



Decision

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Matter of: Wellspring Worldwide, Inc.

File: B-417282.2; B-417282.3; B-417282.4

Date: December 20, 2019

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DIGEST

1. Protest challenging the agency's evaluation of quotations is denied where the evaluation was reasonable and consistent with the terms of the solicitation.
2. Protest that the agency engaged in misleading discussions with the protester by failing to advise during discussions that the protester's quoted price was unreasonably high is denied where the agency did not find the protester's price unreasonable, and was not otherwise obligated to raise this matter during discussions.
3. Protest that the awardee's quotation improperly took exception to the solicitation requirement to quote a fixed price is denied where the agency reasonably determined that the awardee's assumptions were not exceptions, and where the language in question reflects the reservation of a right to request, rather than receive, a price adjustment.
4. Agency's selection of a lower-rated, lower-priced quotation for award is unobjectionable where the agency's tradeoff decision was reasonable and adequately documented.

DECISION

Wellspring Worldwide, Inc., a small business of Chicago, Illinois, protests the issuance of a purchase order by the Department of Health and Human Services (HHS), National Institutes of Health (NIH), to Inteum Company, LLC, of Kirkland, Washington, under request for quotations (RFQ) No. NIAID-RFQ18-20180622, for an enterprise system

solution to support the management of NIH-owned intellectual property. Wellspring challenges NIH's evaluation of the vendors' technical and price quotations, argues that the agency failed to conduct meaningful discussions, and contends that the best-value tradeoff and source selection decision was unreasonable.

We deny the protest.

BACKGROUND

On July 5, 2018, the NIH issued the RFQ as a combined synopsis/solicitation, which was set aside for small businesses. The solicitation sought an electronic system to manage intellectual property matters for HHS, including the patenting and licensing of government inventions and discoveries. RFQ, Statement of Work (SOW) at 1. The agency conducted the procurement in accordance with the commercial item procedures of Federal Acquisition Regulation (FAR) part 12 and simplified acquisition procedures of FAR part 13. The RFQ contemplated the award of a fixed-price purchase order, for a base year and four 12-month options. RFQ at 2.

The RFQ provided that the purchase order would be issued to the vendor whose quotation was evaluated as providing the best value, based on a tradeoff between price and the following non-price factors, in descending order of importance: technical, corporate experience, and past performance. RFQ, Eval. Criteria, at 1-3. The technical factor also consisted of two sub-factors: functional requirements and customize software. Id. at 2.

The solicitation provided that the agency would make a best-value determination "based on the capability of each [vendor's quotation] to meet the specifications listed in the SOW/requirements," and that the government's objective is to "obtain the highest technical quality considered necessary to achieve the project objectives, with a realistic and reasonable cost." Id. The technical and past performance factors were more important than price, but the solicitation advised that price could become more important in the tradeoff analysis as the difference between the non-price factors became closer. Id. The RFQ provided that the price evaluation would include price completeness and accuracy, price reasonableness, and total price to the government. Id. at 3.

NIH received timely quotations from thirteen vendors, including Wellspring and Inteum, by the closing date of August 14, 2018. Contracting Officer Statement (COS), Oct. 16, 2019, at 2. Following an initial evaluation of quotations, the contracting officer established a competitive range of two vendors, Wellspring and Inteum.¹ The agency

¹ The agency explains that it determined that only the quotations submitted by Wellspring and Inteum provided a technical solution that would meet the needs of the NIH community, with corporate experience and past performance that indicated a

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invited the two vendors to provide system demonstrations to the agency. Id. at 3. Thereafter, the agency provided both Wellspring and Inteum with discussions questions. Id.; AR, Tab 10.2, Wellspring Discussions, at 1-4; Tab 11.2, Inteum Discussions, at 1-4. As relevant here, the agency advised Wellspring that its proposed price was too high. The agency requested revised price quotations from both vendors. COS at 3.

After an evaluation of the revised quotations, the agency decided to issue the purchase order to Inteum on January 23, 2019. COS at 3. On February 4, 2019, Wellspring filed a protest with our Office, challenging the January 23 award to Inteum. Id. On February 28, 2019, the NIH notified our Office that it had completed its review of the procurement and intended to take corrective action by re-evaluating the already submitted technical quotations, re-evaluating price realism and reasonableness, taking other procurement actions if deemed appropriate,² and making a new best-value determination. Id. Due to the agency’s corrective action, our Office dismissed the protest as academic. Wellspring Worldwide, Inc., B-417282, Mar. 4, 2019 (unpublished decision).

