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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Innovative Management & Technology Approaches, Inc.

File: B-418823.3; B-418823.4

Date: January 8, 2021

Richard J. Webber, Esq., and Travis L. Mullaney, Esq., Arent Fox, LLP, for the protester.
James W. Norment, Esq., and Hugh R. Overholt, Esq., Ward and Smith, PA, for Epsilon, Inc., the intervenor.
Andrew Squire, Esq., Jennifer Seifert, Esq., and Chieko M. Clarke, Department of Commerce, for the agency.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the awardee's quotation included an assumption that took exception to material requirements in the solicitation and the agency conducted impermissible and unequal discussions only with the awardee to allow it to remove the assumption prior to award.

2. Protest alleging that the agency unreasonably evaluated awardee's quotation is denied where the record shows that the evaluation was reasonable.

DECISION

Innovative Management & Technology Approaches, Inc. (IMTAS), of Reston, Virginia, protests the decision by the Department of Commerce, U.S. Patent and Trademark Office (USPTO) to establish a blanket purchase agreement (BPA) with, and issue two call orders to, Epsilon, Inc., of Weaverville, North Carolina, under request for quotations (RFQ) No. 1333BJ19Q00280146, issued for support of service desk operations. IMTAS argues that Epsilon's quotation was unacceptable because it included an assumption that took exception to material solicitation requirements; that the agency conducted impermissible and unequal discussions when it allowed Epsilon to remove the assumption from its quotation prior to award; and that the agency unreasonably failed to assess a weakness to Epsilon's quotation.

We sustain the protest.

BACKGROUND

The agency issued the RFQ as a small business set-aside to vendors holding General Services Administration federal supply schedule (FSS) contracts under Information Technology Schedule 70 pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab B05b, RFQ at 54.[1] The RFQ sought information technology (IT) support desk services for the agency. These services included receiving customer contacts, recording or escalating incidents and problems, requesting services or changes involving certain hardware and software, incident and service request intake, first call resolution and escalation, and a variety of other services to help resolve IT issues. *Id.* at 5-6.

The RFQ contemplated the establishment of one BPA along with the issuance of two BPA call orders; the BPA and call orders all had concurrent periods of performance of a 1-year or base period with four 1-year option periods.[2] *Id.* at 49, 54. One call order was for service desk support, and the other call order was for advance problem resolution services. *Id.* at 5, 54. The two call orders would be labor-hour contracts; future call orders could be fixed-price, labor-hour, time-and-materials, or any combination of these contract types. *Id.* at 51. Award would be made on a best-value tradeoff basis considering the following four evaluation factors in descending order of importance: technical approach, management approach, past performance, and price.[3] *Id.* at 66. The non-price factors, when combined, were more important than the price factor. *Id.*

The agency received quotations from 17 vendors, including IMTAS and Epsilon; only three of the quotations were considered in the final tradeoff analysis. Contracting Officer's Statement at 3. On June 4, 2020, the agency notified IMTAS that the agency had established a BPA with Epsilon. *Id.* at 8. IMTAS timely protested this decision to our Office, alleging that Epsilon's quotation was unacceptable because it took exception to material solicitation requirements, and that the agency's evaluation was unreasonable and unequal. In response to the protest, the agency took corrective action and stated that it would reevaluate the quotations submitted by IMTAS and Epsilon and, if warranted by the reevaluation, it would conduct a new best-value tradeoff between these two vendors. AR, Tab G04, Corrective Action Memorandum at 6.

[1] The RFQ was amended three times; this decision cites to the most recent amendment. In addition, this decision cites to the Adobe PDF page number of the RFQ.

[2] The RFQ stated that the agency intended to establish a single BPA but that it reserved the right to establish multiple BPAs. RFQ at 54-55.

[3] The technical approach and management approach factors were rated as either superior, satisfactory, or unsatisfactory; the past performance factor was rated as superior, satisfactory, unsatisfactory, or neutral. RFQ at 66.

