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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: VMD Systems Integrators, Inc.

File: B-401037.4; B-401037.7

Date: December 8, 2009

David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr, LLC, for the protester.
John R. Tolle, Esq., and Bryan R. King, Esq., Barton, Baker, Thomas & Tolle, LLP, for Evolver, Inc., an intervenor.

Lisa J. Obayashi, Esq., U.S. Patent and Trademark Office, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency's realism analysis of awardee's proposal was inadequate--because it was based on comparison of awardee's average labor rates to incumbent contractor's average rates--is denied; agency's chosen methodology was within its discretion given fixed-price nature of contract to be awarded, and thus provided reasonable basis for agency to conclude that awardee's price did not present a performance risk.
2. Protest that agency improperly failed to credit protester's proposal with claimed strength is denied where protester fails to establish that claimed strength would provide benefit to agency contemplated by evaluation scheme.
3. Protest that agency misevaluated similarity of awardee's experience to solicited work by considering only dollar value of prior contracts, rather than specific elements of similarity--such as contract type and complexity--is denied; agency reasonably determined that dollar value reflects several aspects of similarity and record shows that agency also considered offerors' descriptions of work under prior contracts in concluding that awardee's experience was of size, type and complexity similar to that described in solicitation.
4. Agency request that offerors indicate whether their proposed rates had been audited by Defense Contract Audit Agency constituted clarification, not discussions, notwithstanding that awardee provided more detailed explanation than other offerors in response, since awardee did not modify its proposal and information was not used in evaluation of proposals.

DECISION

VMD Systems Integrators, Inc., of Vienna, Virginia, protests the award of a contract to Evolver, Inc., of Reston, Virginia, under request for proposals (RFP) No. DOC-52-PAPT-08-01009, issued by the U.S. Patent and Trademark Office (PTO) for end user information technology support services. VMD principally asserts that the agency unreasonably evaluated Evolver's and VMD's proposals, and improperly held discussions only with Evolver.

We deny the protest.

The RFP provided for a "best value" award, on a fixed-price basis, applying the following evaluation factors (in descending order of importance): experience, technical approach, management approach, past performance, and price. Agency Report (AR) at 2. Four offerors responded to the solicitation. Award was made to Enterprise Information System. VMD challenged the award in a protest filed with the Court of Federal Claims. The agency took corrective action in response to that protest; it held a new round of discussions and permitted offerors to submit new final proposal revisions (FPR). VMD's FPR, priced at \$80,843,360, was rated average for experience, above average for technical approach and management approach, and outstanding for past performance, while Evolver's FPR, priced at \$73,662,436, was rated above average for experience, technical approach, and past performance and average for management approach. AR at 11. Following a best value determination, the agency made award to Evolver.

VMD challenges the evaluation and award decision on several grounds. We have reviewed the record and find that VMD's arguments are without merit. We discuss several of those arguments below.

PRICE REALISM EVALUATION

VMD protests that the agency failed to perform a required price realism analysis of Evolver's proposal. In this regard, in reopening discussions, the agency advised each offeror as follows:

In addition to the Independent Government Estimate (IGE) of \$118,755,530.58, the USPTO also utilized a Representative Current Contract Price (RCCP) comprised of labor rates from the incumbent contract and the same representative labor mix used for the IGE as part of its price analysis. The RCCP is \$90,864, 828.

Recognizing the IGE and RCCP are both estimates, please provide rationale for being able to effectively meet the requirements of the RFP and effectively recruit, hire, and retain highly qualified employees with your proposed rate structure. When an Offeror's evaluated price is

below the IGE and the RCCP, the USPTO may interpret this as a risk to successful performance of the requirements under the RFP.

AR at 5. VMD concludes that, had the agency performed the required analysis of Evolver's price, it would have found that it was unrealistic and assigned Evolver's proposal an increased proposal risk.

While there is no requirement that a price realism analysis be performed where, as here, a fixed-price contract will be awarded, Phoebe Putney Mem'l Hosp., B-311385, June 19, 2008, 2008 CPD ¶ 128 at 2, an agency may, as the agency did here, provide for a price realism analysis for the purpose of assessing the risk inherent in offerors' proposals. American Tech., Inc., B-401445, Aug. 28, 2009, 2009 CPD ¶ 178. Where a price realism analysis is performed in connection with award of a fixed-price contract, the nature and extent of the analysis are matters within the agency's discretion; our review is limited to determining whether it was reasonable and consistent with the solicitation's evaluation criteria. Id.

