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Decision

Matter of: Empower AI, Inc.--Costs

File: B-422971.5

Date: September 15, 2025

Daniel P. Graham, Esq., and Llewelyn M. Engel, Esq., McDermott Will & Emery LLP, for the requester.

Joon K. Hong, Esq., Department of Health and Human Services, for the agency.

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DIGEST

Request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to a clearly meritorious protest argument and denied where the other protest allegations were not clearly meritorious.

DECISION

Empower AI, Inc. (EAI), of Reston, Virginia, requests that our Office recommend that the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), reimburse EAI the costs associated with filing and pursuing its protests challenging the issuance of a task order to Booz Allen Hamilton, Inc. (BAH), of McLean, Virginia, under request for quotations (RFQ) No. 240179. The RFQ sought services supporting the calculation of improper payment rates under the Medicaid program and the Children's Health Insurance Program. EAI asserts that the agency unduly delayed taking corrective action in the face of clearly meritorious protest allegations.

We grant the request in part and deny it in part.

BACKGROUND

On May 22, 2024, pursuant to section 8.405-2 of the Federal Acquisition Regulation (FAR), the agency issued the RFQ to contractors holding certain General Services Administration (GSA) multiple award schedule contracts; the solicitation stated that the agency was seeking quotations to "support the production of the national level payment error rates for Medicaid and Children Health Insurance Program (CHIP) as required by

the Payment Integrity Information Act of 2019 (PIIA).” Agency Report (AR), Tab 5, RFQ amend. 0004 at 3.¹ The procurement was conducted under what is generally referred to as the “Payment Error Rate Measurement (PERM)” review program. *Id.*

As amended, the solicitation contemplated issuance of a primarily fixed-price task order² for a 6-month transition period followed by a 3-year base period and two 3-year option periods. During performance, the contractor will perform various tasks associated with three types of reviews: (1) medical;³ (2) data processing;⁴ and (3) eligibility.⁵ EAI is currently the incumbent contractor for medical reviews and data processing reviews; BAH is the incumbent contractor for eligibility reviews.

The solicitation directed vendors to identify their proposed levels of effort in labor categories contained in their GSA schedule contracts, along with the applicable labor rates, and provided that source selection would be based on a best-value tradeoff⁶ between the following evaluation factors: technical understanding/scenarios; technical approach; past performance; small business utilization; and price.⁷

¹ Citations to the protest record and pleadings refer to submissions in the underlying protests (B-422971.1, B-422971.2, B-422971.3, B-422971.4). References to the RFQ refer to amendment 0004 unless otherwise noted, and all citations reference the Adobe PDF page numbers of the documents submitted.

² The solicitation included a limited number of time-and-material contract type line items. RFQ at 3, 29-30.

³ A medical review “determines the appropriateness of the service provided and whether medical records support the service billed.” Contracting Officer’s Statement (COS) at 4.

⁴ The data processing review “determines whether a claim was paid appropriately according to state and federal policies[.]” *Id.*

⁵ The eligibility review “focuses on whether an eligibility determination--a new application or renewal--was processed accurately and appropriately by the state based on applicable federal statutes, regulations, policies, and/or state policies.” *Id.*

⁶ The solicitation provided that: “Once the Government determines the contractor that is the best-suited (*i.e.*, the apparent successful contractor/Offeror), the Government reserves the right to communicate with only that contractor to address any remaining issues, if necessary, and finalize a task order with that contractor.” RFQ at 90.

⁷ The solicitation also provided that, after identifying the apparent successful contractor, the agency would assess that vendor’s compliance with section 508 of the Rehabilitation Act of 1973 (which generally requires that agencies’ electronic and information technology be accessible to people with disabilities.). See 29 U.S.C. § 794d. Section 508 compliance was not an issue in EAI’s protests.

Of relevance here, the solicitation also advised vendors that: “As directed by CMS, the [contractor] will transition the SMERF [State Medicaid Error Rate Findings] system⁸ from the contractor’s environment to the CMS cloud environment.” AR, Tab 4B, Statement of Work (SOW) at 34. The agency acknowledges that nothing in the solicitation identified any preference for a particular cloud solution. See Supp. COS at 11.