The agency's reevaluation of the quotations resulted in the following final ratings assigned to IMTAS's and Epsilon's quotations:

Factor	IMTAS	Epsilon
Technical Approach	Satisfactory	Satisfactory
Management Approach	Satisfactory	Satisfactory
Past Performance	Superior	Superior
Price	$51,818,357.25	$46,557,292.51

AR, Tab I07, Award Recommendation Memorandum at 6. The contracting officer, who was also the source selection authority (SSA), found that the two vendors were relatively equal under the technical approach and management approach factors. AR, Tab I08, SSA Award Determination at 4. Under the past performance factor, the SSA found that IMTAS's performance as the incumbent contractor for service desk support gave IMTAS a "slight edge" over Epsilon. *Id.* at 5. However, the SSA concluded that IMTAS's slight edge in this factor was not "singly or aggregately worth the price premium associated with their quot[ation]." *Id.* Thus, because IMTAS's advantage in this one factor did not warrant the price premium for IMTAS's quotation, the agency reaffirmed its decision to establish the BPA with Epsilon as the best value to the agency. *Id.*

On September 22, the agency notified IMTAS of its decision to establish a BPA with Epsilon. AR, Tab J02, Notification of Award at 1. This protest followed.

DISCUSSION

IMTAS asserts that Epsilon's quotation included a technical assumption that took exception to material solicitation requirements, rendering the quotation unacceptable. IMTAS further contends that the agency engaged in impermissible and unequal discussions when it contacted only Epsilon prior to award and requested that it remove this assumption from the quotation, which Epsilon did. Finally, IMTAS argues that the agency's evaluation was unreasonable because it failed to assess a weakness to Epsilon's quotation for its high-risk staffing plan.[4] We sustain IMTAS's protest on the basis that Epsilon's quotation included an assumption that took exception to material solicitation requirements, and the agency conducted impermissible and unequal discussions in allowing Epsilon to remove this assumption from its quotation prior to award.

[4] IMTAS also argued that the agency should have assessed a weakness to Epsilon's quotation because its key personnel failed to meet the minimum education requirements, and that the agency unreasonably evaluated IMTAS's quotation under the management approach factor. The agency provided a detailed response to these assertions and the protester did not respond to the agency's position; we therefore find that IMTAS abandoned these arguments. *The Green Tech. Group, LLC*, B-417368, B-417368.2, June 14, 2019, 2019 CPD ¶ 219 at 8.

Where, as here, an agency issues a solicitation to FSS vendors under the provisions of FAR subpart 8.4 and conducts a competition for the establishment of a BPA, our Office will not reevaluate the quotations; rather, we review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *Digital Solutions, Inc.*, B-402067, Jan. 12, 2010, 2010 CPD ¶ 26 at 3-4. Competitions under the FSS must be conducted on an equal basis; that is, the contracting agency must even-handedly evaluate quotations against common requirements and evaluation criteria. *Kingfisher Sys., Inc.; Blue Glacier Mgmt. Grp., Inc.*, B-417149 *et al.*, Apr. 1, 2019, 2019 CPD ¶ 118 at 8. A protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was unreasonable. *DEI Consulting*, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2.

Exception to Material Requirements and Unequal Discussions

IMTAS argues that Epsilon's quotation was unacceptable because it included an assumption that took exception to material solicitation requirements. It also contends that the agency conducted unequal discussions when it contacted only Epsilon prior to award and allowed it to remove the assumption from its quotation. For the reasons discussed below, we agree and sustain the protest. We provide below additional background on the solicitation, Epsilon's quotation, and the agency's evaluation, then address each of IMTAS's allegations in turn.

A proposal or quotation that takes exception to a solicitation's material terms and conditions should be considered unacceptable and may not form the basis for an award. *Deloitte Consulting LLP*, B-417988.2 *et al.*, Mar. 23, 2020, 2020 CPD ¶ 128 at 6; *IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Sols., Inc.*, B-409806 *et. al*, Aug. 15, 2014, 2014 CPD ¶ 241 at 10. Material terms of a solicitation include those which affect the price, quantity, quality, or delivery of the goods or services being provided. *Arrington Dixon & Assocs., Inc.*, B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 11. In determining the technical acceptability of a proposal or quotation, an agency may not accept at face value a promise to meet a material requirement, where there is significant countervailing evidence that was, or should have been, reasonably known to the agency that should create doubt whether the offeror or vendor will or can comply with that requirement. *Bahrain Telecommunications Co., B.S.C.*, B-407682.2, B-407682.3, Jan. 28, 2013, 2013 CPD ¶ 71 at 5-6.

