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Comptroller General
of the United States

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Decision

Matter of: Ohio KePRO, Inc.

File: B-417836.4; B-417836.5

Date: November 4, 2020

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Alexander J. Brittin, Esq., Brittin Law Group, PLLC, Mary Pat Buckenmeyer, Esq., Dunlap Bennett & Ludwig PLLC, Daniel P. Graham, Esq., and Ryan D. Stalnaker, Esq., Vinson & Elkins LLP, for Livanta LLC, the intervenor.
Pamela R. Waldron, Esq., and Kevin Misener, Esq., Department of Health and Human Services, for the agency.
Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly engaged in post-final proposal revision discussions only with the awardee when it allowed the awardee to submit previously omitted pricing is sustained where the record shows that the exchange resulted in material changes to the awardee's proposal.

DECISION

Ohio KePRO, Inc. (KEPRO), of Harrisburg, Pennsylvania, protests the issuance of a task order to Livanta, LLC, of Annapolis Junction, Maryland, under task order request for proposals (TORP) No. 190361, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for beneficiary oversight and claim review services. KEPRO challenges the agency's evaluation of proposals and contends that the agency engaged in unequal discussions.

We sustain the protest.

BACKGROUND

On March 28, 2019, the agency issued the solicitation, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, to contractors holding CMS's Beneficiary and Family Centered Care – Quality Improvement Organization

(BFCC-QIO) indefinite-delivery, indefinite-quantity (IDIQ) contracts. Agency Report (AR),[1] Tab 5, TORP.

The solicitation sought proposals to provide beneficiary oversight and expert services for Medicare claim reviews nationwide. TORP, attach. 1, Statement of Work (SOW) at 1, 12. The contracting officer explains that the purpose of this task order is "to decrease the paid claims error rate and address medical review related coverage, coding and billing errors to improve healthcare services for Medicare beneficiaries and protect the Medicare Trust Fund." Contracting Officer's Statement (COS) at 1.

Prior Award Decisions

Livanta and KEPRO submitted timely proposals in response to the original solicitation. AR, Tab 4, Source Selection Decision (SSD) at 2-3. After conducting discussions with the two offerors, the agency evaluated the proposals and made award to Livanta on July 30, 2019. *Id*. at 3; COS at 3. KEPRO protested the award to our Office. Protest, B-417836; B-417836.2. On November 18, 2019, our Office sustained KEPRO's protest, finding that the agency had failed to reasonably evaluate the proposals, and had failed to properly document its evaluation. *Ohio KePRO, Inc*., B-417836, B-417836.2, Nov. 18, 2019, 2020 CPD ¶ 47.

As corrective action, the agency revised the solicitation, and evaluated revised proposals. COS at 3. On February 26, 2020, the agency made award to KEPRO. *Id.* Livanta filed a protest challenging the agency's award decision. Protest, B-417836.3. On April 14, our Office dismissed Livanta's protest as academic due to the agency's stated intention to take corrective action. *Livanta, LLC*, B-417836.3, Apr. 14, 2020 (unpublished decision). Specifically, the agency notified our Office that it intended to terminate the award to KEPRO, amend the solicitation, seek and evaluate revised proposals, conduct discussions, and make a new award decision. *Id*.

Current Award Decision

Under the solicitation, as amended, award would be made to the offeror on a best-value tradeoff basis, considering price and non-price factors, listed in descending order of importance: technical approach and understanding, key and other recommended personnel and staffing plan, past performance, and 508 compliance.[2] AR, Tab 4, TORP, amend. 15, attach. 6, Proposal Instructions at 11. The amended solicitation

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[1] The agency report is comprised of tabs and exhibits. The agency explains that the tabs contain every document in the agency report, and that the exhibits are copies of certain documents contained in the tabs that the agency contends are of particular relevance to the protest. Agency Response to Supp. Document Request (Sept. 22, 2020) at 1. This decision cites to the tabs provided by the agency in its report.

[2] 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.

contemplated the award of a single fixed-priced task order, with a 54-month period of performance. TORP, amend. 15, attach. 7, Terms and Conditions at 1-2.

Offerors were required to submit proposals consisting of the following three volumes: technical; business; and business ethics, conflict of interest and compliance. TORP, amend. 15, attach. 6, Proposal Instructions at 1.