NIH re-evaluated the quotations previously submitted. Based on this re-evaluation, Inteum’s and Wellspring’s quotations were evaluated as follows:

	INTEUM	WELLSPRING
Technical	Good	Outstanding
Past Performance	Similar	Very Similar
Corporate Experience	Acceptable	Outstanding
Total Evaluated Price	\$1,136,377	\$6,245,894

AR, Tab 9.2, Basis for Award, at 3.

Based on this review, the agency again concluded that Inteum provided the best value to the government. Id. The agency notified Wellspring of its decision. After a debriefing, Wellspring filed this protest.

DISCUSSION

Wellspring challenges NIH’s evaluation of Wellspring’s and Inteum’s technical and price quotations, and the selection of Inteum’s lower-rated, lower-priced quotation. Wellspring alleges that NIH unreasonably assigned five weaknesses to its quotation

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likelihood of on-time, within-budget delivery of the proposed solution. COS at 3; Agency Report (AR), Tab 9.2, Basis for Award, at 2.

² As part of its corrective action, the agency updated the independent government estimate (IGE). COS at 3.

under the functional requirements subfactor.³ As for the awardee, the protester asserts that its quotation failed to meet the minimum technical requirements for browser capability as specified by the RFQ, and should have been found technically unacceptable. The protester also argues that aspects of the technical evaluation (such as the product demonstration) were undocumented and inconsistent with the underlying record, and that the agency engaged in misleading discussions with Wellspring. Finally, the protester contends that Inteum's price quotation took exception to the solicitation's requirement to quote a fixed price. For the reasons discussed below, we find the protester's arguments to be without merit.⁴

As noted above, NIH conducted this procurement using simplified acquisition procedures for commercial items. Simplified acquisition procedures are designed, among other things, to reduce administrative costs, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. FAR § 13.002. When using these procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. McLaurin Gen. Maint., Inc., B-411443.2, B-411443.3, Jan. 14, 2016, 2016 CPD ¶ 41 at 3; ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4. In reviewing protests of an allegedly improper simplified acquisition evaluation, our Office examines the record to determine whether the agency met this standard and exercised its discretion reasonably. Computers Universal, Inc., B-297552, Feb. 14, 2006, 2006 CPD ¶ 42 at 4-5.

Technical Evaluation of Wellspring

Wellspring argues that the agency's assessment of five weaknesses to its quotation under the functional requirements subfactor of the technical factor was unreasonable because its quotation demonstrated that its system could satisfy all SOW requirements, including the five areas giving rise to the weaknesses.⁵ The agency argues that assessment of the weaknesses was reasonable because in each instance the

³ In the alternative, Wellspring alleges that the agency engaged in disparate treatment by not assessing weaknesses to Inteum's quotation for the same attributes also contained in Inteum's quotation.

⁴ Although we do not address all of the protester's arguments in this decision, we have considered all of them, and find no basis to sustain the protest.

⁵ Specifically, these weaknesses included: (1) no indication that model agreement terms can be archived and reused; (2) support for infringement-related monitoring/investigation/corrective action does not appear to meet all NIH needs; (3) no indication of workflow to assess penalties on partners that are out of compliance with licensing terms; (4) no indication of workflow to create reimbursements; and (5) no indication of ability to store marketing information about labs/researchers for future use agreements/licenses related to NIH-owned technologies. AR, Tab 6.1, Technical Evaluation Panel (TEP) Report, at 8-9.

protester's quotation either did not fully address the requirements or merely restated the SOW requirements, without demonstrating the vendor's ability to address the requirements, as required by the RFQ. We discuss two representative weaknesses below.

For evaluation of technical approach, the RFQ provided that the agency would evaluate the information contained in a vendor's quotation to determine the extent of its understanding of the requirements, including the soundness of the vendor's proposed methodology to effectively meet and comply with the tasks and requirements outlined in the SOW. RFQ, Eval. Criteria, at 4. For the functional requirements subfactor, vendors were to demonstrate their "ability to address [the] functional requirements listed in the SOW/Solicitation." Id. The solicitation also required that vendors clearly demonstrate their ability to customize software within six months of award. Id.

The TEP assessed a weakness to Wellspring's quotation for failing to demonstrate the ability of its proposed system to meet all of the requirements under the SOW sections to "Establish Agreements" and "Manage Active Agreements." AR, Tab 6.1, TEP Report, at 8-9. These sections of the SOW require that a vendor's proposed solution "[p]rovide templates and/or tools to generate commonly used types of draft agreements in MS Word for further customization," and also "[a]llow NIH to create 'sets' of pre-defined agreement terms for different types of agreement[s]." RFQ, SOW, at 3. In assessing the weakness, the TEP noted that there was "[n]o indication that model agreement terms can be archived and reused." AR, Tab 6.1, TEP Report, at 8-9. The TEP further noted that "[o]ver 90 percent of the terms outlined in the NIH model agreements are used repetitively," and concluded that "[l]ack of this feature would increase workload of staff exponentially." Id.

