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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Colson Services Corporation

File: B-310971; B-310971.2; B-310971.3

Date: March 21, 2008

Scott E. Pickens, Esq., Craig S. Burkhardt, Esq., and Richard H. Streeter, Esq.,
Barnes & Thornburg LLP, for the protester.

Philip J. Davis, Esq., Nicole P. Wishart, Esq., and Tracye Winfrey Howard, Esq., Wiley
Rein LLP, for Retirement System Group, Inc., an intervenor.

Laura Mann Eyester, Esq., Small Business Administration, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging source selection decision is denied where source selection authority recognized that solicitation requirements not addressed by protester in its technical proposal had been satisfactorily addressed in protester's business proposal.
 2. Request for clarification of whether proposed rebate amounts had been offered on a monthly or an annual basis did not constitute discussions where offerors were not given the opportunity to revise their rebate amounts.
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DECISION

Colson Services Corporation protests the award of a contract to Retirement System Group, Inc. (RSG) under request for proposals (RFP) No. SBAHQ-07-R-0010, issued by the Small Business Administration (SBA) for Fiscal and Transfer Agent (FTA) services for the secondary market program of SBA's 7(a) Guaranteed Loan program. Colson argues that the agency's evaluation of proposals was unreasonable and that the agency improperly failed to conduct discussions with the firm.

We deny the protest.

BACKGROUND

SBA's 7(a) Guaranteed Loan program is the primary federal lending program devoted to small businesses. The program extends a full faith and credit guarantee of the U.S. government to lenders that make small business loans pursuant to SBA rules and regulations. The program currently provides guarantees on loans up to \$2 million, and a maximum guarantee amount of \$1.5 million. At present, the 7(a) portfolio of loans exceeds 300,000 accounts with an outstanding gross principal balance of \$46.5 billion. RFP at 6.

The purpose of the RFP at issue here is to facilitate the receipt and recording of guaranteed interests in loan payments from lending institutions participating in the 7(a) Guaranteed Loan program and to conduct a primary and secondary market in the individual loans and certificates guaranteed by the SBA. To this end, the contractor is to develop, implement, and operate an interactive, electronic fiscal and transfer payment system. The contractor is also to furnish custodial care and safekeeping services for documents relating to structured credit facilities and loan portfolio securitization instruments. Id.

The RFP authorizes the contractor to collect various service fees from lenders as compensation for the services that it furnishes under the contract; it also authorizes the contractor to collect and retain float income on any loan payment funds in its possession. RFP at 4-5. In lieu of prices, the RFP asks offerors for proposed "rebate" amounts—that is, it asks offerors for the amounts (of the income that they make under the contract) that they will remit to the government.¹

The solicitation contemplated the award of a contract for a 4-month phase-in period, an 8-month base period, and four 1-year option periods. The RFP provided for award to the responsible offeror whose proposal represented the best value to the government, price and other factors considered, with the non-price factors of significantly greater importance in the determination of best value than price. Non-price factors consisted of technical approach, management approach, personnel, and past performance; the first two factors were of equal importance and of greater significance than the second two, which were also of equal weight. The solicitation advised offerors of the possibility that the agency might choose to award on the basis of initial proposals.

¹ The solicitation permitted offerors to propose different rebate amounts based on the prevailing Federal Funds Rate (FFR) in place at the inception of each period of performance. That is, each offeror was asked for a separate rebate amount for each period of performance for each of the following five FFR ranges: 0.01%-3.00%, 3.01%-5.00%, 5.01%-7.00%, 7.01%-9.00%, and 9.01% and greater.

Two offerors, RSG and Colson, submitted proposals by the RFP's October 24, 2007 closing date. The agency's technical evaluators assigned the proposals the following ratings:

Offeror	Tech. Appr.	Mgmt. Appr.	Personnel	Past Perf.	Overall
Colson	Green	Green	Green	Blue	Green
RSG	Blue	Blue	Green	Green	Blue

Agency Report (AR) Tab 32, Award Determination at 1.²

The evaluators furnished a detailed explanation as to the basis for each rating (which we will discuss, as relevant, below.) After reviewing the proposals and the findings of the technical evaluation team and determining that RSG had offered a significantly higher rebate than Colson for each FFR range during each period of performance, the contracting officer (who was serving as the source selection

² The RFP provided for the rating of proposals under the non-price factors as blue, green, yellow, or red. Ratings of blue, green, and yellow were defined as follows:

Blue: Clearly meets and exceeds the requirements of the Factor being evaluated. Demonstrates an exceptional understanding of goals and objectives of the acquisition. No significant weaknesses exist. One or more significant strengths exist.

