U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Cynergy Professional Systems, LLC--Reconsideration

File: B-418367.8

Date: September 22, 2020

G. Matthew Koehl, Esq., Gary J. Campbell, Esq., and Lidiya Kurin, Esq., Womble Bond Dickinson (US), LLP, for the protester.
Thomas K. David, Esq., Kenneth Brody, Esq., and Katherine A. David, Esq., David, Brody & Dondershine, LLP, for Colossal Contracting, LLC, the intervenor.
Mellany Alio, Esq., Reza Behinia, Esq., and Mary G. Courtney, Esq., Department of Veterans Affairs, for the agency.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of our prior decision denying the protester's protest is denied where, even assuming that our prior decision contained certain errors, any such errors were immaterial as there is a sufficient alternative basis on which we would have denied the protest that is supported by the underlying record.

DECISION

Cynergy Professional Systems, LLC, a small business of Laguna Hills, California, requests reconsideration of our decision in *Cynergy Professional Systems, LLC*, B-418367.4, June 1, 2020, 2020 CPD ¶ __, denying its protest challenging the issuance of a delivery order to Colossal Contracting, LLC, a small business, of Annapolis, Maryland. The agency issued the delivery order under request for quotations (RFQ) No. 36C10B20Q0026, which was issued by the Department of Veterans Affairs (VA), for computer hardware, software, incidental services, and components.

Cynergy primarily alleged that the VA improperly excluded its quotation from consideration for award without reopening discussions to address a deficiency first identified as a result of a post-award protest challenging the agency's initial award to Cynergy. The protester also alleged that the awardee failed to comply with several material RFQ requirements. In denying Cynergy's protest, we concluded that the VA's initial exchanges with offerors did not rise to the level of discussions; therefore, the VA had no duty to conduct further exchanges with offerors as part of the agency's

corrective action. Additionally, because we found that the agency had reasonably evaluated Cynergy's quotation as technically unacceptable, Cynergy was not an interested party to challenge the agency's evaluation of the awardee's quotation.

On reconsideration, Cynergy primarily asserts that our prior decision materially erred when it concluded that the VA's exchanges with offerors did not constitute discussions. According to the protester, had our Office correctly found that the exchanges at issue constituted discussions, we would have concluded that the VA was required to reopen discussions with Cynergy. This is so because the deficiency, which ultimately led to its exclusion, existed in its initial quotation, but the deficiency was never raised with Cynergy during the round of discussions the protester argues the agency conducted with offerors. Having failed to disclose this deficiency to the protester during the discussions process, Cynergy argues its discussions were inherently defective and not meaningful. According to Cynergy, the only way for the agency to correct this error was for the agency to reopen discussions with Cynergy as part of its corrective action. *See* Req. for Reconsideration at 22 (citing our decision in *DevTech Sys., Inc.*, B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11).

We deny the request.

BACKGROUND

The RFQ, issued on October 30, 2019, to holders of the National Aeronautics and Space Administration Solutions for Enterprise Wide Procurement (SEWP) V governmentwide acquisition contract, sought quotations for personal computers, laptops, monitors, docking stations, and incidental services. Contracting Officer's Statement (COS) ¶ 3. The requirement was set aside for service-disabled veteran-owned small businesses, and contemplated the issuance of a delivery order to the lowest-priced, responsive, responsible vendor whose quotation conformed to the terms of the RFQ. Agency Report (AR), Tab 4, RFQ at 85. The procurement here was conducted under the provisions of Federal Acquisition Regulation (FAR) subpart 16.5.