On June 26, 2024, quotations were submitted by four vendors, including BAH and EAI.⁹ Thereafter, the agency evaluated the quotations, conducted discussions, and requested and received revised quotations. On September 12, the agency notified EAI that BAH’s quotation had been selected for award. On September 23, EAI filed a protest with our Office (docketed as B-422971.1) challenging various aspects of the agency’s evaluation and source selection process. On October 17, prior to submitting a report responding to EAI’s protest, the agency stated that it would take corrective action by reevaluating the vendors’ quotations and making a new source selection decision. First Notice of Corrective Action, Oct. 17, 2024. Accordingly, based on the agency’s proposed corrective action, we dismissed the September 23 protest. *Empower AI, Inc.*, B-422971, Oct. 18, 2024 (unpublished decision).

Thereafter, the agency reevaluated the quotations with the following results:¹⁰

	Technical Scenarios	Technical Approach	Past Performance	Small Business	Price
BAH	High Confidence	High Confidence	High Confidence	Some Confidence	\$108,976,666
EAI	Some Confidence	Some Confidence	Low Confidence	Some Confidence	\$76,079,590

AR, Tab 18, Source Selection Decision at 13.

In evaluating the proposals under the technical approach factor and concluding that BAH’s quotation was superior to EAI’s, the agency noted that EAI’s quotation reflected an intent to rely on [redacted] as the cloud platform, while BAH’s quotation was based on the [redacted] platform. AR, Tab 17, Post-Exchange Memo at 8-11,19-22. Based on the vendors’ differing approaches to cloud migration, the agency initially assessed [redacted]. During discussions, based on EAI’s assertion that it was capable of [redacted], the agency [redacted].¹¹ In contrast, [redacted] to BAH’s quotation, the agency [redacted]. *Id.* at 68.

⁸ The SMERF system “is a public facing website that allows state partners and CMS to view PERM findings.” COS at 18.

⁹ The other two vendors were [redacted].

¹⁰ The adjectival ratings and evaluated prices did not change from the agency’s prior evaluation.

¹¹ The agency elaborates that [redacted]. Supp. COS at 11-12 (italics added).

In evaluating quotations under the price factor, the agency performed a comprehensive analysis of the labor categories, associated levels of effort, and applicable labor rates reflected in each vendor's quotation. *Id.* at 27-66. Based on this analysis, the agency was [redacted] about EAI's [redacted],¹² and [redacted]. COS at 16; see AR, Tab 17, Post-Exchange Memo at 57.

On February 20, 2025, the agency again notified EAI that BAH's quotation had been selected for award. On February 27, EAI again filed a protest (docketed as B-422971.2) challenging various aspects of the agency's source selection process. On March 31, the agency submitted its report responding to EAI's various allegations, maintaining that EAI's protest was wholly without merit. On April 10, EAI filed a supplemental protest (docketed as B-422971.3) identifying additional protest grounds based on information disclosed in the agency's March 31 report. On April 25, the agency filed a supplemental report continuing to maintain that all of EAI's protest allegations were without merit.

By way of overview, EAI's protests contained the following allegations: (1) the agency's evaluation, based on its preference for the AWS cloud platform, constituted application of unstated evaluation criteria; (2) the agency improperly performed a price realism analysis; (3) BAH's quotation included assumptions that took exception to the solicitation requirements;¹³ (4) prior activities of BAH's subcontractor supporting state Medicaid agencies created organizational conflicts of interest (OCIs); and (5) BAH's proposed medical review manager did not meet the solicitation's experience requirements.¹⁴ Protest at 18-21; Supp. Protest at 4-30.

On May 20, GAO conducted a conference call with the parties, seeking clarification and providing GAO feedback regarding the various protest issues. On May 21, the agency stated that it would take corrective action, elaborating that it would, among other things, "[a]mend the solicitation related to cloud migration, and allow quoters to submit revised proposals with revisions limited to the areas of amendment and related areas of their

¹² As noted above, EAI is the incumbent contractor for medical reviews and data processing reviews, and BAH is the incumbent contractor for eligibility reviews.

¹³ The solicitation instructed vendors that their quotations should include "[c]onfirmation that no exceptions are taken to the terms and conditions of the pending task order," but also instructed that quotations should include a "[d]escription of any assumptions (other than those given in the RFQ) relied upon for the preparation of the quote." RFQ at 100-101.

¹⁴ EAI also raised other protest grounds that it subsequently withdrew. Supp. Protest at 3; Req. for Recommendation to Reimburse Protest Costs at 2 n.1.

proposals that were materially impacted.”¹⁵ Second Notice of Corrective Action, May 21, 2025, at 1.