Green: Meets the requirements of the Factor being evaluated. Demonstrates an acceptable understanding of goals and objectives of the acquisition. There may be strengths and weaknesses, but strengths either balance or outweigh any weaknesses.

Yellow: Marginally meets the requirements of the Factor being evaluated or presents significant performance risks. Weaknesses have been found that outbalance any strengths that exist, and these weakness[es] may be difficult to correct.

RFP at 59.

authority) selected RSG’s proposal for award.³

Prior to making the award, however, the contracting officer determined that she should clarify with each offeror whether the rebate amounts that it had proposed were on a monthly or an annual basis. As a consequence, she sent identical e-mail messages to the two offerors requesting this information.⁴ Both offerors responded (via e-mail on November 28) that their rebate amounts were on an annual (or full period of performance), as opposed to a monthly, basis.⁵

³ The “rebate” amounts proposed by the two offerors were as follows:

Federal Funds Rate	Colson 4-month phase-in	Colson 8-month base	Colson Option Yrs. 1-4	RSG 4-month phase-in	RSG 8-month base	RSG Opt. Yr. 1/ Yrs. 2-4
0.01-3.00%	\$150,000	\$300,000	\$450,000	\$400,000	\$800,000	\$1.2/.9 M (million)
3.01-5.00%	\$300,000	\$600,000	\$900,000	\$1.3 M	\$2.6 M	\$3.9/3.6 M
5.01-7.00%	\$400,000	\$800,000	\$1.2 M	\$1.6 M	\$3.2 M	\$4.8/4.5 M
7.01-9.00%	\$500,000	\$1 M	\$1.5 M	\$2.4 M	\$4.8 M	\$7.2/6.9 M
9.01% and higher	\$600,000	\$1.2 M	\$1.8 M	\$3.2 M	\$6.4 M	\$9.6/9.3 M

⁴ The text of each message was as follows:

I wanted to clarify the rebate amount in your proposal. Is it on a monthly or an annual basis? Thanks!

AR, Tabs 34 and 35.

⁵ Colson responded that its rebate amount was on an annual basis, while RSG-- recognizing that the phase-in and base periods were for periods of performance of less than a year--responded that each of its rebate amounts was for the entire corresponding period of performance. Given that the phase-in and base periods together constitute an annual period of performance, and that Colson’s rebate amounts for the two periods, added together, equal its rebate amounts for each of the option years, we think it clear that the offerors intended the same thing by their responses.

The agency awarded a contract to RSG on November 30 and notified Colson of the award the following working day. On the same day that it received notification, Colson requested a debriefing. The debriefing was held on December 18. Colson filed an initial protest with our Office on December 18 and a supplemental protest on December 27. Colson filed a second supplemental protest on January 25, 2008.

DISCUSSION

Colson takes issue with the agency's evaluation of its own proposal under the technical approach and personnel factors and with the evaluation of RSG's proposal under the past performance factor. The protester also argues that the contracting officer's communications with it regarding the basis for its "rebate" pricing constituted discussions, and that because the agency initiated discussions with it concerning one aspect of its proposal, the agency had an obligation to hold discussions with it regarding all areas of weakness in its proposal.

Turning first to the protester's complaints regarding the evaluation of proposals, in reviewing a protest challenging an agency's evaluation, we will not evaluate the proposal(s) anew or substitute our judgment for that of the agency; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria and with applicable procurement statutes and regulations. Cooperativa Muratori Riuniti, B-294980, B-294980.2, Jan. 21, 2005, 2005 CPD ¶ 21 at 3. As explained below, based on our review of the record here, we find no basis to question the agency's evaluation under the factors in question.

Technical Approach

The RFP advised offerors that their proposals would be evaluated under the technical approach factor to determine the extent to which their proposed approaches, including phase-in and phase-out plans, demonstrated the ability to meet or exceed the requirements of the solicitation. RFP at 58. The agency evaluation team found both strengths and weaknesses in the protester's proposed technical approach. Strengths identified by the agency at Colson's debriefing included the protester's demonstration of its complete understanding of the current project requirements, its presentation of a well-defined and well-supported project plan, and its well-written phase-out plan, while weaknesses included the following:

Colson defined operational processes, but did not tie them to specific functional units within the organization and did not assign them to specific individuals. Colson did not mention reconciliation of purchased loans Colson discussed sending notices on fees, but did not discuss follow-up on collection of fees (reference

Section C-7.3.8 of the Solicitation).⁶ Colson did not address the new requirement to reconcile lender balances with its balance on secondary market purchases. Colson did not identify the senior leader within its organization who is responsible for providing general direction during the phase-out period of the contract.

