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Decision

Matter of: Eagle Technologies, Inc.

File: B-421357.5

Date: March 22, 2024

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William B. Blake, Esq., Department of the Interior, for the agency.

Hannah G. Barnes, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that corrective action taken in response to a prior protest overly restricted the scope of revisions offerors could make to their quotations is dismissed as untimely where it was not filed prior to the time revised quotations were to be submitted.
 2. Protest that the agency failed to consider certain quotation revisions is denied where the record shows that, whether or not these revisions were beyond the scope of permitted revisions, the agency's evaluation and source selection fully and reasonably considered them.
 3. Allegation that the agency failed to conduct a price realism analysis is denied where the solicitation did not require a price realism analysis and where the protester has not demonstrated that the awardee's price was so low that it called into question the awardee's understanding of the requirements.
 4. Protest challenging an agency's evaluation of the order-level materials in the awardee's quotation is dismissed as untimely where the argument was not filed within 10 days after the protester knew of the basis for protest.
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DECISION

Eagle Technologies, Inc., a small business of Arlington, Virginia, protests the issuance of a task order to Flexion, Inc., a small business of Madison, Wisconsin, under request

for quotations (RFQ) No. 140D0422Q0719, issued by the Department of the Interior on behalf of the Department of Health and Human Services, Office of Head Start, for information technology services. The protester challenges various aspects of the agency's evaluation.

We deny the protest.

BACKGROUND

On September 15, 2022, the agency issued the RFQ as a small business set-aside, using General Services Administration (GSA) Federal Supply Schedule (FSS) procedures, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab 3, RFQ at 1. The solicitation sought information technology services for the management, development, and maintenance of the Head Start Enterprise System, a data management system supporting the oversight of Head Start grant recipient organizations and program operations at the local, state, regional, and national levels. AR, Tab 6, RFQ Statement of Objectives at 1. The solicitation contemplated the issuance of a single time-and-materials task order with one 12-month base period and four 12-month option periods. RFQ at 2-3.

The RFQ provided for award on a best-value tradeoff basis, considering the following three evaluation factors, listed in descending order of importance: technical response, oral presentation, and price. RFQ at 11-12. Within the technical response factor, the solicitation included four subfactors: technical approach, staffing plan, similar experience, and case studies. *Id.* at 12. Rather than identifying strengths or weaknesses, the solicitation provided for the evaluation of quotations by identifying areas that either raise or lower expectations of success. *Id.* All non-price factors would receive confidence ratings of high, some, or low confidence. *Id.* at 11. Further, the RFQ advised that the non-price evaluation factors "are significantly more important than evaluated price." *Id.*

The RFQ established a three-phase, advisory down-select process. RFQ at 12-15. For phase one, the RFQ advised vendors that their technical response, inclusive of technical approach, staffing plan, similar experience, and case studies submissions, would be evaluated and that all vendors with quotations receiving a high confidence rating would be invited by email to participate in phase two, which consisted of oral presentations. *Id.* at 13. Vendors that received less than a high confidence rating were advised against participating in phase two but were not precluded from doing so. *Id.* For phase two, vendors would conduct an hour-long oral presentation virtually, with time allocated for evaluators to ask the vendors a series of questions in a structured question and answer session. *Id.* at 14.

In phase three, the agency would evaluate each vendor's quoted price "to assist in determining the [q]uoter's understanding of the requirements" and "evaluate [a] best value determination." *Id.* at 15. The solicitation advised that the agency "reserves the right, but is not required, to conduct a price realism analysis" and cautioned that for

vendors quoting “an unreasonably high price or unrealistically low price, it may be determined that the [vendor] does not have an adequate understanding of the technical requirements.” *Id.* The RFQ advised vendors to assume “an approximate budget of \$8 [million] to \$10 [million]” for the base period and each option period. *Id.* at 2.

By October 21, 2022, the closing date for receipt of quotations, the agency received quotations from five vendors. Contracting Officer’s Statement (COS) at 4. Following the phase one advisory down-select, three vendors, including Flexion and Eagle, proceeded to the oral presentations stage. COS at 12-13. The agency evaluated these three vendors’ quotations as follows:

	Phase 1 / Technical Response	Phase 2 / Oral Presentations	Price
Eagle	High Confidence	Some Confidence	\$49,026,786
Flexion	High Confidence	High Confidence	\$38,751,151
Offeror C	High Confidence	Some Confidence	\$42,034,512

See AR, Tab 31, Award Summary at 8-9.

