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Decision

Matter of: Meridian Knowledge Solutions, LLC

File: B-420150; B-420150.2; B-420150.3

Date: December 13, 2021

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DIGEST

Protest is sustained where the agency's issuance of blanket purchase agreements with various periods of performance shorter than ten years was inconsistent with the 10-year term contemplated by the solicitation.

DECISION

Meridian Knowledge Solutions, LLC, of Reston, Virginia, protests the issuance of three blanket purchase agreements (BPAs) to The Educe Group, Inc., of Bethesda, Maryland, Envisage Technologies, LLC, of Bloomington, Indiana, and IBM Corporation, of Armonk, New York, by the Department of Homeland Security under request for quotations (RFQ) No. 70RTAC20Q0000081 pursuant to the General Services Administration's (GSA) Federal Supply Schedule (FSS), Information Technology program (Legacy Schedule 70), for information technology support services. The protester contends two of the awardees are ineligible for award, and that the agency erred in evaluating quotations in several respects.

We sustain the protest.

BACKGROUND

On September 4, 2020, the agency issued the RFQ seeking information technology services supporting the agency's learning management software system. Memorandum of Law (MOL) at 1. The solicitation contemplated the issuance of at least two blanket purchase agreements (BPA) with ordering periods of "up to ten years from award to

consist of a one-year base and nine, one-year option periods.” Agency Report (AR), Tab 7, RFQ at 1.

The RFQ provided for issuance of BPAs based on five evaluation factors: (1) solution capability survey; (2) prior experience; (3) technical solution, (4) technical approach, and (5) price. *Id.* at 75-77. These factors would be evaluated in two phases. *Id.* In the first phase, the agency would evaluate written responses to the first two evaluation factors, and then provide an advisory notification to vendors recommending whether they should proceed to the second phase. *Id.* In the second phase of the evaluation, the vendors would address the third and fourth evaluation factors by conducting a technical demonstration and oral presentation, which the agency would evaluate in combination with price. *Id.*

With regard to price, the RFQ provided that quotations would be evaluated on the basis of a total evaluated price including the costs associated with providing all of the services described in the solicitation. RFQ at 84. Additionally, the RFQ advised vendors that they must provide a breakdown of their price to include labor categories, rates, and hours, and that firms must document any pricing related assumptions. RFQ at 79-80. Concerning price assumptions, the RFQ noted that any assumptions that are considered unacceptable by the agency and cannot be resolved may result in the firm being removed from consideration. *Id.*

The agency received 13 initial quotations in response to phase one, and the agency recommended five vendors proceed to phase two. MOL at 2. Six total vendors elected to participate in phase two, including all five of the vendors that received a positive recommendation and one additional vendor. *Id.* Following technical demonstrations and oral presentations, the agency conducted exchanges with the vendors, and requested that they revise and resubmit technical and price assumptions and price quotations. *Id.* at 2-3.

The agency evaluated the quotations of the protester and awardees as follows:

	Solution Capability Survey	Prior Experience	Technical Solution	Technical Approach	Total Evaluated Price
Envisage	High Confidence	Some Confidence	High Confidence	High Confidence	\$98,064,437
Educe Group	High Confidence	Some Confidence	High Confidence	Some Confidence	\$43,565,204
IBM	High Confidence	Some Confidence	Some Confidence	Some Confidence	\$68,167,288
Meridian	High Confidence	Some Confidence	Some Confidence	Low Confidence	\$117,944,250

MOL at 4.

Of note, the three awardees were collectively the highest-rated vendors, and all were significantly lower priced than Meridian. Because the awardees were both higher rated and lower priced, the agency did not perform a best-value tradeoff with respect to Meridian. AR, Tab 32, Award Decision Document at 17.

Relevant to this protest, two of the awardees, Envisage and Educe Group, submitted quotations based on FSS contracts that would expire in 2022 and 2030, respectively. See *Id.* at 23. On August 31, 2021, the agency issued BPAs with varying periods of performance tailored to the time remaining on each awardee's FSS contract. *Id.* Specifically, the agency issued a BPA to Envisage with a period of performance extending to October of 2022, a BPA to Educe with a period of performance extending to August of 2030, and a BPA to IBM for the full 10-year period of performance. *Id.* The agency provided a brief explanation of the basis of award to unsuccessful vendors, and this protest followed.