Colson Post-Award Debriefing, Dec. 13, 2007, at 2. Additional weaknesses identified by the evaluators in their evaluation report (but not mentioned at the debriefing) were the protester's failure to demonstrate compliance with the RFP's bonding requirements (§ H-1), its failure to indicate its intention to undergo a required audit (§ H-6), and its failure to demonstrate that it would adhere to all of the solicitation's information technology (IT) security regulations (§ H-8). Evaluation Plan for Colson at 6.

In its first supplemental protest, the protester disputed the findings of weakness identified at the debriefing. Colson maintained that the RFP did not ask offerors to tie operational processes to functional units or specific individuals (but that it had nevertheless done so); similarly, the protester argued that the RFP did not request identification of the senior leader responsible for phase-out. In response to the criticism that it had failed to address the reconciliation of purchased loans, Colson argued that its proposal made clear that all procedures would be fully compliant with the requirements of the statement of work. Further, in response to the criticism that it had not discussed follow-up on collection of fees, the protester asserted that § C-7.3.8 of the RFP did not require any follow-up on collection of fees, and that, indeed, it was not "a function or responsibility of the FTA contractor to collect unpaid fees." Supplemental Protest at 11.

The agency addressed these arguments in a detailed manner in its report, explaining the basis for each of the findings that the protester disputes. In commenting on the agency report, the protester did not take issue with or attempt to rebut the agency's explanations (although it did raise a new argument, which we address below, in response to the criticism that it had failed to discuss follow-up on collection of fees);

⁶ Section C-7.3.8 provides in relevant part as follows:

The contractor shall collect and account for the basis point ongoing guarantee fee for all loans approved after October 12, 1995 and all loans whose guarantee portion was sold in the secondary market. . . . The Contractor shall issue invoices for unpaid and underpaid basis point ongoing guarantee fees and shall be responsible for keeping records for all activities related to the invoices.

RFP at 21.

thus, we consider it to have abandoned these arguments. CM Mfg., Inc., B-292370, Mar. 2, 2004, 2004 CPD ¶ 69 at 3.

In commenting on the agency report, Colson failed to pursue its argument that § C-7.3.8 did not require follow-up on collection of fees, but instead argued that it had addressed follow-up reporting on fees in its proposal, as required by § C-7.3.9.⁷ Colson further argued that the evaluators had treated the two proposals unequally by finding that its proposal had failed to address follow-up on collection of fees, while failing to make such a finding with regard to RSG's proposal when, according to the protester, RSG had in its proposal merely committed to following the reporting process that Colson had described in its proposal.

The foregoing argument fails to acknowledge the distinction between the requirements in § C-7.3.8 that the contractor collect and account for the guarantee fees, as well as issue, and keep records for all activities relating to, invoices for unpaid and underpaid fees, and the requirement in § C-7.3.9 that the contractor furnish quarterly reports to the agency on delinquent unpaid and underpaid fees. The agency explained in its report that although Colson had addressed the reporting of unpaid fees to the SBA (*i.e.*, the § C-7.3.9 requirement) and the invoicing of underpayments (one of the § C-7.3.8 requirements), it had not addressed the § C-7.3.8 requirement for invoicing and collection of unpaid fees—that is, it was the protester's failure to address invoicing and collection of unpaid fees that was the weakness in its proposed approach. Because it was not the protester's failure to address the reporting requirement in § C-7.3.9 that the agency found to be a weakness, the protester's argument that it did address the reporting requirement (and that RSG merely committed to following its approach to satisfying the requirement) neither addresses nor rebuts the agency's finding of weakness.

In its second supplemental protest, Colson further argued with regard to the evaluation of its proposal under the technical approach factor that the evaluators had incorrectly determined in their evaluation report that its proposal had failed to demonstrate compliance with the bonding, audit, and IT security requirements set forth in section H of the RFP. The protester also argued that the agency had treated

⁷ Section C-7.3.9 provides:

In the course of reconciling ongoing guarantee fee payments, the Contractor shall accumulate data on delinquent ongoing guarantee fees by lender. The Contractor shall be responsible for establishing lender fee receivable balances and for providing a report to the COTR on delinquent unpaid and underpaid basis point ongoing guarantee fees on no less than a quarterly basis.

the proposals of the two offerors unequally in failing “to fully credit Colson for its voluntary initiative to implement at its expense a transformation initiative to upgrade, automate and modernize the 7(a) FTA system . . . , while giving RSG exceptional credit for a similar system upgrade proposal” Second Supplemental Protest at 5.

