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# Decision

**Matter of:** Red River Science & Technology, LLC

**File:** B-422253.3; B-422253.4; B-422253.5; B-422253.6

**Date:** November 26, 2024

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## DIGEST

1. Protest that the agency improperly amended the solicitation is denied where the record shows that the agency had a reasonable basis to amend the solicitation.
  2. Protest that the agency improperly reopened discussions is denied where the record shows that the agency had a reasonable basis to reopen discussions.
  3. Protest that the agency is conducting unequal discussions is dismissed as premature.
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## DECISION

Red River Science & Technology, LLC, of Lawton, Oklahoma, protests the agency's alleged actions regarding a task order contemplated under request for quotations (RFP) No. W519TC23R0022, issued by the Department of the Army, Army Materiel Command, for logistics support services at Fort Campbell, Kentucky, as part of the Enhanced Army Global Logistics Enterprise (EAGLE) program. The protester asserts that the agency improperly amended the solicitation, reopened discussions, and conducted unequal discussions.

We deny the protest in part and dismiss the protest in part.

## BACKGROUND

The RFP, issued on June 21, 2023, as a small business set-aside and pursuant to Federal Acquisition Regulation (FAR) part 13, sought logistics support services to

include maintenance, supply, and transportation services to be provided at Fort Campbell. Agency Report (AR), Tab 3, Conformed RFP at 3, 31.<sup>1</sup> The RFP was issued to holders of the EAGLE basic ordering agreement. *Id.* at 31. The EAGLE program is utilized to execute logistics services requirements at logistics readiness centers and other Army installations around the world. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1.

The RFP was issued as a cost-plus-fixed-fee/fixed-price task order to be performed over a 1-year base period (including a 60-day transition-in period), four 1-year option periods, and one 6-month option period. Conformed RFP at 37. Award would be made to the offeror with the lowest-priced, technically acceptable proposal considering cost/price and two non-price factors: technical and past performance. *Id.* at 55. Under the technical factor proposals were to be assigned ratings of acceptable or unacceptable, and under the past performance factor proposals were to be assigned ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown (neutral) confidence. *Id.* at 58-59. To be eligible for award, a proposal had to receive a rating of substantial confidence. *Id.* at 55. Price was to be evaluated as fair and reasonable. *Id.*

As relevant here, the RFP stated that if an offeror's or subcontractor's proposal included "indirect expense rates not fully supported (IAW) [in accordance with] L.5.4.2.13, those rates will be capped at the proposed rates for evaluation purposes and for the life of the requirements task order (52.216-21)." *Id.* at 59.

The agency received 12 proposals. COS/MOL at 3. The agency ranked all proposals by price and determined that there were five technically acceptable proposals. *Id.* The agency finalized the competitive range on February 26, 2024, which consisted of four offerors, including Red River. *Id.* at 4. The agency provided these offerors the opportunity to submit revised proposals and all offerors except Red River did so. *Id.* The agency reevaluated proposals and three were found technically acceptable, including Red River's. *Id.* at 5. The agency then evaluated past performance and cost/price and allowed offerors to submit revised cost/price proposals. *Id.* at 5-6. Several proposals, [DELETED], included capped rates.<sup>2</sup> COS/MOL at 6, 15-16; Supp. MOL at 4.

After completing evaluations, the agency determined that another offeror had the lowest-priced, technically acceptable proposal with a rating of substantial confidence. COS/MOL at 6. The agency sent a notice of intent to award to this offeror on July 10, but this offeror declined award. *Id.* On July 22, the agency sent a notice of intent to make award to Red River, which had the next lowest-priced, technically acceptable proposal with a rating of substantial confidence. *Id.* As relevant here, the notice of intent to make award stated the following:

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<sup>1</sup> The conformed RFP includes amendments 0001-0003.

<sup>2</sup> [DELETED]. COS/MOL at 7.

Pursuant to FAR Part 19.302(d)(1), the apparent unsuccessful offerors have until 29 July 2024 (5<sup>th</sup> business day from the date of intent to award was sent to unsuccessful offerors) to protest the small business representation of your company. . . . Please note that award has not officially been made yet, and that this letter is not a notice to proceed, nor is it a guarantee of a task order award. If/when the official task order award is made, your company will be officially notified via letter with a fully executed/binding copy of the contract/task order.

AR, Tab 20, Apparent Awardee Notice of Intent to Award at 1.

Red River confirmed acceptance of the opportunity to receive award. COS/MOL at 6.

On July 25, before the agency made an official award to Red River, a senior contracting official issued a verbal order that the government would no longer be capping indirect rates for all EAGLE task orders. *Id.*; AR, Tab 23, Declaration of Branch Chief at 2. This verbal order was finalized in a memorandum on August 19, and stated: “Effective immediately by direction of the Executive Director of Army Contracting Command – Rock Island (ACC-RI), all EAGLE Task Orders shall be awarded to the successful Offeror(s) without the capping of indirect rates.” AR, Tab 25, Memorandum to Remove Capped Rates. As a result, the contracting officer could no longer make an award to Red River. COS/MOL at 6-7.