The protester points to various provisions in its quotation, which it asserts, adequately addressed this SOW requirement, see, e.g., AR, Tab 4.1, Wellspring Technical Quotation, at 7 ("[C]lients are able to upload form templates, such as Microsoft Word and Adobe PDF templates, in order to auto-generate forms in [the software]."); id. ("Many Wellspring clients will upload agreement templates into [the program], and then use the document forms tool to auto-populate those documents with information directly off of the agreement record."); id. ("Users can also create templates with pre-defined agreement terms for different types of agreements."). The protester also argues that its quotation stated that its proposed system "satisfies all of the 'Establish Agreements' SOW requirements out of the box," which the protester maintains, "includes the requirement to archive and reuse model agreement terms." Comments at 42; AR, Tab 4.1, Wellspring Tech. Quotation, at 16.

The agency responds that, despite the statements cited in Wellspring's quotation, the TEP had concerns that the protester's solution did not adequately address archiving and reusing repetitive terms. According to the TEP chair, the weakness was further explored with Wellspring during a system demonstration, but the TEP's concerns were not allayed. TEP Chair Statement, Nov. 6, 2019, at 3. Although Wellspring contends that the content of its quotation was sufficient or should have been interpreted

differently, the protester's disagreement with the agency's evaluation provides no basis to sustain the protest. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. On this record, we find no basis to sustain the protest.

As another example, the protester challenges a weakness assigned to its quotation based on the SOW requirements for infringement actions. As relevant here, the SOW included the following requirements for infringement actions:

- Allow creation of infringement action records;
- Provide workflow for review and approval of recommended courses of action for infringements;
- Support automated generation of emails related to different statuses of infringement actions;
- Allow assignment of infringement actions to specific individuals to complete specific tasks;
- Provide a means to record disposition of infringement actions

RFQ, SOW, at 5.⁶

NIH assigned a weakness to Wellspring's quotation for failing to demonstrate adequate "[s]upport for infringement-related monitoring[,] investigation[,] and] corrective action." AR, Tab 6.1, TEP Report, at 9. In assessing the weakness, the TEP concluded that these aspects of Wellspring's quotation do "not appear to meet all NIH needs." Id. The agency argues that its assessment of the weakness was reasonable because Wellspring's quotation merely restated the SOW's requirements without demonstrating how its system could meet the requirements.

In response, Wellspring points to two sentences in its quotation, which the protester contends, adequately addressed these SOW requirements. See AR, Tab 4.1, Wellspring Technical Quotation, at 12. The protester also points to a "Capability Summary" attached as an appendix to its quotation, which the protester asserts, stated that Wellspring's quoted system could meet all of the SOW requirements, including the infringement-related requirements, and therefore, that it was unreasonable for the agency to assess a weakness to its quotation relating to these requirements. Supp. Comments at 44.

It is not apparent from Wellspring's quotation, or from the protester's submissions to our Office in connection with this protest, that the cited portions of Wellspring's quotation demonstrated Wellspring's "ability, resources, and experience required to perform [this

⁶ NIH explained that "[i]nfringement activities are critical to the NIH Technology Transfer Program in that it allows us to protect and enforce the patent rights assigned to the U.S. Federal Government," and that "[b]eing able to document and enforce infringement cases, in many cases, recovers millions of dollars of royalties." AR, Tab 6.1, TEP Report, at 9.

requirement], including [the] detailed procedures and methods to be used,” as required by the RFQ. RFQ, Eval. Criteria, at 1. Rather, the cited sentences in Wellspring’s quotation appear to essentially restate the bulleted requirements of the SOW. Compare AR, Tab 4.1, Wellspring’s Technical Quotation, at 12 (stating that its system “supports the creation of infringement records,” “allows for the review and approval of recommended courses of action for infringements,” supports “automated generation of emails related to different statuses of infringement actions,” allows “assignment of infringement actions to specific individuals to complete specific tasks,” and allows “a means to record disposition of infringement actions,” with, RFQ, SOW, at 5 (almost identical language; see quoted SOW requirement above). Similarly, the statements in Wellspring’s Capability Summary that Wellspring’s system meets the SOW requirements “out of the box” essentially just acknowledge that Wellspring’s system meets the SOW’s requirements.