After conducting a best-value tradeoff, the agency concluded that Flexion’s quotation presented the best value to the government, finding that Flexion presented “a strong understanding of the technical risks of the project, and a comprehensive plan to mitigate the risk,” as opposed to both Eagle and Offeror C, which “failed to adequately address or demonstrate a deep understanding of potential obstacles for effective systems development.” *Id.* at 12-13. Noting that Flexion had submitted the lowest price and was the only vendor to receive ratings of high confidence for both non-price factors, the agency selected Flexion for award. *Id.* at 13-14.

On December 21, the agency informed Eagle that it had not been selected for award, and in response, Eagle filed a protest with our Office on December 27. COS at 2. The agency notified our Office that it intended to take corrective action by making a new best-value award decision; consequently, our Office dismissed the protest as academic on February 2, 2023. See *Eagle Technologies, Inc.*, B-421357; B-421357.2, Feb. 2, 2023 (unpublished decision). On May 8, the agency reaffirmed the award decision to Flexion, with the ratings remaining unchanged. AR, Tab 38, Post Corrective Action Award Notice at 1.

On May 16, Eagle filed a second protest with our Office alleging, among other grounds, that a member of Flexion’s key personnel was unavailable and that its quotation should be eliminated on that basis. COS at 17. On July 17, after the June 14 due date for the agency report, the agency again notified our Office that it intended to take corrective

action by confirming key personnel availability with each vendor, and, if needed, allowing vendors to substitute key personnel through limited exchanges; consequently, our Office dismissed the protest as academic. See *Eagle Technologies, Inc.*, B-421357.3; B-421357.4, July 26, 2023 (unpublished decision). As part of this corrective action, the agency sent limited exchange letters to Offeror C, Flexion, and Eagle, asking them to confirm key personnel availability, to provide updated key personnel information in the case of unavailability, and to “revise any portion of your quote directly affected by key personnel updates.” COS at 18 (citing AR, Tab 39, Eagle Limited Exchange Letter at 1). The agency required vendors to provide an explanation “demonstrating that each revision is necessitated by key personnel updates” and warned that “[a]ny revisions not directly connected to key personnel updates are prohibited.” *Id.* The letter established a September 5, 2023, due date for responses. *Id.* Each vendor timely submitted its key personnel updates. COS at 18.

As relevant here, Eagle made one substitution to its proposed key personnel, in the position of [REDACTED], and revised other sections of its technical quotation that it considered to be directly related to that change. COS at 18. It also lowered its price to \$44,644,982, asserting that the key personnel change enabled Eagle to reduce its staffing and therefore lower its price. *Id.* at 19. The contracting officer did not consider these additional changes in the price and technical quotations to be within the scope of the limited exchanges and did not believe that Eagle had justified them in accordance with the instructions provided during discussions, but nevertheless asked the evaluation panel to review the changes, which the evaluators did. *Id.* at 18.

After evaluating the revised quotations, the agency reaffirmed the award decision to Flexion and notified Eagle on December 6, stating that “the evaluation results support the finding that regardless of the assigned ratings, Flexion presented a stronger technical quot[ation] than Eagle even when Eagle’s quot[ation] revisions were considered.” AR, Tab 52, Eagle Award Notice at 1. On December 15, this protest followed.

DISCUSSION

The protester challenges various aspects of the agency’s evaluation and corrective action. First, Eagle contends that the agency’s discussions, conducted through an August 17 “limited exchange letter,” improperly limited the scope of quotation revisions that could be made and that the agency’s evaluation of revisions submitted in response to the limited exchanges was flawed. Next, the protester asserts that the agency did not conduct a proper price realism analysis of the awardee’s quotation. Finally, the protester asserts that Flexion is ineligible for award because its quotation exceeds the scope of its GSA FSS contract. After reviewing the record, we find no basis to sustain Eagle’s protest.¹

¹ In its various protest submissions, Eagle has raised arguments that are in addition to, or variations of, those specifically discussed below. While we do not specifically

(continued...)

Limited Exchanges

With regard to the limited exchanges conducted pursuant to corrective action, the protester makes two arguments. First, Eagle challenges the limited scope of revisions. Second, the protester challenges the implementation of those limited exchanges, arguing that the agency unreasonably evaluated its revised quotation.

Eagle argues that the limited exchanges the agency conducted with vendors as part of its most recent round of corrective action constitute discussions and asserts that those discussions unduly restricted the revisions that could be made to quotations. Protest at 19. The protester objects to the agency's limiting quotation revisions to confirming the availability of key personnel and any other changes "directly affected by key personnel updates." *Id.* at 23 (quoting AR, Tab 39, Eagle Limited Exchange Letter at 1). The agency responds that its exchanges were fair and meaningful, arguing that it has the discretion to limit the scope of revisions pursuant to discussions when those discussions are part of corrective action. Memorandum of Law (MOL) at 8-9.