The solicitation included nine contract line item numbers (CLINs). TORP, amend. 15, attach. 7, Terms and Conditions at 1. Pertinent to the protest, CLINs 1, 2 and 3 related to the following three types of claims, respectively: higher-weighted diagnosis-related group (HWDRG), short stay reviews (SSR), and focused reviews.[3] *Id.* For each type of claim, offerors were provided a chart containing the minimum and maximum number of claims reviews to be performed.[4] *Id.*

As relevant to this protest, offerors were instructed that their business proposals "shall indicate the price per claim review type." TORP, amend. 15, attach. 6, Proposal Instructions at 8; *see also Id.* at 9 ("[t]he business proposal shall be priced utilizing a [f]irm-[f]ixed-[p]rice per claim review type." Also relevant to this protest, offerors were provided with a sample chart and requested to include the total price for each claim type in the chart as a part of their business proposals. *Id.* at 9. Both this chart and the chart containing the minimum/maximum number of claim reviews contained a single location for the price per claim review to be entered. *See* TORP, amend. 15, attach. 6, Proposal Instructions at 9 ("Enter price per [] claim review;" TORP, amend. 15, attach. 7, Terms and Conditions at 1 ("Fixed Price Per Claim"). In terms of evaluation, the agency advised offerors that it would conduct a price analysis of their business proposals. TORP, amend. 15, attach. 6, Proposal Instructions at 10.

Livanta and KEPRO submitted timely proposals in response to the amended solicitation. COS at 3. After conducting discussions with the two offerors, the agency requested final revised proposals. AR, Tab 4, SSD at 7. Both Livanta and KEPRO submitted final proposals prior to the established deadline of May 27. COS at 5.

On July 1, the agency conducted an exchange with Livanta that it labeled as clarifications. AR, Tab 8, Agency Clarification Questions to Livanta (July 1, 2020). Specifically, the agency requested that Livanta provide information related to a number of aspects of its business proposal. *Id.* at 1. In response, Livanta provided a letter containing answers to the agency's questions in addition to a revised version of its

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[3] Under the task order, the awardee will review a sample of SSR claims and HWDRG claims under an improper payment reduction strategy. TORP, attach. 1, SOW at 16. The task order awardee will use the results of all case review activities to identify and make recommendations related to quality improvement efforts and focused reviews that should be conducted. *Id.* at 13.

[4] The remaining six CLINs were optional CLINs for additional claim review volumes above the maximums listed in CLINs 1-3. *Id.* at 3. Offerors were advised that the agency would exercise the optional CLINs, as needed. *Id.*

business proposal. AR, Tab 6, Livanta Response to CMS Business Proposal Clarification Questions (July 1, 2020).

The agency evaluated the final proposals of Livanta and KEPRO as follows:

	Livanta	**KEPRO**
Technical Approach and Understanding	Very Good	Satisfactory
Key Personnel and Other Recommended Personnel	Very Good	Satisfactory
Experience	Very Good	Very Good
Section 508 Compliance	Adequate	Adequate
Overall Technical Rating	Very Good	Satisfactory
Final Proposed Price	$54,856,695	$60,084,789

AR, Tab 4, SSD at 5-6.

The contracting officer, acting as the source selection authority, conducted an integrated assessment of the proposals and concluded that Livanta's proposal offered the best value to the agency. *Id.* at 8. When making this determination, the contracting officer stated that a tradeoff was unnecessary because Livanta proposed the lowest price and was the highest technically rated offeror. *Id.*

The agency issued the task order to Livanta on July 22. This protest followed.[5]

DISCUSSION

The protester challenges multiple aspects of the agency's evaluation of proposals and the source selection decision.[6] For example, the protester argues that the agency

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[5] The awarded value of the task order at issue exceeds $10 million. Therefore, this procurement is within our jurisdiction to hear protests related to the issuance of orders under civilian agency multiple-award, indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1)(B).

[6] KEPRO also alleged that Livanta had conflicts of interest that the agency failed to adequately investigate. Supp. Protest and Comments at 46-50. KEPRO subsequently withdrew this protest ground. Protester Supp. Comments at 1 n.2.

unreasonably assigned its proposal a significant weakness under the technical approach and understanding factor. Protest at 15-19. The protester also contends that the agency engaged in unequal and improper discussions when it conducted an exchange with Livanta that allowed that firm to revise its proposal after the common cutoff for all offerors to submit final proposal revisions. Comments and Supp. Protest at 6.

As explained below, we find that the agency engaged in unequal discussions and sustain KEPRO's protest on that basis.[7] Since we are sustaining the protest against the agency's conduct of discussions, which will necessarily lead to conducting discussions with offerors and a request for revised proposals, followed by a new evaluation and tradeoff decision, we need not address the remainder of KEPRO's protest allegations related to the agency's evaluation of proposals and source selection decision. *See, e.g.*, *SRA Int'l Inc*., B-410973, B-410973.2, Apr. 8, 2015, 2016 CPD ¶ 32 at 54 n.6; *YWCA of Greater Los Angeles,* B-414596 *et al*., July 24, 2017, 2017 CPD ¶ 245 at 3 n.5.