As discussed in detail in our prior decision, the RFQ included multiple material technical requirements, including the requirement that proposed products be Electronic Product Environmental Assessment Tool (EPEAT) Bronze registered. *See Cynergy Prof. Sys., LLC*, *supra*, at 2-3. In order to demonstrate compliance with the RFQ's minimum technical requirements, including the EPEAT requirement, offerors were required to complete a specification compliance matrix that was included as attachment A to the RFQ. The specification compliance matrix required vendors to provide the make, model, and part numbers for each proposed product, along with the "technical specifications or confirmation that the device meets the minimum requirements in the cells associated with the minimum requirements." AR, Tab 5, Specification Compliance Matrix, "Instructions" Tab, cell E:11. Relevant here, Cynergy represented that its proposed 32" Samsung monitor exceeded the minimum EPEAT Bronze requirement. AR, Tab 20, Cynergy Specification Compliance Matrix, "Monitors Adjustable" Tab, cell G:18.

The VA ultimately received a total of 11 quotations from nine SEWP contract holders. COS ¶ 9. Based on initial evaluations, the agency concluded that clarifications/ exchanges with the vendors were needed to supplement the information received in quotations. *See* AR, Tab 21, Exchanges with Cynergy; Tab 22, Exchanges with Colossal. Subsequently, after receipt and review of all clarifications, and evaluating quotations, on December 13, the agency made an award to Cynergy. COS ¶ 22. On December 24, another competitor, Colossal, protested to our Office the issuance of the order to Cynergy (B-418367), arguing that the award was improper because Cynergy's proposed Samsung 32'' monitor was not on the EPEAT registry.

As a result of the protest, the contracting officer ultimately found that Cynergy's proposed 32" monitor, which had previously been on the EPEAT registry, was no longer on the active registry because it did "not meet the current (2018) Computers and Displays category criteria." AR, Tab 31, Contracting Officer's Determination of Corrective Action ¶ 12. Accordingly, the agency represented that it would take corrective action in response to Colossal's protest, including canceling the order issued to Cynergy, reevaluating the VA's requirements and, if appropriate, reevaluating all quotations and making a new award decision. AR, Tab 47, Notice of Correction Action, at 1.

Based on the VA's proposed corrective action, we dismissed the protest as academic. *Colossal Contracting, LLC*, B-418367, Jan. 24, 2020 (unpublished decision). The VA ultimately reevaluated quotations without conducting further clarifications/exchanges with offerors. As a result of the corrective action, on February 12, 2020, the VA issued the order to Colossal, as the next-in-line responsive vendor. COS ¶ 26; AR, Tab 34, Source Selection Decision, at 8.

On February 21, Cynergy filed its protest with our Office challenging the technical acceptability of Colossal's quotation, and asserting that the VA unreasonably excluded its quotation from further consideration, without reopening discussions as part of the agency's corrective action. Relying on our decision in *DevTech Sys., Inc.*, *supra*, the protester argued that since the agency identified a deficiency in its quotation during the reevaluation that was present in the quotation as initially submitted, and the VA could have raised the concern during its prior rounds of discussions, the agency was required to reopen discussions to raise that concern during the corrective action taken in response to Colossal's protest.

On June 1, our Office issued a decision denying Cynergy's protest. We first found that the VA's exchanges with vendors did not rise to the level of discussions, and, therefore, there was no duty to reopen discussions since no discussions had ever been conducted. *Cynergy Prof. Sys., LLC*, *supra* at 6-7. We also questioned the appropriateness of applying the line of decisions relied upon by Cynergy for the proposition that an agency, when conducting a procurement under the negotiated procurement procedures of FAR part 15, has a duty to reopen discussions to address later identified significant weaknesses or deficiencies, to the specific delivery order

procurement at issue, which was conducted using the task and delivery order procedures set forth in FAR subpart 16.5. *Id.* at 7. Additionally, because we found that Cynergy's quotation was reasonably found to be technically unacceptable, we found that Cynergy was not an interested party to challenge the agency's evaluation of Colossal's quotation. *Id.* at 7-8. On June 11, Cynergy filed this request for reconsideration of our June 1 decision.

