



Decision

Matter of: Computer World Services Corporation

File: B-418287.3

Date: June 29, 2020

Jonathan J. Frankel, Esq., and Karla J. Letsche, Esq., Frankel PLLC, for the protester. Sharon L. Larkin, Esq., and James M. Larkin, Esq., The Larkin Law Group LLP, for the intervenor.

Shandra Kotzun, Esq., Department of Homeland Security, for the agency.

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

DIGEST

Protest challenging agency's proposed corrective action is sustained where record shows agency intends to materially change its method for evaluating proposals without amending solicitation and affording competing firms an opportunity to submit revised quotations.

DECISION

Computer World Services Corporation (CWS), of Washington, D.C., protests the actions of the Department of Homeland Security, United States Coast Guard, taken in connection with request for quotations (RFQ) No. 70Z07919QPNZ00200, issued to acquire centralized service desk information technology support services. CWS argues that certain proposed corrective action taken in response to an earlier protest is improper.

We sustain the protest in part, and dismiss it in part.

BACKGROUND

CWS filed an earlier protest with our Office challenging the agency's issuance of a task order to another concern, Intellect Solutions, LLC, maintaining that the agency had misevaluated quotations submitted in response to the RFQ and made an unreasonable source selection decision. *Computer World Services Corporation*, B-418287, B-418287.2, Feb. 26, 2020, 2020 CPD ¶ ___. We sustained CWS's prior protest.

As we explained in our first decision, the RFQ as originally issued contemplates issuance, on a best-value tradeoff basis, of a fixed-price task order under the successful concern's Federal Supply Schedule (FSS) contract to provide these services for a base period of 5 months and four 1-year options. The competition was confined to eligible historically underutilized business zone (HUBZone) small business concerns. The agency was to consider price and two non-price evaluation factors, technical capability and corporate experience. The agency was to evaluate the firms' total prices for reasonableness, and would evaluate selected unburdened labor rates for realism. The RFQ provided that the agency would make a best-value tradeoff decision based on consideration of all the evaluation factors. After evaluating quotations, engaging in discussions, and soliciting, obtaining, and evaluating revised quotations, the agency selected Intellect for issuance of the task order. CWS protested to our Office after learning of the agency's selection decision.

We sustained CWS's protest, finding that the agency's evaluation of price--which concluded that CWS's proposed price was both unreasonably high, and also was based on unrealistically low labor rates--was improper. The agency's conclusion that CWS's price was unreasonably high was based on a comparison of the CWS price to an independent government estimate (IGE) that had been prepared by the agency. As to the agency's conclusion that CWS's proposed labor rates were unrealistic, the agency used benchmark unburdened hourly rates of compensation that had been selected by the agency to make a comparison between those rates and CWS's proposed unburdened hourly rates.

We also sustained CWS's protest challenging the non-price evaluation of the quotation submitted by Intellect. We found that the agency had failed meaningfully to account for, and critically consider, differences between the level of effort and labor mix offered by Intellect and the level of effort and labor mix used to calculate the IGE. Finally, while not discussing the issue in detail, we noted that CWS had advanced a challenge to the evaluation of one of Intellect's corporate experience examples, and suggested that, as part of any reevaluation, the agency validate its findings with respect to the acceptability of Intellect's corporate experience.

In arriving at our conclusions, we pointed out that the IGE was materially flawed because, among other things, it was based on an inappropriate level of effort and labor mix given the agency's requirements as outlined in the RFQ, and also used inappropriate averaged hourly rates from a contract vehicle that was not being used to acquire the services.¹ We also found that the benchmark unburdened hourly rates used

¹ As noted, the acquisition is being conducted using the FSS and is confined to eligible HUBZone small business concerns. The agency prepared the IGE using large business averaged hourly rates from a different contract vehicle, the General Services Administration's Alliant II "governmentwide" contract vehicle, a multiple-award, indefinite-delivery, indefinite-quantity contracting program available to all government

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by the agency in evaluating the realism of CWS's unburdened rates were irrationally selected and also may have resulted in an evaluation of competing quotations on other than a common basis.