On May 22, we dismissed EAI’s February 27 and April 10 protests. *Empower AI, Inc.*, B-422971.2, B-422971.3, May 22, 2025 (unpublished decision). On June 6, EAI filed this request that we recommend reimbursement of the protest costs EAI incurred in connection with the protests docketed as B-422971.2 and B-422971.3.

DISCUSSION

EAI requests that our Office recommend reimbursement of the costs it incurred in pursuing all the above-identified protest grounds, which were contained in its protest and supplemental protest, noting that the agency’s corrective action in response to those protests was not taken until after the agency had asserted that all of the protest allegations were without merit. Req. for Recommendation to Reimburse Protest Costs at 1-6. The agency responds to EAI’s request for reimbursement by asserting that none of the protest allegations meet the “clearly meritorious” standard. Agency’s Resp. to Protester’s Req. at 1-6.

When a procuring agency takes corrective action in response to a protest, we may recommend that the agency reimburse the protester its protest costs if the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. 4 C.F.R. § 21.8(e); *Information Ventures, Inc.--Costs*, B-294580.2 *et al.*, Dec. 6, 2004, 2004 CPD ¶ 244 at 2. However, our Regulations do not contemplate a recommendation for reimbursement of protest costs in every case where the agency takes corrective action. *Id.* Rather, as a prerequisite to a recommendation for cost reimbursement the protester must show that: (1) the agency unduly delayed taking corrective action;¹⁶ and (2) the protest was clearly meritorious--that is, not a close question. *Skyward IT Solutions, LLC--Costs*, B-421561.11, Oct. 25, 2023, 2024 CPD ¶ 4 at 2-3; *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3. A protest is clearly meritorious only if a reasonable agency inquiry

¹⁵ On May 27, the agency issued amendment 0006 to the RFQ, which stated, “CMS Amazon Web Services (AWS) is the preferred cloud hosting environment for this initiative,” and limited the scope of quotation revisions. RFQ amend. 0006 at 94. On June 2, EAI filed a protest (docketed as B-422971.4) challenging the terms of the amended solicitation. On June 20, the agency stated that it was canceling the solicitation. Thereafter, we dismissed EAI’s June 2 protest. *Empower AI, Inc.*, B-422971.4, June 25, 2025 (unpublished decision).

¹⁶ While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *AGFA HealthCare Corp.--Costs*, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4. As discussed above, the agency’s corrective action here was taken after it had responded to both EAI’s protest and supplemental protest.

would show the absence of a defensible legal position. *Technatomy Corp.; Octo Consulting Grp., Inc.--Costs*, B-413116.49, B-413116.50, Dec. 14, 2016, 2016 CPD ¶ 366 at 3. The fact that an agency decides to take corrective action does not, itself, establish the absence of a defensible legal position. *Yardney Tech. Prods., Inc.--Costs*, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Here, based on our review of the record and as discussed below, we recommend reimbursement of the protest costs associated with EAI's protest challenging the agency's application of an unstated evaluation factor--that is, its unstated preference for an AWS cloud solution; we deny EAI's request with regard to the remaining protest allegations.

Unstated Evaluation Factor

First, EAI's supplemental protest complained that the agency improperly evaluated quotations under the technical approach evaluation factor based on the extent to which each vendor addressed the agency's undisclosed preference for transitioning to the AWS cloud. In this regard, EAI notes that the agency actually referred to proposing an AWS cloud solution as a "requirement." See Supp. COS at 11-12.

In responding to the supplemental protest, the agency effectively acknowledged its preference for an AWS cloud solution,¹⁷ but asserted that the protest should be denied because [redacted]. Supp. COS at 12.

Agencies are required to evaluate proposals based solely on the factors identified in the solicitation. *Intercon Assocs., Inc.*, B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 at 5; *Computer Info. Specialist, Inc.*, B-293049, B-293049.2, Jan. 23, 2004, 2004 CPD ¶ 1 at 3-4. We will sustain a protest where an agency's application of an unstated evaluation factor was a consideration in making the source selection decision. *Id.*

Here, based on our review of the record, we conclude that EAI's assertion that the agency applied an unstated evaluation factor in evaluating the vendors' competing approaches to cloud migration was a clearly meritorious protest allegation for which the agency's corrective action was unduly delayed.

As discussed above, there is no dispute that, although the solicitation put vendors on notice that the agency would seek cloud migration, it failed to disclose the agency's preference for an AWS solution--and this preference had an impact on the evaluation. Specifically, the contemporaneous evaluation record establishes that the agency:

¹⁷ As noted above, the contemporaneous evaluation documentation stated: "Transitioning to AWS [redacted] is the . . . preferred environment." AR, Tab 17, Post-Exchange Memo at 9. Further, the agency's corrective action (taken on May 27 after we dismissed the protests for which EAI seeks cost reimbursement) included an amendment to the RFQ advising vendors that AWS "is the preferred cloud hosting environment for this initiative." RFQ amend. 0006.

