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# Decision

**Matter of:** JHC Technology, Inc.

**File:** B-417786

**Date:** October 23, 2019

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## DIGEST

Protest challenging agency's exchanges during step one of a two-step competition with a vendor that was subsequently eliminated from the competition as unequal discussions is denied because the protester cannot demonstrate any potential competitive prejudice where the agency did not conduct exchanges with the awardee during step one.

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## DECISION

JHC Technology, Inc., of Oxon Hill, Maryland, protests the establishment of a blanket purchase agreement (BPA) under the General Services Administration (GSA) Federal Supply Schedule (FSS) with Govplace, Inc., of Reston, Virginia, under request for quotations (RFQ) No. 70SBUR19Q00000040, which was issued by the Department of Homeland Security, United States Citizenship and Immigration Services (USCIS) for commercial cloud computing services. The protester argues that USCIS conducted unequal discussions and improperly excluded its quotation from the competitive range.

We deny the protest.

## BACKGROUND

USCIS issued the RFQ on March 20, 2019, under the FSS procedures of Federal Acquisition Regulation (FAR) subpart 8.4, seeking quotations for a BPA to provide commercial cloud computing services. Agency Report (AR), Exh. 1, RFQ at 6-8.<sup>1</sup> The RFQ anticipated the establishment of a fixed-price BPA with a base period of 1 year, and three 1-year options, with a not-to-exceed amount of \$109,747,689. Id. at 7-8. The RFQ was limited to vendors holding a contract under the GSA Schedule 70 special item number 132-40. Id. at 6. Vendors' quotations were required to include, at a minimum, all of the commercial cloud services<sup>2</sup> identified in the description of requirements (DOR), as well as the following brand-name clouds from the following providers: Amazon Web Services (AWS) US East/West, Twilio, and CloudCheckr. Id. at 7. The RFQ stated that the agency sought "access to as many commercial clouds as possible." Id.

The RFQ provided for a two-step evaluation process. Id. In step one, USCIS was to evaluate the number and acceptability of the quoted cloud offerings, and review whether prices were fair and reasonable. Id. at 34. The acceptability of cloud offerings was to be gauged by considering: (1) a checklist detailing the attributes of each product offering, (2) the pass/fail rating of each product offering, and (3) the total number of product offerings with a pass rating. Id. at 34-36. The agency was to verify that vendors' prices were fair and reasonable by reviewing the submitted GSA price lists in accordance with the evaluation criteria described in the solicitation. Id. at 36-37. To earn admission to step two of the evaluation, a quotation also needed to include the following: (1) Twilio and CloudCheckr clouds, (2) at least three infrastructure as a service/platform as a service (IaaS/PaaS) offerings which included AWS US East/West, and (3) six software as a service (SaaS) services meeting the minimum requirements outlined in the DOR. Id. at 35. The vendors that quoted the highest number of product offerings with a pass rating were considered the most highly technically rated, and would be advanced to step two of the competition. Id.

In step two of the evaluation, the agency was to review vendors' quoted discounts on the historical prices for AWS cloud services provided in the RFQ. Id. at 37. The RFQ advised that the award decision would "not be made using a tradeoff." Id. Instead, award was to be made to the vendor that quoted the lowest overall price for AWS cloud services, based on the discount on the historical prices provided in the RFQ. Id. at 37-38.

The agency received eight quotations by the initial closing date of April 11. Supp. AR, Step Two Selection Decision, at 4. Pertinent here, "[a]fter receipt of quotations, the

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<sup>1</sup> Citations to the record are to the numbered pages provided by the agency in its report, unless otherwise noted.

<sup>2</sup> References to "cloud services," "cloud offerings," or "clouds" refer to the commercial cloud services detailed in the description of requirements. See RFQ at 43-53.

agency had numerous concerns about the quotation submitted by [Vendor F].” Supp. Contracting Officer’s Statement (COS) at 1. To address those concerns, USCIS asked Vendor F several questions via email, expressly stating “[t]his is not an invitation to make any changes to your [quotation.]” AR, Exh. 5, Request for Clarification, June 3, 2019, at 2. The agency concluded that Vendor F’s response to the agency’s questions “made quite clear” that its quotation was not technically acceptable. Supp. COS at 2; Supp. AR, Step Two Selection Decision, at 7-8.