The record shows that the agency evaluated the realism of Evolver's price, specifically, to determine whether it posed a risk that Evolver would not be able to hire the incumbent personnel, as it proposed to do. Specifically, the price evaluation team (PET) compared Evolver's average unburdened labor rates to the incumbent contractor's average unburdened rates for the 15 labor categories for which the agency had actual incumbent salaries. PET Report (PETR) at 4. Based on its analysis, the PET found that Evolver's average unburdened labor rate was [DELETED] lower than the incumbent's. The agency also considered that Evolver's indirect rate [DELETED] was significantly lower than the incumbent's [DELETED], VMD's [DELETED], and one of the two other offerors [DELETED]. PETR at 8. Finally, the PET considered Evolver's justification for its rate structure, which took into account the current state of the economy and a discount negotiated with one of its subcontractors. PETR at 3. The agency concluded that, since the incumbent had been performing successfully for 7 years with an average unburdened rate that was [DELETED] percent below the industry average unburdened rate, and given the current economy, Evolver would be able to hire and retain incumbent personnel with its proposed rates. PETR at 5.

VMD asserts that the agency's analysis of Evolver's price proposal did not provide an accurate risk assessment of Evolver's ability to hire the incumbent personnel. According to VMD, the agency's use of an average of all labor rates in its comparison of Evolver's rates to the incumbent's rates ignored the differences in the actual rates for specific labor categories, and thus did not provide an accurate basis for assessing Evolver's ability to effectively recruit, hire and retain incumbent personnel. This argument is without merit. The comparison based on average rates provided the agency with some understanding of the realism of Evolver's price, and there simply was no requirement that the agency perform a more exacting analysis given the fixed-price nature of the contract to be awarded. American Tech., Inc., *supra*. VMD has provided a labor category by labor category comparison of its rates to Evolver's,

and notes that in almost every case Evolver's rates are lower. However, neither VMD's, nor any other offeror's, rates are a mandatory benchmark for determining realism. We conclude that there is no basis to question the agency's realism analysis.

TECHNICAL APPROACH EVALAUTION--VMD PROPOSAL

VMD asserts that its proposal should have been assessed a strength under the technical approach factor--and that, as a result, its rating under this factor should have been outstanding rather than above average--on the basis that its team managers made an exclusive commitment to VMD and, thus, could not be offered in any other proposal. Comments, Nov. 2, 2009, at 15. However, it is not clear to us--and VMD does not explain--why the inability of other offerors to propose VMD's managers provides some benefit to the agency that should have been reflected in VMD's evaluation. Proposals were to be evaluated based on the offered personnel, and there is no indication that VMD's proposal was not evaluated on this basis.

EXPERIENCE EVALUATION--EVOLVER PROPOSAL

Experience was to be evaluated based on offerors' demonstrated ability to perform the requirements in the statement of work (SOW). RFP at 73. In evaluating experience, the agency was to compare the type, size and complexity of prior contracts to the requirements of the SOW. More emphasis would be given experience gained as a prime contractor, rather than as a subcontractor, and greater weight would be accorded contracts with a greater length of performance. RFP amend. 1, at 6. Offerors were required to submit five prior contract references. Id.

VMD asserts that, in evaluating Evolver's experience as above average, the agency focused only on the monetary value of Evolver's prior contracts; it failed to consider complexity and type, similarity to the SOW, and prime contractor versus subcontractor experience. In this latter regard, VMD has provided a chart allegedly demonstrating that Evolver lacks prime contractor experience in a number of areas covered by the SOW, including maintenance, integrated baseline support (IEBS), WebTA support, and Certification and Accreditation. VMD concludes that it was improper for the agency to assign Evolver an above average rating for experience.

In reviewing a protest challenging an agency's proposal evaluation, it is not our role to reevaluate proposals. Rather, we will consider only whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Anwar Al-Anduols, B-401550, B-401550.3, Sept. 22, 2009, 2009 CPD ¶ 188.