Here, the solicitation stated that the contractor "shall handle all incoming internal and external contacts directly received or transferred to the . . . [s]ervice [d]esk." RFQ at 8. The RFQ provided the historical number of yearly contacts to the service desk on which vendors could base their quotations, but cautioned that these numbers could "fluctuate greatly" and might increase or decrease during performance of the call orders. *Id.* at 22. Under the technical approach factor, vendors had to describe their technical approach to meet the call order requirements outlined in the RFQ, including the service level agreements (SLAs). *Id.* at 59. The SLAs set forth certain performance standards, and

the RFQ stated that the contractor "shall meet or exceed the minimum SLAs" identified in the RFQ.[5] *Id.* at 46. To evaluate the technical approach factor, the agency would review the "adequacy and completeness" of the vendors' proposed technical approach and assess the vendors' understanding and capability to meet the BPA and call order requirements. *Id.* at 67.

Epsilon's quotation included the following technical assumption:

> Team Epsilon's staffing proposal is based upon the average historical volumes as provided in the [statement of work] and supported by the data provided in [the] RFQ[.] All staffing will be provided to the [contracting officer's representative] for approval on a monthly basis. An increase of 10% or greater in call/email volume from the agreed staffing plan will trigger a request for a contract modification to fund surge staffing. If surge support is not granted, then Team Epsilon will make every effort to meet the SLAs as described in the SOW; however, Team Epsilon will not be held responsible for a missed SLA in this instance.

AR, Tab C01, Epsilon Tech. Quotation at 34. In the award determination, the SSA first conducted a comparative analysis of IMTAS's and Epsilon's quotations, from which he concluded that Epsilon's quotation was the best value, before turning to a discussion of Epsilon's assumption. AR, Tab I08, SSA Award Determination at 3-5. The SSA interpreted the assumption to be a statement regarding Epsilon's commitment to perform on a labor-hour call order. In this regard, the SSA noted that under labor-hour call orders, the contractor is required to perform only up to the amount of funds obligated to the call order, but stated that he had concerns that the assumption was not clear enough regarding Epsilon's responsibility to perform up to that obligated amount.[6] *Id.* at 5-6. However, the SSA also decided that when the assumption was read in the complete context of Epsilon's quotation, "most of the concern is mitigated."[7] *Id.* at 6.

The SSA also concluded that any concerns about the assumption could be mitigated through pre-award communications with Epsilon under RFQ section 12.1, which stated that the agency "reserves the right to communicate with any or all [c]ontractors submitting a quote, if it is determined advantageous to USPTO to do so." *Id.* The SSA stated that it was advantageous to communicate with only Epsilon "to address the issue

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[5] Examples of SLAs include maintaining an average answer speed of 1 minute or less; responding to voice messages within 2 business hours of receipt; and resolving incidents on the first call or contact with the service desk 75 percent of the time. RFQ at 46-47.

[6] The SSA noted that FAR 8.404 addresses the issue of a contractor's obligation to perform on a labor-hour contract up to the amount obligated to the call by requiring a ceiling price for each labor hour order. AR, Tab I08, SSA Award Determination at 7.

[7] The SSA identified statements from Epsilon's quotation that it claimed mitigated any concerns with the assumption; we address these statements below.

of its continued obligations to perform so long as there are sufficient funds obligated on the call order." *Id.* at 7. The SSA further explained that allowing Epsilon to correct the assumption "will only serve in making the best value quote from the apparent awardee even better." *Id.*

On September 17, the SSA sent a letter to Epsilon, in which the SSA stated that the assumption appeared to conflict with other parts of Epsilon's quotation that recognized the obligation to continue performance without a modification, and that any concern Epsilon may have about being able to perform was addressed by the ceiling price for call orders required by FAR 8.404. AR, Tab I09, Letter from Agency to Epsilon, Sept. 17, 2020 at 1. Citing to RFQ section 12.1 as authority to communicate with Epsilon, the SSA requested that Epsilon "update its quote to remove the noted assumption." *Id.* at 2. In response, Epsilon removed the assumption from its quotation. AR, Tab J01, Email from Epsilon to Agency, Sept. 17, 2020. Five days later, the agency notified IMTAS of its decision to establish a BPA with Epsilon. AR, Tab J02, Notification of Award at 1.

