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Decision

Matter of: CDO Technologies, Inc.; Abacus Technology Corporation

File: B-418111; B-418111.2; B-418111.3; B-418111.4; B-418111.5; B-418111.6

Date: January 14, 2020

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Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging agency's evaluation of proposals are denied in part, and dismissed in part, where record shows that agency's evaluation of proposals was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations; and where one protester is not an interested party to challenge the agency's evaluation.

2. Protests challenging the adequacy of discussions are denied where record shows that any concerns identified by the protesters were not prejudicial, and where the record further shows that discussions were equal with all offerors.

DECISION

CDO Technologies, Inc., of Dayton, Ohio, and Abacus Technology Corporation, of Chevy Chase, Maryland, protest the issuance of a task order to MicroTechnologies, LLC (MicroTech) of Vienna, Virginia, under request for proposals (RFP) No. FA4890-19-R-A013, issued by the Department of the Air Force for Combined Air and Space Operations Center communications support services. The protesters argue that the agency miscalculated proposals, engaged in unequal discussions, and made an unreasonable source selection decision.

We deny the protest of CDO and dismiss the protest of Abacus.

BACKGROUND

The RFP contemplates the issuance, on a best-value tradeoff basis, of a hybrid fixed-price, cost-reimbursement type task order to perform the solicited services for a 9-month base period and four 1-year option periods. Firms were advised that proposals would initially be evaluated on the basis of two pass/fail considerations (evidence of a valid top-secret facility clearance, and evidence of having performed similar scope work within the last five years), and that the proposal had to be found acceptable under these pass/fail considerations to be evaluated further. RFP at 6-7. The RFP also advised that those proposals found acceptable under the pass/fail elements would be evaluated considering price and technical considerations. RFP at 7. The RFP identified two technical “aspects”--management and staffing plan, and transition and phase-in--that were equal in importance.¹ RFP at 7. Price would be evaluated for fairness, realism and balance. *Id.* at 8. The agency would engage in a “technical tradeoff” process, whereby the greater the equality of the proposals under the technical aspects, the more important price would be in the agency’s selection decision. *Id.* at 6.

The agency received several proposals in response to the RFP. After evaluating those proposals, engaging in discussions with the offerors, and receiving and evaluating proposal revisions in response to the agency’s discussion questions, the agency determined that all of the proposals met the pass/fail considerations. The agency assigned the protesters’ and awardee’s proposals the following ratings:

	Mgmt. and Staffing Plan	Transition and Phase-In	Evaluated Price
CDO	Excellent	Acceptable	\$215,890,503
Abacus	Excellent	Acceptable	\$222,967,889
MicroTech	Excellent	Acceptable	\$159,999,966

Agency Report (AR) exh. 21, Source Selection Decision Document (SSDD), at 112.² Based on these evaluation results, the record shows that the agency found the proposals of these three offerors to be substantially technically equal and made award based on the lower price offered by MicroTech, concluding that any particular strengths found in the other two proposals did not merit their cost premiums. *Id.* at 115. After

¹ The RFP advised that proposals would be assigned adjectival ratings under each aspect of excellent, good, acceptable or unacceptable. RFP at 7.

² The agency provided separate reports in each protest that differed in certain respects, but that also included similarly-numbered exhibits in certain instances. For example, the SSDD is identified as exhibit 21 in both reports. We refer simply to the agency report in those instances where the exhibits are similarly numbered. Where necessary, we identify the agency report by protester.

learning of the agency's selection decision and requesting and receiving debriefings, CDO and Abacus filed protests with our Office.³

DISCUSSION

Preliminary Matters

Before turning to a discussion of CDO's protest, we consider first whether Abacus is an interested party for purposes of maintaining its protest. In this regard, our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a)(1), 21.1(a), require a protester to be an "interested party," that is, an actual or prospective offeror whose direct economic interest would be affected by the award, or the failure to award, a contract. Determining whether a party is interested involves a variety of considerations, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Technica LLC, B-417177 et al., Mar. 21, 2019, 2019 CPD ¶ 125 at 7. Where a firm would not be in line for the award of a contract (or in this case, the issuance of a task order), the firm is not an interested party to maintain its protest. Id.