The agency’s evaluation ranked the eight quotations, and selected the top three most highly rated quotations to advance to step two of the competition, as follows:

Vendor	Final Cloud Count	Rating by Cloud Count
Govplace	[DELETED]	Highest
Vendor B	[DELETED]	Second Highest
Vendor C	[DELETED]	Third Highest
Vendors listed above this line advanced to step two		
Vendor D	[DELETED]	Fourth highest
JHC	[DELETED]	Fifth Highest
Vendor E	[DELETED]	Technically unacceptable
Vendor F	[DELETED]	Technically unacceptable
Vendor G	[DELETED]	Technically unacceptable

Supp. AR, Step Two Selection Decision, at 7.

Following review of the top three vendors’ quotations, the agency opened discussions with only those vendors on June 12, and closed discussions two days later. COS at 3. The agency received final quotations from the top three vendors, and concluded that Govplace had the lowest quoted price for the AWS cloud services, based on its quoted discounts to the historical prices included in the RFQ. Id. Accordingly, the agency selected Govplace’s quotation for award. Id. The agency provided JHC with a brief explanation of the basis for the award, and also advised that JHC’s quotation was not among those selected for step two of the competition. Id. This protest followed.

## DISCUSSION

JHC raised six primary arguments: (1) USCIS improperly eliminated JHC from award consideration without evaluating vendors’ relative prices; (2) USCIS failed to consider the quality of the cloud offerings proposed in JHC’s quotation; (3) the solicitation was latently ambiguous with regard to the evaluation of cloud offerings; (4) the awardee had disqualifying organizational conflicts of interest (OCIs); (5) USCIS engaged in unequal discussions with vendors; and (6) the evaluation criteria were unreasonable, presenting a significant issue for future cloud-based procurements.<sup>3</sup> Protest at 6-14. The protester

<sup>3</sup> The protester also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

subsequently withdrew its argument regarding OCIs based on information provided by the agency. Notice of Partial Withdrawal, July 29, 2019, at 1.

USCIS argued that JHC's remaining arguments--with the exception of the allegation regarding unequal discussions--were untimely challenges to the terms of the solicitation. Agency Request for Dismissal, Aug. 2, 2019, at 5-12. Our Office agreed, concluding that these arguments, in effect, challenged the terms of the solicitation, and were therefore untimely. GAO Response to Request for Dismissal, Aug. 9, 2019, at 1 (citing 4 C.F.R. § 21.2(a)(1) (protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time)). With regard to the price evaluation, we concluded that the RFQ did not provide for a comparison of vendors' prices in step one of the competition, and instead stated that prices would be evaluated only for reasonableness. Id. at 1-2. With regard to the technical evaluation, we concluded that the agency's evaluation of the number of quoted clouds followed the express terms of the RFQ's evaluation criteria, which did not provide for evaluation of the quality of the clouds; we also found that these criteria were not ambiguous. Id. at 1-3. Finally, we found that the protester's post-award challenges to the evaluation criteria--which the protester conceded were untimely--did not raise issues of widespread interest to the procurement community which we previously have not considered on the merits, and therefore did not provide a basis to invoke the "significant issue" exception to our timeliness rules. Id. at 2, 3-4 (citing 4 C.F.R. § 21.2(c); Hawker Beechcraft Def. Co., LLC, B-406170, Dec. 22, 2011, 2011 CPD ¶ 285 at 4 n.4)); see Protest at 1, 12-13.

We address the remaining argument, unequal discussions, and find that there is no possible prejudice to the protester. Accordingly, we deny the protest.

### Unequal Discussions

JHC alleges that emails sent between USCIS and Vendor F on June 3 and 4 allowed Vendor F to provide an updated GSA pricing document and add statements explaining each SaaS offering, its teaming partners, part numbers, and where the SaaS items may be found on the schedule. Protest at 12; Protester's Comments on Additional Agency Documents, Sept. 25, 2019, at 2. According to the protester, these exchanges constituted discussions because they permitted Vendor F to materially revise its quotation and because the agency considered this information in the evaluation of its quotation. Protester's Supp. Comments, Sept. 10, 2019, at 2. JHC contends that the agency conducted prejudicially unequal discussions because it was not afforded a similar opportunity to revise its quotation. Id. at 3.

Under the negotiated procurement procedures of FAR part 15, discussions allow an agency to communicate with offerors to obtain information essential for determining the acceptability of proposals, or to provide offerors an opportunity to revise or modify their proposals. See FAR § 15.306(d); Pontiac Flying LLC, B-414433 et al., June 12, 2017, 2017 CPD ¶ 188 at 6-7. Clarifications, in contrast, are limited exchanges that allow offerors to explain certain aspects of their proposals or to resolve minor or clerical

mistakes. See FAR §§ 15.306(a)(1)-(2); Pontiac Flying LLC, supra. The “acid test” for deciding whether discussions, rather than clarifications, have been held is whether an offeror was provided the opportunity to modify or revise its proposal. See Allied Tech. Grp., Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 4. This distinction is critical because if an agency engages in discussions with an offeror, it must hold discussions with all other similarly situated offerors. See Front Line Apparel Grp., B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4; FAR § 15.306(e) (government personnel involved in the acquisition shall not engage in conduct that favors one vendor over another).