Eagle's objection to the limits that were placed on the scope of revisions is untimely.² Underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the underlying ground rules by which a competition is conducted should be resolved as early as practicable during the solicitation process, but certainly in advance of an award decision if possible, not afterwards. *Nationwide Pharm. LLC--Recon.*, B-413489.2 *et al.*, Nov. 25, 2016, 2016 CPD ¶ 339 at 5. Where, as here, an agency affirmatively limits the scope of revisions to proposals or quotations in a manner that the protester believes is legally objectionable, the protester may not wait until its proposal or quotation is eliminated from further consideration to file its protest, and must instead file its protest before the deadline for revisions. See *ThunderCat Tech., LLC*, B-421299, Mar. 6, 2023, 2023 CPD ¶ 63 at 5.

Thus, to protest that the agency improperly restricted quotation revisions pursuant to corrective action, Eagle was required to raise this allegation before the September 5, 2023, deadline for receipt of quotation revisions. Instead, Eagle submitted its revisions following discussions and then did not raise this protest ground until after the agency's December 6, 2023, decision reaffirming the award to Flexion. See AR, Tab 52, Eagle Award Notice at 1. Accordingly, we dismiss this argument as untimely.

address all the protester's arguments, we have considered all of them and find that they afford no basis on which to sustain the protest.

² While the parties did not raise or discuss the timeliness of this argument, our Regulations establish that protests that are untimely on their face may be dismissed. 4 C.F.R. § 21.2(b); *Vysnova Partners, Inc.--Recon.*, B-420654.4, Oct. 25, 2022, 2022 CPD ¶ 267 at 4.

Next, Eagle argues that the agency unreasonably evaluated its revised quotation by identifying areas that lowered expectations of success, and, alternatively, by failing to consider many of the revisions. The protester asserts that its revised quotation updated both its [REDACTED] and other areas of its quotation, in accordance with the limited exchange letter Eagle received instructing vendors to “revise any portion of your [quotation] directly affected by key personnel updates.” AR, Tab 39, Eagle Limited Exchange Letter at 1. In response to the agency finding that many of Eagle’s revisions were outside the scope of the limited revisions, the protester asserts that all its revisions are directly related to the [REDACTED] modification. Supp. Comments at 2. For example, Eagle states that it revised its quotation by reducing its staff because its “new [REDACTED] has . . . [a] distinctly more advanced [skillset] as reflected in his resume,” allegedly requiring Eagle to “adjust the way the [REDACTED] [] integrates with our [a]gile teams” and leading to a “modified [human-centered design] approach [that] fully describes and informs our [s]taffing [p]lan.” AR, Tab 42, Eagle Revised Technical Quotation at 3. Eagle complains that the agency criticized this staffing modification, in addition to other revisions. Comments and Supp. Protest at 6. The protester contends that the agency could not “unilaterally disregard” these changes. *Id.* at 3.

The agency responds that the protester’s assertions are without merit. The agency contends that it reasonably evaluated the revised quotations in a manner consistent with the terms of the solicitation and found that the key personnel changes for each vendor, including Eagle, were “acceptable replacements” that did not change the original evaluation ratings. COS at 18. The agency states that “even though Eagle made [quotation] revisions that were outside of the scope of limited exchanges,” the agency still considered these revisions. *Id.* at 26. The agency points to its award documentation, which states that the contracting officer “has fully considered the merits of Eagle’s technical revisions” and concluded that “Flexion remains the best value to the agency.”³ AR Tab 51, Second Award Summary at 7. In considering these revisions, the evaluation team stated that the replacement [REDACTED] qualifications, while different from the initially proposed [REDACTED], were comparable. AR Tab 51, Second Award Summary at 2. The agency further supported its evaluation of Eagle’s quotation revisions as follows:

The [evaluators] stated that accepting the changes would not result in Eagle being of higher technical merit than Flexion. Specifically[,] the [evaluators] stated, “Eagle would not be comparatively stronger (from a technical standpoint) than Flexion and [Offeror C] even if all of Eagle’s [quotation] revisions were accepted. Eagle removed a number of staff positions[,] and plac[ing] work across various work streams with one [REDACTED] is stretching that one resource beyond what is possible for one staff person. One [REDACTED], no

³ We note that the record displays some inconsistency on the agency’s part regarding whether it accepted all of Eagle’s revisions, due to its contention that many of those revisions were outside the scope of the limited exchanges. See COS at 19. However, the agency ultimately did fully consider these revisions, as explicitly documented in the award summary cited here.

matter how excellent, would not be able to support design activities for 3 scrum teams while also training up the entire staff on [user experience], running Section 508 [c]ompliance, conducting accessibility training, and being involved in [h]elp [d]esk and [p]rogram [s]upport tickets. The [evaluators] determined this demonstrates a lack of understanding of how much effort is required for successful development using human centered design.”