Regarding the former argument, the contracting officer explained that she reviewed and considered the contents of both offerors’ proposals, as well as the evaluation team’s reports, in arriving at her source selection decision, and thus was aware at the time she made her decision that while Colson had not addressed the bonding and audit requirements in its technical proposal, leading to the finding of weakness by the technical evaluation team, Colson had in fact addressed them in its business proposal. That is, according to the contracting officer, she was aware at the time of her source selection decision that the weaknesses attributed to Colson’s proposal by the technical evaluation team in these two areas were not in fact weaknesses, and did not take them into consideration in her trade-off determination. The contracting officer’s position is supported by the contemporaneous source selection document, in which she makes no mention of Colson’s non-compliance with the bonding and audit requirements in summarizing the proposal’s strengths and weaknesses. See AR Tab 32, Award Determination at 1.

The protester asserts that even though the contracting officer was aware that Colson had in fact addressed the bonding and audit requirements in its business proposal and took this information into consideration in making her award decision, her decision was nevertheless flawed in that it was based on a defective technical evaluation. Thus, we understand the protester to be arguing that although the contracting officer was aware that two of the weaknesses identified by the technical evaluation team were not in fact weaknesses and did not consider them in making her source selection decision, her determination was nonetheless flawed because it also took into consideration the rating of green under the technical approach factor assigned by the technical evaluators, which rating the evaluators had arrived at taking the two weaknesses into consideration. We disagree with the protester’s reasoning. It is clear from the contracting officer’s source selection decision that she considered the underlying basis for the evaluators’ rating of green, *i.e.*, the strengths and weaknesses in Colson’s technical approach, and not simply the color rating assigned by the evaluators, in making her tradeoff determination; accordingly, we see no reasonable basis for the argument that her trade-off determination was flawed.

Regarding the protester’s argument that it addressed the RFP’s IT security regulations, the agency explained that the evaluation team’s criticism of Colson’s proposal was that it failed to demonstrate adherence to all of the security regulations. In particular, the agency noted that while the RFP required a System Security Officer (SSO), who would be responsible for ensuring that an appropriate level of physical, operational, and technical security is maintained to protect the

computers and facility that process SBA information and the information processed, RFP at 34, Colson had proposed an individual who would be devoting only 30 percent of his time to the contract effort. The SBA further noted that it “believe[d] that such part time devotion to the contract’s IT requirements [was] a failure by Colson to address how it would adhere to all IT security requirements.” Supplemental Agency Report at 4. In its comments responding to the supplemental agency report, the protester did not seek to rebut the agency’s argument that it had not adequately responded to the requirements of the solicitation pertaining to the SSO by offering a part-time employee to perform the job responsibilities; accordingly, we consider it to have abandoned this argument as well.

Turning then to the protester’s complaint that the evaluators gave the two proposals unequal credit for similar system upgrade proposals, the protester did not pursue this argument in its comments responding to the second agency report; moreover, the record does not support the protester’s allegation of unequal treatment in any event. In this connection, the evaluators identified Colson’s proposed improvements as a strength in Colson’s technical approach, noting that “the proposed improvements are innovative next steps in the development of SBA’s fiscal and transfer system.” Evaluation Report for Colson at 4. Similarly, the evaluators identified RSG’s proposed improvements as a strength, observing that “[t]he proposal includes a number of ways the Bidder plans to modernize and streamline the existing processes in order to get SBA up to and beyond industry standard.” Evaluation Report for RSG at 4. Since each offeror’s approach to upgrading the system was recognized as a strength in the evaluation of its proposal, we do not think that the record supports the protester’s allegation of unequal treatment.

Personnel

The RFP furnished the following guidance regarding the evaluation of offerors’ proposals under the personnel factor:

Each Offeror will be evaluated on the qualifications of its key personnel as related to requirements of the Solicitation. For the cognizant business unit, each Offeror will also be evaluated on:

- Its personnel resources, with emphasis placed on the education and professional certifications obtained by the work force in relation to the number of personnel in the business unit, and the average length of employee service.
- Its ability to effectively train personnel, including retraining and training for new requirements and systems.
- Its ability to recruit and retain high quality personnel, including the turnover rate experienced by the business unit for the last three (3) year period. The turnover rate is defined as the number of personnel who departed

(regardless of reason) divided by the average number of personnel during the period.

