldwin, Esq., Department of Housing and Urban Development, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Awardee's receipt of benefits flowing from contract performance, including greater visibility, access to an expanded customer base, and reduction of marketing costs, constitutes sufficient consideration to support the award of a no-cost contract.
 2. Allegation that agency engaged in disparate treatment by permitting only the awardee to submit a no-cost quotation is denied where agency provided the same information to all of the competing vendors and any vendor could have submitted a no-cost quotation.
 3. Protest that U.S. Small Business Administration (SBA) improperly issued certificate of competency for awardee is denied where record indicates the procuring agency provided all reasonably relevant information to the SBA.
 4. Protest asserting that awardee will not comply with solicitation requirement for a web-based system is a matter of contract administration which we will not consider.
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DECISION

LCPtracker, Inc., of Orange, California, and eMars, Inc., of Scottsdale, Arizona, protest the Department of Housing and Urban Development's (HUD) award of a no-cost contract to Elation Systems, Inc., of Pleasanton, California, pursuant to

request for quotation (RFQ) No. RFQ-M-14-00004, for a commercial off-the-shelf (COTS) web-based payroll tracking service to monitor compliance with Davis-Bacon wage rates.¹ One or both of the protesters assert that: the no-cost contract should be considered void for lack of consideration; the agency engaged in disparate treatment of the vendors; the U.S. Small Business Administration improperly issued a certificate of competency for Elation; and Elation will not meet the solicitation requirement for a web-based system.

We deny the protests.

BACKGROUND

On July 9, 2014, the agency sent the solicitation to three small businesses (LCPtracker, eMars, and Elation) that the agency's market research had identified as offering the services sought. The solicitation did not seek submission of technical proposals, nor did it establish technical evaluation factors. Rather, the solicitation identified various system capabilities that are required, including: electronic submission of certified payroll data from contractors and subcontractors; providing access to contractors and subcontractors from any location via the internet; importing and exporting data files from the contractors' and subcontractors' existing payroll systems; storing/maintaining the Federal prevailing wage rates; and producing various reports.² RFQ, at 3. The solicitation contemplated award of a contract for a base year and four option years. Vendors were instructed to complete a fee schedule quoting fixed prices, by contract period, for the required services. Id. at 1. The agency stated that a contract would be awarded to the vendor "who submits the lowest total price, inclusive of all option years."³ RFQ Transmittal E-mail, July 9, 2014.

In August, the agency provided responses to various vendor questions regarding the procurement. Among other things, eMars asked whether the awardee would be permitted to charge third-party users for the services provided. eMars Protest, exh. D. The agency responded that such charges would not be permitted, stating, "HUD plans to pay the total price." eMars Protest, exh. E.

¹ HUD's Office of Labor Standards and Enforcement is responsible for administration and enforcement of federal labor standards in HUD Projects. eMars Agency Report (AR), exh. 1, RFQ at 2.

² Neither protester asserts that Elation's system fails to comply with any of these particular requirements.

³ The agency estimated that the total cost of the services sought for all 5 performance periods would be \$936,000. Contracting Officer's Statement, July 1, 2015, at 1.

On September 4, 2014, each of the three vendors submitted a price quotation and, thereafter, the agency evaluated the quotations as follows:

LCPtracker	\$1,015,950
eMars	\$ 449,000
Elation	\$ 0 ⁴

Contracting Officer's Statement, July 1, 2015 at 1.

Initially, the agency questioned Elation's capability to perform the contract without monetary compensation; accordingly, on September 29, 2014 the agency awarded a contract to eMars. Thereafter, Elation and LCPtracker filed protests with this Office. On December 23, the agency advised our Office that it intended to take corrective action, including reevaluation of the vendors' quotations; thereafter, we dismissed Elation's and LCPtracker's protests as academic.

By email to Elation dated January 7, 2015, the agency requested that Elation confirm its no-cost quotation; confirm its understanding that no charges would be passed on to any third-party users; and confirm its understanding that Elation would be liable for all costs associated with contract performance. eMars AR, exh. 10. Elation responded by email that same day, stating:

We fully understand that should we receive a purchase order award for these services, our firm will be liable for all costs associated with contract performance for the scope outlined in the bid solicitation; the Department's liability will be the awarded purchase value of \$0.01 (or \$0.00 if that option is accepted), and all associated system users' liability for payment of services provided under the purchase order will be zero.

Id.

The contracting officer was still concerned about Elation's ability to perform the contract without monetary compensation and, by letter dated January 12, 2015, referred the matter of Elation's responsibility to the Small Business Administration (SBA). eMars AR, exh. 9. In its referral letter, the contracting officer advised the SBA, among other things, that:

HUD seeks to automate the payroll review process for federally funded or assisted construction projects . . . via a subscription to a Commercial Off-The-Shelf (COTS) web-based service. . . . There are approximately 6,000

⁴ Elation's fee schedule reflected a price of \$0.01 for the total five-year period, but stated that, if there was no minimum value for awarding the contract, its quotation was "\$0.00" for the five-year period. eMars AR, exh 6, Elation Fee Schedule.

