



United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** Oak Hill Technology, Inc.

**File:** B-406993

**Date:** October 10, 2012

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Alexander J. Brittin, Esq., Brittin Law Group, PLLC, for the protester.  
Christine Simpson, Esq., Department of Health and Human Services, for the agency.  
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency reasonably concluded that protester failed to include a “final” subcontracting agreement in its proposal as required by solicitation where the proposal included an unexecuted subcontract agreement marked as a “draft” document.

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### DECISION

Oak Hill Technology, Inc. (OHT), of Austin, Texas, protests the elimination of its proposal from consideration for award by the Department of Health and Human Services, Center for Medicare and Medicaid Services (CMS) under request for proposals (RFP) No. CMS-2012-0004, for contact center operations. The protester argues that the agency unreasonably rejected its proposal for failing to include a “final” subcontract agreement.

We deny the protest.

### BACKGROUND

CMS issued the RFP on March 27, 2012, for the purpose of obtaining contact center operations support to respond to inquiries for CMS customer service. The RFP called for the contractor to support “multi-channel” operations to receive and respond to inquiries and provide information through various channels such as telephone, mail, email, fax, and online chat. The RFP anticipated the award of a single cost-plus award-fee contract for a transition period, plus nine one-year option periods.

As relevant, the RFP's evaluation scheme specified certain initial pass/fail criteria that offerors were required to meet in order to be further evaluated. Specifically, section M.4.a of the RFP stated that in order to be considered for award, "[t]he offeror must clearly demonstrate that it has operated a contact center, within the last five (5) years, that handled at least 20 million inbound customer service representative calls in a multi-channel environment (at least 2 channels) for 1 client for at least 1 consecutive 12 month period." RFP at M.4.a. Section M.4.a also included a "Note" on the pass/fail experience requirement, stating that:

The Corporate Experience requirement may be met with a combination of Corporate Experience from the offeror, or a single subcontractor that will perform major or critical aspects of the requirement . . . "A single subcontractor that will perform major or critical aspects of the requirement" means a subcontractor proposed to perform a minimum of 25% of the labor hours. Subcontracting agreements and the establishment of new legal entities must be final at the time of proposal submission.

Id.

The RFP also stated in its instructions, with regard to the pass/fail criteria, that "[t]he offeror shall demonstrate how they have met the pass/fail requirement in Section M of this solicitation by providing the following information," including "[a]s applicable, [copies] of formal subcontracts, teaming agreements and legal documentation substantiating any new legal entities." Id. at L.19.b. Another subsection of the RFP's instructions, titled "Subcontract Proposal(s)," also required that offerors submit business proposals for each of their subcontractors, including, as relevant:

A copy of the subcontract agreement which includes: (For the purpose of providing the business proposal information required by this section, draft subcontract and teaming agreements are acceptable. However, please note that subcontracting agreements and the establishment of new legal entities must be final at the time of proposal submission for those offerors utilizing the experience of subcontractors to meet the pass/fail criteria (See Section M.4) . . .

- A description of the services to be subcontracted (i.e., Statement of Work):
- Identification of the pricing arrangement (e.g., Fixed Price, Cost Plus Fixed Fee, etc.);
- Proposed subcontract price; and,
- Flow down of appropriate FAR clauses

Id. at L.17.e. Finally, amendment 2 to the RFP included a questions and answers section. Among the questions, an offeror asked the following:

Typically subcontract agreements are created after award. Can a draft subcontract agreement or teaming agreement with the required information [be] substituted for a subcontract agreement?

RFP, Amendment 2, Q&A, at 13-14. In response, the agency answered in relevant part as follows:

For the purpose of providing the business proposal information required by L.17.e, draft subcontract and teaming agreements are acceptable. However, please note that subcontracting agreements and the establishment of new legal entities must be final at the time of proposal submission for those offerors utilizing the experience of a subcontractor to meet the pass/fail criteria.

Id.

OHT was among several offerors to timely submit a proposal in response to the RFP. Upon receipt, the agency provided the proposals to a technical evaluation panel (TEP), which first reviewed the proposals against the RFP's pass/fail criteria. With regard to OHT's proposal, the TEP found that OHT proposed to meet the pass/fail corporate experience requirement through a subcontractor, [deleted], which was proposed to handle 39.75 percent of the contract labor hours. The TEP found that [deleted] corporate experience and percentage of labor hours were sufficient to meet the experience requirement. However, on review of the documentation submitted with the proposal, the TEP determined that while OHT and [deleted] had submitted a signed teaming agreement, they had not submitted a "final subcontract agreement" as required for offerors proposing a subcontractor to meet the pass/fail corporate experience criteria. Rather, the TEP found that OHT had submitted only "an unsigned 'Draft Subcontract Agreement' in . . . its Business Proposal." Agency Report (AR), Tab 7A, TEP Pass/Fail Report, at 4. The TEP concluded that "[s]ince the RFP clearly states that subcontracting agreements must be final at the time of proposal submission and [OHT] submitted an unsigned 'Draft Subcontract Agreement,' [OHT] does not meet this portion of the pass/fail criteria."