Unequal Discussions

The protester challenges the agency's conduct of discussions, arguing that the agency engaged in discussions with Livanta after the deadline for receipt of final revised proposals by allowing Livanta to revise its business proposal in a material way. Supp. Protest and Comments at 6-15. In this regard, KEPRO contends that Livanta's final revised proposal failed to meet the material solicitation requirement to provide a fixed-price per claim type, and therefore was unawardable. Thus, according to the protester, Livanta's proposal would have remained unacceptable but for the round of discussions that the agency conducted with only Livanta.

In response, the agency maintains that its post-final proposal revision exchange with Livanta was merely a clarification. Supp AR at 10. In this regard, the agency contends that the information that Livanta provided did not amount to a material change in its proposal. *Id*. at 11.

As an initial matter, we note that this procurement was conducted subject to the provisions of FAR 16.505, which does not establish specific requirements for conducting clarifications or discussions. *Pioneering Evolution, LLC*, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 9. However, where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in

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[7] After development of the record, the GAO attorney conducted an outcome prediction alternative dispute resolution (ADR) conference (for a description of GAO's outcome prediction ADR process, *see Alaska Structures, Inc.--Costs*, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 4 n.4). She advised the parties that KEPRO's allegation that the agency held unequal discussions appeared to be meritorious. The agency subsequently informed our Office that it did not intend to take corrective action in response to the protest.

large part, reflect the standards applicable to negotiated procurements. *See, e.g.*, *Technatomy Corp*., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 5.

In conducting exchanges with offerors, agency personnel may not "engage in conduct that . . .[f]avors one offeror over another," FAR 15.306(e); in particular, agencies may not engage in what amounts to disparate treatment of the competing offerors. *Pioneering Evolution, LLC, supra* at 10*; Front Line Apparel Grp.,* B-295989, June 1, 2005, 2005 CPD ¶ 116 at 3-4. Where an agency reopens discussions with one offeror after the receipt of final proposal revisions, it must afford all offerors in the competitive range an opportunity for reopened discussions. *Lockheed Martin Simulation, Training & Support*, B-292836.8 *et al*., Nov. 24, 2004, 2005 CPD ¶ 27 at 8.

The agency's characterization of a communication as clarifications or discussions is not controlling; it is the actions of the parties that determine whether discussions have been held and not merely the characterization of the communications by the agency. *Priority One Servs., Inc*., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. As we have consistently stated, the acid test for deciding whether an agency has engaged in discussions is whether the agency has provided an opportunity for proposals to be materially changed. *Id*.

In contrast, clarifications are limited exchanges that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical issues. *See* FAR 15.306(a)(2). Therefore, clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. *See, e.g.*, *Res Rei Dev., Inc.,* B-410466.7, Oct. 16, 2015, 2015 CPD ¶ 320 at 10; *Int'l Waste Indus.,* B-411338, July 7, 2015, 2015 CPD ¶ 196 at 5;

It is a fundamental principal of government contracting that, in a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. *See Manthos Eng'g, LLC*, B-401751, Oct. 16, 2009, 2009 CPD ¶ 216 at 2; *Plasma-Therm, Inc.*, B-280664.2, Dec. 28, 1998, 98-2 CPD ¶160 at 3. Material terms of a solicitation include those which affect the price, quantity, quality, or delivery of the goods or services being provided. *See Arrington Dixon & Assocs., Inc*., B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 11. Thus, we have consistently found that the submission of information necessary to find a proposal acceptable constitutes discussions. *See, e.g.*, *Chicago Dryer, Inc.,* B-402340, Feb. 16, 2010, 2010 CPD ¶ 52 at 4.

As explained above, the solicitation required that all offerors propose a single price per claim review type that would be applicable to the quantities set forth under CLIN 1 (HWDRG claim reviews), CLIN 2 (SSR claim reviews), and CLIN 3 (focused claim reviews). TORP, amend. 15, attach. 7, Terms and Conditions at 1. In this regard, the solicitation required that offerors provide a price per claim to review various types and volumes of claims, including a price per review for an initial volume of 228,000 higher-weighted diagnosis-related group (HWDRG) claim reviews under CLIN 1, and a price per review for an initial volume of 75,000 short stay review (SSR) claims under CLIN 2.