IMTAS contends that, contrary to the SSA's conclusions, the assumption in Epsilon's quotation takes exception to the requirements that the contractor handle all incoming contacts and meet or exceed the SLAs. We agree with the protester.

As explained above, the RFQ required the contractor to handle all incoming contacts and provided vendors with the yearly average number of contacts on which to base their quotations, but cautioned that this number could fluctuate. Vendors therefore were required to quote the staffing that would be sufficient to cover all contacts, including any increases over the yearly average. In addition, the RFQ required the contractor to meet or exceed all SLAs, and did not contemplate a situation where the contractor would be permitted to miss an SLA. Epsilon's assumption takes exception to these requirements because it expressly states that Epsilon cannot be held responsible for missing a required SLA if the agency does not agree to a modification to fund a 10 percent or greater increase in contacts. These requirements are material because they deal with the quantity of contacts the vendor is expected to handle and the quality of the vendor's performance through the standards set by the SLA.

In response, the agency argues that the assumption was not an exception to a material term of the RFQ, but rather was "a sincere acknowledgement of any vendors' limits on liability imposed by labor hour contracts during the performance and administration of the contract." Memorandum of Law (MOL) at 9. Consistent with the SSA's reasoning that the assumption related to Epsilon's commitment to perform as long as there are funds obligated to the call order, the agency maintains that Epsilon's assumption is simply an acknowledgment that it would not be able to perform once the call order has reached the total amount of obligated funds without a modification.[8] *Id.* at 10-11. Thus,

[8] The agency supports this argument by citing to the requirement in FAR 8.404 that any labor-hour call order must include a ceiling price. MOL at 9 (citing FAR 8.404(h)(ii)).

according to the agency, the assumption is not an exception to the terms of the RFQ, but rather an acknowledgment of the limitations on performance prescribed on labor-hour contracts.[9] *See id.*

We find that this argument has no support in the plain language of Epsilon's quotation. Epsilon's assumption contains no mention of a ceiling price or the maximum obligated funds for the call order. The assumption does not state that Epsilon intends to perform only up to the ceiling price established by the agency, nor is it a simple acknowledgment of the limitations on performance of labor-hour contracts. Rather, the assumption makes expressly clear that if there is a 10 percent or greater increase in contacts from the agreed staffing plan, then Epsilon will request a contract modification to fund that increase, without any discussion of whether the call order ceiling price has been reached. Moreover, the assumption made clear that if the contract modification was not granted, then Epsilon would not be held responsible for missing the contractually-mandated SLAs. In short, nothing about Epsilon's assumption remotely suggests that it is tied to the call order ceiling price. The SSA's and agency's attempts to read this into the assumption are unpersuasive and not supported by the record.

The agency next argues that the SSA found that several other parts of Epsilon's quotation "clearly address its obligations to continue to meet the SLAs" and that these other sections mitigate any concerns with the assumption when read in the context of the entirety of Epsilon's quotation. MOL at 14; *see also* AR, Tab I08, SSA Award Determination at 6 (finding that when the assumption "is read in the complete context of Epsilon's quote, most of the concern is mitigated.").

Based on our review of the record, we disagree. None of the statements relied on by the SSA rescind or withdraw Epsilon's assumption. In fact, many of the statements are not even related to the assumption. For example, the SSA highlighted a statement from Epsilon's quotation that Epsilon "will engage with the [contracting officer's representative] when SLA could be impacted due to known issues . . . when running forecast simulations." AR, Tab I08, SSA Award Determination at 6 (quoting AR, Tab C01, Epsilon Tech. Quotation at 17). This statement does not relate to the awardee's assumption and says nothing about whether Epsilon intends to meet or exceed the SLAs if there is an increase in contact volume.

The SSA also relied on a statement that Epsilon's staffing schedule "is based on historical metrics provided in the solicitation" and that Epsilon "will adjust our staffing schedule as needed to achieve SLAs during all hours of operation." *Id.* While this general statement suggests that Epsilon intends to achieve SLAs during all hours of operation, it still does not refute or negate its assumption. In this regard, we agree with

[9] The agency also argues that because an increase to the ceiling price would require a contract modification, Epsilon's assumption is a contract administration issue over which GAO has no jurisdiction. MOL at 14. Because we find that the assumption does not merely reflect Epsilon's acknowledgment of the ceiling price for labor-hour contracts required by FAR 8.404, we reject this argument.