Abacus's protest principally challenges the agency's evaluation of the MicroTech proposal.⁴ Specifically, Abacus alleges that the agency unreasonably found that the MicroTech proposal met the pass/fail requirement to provide evidence that it had performed similar scope work within the past five years; that the agency failed adequately to evaluate (and document its evaluation of) the MicroTech proposal for

³ This task order competition was confined to small business concerns holding indefinite-delivery, indefinite-quantity contracts under the Air Force's Network-Centric Solutions-2 contracting program. Because the value of the task order issued here exceeds \$25 million, our Office has jurisdiction to consider these protests. 10 U.S.C. § 2304c(e)(1)(B).

⁴ In its initial protest, Abacus also argued that the agency misevaluated its proposal by identifying a strength in its initial proposal under the transition and phase-in technical aspect that the agency failed to carry forward during the evaluation of Abacus's proposal revisions. Specifically, Abacus argued that the agency originally assigned its proposal a strength for offering a resource manager for activities occurring outside of the continental United States (OCONUS) during contract transition, but then eliminated that strength under the transition and phase-in aspect, instead crediting its proposal with the same strength under the staffing and management approach aspect. Abacus Initial Protest at 15-17. Abacus also originally argued that the agency erred in assigning its proposal a rating of acceptable under the transition and phase-in aspect, maintaining that it should have been assigned a rating of good instead. Id. at 14-15.

The agency provided detailed responses to these allegations in its report to our Office. Abacus made no further mention of these allegations in its comments responding to the agency report. We therefore conclude that these assertions were abandoned by Abacus. Yang Enterprises, Inc., B-415923, Mar. 12, 2018, 2018 CPD ¶ 109.

price realism for several reasons; and that, correspondingly, the agency also erred in not downgrading the MicroTech proposal during its technical evaluation based on the alleged failures of the agency's price realism evaluation.

We conclude that Abacus is not an interested party to maintain these aspects of its protest. As the record shows, the agency found the proposals of Abacus, MicroTech and CDO all to be substantially technically equal. AR, exh. 21, SSDD, at 115. The record also shows that the proposal of CDO was less expensive than the proposal of Abacus. Id. at 112. Abacus has not raised any allegations regarding the agency's evaluation of the CDO proposal, or the agency's conclusion that the CDO and Abacus proposals were substantially technically equal.⁵ Thus, even if Abacus were correct that the agency misevaluated the MicroTech proposal (and even if Abacus established that the MicroTech proposal should have been disqualified for failing to meet the pass/fail requirement challenged by Abacus), CDO, not Abacus, would be in line for award. It follows that Abacus is not an interested party to maintain these aspects of its protest. We therefore dismiss these allegations.⁶

⁵ Abacus does argue that the agency failed to identify its proposal as the most highly rated, and instead unreasonably found it to be substantially technically equivalent to the MicroTech proposal. Abacus argues that its proposal was the most highly rated because of a strength identified in its proposal relating to the provision of key personnel. Abacus argues that, in light of the errors it maintains occurred in connection with the evaluation of the MicroTech proposal, it was unreasonable for the agency to conclude that the Abacus and MicroTech proposals were substantially technically equal.

The record shows that all three offerors proposed additional key personnel in excess of those required under the RFP, and that the agency characterized this aspect of all three proposals as offering the "greatest" technical strength to the agency. Specifically, the record shows that Abacus proposed 20 additional key personnel, MicroTech proposed 7 additional key personnel, and CDO proposed 5 additional key personnel. AR, exh. 21, SSDD, at 114. The record also shows that the agency identified a second strength in the Abacus proposal that the agency characterized as a "slight" technical strength, and also identified a second strength in the CDO proposal that the agency characterized as a "considerable" strength. Ultimately, as noted, the agency concluded that all three proposals were substantially equal to one another. Id. at 115.