As discussed above, the RFQ here was issued under the FSS provisions of FAR subpart 8.4. The FSS program is directed and managed by GSA, and provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. FAR § 8.402(a). There is no requirement in FAR subpart 8.4, however, that agencies seek clarifications or otherwise conduct discussions with vendors in the same manner as negotiated procurements under FAR part 15. Kardex Remstar, LLC, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 4. If an agency engages in exchanges with a vendor pursuant to a FAR subpart 8.4 procurement, our Office will look to FAR part 15 for guidance in determining whether the exchanges were fair and equitable. Ricoh USA, B-411888.2, Nov. 18, 2015, 2015 CPD ¶ 355 at 6. To successfully protest a FAR subpart 8.4 procurement on the ground of unequal discussions, a protester must show: (1) that discussions were in fact held; (2) that the discussions favored one vendor over another; and (3) that the protester was prejudiced by the unequal discussions. See id. at 5-6 (discussions held in a FAR subpart 8.4 procurement must be fair and equitable); see also CSI Aviation, Inc., B 415631 et al., Feb. 7, 2018, 2018 CPD ¶ 68 at 15-16 (no basis to sustain protest where the protester was not prejudiced by unequal discussions in a FAR subpart 8.4 procurement). For reasons discussed below, we find that the protester has failed to demonstrate prejudice, and thus, the protest cannot be sustained.

USCIS contends that the exchanges with Vendor F were not discussions because they did not permit the vendor to materially revise its quotation. Agency Response to Protester’s Comments, Sept. 4, 2019, at 3-4. The agency explains that although Vendor F provided more information than requested in response to the agency’s request for clarifications, the agency recognized that this information exceeded the scope of the clarifications request. Id. For this reason, the agency states, it did not consider the information in the evaluation of Vendor F’s quotation. Id.

JHC argues that USCIS reviewed all of the information provided by Vendor F in its exchanges with the agency, and that this information was considered in the agency’s evaluation of the vendor’s quotation. Protester’s Supp. Comments, Sept. 10, 2019, at 2. JHC further states that, “[h]ad the discussions been meaningful and equal, JHC would have likewise updated its pricing and cloud offerings[,]” and that “[t]hese revisions would have elevated its [quotation] to step two of the evaluation process, where the award decision was made.” Id. According to the protester, “[b]ecause it was excluded, [it] was prejudiced.” Id.

We need not address the merits of JHC's allegation of unequal discussions because we conclude that, even if the argument had merit, the protester could not have suffered prejudice based on the agency's actions. Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Raytheon Co., supra. Where an agency conducts discussions with another unsuccessful vendor or offeror, but does not conduct discussions with the protester or the awardee, the protester cannot demonstrate prejudice. See Joint Venture Penauillie Italia S.p.A.; Cofathec S.p.A.; SEB.CO S.a.s.; CO.PEL.S.a.s., B-298865, B-298865.2, Jan. 3, 2007, 2007 CPD ¶ 7 at n.4.; see also OMV Med. Inc.; Saratoga Med. Ctr. Inc., B-281387 et al., Feb. 3, 1999, 99-1 CPD ¶ 52 at 7.

Here, even assuming for the sake of argument that the protester's allegation of unequal discussions has merit and USCIS conducted discussions with Vendor F prior to selecting quotations to advance to step two of the competition, we see no basis to conclude that, but for the agency's actions, JHC would have had a substantial chance of receiving the award. Vendor F's quotation was found technically unacceptable, and was therefore not selected to advance to step two of the competition. Supp. AR, Step Two Selection Decision, at 8. Because Vendor F's quotation was neither advanced to step two of the competition, nor selected for award, JHC could not have been prejudiced by the exchanges between USCIS and Vendor F during step one--even if they were discussions. See Joint Venture Penauillie Italia S.p.A.; Cofathec S.p.A.; SEB.CO S.a.s.; CO.PEL.S.a.s., supra; see also OMV Med. Inc.; Saratoga Med. Ctr. Inc., supra. For this reason, we find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong  
General Counsel