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# Decision

**Matter of:** FEI Systems

**File:** B-414852.2

**Date:** November 17, 2017

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Shelton H. Skolnick, Esq., FEI Systems, for the protester.  
William B. Blake, Esq., Department of the Interior, for the agency.  
Young S. Lee, 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 alleging that the solicitation contained a latent ambiguity is denied where the protester's interpretation of the solicitation language is not reasonable.
  2. Protest challenging agency's evaluation of protester's quotation and its exclusion from the competition is denied where the record shows that the evaluation was reasonable.
  3. Protest alleging that agency should have allowed protester to submit clarifications is denied where agency was not required to request clarifications from protester.
  4. Protest alleging that agency's decision not to allow the protester an opportunity to correct defects in its proposal violated the Federal Acquisition Regulation, harms competition, and is against the taxpayer's interest, is dismissed where the allegations fail to establish the likelihood that the agency violated applicable procurement laws or regulations.
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## DECISION

FEI Systems, a small business of Columbia, Maryland, protests its exclusion from the competition under request for quotations (RFQ) No. D17PS00345, issued by the Department of the Interior (DoI) for a task order for enterprise software support services. The protester argues that the agency improperly excluded its quotation for failing to respond to two Federal Acquisition Regulation (FAR) provisions that were included in the RFQ.

We deny the protest in part and dismiss it in part.

## BACKGROUND

The Department of the Interior, on behalf of the Department of Health and Human Services, issued the RFQ on May 3, 2017, to awardees of the National Institutes of Health Information Technology Acquisition and Assessment Center, (NITAAC) Chief Information Office, Solutions and Partners 3 (CIO-SP3) Small Business (SB) government-wide acquisition contract (GWAC).<sup>1</sup> Contracting Officer Statement (COS) at 1; Agency Report (AR), Tab 4, RFQ, at 1.<sup>2</sup> The competition was conducted pursuant to FAR subpart 16.5, and sought quotations for the management and provision of a full range of application support services for the Substance Abuse and Mental Health Services Administration's (SAMHSA) internal and external networks. RFQ at 2, 3.

The RFQ contemplated the issuance of a labor-hour task order with a 1-year base period and four 1-year options, to the vendor that submitted the best-value quotation.<sup>3</sup> Id. at 2, 30, 52. The solicitation required vendors to submit quotations that complied with the RFQ's instructions. Id. at 51. The instructions notified vendors that their quotations could be rejected if they failed to provide any information requested by the RFQ. Id. at 48.

Section 6 of the RFQ contained FAR provisions at sections 52.209-7 - Information Regarding Responsibility Matters (July 2013) and 52.227-15 - Representation of Limited Rights Data and Restricted Computer Software (Dec. 2007). Id. at 54-56. When included in a solicitation, the provision at FAR section 52.209-7 requires vendors to identify whether they have current active federal contracts and grants with a total value greater than \$10 million. Id. at 55; FAR § 52.209-7(b). By checking the box in the provision which indicates whether a vendor has current active contracts and grants with a total value greater than \$10 million, the vendor also represents that the information it has entered in the Federal Awardee Performance and Integrity Information System

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<sup>1</sup> The CIO-SP3 SB GWAC is a 10-year, indefinite-delivery, indefinite-quantity, multiple award contract.

<sup>2</sup> As provided by the agency, certain sections of the solicitation were numbered by page, while other segments were numbered by section and page. For the purposes of this decision, and to avoid confusion, citations to the RFQ are to sequential page numbers only, rather than to section and page numbers.

<sup>3</sup> Although not relevant to the protest issues raised here, quotations were to be evaluated using the following five factors: technical and management approach, experience and expertise of proposed staff, corporate capabilities, past performance, and price. RFQ at 51. The non-price factors were of equal importance, while price was considered to be the least important factor. Id. The solicitation notified vendors that the agency reserved the right to issue the task order to the vendor that submitted other than the lowest-priced quotation, if the technical benefits of the higher-priced quotation were determined to be worth the additional price. Id. at 52.

(FAPIS) is current, accurate, and complete as of the date the quotation was submitted. RFQ at 55, FAR § 52.209-7(c). The provision at FAR section 52.227-15 requires vendors to identify whether they intend to use limited rights data or restricted computer software to fulfill a solicitation's data delivery requirements. RFQ at 56; FAR § 52.227-15(b).