In its business proposal, Livanta proposed two prices per claim review for each of the CLINs 1, 2, and 3.[8] AR, Tab 6, Livanta Proposal, Vol. II, Revised Business Proposal. For example, while the solicitation contemplated that the offeror would propose one price per claim review applicable to all 228,000 HWDRG claim reviews under CLIN 1, Livanta proposed two prices based on various quantities. *Id.* at 6. Specifically, Livanta proposed a price of $[DELETED] per HWDRG claim review up through 175,000 claim reviews, and a price of $[DELETED] for HWDRG claim reviews from 176,000 to 228,000. *Id*. This meant that 999 of Livanta's HWDRG claim reviews lacked a proposed price (*i.e.*, 175,001 to 175,999). Similarly, for CLIN 2**,** Livanta proposed a price of $[DELETED] per SSR claim review up through 55,000, and $[DELETED] for SSR claim reviews from 56,000 to 75,000. *Id.* As with the HWDRG claim reviews, Livanta's proposed pricing structure left 999 of Livanta's SSR claim reviews lacking a proposed price (*i.e.*, 55,001 to 55,999). In contrast to CLINs 1-2, Livanta proposed a single price per focused claim review for CLIN 3. *Id.*

Thus, based on Livanta's pricing structure and its failure to propose a fixed-price for the requested quantities for these two types of claim reviews, Livanta's final revised business proposal omitted required pricing information. As a result, the missing prices represented a failure to meet a material requirement of this solicitation. *See Business Integra, Inc.,* B-407273.22, Feb. 27, 2014, 2014 CPD ¶ 88 at 4 (failure to provide rates for all labor categories made proposal unacceptable for award). As noted above, in a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. *Raytheon Techincal Servs. Co. LLC*, B-404655.4 *et al*., Oct. 11, 2011, 2011 CPD ¶ 236 at 9.

Recognizing Livanta's failure to provide this information in its business proposal, the agency requested that Livanta state the proposed price for the omitted claim reviews.

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[8] By proposing multiple prices per claim review, the protester argues that Livanta's proposal was structured in a manner not contemplated by the solicitation. The protester further contends that this resulted in unbalanced pricing that shifted risk to the agency, and constituted a benefit to Livanta not extended to KEPRO. Supp. Protest and Comments at 15; Protester Supp. Comments at 22. Where an irregularity in an offer results in benefits to an offeror not extended to all the offerors by the solicitation, and is prejudicial to other offerors, such an offer is unacceptable. *See Tri-State Gov't Servs.*, Inc., B-277315.2, Oct. 15, 1997, 97-2 CPD ¶ 143 at 3-4. Because we find that the agency engaged in unequal discussions, we do not address the protester's argument that the awardee's proposal should have been found unacceptable by virtue of its proposed pricing structure. Nevertheless, the agency may wish to examine this matter and issue an amendment to the solicitation clarifying whether such a pricing structure is permissible when implementing the corrective action below.

AR, Tab 8, Agency Clarification Questions to Livanta (July 1, 2020). Livanta responded to the agency's communication by submitting a revised proposal on July 1, 2020 which included two new versions of Livanta's business proposal. AR, Tab 6, Livanta Response to CMS Business Proposal Clarification Questions (July 1, 2020). Of note, one version used track changes[9] to show the revisions against the May 27 proposal, and the other version was a clean version of the business proposal, revised as of July 1. *Id.*

Here, the agency's insistence that the communications it conducted with Livanta after the receipt of final proposal revisions were clarifications and not discussions is unavailing. These communications from the agency to Livanta invited responses from Livanta that were necessary to determine the acceptability of the firm's proposal, and in fact resulted in Livanta being permitted to supplement its proposal by providing prices for certain quantities in CLINs 1 and 2 that lacked a price per claim review. Indeed, the materiality of these revisions is highlighted by the fact that the source selection decision incorporates Livanta's updated pricing information in its description of Livanta's price per claim review. AR, Tab 4, SSD at 1-2, 7-8. By obtaining the missing prices for certain quantities in CLINs 1 and 2 after the common cutoff established for receipt of final proposal revisions, the agency engaged in discussions with only Livanta and, thereby, allowed it to revise its proposal. *Global Language Center*, B-413503.8, June 1, 2017, 2017 CPD ¶ 238 at 6 (protest sustained where agency improperly conducted discussions with awardee after submission of final offers to allow awardee to explain and provide prices for required quantities beyond the estimated quantities set forth in the solicitation).

