U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

Comptroller General
of the United States

Decision

Matter of: Eccalon LLC

File: B-420297.3

Date: June 13, 2022

David S. Panzer, Esq., and Michael E. Hatch, Esq., Ward & Berry, PLLC, for the protester.
Katherine B. Burrows, Esq., Jacqueline K. Unger, Esq., Patrick T. Rothwell, Esq., Eric A. Valle, Esq., Piliero Mazza, PLLC, for Contracting Resources Group, Inc., the intervenor.
Stephan Piel, Esq., Department of Defense, for the agency.
Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the terms of the solicitation following an amendment issued in response to a sustained protest is denied where the amendment remedied the previously identified improprieties and otherwise made reasonable changes to the solicitation.

DECISION

Eccalon, LLC, a small business of Hanover, Maryland, challenges the corrective action taken by the agency after our Office sustained Eccalon's protest of the issuance of a task order to Contracting Resources Group, Inc. (CRG), a small business of Baltimore, Maryland, under request for quotations (RFQ) No. HQ0034-21-Q-0019. The RFQ, issued by Department of Defense (DOD), Washington Headquarters Services, seeks services to support the DOD's Office of Small Business Programs with increasing small business participation in DOD acquisitions. The protester argues an amendment issued by the agency in response to the sustained protest was overly broad, not appropriate to remedy the procurement improprieties, and unsupported by any documented change in the agency's requirements.

We deny the protest.

BACKGROUND

As noted above, Eccalon's current protest challenges an amendment issued by the agency in response to our Office's decision sustaining Eccalon's earlier protest of this procurement. Protest at 4-5; *see Eccalon, LLC*, B-420297, B-420297.2, Jan. 24, 2022, 2022 CPD ¶ 70. We begin by providing some background regarding the original RFQ and protest.

Original RFQ and Protest

On April 30, 2021, the agency issued the RFQ as a set-aside for small business vendors under the General Services Administration's Federal Supply Schedule in accordance with Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Exh.1, RFQ at 4; AR, Exh. 11, Unsuccessful Quoter Notification at 331.[1] The due date for quotations, as amended, was August 2, 2021. AR, Exh. 3, RFQ amend. 0002 at 82.[2]

The original RFQ provided for the evaluation of quotations under the following four evaluation factors: prior experience; technical approach; management and staffing approach; and price. RFQ at 44-45. For prior experience, vendors were to identify three efforts within the last five years that were of the same or similar scope, magnitude, and complexity as the requirements of the RFQ. *Id.* at 44. The RFQ provided that quotations would be evaluated "based on how well the quoter has performed on contracts that have been determined to be both recent and relevant to the [Performance Work Statement (PWS)]," and that there were "three aspects to the past performance evaluation: recency, relevancy, and quality of performance." *Id.* at 127.

For technical approach, vendors were to provide their approach to the following task areas: cybersecurity, integrated performance management, mentor-protégé pilot program, and program management. *Id.* at 125. Under this factor, the agency would evaluate the vendor's understanding of the requirements, the extent to which the quotation details practical methods to accomplish the required tasks, and whether the quotation identified reliable methods for ensuring quality deliverables. *Id.* at 127.

For management and staffing approach, vendors were to demonstrate their approach for recruiting personnel and mitigating staff turnover. *Id.* at 125. Additionally, vendors were to propose a labor mix for the task areas, which was to include the minimum level of education and years of experience for each labor category. *Id.* The agency would evaluate the vendor's ability to meet requirements, recruit personnel, and mitigate staff

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[1] All citations to the agency report reference the Adobe PDF page number of the cited page.

[2] Prior to the current protest, the solicitation was amended twice. *See* AR, Exh. 3, RFQ amend. 0002 at 81. Following our Office's decision, the agency amended the solicitation a third time; the third amendment forms the basis of the current protest.

turnover effects. In addition, the agency would evaluate the vendor's "labor mix—to include [level of effort (LOE)] and minimum qualifications of the quoted FSS [labor categories (LCATs)]—to determine the extent to which the quoted labor mix can satisfy the PWS requirements." *Id.* at 127.

The RFQ provided for award on a best-value tradeoff basis where prior experience was the most important evaluation factor, technical approach was the second most important, and management and staffing approach was the third most important. *Id.* When combined, the three non-price factors were significantly more important than price. *Id.*

The agency received four quotations, including quotations from Eccalon and CRG. AR, Exh. 10, Best-Value Decision Memorandum at 317-318. The source evaluation board (SEB) evaluated quotations under the prior experience, technical approach, and management and staffing approach factors and assigned the following ratings:

	Eccalon	**CRG**
Prior Experience	Substantial Confidence	Neutral
Technical Approach	Outstanding (Low Risk)	Acceptable (No Worse than Moderate Risk)
Management and Staffing Approach	Low Risk	Low Risk
Price	$54,672,934	$34,536,498

Id. at 320.