The agency received 14 quotations in response to the RFQ, including the one submitted by FEi. COS at 2. On June 16, 2017, the contracting officer (CO) notified FEi that its quotation did not provide all the information required by the solicitation and was therefore excluded from the competition. *Id.* On June 22, FEi filed a protest with the agency challenging DoI's decision. AR, Tab 16, FEi Agency-Level Protest (ALP), at 1-8. The agency dismissed FEi's protest on August 3, concluding that "only GAO may consider the protest allegations of FEi."<sup>4</sup> AR, Tab 17, Contracting Officer Final Decision (COFD), at 3. FEi filed its protest with our Office on August 8.<sup>5</sup> Protest at 1.

## DISCUSSION

FEi argues that the agency improperly excluded its quotation from the competition for failing to respond to two FAR provisions at sections 52.207-7 and 52.227-15. The protester asserts that the solicitation did not require responses to the FAR provisions and that even if responses were required, its quotation contained all the necessary information to be evaluated as compliant. *Id.* at 5. The protester also contends that the agency should have requested clarifications and provided FEi with an opportunity to submit a late response.<sup>6</sup> AR, Tab 16, FEi ALP, at 6-7; Protest at 5-6. Finally, FEi alleges that its quotation should be included in the competition because the agency's decision to exclude it runs counter to the intent of the FAR, competitive negotiations, and taxpayer's interests. AR, Tab 16, FEi ALP, at 7-8.

### Latent Ambiguity

The protester first contends that the agency improperly excluded FEi's quotation from the competition for failing to provide responses to the FAR provisions at sections 52.209-7 and 52.227-15 because responses to these two FAR provisions were not required. For example, the protester asserts that although the RFQ required vendors to

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<sup>4</sup> The contracting officer's final decision explained that "as explicitly stated in FAR 16.505(a)(10)(i)(B), '[p]rotests of orders in excess of \$10 million may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.' No protest is authorized under the procedures of FAR 33.103, Protest to the Agency." AR, Tab 17, COFD, at 2-3.

<sup>5</sup> As the estimated value of this proposed task order under the GWAC exceeds \$10 million, this protest is within our jurisdiction. 41 U.S.C. § 4106(f)(2).

<sup>6</sup> All the allegations that were raised in FEi's agency-level protest were incorporated by reference in the protest it filed with our Office. Protest at 3.

submit responses to “forms,” it did not expressly require vendors to respond to the solicitation’s FAR provisions. Id.; Comments at 4, 6. FEi also asserts that any defects in its quotation were the result of a latent ambiguity in the solicitation. Protest at 5. The protester contends that evidence of the latent ambiguity is demonstrated by the failure of other vendors to provide responses to these two FAR provisions. Id. at 5-6.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Crew Training Int’l, Inc., B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. Id. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id.

Here, we disagree with FEi’s assertions that the solicitation did not require vendors to respond to FAR provisions at sections 52.209-7 and 52.227-15, and that the RFQ contained a latent ambiguity. While the protester makes much of the fact that the solicitation expressly required responses to “forms” but not provisions, the RFQ specifically notified vendors that a “failure to submit **any** of the information requested in this RFQ may lead to the rejection of your quotation.” RFQ at 48 (emphasis added). The solicitation contained the FAR provision at section 52.209-7, which requires vendors to provide information with regard to the value of their current active federal contracts and grants. Id. at 55; FAR § 52.209-7(b). The RFQ also contained the FAR provision at section 52.227-15, which requires vendors to indicate whether they intend to fulfill the solicitation’s data delivery requirements using limited rights data or restricted computer software.<sup>7</sup> RFQ at 56; FAR § 52.227-15(b). FEi’s quotation did not directly respond to the information required by either of these two FAR provisions. AR, Tab 8, FEi Quotation, at 1-85.

Although FEi contends that there is nothing in the solicitation to indicate that it had to provide responses to the FAR provisions at sections 52.209-7 and 52.227-15, our review of the express language of the solicitation indicates otherwise. Here, the two FAR provisions (52.209-7 and 52.227-15) included in attachment 1 to section 6 of the RFQ clearly required vendors to identify, respectively: (1) whether vendors have

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<sup>7</sup> On May 19, 2017, the agency issued amendment one to the solicitation. COS at 1. This amendment, among other things, notified vendors that “all documents included in Section 6, Attachment 1 that are required to be submitted with your [quotation]” would not count towards the page limitations established by the RFQ for vendors’ quotations. AR, Tab 5, Text of RFQ amend. 1, at 1. The text of the FAR provisions at sections 52.209-7 and 52.227-15 was included in section 6 of the solicitation. RFQ at 54-56. FEi acknowledged receipt of this amendment on the face of its quotation. AR, Tab 7, FEi Technical Quotation, at 1.