In light of these considerations, we recommended that the agency devise methodologies for evaluating the realism of the firms' proposed unburdened labor rates, as well as the reasonableness of the firms' proposed total prices, that were supported by contemporaneous information showing that those methodologies accurately reflected the agency's requirements, and provided a common and rational basis for the evaluation of quotations. Alternatively, we recommended that the agency could elect to revise its acquisition strategy to change how it intends to evaluate quotations. Finally, we recommended that, after taking these preliminary steps, the agency reevaluate quotations and make a new source selection decision.

After receiving our earlier decision, the agency issued a corrective action letter dated March 17, 2020, outlining its intended course of action. That letter provides as follows:

Under the planned corrective action, the USCG [United States Coast Guard] will re-evaluate Factors 1 and 2 [technical capability and corporate experience] based on the evaluation criteria as stated in Section 5 of RFQ No. 70Z07919QPNZ00200. In addition we are revising the Factor 3 evaluation criteria in Section 5 of the RFQ by removing the limited realism analysis from the evaluation. Thus, the only evaluation under Factor 3 will be the reasonableness evaluation of the total evaluated price. An amendment will not be issued reflecting this change; this email serves as the official notification.

We are requesting that you revalidate your price quote through 18 May 2020. If your company decides not to revalidate, it will not be included in this revised evaluation. USCG will not be accepting new price quotations.

Also, your company has the option to withdraw your quotation if they would like to do so. An email response is due no later than noon Thursday, 19 March 2020.

Agency Report (AR), exh. 3, Corrective Action Letter (emphasis in original). After receiving the agency's corrective action letter, CWS filed the instant protest on March 27.

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agencies to fulfill information technology requirements. We concluded that there was no rational basis for the agency to have used those hourly rates in preparing the IGE.

DISCUSSION

CWS challenges the agency's proposed corrective action, raising two principal challenges. First, CWS argues that the agency impermissibly has revised the solicitation's evaluation criteria without affording firms an opportunity to revise their quotations. Second, CWS argues that the agency has failed to adhere to our recommendation that it devise a means for evaluating the reasonableness of the quotations that will accurately reflect the agency's requirements and provide for a common and rational basis for the evaluation of quotations. We sustain CWS's protest as to the first issue, and dismiss it as premature as to the second.

Timeliness

Before discussing the merits of CWS's protest, we address an argument raised by the intervenor concerning the timeliness of the CWS protest. According to Intellect, CWS's protest was untimely because it was submitted after the deadline established in the agency's corrective action letter that asked for firms either to revalidate or withdraw their price quotations no later than March 19. Intellect maintains that, because the agency's letter made some type of change to the terms of the RFQ and required a further submission, CWS was required to protest no later than the March 19 deadline. We disagree.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), provide, in relevant part, as follows:

In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

This provision of our regulations was revised in 2018 to harmonize our timeliness rules (including the timeliness rule that governs in the case of a requested and required debriefing), and to explain which rule applied in situations where a solicitation impropriety becomes apparent after proposals (or in this case quotations) have been submitted, but where there is no opportunity to submit revised proposals.² This revision also essentially codified a rule articulated in a prior decision of our Office, *Armorworks*

² Under 4 C.F.R. § 21.2(a)(1), protests concerning alleged improprieties that are apparent on the face of a solicitation must be protested no later than the deadline for submission of bids or proposals (or, as here, quotations). Under 4 C.F.R. § 21.2(a)(2), any protest not covered under the first rule must be filed within 10 days of when the protester knows or should know of its basis for protest.

Enterprises, LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176. In that decision, we specifically stated that where an alleged solicitation impropriety is incorporated into a solicitation by, for example, the issuance of an amendment after proposals have been submitted, but there is no opportunity to submit revised proposals, the alleged impropriety must be protested within 10 days of when its existence is known or should be known by the protester. *Id.* at 7-8; See also, *Protect the Force, Inc.--Recon.*, B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306.