Following the SEB's evaluation, the source selection authority (SSA), who was also the contracting officer, conducted an independent analysis of the findings under each evaluation factor. *Id.* at 321. The SSA concurred with the SEB's evaluation under the prior experience factor and concluded that Eccalon's prior experience was "distinctly better" than CRG's prior experience. *Id.* at 322. Under the technical approach factor, the SSA concluded that Eccalon's approach was only somewhat superior to CRG's approach because Eccalon's advantage was "heavily due to experience and not necessarily innovation." *Id.* at 327. The SSA further concluded there was moderate risk associated with Eccalon's approach under one of the staffing and management approach subfactors, and that CRG's quotation thus provided the superior approach under the staffing and management approach factor. In conducting the tradeoff analysis, the SSA concluded that although Eccalon's quotation had "technical and prior experience superiority," it offered only "moderately superior benefits" overall that did not warrant the price premium of nearly $20 million. As a result, the SSA selected CRG for the task order. *Id.* at 329.

Eccalon then filed a protest with our Office, arguing the agency unreasonably evaluated quotations, which resulted in an unreasonable source selection decision. *See Eccalon, LLC*, *supra*. Our Office sustained the protest. *Id.* In sustaining the protest, we concluded the SSA unreasonably evaluated quotations under the technical approach factor, and unreasonably evaluated Eccalon's quotation under the management and staffing approach factor. *Id.* at 9-10. Among other things, we found that it was unreasonable for the SSA to discount Eccalon's advantage under the technical approach factor on the basis it was "heavily due to experience and not necessarily innovation" where consideration of innovation was not expressly provided for in the RFQ, and there was not a "clear nexus" between the terms of the solicitation and the SSA's consideration of that factor. *Id.* at 5, 7. We also found the SSA's decision to downgrade Eccalon's quotation under the management and staffing approach factor was unreasonable as the record did not demonstrate that the SSA considered the qualifications of Eccalon's proposed staff. *Id.* at 9. In sum, we concluded the agency's evaluation was contrary to the terms of the solicitation, and recommended the agency reevaluate quotations in a manner consistent with our decision, and if warranted, make a new source selection decision. *Id*. at 9-10.

Amendment 0003 and Current Protest

On February 25, 2022, the agency issued amendment 0003 to the RFQ. AR, Exh. 21, RFQ amend. 0003 at 367. As relevant here, the amendment changed the contract type from a fixed-price contract to a fixed-price, level of effort (FFP-LOE) contract in accordance with FAR section 16.207. AR, Exh. 23, FFP-LOE Approval at 478. The amendment also revised the description of evaluation factor two, technical approach, by adding language advising vendors that the agency would not evaluate prior experience, but would evaluate innovation and proposed methodology, under the factor. Contracting Officer's Statement (COS) at 9-10; AR, Exh. 21, amend. 0003 at 457. In addition, the amendment deleted entirely factor three, management and staffing approach. It also amended factor four, price, to change submission instructions and indicate that the agency would perform a price realism analysis as part of its evaluation. COS at 7-8; AR, Exh. 21, amend. 0003 at 367, 412-415. Revised quotations were due by March 14, 2022. AR, Exh. 21, amend. 003 at 367. Eccalon filed this pre-award protest with our Office on March 7.

DISCUSSION

Eccalon challenges the terms of the solicitation following amendment 0003, arguing the agency violated the FAR by changing the contract type to an FFP-LOE contract. The protester also argues the changes to the evaluation factors are overly broad, not appropriate to remedy the improprieties from the prior procurement, and unsupported by any change in the agency's requirements. Protest at 25-36. Eccalon also contends the amendment has, in effect, impermissibly changed the competition into a lowest-price, technically acceptable (LPTA) procurement. *Id.* at 36-40. For reasons discussed below, we deny the protest.[3]

As a general rule, the details of implementing the recommendations of our Office are within the sound discretion and judgment of the contracting agency, and we will not question an agency's ultimate manner of compliance, so long as it remedies the procurement improprieties that were the basis for our recommendation. *AXIS Mgmt Group, LLC*, B-408575.2, May 9, 2014, 2014 CPD ¶ 150 at 4. An agency may take steps beyond those recommended by our Office to address the procurement improprieties that formed the basis for our recommendation. *See 360 IT Integrated Solutions; Variq Corp.*, B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 6. When an agency's proposed corrective action goes beyond what our Office originally may have recommended in connection with sustaining a protest, the agency's decision to pursue such a course of action does not, by itself, provide a basis for protest, absent some showing that the agency's actions are contrary to procurement law or regulation, or otherwise are improper. *See C2C Solutions, Inc.; Trust Solutions, LLC*, B-401106.6, B-401106.7, June 21, 2010, 2010 CPD ¶ 145 at 3; *see also NavCom Defense Elecs., Inc.*, B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 3. An agency's corrective action is reasonable if it is appropriate to remedy flaws that the agency believes exist in its procurement process. *Patriot Contract Servs. LLC, et al.*, B-278276.11 *et al.*, Sept. 22, 1998, 98-2 CPD ¶ 77 at 4.