RFP at 58.

In its evaluation under the personnel factor, the agency's technical evaluation team recognized as strengths in Colson's proposal the advanced education, expertise, and experience of the protester's proposed key personnel; the protester's well-defined organizational structure; its multi-faceted approach to training; and its ability to recruit and retain qualified personnel. AR, Tab 37B at 12-13. The evaluators also identified the following weaknesses in the proposal, however, which resulted in the assignment of a rating of green for the factor:

- The proposal does not address how staffing for the new requirements of this solicitation will be handled We expect the Bidder to describe how it plans to fill positions needed for these new requirements while successfully managing the existing requirements for this fiscal and transfer agent function.
- The Bidder has not described what type of training needs the current and new staff will need to undergo in order to successfully implement the new requirements stated in this solicitation. The proposal also lacks the detail associated with just how many additional employees will be needed to handle the new requirements of this solicitation

Id.

In its first supplemental protest, the protester argued that there was "a mismatch" between the evaluation scheme set forth in the RFP and the evaluation actually conducted in that the RFP did not specifically ask how staffing would be achieved for the new requirements. The protester also argued that its proposal did address recruitment and training/retraining to meet the new RFP requirements, and that while the solicitation did not specifically ask for detail regarding the number of additional employees that would be needed to handle the new requirements, Colson "plainly projected its staffing levels" in its business proposal.⁸ Supplemental Protest, Dec. 27,

⁸ In its initial protest to our Office, Colson also alleged that the SBA had failed to conduct a meaningful evaluation of the proposals under the personnel factor and had instead improperly "normalized the field for this factor" by assigning both proposals the same rating of green. Protest at 6. The agency explained in its report that each proposal had received a rating of green under the personnel factor because each contained both strengths and weaknesses pertaining to the factor. In responding to

(continued...)

2007, at 10. In its second supplemental protest, Colson further argued that the evaluators had treated RSG's proposal and its own "disparately and unequally" by failing to downgrade RSG's proposal, which also failed to address staffing and training for the new requirements, under the personnel factor. Second Supplemental Protest, Jan. 25, 2008, at 5.

In response to the protester's argument that the solicitation did not specifically request information about staffing for the new requirements, the agency points out that the RFP provided for the evaluation of each offer based on the qualifications of the proposed key personnel as related to the requirements of the solicitation. The agency maintains that it should have been obvious that the requirements of the RFP included the new requirements and thus that offerors needed to explain how they would staff the new requirements. We agree with the agency that the RFP language was sufficient to place offerors on notice that the evaluators would consider in their evaluation the qualifications of an offeror's proposed staff to meet all of the requirements--existing and new ones. Regarding the protester's assertion that it did address recruitment and training to meet the new requirements, the agency maintains that Colson's training plan did not address training to meet the new requirements or updates to the system, except to note that Colson employees would take SBA's Computer Security Awareness Training. In commenting on the agency report, the protester did not dispute the agency's position--and indeed, appeared to concede its correctness by arguing that RSG had also failed to address staffing and training for the new requirements in its proposal; accordingly, we will not consider the argument further.

With regard to the protester's argument that the evaluators treated the two proposals unequally by failing to identify RSG's approach to staffing and training for the new requirements as a weakness under the personnel factor, even assuming for the sake of argument that this allegation is correct, we fail to see how it resulted in prejudice to Colson. We note in this connection that RSG's proposal was already rated green under the personnel factor based on the evaluators' recognition that the proposal contained both strengths and weaknesses pertaining to the factor, and the protester has not argued--nor, based on the record before us, do we think that it reasonably could have argued--that the attribution of an additional weakness to RSG's proposal would have resulted in a lowering of the proposal's rating under the factor to below green.

(...continued)

the agency report, the protester did not pursue the argument that the agency failed to conduct a meaningful evaluation of the proposals under the personnel factor.

Past Performance

The protester argues that the agency should have assigned RSG a rating of neutral, rather than a rating of green (signifying acceptable), under the past performance factor because RSG lacks relevant past performance.⁹

This argument does not provide a basis for sustaining Colson's protest because, as with regard to the previous argument pertaining to staffing and training for the new requirements, there is no evidence that Colson was prejudiced by the allegedly improper rating. That is, there is no reasonable basis to believe that RSG's proposal, which received ratings of blue under each of the two most significant technical evaluation factors, technical approach and management approach, and a rating of green under the personnel factor, would have received an overall technical rating of other than blue had the proposal received a rating of neutral, rather than green (acceptable), for past performance. We note in this connection that in our view, it would be inconsistent with the concept of a neutral rating for an agency to lower a proposal's overall technical rating as a result of a neutral rating for past performance. See Inlingua Schools of Languages, B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340 at 5-6 (evaluation scheme that penalizes offeror for neutral past performance ratings is improper).