We conclude that the agency’s evaluation was reasonable. It is a vendor’s obligation to submit an adequately written quotation for the agency to evaluate. See WKG & Assocs., LLC, B-409835, Aug. 26, 2014, 2014 CPD ¶ 250 at 7. Simply restating the requirements of the RFQ is not sufficient in this regard. Here, the RFQ cautioned that “[a]ll information must be presented in sufficient depth for the Government to make a comprehensive evaluation of the [vendor’s] understanding of the SOW and [its] capability for successful performance.” RFQ, Eval. Criteria, at 1. To the extent the protester contends that its quotation was sufficient, or should have been interpreted differently, the protester’s disagreement, without more, is insufficient to establish the agency’s evaluation was unreasonable. Ben-Mar Enters., Inc., supra. On this record, we find no basis to sustain the protest.

Technical Evaluation of Inteum

Wellspring also challenges the agency’s technical evaluation of the awardee’s quotation. In particular, the protester argues that the awardee’s proposed commercial off-the-shelf (COTS) software failed to meet the solicitation’s minimum technical requirements pertaining to browser compatibility.⁷

⁷ The protester also argues that Inteum’s proposed COTS solution failed to meet minimum requirements for Section 508 accessibility. In this regard, Section 508 of the Rehabilitation Act of 1973, as amended, generally requires that agencies’ electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d. The protester contends that applicable HHS Acquisition regulations prohibited the agency from selecting Inteum’s allegedly Section 508 non-compliant commercial product over Wellspring’s Section 508 compliant commercial product. Supp. Comments at 16, n.3; Supp. Protest at 37-38. As relevant here, the RFQ incorporated by reference HHS Acquisition Regulation clause 352.239-74, Electronic and Information Technology (EIT) Accessibility (Dec 2015), which states that EIT supplies and services developed, acquired, or maintained under the contract or order must comply with the accessibility standards set forth in 36 C.F.R. part 1194. Although both the awardee and
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As relevant here, the RFQ required that vendors provide “a web-based application interface.” RFQ, SOW at 2. The agency clarified during preaward questions and answers (Q&As) that the deployed solution must be compatible with recent and current versions of the following web browsers: Internet Explorer, Microsoft Edge, Mozilla Firefox, Google Chrome, and Apple Safari. RFQ, Q&A No. 22.

Wellspring argues that the awardee’s proposed system fails to meet the browser compatibility requirement because Inteum’s system will work only with browsers compatible with the plug-in, Microsoft Silverlight. The protester asserts that, because MicroSoft Silverlight is outdated, it is only supported by one of the browsers required by the solicitation.

The agency argues that its evaluation of Inteum’s system as meeting the minimum requirements of the SOW was reasonable. According to the TEP Chair, “[t]he TEP’s evaluation, which included attending the demonstration of [Inteum] determined that the version of the [COTS software] that was proposed and demonstrated by Inteum, namely Inteum Web, satisfied the base needs defined in the SOW.” TEP Chair Statement at 1. Specifically, the TEP Chair explains that the agency’s determination of the compatibility of Inteum’s system “was based on the vendor demonstration,” which revealed that Inteum’s system “was compatible with the current version of four out of five browser types listed in [the] Q&A of the solicitation as of the due date of the initial [quotation] submission,” including: Internet Explorer version 11.x and later; Firefox version 52.x and later; Google chrome version 60.x and later; and Safari (for Macintosh (Mac) Operating System) v11.x and later. Id. at 1-2.

The TEP Chair states that “[t]he one browser which was not compatible [with Inteum Web] was the Microsoft Edge version 40.x and later.” Id. at 1. He explains, however, that the demonstration revealed that “Inteum Web will work on MS Edge,” and that “the vendor would merely need to install the MS Silverlight application locally.” Id. at 2. In this regard, the TEP Chair notes that the RFQ does not state anywhere that “the proposed COTS products need to be compatible with all recent browsers in the COTS products native form, which is without a plug-in or other application to help it run.” Id. In addition, he points out that the RFQ “clearly defined that the vendors were all given the

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protester submitted product assessment template (PAT) documentation with their quotations, nothing in the RFQ provided that vendors’ quotations would be evaluated based on the submission of the PAT documentation or a vendor’s ability to demonstrate compliance with the established EIT accessibility standards. To the extent the protester asserts the agency should have evaluated the documentation as part of its award determination, this issue was apparent on the face of the solicitation, and therefore the argument is untimely. 4 C.F.R. § 21.2(a)(1) (protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial quotations shall be filed prior to the time set for receipt of initial quotations). As a result, we dismiss the argument.

opportunity to adjust their systems to meet [the government's] needs within six months of the award." Id.; RFQ, Eval. Criteria, at 2.