DISCUSSION

The protester challenges the issuance of the three BPAs on several grounds. First, the protester argues Envisage and Educe were not eligible for award because their FSS contracts would not permit them to perform a BPA for the full 10-year period of performance contemplated by the RFQ. See Protest at 14-15; First Supp. Protest at 3-6. Second, the protester challenges the agency's price analysis and alleges the agency engaged in misleading discussions. Protest at 15-20. Finally, the protester challenges the agency's technical evaluation and the conduct of oral presentations in several respects. First Supp. Protest at 13-19. As discussed below, we sustain the protester's argument that Envisage and Educe were not eligible for award and deny the remaining allegations.

BPA Periods of Performance

The protester argues the agency erred by issuing BPAs for less than the full 10-year period of performance contemplated by the RFQ. Protest at 14-15. In this case, the agency issued three BPAs to three vendors with three different periods of performance. See AR, Tab 32, Award Decision Document at 23. The protester contends the 10-year period of performance was a material requirement of the solicitation and that Envisage and Educe should have been ineligible for award. Protest at 14-15; First Supp. Protest at 3-6. This is particularly relevant because the solicitation contemplated the agency would make at least two awards, and if two of the three BPA awardees were ineligible for award the protester would stand a significant chance of receiving a BPA award. *Id.*

Our Office has recognized that an FSS BPA is not established with the contractor directly, but rather is established under the contractor's FSS contract, such that the FSS BPA orders "ultimately are to be placed against the successful vendor's FSS contract." *GBK P'ship, LLC-Constant Assocs., Inc.*, B-417039, Jan. 24, 2019, 2019 CPD ¶ 30 at 5, citing *Panacea Consulting, Inc.*, B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 1-2 n.1. Thus, as we have further recognized, when an agency intends to

place an order under an FSS BPA, the vendor must have a valid FSS contract in place because that contract is the means by which the agency satisfies the competition requirements of the Competition in Contracting Act in connection with any orders issued under the BPA. *Canon USA, Inc.*, B-311254.2, June 10, 2008, 2008 CPD ¶ 113 at 3-4. In this regard, Federal Acquisition Regulation (FAR) section 8.405-3(d)(3) requires a vendor's FSS contract to have sufficient duration, including potential options, to coincide with the entire potential period of performance for the resulting BPA. See *NCS Techs., Inc.*, B-417956, B-417956.2; Dec. 13, 2019, 2019 CPD ¶ 427 at 7 (sustaining protest of BPA award because BPA's option years, if exercised, would extend beyond awardee's underlying FSS contract); *GBK P'ship, LLC-Constant Assocs., Inc.*, *supra* at 4 (denying protest challenging the exclusion of protester's quotation from competition when protester's FSS contract lacked a sufficient period of performance to cover the potential duration of the anticipated BPA).

The agency argues that it satisfied the requirements of FAR section 8.405-3(d)(3) in this case because each vendor's BPA was tailored to the time remaining on its FSS contract, such that no vendor received a BPA that extended beyond its FSS contract. MOL at 4-6. Moreover, the agency contends that this was consistent with the terms of the solicitation because the solicitation advised vendors that the BPAs would have terms of "up to" ten years. *Id.* The protester responds that this reading of the solicitation is unreasonable and inconsistent with other terms of the solicitation. We agree.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. In this case, the agency's reading of the solicitation is unreasonable because the provisions relied on by the agency are not rationally susceptible to the meaning the agency gives them when read in the context of the solicitation as a whole.

In relevant part, the solicitation provided the period of performance for the BPAs would be "established with an ordering period of up to ten years from award to consist of a one-year base and nine, one-year option periods." AR Tab 7, RFQ at 1. While the agency is correct that the RFQ advises vendors that the ordering period of the BPA will be "up to" ten years, the RFQ also notes this period "consists of" one base year and nine option years. *Id.* The agency's reading--that the phrase "up to" ten years contemplated the issuance of BPAs of varying lengths--is inconsistent with the portion of the sentence explaining that the period "consists of" a base year and nine option years, and the agency offers no explanation of how that text should be given effect in its reading of the solicitation. A more natural reading of the relevant language is that the BPA ordering period would be "up to" ten years because the agency may or may not exercise some of the awarded options, not because the agency intended to issue BPAs of varying lengths to different vendors.

Further, other portions of the solicitation reinforce the fact that the agency's reading of this language is unreasonable. For example, the statement of work (SOW) does not state that the term of the BPA will be "up to" ten years, but rather provides that the "anticipated ordering period for each BPA is ten years consisting of one, twelve-month base period with nine, twelve-month option periods." AR, Tab 7b, SOW at 18. Further, the solicitation required all vendors to price the base year and all nine option years, notwithstanding that several vendors would be ineligible to perform the later option years. See RFQ at 80.