AR, Tab 51, Second Award Summary at 2-3.

In reviewing a protest challenging an agency’s technical evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency’s evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *OPTIMUS Corp.*, B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. A protester’s disagreement with the agency’s judgment, without more, does not establish that an evaluation was unreasonable. *Sky Solutions, LLC*, B-421139.2, B-421139.3, June 30, 2023, 2023 CPD ¶ 184 at 5.

Here, we find that the agency’s evaluation of revised quotations was reasonable. We note the agency’s assertion that it fully considered Eagle’s quotation revisions and found that Flexion’s quotation still presented the best value to the agency. COS at 26. We also note the agency’s finding that Eagle’s new [REDACTED], while acceptable, did not change Eagle’s technical response rating, as well as the evaluators’ conclusion that Eagle’s staffing changes, rather than improving its technical quotation, stretched its resources too thin. COS at 18; AR, Tab 51, Second Award Summary at 2-3. Our review of the record supports our conclusion that the agency’s evaluation was consistent with the terms of the solicitation. To the extent the protester disagrees, that disagreement does not establish that the agency’s evaluation was unreasonable. See *Sky Solutions, LLC, supra*. This protest ground is denied.⁴

Price Realism

Next, Eagle argues that the agency did not perform a required price realism analysis of Flexion’s quotation. Protest at 27. Specifically, the protester asserts that Flexion’s quoted price of \$38,751,151, “fell far below” the solicitation’s overall “clear estimate” of \$40 million to \$50 million and contends that this difference in price “rais[es] serious questions . . . as to whether Flexion could perform the [g]overnment’s requirements

⁴ As a final matter concerning quotation revisions, Eagle argues that the agency was required to reopen discussions to address weaknesses identified in its quotation revisions. Comments and Supp. Protest at 6. However, no such requirement exists in this circumstance. Where a vendor introduces defects into its quotation in a revised quotation, it runs the risk that the agency will exercise its discretion not to reopen discussions. See, e.g., *Research Analysis & Maint., Inc.*, B-410570.6, B-410570.7, July 22, 2015, 2015 CPD ¶ 239 at 11.

under the stated price.” *Id.* at 28; see RFQ at 2. The protester also points to the \$44,185,186 independent government estimate, arguing that Flexion’s quotation is “dramatically out of line” with this estimate (approximately, 13 percent) and contends that the agency did not take this price deviation into account. Protest at 30.

The agency responds that the solicitation did not require the agency to perform a price realism evaluation, pointing to the solicitation language advising that the agency “reserves the right, but is not required, to conduct a price realism analysis.” MOL at 16; RFQ at 15. The agency also argues that the protester mischaracterizes the solicitation’s approximate budget as a “clear estimate” rather than a rough approximation and asserts that Eagle’s description of Flexion’s quoted price as falling “far below” this approximation is an exaggeration. MOL at 16 (quoting Protest at 28).

While an agency may conduct a price realism analysis in awarding a time-and-materials contract for the limited purposes of assessing whether an offeror or vendor’s low price reflects a lack of technical understanding or risk, vendors or offerors must be advised that the agency will conduct such an analysis. PricewaterhouseCoopers Pub. Sector, B-415129.3, July 31, 2018, 2018 CPD ¶ 272 at 2. Where an agency states in a solicitation that it “reserves the right” to conduct a price realism analysis, the decision to conduct such an analysis is a matter within the agency’s discretion. *MindPoint Grp., LLC*, B-418875.2; B-418875.4, Oct. 8, 2020, 2020 CPD ¶ 309 at 9.

