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Decision

Matter of: Cynergy Professional Systems, LLC

File: B-418367.4

Date: June 1, 2020

G. Matthew Koehl, Esq., and Gary J. Campbell, 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.

Kasia Dourney, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that an agency failed to conduct discussions during a reevaluation of quotations submitted under Federal Acquisition Regulation subpart 16.5 after it discovered, post-award, that the protester's quotation was noncompliant with a material solicitation requirement is denied where no discussions were required, and the protester's quotation was properly excluded from further consideration.

2. Protest challenging the new award as noncompliant with the material solicitation requirements is dismissed where the protester is not an interested party to challenge the award.

DECISION

Cynergy Professional Systems, LLC, (Cynergy), of Laguna Hills, California, protests the award of a delivery order to Colossal Contracting, LLC, of Annapolis, Maryland, under request for quotations (RFQ) No. 36C10B20Q0026, issued by the Department of Veterans Affairs (VA) to the holders of the National Aeronautics and Space Administration Solutions for Enterprise Wide Procurement V (SEWP V) governmentwide acquisition contract for computer hardware, software, incidental services, and components. Cynergy challenges the exclusion of its quotation from consideration, without discussions, after the agency's corrective action. Cynergy also contends that the awardee failed to comply with several material RFQ requirements.

We deny the protest.

BACKGROUND

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

The RFQ included multiple material technical requirements which were described in detail in section A6.0, as follows:

The Contractor shall ensure that information technology products are procured and/or services are performed with products that meet and/or exceed ENERGY STAR, FEMP [Federal Energy Management Program] designated, low standby power, and EPEAT^[1] [Electronic Product Environmental Assessment Tool] guidelines. The Contractor shall provide/use products that earn the ENERGY STAR label and meet the ENERGY STAR specifications for energy efficiency.

Specifically, the Contractor shall:

1. Provide/use ENERGY STAR products, as specified at www.energystar.gov/products (contains complete product specifications and updated lists of qualifying products).

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3. Provide/use EPEAT registered products as specified at www.epeat.net. At a minimum, the Contractor shall acquire EPEAT® Bronze registered products. EPEAT registered products are required to meet the technical specifications of ENERGY STAR, but are not automatically on the ENERGY STAR qualified product lists. The Contractor shall ensure that applicable products are on both the EPEAT Registry and ENERGY STAR Qualified Product Lists. The acquisition of Silver or Gold EPEAT registered products is encouraged over Bronze EPEAT registered products.

¹ EPEAT is "the leading global ecolabel for the IT sector." See <https://greenelectronicscouncil.org/epeat/epeat-overview/> (last visited on May 19, 2020). The EPEAT ecolabel is managed by the Green Electronics Council, which maintains the EPEAT Registry, listing products meeting certain environmental performance criteria related to, for example, energy use, recycling, or toxicity of products. *Id.*

RFQ at 55.

The solicitation also incorporated by reference FAR provision 52.223-16--Acquisition of EPEAT®-Registered Personal Computer Products, which provides, in pertinent part:

b) Under this contract, the Contractor shall deliver, furnish for Government use, or furnish for Contractor use at a Federally controlled facility, only personal computer products that, at the time of submission of proposals and at the time of award, were EPEAT® bronze-registered or higher.

FAR 52.223-16.

An attachment to the solicitation, Specification Compliance Matrix, prescribed the VA's minimum compliance requirements for each device to be provided under the RFQ. *Id.* at 85-86; AR, Tab 5, att. A, Specification Compliance Matrix. In the Specification Compliance Matrix, vendors were to provide the make, model, and part numbers for each proposed device, 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, att. A, Specification Compliance Matrix, Instructions.

As relevant to this protest, vendors had to self-certify that their proposed monitors are EPEAT and "EPA Energy Star rated/registered." *Id.*

Vendors were advised that failure to complete the matrix, or to provide sufficient detail, could result in their quotation being found nonresponsive. *Id.* Furthermore, the RFQ advised that errors or misrepresentations contained within a quotation "may render the [o]fferor's quot[ation] [u]nacceptable and thus, ineligible for award." RFQ at 87.

Shortly after issuing the RFQ, the VA received multiple rounds of questions regarding the requirement from interested vendors, and amended the solicitation five times. COS ¶¶ 5-10. On November 18, 2019, the agency received 11 quotations from 9 SEWP V contract holders.² COS ¶ 11. The RFQ reserved the VA's right to conduct the evaluation in the most effective manner, including initially evaluating only the technical quotation of the lowest-priced vendor. RFQ at 85. Having concluded, however, that the lowest-priced quotation was not technically acceptable, the agency decided to evaluate all technical quotations received. COS ¶ 12.