DISCUSSION

The crux of Cynergy's request for reconsideration is that our Office's prior decision is based on the material error that the VA's exchanges with offerors did not constitute discussions. The protester contends that the exchanges were in fact discussions because the exchanges highlighted deficiencies that otherwise would have rendered the quotations unacceptable and resulted in the submission of revised quotations eliminating the identified deficiencies. Cynergy contends that had our Office correctly concluded that the VA had conducted discussions, our prior cases, including *DevTech Sys., Inc.*, *supra*, would have compelled the VA to reopen discussions and afford Cynergy the opportunity to address the deficiency with respect to its proposed Samsung 32" monitor, notwithstanding that the assessed deficiency was first identified after the conclusion of the initial round of discussions as the result of a post-award protest.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). We will reverse a decision upon reconsideration only where the requesting party demonstrates that the decision contains a material error of law or facts. *AeroSage, LLC--Recon.*, B-417529.3, Oct. 4, 2019, 2019 CPD ¶ 351 at 2 n.2; *Department of Justice; Hope Village, Inc.--Recon.*, B-414342.5, B-414342.6, May 21, 2019, 2019 CPD ¶ 195 at 4. For the reasons that follow, even assuming the protester's contention that the exchanges in connection with the initial award to Cynergy constituted discussions, there would be no basis to grant reconsideration because the line of decisions requiring an agency to reopen discussions to address a later identified concern or deficiency do not apply under the unique circumstances of this case.[1]

Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal or quotation deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's

[1] As set forth above, the relevant standard for granting reconsideration before our Office is whether our decision contains a material error of fact or law; that is, but for the error, our Office would have likely reached a different conclusion as to the merits of the protest. For example, in *Department of Justice; Hope Village, Inc.--Reconsideration*, *supra*, we declined to grant a request for reconsideration alleging that our decision contained a material error of fact where, even assuming the requester's assertion of a factual error was correct, the changed facts would not have impacted our underlying legal analysis. *Id.*

potential for receiving award. *PAE-Parsons Global Logistics Servs., LLC--Advisory Opinion*, B-417506.13, Oct. 18, 2019, 2019 CPD ¶ 364 at 10 n.7. The protester relies on a corollary to this basic standard for meaningful discussions. Specifically, we have further explained that an agency is not relieved of its obligation to conduct meaningful discussions because it did not learn of the information giving rise to its concerns until after discussions had concluded. If, after discussions are completed, the agency identifies concerns pertaining to the quotation as it was prior to discussions that would have had to be raised if they had been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offeror. *See, e.g.*, *AI Long Ford*, B-297807, Apr. 12, 2006, 2006 CPD ¶ 68 at 8; *DevTech Sys., Inc.*, *supra* at 4.[2]

Imbedded within this line of decisions is the principle that an agency's discussions cannot be meaningful when it identifies a deficiency or significant weakness after it conducts discussions, yet the deficiency or weakness should have been apparent at the time the agency conducted discussions. Reopening discussions and affording a firm an opportunity to address concerns that should have previously been identified and raised during the initial round of discussions would remedy the agency's error. *See, e.g.*, *AI Long Ford*, *supra* at 1 (sustaining protest where, after discussions had concluded, the agency "identified concerns pertaining to the achievability of protester's proposed delivery schedule that *should have been apparent to the agency* prior to discussions") (emphasis added).

The application of this rule, however, is predicated on the fact that the underlying evaluated concern was reasonably--or reasonably should have been--apparent to the agency when it initially evaluated quotations prior to conducting discussions. For example, we have sustained protests for failing to reopen discussions where the

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[2] This procurement was not conducted using the negotiated procedures of FAR part 15, but, rather, was a delivery order competition conducted in accordance with FAR subpart 16.5. We have recognized that FAR 16.505 does not establish specific requirements for conducting discussions; nevertheless, when discussions are conducted, they must be fair and reasonable. *DynCorp Int'l LLC*, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 16. We have further recognized that where an agency conducts a delivery order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. *Id.*

Here, we need not resolve any disputed questions with respect to whether the decisions relied upon by the protester interpreting the scope of meaningful discussions for a procurement conducted pursuant to FAR part 15 procedures should apply to procurements conducted in accordance with FAR subpart 16.5 procedures (whether generally or to the specific procurement conducted here) because, as set forth herein, even assuming that decisions applying FAR part 15 discussions standards apply to this delivery order procurement, we nevertheless do not find that the decisions relied upon by Cynergy are applicable to the facts of this case.

