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# Decision

**Matter of:** BluePath Labs, LLC

**File:** B-417960.7

**Date:** October 26, 2020

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Wayne A. Keup, Esq., Wayne A. Keup, PLLC, for the protester.  
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## DIGEST

Challenge to the agency's award decision and evaluation of past performance of the awardee is denied where the evaluation was consistent with the terms of the solicitation.

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## DECISION

BluePath Labs, LLC (BluePath), a service-disabled veteran-owned small business (SDVOSB) of Washington, D.C., protests the award of a contract to Rios Partners, of Arlington, Virginia, under request for quotations (RFQ) No. 36C24E19Q0127, issued by the Department of Veterans Affairs (VA) for research analysis services. BluePath contends that the agency's award decision and evaluation of the awardee's past performance were flawed.

We deny the protest.

## BACKGROUND

This is BluePath's seventh protest challenging this procurement before our Office. We provide a short history of the procurement below.<sup>1</sup>

On July 30, 2019, the VA issued the RFQ, as a set-aside for SDVOSBs, to procure research services in order to produce scientific portfolio analyses of chronic diseases

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<sup>1</sup> A full recitation of the background of this procurement can be found in our prior decision, *BluePath Labs, LLC--Recon.*, B-417960.6, July 10, 2020, 2010 CPD ¶ 232 at 1-5.

prevalent in the American veteran population. Agency Report (AR), Tab 3, RFQ at 7. The RFQ contemplated the award of a fixed-price contract with a 1-year base period and four 1-year option periods. *Id.* at 8. The RFQ identified three tasks: portfolio reviews and analyses, analysis of translational potential, and expedited literature reviews. *Id.* at 7-8.

The RFQ contemplated that a firm would perform expedited literature reviews by summarizing existing knowledge of research topics and current treatments for diseases affecting veterans. *Id.* at 7. The RFQ stated that literature reviews would support the portfolio review and analysis, which would consist of the VA gathering project-level data and researching strengths, weaknesses, and quality improvement recommendations for broad research efforts in a research topic area. *Id.* at 8. The analysis of translational potential would involve a review of the aims, results, and other relevant data elements of projects identified in research portfolios, and scoring the potential for translation to VA research projects through the creation of in-depth reports. *Id.*

The RFQ advised that award would be made on a best-value tradeoff basis, considering technical, price, and past performance factors. *Id.* at 2, 36. The RFQ also warned vendors that the lowest-priced quotation may or may not be deemed the best value. *Id.*

As relevant to the protest, an offeror's past performance volume was required to identify up to five referenced contracts of similar size, scope, and complexity. *Id.* at 29. The agency would consider a vendor's past performance based on the depth, breadth, relevancy, and currency of contracts deemed similar to this procurement. *Id.* Additionally, amendment 1 required that past performance include prime vendor information. *Id.* at 53.<sup>2</sup>

Four vendors, including BluePath and Rios Partners, submitted quotations prior to the August 14 closing date. *BluePath Labs, LLC--Recon.*, *supra* at 2. On August 30, the agency made award to Rios Partners. *Id.* Between September 2019 and May 2020, BluePath filed several post-award actions with our Office. *BluePath Labs, LLC*, B-417960, Sept. 27, 2019 (unpublished decision); *BluePath Labs, LLC*, B-417960.2, B-417960.3, Feb. 4, 2020 (unpublished decision); *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175; *BluePath Labs, LLC*, B-417960.5, May 21, 2020 (unpublished decision); *BluePath Labs, LLC--Recon.*, B-417960.6, July 10, 2020, 2020 CPD ¶ 232.

As relevant here, in February 2020, in response to the B-417960.2 and B-417960.3 protests (B-417960.2 protest), the agency terminated the previous award to Rios Partners and indicated its intent to take corrective action by conducting discussions, soliciting and evaluating revised proposals, and making a new award decision. Contracting Officer's Statement (COS) at 1. We dismissed the B-417960.2 protest on February 4, 2020. *BluePath Labs, LLC*, B-417960.2, B-417960.3, *supra*. On July 17,

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<sup>2</sup> The agency produced the RFQ and the amendment to the RFQ in one Adobe pdf document. AR, Tab 3, RFQ. Citations to the amendment in this decision are to the page numbers in that document rather than to the specific amendment.

after completing the corrective action taken in response to the B-417960.2 protest, the agency again made award to Rios Partners for a total contract value of \$5,606,701. COS at 2. On July 24, BluePath protested to our Office.