“current active [f]ederal contracts and grants with total value greater than \$10,000,000” and (2) whether vendors intend to provide to the government any data or computer software with less than the full rights contemplated under FAR clause 52.227-14. RFQ at 54-56. Each provision included two checkboxes ([ ]) next to an applicable response to the provision requirement. It was self-evident that vendors were required to mark one of the two available checkboxes indicating the applicable response chosen by the vendor to address the provision requirement.

We also disagree with FEi’s contention that because other vendors failed to respond to the two FAR provisions, this fact establishes that a latent ambiguity existed in the solicitation. As discussed above, the terms of the FAR provisions make it self-evident that vendors were required to provide responses to the information being requested. The fact that other vendors also mistakenly failed to respond does not, by itself, establish that there was an ambiguity.<sup>8</sup>

In our view, the solicitation language, read as a whole (including amendment one to the RFQ), does not support FEi’s interpretation that the solicitation was unclear as to whether vendors were required to provide a response to the provision requirements with the submission of their quotations. Crew Training Int’l, Inc., *supra*, at 4-5. We do not agree that the solicitation language is susceptible to two different reasonable interpretations and, accordingly, find no ambiguity here.

#### Evaluation of FEi Quotation

FEi also argues in the alternative that even if the RFQ required responses to the FAR provisions at sections 52.209-7 and 52.227-15, the agency improperly eliminated its quotation from the competition. In this respect, the protester asserts that it effectively provided responses to the two FAR provisions in other sections of its quotation.<sup>9</sup> We have reviewed all the protester’s assertions and find none provide a basis to sustain its protest.

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<sup>8</sup> The record reflects that another vendor, which was also eliminated from the competition, contacted the agency to request that it be given an opportunity to submit responses to the FAR provisions. AR, Tab 15, Vendor E-mail, at 1. In its e-mail to the agency, the vendor stated that responding to the FAR provisions was a “known submittal requirement” and that the vendor was “flabbergasted that [it] inadvertently left [the information] out of the package.” *Id.*; COS at 4. Thus, contrary to FEi’s assertion, not all other excluded vendors were confused as to whether the solicitation’s FAR provisions required a response.

<sup>9</sup> FEi initially raised these arguments in its agency-level protest. AR, Tab 16, FEi ALP, at 7. The arguments were subsequently incorporated by reference into its protest. Protest at 5.

A contracting agency's evaluation of quotations is a matter within the agency's discretion. Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 4. In reviewing an agency's evaluation, we will not reevaluate quotations; rather we will examine the evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id. at 4-5. It is the agency's role to define both its underlying needs and the best method of accommodating those needs, and it is within the agency's discretion to reject as unacceptable quotations that do not meet the requirements that it defines. Id. at 5.

In contrast, it is the vendor's responsibility to submit a well-written quotation, with adequately detailed information, which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. Technatomy Corp., supra, at 6. Agencies are not required to infer information from an inadequately detailed quotation, or to supply information that the protester elected not to provide. Id.

The protester contends that its quotation responded to the information required by the provision at FAR section 52.209-7 because its submission included past performance information showing that FEi had at least one current active contract valued at over \$10 million. The protester also argues that its quotation met the requirements of the provision at FAR section 52.227-15, because the solicitation required vendors' quotations to identify any assumptions, conditions, or exceptions in their quotations, and FEi's quotation did not claim any. AR, Tab 16, FEi ALP, at 7.

In response, the agency asserts that in addition to identifying whether a vendor has any current active contracts valued at over \$10 million, the provision at FAR section 52.209-7 also requires vendors to confirm whether their information in FAPIIS is current, accurate, and complete as of the date of the submission of their quotations--which FEi did not do. Memorandum of Law (MOL) at 3-4; FAR § 52.209-7(c). The agency also explains that while FEi's quotation did not contain any express assumptions, conditions or exceptions, the provision at FAR section 52.225-15 requires an affirmative response from vendors, and the contracting officer was not required to infer how FEi intended to fulfill the solicitation's data delivery requirements just because FEi's quotation did not contain a separate list of assumptions, conditions, or exceptions. MOL at 4.

Our review of the record confirms that FEi's quotation did not provide a response to the provision at FAR section 52.209-7, and did not establish that its information in FAPIIS was current, accurate, or complete as of the date its quotation was submitted. AR, Tab 7, FEi Technical Quotation, at 1-69; AR, Tab 8, FEi Past Performance Quotation, at 1-12; AR, Tab 9, FEi Price Quotation, at 1-65. Additionally, FEi's quotation did not include an affirmative response to the provision at FAR section 52.225-7, and did not indicate whether FEi intended to fulfill the solicitation's data delivery requirements using limited rights data or with restricted computer software. Id.