While Abacus raises various challenges to the agency's evaluation of the MicroTech proposal, it has not challenged any aspect of the evaluation of the CDO proposal, or its finding that the Abacus and CDO proposals were substantially technically equal. Under these circumstances, we conclude that the record establishes that the CDO and Abacus proposals were substantially technically equal, and that the agency's source selection decision ultimately turned on the question of price.

⁶ Abacus has two remaining allegations relating to the agency's conduct of discussions. We address those contentions below.

CDO's Evaluation Challenges

CDO argues that the agency failed to reasonably evaluate the MicroTech proposal.⁷ Specifically, CDO argues that MicroTech was able to achieve its lower price principally by proposing a smaller, less qualified workforce as compared to the workforce proposed by CDO. CDO argues that the agency never gave adequate consideration to this difference, and that MicroTech's proposed staffing approach was necessarily inferior compared to the staffing approach proposed by CDO.

We find no merit to this aspect of CDO's protest. In considering challenges to an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, and applicable statutes and regulations. Ausley Associates, Inc., B-41750 et al., July 24, 2019, 2019 CPD ¶ 279 at 3.

The RFP included worksheets for offerors to complete that required them to "map" their proposed labor categories to the labor categories identified in the solicitation. RFP at 104-110. In most instances, each broad labor category in the worksheets included a range of four steps or levels.⁸ The record shows that, in preparing its proposal, MicroTech proposed to use just two levels for each labor category, with its level I corresponding to a combined level I and II in the worksheets, and its level II corresponding to a combined levels III and IV in the worksheets. The MicroTech proposal expressly states:

Our skill mix is defined in two levels: (1) entry to journeyman and (2) senior to master. For each function, sub-function, and position level, ***Team MicroTech's position responsibilities, qualifications (minimum education, experience, and certifications), and functions directly map and will comply with those provided in PWS*** [performance work statement], ***Appendix A – Functional Requirements***.

CDO AR, exh. 16, MicroTech Technical Proposal (Revision 3), at 15 (emphasis in original). However, an examination of the MicroTech worksheets shows that, when mapping its labor categories to those included in the RFP, it used only the two lower-level labor categories.

⁷ In its initial protest, CDO argued that the agency had misevaluated its proposal in several areas. CDO subsequently withdrew these allegations.

⁸ For example, the RFP included the labor category Enterprise Network Administrator, Continental United States (), and listed four levels (I-IV) corresponding to graduated levels of proficiency. RFP at 104.

CDO's argument is premised on the assertion that MicroTech proposed principally level I or II positions, and that this is how it achieved its cost savings. In support of its position, CDO directs our attention to a comparison of the offerors' proposed labor rates prepared by the agency which it maintains shows that MicroTech's proposed labor categories correspond to level I and II positions. AR, exh. 22, Labor Rate Comparison.

A careful examination of that document shows, however, that, while there are labor categories where MicroTech's proposed labor rates correspond to the level I or II rates proposed by other offerors (as well as the rates used to prepare the government estimate), many of its proposed level I and II labor rates correspond to labor rates that are significantly higher than the rates identified by other offerors (as well as those used to prepare the government estimate) for the level I or II positions.

For example, in the labor category Enterprise Network Administrator, CONUS, the record shows that MicroTech's level I labor rate is \$[deleted], and its level II labor rate is \$[deleted]. AR, exh. 22, Labor Rate Comparison, at 1. In comparison, CDO's level I labor rate for the same labor category is \$[deleted]--slightly higher than MicroTech's rate--but its level II labor rate is only \$[deleted]--significantly lower than MicroTech's proposed level II labor rate. Id. In this same labor category, the government estimate includes only a level III labor rate, and that rate is \$[deleted], a rate that, again, is significantly lower than MicroTech's level II labor rate. Id. The record therefore shows in this example that MicroTech's level I or II labor rates, were in fact much higher than the level I or II rates proposed by other offerors (such as CDO), as well as higher than the level III rate identified in the government estimate for this type of employee.⁹