[redacted]. See Supp. COS at 11-13. In contrast, the evaluation record clearly shows [redacted]. AR, Tab 17, Post-Exchange Memo at 9.

Further, the agency delayed initiating corrective action (by amending the solicitation to disclose its preference, see RFQ amend. 0006) until after it had submitted its response to the allegation in which the agency asserted the protest was without merit. On this record, we conclude the agency unduly delayed taking corrective action in response to a clearly meritorious protest allegation and, accordingly, we recommend reimbursement of EAI's costs associated with this portion of its protest.

Alleged Price Realism Analysis

Next, EAI protested that the agency's comprehensive price evaluation¹⁸ constituted an improper price realism analysis.¹⁹ In this context, EAI acknowledges that its quotation [redacted]. Supp. Protest at 5. Based on [redacted], EAI asserted that the agency's price evaluation constituted a "classic realism analysis" and, therefore, was improper. *Id.*

In responding to this portion of EAI's protest, the agency "vehemently disagree[d]" that it had conducted a price realism analysis, specifically noting that [redacted]. Supp. COS at 3. Rather, the agency maintains that its price evaluation was conducted pursuant to the requirements of FAR section 8.405-2,²⁰ which states that the agency "is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered[.]"

Based on our review of the record, we do not view this protest allegation as constituting a clearly meritorious allegation. As noted above, a protest is clearly meritorious only if a

¹⁸ As noted above, in evaluating price, the agency performed a comprehensive analysis of the labor categories, associated levels of effort, and applicable labor rates that were contained in each vendor's quotation for the various tasks to be performed. AR, Tab 17, Post-Exchange Memo at 27-66. Based on this analysis, the agency was [redacted]. *Id.* at 57.

¹⁹ There is no dispute that the solicitation provided for assessing price reasonableness, but did not provide for a price realism evaluation. A price reasonableness evaluation assesses whether a proposed price is higher than warranted; a price realism evaluation assesses whether a proposed price is so low as to create risk or reflect a failure to understand the solicitation's requirements. See, e.g., *Triad Int'l Maint. Corp.*, B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 8. We have explained that an agency may not conduct a price realism analysis in the context of a fixed-price contract without first advising offerors that it intends to do so. See, e.g., *Emergint Techs., Inc.*, B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 4-6.

²⁰ As noted above, this procurement was conducted pursuant to FAR section 8.405-2, which establishes requirements for procurements of services conducted under GSA schedule contracts that require statements of work.

reasonable agency inquiry would show the absence of a defensible legal position, *Technatomy Corp.; Octo Consulting Grp., Inc.--Costs*, B-413116.49, B-413116.50, Dec. 14, 2016, 2016 CPD ¶ 366 at 3. Here, the contemporaneous evaluation documentation supports the agency's position that its analysis focused on the labor mix and level of effort reflected in EAI's quotation--as the agency was required to do by the applicable FAR provisions; it did not reflect any assessments regarding the realism of the labor rates associated with EAI's staffing approach.

Moreover, as noted above, GAO conducted a conference call with the parties on May 20, seeking clarification and providing GAO feedback regarding the various protest issues. In connection with that call, GAO sought specific additional information from the agency related to this allegation. See GAO Notice Following Conference Call at 2. We have stated that, where resolution of a protest allegation requires substantial further development, as indicated by our Office's request for additional information, the allegation fails to meet the "clearly meritorious" standard. *Kingdomware Techs.--Costs*, B-406228.2, May 10, 2012, 2012 CPD ¶ 157 at 2-3. Accordingly, the record here does not support EAI's assertion that the agency had no legally defensible position, and we deny EAI's request for a recommendation of cost reimbursement regarding this portion of EAI's protest.²¹

BAH's Alleged Exceptions to the Solicitation Requirements

Next, EAI complained that BAH's quotation included assumptions that conflicted with various terms of the solicitation and should have rendered BAH's quotation unacceptable. Supp. Protest at 10-19. Among other things, EAI asserted that BAH's quotation altered the solicitation requirements regarding: [redacted]. *Id.*

The agency responded that it reviewed all of BAH's stated assumptions, concluded that they were reasonable and did not conflict with the terms of the solicitation and, where necessary, sought clarification and revision of BAH's assumptions during discussions. Supp. COS at 5-10. More specifically, the agency's response noted that BAH's quotation stated that it was not taking exception to any of the solicitation's terms and conditions; further, the agency's response addressed each aspect of BAH's quotation that EAI asserted rendered the quotation unacceptable, explaining the bases for rejecting EAI's assertions.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or in this case quotations, nor substitute our judgment for that of the agency; rather, we will properly defer to the procuring agency with regard to substantive evaluation judgments, as it is the procuring agency that must live with those judgments.