In short, the solicitation clearly contemplated the issuance of two or more 10-year BPAs, not BPAs of varying lengths. The term of performance is generally a material requirement of a solicitation, to which failure to conform renders a vendor ineligible for award. See, e.g., *GBK P'ship, LLC-Constant Assocs., Inc.*, *supra* at 4. Accordingly, Educe and Envisage were ineligible for the BPAs, and the agency's decision to issue BPAs of varying lengths rather than 10-year BPAs to these vendors was inconsistent with the terms of the solicitation.

The agency and intervenor argue that, even if the agency erred in this regard, the protester has failed to demonstrate competitive prejudice. See Intervenor's First Supp. Comments at 2-3; MOL at 6-7. We note that our decisions have concluded that an agency may, in some circumstances, waive a material solicitation requirement if there is no prejudice to the other competitors and the quotations or proposals will meet the agency's needs. *Up-Side Mgmt. Co.*, B-417440, B-417440.2, July 8, 2019, 2019 CPD ¶ 249 at 7. When an agency waives a material solicitation requirement, our Office will not sustain a protest unless the protester can demonstrate that it was prejudiced by the waiver. *Id.* In this context, we have clarified that prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful, but rather that prejudice is assessed based on whether the protester would have submitted a different proposal or could have done something else to improve its chances for award had it known that the agency would waive the requirement. See, e.g., *Blue Origin Federation, LLC, et al.*, B-419783 *et al.*, July 30, 2021, 2021 CPD ¶ 265 at 73-74.

We do not agree that the protester has failed to demonstrate competitive prejudice. We note that the agency's tradeoff decision compared all vendors on the basis of their total evaluated price including the base year and all nine option years. See AR, Tab 32, Award Decision Document at 7-8. The agency made this comparison notwithstanding that several of the vendors under consideration were not eligible to receive a BPA covering the later option years they priced. Of note, all awardees provided pricing in the later option years that was lower than that in the earlier option years and two of the awardees included no escalation of those prices over time. *Id.*

For example, Envisage's FSS contract expires in October of 2022, so it was only eligible for a BPA with an ordering period of less than two years.¹ See *Id.* at 23.

Notwithstanding this fact, the agency evaluated Envisage's price and performed a tradeoff as though it were eligible to perform all ten years. *Id.* Envisage provided a price in option year two that was approximately 20 percent lower than its price for option year one, and all of its option year pricing for years two through nine was lower than its option year one pricing. See AR, Tab 32, Award Decision Document at 7-8. While several vendors, including the protester, provided slightly lower prices for option years two through nine than for option year one, Envisage was in the unique position of providing prices for the later option years while knowing it could not be called upon to perform during those years. *Id.*

In this case, the agency's decision to consider the later, lower-priced option years for vendors that could not perform in those years had the effect of making those vendors seem more attractively priced than they actually were. Moreover, because the solicitation did not contemplate BPAs of varying lengths, it was not clear to all vendors that some vendors, but not others, would be able to freely submit lower option-year pricing confident that their FSS terms would preclude the issuance of a BPA covering those years. Accordingly, comparing all vendors on the basis of ten years of pricing when several vendors knew they would be unable to perform all ten years was clearly irrational, and this may have worked to the competitive prejudice of the protester.²

¹ The agency's award document notes that orders under the BPA may extend beyond the end of the underlying FSS contract by as much as five years, but the period of performance of the BPA issued to Envisage would end in October of 2022. AR, Tab 32, Award Decision Document at 23.

² We note that the protester has not explained with precision how it was prejudiced under this scheme as opposed to an alternative evaluation, but this is not fatal to the protester's claim here. Simply put, it is not clear in what way the agency could fairly and rationally compare prices when it intends to award BPAs of varying lengths. That is to say, when, as here, vendors were not aware of the potential lengths of the ordering periods that could be issued to other vendors, and all vendors received BPAs of differing lengths, it is unclear how the agency could have a rational basis for its price comparison.

For example, the agency might have chosen to perform a separate tradeoff for each vendor based only on the number of years that vendor was capable of performing, such as by performing a tradeoff only of the base year and first option year for a vendor that was only eligible for a 2-year ordering period. However, that approach presents several difficulties. For example, a vendor may appear uncompetitive when considering only the first two years of its pricing, but highly competitive when considering all ten years. In effect, such a comparison would effectively alter the evaluation criteria for each vendor on the basis of the content of other vendor's quotations. Because a vendor's evaluation would depend on factors that were not readily ascertainable from the solicitation, it is not clear that such an evaluation methodology would provide an

Nonetheless, we resolve doubts regarding prejudice in favor of the protester; a reasonable possibility of prejudice is sufficient to sustain a protest. *Alutiiq-Banner Joint Venture*, B-412952 *et al.*, July 15, 2016, 2016 CPD ¶ 205 at 11. Accordingly, this protest ground is sustained.