On August 15, the agency re-opened discussions with all offerors in the competitive range and began to draft an amendment to the solicitation (amendment No. 0006) to remove the language capping indirect rates. *Id.* at 7; AR, Tab 63, Letter to Red River at 1. The agency first sent evaluation notices to the two offerors that had capped rates in their proposals.<sup>3</sup> COS/MOL at 7. While the agency was drafting amendment No. 0006 and conducting discussions, Red River submitted questions to the agency *via* email on August 16, 22, and 26. *Id.* The agency responded to each of these inquiries by explaining that it was in the process of preparing documents and responses. *Id.* This protest was filed on August 28, asserting primarily that the agency improperly reopened discussions and was conducting them unequally. Protest at 20-30.

On September 4, during the pendency of this protest, the agency issued amendment No. 0006, which removed the language capping indirect rates, included question and answer responses and an updated wage determination, and provided an opportunity to submit revised proposals. COS/MOL at 7-8; Supp. MOL at 1-2. The agency also responded to Red River’s emails on September 5. COS/MOL at 8. On September 10, three offerors submitted timely revised proposals, including Red River. *Id.* As of today, the agency is still conducting discussions.<sup>4</sup> Supp. MOL at 2.

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<sup>3</sup> [DELETED]. COS/MOL at 14-15; Comments & Third Supp. Protest at 3-4.

<sup>4</sup> The agency clarified in its supplemental agency report that discussions had not closed and final revised proposals have not yet been submitted. Supp. MOL at 8.

## DISCUSSION

The protester raises many challenges to the agency's conduct during the procurement, including the agency's decision to amend the RFP and reopen discussions, and asserts that the agency is conducting unequal discussions. While we do not address every challenge herein, we have considered them all and find that none provide us with a basis to sustain the protest.<sup>5</sup> We address the primary arguments below.

### Amendment No. 0006

One of Red River's primary arguments is that the agency had no reasonable basis to amend the RFP and did so to benefit only one offeror. Supp. Protest at 3-9; Comments & Third Supp. Protest at 17, 27. The agency responds that it had a reasonable basis to issue amendment No. 0006 because the policy change regarding capped rates constituted a material change to the terms of the RFP and it was required to amend the solicitation to reflect the change. COS/MOL at 17; Supp. MOL at 4-5. The Army explains that it did not issue the amendment to benefit any one offeror, and that capped rates have had a negative impact on many small business offerors and created many complications over the years, and it has determined that it is in its best interest not to award task orders with capped rates. COS/MOL at 19.

Here, we find that the protester has not demonstrated that the agency improperly or unreasonably amended the RFP. Contracting agencies have broad discretion to determine their needs and the best way to meet them. *ASRC Fed. Data Network Techs., LLC*, B-418765, Aug. 28, 2020, 2020 CPD ¶ 339 at 6; *Crewzers Fire Crew Transport, Inc.*, B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3. We will not question an agency's determination of its needs unless that determination has no reasonable basis. *Loyal Source Gov't Servs., LLC*, B-420959.6, Mar. 31, 2023, 2023 CPD ¶ 86 at 5-6 (denying challenge to the agency's corrective action amending the solicitation terms where the agency had a reasonable basis for the changes).

The agency has explained that it issued the amendment to remove the language to cap rates because of the internal policy change that was ordered in the verbal order on

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<sup>5</sup> After the protester filed its final comments on October 17, the protester filed an additional brief approximately one month later on November 13. Electronic Protest Docketing System Docket entry No. 29. The protester did not request permission from GAO before filing this brief as required by our Bid Protest Regulations 4 C.F.R. § 21.3(j) ("The agency and other parties must receive GAO's approval before submitting any additional statements. GAO reserves the right to disregard material submitted without prior approval."). Moreover, the filing appears to be based on a decision that was publicly available prior to the deadline for the protester's comments to be filed. As a result, we do not consider this argument because the filing was made in a piecemeal fashion and is untimely. *Gulf Master Gen. Trading, LLC*, B-420682.2, B-420682.3, Sept. 26, 2022, 2022 CPD ¶ 244 at 3-4.

July 25 and later put into writing in a memorandum on August 19. AR, Tab 25, Memorandum to Remove Capped Rates; COS/MOL; Supp. MOL; and AR, Tab 23, Declaration of Branch Chief at 2. Red River has not asserted that the agency's requirements did not change or that the agency has violated procurement laws or regulations by issuing the amendment. Rather, the protester attempts to refute the agency's explanation by speculating that the agency has other motives for amending the RFP, such as benefiting another offeror, and offers us only conjecture based on the timing of events as evidence to support its speculation. For example, the protester asserts the following:

The Army improperly changed the Fort Campbell RFP after announcing that Red River was the successful offeror, in response to and because of [another offeror's] complaints about capped rates. The Army then improperly amended the Fort Campbell RFP to help [another offeror] by adding 'no cap' language. The existence of a July 25 'verbal order' is not supported by the record, and the August 19 Memorandum does not justify reopening discussions on August 15 or issuing Amendment 0006.