HUD projects totaling \$8 billion dollars in funding that are overseen for compliance with the prevailing wage rates throughout the Nation, which would likely result in more than 6,000 system users under this Purchase Order. . . .

Quotes for this service were received on September 4, 2014. Elation Systems is the apparent successful offeror with a quote of . . . \$0.01 for five years of service. The quote submitted by Elation Systems further noted that if there was no minimum award amount, their quote was reduced to zero for the five years of service. . . . The Contract Specialist requested that Elation Systems verify their understanding that HUD intends to pay all costs associated with this contract, and that HUD and contractor users will not be charged for use of the system, which Elation Systems subsequently confirmed.

HUD has significant concerns regarding the apparent low offeror's ability to perform the contract, specifically their capability of providing access, training, and customization of reports for all users provided for under the Purchase Order with no compensation from either HUD or contractor users. . . .

HUD believes that the zero value quote . . . would prohibit Elation Systems from fulfilling the requirements of this contract. . . . As such, HUD is referring this matter to the U.S. Small Business Administration at this time.

Id.

Thereafter, the SBA sought information from Elation regarding its quotation. In response, Elation provided the SBA with an explanation regarding its no-cost quotation, stating, among other things:

As described in our cover letter, our system is based on the [redacted] model. As such, it has [redacted].

Elation Systems is currently operating with [redacted] of our support team's capacity to support existing customers, leaving [redacted] open capacity to engage in the needs of HUD and its projects without necessitating additional hires or overhead. . . .

HUD is the largest awarding agency that uses this type of solution, and so Elation Systems, Inc. recognizes the significance that gaining the contract would hold.

Currently Elation Systems, Inc. holds the bulk of our contracts in [redacted] and [redacted] Obtaining the HUD contract would open Elation to the

national market, allowing us to reach thousands of contractors, agencies, and users in an unprecedented market reach.

We have determined that the primary way to build business relationships and market our product is through word-of-mouth associating with our current contracts. . . .

[W]e have determined that the proposed HUD contract would allow us to avert . . . traditional [marketing] efforts

LCPtracker AR, exh. 9, Elation Bid Explanation, at 1-3.

In response to HUD's referral, the SBA reviewed Elation's technical operations, its technical and staff resource capacities, the firm's past and present performance, and Elation's explanation for submitting a no-cost quotation. eMars AR, exh. 9, Letter from SBA to HUD, Feb. 12, 2015. On February 12, 2015, the SBA issued a certificate of competency (COC), stating "it is determined that Elation Systems, Inc. is responsible to perform per the requirements of the proposed acquisition." *Id.* On May 20, the agency awarded a no-cost contract to Elation. These protests followed.

DISCUSSION

One or both of the protesters assert that: the no-cost contract should be considered void for lack of consideration; the agency engaged in disparate treatment of the vendors; the SBA improperly issued a COC for Elation; and Elation will not meet the solicitation requirement for a web-based system.

Validity of the No-Cost Contract

LCPtracker and eMars both assert that the contract with Elation should be considered void for lack of consideration. LCPtracker Protest, May 27, 2015, at 1-2; eMars Comments on AR/Supp. Protest, July 10, 2015, at 5-7. We disagree.

To be enforceable, a contract with the United States government requires an offer, acceptance of the offer, and consideration. Rick's Mushroom Service, Inc. v. United States, 76 Fed. Cl. 250, 259 (2007), citing Total Medical Management Inc. v. United States, 104 F.3d 1314, 1319 (Fed Cir. 1997). A contract is supported by adequate consideration if it involves mutual promises of the contracting parties whereby each party obtains a benefit. See GSA: Real Estate Brokers' Commissions, B-291947, Aug. 15, 2003; T.V. Travel, Inc.; World Travel Advisors, Inc.; General Services Administration--Request for Reconsideration, B-218198.6 et al., Dec. 10, 1985, 85-2 CPD ¶ 640 at 4-6. Consideration for a contract need not be monetary, and this Office has repeatedly concluded that adequate consideration exists where a contractor promises to perform certain services, the government promises to grant the contractor the right to perform the procured services, and both parties obtain

benefits from the arrangement. See, e.g., No-Cost Contracts for Event Planning Services, B-308968, n.2, Nov. 27, 2007; GSA: Real Estate Brokers' Commissions, supra.