Id.

The TEP then forwarded its evaluation results to the contracting officer, who also reviewed OHT's proposal, and documented her own determination on the pass/fail criteria. In her determination, the contracting officer wrote:

An unsigned "Draft Subcontract Agreement" is not a final subcontract agreement. After reviewing the Teaming Agreement

and the “Draft Subcontract Agreement,” it was determined that [OHT and Teleperformance] do not meet the solicitation requirement in M.4.a that the subcontract agreement be final at the time of proposal submission.

The RFP language in Section M.4.a clearly provides that any subcontracting agreements on which an offeror relied to establish the required experience had to be “final” at the time of proposal submission. This was confirmed in [Amendment 2], Q&A document, Q&A #34, and in RFP Section L.17.e.1.a of [Amendment 2].

AR, Tab 7, Contracting Officer’s Pass/Fail Determination, at 3 (emphasis original).

On June 29, the agency informed OHT that its proposal had been eliminated for failure to meet the RFP’s pass/fail criteria, and specifically for failure to provide a final subcontracting agreement between OHT and [deleted]. On July 1, OHT requested that the agency reconsider its determination based on [deleted]’s commitment to the RFP, as demonstrated by the fully executed teaming agreement and other documentation provided with the proposal. OHT also provided the agency with a subcontracting agreement it entered into with [deleted], which had been signed on June 30 and backdated to the date of proposal submission. The contracting officer reviewed OHT’s request, and on July 6, informed OHT that its proposal would not be reinstated. The contracting Officer concluded that “[s]ince the RFP required the subcontract agreement to be final at the time of proposal submission and the subcontract agreement submitted with [OHT]’s proposal was an unexecuted draft,” OHT was properly excluded from the competition. AR, Tab 10, CO’s Decision on Protester’s Request for Reconsideration, at 2. OHT then filed this protest on July 9.

## DISCUSSION

OHT alleges that the agency failed to follow the RFP’s evaluation criteria, which OHT argues did not require the submission of a final subcontract agreement. Instead OHT argues that it needed only submit a draft subcontract agreement in accordance with the RFP, so long as that draft was “final” at the time of proposal submission. OHT asserts that it met this criteria by submitting a draft subcontract agreement that contained all necessary terms and conditions, except for the period of performance and wage determinations, which were to be completed after award. OHT also points to [deleted]’s commitment to enter into a subcontract, as demonstrated by the signed teaming agreement and the statement in [deleted]’s business proposal that:

We have reviewed the proposed subcontract agreement and find no issues to any terms and conditions. We are excited to be

OHT's partner and will enter into a subcontract agreement following the [contact center operation] contract award from CMS. Attached is Exhibit 1, copy of the currently drafted subcontract agreement between OHT and [deleted].

AR, Tab 4, [deleted] Business Proposal, at 2. We conclude that the RFP required submission of more than an unexecuted draft document from those offerors, such as OHT, proposing to use a subcontractor to meet the pass/fail corporate experience criteria, and that OHT failed to meet this standard.<sup>1</sup>

The RFP's instructions in this case, at L.17.e, clearly required offerors to submit business proposals for each of their proposed subcontractors, including a copy of their subcontract agreements. Thus, submission of a subcontract agreement for each subcontractor was mandatory under the terms of the RFP. Concerning whether that subcontract agreement could be a draft, the RFP's instructions noted parenthetically that:

For the purpose of providing the business proposal information required by this section, draft subcontract and teaming agreements are acceptable. However, please note that subcontracting agreements and the establishment of new legal entities must be final at the time of proposal submission for those offerors utilizing the experience of subcontractors to meet the pass/fail criteria (See Section M.4)

RFP at L.17.e.

We conclude that this parenthetical establishes two separate requirements for the status of the subcontract agreement to be submitted with the subcontractor's business proposal, based on the purpose for which the subcontractor is proposed. In the case of a subcontractor proposed for a purpose other than meeting the RFP's pass/fail experience requirement, the parenthetical states that submission of a draft subcontract agreement is acceptable. However, where an offeror proposed a subcontractor in order to meet the RFP's pass/fail experience requirement, the RFP expressly provided that the "subcontracting agreements . . . must be final at the time of proposal submission." Id. Thus, where OHT proposed [deleted] to meet the pass/fail experience criteria, the RFP required [deleted] to include a "final" subcontract agreement in its business proposal.