agency's initial evaluation was inconsistent with evaluation criteria or otherwise inadequate. *See, e.g.*, *West Sound Servs. Grp., LLC*, B-406583.2, B-406583.3, July 3, 2013, 2013 CPD ¶ 276 at 11-13 (sustaining protest where agency failed to raise during initial discussions, or subsequently reopen discussions, to address concerns that certain aspects of the protester's proposed effort were understaffed where the agency represented that it had not evaluated those aspects of the protester's initial proposal prior to conducting discussions); *Sentrillion Corp.*, B-406843.3, *et al.*, Apr. 22, 2013, 2013 CPD ¶ 207 at 6-8 (same, where agency raised concerns during discussions that certain required licenses were missing or expired, then subsequently determined that license applications that were included with the initial proposal were incomplete, but failed to reopen discussions to address the incomplete applications); *CIGNA Gov. Servs., LLC*, B-401062.2, B-401062.3, May 6, 2009, 2010 CPD ¶ 283 at 7 (same, where agency failed to identify apparent discrepancy between the protester's proposed costs and the other offerors' proposed costs until after conducting discussions, and failed to reopen discussions); *DevTech Sys., Inc.*, *supra* at 3-4 (same, where agency represented that "there may have been shortcomings and also inadequacies in documentation concerning th[e] procurement," convened a new evaluation panel, declined to reopen discussions, and identified concerns across multiple qualitatively-evaluated non-cost/price factors); *Mechanical Contractors, S.A.*, B-277916.2, Mar. 4, 1998, 98-1 CPD ¶ 68 at 5-6 (same, where an initial evaluation panel rated the protester's proposal highly under a number of qualitatively evaluated factors, but a new evaluation panel convened following a protest downgraded the proposal under the same evaluation factors for failing to provide adequate supporting narratives).

We have also found that an agency fails to conduct meaningful discussions when it subsequently determines that the solicitation was ambiguous, or when the proposal or quotation as it existed prior to discussions contained patent ambiguities or defects, and fails to provide an offeror an opportunity to address the evaluated concern. *See, e.g.*, *Fidelity Techs. Corp.*, B-276425, May 30, 1997, 97-1 CPD ¶ 197 at 5-6 (sustaining protest that the agency failed to engage in meaningful discussions where it failed to raise questions regarding the protester's small business size status where "inconsistencies within the proposal itself put the contracting officer on notice of the apparent error"); *Test Sys. Assocs., Inc.*, B-256813.5, Oct. 14, 1994, 94-2 CPD ¶ 153 at 7-8 (same, where agency did not reopen discussions to address the small business protester's apparent undue reliance on large business concerns after an ambiguity in the terms of the solicitation with respect to applicable limitations was identified).

Unlike the circumstances in the above line of decisions, where the protester could point to an agency's failure to address a significant weakness or deficiency resulting from an apparent quotation shortcoming, evaluation error, or solicitation ambiguity, here, the record shows that no such concern was readily apparent in Cynergy's quotation, the VA's evaluation, or the RFQ's terms. Rather, the record shows that the later identified deficiency in Cynergy's quotation was entirely the result of an inaccurate representation made by the protester with respect to one of its proposed monitor's technical

compliance with the RFQ's specifications.[3] In other words, there was nothing inherently wrong with the agency's evaluation given the representations in Cynergy's quotation.