In the document prepared by the agency comparing the proposed labor rates, MicroTech's labor rates are "mapped" to the level I or II row in every instance. However, it is clear that, consistent with the MicroTech proposal language quoted above, as well as its actual proposed rates, MicroTech was using a two-level approach that captured or blended the two lower-level labor categories and the two higher-level labor categories together into single categories. The agency's "mapping" of those labor rates to the level I and II labor categories shows only that the agency was applying a consistent nomenclature to the offerors' labor categories, not that there were not differences in the offerors' proposed approaches, as illustrated by the examples discussed.

⁹ As a second example, the record shows that, in the TLC System Administrator CONUS labor category, MicroTech's proposed level I labor rate was \$[deleted], while its level II labor rate was \$[deleted]. AR, exh. 22, Labor Rate Comparison, at 1. In comparison, CDO did not propose any level I or II personnel in the same labor category, and instead proposed only level III and IV personnel. Its labor rate for level III personnel was \$[deleted]--higher than MicroTech's level I rate--but its level IV labor rate was only \$[deleted]--significantly lower than MicroTech's so-called "level II" rate. Id. In this same category, the government estimate used level II and III personnel, at rates, respectively, of \$[deleted] and \$[deleted]. Id.

The record also shows that the agency expressly acknowledged and understood the fact that, overall, MicroTech proposed a larger number of lower-level positions to staff the requirement, but concluded that this did not render the MicroTech proposal unacceptable for failing to meet the RFP's requirements. AR, exh. 21, SSDD, at 110. The evaluators also concluded that the rates proposed by MicroTech either were actual rates from the predecessor contracts currently being performed, or higher rates, thereby largely establishing that the rates were realistic. Id.

Finally, and perhaps most importantly, CDO has not identified any instances where MicroTech's proposed personnel do not meet the education, experience or certification requirements identified in the RFP or were otherwise unacceptable. At best, CDO has shown that it proposed to staff the task order with comparatively higher-priced labor. However, the fact that CDO's proposed labor rates are higher does not necessarily show that its approach is technically superior, and the agency made no such finding.¹⁰ In light of these considerations, we have no basis to object to the agency's evaluation of the MicroTech proposal for the reasons advanced by CDO. We therefore deny this aspect of its protest.

CDO next argues that the agency should have found the MicroTech proposal unacceptable because one of its key employees left the company before the task order was issued and MicroTech failed to advise the agency of his departure.

We find no merit to this aspect of CDO's protest because the RFP did not require the submission of key personnel resumes as part of the proposals, and there is no showing that the agency relied on the resume of the individual in question in evaluating MicroTech's proposal. In this regard, the agency specifically advised offerors that it was not requiring firms to submit resumes or letters of commitment for proposed key personnel. AR, exh. 7, Offeror Questions and Answers, Questions 56, 57.

Consistent with that instruction, the MicroTech proposal did not include any resumes or letters of commitment for its key personnel. Instead, MicroTech offered only to provide the agency with resumes and letters of commitment upon request. AR, exh. 16, MicroTech Technical Proposal, (Revision 3), at 16.

There is no evidence in the record to show that the agency ever requested, or that MicroTech ever provided, any resumes or letters of commitment to the agency, nor is there any evidence to show that the agency relied on key personnel resumes or letters

¹⁰ The record also shows that CDO proposed to staff the task order for the CONUS requirement with more personnel than any other offeror except one, and proposed to staff the OCONUS requirement with more personnel than any other offeror. CDO AR, exh. 40, Updated Comparative Price Analysis, Full Time Equivalent Comparison Worksheet. Again, this does not demonstrate that the CDO approach is necessarily technically superior, only that it differs from the approach proposed by other offerors.

of commitment in its evaluation. Under the circumstances, the fact that one of MicroTech's designated key personnel may have departed the organization does not provide a basis for the agency to have rejected the MicroTech proposal. IPKeys Technologies, LLC, B-416873.2, B-416873.3, Apr. 5, 2019, 2019 CPD ¶ 138 at 7-8 (where solicitation does not require the identification of key personnel and the submission of their resumes for evaluation, there is no basis to suggest that an agency should have rejected a proposal where a key employee departs). We therefore deny this aspect of CDO's protest.