The evaluation here was unobjectionable. First, as for complexity and type, the agency explains that it cited the dollar value of the prior contracts because it considers dollar value to be a good indicator of size, complexity, and type of contract, including the number of end users the contract supported. SAR at 3. The

agency explains, moreover, that it did not base its rating solely on dollar value, but also considered the descriptions of the prior contracts (provided by the offerors) to ascertain whether they were similar to the SOW, as well as similar in size, type and complexity. TET Statement at 3. In the absence of RFP provisions establishing a different specific methodology for assessing complexity and type, the agency's approach of considering the dollar value of the prior contracts, as well as the nature of the tasks performed, provided a reasonable basis for assessing the similarity of prior contracts.

Regarding prime contractor versus subcontractor experience, the solicitation did not call for any specific weighting or require that an offeror have experience as a prime contractor in each area of the SOW, and there is no indication that prime contractor experience was not given appropriate consideration. The agency determined, and the record shows, that Evolver's proposal demonstrated experience, under its prior prime and subcontracts contracts collectively, in all areas of the SOW, including, for example, prime contractor experience in IEBS and in most other areas of the SOW. SAR at 2-3.¹² In fact, the agency determined that Evolver had 18 years experience performing similar contracts, and that it had performed more than \$100 million worth of similar services. We conclude that there is no basis for us to question the evaluation in this area.

DISCUSSIONS

Following the receipt of FPR's, the agency asked each offeror whether its direct and/or indirect rates had been audited by the Defense Contract Audit Agency (DCAA), and to provide a DCAA contact. The three offerors other than Evolver responded that their rates were on file with DCAA and provided contact information. Evolver responded that its rates had not been audited by DCAA and explained why, identified the organizations that had audited its rates, explained how it determined its indirect rates, and provided a spreadsheet showing its rate structure. VMD maintains that the agency's exchange with Evolver constituted discussions, and that

¹ VMD asserts that its experience rating (average) should have been comparable to Evolver's (above average) because, like Evolver, its proposal demonstrated prime contractor experience in almost all areas of the SOW. However, VMD's proposal demonstrated fewer years of experience than Evolver's (14.5 versus 18) and VMD's prior contracts were valued at substantially less than Evolver's (\$26.6 million versus over \$100 million). Based on these differences, the agency reasonably could assign Evolver a higher rating for experience.

² VMD also argues that, in evaluating Evolver's experience, the agency failed to consider Evolver's alleged problems in performing the Decennial Response Integrated System Subcontract. The agency reports, however, and VMD has not shown otherwise, that it was another contractor, not Evolver, that experienced performance problems under the identified subcontract. SAR at 5.

it therefore was required to hold discussions with all offerors in the competitive range.

As a general rule, discussions occur where the government communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror an opportunity to revise or modify its proposal in some material respect. Federal Acquisition Regulation (FAR) § 15.306(d)(3); Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Clarifications, on the other hand, are “limited exchanges” agencies may use to allow offerors to clarify certain aspects of their proposals or resolve minor or clerical mistakes. FAR § 15.306(a)(2); Manthos Eng’g, LLC, B-401751, Oct. 16, 2009, 2009 CPD ¶ __. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether the offeror has been afforded an opportunity to revise or modify its proposal. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. Where an agency reopens discussions with one offeror after the receipt of FPRs, it must afford all offerors in the competitive range an opportunity for reopened discussions. International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 at 6.

The communication with Evolver did not constitute discussions. The agency requested the information from all offerors for rate verification, not evaluation, purposes. Supp. COS at 2. The agency did not evaluate Evolver’s rates based on the response; rather, it ultimately accepted Evolver’s rates—which were lower than those proposed in Evolver’s original price proposal—based on advice from DCAA that the award of this large contract to a small business concern could result in a significant reduction in the concern’s indirect rates. Price Evaluation at 5. Since the information the agency sought from and provided by Evolver was not used to evaluate its proposal or to determine whether its proposal was acceptable, and since Evolver did not revise its proposal, the communication with Evolver and the other offerors constituted clarifications, not discussions. See SRS Tech., B-291618.2, B-291618.3, Feb. 24, 2003, 2003 CPD ¶ 70 at 3 n.4 (exchanges concerning accounting practices for uncompensated overtime, which did not request or lead to proposal revisions, constituted clarifications, not discussions).

The protest is denied.

Lynn H. Gibson
Acting General Counsel