Challenge to the Change in Contract Type

Eccalon argues the agency's decision to change the contract type from a fixed-price to FFP-LOE contract type violated FAR section 16.207. Protest at 39. Specifically, Eccalon argues the limitations imposed by this section prohibit the use of an FFP-LOE here.

Per FAR section 16.207-1, an FFP-LOE contract requires:

> (a) [t]he contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms; and
>
> (b) [t]he Government to pay the contractor a fixed dollar amount.

Additionally, FAR section 16.207-3 limits the use of FFP-LOE contracts, providing that this contract type may be used only when:

> (a) [t]he work required cannot otherwise be clearly defined;
>
> (b) [t]he required level of effort is identified and agreed upon in advance;

[3] Although this decision does not specifically address each argument raised by the protester, we have considered them all and find none to be meritorious.

> (c) [t]here is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort; and
>
> (d) [t]he contract price is at the simplified acquisition threshold or less, unless approved by the chief of the contracting office.

FAR 16.207.

According to Eccalon, an FFP-LOE contract is inappropriate here because the required work can be stated in specific terms, meaning the use of this type of contract violates the limitation imposed by FAR section16.207-3(a). Protest at 41-42. The agency maintains, however, that "[t]he required work cannot be clearly defined." AR, Exh. 23, FFP-LOE Approval at 474. Although the agency concedes "most of the *types* of required tasks are clearly defined," it contends that "the *extent or quantity* required of those tasks cannot be clearly defined." *Id.*

As an example, the agency points to task area 2.11.3, which requires vendors to "[d]evelop mechanisms, such as online checklist for training, to provide assistance to help small manufacturers and universities conduct voluntary self-assessments/ readiness checks in order to understand operating environments, cybersecurity requirements, and existing vulnerabilities." RFQ amend. 0003 at 433-434. The agency argues that developing mechanisms is "an open-ended task, the extent of which is not clear." AR, Exh. 23, FFP-LOE Approval at 474. For example, the agency argues that "[t]he point at which the contractor has created enough products (*i.e.*, 'mechanisms') to have sufficiently helped small manufacturers and universities . . . is not susceptible to definition in the PWS." *Id.*

On this record, we cannot conclude the agency unreasonably determined that the amount of work associated with the various task areas cannot be clearly defined.

As a result, we have no basis to object to the agency's selection of FFP-LOE as the contract type.[4] This protest ground is denied.

Challenge to the Amendment of Technical and Price Factors

Eccalon also challenges the agency's amendment of factors two, three, and four. Protest at 32-36. For factor two, technical approach, the solicitation originally provided that the agency would evaluate the extent to which the quotation demonstrated the vendor's understanding of the requirements, practical and feasible methods to accomplish the required tasks, and reliable methods of ensuring quality deliverables. AR, Exh. 3, RFQ amend. 0002 at 127. Amendment 003 modified this factor, and provided the agency would evaluate a vendor's technical approach to determine the extent to which the proposed methodology provided for quality performance of the required tasks and for quality deliverables, demonstrated innovation, and demonstrated an understanding of the requirements. AR, Exh. 21, RFQ amend. 0003 at 457. According to Eccalon, it was unreasonable for the agency to amend the technical approach factor to include innovation and remove consideration of practicality, feasibility, and reliability. Protest at 35-36. The protester contends that by amending the ground rules pertaining to the evaluation, the agency is attempting "to justify the SSA's prior evaluation in favor of CRG." *Id.* at 5.