Here, as the agency points out, the award of this contract represents a commitment by HUD to use Elation's wage-rate services for projects across the nation that have a total value of \$8 billion--which will expose Elation's system to more than 6,000 users nationwide. eMars AR, exh. 9, COC Referral Letter. Elation expects to benefit from this exposure through an elevated competitive position in the national marketplace, and further expects to reduce the marketing costs that it would otherwise incur. In short, Elation projects that the extensive visibility it will obtain through performance of the HUD contract will substantially increase its share of the national market, and that this increase, along with marketing cost savings, will more than offset Elation's costs to perform the requisite services without monetary compensation. On this record, we find no basis to question the existence of benefits flowing to Elation as a result of HUD's promise to use Elation's services, and we reject the protesters' assertions that the contract is void for lack of consideration.

Disparate Treatment of Vendors

Next, eMars complains that the agency engaged in "disparate treatment" by "allowing only Elation to present a no-cost proposal." eMars Supp. Protest/Comments on AR, July 16, 2015, at 2. In this context, eMars notes that the solicitation included various Federal Acquisition Regulation (FAR) clauses, further pointing out that no-cost contracts are not subject to the FAR.⁵ eMars complains that, while it had to consider the "cost of compliance with such FAR clauses" in preparing its for-cost quotation, Elation obtained an unfair advantage by eliminating the applicability of the FAR through its submission of a no-cost quotation. Id.

In conducting procurements, agencies may not generally engage in conduct that amounts to unfair or disparate treatment of competing offerors. See, e.g., Front Line Apparel Grp., B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4; Systems Mgmt, Inc.; Qualimetrics, Inc., B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8.

Here, the agency points out that it provided the same information to all of the potential vendors, including responses to vendor questions; accordingly, either of the protesters could have submitted no-cost quotations. Further, the agency notes that the FAR provisions that were included in the solicitation are also clauses in the

⁵ See Fidelity and Casualty Co. of New York, B-281281, Jan. 21, 1999, 99-1 CPD ¶ 16 (FAR requirements apply only to acquisitions conducted with appropriated funds).

contract signed by Elation. eMars AR, exh. 3, Elation Contract. Accordingly, Elation is, in fact, bound by the very FAR provisions the omission of which eMars asserts created an unfair advantage for Elation. On this record we find no merit in eMars' allegation of disparate treatment.

SBA's Issuance of a COC

Next, eMars asserts that the SBA's issuance of a COC for Elation was improper, alleging that the agency failed to provide sufficient information to the SBA regarding the contract requirements.

As a general rule, our Office will not review the SBA's issuance of a COC. 4 C.F.R. § 21.5(b)(2). One exception, which we "will interpret narrowly," is an allegation that the procuring agency withheld or failed to provide "vital information bearing on the firm's responsibility" to the SBA. Id.

Here, as discussed above, the agency provided the SBA with virtually all potentially relevant information in its possession, including a description of the required effort, the magnitude of the requirements, Elation's submission of a no-cost quotation, the requirement that third-party users not be billed, and the agency's own concerns regarding Elation's performance. On this record there is no basis for our Office to further question the SBA's issuance of a COC.

Elation's Compliance with Solicitation Requirements

Finally, eMars asserts that Elation will fail to comply with the solicitation requirement for a "web-based" system.⁶ eMars Protest at 2-3. In this regard, eMars references a portion of Elation's internet website that refers to its system as "cloud based," maintaining that this indicates Elation will not comply with the solicitation requirement for a "web-based" system. Id.

Elation responds that its system is, in fact, web-based, and that the website description of its system on which eMars relies reflects additional cloud-based capabilities. Elation Comments on AR, July 13, 2015, at 2-3. Elation elaborates that it "[redacted] adding cloud-based features and functions," such as [redacted]. Id. Supporting its assertion that its system is web-based, Elation states that it does, in fact, "maintain[] its own system security and infrastructure, including but not limited to [redacted]." Id. Finally, both the agency and Elation maintain that Elation's quotation reflected its intent to comply with the solicitation requirements,

⁶ Under the heading "Deliverables and Milestones," the solicitation stated: "Provide a web-based software subscription for monitoring and enforcement of Davis Bacon wage rates," explaining that "Web-based is defined as hosted and maintained by the contractor." RFQ at 3.

and that its actual performance under the contract is a matter of contract administration.

In performing our bid protest function, this Office will not generally review matters of contract administration. 4 C.F.R. 21.5(b)(2). Whether a contractor complies with its contractual obligations after a contract is awarded is a matter of contract administration. See, e.g., Ashland Sales & Services Co., B-408969, Nov. 1, 2013, 2013 CPD ¶ 256 at 2.

Here, as discussed above, the solicitation identified the various requirements that a vendor's system must meet; did not require the submission of technical quotations; and required only that vendors submit price quotations. Elation submitted a price quotation reflecting its intent to comply with the solicitation requirements. Accordingly, to the extent eMars asserts that Elation will fail to comply with the solicitation requirements for a web-based system, we view that allegation as raising a matter of contract administration which we will not further consider.

The protests are denied.

Susan A. Poling
General Counsel