Here, the record reflects that FEi's quotation failed to respond to the FAR provisions because it did not provide all the information required. The agency was not required to

infer missing responses to the FAR provisions based on information that was, or was not, provided in the protester's quotation. Rather, it was the protester's responsibility to provide all the information required by the agency and to submit a well written quotation clearly demonstrating FEi's ability to comply with all the solicitation's requirements. Technatomy Corp., *supra*, at 6. In this regard, we have no basis to object to the agency's rejection of FEi's quotation for failing to meet the requirements of the solicitation.

#### Clarification

FEi also contends that the agency should give it an opportunity to clarify its quotation by submitting the required attachment, wherein it could have responded to the provisions at FAR sections 52.209-7 and FAR 52.225-15. Protest at 5-6. In this regard, the protester argues that "accepting FEi's submission of Attachment 1 after the deadline is in no way unfair to other competitors," because doing so would not "change a single word or aspect from FEi's [quotation]." AR, Tab 16, FEi ALP, at 7. In essence, the protester asserts that other vendors would not be prejudiced if the agency accepted a late response to the FAR provisions because it would not provide FEi with the opportunity to revise its technical quotation or price.

As noted above, this task order procurement was conducted as a competition between CIO-SP3 small business contract holders and, as such, was subject to the provisions of FAR subpart 16.5, which does not establish specific requirements for conducting clarifications or discussions. Technatomy Corp., *supra*, at 7. Where, as here, however, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness, will, in large part, reflect the standards applicable to negotiated procurements. *See, e.g., TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 4; Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 3-4.

In a negotiated procurement conducted pursuant to FAR part 15 (which is not directly applicable here), clarifications are "limited exchanges" between the government and vendors that may occur when award without discussions is contemplated. FAR § 15.306(a)(1). Such exchanges may allow vendors to clarify certain aspects of their quotations or to resolve minor clerical errors. *See* FAR § 15.306(a)(2). Although agencies have broad discretion as to whether to seek clarifications from vendors, vendors have no automatic right to clarifications regarding quotations. Technatomy Corp., *supra*, at 8.

Here, we find that the agency was not required to request clarifications from FEi. Although the protester contends that DoI should have allowed it to respond to the FAR provisions, it cites to no legal authority that would obligate the agency to provide it with such an opportunity.<sup>10</sup> Furthermore, all quotations that did not provide a response to

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<sup>10</sup> In its comments, the protester contends that it should be allowed to submit a late response to the FAR provisions because "[e]xcluding FEi over a checked box without  
(continued...)

the FAR provisions were eliminated from the competition. In this regard, the agency treated all vendors equally. Here, FEi did not have an automatic right to clarify its quotation to provide the responses to the two FAR provisions that were missing from its quotation. Id.

#### Intent of the FAR

Finally, the protester argues that excluding FEi's quotation from the competition runs counter to the intent of the FAR, competitive negotiation, and the taxpayer's interest. AR, Tab 16, FEi ALP, at 7. We dismiss these protest allegations because, as filed with our Office, they do not establish a valid basis for challenging the agency's action.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., 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.

Here, FEi broadly contends that the agency's action violates the FAR's mandate to maintain "a process designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to the selection of the proposal representing the best value to the Government." AR, Tab 16, FEi ALP, at 7; FAR § 15.002(b). As discussed above, we find no merit to any of the other allegations raised by the protester. With respect to these remaining allegations, the protester has not established, nor has our review of the record provided, a basis to question the process used by the agency in this competition. As such, these broadly stated protest allegations do not include sufficient information to establish the likelihood that the agency in this case violated applicable procurement laws or regulations and is, therefore, dismissed. See Bid Protest Regulations, 4 C.F.R. § 21.5(f); See Wittenberg Weiner Consulting, LLC, B-413457 et al., Oct. 31, 2016, 2016 CPD ¶ 320 at 7-8 (dismissing protest allegation that failed to establish the likelihood that the agency violated any applicable procurement laws or regulations).

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ever listing it as a requirement is not giving FEi a "fair opportunity." Comments at 6. We note that FAR § 16.505(b)(1)(i) requires agencies to provide vendors with "fair opportunity" to be considered for orders that exceed a certain dollar threshold. In this regard, the FAR gives contracting officers "broad discretion in developing appropriate order placement procedures." FAR § 16.505(b)(1)(ii). There is no FAR part 16.5 requirement mandating that agencies conduct clarifications.

In sum, we find that the agency reasonably concluded that the protester's quotation did not meet the RFQ's submission requirements. Consequently, we find nothing objectionable about the agency's decision to exclude the protester from further consideration.

The protest is denied in part and dismissed in part.

Susan A. Poling  
General Counsel