Unequal Discussions

The record shows that, after selecting MicroTech for issuance of the task order, the agency discovered a proposal submitted by another offeror that the agency was unaware of, and that it failed to evaluate. The agency explains that, after it announced its selection decision, it was contacted by the other offeror, who requested a debriefing.

After investigating the situation, the agency discovered that the firm's proposal had been timely and correctly submitted. The agency explains that, in light of the circumstances, it proceeded to evaluate the proposal, engage in discussions with the offeror, and solicit and obtain proposal revisions. The agency then evaluated the revised proposal and executed an addendum to the source selection decision and various other evaluation documents, ultimately finding that this new proposal did not affect the agency's decision to select MicroTech.

Both protesters argue that the agency engaged in unequal discussions by affording the new offeror an opportunity to engage in discussions after MicroTech's price had been revealed. Both protesters argue that they should be afforded a similar opportunity to engage in discussions with the benefit of knowing the MicroTech price.

We dismiss these protest allegations because neither protester has demonstrated that it was prejudiced by the agency's actions. Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident from the record, we will not sustain a protest, even if the agency's actions arguably may be improper. AECOM Management Services, Inc.--Advisory Opinion, B-417506.12, Sept. 18, 2019, 2019 CPD ¶ 342 at 10.

Here, while we agree with both protesters that the circumstances presented are unusual, we nonetheless conclude that neither protester was prejudiced by the agency's actions. Obviously, if the agency had selected the new offeror for issuance of the task order rather than MicroTech, this would present a situation prejudicial to both protesters, since, as correctly noted by both CDO and Abacus, the new offeror was afforded an opportunity to engage in discussions with the agency after having learned of MicroTech's price. However, since the new offeror was not selected and MicroTech remained the recipient of the task order, there is no basis for our Office to conclude that either protester was prejudiced by the agency's actions. Neither CDO, Abacus, nor MicroTech was afforded discussions with the agency after it made its selection decision.

We therefore dismiss this aspect of the protests without a need to reach any conclusion about the propriety of the agency's actions.

Abacus also argues that the agency engaged in unequal discussions with MicroTech that violated the terms of the solicitation. As noted, the agency engaged in multiple rounds of discussions with the offerors. The record shows that the agency transmitted its final round of discussion questions to Abacus on August 7, 2019, and requested a response by August 9. Abacus AR, exh. 11, Abacus Discussion Materials, at 17-20. In contrast, the record shows that the agency transmitted its final discussion questions to MicroTech on August 22, requesting a response by August 23. Abacus AR, exh. 12, MicroTech Discussion Materials, at 25-28. According to Abacus, this violated a solicitation provision that it maintains required the agency to simultaneously request responses to discussions.

We dismiss this aspect of Abacus's protest because it has neither alleged, nor demonstrated that the agency's actions were prejudicial. The firm has not argued or demonstrated, for example, that market conditions varied in any way during the approximately 2-week interval that elapsed between the time Abacus was required to submit its proposal revisions, and the time MicroTech was required to submit its proposal revisions. In the absence of any showing of prejudice, there would be no basis for our Office to object to the agency's actions. AECOM Management Services, Inc.-- Advisory Opinion, supra.