the protester's argument that "[t]here is no inconsistency between Epsilon's general expressions of intent to meet the SLAs and the exception it carves out in its assumption for when volumes of calls exceed 10% above average historical numbers." Supp. Comments at 6; *see Bahrain Telecommunications Co., B.S.C.*, *supra* (an agency may not accept at face value a promise to meet a material requirement, where, as here, there is significant countervailing evidence reasonably known to the agency evaluators that should create doubt about whether the offeror or vendor will or can comply with that requirement.). Accordingly, we do not agree that Epsilon's quotation, when read in its entirety, mitigates any concerns created by the challenged assumption for Epsilon to handle all incoming calls and meet or exceed the SLAs.[10]

Having established that Epsilon's assumption took exception to material RFQ requirements, we turn to the protester's argument that the agency's communications to allow Epsilon to remove the assumption from its quotation constituted impermissible and unequal discussions. Based on our review of the record, we agree with the protester.

Where an agency conducts exchanges with vendors in a FAR subpart 8.4 procurement, those communications--like all other aspects of such a procurement--must be fair and equitable. *USGC, Inc.*, B-400184.2 *et al.*, Dec. 24, 2008, 2009 CPD ¶ 9 at 3. While the requirements of FAR part 15 do not apply to procurements conducted under FAR subpart 8.4, our Office looks to the standards and the decisions interpreting part 15 for guidance in determining whether exchanges with vendors under a FAR subpart 8.4 procurement were fair and equitable. *Id.* In this regard, FAR 15.306 explains that discussions occur when an agency communicates with a vendor for the purpose of obtaining information essential to determine the acceptability of a proposal or quotation, or provides the vendor with an opportunity to revise or modify its proposal or quotation. *Arrington Dixon & Assocs., Inc.*, B-409981, B-409981.2, Oct. 3, 2014, 2014 CPD ¶ 284 at 9; *see* FAR 15.306(d).

Here, the agency contacted Epsilon prior to award and requested that Epsilon remove from its quotation an assumption that took exception to material terms of the solicitation. Thus, Epsilon was allowed to revise its quotation to remove language that made its quotation unacceptable. In our view, this communication was a textbook case of discussions. In the context of a procurement conducted under FAR subpart 8.4, by holding discussions with only Epsilon and not affording the same opportunity to IMTAS, the agency failed to treat all vendors fairly and equitably.[11]

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[10] In addition to those discussed in this decision, the SSA cited to other sections of Epsilon's quotation and claimed those sections mitigated concerns with the assumption. We have reviewed all of the sections cited to by the SSA and find that none refute or withdraw the assumption and therefore do not mitigate these concerns.

[11] The agency contends that the exchange with Epsilon was to "clarify conflicting parts of its quote[]" and that the agency "received those clarifications with the removal of the anomaly and validated the award." MOL at 19-20. Clarifications are defined as "limited

The agency argues that the SSA reasonably concluded that in the context of a FAR subpart 8.4 procurement, section 12.1 of the RFQ permitted the SSA to contact only Epsilon to request that Epsilon remove the assumption. MOL at 17; Supp. MOL at 5. Section 12.1 of the RFQ stated:

> USPTO intends to establish a BPA without further communicating with [o]fferors. Consequently, [o]fferors are highly encouraged to quote their best technical and pricing quotes in their initial submissions. However, USPTO reserves the right to communicate with any or all [c]ontractors submitting a quote, if it is determined advantageous to USPTO to do so. This statement is not to be construed to mean that USPTO is obligated to communicate with every Offeror (note that FAR Part 15 procedures do not apply to FSS ordering procedures, therefore formal discussions are not applicable). An [o]fferor[] may be eliminated from consideration without further communication if its technical and/or pricing quotes are not among those [o]fferors considered most advantageous to the Government based on a best value determination.

RFQ at 55. The agency asserts that this language permitted the SSA to contact only one vendor "to address any concerns that may arise," and that here, the SSA correctly concluded that he was allowed to contact only Epsilon about the assumption because it was advantageous for the agency to do so. MOL at 17-18. In this regard, the SSA stated that it was advantageous to communicate with Epsilon because "[a]llowing the noted assumption to be corrected will only serve in making the best value quote from the apparent awardee even better." *Id.* at 8.