Comments & Third Supp. Protest at 27.

Such speculation is not sufficient evidence to establish that the agency has been unreasonable. Moreover, government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. *Mindpetal Software Sols., Inc.*, B-420070, B-420070.2, Nov. 18, 2021, 2021 CPD ¶ 375 at 8 n. 8.

We also note that, not only did the agency have the discretion to amend the solicitation, it may have been required to do so. Our decisions have explained that all procurements, including small purchases, must be conducted consistent with the concern for a fair and equitable competition that is inherent in any procurement. *Ann Riley & Assocs., Ltd.*, B-241309.2, Feb. 8, 1991, 91-1 CPD ¶ 142 at 4. Although there is no requirement in FAR part 13 regarding when an agency must amend a solicitation, we have found in situations where an agency has issued a solicitation pursuant to FAR part 13 and deviated from the terms of a solicitation during evaluations or changed the terms of the solicitation after quotations had been received that the agency was required to amend the solicitation or notify vendors. *Id.* (rejecting the argument that the requirements in FAR part 15 regarding mandatory amendments or notifications to offerors do not apply to FAR part 13 procurements because agencies are required to conduct fair and equitable competitions). As the record shows the agency had a reasonable basis for amending the solicitation, we deny this protest argument.

Discussions

Red River's remaining primary arguments are that the agency improperly reopened discussions<sup>6</sup> because the agency has not provided evidence that there was a verbal order issued on July 25 regarding capped rates or explained the delay between the verbal order and the memorandum on August 15, and is still conducting unequal discussions. Comments & Third Supp. Protest at 2-3, 27-29; Supp. Comments at 3-6. The agency responds that it had a reasonable basis for reopening discussions; that being the issuance of amendment No. 0006 and because several offerors' proposals contained capped rates and had to be given an opportunity to revise their proposals. COS/MOL at 15-16; Supp. MOL at 5, 7. The agency also responds that it is not conducting unequal discussions and that discussions are still being conducted with all offerors in the competitive range, including Red River. Supp. MOL at 2.

The decision whether to reopen discussions is largely a matter left to the agency's discretion, and an agency can always reopen negotiations where it finds that it would be in the government's best interests to do so.<sup>7</sup> *Snodgrass JV*, B-420376.2, Jan. 20, 2023, 2023 CPD ¶ 34 at 7; *Sperry Corp.*, B-219596, Oct. 16, 1985, 85-2 CPD ¶ 415 at 4. Our decisions recognize that it is up to the procuring agency to decide when the negotiation and offer stage of a procurement will conclude, and an agency's decision in this regard will not be disturbed absent a clear showing that the agency abused its discretion. *Id.*

Red River has failed to show that the agency lacked a reasonable basis for reopening discussions. As mentioned above, Red River offers only conjecture as the basis for challenging the agency's actions, and simply claims generally that there is no evidence of the verbal order, despite all of the contemporaneous evidence shown in memorandum and declarations the agency has provided. AR, Tab 25, Memorandum to Remove Capped Rates; COS/MOL; Supp. MOL; and AR, Tab 23, Declaration of Branch Chief at 2. Therefore, we conclude that, as discussed above, the record shows that the agency had a reasonable basis for reopening discussions with offerors because it could no longer make award to [DELETED] or any other offeror that had submitted a proposal including capped rates.

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<sup>6</sup> Red River repeatedly asserts that one of the reasons the agency improperly reopened discussions was because the agency did so after making award to Red River. Supp. Protest at 9; Supp. Comments at 4. This is factually incorrect and Red River directly and impliedly acknowledged several times that it did not receive award. Comments & Third Supp. Protest at 27-28. As we described above, Red River only received a notice of intent to award and an official award was never made. AR, Tab 20, Apparent Awardee Notice of Intent to Award at 1.

<sup>7</sup> Though this procurement was conducted pursuant to the FAR part 13 simplified acquisition procedures, those procedures provide discretion to contracting officers to use one or more of the evaluation procedures in FAR parts 14 and 15, such as discussions. See FAR 13.106-2(b); *Bio-Rad Labs., Inc.*, B-297553, Feb. 15, 2006, 2006 CPD ¶ 58 at 6.

Lastly, we dismiss Red River's argument that the agency is conducting unequal discussions as premature. As of its most recent supplemental comments, Red River does not refute the agency's statement that it is currently conducting discussions with it. We need not now resolve this dispute given that an award decision has not yet been made. If Red River is not selected for award, it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time.<sup>8</sup> *Northrop Grumman Tech. Servs., Inc.*, B-404636.11, Jun. 15, 2011, 2011 CPD ¶ 121 at 4.

The protest is denied in part and dismissed in part.

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<sup>8</sup> Red River also asserts that the original offeror who declined award should not be included in discussions and is ineligible for award. Supp. Comments at 4-6. As discussions have not yet concluded and final revised proposals have not yet been evaluated, we consider this argument premature. *Northrop, supra*.