## DISCUSSION

BluePath contends that the agency's evaluation of Rios Partners's past performance was flawed because it failed to comply with the solicitation requirement to evaluate past performance of the prime contractor. Protest at 3. The protester also contends that the agency's best-value determination was improper. *Id.* at 5. We have reviewed the protester's arguments and find no basis to sustain the protest.<sup>3</sup>

### Interested Party Status

As a threshold matter, the agency requests dismissal of the protest on the basis that the protester is not an interested party to challenge the agency's evaluation of Rios Partners's past performance because BluePath's quotation was found ineligible for award.<sup>4</sup> Memorandum of Law (MOL) at 13. The agency advances two arguments to support this contention; however, neither allegation provides a basis to dismiss the protest.

First, the agency asserts the protester is ineligible for award and therefore not an interested party to challenge the awardee's evaluation. In this regard, the agency argues that BluePath's quotation violated the limitation on subcontracting, which provides that in the case of a contract for services (except construction), a small business concern will not pay a firm that is not similarly situated more than 50 percent of the amount paid to the concern by the government. MOL at 13-14 (citing 13 C.F.R § 125.6). Specifically, the agency asserts that based on the labor categories identified in BluePath's quotation, its subcontractor--a non-SDVOSB--will perform more than 50 percent of the requirement. *Id.* at 15-16

An agency's judgment as to whether a small business vendor can comply with the limitation on subcontracting provision is generally a matter of responsibility and the contractor's actual compliance is a matter of contract administration. *NEIE Med. Waste Servs.*, B-412793.2, Aug. 5, 2016, 2016 CPD ¶ 213 at 3-4. Neither issue is one that our Office generally reviews. *Id.* at 4; *see also* 4 C.F.R. § 21.5(a), (c). However, where a proposal, on its face, should lead an agency to the conclusion that a vendor could not

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<sup>3</sup> While we do not address every argument or variation thereof raised by the protester, we have reviewed them all and find that none provides a basis to sustain the protest.

<sup>4</sup> Prior to the submission of the agency report, the agency requested dismissal of the protest on this same basis. *See* Req. for Dismissal at 3-5. We declined to dismiss the protest in response to this filing. Electronic Protest Docketing System No. 16 (declining to grant summary dismissal).

and would not comply with the subcontracting limitation, the quotation may not form the basis for an award. *Ace-Federal Reporters, Inc.*, B-417846.4, B-417846.5, Apr. 23, 2020, 2020 CPD ¶ 150 at 13.

Such circumstances, however, are not present here. Despite the agency's assertions to the contrary, the record reflects that BluePath's quotation did not include a labor category breakdown for BluePath and its subcontractor that would have allowed the agency to conclude that BluePath's subcontractor would perform more than 50 percent of the requirement. AR, Tab 4, BluePath's Price Quotation at 1-6. Indeed, the agency acknowledges that it "[lacked] information to determine which (if any) of [the] positions would be accomplished by the subcontractor." MOL at 15 n.15. Additionally, the record shows that BluePath agreed to all terms and conditions set forth in the solicitation. AR, Tab 5, BluePath's Technical Quotation at 1.

Second, the agency asserts that the protester's quotation is ineligible for award because it took exception to a material term of the RFQ by failing to propose a fixed price. MOL at 18. In this regard, the agency states that although the statement of work requires a contractor to deliver up to six in-depth reports on topic-specific portfolios, the protester's price quotation placed restrictions on its efforts to develop these reports by stating the following:

[o]ffer is based on the Government providing guidance regarding the 'average' of 5 technologies to 'deep dive' evaluate within identified portfolios. Note the breadth and depth and analysis required for an adequate 'deep dive' can vary widely between different portfolios and technologies. '5' is a bounding within a [firm fixed price] task. We do not know what we will be asked to [evaluate]. We are using our professional experience regarding the level of effort [LOE] required to conduct the pertinent qualitative portfolio analysis on average and we assume that the Government will work with us to optimize this LOE based on the specific portfolio reviews it requests.

*Id.* at 17 (citing AR, Tab 4, BluePath's Price Quotation at 4).

Clearly stated solicitation requirements are considered material to the needs of the government, and 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. *Akira Techs., Inc.; Team ASSIST, B-412017 et al.*, Dec. 7, 2015, 2015 CPD ¶ 383 at 5. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. *22nd Century Techs., Inc.*, B-418029 *et al.*, Dec. 26, 2019, 2020 CPD ¶ 14 at 13.

In our view, the quoted portion of BluePath's quotation neither conditions performance at a fixed price on terms inconsistent with the terms of the solicitation, nor suggests that the protester will not provide the required reports at the quoted price. Accordingly, we do not find that BluePath took exception to material terms of the solicitation in its price quotation. Thus, we conclude that BluePath is an interested party to pursue its

challenge to the agency's evaluation of the awardee's quotation, and decline to dismiss the protest.