Other Challenges

The protester raises numerous other grounds of protest. We have considered them and conclude that they provide no further basis to sustain the protest. For example, the protester contends: the agency erred in conducting its cost evaluation because vendors made differing cost assumptions; the agency conducted misleading discussions; and the agency's conduct of presentations created an unequal access to information organizational conflict of interest (OCI). Protest at 15-16, 18-19; 2nd Supp. Protest at 3-6. We address several of these representative arguments in turn.

Price Assumptions

The protester argues vendors made differing pricing assumptions and therefore the agency's price analysis was not comparing "apples to apples." Protest at 15-16. In this regard, the protester notes that the primary drivers of pricing are subscription software components and labor, and vendors had differing price assumptions concerning both categories. *Id.* For example, the protester notes some vendors priced certain subscription software components of their proposed solution based on the assumption that the agency would order certain other software components as well, and reserved the right to revise pricing if the agency elected to order one software component without the other. Protester's Comments at 6-10.

By contrast, the protester priced all software components as stand-alone components, and contends that the agency had no basis for price comparison if it sought to order only one such software component. *Id.* As an additional example of differing price assumptions, the protester notes IBM and Educe proposed fewer service hours than the agency estimated would be necessary, while Meridian and Envisage proposed at least the number of hours the agency estimated. *Id.* The protester argues that, although the solicitation permitted vendors to alter the number of hours proposed for these services, IBM and Educe did not propose adequate service hours to perform the agency's requirement. *Id.*

intelligible, common basis on which vendors could compete and have their prices evaluated. See *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 338 at 7-8 (sustaining protest when solicitation provided for awards to two offerors based on the agency's assessment of which combination of two independently developed proposals represented the best value to the government, because that evaluation methodology does not provide an intelligible, common basis on which offerors are expected to compete and have their proposals evaluated).

When reviewing a protest against an agency's evaluation, our Office will not substitute our judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *U.S. Textiles, Inc.*, B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218 at 2. In this regard, the evaluation of quotations is a matter within an agency's broad discretion, since the agency is responsible for defining its needs and the best method for accommodating them. *Id.*

In this regard, the agency's contemporaneous price analysis shows that the agency reviewed each pricing assumption made by the various vendors and provided commentary on those assumptions, including rejecting or clarifying certain assumptions the agency found to be unacceptable. See, e.g., AR, Tab 31, Price Analysis at 25-29. That is to say, the record shows the agency evaluated and carefully considered each vendor's price assumptions. *Id.*

For example, with respect to the protester's allegation that certain vendors priced some software components based on an assumption that they would be ordered together, the agency's price analysis indicates that the agency requested additional information from those vendors concerning the composition of those prices, and then explicitly accepted the relevant price assumptions. See, e.g., *Id.* at 175, 229. While the protester objects to the agency's acceptance of those assumptions, we note that bundled pricing is only potentially a meaningful distinction between quotations if the agency intended to order the component services or software platforms separately. Here, however, the solicitation required vendors to submit a total price for the entirety of the agency's statement of work and the agency's acceptance of these assumptions after requesting more information appears to reflect the agency's understanding of its own ordering needs in relation to the total requirement. In any case, the contemporaneous record reflects that the agency reasonably considered the fact that certain vendors offered bundled pricing, and we see no basis to conclude the agency was unreasonable in accepting these price assumptions or that its acceptance of these assumptions prevented the agency from intelligently comparing quotations.

Similarly, with respect to the protester's arguments concerning labor hours, the contemporaneous record reflects that the evaluators noted and considered that Educe and IBM proposed service hours lower than the government estimate. See, e.g., AR, Tab 31, Price Analysis at 217-218. Moreover, the solicitation clearly permitted vendors to vary the number of service hours they quoted, and the agency's price analysis provides detailed technical explanations for the proposed reductions in service hours. *Id.* In this regard, the protester has not identified any reason to challenge the agency's evaluative conclusions, other than the fact that Educe and IBM quoted fewer hours than the protester, who is the incumbent. While the protester may disagree with the agency's evaluation, we see no basis to conclude the agency was unreasonable in concluding that the labor mixes quoted by those vendors were acceptable.