The protester contends that section 12.1 "does not say that the USPTO reserves the right to conduct discussions with any one offeror of its choice." Comments & Supp. Protest at 12. The protester further asserts that this section also does not state that "if the [a]gency does elect to engage in conduct amounting to discussions, the [a]gency is reserving the right to conduct unequal discussions--effectively to help any single offeror of its choice resolve a significant deficiency in its proposal to the detriment of the other offerors." Supp. Comments at 11. In this regard, IMTAS argues that section 12.1 refers to "communications" with vendors, and that while FAR subpart 8.4 does not use the term communications, FAR 15.306(b) defines it to mean exchanges with offerors that "shall not be used to cure proposal deficiencies . . . and/or otherwise revise the proposal." *Id.* (quoting FAR 15.306(b)(2)). IMTAS concludes that "where section 12.1 states that the [a]gency is not obligated to 'communicate' with every offeror, that can . . .

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exchanges" that agencies may use to allow vendors to clarify certain aspects of their proposals (or in this case quotations) or to resolve minor or clerical mistakes. *See* FAR 15.306(a)(2); *Arrington Dixon & Assocs., Inc.*, *supra*. Here, Epsilon was not resolving a minor or clerical mistake, but was allowed to revise its quotation to make it acceptable by removing an expressly stated exception to the solicitation's requirements. This clearly constitutes discussions, not clarifications.

be read to refer to exchanges that are not discussions, as discussions with only one offeror would not be fair and equitable and so would be a violation of the FAR." *Id.*

When 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. *Magellan Fed.*, B-416254, B-416254.2, June 7, 2018, 2018 CPD ¶ 206 at 4. We have also recognized that when interpreting various sections of a contract, "[i]t is presumed that the contract as written is legal, and that an interpretation which does not ascribe illegality to the contract is preferred." *Marketing Consultants International Limited*, B-183705, Dec. 10, 1975, 75-2 CPD ¶ 384 at 5.

We agree with the protester that section 12.1 of the RFQ did not allow the agency to conduct unequal discussions with only one vendor. Section 12.1 states that the agency can "communicate" with any or all offerors, but does not explain what those communications could entail. As the protester notes, FAR part 15--which we look to for guidance to determine whether exchanges with vendors under a FAR subpart 8.4 procurement were fair and equitable--defines communications as exchanges between the agency and offerors, but that such exchanges "shall not be used to cure proposal deficiencies" or "otherwise revise the proposal." FAR 15.306(b). Based on this general guidance, we agree with the protester's view that section 12.1 does not give the agency the right to engage in discussions with only one vendor to allow it to cure an otherwise unacceptable quotation. To read this provision as the agency argues would violate the requirement that all vendors be treated fairly and equitably in FAR subpart 8.4 procurements.[12] Consistent with this view, the statement in section 12.1 that the agency is not obligated to communicate with every offeror reflects the agency's ability to engage in clarifications, but does not allow the agency to communicate with only one offeror and permit only that offeror an opportunity to revise its proposal.

Moreover, the SSA's determination that communication with Epsilon would be advantageous to the agency because it would make the quotation from the apparent awardee even better was based on the flawed conclusion that Epsilon's quotation already offered the best value.[13] As explained above, Epsilon's quotation took

[12] The agency claims that IMTAS's protest is an untimely challenge to the terms of the solicitation because section 12.1 put vendors on notice that the agency could communicate with only one vendor. Because we conclude that a reasonable reading of section 12.1 would not lead a vendor to think that the agency reserved the right to engage in unequal discussions with only one offeror, we reject the agency's argument that IMTAS's protest is an untimely challenge to the terms of the solicitation.

[13] The agency raises a number of other arguments as to why the SSA believed that communication with Epsilon would be advantageous to the agency. For example, the agency asserts that the SSA wanted to expeditiously complete this procurement, and was concerned that any reopening of quotations would be unfair to Epsilon because

exception to material terms of the RFQ; accordingly, it was unacceptable and could not have been the best-value quotation. Given this, the agency is essentially arguing that section 12.1 allowed it to communicate with only one vendor to allow that vendor to cure an otherwise unacceptable quotation. We reject this argument as unreasonable and inconsistent with the requirement that exchanges with vendors in a FAR subpart 8.4 procurement be fair and equitable.[14]

The agency argues that our decision in *VariQ-CV JV, LLC*, B-418551, B-418551.3, June 15, 2020, 2020 CPD ¶ 196, supports a finding that the agency's communications with Epsilon were proper and permissible. *VariQ* involved a solicitation provision which stated that once the agency determined the contractor that was "best-suited (i.e., the apparent successful contractor)," the agency "reserve[d] the right to communicate with only that contractor to address any remaining issues, if necessary, and finalize a task order with that contractor." *VariQ-CV JV, LLC*, B-418551, B-418551.3, June 15, 2020, 2020 CPD ¶ 196 at 18. The solicitation also stated that these issues "may include technical and price." *Id.*

After identifying the apparent successful contractor through a comparative assessment of proposals, the agency in *VariQ* engaged in exchanges with only that contractor, and allowed the contractor to update its proposed staffing and price. *Id.* at 19-20. The protester argued that the solicitation provision allowed the agency only to conduct "clean-up exchanges" and did not permit wholesale changes to the proposal. *Id.* We rejected this argument in *VariQ*, finding that nothing in the solicitation provision limited the scope of exchanges the agency could conduct with the apparent successful offeror and that the provision expressly provided that such exchanges "may include technical and price." *Id.* at 20.

The agency argues that the solicitation language at issue in *VariQ* is "exceedingly similar" to the language in section 12.1 of the RFQ and that our decision in *VariQ*

IMTAS knew Epsilon's price as a result of IMTAS's prior protest. Supp. MOL at 9-11. None of these arguments overcome the fact that Epsilon's quotation was unacceptable as submitted, nor do they provide a basis for the agency to conduct unequal discussions with only Epsilon.

[14] The agency raises another argument regarding the language in section 12.1 which stated that vendors could be eliminated from consideration without further communication if their technical or pricing quotations were not among those considered most advantageous to the government based on the best-value determination. Supp. MOL at 12. Based on this language, the agency contends that after the best-value determination, IMTAS was effectively eliminated from consideration and that therefore the agency was free to engage in communication with only Epsilon. *Id.* at 12-13. This argument fails for the same reasons we have explained above: the best-value determination was fundamentally flawed because it unreasonably determined that Epsilon's quotation was the best value despite the quotation taking exception to material solicitation requirements.

validates the agency's communications with Epsilon here. The protester contends that our decision in *VariQ* is inapposite and distinguishable because, unlike in *VariQ*, Epsilon could not be reasonably viewed as the apparent successful offeror by virtue of its unacceptable quotation. We agree with the protester.

As noted above, the SSA's decision that it was appropriate to communicate only with Epsilon about its assumption was based on the flawed and unreasonable conclusion that the assumption did not take exception to material RFQ requirements and instead was merely an acknowledgement of the ceiling price on labor-hour contracts. Thus, the agency's exchanges with Epsilon here were not with the best-suited or apparent successful vendor, as they were in *VariQ*. Moreover, the solicitation language in *VariQ* was notably different from the language in section 12.1 of the RFQ here. In *VariQ*, the solicitation expressly stated that the agency could communicate only with the apparent successful contractor to address any remaining issues, which could include technical and price. Here, section 12.1 stated only that the agency could communicate with any vendor and was not obligated to communicate with all vendors. Unlike the solicitation language in *VariQ*, section 12.1 of the RFQ here did not identify what those communications could address and, as explained above, it did not permit the agency to conduct unequal discussions with a vendor to allow that vendor to cure an otherwise unacceptable quotation. We therefore conclude that our decision in *VariQ* does not support the agency's actions in this procurement.[15]

In sum, we find that Epsilon's assumption took exception to the material terms of the RFQ to handle all incoming service desk contacts and to meet or exceed all SLAs. Accordingly, Epsilon's quotation as submitted was unacceptable and not eligible for award. The agency then conducted impermissible and unequal discussions when it contacted Epsilon and allowed it to remove the assumption from its quotation. We therefore sustain the protest on this basis.