In any event, we do not agree with Abacus that there was a requirement for the agency to simultaneously request proposal revisions.¹¹ A review of the RFP provision identified by Abacus shows only that the agency instructed offerors that it would not separately solicit final proposal revisions, and consequently, proposal revisions were to be submitted "simultaneously" with responses to the agency's discussion questions. The RFP provided as follows:

Interchanges may be conducted if in the Government's best interest and if the CO [contracting officer] determines them necessary. Interchanges may be conducted with some, all, or none of the Offerors to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Should interchanges be conducted, Offeror responses will be considered in making the selection decision. Proposal changes submitted by the Offeror in response to Interchange Notices will be subject to evaluation. Proposal revisions, to include any final price adjustments, will be requested simultaneously if interchanges are opened. Offerors shall submit all proposal changes, technical, and price, in response to

¹¹ This is not an acquisition being conducted pursuant to Federal Acquisition Regulation (FAR) part 15, which requires, among other things, that proposal revisions in the wake of discussions be submitted by all offerors on a common cut-off date. FAR § 15.307(b).

Interchange Notices. No subsequent Final Proposal Revisions will be requested after the interchanges are closed.

RFP at 3. Simply stated, nothing in the RFP required the agency to solicit proposal revisions from all offerors simultaneously. Rather, the RFP advised offerors that responses to discussion questions (for example, narrative responses to the agency's questions) would be required "simultaneously" with actual proposal revisions (for example, revised proposal pages). We therefore also conclude that this aspect of Abacus's protest fails to state a legally sufficient basis. 4 C.F.R. § 21.5(f).

Finally, CDO argues that the agency engaged in unequal discussions with MicroTech because one of its discussion questions was phrased slightly differently compared to similar discussion questions submitted to CDO. In this connection, the record shows that in all instances except one, where it questioned an offeror's proposed labor rate as unrealistic, the agency used identical language in its questions. Those questions provided as follows:

In accordance with [RFP] para 5.3.3 please address this disparity for the proposed labor rates of the OCONUS labor categories listed above as an unrealistically low offer may pose an unacceptable risk to the Government and may be reason to reject an Offeror's proposal. As a response to this IN [interchange notice], please submit any resultant changes to your proposal in the form of changed pages.

CDO AR, exh. 11, CDO Discussion Materials, at 13; AR, exh. 12, MicroTech Discussion Materials, at 11.

In contrast, in its final exchange with MicroTech, the agency used the following language:

In accordance with [RFP] para 5.3.3 please address this disparity, providing evidence of your capability and/or experience providing similar services at similar prices to support your proposed CONUS labor rates for the above labor categories.

CDO AR, exh. 12, MicroTech Discussion Materials, at 27. According to CDO, this instruction provided MicroTech an advantage because it provided greater detail to MicroTech and informed the firm that it could provide evidence to substantiate its labor rate rather than simply raise it.

We find no merit to this aspect of CDO's protest. CDO essentially takes the position that the instructions it received led it to conclude that it was required to raise the labor rates identified by the agency as unrealistically low, whereas the final instruction to MicroTech advised it that it could instead provide information to substantiate its proposed rates rather than simply raise them. However, neither set of instructions directed the offerors necessarily to raise their proposed labor rates. In both instances, the offerors were merely instructed to "address this disparity," but the instructions

remained neutral about how the offeror could satisfy the agency's concern, whether by raising a particular rate or by offering further substantiation of the proposed rate without increasing it.

In any event, the instructions provided to MicroTech in the final round of discussions merely parroted back identical language found in the RFP, which provided as follows:

The Offeror's price proposal shall represent the Offeror's best effort to respond to the solicitation. In instances where an Offeror's proposed prices appear unrealistically low, Offerors may be requested to address this disparity, providing evidence of their capability and/or experience providing similar service(s) at similar price(s). An unrealistically low offer may pose an unacceptable risk to the Government and may be a reason to reject an Offeror's proposal.

RFP at 9 (emphasis supplied). Accordingly, all firms were provided the exact same instructions. The agency was not required to reiterate the express terms of the RFP in conducting discussions with CDO, and the fact that it may have done so in its discussions with MicroTech did not provide that firm with an improper advantage in light of the express terms of the RFP. We therefore find no merit to this aspect of CDO's protest.

The protests are denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel