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## Decision

**Matter of:** Aurora Industries, LLC

**File:** B-419448.4; B-419448.5

**Date:** November 16, 2023

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Kenneth A. Martin, Esq., The Martin Law Firm, PLLC, for Bering Global Solutions, LLC, the intervenor.  
Nathan E. Mires, Esq., and Robert J. Alley, Esq., Department of Justice, for the agency.  
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency unreasonably found proposal ineligible for award is denied where the evaluation was consistent with the solicitation and procurement law and regulation.
  2. Protest that the agency unreasonably failed to conduct clarifications with the protester to rectify errors in the protester's price proposal is denied where the proposal defects could not have been cured through clarifications.
  3. Protester is not an interested party to challenge the agency's evaluation of the protester's technical proposal or the eligibility of the awardee's proposal where the protester would not be in line for award even if its allegations were sustained.
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### DECISION

Aurora Industries, LLC, of Virginia Beach, Virginia, protests the award of a contract to Bering Global Solutions, LLC, (BGS), of Anchorage, Alaska, under request for proposals (RFP) No. 15A00021R00000007, issued by the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), to support the distribution and supply service center for ATF's Special Operations Division. The protester challenges the agency's evaluation of its proposal and contends that the awardee may not be adhering to the RFP's limitations on subcontracting.

We deny the protest.

## BACKGROUND

The RFP, set aside for 8(a)<sup>1</sup> small businesses, sought proposals for the award of a single fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract for a distribution and supply service center. Agency Report (AR), Tab 3(a) RFP amend. 11<sup>2</sup> at 1. Award would be made on a best-value tradeoff basis considering the following factors, listed in descending order of importance: technical/managerial approach; price; key personnel; past performance; and transition plan. AR, Tab 2(d), RFP Section M at 1-2. The technical/managerial approach factor had four equally weighted subfactors: management plan; products; software deliverables; and software presentation. *Id.* at 2. The contract was for a 1-year base period and four 1-year options. RFP at 5.

The RFP included a pricing spreadsheet, which listed numerous items of clothing, firearms accessories, body armor, and medical, safety, and measuring equipment. See AR, Tab 1(h), RFP attach. B, Pricing Chart. The pricing chart contained tabs for the base year and option years one through four; offerors were to provide a price for each listed item and a total price for each year of performance. *Id.* The RFP prohibited adding or deleting cells from the pricing chart. See AR, Tab 2(b), RFP Section L at 10 (noting that “[c]ontractors will not add or delete cells or make format changes to the Attachment B Excel spreadsheet”).

The RFP advised offerors that “**Price**, will be based solely on the all-inclusive pricing that is submitted on Attachment B of this solicitation.” AR, Tab 2(d), RFP Section M at 9. The RFP further advised offerors: “**NOTE**: Attachment B pricing is based on one (1) each per item per year for the order under the resulting IDIQ Contract, the one (1) each per item per year is provided for purposes of price evaluation only.” *Id.* The RFP provided the current number of agency personnel by labor category to assist offerors in estimating the agency’s ordering quantities. *Id.*

The RFP required offerors, in accordance with the requirements of FAR clause 52.219-14, Limitations on Subcontracting, to certify the level of subcontracting proposed. *Id.* at 34.

ATF received proposals from five offerors, including Aurora--the incumbent--and BGS. AR, Tab 10, Source Selection Decision (SSD) at 5. The chart below summarizes the agency’s evaluation of the proposals from the protester and the awardee:

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

<sup>2</sup> The agency indicated that amendment 11 restated the solicitation terms in full. Memorandum of Law (MOL) at 1. The protester concurs. See Protest at 2.

Factor	Offeror	
	Aurora	BGS
Technical/Managerial Approach	Unsatisfactory	Good
Price	Could Not Evaluate	\$138,572
Key Personnel	Satisfactory	Good
Past Performance	Satisfactory Confidence	Neutral Confidence
Transition Plan	Unsatisfactory	Exceptional

*Id.* at 73.

The source selection authority (SSA), who was also the contracting officer for this procurement, determined that Aurora’s proposal was “noncompliant with the RFP (not responsible), and therefore ineligible for award.” *Id.* Aurora’s proposal was noncompliant because it impermissibly added cells to the attachment B pricing chart, “in direct violation of the solicitation instructions.”<sup>3</sup> AR, Tab 10, SSD at 73. In the SSA’s view, “[t]he addition of cells was clearly prohibited by the solicitation in Section L, which stated that ‘Contractors will not add or delete cells or make format changes to the Attachment B Excel spreadsheet.’” *Id.*, citing AR, Tab 2(b), RFP Selection L at 10. The SSA “considered Aurora’s price proposal defective because it failed to conform with the solicitation requirements” and consequently found Aurora ineligible for award. *Id.* The SSA found that BGS’s proposal represented the best value to the agency. *Id.* at 75. Award was made to BGS, and this protest followed.

## DISCUSSION

Aurora asserts numerous challenges to ATF’s evaluation of the protester’s proposal under each of the non-price factors, including that the issue with Aurora’s proposal pricing could have been resolved through clarifications. Protest at 9-10. ATF argues that it reasonably found Aurora’s proposal ineligible for award because its pricing chart failed to conform to solicitation requirements. The agency further asserts that it was not required to conduct clarifications with Aurora, and that, in any event, the issues with the proposal could not have been resolved via clarifications. MOL at 7. ATF argues that because it reasonably evaluated the protester’s proposal as unacceptable--and thus ineligible for award--the protester is not an interested party to assert its other challenges to the evaluation. As discussed below, we agree with the agency that it was not

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<sup>3</sup> The protester notes that it added cells to the pricing spreadsheet for certain items for which the spreadsheet did not provide for pricing by size. Resp. to Req. for Dismissal at 2. As Aurora explains: “The pricing spreadsheet did not take into consideration the price spread on sized items. Many items are not sized, so the price per item remains constant. Sized items are significantly different. Different sizes have different pricing.” Protest at 9. If Aurora considered the pricing methodology defective, the protester could have timely challenged the solicitation’s terms prior to the closing time for proposals; because Aurora did not do so, any challenge to the solicitation’s pricing methodology is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1).

required to conduct clarifications with the protester; that it reasonably found the protester's proposal, as submitted, ineligible for award; and that the protester is not an interested party to assert its other protest grounds.<sup>4</sup>

#### Evaluation of Aurora Proposal as Ineligible

ATF argues that Aurora violated the solicitation's express instructions when the protester simultaneously provided both too much price information--the cells added to attachment B--and too little price information--the total price per base and option periods. MOL at 7. ATF argues further that "[t]his type of glaringly deficient price proposal could only be brought into conformance with the solicitation and evaluability of the Agency through discussions." *Id.* The agency argues that, because Aurora submitted a defective price proposal, its proposal was ineligible for award. *Id.* at 26. ATF further argues that the protester "concedes" that its price proposal is defective. MOL at 7-8.

Aurora argues that the fact that the agency evaluated Aurora's technical proposal was a *de facto* admission on ATF's part "that the Aurora pricing schedule was not fatally defective to the consideration of [Aurora's proposal]," and that the agency "thereby waived any right that it may have had to raise this issue." Comments at 2. Aurora provided no legal support for this argument. *See id.* The record demonstrates, however, that the agency's evaluation of the technical factors was independent of its price evaluation. *See AR, Tab 6, Source Selection Consensus Report (evaluating only the technical factors).*

We agree with the agency that Aurora's price proposal was defective and that its proposal was therefore ineligible for award. As noted above, the RFP advised offerors that they were not to modify attachment B in any way. *See AR, Tab 2(b), RFP Selection L at 10.* Aurora modified its attachment B by adding cells for various sizes of items, and the protester failed to provide the total prices required by the attachment. It is well settled that a proposal that fails to comply with the solicitation requirements cannot form a valid basis for award. *General Dynamics Info. Tech., Inc., B-415568, B-415568.2, Jan. 25, 2018, 2018 CPD ¶ 63 at 8* (finding price proposal that did not conform to solicitation requirements rendered proposal ineligible). Here, Aurora's price proposal failed to comply with explicit solicitation requirements, and ATF reasonably evaluated the proposal as ineligible for award.

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<sup>4</sup> While we do not discuss every allegation, we considered all of them and found none provide a basis on which to sustain the protest.

## The Agency's Decision Not to Conduct Clarifications

Aurora does not dispute that it modified its attachment B pricing chart by adding items not included in the solicitation's attachment B. See Protest at 9 (noting that "Aurora added cells to the pricing spreadsheet for certain items where the price spread between sizes is highly significant"). Moreover, its attachment B did not contain total prices for base and option years. See AR, Tab 5(i), Aurora attach. B. Aurora argues that where there is an issue that is obvious from the face of the proposal, and there is "information in the proposal that could correct or clarify the proposal," then "an agency will have abused the discretion extended to it via FAR 15.306 when it determines not to seek clarifications." Resp. to Req. for Dismissal at 4, *citing Aspire Therapy Servs. & Consultants, Inc., v. U.S.*, 166 Fed. Cl. 366 (2023).