### Past Performance

Our Office examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of vendors' quotations are primarily matters within the contracting agency's discretion. *OBXtek, Inc.*, B-415258, Dec. 12, 2017, 2017 CPD ¶ 381 at 6. We will not question an agency's determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation criteria. See, e.g., *Merrill Aviation & Def.*, B-416837, B-416837.2, Dec. 11, 2018, 2018 CPD ¶ 421 at 3; *Concept Plus, LLC; Synergy Bus. Innovation & Sols., Inc.*, B-416142 *et al.*, June 22, 2018, 2018 CPD ¶ 229 at 4.

BluePath contends that the agency improperly evaluated Rios Partners's past performance by accepting information for "Team Rios"--which the protester asserts "is comprised of Rios Partners, [its subcontractor,] and likely others"--even though the solicitation permitted the agency to consider only contracts performed by the prime contractor. Protest at 3. In support of this argument, the protester relies on documents contained in the agency report filed in response to a prior protest, B-417960.2, which our Office dismissed on February 4, 2020, based on the agency's intent to take corrective action. *Id.* at 4 n.3.

The agency argues that the protester's reliance on a stale, expired quotation, the evaluation of which served as the basis for a prior award decision, is insufficient to show that the agency's evaluation of Rios Partners's revised quotation was unreasonable. MOL at 6. As stated above, the agency's corrective action in response to the B-417960.2 protest involved soliciting and evaluating revised quotations prior to making a new award to Rios Partners. *Id.* at 7-8. In this regard, the agency explains that after evaluating the awardee's revised quotation, it concluded that two of the five referenced contracts were indeed performed by Rios Partners as the prime contractor. *Id.* at 8 (citing AR, Tab 7, Award Decision at 4). Thus, the agency maintains that based on its evaluation of these two contracts, it reasonably determined that Rios Partners's past performance was relevant to the instant procurement. *Id.* at 8-10.

In response, the protester argues that the awardee's revised quotation does "nothing more" than substitute Rios Partners's name for that of "Team Rios." Comments at 2. BluePath argues that this is improper because the agency gave Rios Partners credit for Team Rios's past performance and failed to identify which percentage of work was performed by Rios Partners rather than Team Rios. *Id.* Additionally, the protester contends that the awardee's contracts do not demonstrate translational potential because neither involves the performance of basic research. *Id.* at 6.

Here, the record shows that Rios Partners submitted five contracts as part of its revised past performance quotation. AR, Tab 8, Rios Partners Quotation at 3-7. The record

also shows that the agency concluded that Rios Partners was not the prime contractor on three of these contracts, and did not consider these contracts in its evaluation of Rios Partners's past performance. AR, Tab 7, Award Decision at 4. In addition, the record shows the agency found that the two remaining contracts were performed by Rios Partners and were highly relevant to this procurement because they included performance tasks similar to the requirements here. *Id.* Further, the agency found that Rios Partners's contracts demonstrated proficiency in all task areas across the scope of the contracts and within specific projects for its contracts. *Id.* For example, the agency determined that both contracts identified experience completing analysis of translational potential and one contract identified portfolio review and analysis. *Id.*

We find no basis to sustain this aspect of the protest. In this regard, the record shows that in evaluating the awardee's revised quotation, the agency only considered the two contracts in which Rios Partners was identified as the prime contractor. In evaluating these two contracts, the agency concluded that Rios Partners's contracts showed proficiency in all tasks areas identified in the RFQ, including analysis of translational potential and portfolio review analysis. Additionally, despite the protester's argument to the contrary, the solicitation did not require firms to identify the percentage of work performed by each team member. Similarly, to the extent the protester contends that Rios Partners's quotation fails to show basic research necessary to demonstrate the task of analysis of translational potential, we note that the record shows that one of the awardee's contracts identifies "extensive experience conducting robust and varied research." See AR, Tab 8, Rios Partners Quotation at 4. On this record, we find the agency's evaluation unobjectionable. The protester's disagreements with the agency's conclusions, without more, do not show that the agency's evaluation was unreasonable. *22nd Century Techs., Inc., supra.* As a result, we deny this protest ground.

#### Best-Value Determination

Finally, we find no merit to BluePath's assertion that the best-value determination was unreasonable because BluePath's price was 12 percent lower than the awardee's. Protest at 5. As stated above, the RFQ advised that the lowest-priced quotation may or may not be deemed the best value. See RFQ at 2, 36. The record here shows that the agency directly compared BluePath's and Rios Partners's respective prices when determining that Rios Partners's quotation was the overall superior submission and therefore represented the best value. AR, Tab 7, Award Decision at 6-7. Although the protester disagrees with the agency's judgment in reaching the award decision, BluePath has not established that the agency's determination was unreasonable or inconsistent with the stated evaluation criteria. See, e.g., *Russell Enters. of N. Carolina, Inc.*, B-292320, July 17, 2003, 2003 CPD ¶ 134 at 3-4.

The protest is denied.

Thomas H. Armstrong  
General Counsel