Additionally, the TEP Chair explains that "[a]t the time of the submission of quotations, none of the Government's end-users utilized Microsoft Edge," which was the one incompatible browser in question, but that in any event, "[b]ased on Inteum's technical quotation and demonstration, support for all five types of browsers is expected as of initial delivery of the completed system." Id. He also notes that "the [g]overnment was advised that the latest version of the Inteum product, Minuet, was set to be released during this six-month period, and therefore would deliver a substantial upgrade in capability to address the risk." Id. Accordingly, the TEP Chair explains that the agency "viewed the risk presented by this shortcoming [as] minimal." Id.

The protester claims that we should give no weight to the TEP Chair's statement since it includes explanation not reflected in the contemporaneous record. Our Office generally considers post-protest explanations, such as this, however, where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. See Lynxnet, LLC, B-409791, B-409791.2, Aug. 4, 2014, 2014 CPD ¶ 233 at 6. To the extent the protester asserts that the TEP Chair's statements are inconsistent with the record, based on our review of the record, and as discussed below, we disagree.

For example, the protester asserts that we should give no weight to the TEP Chair's statement because it is "facially inconsistent" with a statement made by the awardee during discussions. Supp. Comments at 21. In particular, the protester cites to a statement made by Inteum during discussions that its system "requires browsers compatible with Microsoft Silverlight." AR, Tab 11.2, Inteum Discussions, at 1. We do not agree that Inteum's discussions response is "facially inconsistent" with the TEP Chair's statement that Inteum's demonstration revealed that Inteum's system was compatible with the current version of four browsers listed in the RFQ as of the date of the initial quotation submission. TEP Chair Statement at 1. The protester has failed to demonstrate any inconsistency between the TEP Chair's statement and the contemporaneous record, and we find nothing unreasonable regarding the agency's explanation in this regard.

The protester further points to a July 2019 statement from Microsoft announcing an "end-of-support" date for Silverlight of October 12, 2021, and stating that Silverlight will no longer be supported for Chrome, Firefox, or any browser using the Mac operating system. The protester contends that this publicly available information "indicates [that the Microsoft Silverlight plug-in] is unsupported and incompatible with four of the five browsers required to be supported by" the awardee's Inteum Web system, Supp. Comments at 16, which the protester asserts, conflicts with the TEP Chair's statement that awardee's demonstration revealed that Inteum's system was compatible with the current version of some of the browsers listed in the RFQ as of the date of the initial quotation submission. TEP Chair Statement at 1. In making this argument, however,

the protester again has not identified an inconsistency between the TEP Chair's statement and the contemporaneous record, which reflects that the TEP found that Inteum's technical submission warranted a good rating because it met the solicitation's requirements.⁸ AR, Tab 6.1, TEP Report, at 4. The TEP Chair's statement simply provides additional details regarding the TEP's evaluation during the demonstration.

In sum, based on the record, including the TEP Chair's statements, we conclude that the agency's evaluation of Inteum's system as meeting the solicitation's minimum requirements pertaining to browser compatibility was reasonable. On this record, we find no basis to sustain the protest.

Misleading Discussions

The protester argues that the agency failed to conduct meaningful discussions because it advised Wellspring that the agency regarded its quoted price as "too high," but failed to advise Wellspring that its quoted price was "unreasonably high." The agency argues that discussions were meaningful because it raised the issue of Wellspring's price with the vendor during discussions, and provided Wellspring with two opportunities to revise its price quotation. The agency further contends that it did not find that Wellspring's quoted price was unreasonably high, and therefore, was not required to raise this issue during discussions. For the reasons discussed below, we have no basis to object to the agency's actions.

Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should treat vendors fairly and reasonably in the conduct of those procedures. ERIE Strayer Co., supra, at 1. Where an agency elects to conduct discussions with a vendor concerning price, it is not required to advise the vendor of the specific areas where its price is too high or to provide a specific price that the vendor must meet; rather, simply advising the vendor that its price is too high is sufficient. See MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219

⁸ To the extent the protester argues that the agency's evaluation failed to adequately consider the risk posed by the awardee's system's reliance on an "end of life system," the TEP Chair explains that "the [g]overnment was advised that the latest version of the Inteum product . . . was set to be released during this six month period, and therefore would deliver a substantial upgrade in capability to address risk." TEP Chair Statement at 2. The TEP Chair's statements are supported by the contemporaneous record. See AR, Tab 11.2, Inteum Discussions, at 1 (advising agency that Inteum will provide the "newer version of [its] solution," which is its "next generation solution" to NIH "at no extra cost," and that this solution is "browser agnostic" and "can run on mobile platforms"). The protester has not demonstrated an improper or unreasonable evaluation by the agency. Accordingly, while the protester may not agree with the agency's evaluation, the protester's disagreement with the evaluation, without more, provides no basis to sustain the protest. Ben-Mar Enters., Inc., supra.

at 14-15; see also Total Home Health, B-417283, B-417283.2., Apr. 26, 2019, 2019 CPD ¶ 166 at 4.