During the evaluations, the agency concluded that clarifications/exchanges with the vendors were needed to supplement the information received in quotations. See AR, AR TAB 21, Exchanges with Cynergy; AR, TAB 22, Exchanges with Colossal. Subsequently, after receipt and review of all clarifications, and evaluating quotations, on December 13, 2019, the agency made an award to Cynergy. COS ¶ 22.

² Cynergy submitted three quotations.

On December 24, 2019, Colossal protested the award to our Office (B-418367), arguing that the award was inconsistent with the solicitation requirements because Cynergy's proposed Samsung 32" monitor was not on the EPEAT registry. Cynergy intervened in the protest.

The contracting officer reviewed the protester's allegations and "discovered that the awardee's certification that its monitors were on the EPEAT registry was inaccurate." COS ¶ 24. The agency then asked Cynergy--through its attorney--to verify a claim made in the Specification Compliance Matrix attachment included in Cynergy's quotation, that its 32" monitor is 2018 EPEAT Gold registered. COS ¶ 24; AR, TAB 20, Cynergy Att. A Response.

In response, on January 16, 2020, Cynergy provided a December 30, 2019, letter from Samsung Electronics America, Inc., signed by Samsung's director of contracts and proposals, which stated:

Samsung desktop monitor model [DELETED] meets EPEAT /Energy Star *[insert specific cert]* requirements, which were current at the time of Cynergy's tender.

AR, TAB 45, Samsung Letter.

Attached to the letter was an excerpt from the Green Electronics Council's website, listing an EPEAT archive of personal computers (PC) and displays that were active on the EPEAT registry between 2014 and 2019. AR, TAB 44, EPEAT PCs and Displays Archive 2014-2019. That document lists the 32" Samsung monitor's "archive date" on the EPEAT registry as July 7, 2016. *Id.*

The record shows that the contracting officer independently inquired about the issue with the Green Electronics Council, which confirmed that the 32" Samsung monitor was registered but was no longer on the active EPEAT 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 concluded that Cynergy's quotation was noncompliant with a material requirement of the RFQ, COS ¶ 24, and on January 16, 2020, it notified our Office that it would take corrective action, as follows:

[T]he Agency intends to cancel the subject award and review the requirement to confirm it appropriately addresses the Agency's needs. Should a determination be made that the requirement does not appropriately meet the Agency's needs, the Agency will cancel the Solicitation, amend the requirement and re-solicit. If the requirement is found to be satisfactory, then the Agency intends to re-review all quotes for compliance with the Solicitation and make another award.

AR, Tab 47, Notice of Corrective Action at 1.

Based on the VA's pending corrective action, we dismissed Colossal's protest as academic. *Colossal Contracting, LLC*, B-418367, Jan. 24, 2020 (unpublished decision).

On January 30, 2020, the VA notified Cynergy of the termination of its delivery order, and the parties signed a bilateral modification of its contract with the VA, terminating Cynergy's award. AR, Tab 32, Contracting Officer's Notification of Termination; AR, Tab 33, Bilateral Termination.

As part of its corrective action, the VA reevaluated the quotations that formed the basis of the original award decision. The agency did not conduct clarification/exchanges with vendors during its corrective action. As a result of corrective action, on February 12, 2020, Colossal, as the next-in-line responsive vendor, received the award valued at \$466,086,436.56. COS ¶ 26; AR, Tab 34, Source Selection Decision (SSD) at 8.

After a debriefing, Cynergy protested to our Office.³

DISCUSSION

The protester contends that the agency unreasonably excluded its quotation from further consideration, without conducting discussions, after the agency's corrective action. Protest at 1-2, 14-17. Cynergy argues that it was never notified that the agency found its quotation noncompliant, and only learned of that fact when it was debriefed on February 13, 2020. *Id.* at 1. Relying on our decision in *DevTech Sys., Inc.*, B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4, Cynergy claims that since the VA identified a deficiency in its quotation during the reevaluation that was present in the quotation when it was initially submitted, and the agency could have raised the concern if it had been identified when discussions were held in November and December 2019, the agency was required to reopen discussions to raise that concern during its corrective action. Protest at 15.

In *DevTech*, our Office noted that in the context of a procurement conducted pursuant to the procedures of FAR part 15 and where after discussions have concluded, an agency identifies concerns relating to a proposal that should have been apparent to the agency prior to discussions, the agency is required to reopen discussions in order to raise its concerns. *DevTech Sys., Inc.*, B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4. Cynergy also challenges the agency's evaluation of Colossal's quotation, and argues that the awardee's quotation failed to meet numerous minimum mandatory RFQ requirements. *Id.* at 2, 17-25.

³ The awarded value of the delivery order at issue exceeds \$25 million. AR, Tab 34, SSD at 8. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award contracts valued over \$25 million. 10 U.S.C. § 2304c(e)(1)(B).