We have no basis to object to the agency's action here as this amendment falls within the discretion afforded to the agency in taking corrective action. In the earlier protest, Eccalon argued the agency unreasonably downgraded its quotation for a lack of innovation where the express terms of the solicitation provided for an evaluation based on practicality, feasibility, and reliability. *See Eccalon, LLC*, *supra* at 7. We sustained Eccalon's protest on this ground because the solicitation did not identify innovation as

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[4] Eccalon also challenges the decision to use a FFP-LOE contract type under FAR section 16.207-3(d), arguing that the contract price will be "many multiples of the simplified acquisition threshold." Comments at 25. It also argues the signature of the chief of the contracting office was not made until after the protest had been filed. *Id.* at 26 n.13. We have no basis to object to the agency's action here as Eccalon has not demonstrated competitive prejudice. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. *Raytheon Co.,* B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. As stated above, under FAR section 16.207-3(d), if the contract price is expected to exceed the simplified acquisition threshold, the chief of the contracting office must approve the use of a FFP-LOE contract type. Here, the contracting officer states that the price will likely exceed the simplified acquisition threshold, and the chief of the contracting office has since approved the contract type. COS at 6. Even if the amendment was issued prior to the signature of the chief of the contracting office, Eccalon has not demonstrated how it was competitively prejudiced by the agency issuing the amendment without the chief of the contracting office's signature approving the change in contract type or approving the use of this contract type after the protest was filed.

an evaluation factor, and we found no clear nexus between the agency's consideration of innovation and the terms of the solicitation. *Id.* By amending the solicitation to include innovation and remove practicality, feasibility, and reliability from this factor, the agency has remedied this impropriety. Put another way, innovation was formerly an unstated evaluation criterion that conflicted with the stated evaluation criteria. Amendment 0003 made innovation a stated evaluation criterion, so this impropriety has been resolved. With regard to the protester's assertion that the agency is amending the evaluation criteria to justify its prior evaluation, contracting agencies have the discretion to revise the terms of a solicitation at any point prior to contract award so long as the revisions are reasonably based and vendors are provided an opportunity to revise their quotations in response to them, as was the case here. *DynaLantic Corp.*, B-274944.5, Aug. 25, 1997, 97-2 CPD ¶ 75 at 4, 7. Accordingly, this protest ground is denied.

Eccalon next challenges the agency's decision to remove factor three, management and staffing approach, from the solicitation. Protest at 37. As relevant here, the solicitation originally provided for evaluation of a vendor's management and staffing approach based on how the vendor would meet the requirements, maintain recruiting for personnel turnover, and mitigate any staff turnover effects. COS at 7; AR, Exh. 3, amend. 0002 at 127. Factor three further provided the agency would evaluate the vendor's labor mix. *Id.* Eccalon argues the agency unreasonably eliminated this factor; according to the protester, it is vital to consider the labor mixes submitted by the vendors, and the experience and qualifications of its personnel. Protest at 38.

We have no basis to object to the agency's removal of this evaluation factor from the solicitation. As explained above, we find unobjectionable the agency's amendment of the contract type. As a result of the amendment, the agency, not the vendor, will provide the labor mix. With regard to the evaluation of personnel, the contracting officer determined this portion of the factor overlapped with other factors. COS at 8. For example, under factor one, prior experience, a vendor's references were asked to assess the vendor's ability to provide and maintain personnel. *Id.* Therefore, the contracting officer decided there is no need for the agency to evaluate staff turnover a second time under a different factor. The elimination of this factor was within the discretion of the agency, particularly given the changes elsewhere in the solicitation. The record does not support Eccalon's argument that these considerations were unreasonable, or that the resulting amendments to the solicitation were overly broad or unsupported. This protest ground is thus denied.

Eccalon also challenges the agency's amendment to the submission instructions for factor four, price, as well as the agency's decision to include a price realism analysis as part of the evaluation on the ground that it "never challenged the [fixed-price] nature of the procurement," and therefore, these changes do not qualify as remedies. Protest at 39. In other words, Eccalon argues it is unreasonable for the agency to amend the solicitation unless the amendment remedied a sustained protest ground from the earlier procurement. *See id.*

We find nothing objectionable in the agency's decision to amend the solicitation here. Eccalon's argument amounts to little more than its preference for the terms of the original solicitation and its disagreement with the agency's rationale for amending them. Such disagreement does not provide a basis to sustain a protest. *See Onésimus Defense, LLC*, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224.

Finally, Eccalon argues the agency's changes to the evaluation criteria create an impermissible LPTA by "eliminating virtually any consideration of the experience of a quoter's employees . . . and at what point of performance they will be engaged." Protest at 43. According to Eccalon, the only distinguishing characteristic between quotations will be price. *Id.* at 44. We disagree. The solicitation provides for a tradeoff between experience, technical approach, and price. *See* AR, Exh. 23, RFQ amend. 0003 at 457. In doing so, the agency will consider the extent to which a proposed methodology demonstrates innovation, among other things. *Id.* The argument that amendment 0003 creates an LPTA source selection methodology is unsupported by the express terms of the solicitation.

The protest is denied.

Edda Emmanuelli Perez
General Counsel