Here, the record shows that the agency informed Wellspring that its overall price was too high and that it should consider adjusting its price. AR, Tab 10.2, Wellspring Discussions, at 4. In response, Wellspring opted to lower its proposed price, but also defended its high pricing, stating:

We acknowledge that our proposed pricing is higher than what we submitted as part of the independent market research conducted over 2 years ago; increases reflect standard inflation and cost of business adjustments. Notably, when compared to other enterprise-level SAAS software solutions (e.g., Salesforce, Microsoft Dynamics, Oracle, and SAP), our pricing is [DELETED]% lower per user/month.

It may be that some of the government's market research included smaller companies with limited product and services capabilities, such as some of those in the tech transfer software market, which would translate to lower prices.

Id. at 3.

The agency subsequently asked if Wellspring would be willing to give the government an additional discount, and provided the vendor with another opportunity to lower its price. Id. at 2. Wellspring did not reduce its proposed price further. Id. at 1.

The record reflects that, after the close of discussions and receipt of final price quotations, the agency conducted a price reasonableness determination, and concluded that Wellspring's technically superior solution was reasonably priced. AR, Tab 8.1, Price Evaluation, at 4. In making this determination, the record reflects that the agency compared Wellspring's price quotation to the quotations submitted by the other vendors, including the awardee, and to the independent government estimate. Id.

The protester acknowledges that the agency advised Wellspring during discussions that its price was "too high." The protester argues, however, that discussions were not meaningful because the agency improperly failed to inform Wellspring that its price was unreasonably high. The protester is essentially arguing that the agency erred in failing to determine its price quotation to be unreasonably high, and the agency further erred in not telling Wellspring that its price was unreasonably high. Supp. Comments at 37.

As noted above, the agency compared the protester's pricing to that of other vendors, including the awardee, and to the IGE in concluding that the pricing was reasonable. Furthermore, the protester's argument ignores Wellspring's own actions in making the business judgments that led to the price quotation it submitted, and essentially seeks to place on the government the burden of dissuading Wellspring from its attempt to charge

the government what the protester itself characterizes as an unreasonably high price.⁹ We have previously found that such an argument does not provide a basis to sustain a protest. See DynCorp Int'l, LLC, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ 338 at 15. On this record, we have no basis to sustain this protest argument.

Exception to Fixed-Price Requirement

Wellspring next argues that Inteum's price quotation took exception to the terms of the solicitation, and therefore, should have been found technically unacceptable. For the reasons discussed below, we find this argument to be without merit.

A quotation that takes exception to a solicitation's material terms and conditions is unacceptable and may not form the basis for an award. Argus & Black, Inc., B-405813, Jan. 3, 2012, 2012 CPD ¶ 218 at 3; Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 4. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. Concurrent Techs. Corp., B-415513, B-415513.2, Jan. 18, 2018, 2018 CPD ¶ 59 at 11. The requirement to quote fixed prices is a material term or condition of a solicitation requiring such pricing. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2-3. Where a solicitation requests quotations on a fixed-price basis, a price quote that is conditional and not firm cannot be considered for award. Id.; SunEdison, LLC, B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168 at 5.

Here, the RFQ required vendors to submit quotations on a fixed-price basis. RFQ, Q&As Nos. 18-19. Vendors were also instructed to quote fixed prices for each of the line items listed in the RFQ's price schedule template, which included, for example, "implementation and configuration" and "customization." RFQ, Eval. Criteria, at 4. As relevant here, with regard to customization, the solicitation required vendors to identify and price whatever customization of their COTS software solution might be required during the six-month integration phase of performance. RFQ at 4.