Exchanges Regarding Rebate Amount

The protester argues that the agency's request for clarification of the basis for the offerors' rebate amounts constituted discussions because this information was necessary to determine their proposed prices, and that the SBA's initiation of discussions in one area obligated the agency to conduct discussions regarding all significant weaknesses in offerors' proposals.

As previously noted, the contracting officer asked both offerors to clarify whether their rebate amounts were on a monthly or an annual basis, but did not otherwise communicate with them regarding the content of their proposals. The contracting officer sought clarification of the basis for the rebate amounts after being advised by the chairperson of the technical evaluation team that since the RFP included language providing that "[t]he rebate will be made to SBA monthly," RFP at 3, the rebate amounts entered by the offerors on their price schedules should be

⁹ Consistent with Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), which instructs that an offeror without relevant past performance or for whom information on past performance is not available "may not be evaluated favorably or unfavorably on past performance," § M-3.3 of the RFP advised offerors that a lack of relevant past performance would result in assignment of a neutral past performance rating indicating neither a favorable nor unfavorable evaluation. RFP at 58.

considered monthly amounts. The contracting officer apparently questioned whether the two offerors had indeed interpreted the RFP in this manner.¹⁰

Section 15.306 of the FAR describes a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements. Clarifications are “limited exchanges” between the agency and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical errors. FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposal’s potential for award. FAR § 15.306(d)(3); IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 3. The “acid test” for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to modify or revise its proposal Computer Sciences Corp. et al., B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 9.

In our view, the exchanges here did not constitute discussions because neither offeror was given the opportunity to revise its proposal; rather, each was merely given the opportunity to clarify the basis on which it had understood the RFP to be requesting pricing. Regarding the protester’s argument that either offeror could have revised its proposal by “offer[ing] a response that was a change from the originally submitted approach,” Protester’s Comments, Jan. 25, 2008, at 4 n.3, this is essentially an argument that either offeror could have revised its price by misrepresenting the basis for its original pricing—that is, by representing that its rebate amounts had been offered on an annual basis when it had in fact intended them to be on a monthly basis (or vice-versa). Presumably, the protester is not arguing that it would have engaged in such a misrepresentation, and, in any event, we do not think that the opportunity to increase or decrease a price 12-fold, which is the only revision that could have been achieved through such a misrepresentation, represents a meaningful opportunity to revise pricing.

Preaward Equal Opportunity Compliance Evaluation

The solicitation incorporated by reference FAR § 52.222-24, which provides as follows:

¹⁰ While the contracting officer does not explain the basis for her decision to seek clarification of the rebate amounts, we think that she reasonably might have questioned whether the offerors shared the chairperson’s understanding of the basis on which rebate amounts were requested given the format of the price schedule itself, which appears to request rebate amounts corresponding to the entire periods of performance.

If a contract in the amount of \$10 million or more will result from this solicitation, the prospective Contractor and its known first-tier subcontractors with anticipated subcontracts of \$10 million or more shall be subject to a preaward compliance evaluation by the Office of Federal Contract Compliance Programs (OFCCP), unless, within the preceding 24 months, OFCCP has conducted an evaluation and found the prospective Contractor and subcontractors to be in compliance with Executive Order 11246.

The protester argues that the agency violated FAR § 52.222-24 by failing to seek a preaward equal opportunity compliance evaluation by the Office of Federal Contract Compliance Programs prior to awarding to RSG. The agency responded that it did not seek a preaward evaluation by the OFCCP because it does not believe that FAR § 52.222-24 applies because the contract awarded here is at no cost to the government.

As the agency states, because the solicitation authorizes the contractor to collect fees from lenders to compensate it for the services that it provides, SBA will not be paying the contractor directly for its services, and in fact will be receiving rebates from the contractor. In this regard, the agency points out that the contract document itself lists the award amount as "\$0.00." In any event, Colson has failed to demonstrate that it was prejudiced by the agency's failure to seek a preaward compliance evaluation by the OFCCP. In particular, the protester has failed to allege (or offer any support for the argument) that if a compliance evaluation had been conducted, RSG would have been found in violation.

The protest is denied.

Gary L. Kepplinger
General Counsel