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<sup>1</sup> OHT also argues that its interpretation of the RFP is the only rational interpretation, but that to the extent the agency's interpretation of the requirement is also found to be reasonable, a latent ambiguity exists in the solicitation. As explained in this decision, we conclude that the agency's interpretation of the requirement is the only rational interpretation.

Concerning whether the subcontract agreement submitted by OHT and [deleted] should have been considered “final”, we agree with the contracting officer--“[a]n unsigned ‘Draft Subcontract Agreement’ is not a final subcontract agreement.” AR, Tab 7, Contracting Officer’s Pass/Fail Determination, at 3. The subcontract agreement submitted for [deleted] was referenced as the “Draft Subcontract Agreement” in the table of contents and body of the business proposal, was titled “draft subcontract agreement” in the business proposal exhibits, and was marked “DRAFT” in the footer of each of its 47 pages. The draft subcontract agreement was also unsigned.

Moreover, the signed teaming agreement between OHT and [deleted] does not reflect a “final” subcontracting agreement at the time of proposal submission. The document contains a section referencing the subcontract agreement, stating that, “[i]f a contract is awarded it is agreed that each Party will, in good faith, proceed in a timely manner to negotiate a mutually acceptable Agreement for the work identified in [the RFP].” AR, Tab 6, Teaming Agreement, at 1. This “agreement to agree” does not provide any basis on which to conclude that the draft subcontract agreement submitted with [deleted]’s business proposal was “final at the time of proposal submission.” RFP at, L.17.e, M.4.a. Rather, the teaming agreement indicates that OHT and [deleted] did not anticipate finalizing their subcontract agreement until after the award of the contact center operations contract.

Finally, the statement in [deleted]’s business proposal that “[w]e have reviewed the proposed subcontract agreement and find no issues to any terms and conditions,” also refers to the subcontract agreement as “proposed,” and appears in a section of the business proposal entitled “Draft Subcontract Agreement.” AR, Tab 4, [deleted] Business Proposal at 2. To paraphrase the contracting officer--a “proposed” subcontract agreement, as much as a “draft subcontract agreement,” is not a final subcontract agreement.

OHT cites our Office’s decision Strategic e-Business Solutions, Inc., B-310210, Nov. 8, 2007, 2007, CPD ¶ 206, in support of its argument that the agency should have considered the entirety of its proposal in order to determine whether its draft subcontract agreement was in fact a final document. In that decision, which also involved a requirement for the submission of a “final” subcontracting agreement, our Office found that the protester had not met the requirement where it submitted a letter from its subcontractor stating only that the subcontractor would provide “professional services.” Id. at 4. We also concluded that:

the letter furnished by the protester to the agency did not contain a signature . . . thus, there was no evidence that the two parties had in fact entered into an agreement. Given the general nature of the letter and its lack of specificity regarding basic terms, we think that the agency reasonably concluded that [the protester]

failed to demonstrate that it had a final subcontracting agreement in place to establish the required . . . experience that [the protester] itself was missing, as required by the RFP.

Id. OHT argues that because the documentation that it submitted in this case contained an actual draft subcontract agreement with completed terms and conditions, as well as indications of [deleted]'s commitment to the RFP, our Office's decision in Strategic e-Business Solutions, Inc., dictates that its "draft" subcontract agreement be considered "final."

We disagree. Although the draft subcontract agreement submitted by OHT contained the required terms and conditions, OHT's proposal, throughout, references the agreement as a "draft subcontract agreement" and a "proposed subcontract agreement", and the agreement was clearly marked "DRAFT" in the footer of each page. Further, the draft subcontract agreement was unsigned, and the fully executed teaming agreement between OHT and [deleted] indicated that the parties did not intend to finalize their subcontract agreement until after award. Accordingly, as in the case of Strategic e-Business Solutions, Inc., we find no evidence that the two parties had in fact entered into a "final" agreement at the time of proposal submission, as the RFP required. In sum, where the subcontract agreement submitted by OHT was referred to, and marked, as a draft document, and was unsigned, we see no basis to question the contracting officer's determination that OHT failed to submit a final subcontracting agreement, as was required to meet to the RFP's pass/fail corporate experience criteria.

The protest is denied.

Lynn H. Gibson  
General Counsel