²¹ Although the record indicates that the agency misunderstood [redacted], the record also establishes that [redacted]. Accordingly, we do not view the agency's [redacted] as forming a basis for concluding that EAI's complaints about the agency's price evaluation were clearly meritorious.

See, e.g., *Vectrus Sys. Corp.*, B-412306.2, B-412306.3, Jan. 6, 2017, 2017 CPD ¶ 37 at 8-9.

Here, based on our review of the terms of the solicitation, including the provision instructing vendors to describe any assumptions they relied upon in preparing their quotations, along with the agency's explanations regarding the reasonableness and acceptability of each of BAH's assumptions, we reject EAI's assertion that the agency had no legally defensible position with regard to this allegation. Accordingly, we deny EAI's request for a recommendation of cost reimbursement regarding this portion of EAI's protest.

Alleged OCIs

Next, EAI's protest asserted that the agency failed to reasonably consider the potential OCIs that were created by BAH's proposed subcontractor having provided support for various state Medicaid agencies. Protest at 18-21; Supp. Protest at 19-24. EAI acknowledged that BAH's quotation disclosed its subcontractor's activities related to specific state Medicaid agencies, and further provided that the subcontractor would be recused from performing certain task order work related to those activities. EAI also acknowledged that the agency considered the potential for OCIs created by BAH's quotation but complained that the extent of the agency's consideration was inadequate.

In responding to this protest allegation, the agency described the scope of its OCI investigation, which included consideration of the information BAH's quotation disclosed as well as information obtained by the agency in performing independent research regarding this matter. Based on the information considered, the agency maintained that it properly concluded that BAH's quotation did not present unmitigated OCIs.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Social Impact, Inc.*, B-412941, B-412941.2, July 8, 2016, 2016 CPD ¶ 203 at 4-5. Our Office will review an agency's OCI investigation for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgement for the agency's unless there is clear evidence that the agency's conclusion is unreasonable. *Id.*

Here, EAI's various assertions regarding potential OCIs do not clearly establish that the agency's determination regarding potential OCIs was unreasonable. As noted above, GAO conducted a conference call with the parties on May 20, seeking clarification and providing GAO feedback regarding the various protest issues. In connection with that call, GAO sought specific additional information from the agency related to EAI's OCI allegations. See GAO Notice Following Conference Call at 2. As noted above, we have explained that, where resolution of a protest allegation requires substantial further development, as indicated by our Office's request for additional information, the allegation fails to meet the "clearly meritorious" standard. *Kingdomware Techs.--Costs, supra*. While we decline to endorse the agency's assessment of potential OCIs in this

matter, we reject EAI's assertion that its protest allegations were clearly meritorious and, accordingly, we deny EAI's request that we recommend cost reimbursement for this portion of its protest.

BAH's Medical Review Manager

Finally, EAI complained that, while the resume BAH submitted for its proposed medical review manager indicated [redacted], it failed to [redacted], as required by the solicitation. Supp. Protest at 23-24; see SOW at 71.

The agency responded that the resume submitted for BAH's medical review manager clearly demonstrated that [redacted]. Supp. COS at 10-11; see AR, Tab 7N, BAH Revised Technical Proposal at 123-124.

As noted above, we will not reevaluate quotations or substitute our judgment for that of the procuring agency. See *Vectrus Sys. Corp.*, *supra*. Here, our review of the record unambiguously establishes the reasonableness of the agency's determination that BAH's medical review manager met the solicitation requirements. EAI's protest to the contrary is without merit, and its request for our recommendation that EAI be reimbursed for its costs associated with this protest allegation is denied.

RECOMMENDATION

We recommend that the agency reimburse EAI its reasonable protest costs, including attorneys' fees, limited to its costs associated with EAI's assertions regarding an unstated evaluation factor, as discussed above. EAI should submit its claim for cost reimbursement directly to CMS within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

Edda Emmanuelli Perez
General Counsel