Clarifications are limited exchanges, between the government and offerors, that may occur when award without discussions is contemplated. FAR 15.306(a)(1). If award will be made without conducting discussions, "offerors may be given the opportunity to clarify certain aspects of proposals," such as the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond, or "to resolve minor or clerical errors." FAR 15.306(a)(2). When an agency can identify a proposal error from the face of a proposal and asks the offeror to verify what the agency has recognized to be the required corrections, the exchange between the agency and the offeror is clarifications. See *Office Depot*, B-419809, B-419809.2, Aug. 5, 2021, 2021 CPD ¶ 301 at 9 (noting that an agency may allow an offeror to correct a clerical error in a cost or price proposal through clarifications, as opposed to discussions, where the existence of the mistake and the amount intended by the offeror are clear from the face of the proposal); *CH2M Hill Antarctic Support, Inc.*, B-406325 *et al.*, Apr. 18, 2012, 2012 CPD ¶ 142 at 9 (noting that an agency may allow an offeror to correct a mistake or clerical error in a cost proposal through clarifications when both the existence of the mistake or clerical error and the amount intended by the offeror are apparent from the face of the offer). In contrast, discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *ADNET Sys., Inc. et al.*, B-408685.3 *et al.*, June 9, 2014, 2014 CPD ¶ 173 at 16.

The protester relies on *Aspire, supra*, in arguing that ATF unreasonably failed to engage in clarifications with the protester.<sup>5</sup> See Resp. to Req. for Dismissal at 3-4. In *Aspire*, the protester argues, an offeror made a clerical error in listing labor hours, and the agency did not pursue clarifications, notwithstanding that the error was apparent from "an examination of the proposal." *Id.* at 3. Aurora asserts that in *Aspire*, "[c]orrection of

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<sup>5</sup> Our Office views decisions of the Court of Federal Claims (COFC) as persuasive--not controlling--authority in our forum. *QED Sys., LLC*, B-419441.4, Jan. 28, 2022, 2022 CPD ¶ 38 at 6 n.8.

the error would not have permitted the offeror to amend or adjust its offer; it would have only permitted the offeror to clarify and correct the error.” *Id.* The court held in favor of the offeror that the agency should have sought clarifications. *Aspire Therapy Servs. & Consultants, Inc., v. U.S., supra* at 382-383. Aurora contends that its proposal similarly “provide[d] full pricing information,” and that “[t]he Aurora price was calculable from the information provided with the Aurora offer.” Comments at 2.

As the agency notes, however, in *Aspire*, the plaintiff’s mismatched labor hours resulted from a typo that created an obvious mathematical error, and the correct labor hour figure was apparent in *Aspire*’s proposal, despite the error. MOL at 12. In contrast, the agency argues that Aurora’s proposal “added numerous cells over the base and each option year, and it failed to provide its total pricing for any period (base and option years), much less a ‘grand total,’ in its pricing spreadsheet.” *Id.* The agency contends that this “**deliberate decision**” to add additional cells “constituted clearly more than a ‘minor clerical error,’ and was strikingly larger than the minor human-error” at issue in *Aspire*. *Id.* ATF asserts that the addition of cells, combined with the failure to insert total prices into the spreadsheet, “constituted significantly more than a minor error, which clarifications could have corrected.” *Id.*

As noted above, decisions of COFC are not binding on GAO. Regardless, the record here does not support the protester’s contention that, following COFC’s decision in *Aspire*, the agency was required to engage in clarifications with the protester to address the price issues in its proposal. To correct the defects in the protester’s attachment B pricing chart, ATF would have been required to permit the protester to make material revisions to its pricing chart--which would have constituted discussions. Because the agency was not required to conduct discussions and because clarifications would not have remedied the proposal errors, we deny the allegation that the agency unreasonably failed to engage in clarifications with the protester regarding the unacceptability of its price proposal.

#### Interested Party Status

ATF argues that, because the agency reasonably found Aurora’s proposal ineligible for award due to the nonconformance of its price proposal, the protester is not an interested party to bring its other protest allegations. MOL at 7.

Our Bid Protest Regulations define an “interested party” as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. *TENICA & Assocs., LLC, et al., B-411173.10 et al., Mar. 2, 2016, 2016 CPD ¶ 79 at 7.*

Because Aurora’s proposal is ineligible for award due to the defects in its pricing spreadsheet, Aurora would not be in line for award even if we were to sustain its other challenges to the evaluation of its own proposal. Accordingly, the protester is not an

interested party to pursue those challenges. See *Tetra Tech Tesoro, Inc.*, B-403797, Dec. 14, 2010, 2011 CPD ¶ 7 at 6. Moreover, Aurora is not an interested party to challenge the eligibility of the awardee's proposal for award because the awardee's proposal was not the only one that the agency evaluated as acceptable. See Email from Agency to GAO, Oct. 20, 2023. In this regard, an offeror whose proposal has been determined ineligible for award is an interested party to protest the evaluation of the awardee's proposal only if the awardee's proposal is the only one evaluated as technically acceptable. *MicroTechnologies, LLC*, B-415214, B-415214.2, Nov. 22, 2017, 2018 CPD ¶ 48 at 7 n.10. In such a circumstance, the protester is interested because there would not be another offeror in line for award ahead of the protester were its challenges to the awardee's eligibility sustained. *Id.* Because the protester is not an interested party, all remaining protest allegations are dismissed.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel