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# Decision

**Matter of:** DBISP, LLC; Federal Merchants Corp.

**File:** B-419893.8; B-412893.9

**Date:** October 27, 2021

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## DIGEST

1. Protests that agency was required to allow protesters to elect to participate in the second phase of a two-phased procurement is denied where protesters' proposals were eliminated following an initial compliance check, and their proposals submitted for the first phase of the procurement were not evaluated.
  2. Protests that agency could not eliminate protesters' proposals from the competition for failing to provide International Organization for Standardization certifications with their initial proposals without referring the matter to the Small Business Administration for review under its certificate of competency procedure is denied where the certification requirement is a technical evaluation criterion, and not a responsibility criterion.
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## DECISION

DBISP, LLC, a small business of Indianapolis, Indiana, and Federal Merchants Corp., also a small business of Indianapolis, protest the rejection of the proposals they submitted in response to request for proposals (RFP) No. 70RTAC21R00000003, issued by the Department of Homeland Security (DHS) for information technology services.<sup>1</sup> The protesters assert that the agency failed to follow the terms of the solicitation when it eliminated the firms from the competition without evaluating their initial proposals because DBISP and Federal Merchants did not provide either

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<sup>1</sup> DBISP and Federal Merchants filed separate protests, but both protesters were represented by the same counsel and raised the same arguments. We therefore consolidated the protests for the purposes of this decision.

International Organization for Standardization (ISO) certification 9001:2015 quality management systems and/or ISO certification 20243:2018 open trusted technology provider standards. DBISP and Federal Merchants further protest that the agency could not reject their proposals for failing to provide an ISO certification without referring the matter to the Small Business Administration (SBA) for a certificate of competency (COC) assessment.

We deny the protests.

## BACKGROUND

The solicitation was issued as a small business set-aside<sup>2</sup> on April 20, 2021, for two functional categories--information technology value-added resellers and software--under the DHS-wide FirstSource III contract.<sup>3</sup> The solicitation anticipates the award of multiple indefinite-delivery, indefinite-quantity contracts under each of the functional categories for a 5-year base period, three 1-year option periods, and one 2-year option period. RFP amend. 2 at 24.<sup>4</sup> The estimated value of the procurement is \$10 billion. *Id.* at 1. Offerors are permitted to submit proposals for either or both functional categories. *Id.* at 104.

The agency is conducting the procurement in two phases. *Id.* During phase I, offerors were required to submit a compliance checklist, a signed cover letter, and responses to two technical evaluation factors: ability to perform the work, and supply chain risk management approach. *Id.* at 104, 105. The compliance checklist included a list of proposal requirements identified in the solicitation and a column where the offerors could indicate that their proposals met each requirement. AR, Tab 6c, RFP amend. 2, attach. 6, Compliance Checklist. Phase I proposals were due on June 9.

As relevant to this protest, the solicitation instructed offerors to provide ISO certification 9001:2015 quality management systems and/or ISO certification 20243:2018 open trusted technology provider standards at the time of submission of their phase I proposals. RFP at 111. Offerors were also required to indicate whether they submitted

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<sup>2</sup> The RFP included the following small business set-aside categories: 8(a); historically underutilized business zone; service-disabled veteran-owned small business; women-owned small business; and all small businesses. Agency Report (AR) Tab 6b, RFP amend. 2 at 2.

<sup>3</sup> The First Source III contract vehicle provides DHS with a full array of value-added reseller services and access to a wide and renewable variety of information technology commodities and solutions (hardware and software) from multiple original equipment manufacturers that will be available through delivery order competitions. AR, Tab 4d, RFP at 10.

<sup>4</sup> The agency produced an identical agency record in response to the two separate protests. For purposes of this decision, we cite to the record produced in B-419893.8, unless otherwise noted.

the required certifications in the compliance checklist. RFP amend. 2, attach. 6, Compliance Checklist. The certifications were to be evaluated as part of the first technical factor, ability to perform the work. RFP at 111. The solicitation advised offerors that the government would look more favorably on proposals that included both certifications. *Id.*

The solicitation notified offerors that the government would conduct a compliance review during both phases of the procurement. In particular, the RFP stated that proposals that “do not contain a completed compliance review checklist will not be evaluated” and that proposals found to be “noncompliant in accordance with the solicitation instructions will not be evaluated.” RFP at 107.

When the compliance review, and--for the proposals that passed the compliance review--the evaluation of initial proposals was completed, the agency provided an advisory notification letter to each offeror. *Id.* at 113, 122. The letter advised the offeror of one of three possible outcomes: (1) the proposal did not pass the compliance review; (2) the proposal was not among the most highly rated, and the offeror was not likely to be a viable competitor; or (3) the proposal was among the most highly rated and the offeror could proceed to the second phase of the evaluation. *Id.* The government’s advice about participation in the second phase was a recommendation only; offerors who were advised not to proceed to phase II could elect to continue their participation in the procurement.<sup>5</sup> *Id.*

DBISP and Federal Merchants submitted initial proposals which were rejected because the offerors each failed to submit an ISO certification with their respective proposals. Both companies protest that under the terms of the solicitation the agency was required to allow them to participate in phase II if the protesters chose to do so. DBISP and Federal Merchants also protest that when the agency rejected their proposals for failing to provide an ISO certification, the agency was considering DBISP’s and Federal Merchants’ responsibility and thus was required to refer the matter to the SBA for a COC assessment. As discussed below we find that none of these bases of protest have merit.

## DISCUSSION

### Advisory Notice

DBISP and Federal Merchants protest that in eliminating their proposals from the competition for not including a required ISO certification, the agency failed to follow the procedure set out in the solicitation. In this regard, both protesters note that the solicitation provided that after phase I proposals were evaluated, the agency would notify offerors, advising them that their proposals were selected to proceed to phase II,

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<sup>5</sup> For the second phase of the procurement, offerors were required again to submit a compliance checklist, as well as a signed cover letter, technical proposal assumptions, price proposal assumptions, and responses to address the following evaluation factors: demonstrated prior experience, past performance, and price. RFP amend. 2 at 105.

or that they were unlikely to be viable competitors but could elect to proceed to the next phase. DBISP and Federal Merchants assert that the solicitation did not advise offerors that their proposals would be eliminated from the competition, without further consideration, if they did not include the required certifications. The protesters conclude that under the terms of the solicitation the agency was required to allow DBISP and Federal Merchants to proceed to phase II if they chose to do so, rather than not evaluate their proposals.

The agency counters that the process described in the solicitation occurs only after phase I proposals are evaluated. The agency explains that DBISP's and Federal Merchants' phase I proposals were not evaluated because they failed to conform to the solicitation requirements. Since the protesters' proposals were eliminated as a result of the compliance review, the agency argues it was not required to provide them with an opportunity to submit phase II proposals. Based on our review of the record, we agree with the agency.

The solicitation informed offerors that "[t]he government will conduct a compliance review for both Phases I and II. The compliance checklist is included as Attachment 6 to this solicitation." RFP at 107. The phase I checklist provided, "[t]he contractor shall compare its Phase I proposal against each of the requirements as stated in the solicitation prior to submission and indicate yes or no to ensure compliance. . . . [T]he government requires strict compliance with all solicitation requirements or the proposal may not be accepted." RFP amend. 2, attach. 6, Compliance Checklist at 1. The solicitation also notified offerors that proposals that were found to be noncompliant in accordance with the solicitation instructions would not be evaluated. RFP at 107.

The solicitation specifically instructed offerors to include one of the two required certifications with their phase I proposals. RFP at 111. The compliance checklist required offerors to indicate whether one of the two required certifications had been submitted. RFP amend. 2, attach. 6, Compliance Checklist at 1. It therefore was clear from the solicitation, and the compliance checklist, that the agency would consider whether the certifications were submitted as part of its compliance review. As noted above, the solicitation also notified offerors that proposals that were found to be noncompliant in accordance with the solicitation instructions would not be evaluated. Thus, DBISP and Federal Merchants were on notice that if they did not include the required certifications their proposals would not be evaluated.

Moreover, the agency's responses to questions that offerors submitted regarding the certification requirement confirmed that proposals would be eliminated if they did not include one of the certifications with their phase I proposal. For example, one offeror asked if the agency would consider proposals where the offeror committed to achieve the certification within 180 days of award. The agency responded, "[n]o, DHS will not consider proposals where the ISO certifications have not been secured prior to the proposal response date and included with the Phase I proposal in accordance with solicitation requirements." AR, Tab 5h Solicitation Questions & Answers, (Q&A), Q&A 1.

Another offeror asked the agency to “[p]lease confirm that the Government will consider proposals from vendors that have neither certification.” The agency responded, “[t]he two certifications listed are a proposal requirement. Offerors that do not have either certification do not meet proposal requirements.” *Id.*, Q&A 59. Given the clear language in the solicitation, DBISP’s and Federal Merchants’ argument that the agency was required to evaluate their phase I proposals and allow them to participate in phase II is denied.

## Responsibility

DBISP and Federal Merchants also argue that the ISO certification requirement concerns performance quality and is therefore a responsibility type criterion. As a result, according to the protesters, since they are small businesses the agency could not reject their proposals without referring the issue to the SBA pursuant to the COC program.<sup>6</sup>

Even if the ISO certification is a matter of responsibility, an issue we do not decide here, agencies may use responsibility criteria as technical evaluation factors. *KPaul Properties, LLC*, B-419893 *et al.*, Sept. 15, 2021, 2021 CPD ¶ 317; *Consulting and Program Management*, B-225369, Feb. 27, 1987, 87-1 CPD ¶ 229 at 4. Here, the ISO certification was considered under the ability to perform the technical evaluation criterion. The solicitation required that offerors satisfy the ISO certification requirement at the time of proposal submission. RFP at 13. In addition, as discussed above, a proposal that did not include the certification did not meet the solicitation requirements and would not be considered. Thus, under the terms of the solicitation, the requirement to submit one of the two ISO certifications at the time of proposal submission was a material term of the solicitation. See *Tridentis, LLC*, B-418690.4, Jan. 5, 2021, 2021 CPD ¶ 186 at 6; *ProTech Servs. USA, LLC*, B-417484, July 19, 2019, 2019 CPD ¶ 260 at 4.

Where a proposal, on its face, leads an agency to the conclusion that an offeror has not complied with a material term or condition of the solicitation, the matter is one of the proposal’s acceptability, and not a matter of the offeror’s responsibility. *MT & Associates, LLC*, B-410066, Oct. 17, 2014, 2014 CPD ¶ 326 at 6. Since DBISP and Federal Merchants did not submit the ISO certification, their proposals were properly eliminated from the competition and the agency was not required to refer DBISP or

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<sup>6</sup> Under the Small Business Act, 15 U.S.C. § 637(b)(7), the SBA has conclusive authority to determine the responsibility of small business concerns. Thus, when a procuring agency finds that a small business is not eligible for award based on a nonresponsibility determination or a failure to satisfy definitive responsibility criteria, the agency is required to refer the matter to the SBA for a final determination under its certificate of competency procedures. *Specialty Marine, Inc.*, B-292053, May 19, 2003, 2003 CPD ¶ 106 at 2.

Federal Merchants to the SBA. *KPaul Properties, LLC, supra; Tridentis, LLC, supra.*

The protests are denied.

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