Thus, we conclude that the agency, having conducted another round of discussions with Livanta, was required to also conduct discussions with KEPRO, and provide the firm an opportunity to address any deficiencies and significant weaknesses in its proposal. Accordingly, the agency's conduct of discussions was unequal in this respect, and we sustain the protest.[10]

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[9] "Track changes" is a feature in Microsoft Word that highlights revisions that have been made in a document. Generally, when the track changes tool is activated, deletions remain visible with a strikethrough and additions are marked with an underline. *See* Track Changes in Word, Microsoft Office Support, https://support.office.com/en-us/article/Track-changes-in-Word-197ba630-0f5f-4a8e-9a77-3712475e806a (last visited Oct. 30, 2020).

[10] We also note that Livanta's price was based on various assumptions, stated in Livanta's business and technical proposals. AR, Tab 6, Livanta Proposal, Vol. I, Technical Proposal at 2-4; Tab 6, Livanta Proposal, Vol. II, Revised Business Proposal at 2-4. For instance, Livanta's proposal was conditioned on it being able to obtain at least 75% of necessary medical records electronically. AR, Tab 6, Livanta Proposal, Vol. 1, Technical Proposal at 2; Tab 6, Livanta Proposal, Vol. II, Revised Business Proposal at 3. The protester argues that this aspect of Livanta's proposal takes exception to a material requirement of the solicitation because the agency, in an

Competitive Prejudice

Competitive prejudice is an essential element of a viable protest. *SRA Int'l Inc.*, *supra* at 7. 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. *YWCA of Greater Los Angeles, supra* at 6.

In the context of unequal discussions, the focus of our inquiry is on whether the protester, had it been afforded meaningful discussions, could have revised its proposal in a manner that would result in a substantial chance of the protester receiving the award. *Id.* Where, as here, an agency fails to properly conduct discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester since a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. *Id.* (citing *Delfasco, LLC,* B-409514.3, March 2, 2015, 2016 CPD ¶ 192 at 7).

As discussed above, we have found that the agency erred by engaging in unequal discussions. On the issue of prejudice, the protester contends that with the benefit of an additional round of discussions, it likely would have made its pricing more competitive and addressed any concerns the agency had with its proposal, to include the significant weakness assigned by the agency under the technical approach and understanding factor. Comments and Supp. Protest at 6, 14; Protester Supp. Comments at 17. Since we recommend that the agency reopen discussions as well as accept and evaluate revised proposals, we find that KEPRO will have an opportunity to improve the results of its evaluation and the competitiveness of its proposed pricing, thereby giving KEPRO a substantial chance of receiving award. Therefore, we conclude that KEPRO has established the requisite competitive prejudice and sustain the protest.[11]

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amendment addressing question from the offerors, stated that it expected that 50% of all records received would be in electronic format. AR, Tab 5, TORP, amend. 14, attach. J.14 at 1; Supp. Protest and Comments at 3 n.8. Because the record demonstrates--and the contracting officer concedes--that the agency did not consider any of these assumptions in its evaluation of Livanta's technical and business proposals (Supp. Memorandum of Law at 9 n.2), the agency may wish to examine these assumptions, and document its findings, as appropriate, when implementing the corrective action below.

[11] On the 94th day after the filing of this protest (GAO must resolve protests within 100 calendar days 4 C.F.R. §§ 21.9(a); 21.0(d)), the agency filed a request for summary dismissal, contending that KEPRO is not an interested party to pursue its protest. Agency Request for Summary Dismissal (Oct. 29, 2020). In support, the agency alleges that KEPRO's proposed medical director, a key person, is no longer available, rendering KEPRO's proposal ineligible for award. Based upon our review of the parties'

RECOMMENDATION

We recommend that the agency reopen discussions with the offerors and afford them an opportunity to submit revised proposals. We further recommend that the agency should then perform a new evaluation consistent with the terms of the RFP and make a new selection decision. If the agency selects another offeror for award, it should terminate its contract with Livanta for the convenience of the government and make award to the other offeror, if otherwise appropriate. We also recommend that KEPRO be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. 21.8(d)(1). The protester's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. *Id.* at 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

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filings, we find that the agency's request for summary dismissal does not provide sufficient evidence for our Office to conclude that the key person is unavailable, or to dismiss the protest. In this regard, while the agency's filing suggests that the key person in question is currently serving as a medical director on another task order, the agency has not established that this person is unavailable to perform on this task order, if KEPRO were to receive award. In any event, while we find the agency's assertions unpersuasive, we need not reach this question because our recommended corrective action renders the agency's allegation moot, since discussions and receipt of revised proposals raise the possibility that KEPRO's proposal could change. We therefore consider KEPRO an interested party here. *Raytheon Technical Servs. Co. LLC, supra* at 4.