Inteum's pricing template, as relevant here, quoted fixed prices for the base year and option years for the following two line items: implementation and custom integration,

⁹ We also find no merit to the protester's argument that the agency was required to reopen discussions because it revised the IGE after conducting discussions. The protester asserts that, because the agency revised the IGE after conducting discussions to include a break-down of pricing by line item (in addition to total proposed price), the agency was required to reopen discussions to inform it of any line item pricing in its initial proposal that was unreasonably high. As the agency points out, its evaluation under the initial IGE and revised IGE led to the same conclusion that Wellspring's proposed price was reasonable. Supp. AR at 10. That is, the agency's evaluation did not change due to the revised IGE. There is no indication in the record that the agency concluded that any of the line item pricing was unreasonably high at any point during the procurement.

and customization for integration between Inteum and NIH employee directory. AR, Tab 5.3, Inteum Revised Price Quotation, at 2. Inteum's pricing template also included a footnote to the "customization for integration between Inteum and NIH employee directory" line item, which stated as follows:

The proposed customization is based on the provided information in this RFP. If more customization requirement is discovered during implementation, additional work will be charged at \$[DELETED]/hour.

Id.

In a statement submitted in our Office in response to the protest, the TEP Chair explains that Inteum proposed the COTS software module--Integrate for Inteum--as part of its technical solution. TEP's Supp. Statement, Dec. 5, 2019, at 1. To use the Integrate for Inteum software, the TEP Chair explains, the awardee "was required to make specialize[d] configuration changes within the Integrate module itself," including integration between Inteum and the NIH employee directory, which Inteum "price[d] under the 'Customization' line item of its price quote" for the base year and for maintenance for the option years.¹⁰ Id.

The TEP Chair also explains that "[a]ny changes relating to the specialized configuration changes to the Integrate for Inteum software, other than the Employee Directory, which was required to be completed within six (6) months, was included in the line item [of the awardee's price quotation] entitled 'Initial implementation and Custom Configuration.'" Id. In this regard, the TEP Chair states that the pricing for the line item entitled "[i]nitial implementation and [c]ustom configuration" for the base year and options years "covered the entire scope of all customization and custom configuration that was required by the SOW during performance of the purchase order," other than that required for the employee directory. Id. at 2.

The parties do not dispute that the solicitation anticipated the award of a fixed-price purchase order or that vendors were required to propose a fixed price for every line item. Supp. AR at 18; Supp. Comments at 2. Wellspring argues, however, that the footnote language in Inteum's pricing template advising that "[i]f more customization requirement is discovered during implementation, additional work will be charged at \$[DELETED]/hour," expressly takes exception to the RFQ's requirement that vendors quote a fixed price for all line items, including customization. Supp. Comments at 6; AR, Tab 5.3, Inteum's Price Quotation, at 2.

¹⁰ The TEP Chair states that the agency also understood that this work would be encompassed within the option year line items of Inteum's price quotation under line items entitled "customized integration with NIH employee directory (maintenance)." Id.; see AR, Tab 5.3, Inteum's Price Quotation, at 2.

Specifically, the protester asserts that footnote 3 entitles the awardee to charge \$[DELETED]/hour for any customization work required by the SOW, but not “included in the one specific Customization activity for which [the awardee] proposed a fixed-price in its price [quotation]”--that is customization for integration between Inteum’s software and the NIH employee directory. Supp. Comments at 13. The protester maintains that, although the solicitation required the awardee to perform all customization of its COTS software necessary during the 6-month implementation period to meet the SOW performance requirements, the awardee “identified and priced only a single customization activity (integration with the NIH employee directory), and then proceeded to carve out a pricing exception to reserve the unilateral right to charge \$[DELETED]/hour for the work required to accomplish other customization activities that [the awardee] should have foreseen, but did not, and only ‘discovered during the implementation phase.’” Id. at 9.

The agency argues that the footnote is limited to the line item it references-- customization of integration of the employee directory--and is simply stating that Inteum’s customization price for integration of the employee directory was based on the information and requirements of the solicitation. According to the agency, it is reasonable to interpret the footnote as stating that if any additional work relating to integration of the employee directory, above the requirements of the solicitation is required, then that work would be priced at \$[DELETED]/hour. Supp. AR at 17. The agency further disagrees with Wellspring that Inteum’s pricing template included pricing for all customization in only a single line item. In this regard, the agency asserts that Inteum quoted pricing for customization (other than integration of the employee directory) in the implementation and custom integration line item.