Misleading Discussions

Next, the protester argues that the agency erred when it conducted exchanges with vendors, but did not inform the protester that its price was higher than most other vendors. Protest at 18-19. The protester contends that these exchanges were discussions because the agency asked vendors to submit revised quotations, and that discussions must lead vendors into areas of weakness in their quotations.³ *Id.* In this case, the protester notes that the contemporaneous record reflects that evaluators felt the protester's price was so high that the agency would not issue a BPA to the protester even if its technical evaluation had been superior. Protester's Comments at 12-14. According to the protester, this confirms that the agency considered the protester's price to be the primary factor affecting its eligibility for award, and therefore the agency should have raised it during discussions. *Id.*

Discussions, when conducted, must identify proposal deficiencies and significant weaknesses, and should discuss other aspects that reasonably could be addressed in order to materially enhance a vendor's or offeror's potential for receiving award. See *generally*, FAR 15.306(d)(3). The scope and extent of discussions are a matter of contracting officer judgment. *Id.* Regarding the adequacy of discussions involving price, an agency generally does not have an obligation to tell an offeror or vendor that its price is high, unless the agency finds the price to be unreasonable or unacceptable. See *Joint Logistics Managers, Inc.*, B-410465.2, B-410465.3, May 5, 2015, 2015 CPD ¶ 152 at 4; *Creative Info. Tech., Inc.*, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 7-8.

Here, the agency did not conclude that the protester's price was unreasonable or otherwise rendered its quotation unacceptable, in fact, the agency expressly concluded that the protester's price was reasonable. See AR, Tab 32, Award Decision Document at 14. The commentary in the tradeoff document on which the protester focuses amounts to a comparative statement about the protester's quotation when considered in the context of the other prices the agency had received, not a conclusion that the protester's proposal was unacceptable due to its price. *Id.* The protester's argument amounts to a claim that, because price was very significant to the award decision, the agency was obliged to raise it in discussions, but our decisions have consistently rejected that view. See, e.g., *Joint Logistics Managers, Inc.*, *supra* (concluding that agency has no obligation to raise price in discussions even "where price is the determinative factor for award"). Accordingly, we see no basis to conclude the agency erred in this regard.

³ The agency disputes that these interchanges were discussions, but we need not resolve this argument because, even assuming the interchanges were discussions, the agency did not err for the reasons we discuss.

OCI

Finally, the protester contends the agency created an unequal access to information OCI by permitting the same individuals to present at two different vendor's oral presentations. 2nd Supp. Protest at 3-6. Specifically, the protester notes that Educe and IBM proposed the same subcontractor, and that the same subcontractor personnel participated in the oral presentations of both vendors. *Id.* The protester alleges this dual participation created an unfair advantage because the subcontractor personnel had better knowledge of the presentation format going into IBM's presentation, which was conducted second. *Id.*

An unequal access to information OCI exists when a firm has access to non-public information as part of its performance of a government contract and when that information may provide the firm a competitive advantage in a later competition for a government contract. FAR 9.505(b); *CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 25. It is well settled, however, that a vendor may possess unique information, advantages, and capabilities due to its prior experience under a government contract--either as an incumbent contractor or otherwise; further, the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. *CACI, Inc.-Fed.*, B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 at 10; *MASAI Techs. Corp.*, B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. *Council for Adult & Experiential Learning*, B-299798.2, Aug. 28, 2007, 2007 CPD ¶ 151 at 6; *Government Bus. Servs. Group*, B-287052 *et al.*, Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

Here, the scenario the protester finds objectionable does not constitute an unequal access to information OCI. While the subcontractor's participation in two separate presentations may have provided some incremental advantage to IBM,⁴ there is nothing in the record to suggest that the subcontractor personnel received access to source selection information or access to another firm's proprietary information from the government, nor is there any evidence of inappropriate preferential treatment. That is to say, the fact the subcontractor was arguably more familiar with the agency's interviewing style due to having participated in a previous interview is a normally occurring advantage that the agency is not obliged to neutralize. See *Superlative Technologies, Inc.; Atlantic Systems Group, Inc.*, B-415405; *et al.*, Jan. 5, 2018, 2018 CPD ¶ 19 at 6-7 (no OCI where offerors had access to significant non-public mission information, but did not have access to another firm's proprietary information or source selection information).

⁴ Relevant here, the agency correctly notes that IBM's oral presentation was rated lower than Educe's oral presentation, suggesting that any hypothetical advantage accruing from the subcontractor's dual participation was not significant. 2nd Supp. MOL at 2-3.

RECOMMENDATION

We find the agency's issuance of BPAs with periods of performance shorter than ten years to Educe and Envisage to be inconsistent with material terms of the solicitation. We recommend that the agency either reevaluate quotations consistent with the terms of the solicitation, or, in the alternative, revise the solicitation to better reflect the agency's needs. We also recommend that Meridian be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained

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