We have repeatedly explained that where an agency has no information prior to award that would lead to the conclusion that the offeror, or the product or service to be provided, fails to comply with the solicitation's eligibility requirements, the agency can reasonably rely upon an offeror's representation/certification of compliance without further investigation. *See, e.g.*, *Kipper Tool Co.*, B-409585.2, B-409585.3, June 19, 2014, 2014 CPD ¶ 184 at 5 (denying protest that agency could not reasonably rely on representations regarding compliance with the Trade Agreements Act); *KNAPP Logistics Automation, Inc.*, B-406303, Mar. 23, 2012, 2012 CPD ¶ 137 at 4 n.1 (same, with respect to the awardee's small business size certification); *New York Elevator Co., Inc.*, B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 at 2 (same, with respect to compliance with the Buy American Act); *Louisiana Physicians for Quality Medical Care, Inc.*, B-235894, Oct. 5, 1989, 89-2 CPD ¶ 316 at 4 (same, with respect to the awardee's status as a physician sponsored organization).

As with the foregoing decisions, here the protester's quotation provided no basis for the VA to question the protester's representation with respect to the proposed monitor's compliance with the RFQ's applicable specifications. Specifically, Cynergy's specification compliance matrix included with its quotation unequivocally stated that its proposed Samsung 32" monitor not only met the RFQ's EPEAT requirements, but in fact "Exceeds – EPEAT Gold." AR, Tab 20, Cynergy Specification Compliance Matrix, "Monitors Adjustable" Tab, cell G:18.[4] Thus, unlike, for example, the readily apparent

[3] In response to the underlying protest, the VA and intervenor alleged that the protester made what amounted to a material misrepresentation with respect to the technical acceptability of the protester's proposed Samsung 32" monitor that would have justified its exclusion from further consideration for award. We note that the protester contested these allegations, specifically pointing to documentation supplied by the original equipment manufacturer representing compliance with the relevant specification. We need not, however, resolve whether the protester's inaccurate quotation representation was knowing or unintended. In this regard, the question of intent is irrelevant to our resolution because, regardless of the nature of the inaccurate representation, as discussed herein an agency generally may rely upon an offeror's unequivocal representation or certification of compliance when there is no apparent reason for the government to have questioned the representation or certification.

[4] In this regard, the protester does not allege that the inaccurate representation with respect to its proposed monitor's compliance with the EPEAT requirements should have been apparent to the VA at the time the agency initially evaluated Cynergy's quotation. Indeed, the protester's own representative averred that Cynergy itself had no basis to question the original equipment manufacturer's representation that the monitor at issue met the requirements. *See, e.g.*, Protester Response in Opp. to Agency's Request for Dismissal, Cynergy Vice President Decl. ¶ 2 ("In [selecting the Samsung 32" monitor at issue], we relied upon Samsung's representations that this product met all of the RFQ's

incomplete license applications in *Sentrillion Corp.*, *supra*, or the apparent inconsistencies in the protester's size certification in *Fidelity Techs. Corp.*, *supra*, the protester points to nothing--and we do not independently see anything in the record--that should have made the VA question the unequivocal compliance representations made by Cynergy in its quotation. Therefore, we find no reasonable basis for the VA to have questioned or sought further information from Cynergy with respect to the accuracy of the protester's self-certification of compliance at the time it conducted discussions or initially evaluated the quotation.

Thus, in contrast to the above discussed decisions recognizing an agency's obligation to reopen discussions for later discovered significant weaknesses or deficiencies that should have reasonably been apparent to the agency prior to conducting discussions, we find this case to present materially distinguishable facts. In this regard, the later discovered deficiency was solely the result of the protester's inaccurate representation, not a shortcoming on the part of the government's solicitation or evaluation. By introducing erroneous representations in its quotation, essentially masking the underlying deficiency in its quotation, Cynergy made meaningful discussions a near impossibility. Because any fault concerning the scope of the discussions ultimately lies with the protester, we will not hold the agency to account, and decline to extend the above discussed decisions requiring an agency to reopen discussions to the circumstances presented in this case. In sum, we do not find that our underlying decision contained a material, or clearly apparent or obvious, error of law or mistake of fact that would warrant reversal of our denial of Cynergy's protest.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

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minimum requirements, specifically including the requirement to be EPEAT Bronze. We specifically relied in part on then-current Samsung Pricelist in effect at the time of Quote submissions on November 18, 2019.").