We agree with the agency that Inteum’s pricing footnote was limited to the only line item it referenced--customized integration between Inteum’s software and the NIH employee directory. Inteum’s pricing template included several footnotes. See AR, Tab 5.3, Inteum’s Price Quotation, at 2. The awardee opted to insert footnote 3 in the customization for integration with NIH employee directory line item. Id. It is therefore reasonable to read the language in the footnote--“if more customization requirement is discovered during implementation, additional work will be charged at \$[DELETED]/hour”-- as limited to work relating to customized integration between Inteum and the NIH employee directory. Id. In addition, as detailed above with regard to the line item for customization for the employee directory, the TEP Chair explains, the agency understood the “description of the customization activity” for this line item as “covering the entire scope of all customization that could be required by the SOW during performance of the contract” as it relates to customization of the NIH Employee Directory. TEP’s Supp. Statement at 2; Agency Supp. Response, at 3.

We also find reasonable the agency’s reading of Inteum’s pricing template as including more than one line item for customization. In this regard, the agency reasonably understood that the awardee was providing for all customization and custom

configuration work (other than that required by the employee directory) in the line item entitled “initial implementation and custom configuration.”¹¹ TEP’s Supp. Statement at 2; AR, Tab 5.3, Inteum’s Price Quotation, at 2. Although the protester contends that certain items in the awardee’s technical quotation may require additional customization work, or may have been omitted from the awardee’s price, none of these examples relate to the “customization for integration between Inteum and the NIH employee directory” line item, such that they would fall within footnote 3. On this record, the protester has not demonstrated that anything in footnote 3 takes exception to the requirement to propose a fixed price as required by the RFQ. Accordingly, we find no basis to sustain the protest.

Best-Value Tradeoff

Wellspring also challenges the agency’s best-value tradeoff decision, arguing that award to a lower-rated, lower-priced vendor was unreasonable because the source selection authority failed to look behind the ratings to make a comparative assessment of the merits of the quotations. As discussed below, we find no merit to this argument.

As referenced above, when using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. McLaurin Gen. Maint., Inc., supra. In reviewing protests of an allegedly improper simplified

¹¹ Although the protester asserts that we should give no weight to the TEP Chair’s statement, as detailed above, our Office generally considers post-protest explanations, such as this, where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. See Lynxnet, LLC, supra. To the extent the protester asserts that the evaluator’s statements are inconsistent with the record, based on our review of the record, and as discussed below, we disagree, and conclude that the statements are consistent with, and provide a more detailed explanation of, the technical evaluation in the contemporaneous record. For example, we find consistent with the contemporaneous record the TEP Chair’s statements that the awardee included pricing for all customization “other than the [e]mployee [d]irectory” in the line item for “initial implementation and custom configuration” in Inteum’s pricing template. TEP’s Supp. Statement at 2. The record reflects that the awardee’s price quotation revised the language from the RFQ’s pricing template for the pertinent line item to specifically include the word “custom,” thereby changing it from “Initial implementation and configuration” to “Implementation and custom configuration.” Compare RFQ, Eval. Criteria, at 4, with, AR, Tab 5.3, Inteum’s Price Quotation, at 2. In addition, although this line item is for the initial 6-month implementation period, the awardee’s pricing template included prices for the base period and all option periods. AR, Tab 5.3, Inteum’s Price Quotation, at 2. Wellspring’s price quotation, on the other hand, only included a price for the base period. AR, Tab 5.3, Wellspring’s Price Quotation, 4.5, at 2.

acquisition evaluation, our Office examines the record to determine whether the agency met this standard and exercised its discretion reasonably. Computers Universal, Inc., B-297552, supra. An agency may properly select a lower-priced, lower-rated quotation if it reasonably decides that the price premium associated with selecting a higher-rated, higher-priced quotation is not justified. LCLC Inc./CfMRF, B-414357, May 22, 2017, 2017 CPD ¶ 153 at 6.

Here, the record shows that the agency acknowledged in its tradeoff decision and supporting documentation that Wellspring's quotation was superior to Inteum's quotation under all three non-price factors, including technical, corporate experience, and past performance, and identified the benefits provided by Wellspring's quotation. See AR, Tab 9.2, Basis for Award, at 3; Tab 6.1, TEP Report, at 8-9. The agency also acknowledged that under the terms of the solicitation, technical factors were significantly more important than price. Id. at 4; see also RFQ, Eval. Criteria, at 3. However, it concluded that the benefits provided by Wellspring's technical superiority, superiority in corporate experience, and its past performance advantage was not worth a price that was so much higher than Inteum's price, and 290 percent higher than the IGE. AR, Tab 6.1, TEP Report, at 8-9. Based on our review of the record, we conclude that the source selection decision document reasonably supports the agency's relative assessments of the quotations and its best-value determination. Ultimately, the protester's objections to the source selection decision reflect its disagreement with the agency's assessments but do not demonstrate an unreasonable or otherwise improper award determination.

The protest is denied.

Thomas H. Armstrong
General Counsel