Here, the plain language of the solicitation makes clear that the agency “reserves the right, but is not required[] to conduct a price realism analysis.” RFQ at 15. Consequently, the agency was not required to conduct a price realism analysis here. Further, the RFQ referred to an “approximate budget of \$8 [million] to \$10 [million] for the base period, and . . . for each option period thereafter,” or \$40-\$50 million overall. RFQ at 2. The plain language of the solicitation makes clear that this estimated budget range did not impose limits on quotations. Flexion’s quoted price of \$38.8 million, while lower than this approximation, is not drastically different; Flexion’s quoted price is 3 percent below the lower end of that approximation and 13 percent below the independent government estimate. See Protest at 30 (acknowledging this 13 percent price deviation). Ultimately, Eagle’s allegations amount to conclusory statements that assume, without providing support, that Flexion’s lower price should be viewed as a red flag requiring either a price realism analysis or an agency determination that Flexion’s price was so low that it reflects a lack of understanding of the solicitation requirements. See *Ruchman & Assoc., Inc., supra*. We disagree and find that the agency reasonably exercised its discretion not to conduct a price realism analysis. Accordingly, this protest ground is denied.

Proposed Subject Matter Expert (SME)

Eagle also asserts that Flexion is ineligible for award because its quotation exceeds the scope of its GSA FSS contract. Protest at 24. The protester notes that Flexion proposed a [REDACTED] SME and argues that this position does not correspond with a labor category in Flexion’s FSS schedule contract, and further arguing that Flexion

“could not have addressed [this] issue during discussions due to the [a]gency’s restrictions on [quotation] revisions.” Protest at 24. Eagle cites decisions from our Office requiring that goods and services in a vendor’s quotation exist on the vendor’s FSS schedule for FAR subpart 8.4 procurements. *Id.*

The agency responds that Flexion properly identified the services of its [REDACTED] SME as order-level materials in its quotation, pursuant to GSA regulations.⁵ MOL at 10. The agency also asserts that Flexion’s inclusion of this SME “meets all of the requirements to be considered an [order-level material] in accordance with [the GSA Acquisition Regulation Supplement].” *Id.* at 11. The protester responds in its comments on the agency report that the agency did not follow GSA regulations regarding order-level materials. See Comments and Supp. Protest at 13-18.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, protests generally must be filed no later than 10 calendar days after the protester knew, or should have known, the basis of its protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Protest arguments raised after corrective action and re-award of a contract are untimely when the information underpinning such arguments was available to the protester as part of its earlier protest, and the protester failed to raise these arguments in a timely manner. *Verizon Bus. Network Servs., Inc.*, B-419271.5 *et al.*, Apr. 26, 2021, 2021 CPD ¶ 191 at 14; see also *Synergy Sols., Inc.*, B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 6-7.

Here, the basis for Eagle’s argument concerning the agency’s evaluation of Flexion’s proposed SME was known or should have been known to the protester from the record developed in response to its earlier protest. Eagle filed its second protest with our Office on May 16; the agency timely filed its report by June 14; the protester filed its supplemental protest and comments on June 26; and on July 17 the agency informed our Office of its intent to take corrective action. See *Eagle Technologies, Inc.*, B-421357.3; B-421357.4, July 26, 2023 (unpublished decision dismissing the protest as academic).

The agency’s June 14 report included Flexion’s unredacted price quotation, which is also included in the agency report for the current protest. See AR, Tab 16, Flexion Price Quotation. This nine-page price quotation includes a page titled “Order Level Materials” that specifically names the proposed “[REDACTED] Subject Matter Expert” in the introductory paragraph and includes that position in the price chart on the same page. AR, Tab 16, Flexion Price Quotation at 4. In other words, the record shows that by June 14, Eagle had everything it needed to raise this allegation in its June 26 supplemental protest and comments on the agency report, *i.e.*, access to Flexion’s price quotation, which explicitly included the proposed [REDACTED] SME among other

⁵ The GSA Acquisition Regulation Supplement (GSAR) defines order-level materials as “supplies and/or services acquired in direct support of an individual task or delivery order placed against an authorized [FSS] contract . . . when the supplies and/or services are not known at the time of [s]chedule contract.” GSAR 538.7200.

order-level materials. Nevertheless, Eagle did not specifically raise its order-level materials argument asserting that the agency did not follow GSA regulations until it filed its supplemental protest and comments in connection with its protest on January 29, 2024. See Comments and Supp. Protest at 13-18. We have explained that we will not consider arguments that could have and should have been raised in prior protests. See, e.g., *The Arcanum Grp., Inc.*, B-413682.4, B-413682.5, Aug. 14, 2017, 2017 CPD ¶ 335 at 6 n.8; *Savvee Consulting, Inc.*, *supra*; *Waterfront Techs., Inc.--Protest & Costs*, B-401948.16, B-401948.18, June 24, 2011, 2011 CPD ¶ 123 at 10 n.12. Waiting to raise this order-level materials argument in the comments on the agency report is the type of piecemeal presentation that we will not contemplate. This ground is dismissed.

The protest is denied

Edda Emmanuelli Perez
General Counsel