Turning to the circumstances here, we conclude that CWS was only required to file its protest within 10 days of the agency's corrective action letter, and not, as contended by Intellect, by the earlier deadline for revalidating or withdrawing quotations. As an initial matter, we point out that the agency has not amended--and does not intend to amend--the RFQ. The agency acknowledged as much in the body of the corrective action letter itself, by stating that an amendment would not be issued to reflect the change announced by the corrective action letter.

We also note that the parties have not been afforded an opportunity to submit revised quotations. Instead, firms were simply given the option of reaffirming their previously-submitted quotations or withdrawing those quotations. This is not the "further submissions" to which our regulations refer, but instead only an opportunity to signal either further participation in, or withdrawal from, the acquisition without an opportunity to revise quotations. As we explained in the comments that were included with the revision to our regulations, the opportunity to make "further submissions" referred to in our regulations amounts to an opportunity to submit revised proposals (or in this case, quotations):

The revision was proposed to address a conflict as to which of our timeliness rules--21.2(a)(1) or 21.2(a)(2)--takes precedence where a solicitation impropriety becomes apparent after proposals have been submitted, *but there is no opportunity to submit revised proposals.*

83 Fed. Reg. 13817, 13819 (April 2, 2018) (emphasis supplied). In light of these considerations, we conclude that CWS's protest, filed on March 27, within 10 days of the agency's corrective action letter, is timely.

Elimination of Realism Evaluation Factor

CWS argues that the agency impermissibly has in effect revised the RFQ's evaluation criteria without affording firms an opportunity to submit revised quotations. The protester maintains that this is improper because, as a legal matter, the agency is required to afford firms an opportunity to revise their quotations in the wake of any material change to a solicitation's evaluation factors.

The agency responds that it is not necessary for it to amend the RFQ or obtain revised quotations because removal of the realism evaluation factor is not a material change to the solicitation and will not impact the agency's ability to evaluate quotations on a

common basis. According to the agency, because its requirements for vendors to offer an adequate staffing approach and level of effort have not changed, vendors already have had an opportunity to submit quotations in response to the RFQ. The agency further argues that it will be able to evaluate the vendors' ability to recruit and retain qualified personnel, as well as their understanding of the requirement, by evaluating their proposals under the technical capability factor.

We sustain this aspect of CWS's protest. It is axiomatic that, where an agency makes a material change to the terms of a solicitation, it is required to issue an amendment to the solicitation and afford competing firms an opportunity to revise their proposals or quotations in order to provide all firms an opportunity to compete on a common basis. *Global Computer Enterprises, Inc.; Savantage Financial Services, Inc.*, B-404597, *et al.*, Mar. 9, 2011, 2011 CPD ¶ 69 at 10. Among other things, a change to a solicitation's evaluation criteria constitutes a material change that requires permitting firms an opportunity to submit revised proposals or quotations. See *Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186 at 3-5.

Here, although the agency suggests that elimination of the price realism evaluation factor is an immaterial change to the RFQ, the record shows otherwise. During our consideration of CWS's first protest, the record showed that, in evaluating initial quotations, the agency determined that both CWS and Intellect initially had proposed unrealistic unburdened labor rates in certain labor categories. Based on these findings, the agency conducted discussions with the offerors and advised them that the identified unburdened hourly rates had been found unrealistic. In light on the agency's discussion questions, both vendors changed their proposed pricing.

In addition to these considerations, the record also showed that, after receiving revised quotations, the agency determined that CWS was ineligible for award because, among other reasons, its unburdened hourly rates were unrealistic. Finally, CWS, in its current protest, notes that if it were afforded an opportunity to revise its quotation, it would make changes to its proposed pricing and staffing strategy based on the agency's current position that it will no longer consider the realism of the offerors' proposed unburdened hourly rates.