The agency responds that it reasonably relied on Cynergy's self-certification in its quotation regarding the EPEAT registry, and only determined after Colossal's protest was filed that Cynergy's representation that its 32" Samsung monitor was EPEAT-registered was inaccurate.⁴ MOL at 6-8. The VA points out, that in contrast to our decision in *DevTech*, the procurement here was conducted under FAR part 16 and its "streamlined" procedures. Thus, the agency argues that it held no discussions, but states rather, that in the initial stage of this procurement "some exchanges with offerors took place," and that these exchanges are governed by "fundamental fairness." *Id.* at 3. As such, the VA asserts, no discussions were required during the agency's corrective action and reevaluation of quotations.

As a general rule, FAR part 15 procedures do not govern task and delivery order competitions conducted under FAR part 16. Our Office nonetheless will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations. *Imagine One Tech. & Mgmt., Ltd.*, B-401503.4, Aug. 13, 2010, 2010 CPD ¶ 227 at 7. While FAR 16.505 does not establish specific requirements for discussions in task order competitions, exchanges in that context, like other aspects of such a procurement, must be fair and not misleading. *CGI Fed. Inc.*, B-403570 *et al.*, Nov. 5, 2010, 2011 CPD ¶ 32 at 9; see also *Mission Essential Pers., LLC*, B-407474; B-407493, Jan. 7, 2013, 2013 CPD ¶ 22 at 5 (concluding that when an agency conducts a FAR part 16 task order competition as a negotiated procurement, GAO will look to FAR part 15 in assessing whether the contracting agency has acted fairly). When an agency contemplates a contract award without discussions, the agency may, but is not required to, engage in clarifications that give offerors an opportunity to clarify certain aspects of proposals or to resolve minor or clerical errors. See, e.g., *Satellite Servs., Inc.*, B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 2 n.2.

Here, we think that the initial exchanges with vendors were not discussions but only clarifications limited to specific granular issues identified by the agency that were needed to supplement vendors' quotations. We note that the exchanges mainly concerned documents omitted from the quotations, or certain minor details that vendors failed to submit with their quotations. See, e.g., *Allied Tech. Grp., Inc.*, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 6 (offeror permitted to correct missing information through clarifications, rather than discussions); *SRS Techs.*, B-291618.2, B-291618.3, Feb. 24, 2003, 2003 CPD ¶ 70 at 3 n.4. Importantly, vendors were not provided an opportunity to submit revised quotations. We view those exchanges as fair,

⁴ The agency refers to Cynergy's certification regarding EPEAT-registry in different ways, calling it an "erroneous certification," but also refers to it as a misrepresentation, or states that it was "at a minimum negligent[]." Memorandum of Law (MOL) at 3, 7. We need not resolve whether the certification was erroneous, a misrepresentation, or otherwise reconcile the agency's contentions because, as discussed below, we conclude that the VA was not required to conduct discussions with vendors during its corrective action.

as the agency contacted each vendor to clarify certain aspects of their respective quotations, and thus, provided a fair opportunity to be considered for the current delivery order. FAR 16.505(b)(1)(i).

In addition, in contrast to *DevTech, supra*; *Mission Essential Pers., LLC, supra*; and *Imagine One Tech. & Mgmt., Ltd., supra*, the entire procurement here was not conducted under FAR part 15 or using the negotiated procurement procedures under FAR part 15; instead, the agency used an LPTA (lowest-price technically acceptable) source selection process, on a go/no-go basis to establish compliance with material technical requirements of the RFQ as part of a FAR part 16 procurement. There was no competitive range established; no discussions held; and no revised quotations requested. We think that extending the *DevTech* principle to FAR part 16 procurements, as here, would substantially--and incorrectly--expand the duty of the contracting agency to engage in competition requirements that are specifically not contemplated under the FAR. See FAR 16.505(b)(1)(ii) (expressly providing that the competition requirements of FAR part 6 and the policies in subpart 15.3 do not apply to the ordering process involving multiple-award contracts).

Accordingly, we find no merit to Cynergy's contention that the agency was required to reopen "discussions" during its corrective action. We conclude that the VA reasonably determined that the protester's quotation was noncompliant with the material RFQ requirements, and should no longer be considered during the reevaluation process.

With respect to Cynergy's challenges to the agency's evaluation of Colossal's quotation, under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. See 4 C.F.R. § 21.0(a)(1).

Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party where it would not be in line for contract award, were its protest to be sustained. *Id.* Here, the agency correctly determined that Cynergy's quotation was noncompliant with the RFQ requirements, and should be excluded from further consideration during the agency's

corrective action. Accordingly, Cynergy is not an interested party to protest Colossal's award.

The protest is denied.

Thomas H. Armstrong
General Counsel