Evaluation of Epsilon's Quotation

IMTAS alleges that the agency failed to assess a weakness to Epsilon's quotation for its staffing plan, which was based on a 1,920-hour work year. Protest at 11-12. In this regard, IMTAS states that Epsilon's staffing plan included as a "critical component" Epsilon's ability to recruit IMTAS's incumbent staff. Comments & Supp. Protest at 13-14. The protester asserts that Epsilon's 1,920-hour work year offered one less week of vacation than IMTAS's 1,880-hour work year, and therefore "it is highly unlikely

[15] The agency argues that our decision in *Gunnison Consulting Group, Inc.* B-418876 *et al.*, Oct. 5, 2020, 2020 CPD ¶ 344 also supports its communications with Epsilon. Supp. MOL at 5-6. *Gunnison* involved the same solicitation language as in *VariQ*, and we again rejected the protester's challenge to the agency's communications with only the apparent awardee. *Gunnison Consulting Group, Inc.* B-418876 *et al.*, Oct. 5, 2020, 2020 CPD ¶ 344 at 13-14. *Gunnison* is distinguishable for the same reasons as *VariQ* that we discuss above and we therefore conclude that our decision in *Gunnison* likewise does not support the agency's actions here.

that Epsilon will succeed in attracting this 'critical component' of its staffing plan because Epsilon offers significantly less vacation time on average than IMTAS's staff are currently enjoying." *Id.* Thus, IMTAS maintains that the agency should have found a significant risk in Epsilon's quotation because Epsilon would not be able to recruit IMTAS's personnel, who would have to agree to work an additional week per year. *Id.* at 14.

The agency counters that IMTAS's "allegations about what incumbent staff would or would not likely do with a 1,920 hour work year are based on nothing more than speculation about incumbent staff motivations." Supp. MOL at 16. In addition, the agency contends that it did not assess a weakness to Epsilon's quotation because the RFQ contemplated the use of a 1,920-hour work year. MOL at 55.

Based on our review of the record, we find that the agency's evaluation was reasonable. IMTAS's argument rests on the assumption that its incumbent staff would be unwilling to work for Epsilon solely because Epsilon offered one less week of vacation than IMTAS. IMTAS's assumption about what its incumbent staff would do is based only on speculation that is not supported by the record. Moreover, IMTAS's argument ignores other recruitment strategies outlined in Epsilon's quotation. For example, Epsilon's quotation states that it will offer "relocation assistance, bonuses, and pay raises as recruitment methods." AR, Tab C01, Epsilon Tech. Quotation at 61. IMTAS's protest ground does not consider whether these other recruitment methods could mitigate any concerns an employee may have about receiving less vacation time, and instead focuses solely on the vacation time provided by Epsilon. This allegation alone, without more, does not show that the agency's evaluation was unreasonable, and we therefore deny this protest ground.

RECOMMENDATION

We sustain the protest because the agency unreasonably found that the assumption in Epsilon's quotation did not take exception to material solicitation requirements, and then conducted impermissible and unequal discussions with Epsilon in allowing it to remove that assumption from its quotation prior to award. We recommend that the agency either reopen discussions with both vendors, or terminate for the convenience of the government the BPA and call orders established with Epsilon and, if otherwise appropriate, establish the BPA and issue the call orders to IMTAS. In the event the agency reopens discussions, we recommend that the agency conduct meaningful discussions with both vendors, solicit revised quotations, and make a new award decision.[16] We also recommend the agency reimburse IMTAS the costs of filing and

[16] IMTAS also alleged that the agency unreasonably failed to assess strengths to certain aspects of its quotation under the technical approach factor. Protest at 12-18. For example, IMTAS's quotation described how its staffing approach contributed to it achieving a first call resolution rate of 80 percent, which exceeded the minimum SLA requirement of 75 percent. *Id.* at 14-15. A strength was defined as "[a] proposal

pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). IMTAS should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

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element that goes beyond the requirement . . . and is determined to be readily implementable with minimal or no revision after award." AR, Tab I02, Evaluation Plan, amend. 0002, at 6.

In response, the agency did not address this specific aspect of IMTAS's quotation but argued that its evaluation was reasonable because the evaluation record showed that the agency concluded that IMTASs quotation generally met the requirements for this factor. Thus, neither the contemporaneous evaluation documents nor the agency's response to IMTAS's protest contain any meaningful discussion of whether this particular aspect of IMTAS's quotation, which purportedly exceeded an SLA requirement and was readily implementable, warranted a strength. If the agency elects to conduct discussions and solicit revised quotations, it may wish to consider whether this, or any other aspects of IMTAS's quotation, exceed the solicitation's requirements and should be assessed a strength.