While the agency appears to base its position that affording the vendors an opportunity to submit revised quotation is not necessary in order for it to reevaluate quotations that is not the only relevant consideration. Rather, the question is whether the vendors have been afforded a reasonable opportunity to compete for the agency's requirements intelligently and on a comparatively equal basis. A change to a solicitation's evaluation criteria to eliminate consideration of the realism of proposed hourly rates necessarily will fundamentally affect the vendors' pricing and staffing strategy. For example, a firm could choose to submit a low, or even below-cost price for business reasons, and, such a quotation would not be subject to rejection based solely on the low or below-cost price in the absence of a price realism evaluation requirement. See *Ausley Associates, Inc.*, B-417509, *et al.*, July 24, 2019, 2019 CPD ¶ 279 at 4. It follows that, in order to afford the vendors a reasonable opportunity to compete intelligently and on a comparatively

equal basis, it is necessary for the agency to amend the RFQ and afford all firms an opportunity to submit revised quotations based on the revised evaluation scheme. We therefore sustain this aspect of CWS's protest.

Development of a Revised IGE

CWS also challenges the agency's plan for evaluating the reasonableness of the quotations, and by extension, its plan for evaluating the comparative merits of the firms' level of effort and staffing approach. As noted above, the agency originally compared the quotations to an IGE that we determined was materially flawed in a number of respects in order to evaluate the reasonableness of the quotations. Because of the concerns we identified, we recommended that the agency devise a methodology for evaluating the reasonableness of the firms' proposed total prices that would be supported by contemporaneous information showing that the methodology accurately reflected the agency's requirements, and provided a common and rational basis for the evaluation of quotations. We also noted that the agency's evaluation of Intellect's technical approach was unreasonable because it failed to meaningfully take into consideration Intellect's proposed level of effort and staffing approach.

In determining its course of corrective action, the agency now reports that it does not intend to use an IGE in its evaluation of price reasonableness, or in its evaluation of the firms' technical approaches. Instead, the agency represents that it will use other price reasonableness analysis techniques, such as determining whether adequate competition exists, and comparing the quotations received to one another and to historical data. The agency also states that it will evaluate the sufficiency of the firms' proposed level of effort and staffing approach under the technical capability evaluation factor, and will rely on the expertise of its evaluators to assess the quotations for adequacy.

CWS objects to the agency's proposed method for evaluating quotations. CWS argues that the agency should be required to develop a new IGE that accurately reflects the agency's requirements, taking into consideration the agency's estimate of the level of effort, labor mix and likely cost to perform the requirement. According to CWS, a revised IGE is the only feasible basis for evaluating not only the reasonableness of the prices submitted, but also the adequacy of each firm's proposed technical approach.

We dismiss this aspect of CWS's protest as premature. The agency's proposed method for its reevaluation is not, in and of itself, legally objectionable; the agency proposes to use evaluation techniques that clearly are contemplated by applicable legal standards. CWS's real concern relates to how successful the agency will be in its reevaluation. However, any reevaluation cannot be reviewed by our Office until the agency actually performs the reevaluation. See *Savannah River Technology & Remediation, LLC; Fluor Westinghouse Liquid Waste Services, LLC*, B-415637, *et al.*, Feb. 8, 2018, 2018 CPD ¶ 70 at 12. Under the circumstances, we dismiss this aspect of CWS's protest as premature.

RECOMMENDATION

In view of the foregoing discussion, we sustain CWS's protest for the reasons outlined above. We offer no opinion about the advisability of the agency's decision to eliminate realism as an evaluation factor. However, if the agency determines that it no longer has a requirement for evaluating price realism, we recommend that the agency issue an amendment to the RFQ detailing its new evaluation plan, and afford all firms an opportunity to submit revised quotations in response to the amended RFQ.³

Once the agency has received revised quotations, we recommend that it reevaluate those quotations in a manner that is consistent with both our earlier decision, as well as the discussion above, and make a new source selection decision. Should the agency conclude that a firm other than Intellect properly is in line for award, we recommend that the agency terminate the task order issued to Intellect for the convenience of the government, and issue a task order to the successful firm, if otherwise proper. Finally, we recommend that the agency reimburse CWS for the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. CWS's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

³ In the alternative, should the agency conclude that it still requires an evaluation of price realism, then we reiterate our earlier recommendation from our last decision, namely, that the agency devise a methodology for evaluating the realism of the firms' quotations that is supported by contemporaneous information showing that the selected methodology accurately reflects the agency's requirements, and provides a common and rational basis for the evaluation of quotations.