



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Onix Networking Corporation

File: B-411841

Date: November 9, 2015

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DIGEST

Protest alleging that agency issued an improper, out-of-scope, sole-source modification to a previously-awarded Federal Supply Schedule delivery order is sustained where record shows that the modification contemplates providing a product that was never sought during the original acquisition, and there was no reasonable basis for firms to know that the agency would use the delivery order to acquire the product in question.

DECISION

Onix Networking Corporation, of Lakewood, Ohio, protests the issuance, by the Peace Corps, of a modification to a delivery order previously issued to En Pointe Gov, Inc., of Gardena, California, to acquire an e-mail as a service (EaaS) product. Onix maintains that the modification is outside the scope of the delivery order originally issued to En Pointe, and that it amounts to an improper sole-source award for the agency's requirements.

We sustain the protest.

BACKGROUND

En Pointe is an authorized reseller of Microsoft products and services; Onix is an authorized reseller of Google products and services. The EaaS product that the agency is acquiring is a "cloud based" e-mail service, as opposed to the e-mail functionality currently possessed by the agency. The current e-mail functionality is comprised, in relevant part, of a collection of computing hardware, wide-area

network and local area network capabilities, and Microsoft software products licensed, installed and maintained in that computing environment. See generally, Agency Report (AR) Exh. 4, Request for Information, attach. 1 (Draft Requirements Document); attach. 2 (Infrastructure Architecture).

In 2013, the Peace Corps issued En Pointe a delivery order under its Federal Supply Schedule (FSS) contract. That delivery order was for the renewal of the agency's enterprise licensing agreement (EA) to provide software licenses, software maintenance services, and technical support services for the agency's existing suite of Microsoft products for a base year and four 1-year option periods. AR, exh. 2, En Pointe FSS Delivery Order.¹ That delivery order was issued after the agency conducted a limited, brand-name product competition confined to contractors holding FSS contracts that also were authorized resellers of Microsoft products and services. The agency justified its limited competition as follows:

Microsoft software is a core component of the Peace Corps IT [information technology] infrastructure. The Microsoft suite of software tools was selected as the standard for Peace Corps for several reasons, including the wide range of Microsoft products that support business requirements across all office automation and application support arenas, ease of use of the software products for end users and IT professionals alike, simple integration across products in the suite, common tools in the market place making it easier to recruit and retain staff to support the environment, and more. Microsoft is the sole proprietor of the source code and copyright of the software, which restricts other vendors from developing and implementing the brand's upgrades and bug fixes.

AR, exh. 3, Limited Source Justification, at 1-2. The RFQ sought to acquire these license renewal and technical support services for a discrete number of software licenses owned by the Peace Corps, and also specified a discrete number of

¹ In effect, the agency was seeking to keep its existing software licenses up-to-date with the newest versions of Microsoft's products, and to acquire technical support services. At the time, the agency described its acquisition as follows:

The Peace Corps owns perpetual licenses for a variety of Microsoft software components. The products and services requested are 1) the right to upgrade current Microsoft software components to newer versions as Microsoft makes those versions generally available[;] and 2) the capability to acquire onsite technical support assistance or remote problem resolution technical support for the Microsoft software Peace Corps licensed in the Bill of Materials (BOM).

AR, exh. 3, Limited Sources Justification, at 1.

technical support service hours to be provided. AR, exh. 3, RFQ, appendices A and B.

In July 2014, subsequent to the award of En Pointe's delivery order, the agency began to conduct market research to determine what EaaS products were available that could meet its requirements.

First, the agency conducted pilot programs to evaluate the Microsoft and Google EaaS products. The agency evaluated the Google Apps EaaS product from September 2014 through May 2015, and evaluated the Microsoft Office 365 EaaS product from December 2014 through May 2015. Contracting Officer's Statement at 2. At the conclusion of those pilot programs, the agency surveyed its users and determined that both products were appealing, and that the Google product was viewed as slightly superior to the Microsoft product. The survey results were summarized by the agency as follows:

The reaction from both groups of pilot participants was positive. In general, there is great enthusiasm around the agency's migration to an EaaS platform, regardless of the specific platform chosen. The survey conducted in May 2015 included a question on the respondents overall satisfaction with either Google or Microsoft, which is included below. Although Google received a slight edge, it is clear that both platforms met with a generally positive reaction from end-users.

AR, exh. 6, Peace Corps Decision Memorandum, at 2.

Second, the agency issued a request for information (RFI) to prospective FSS vendors that previously had been issued a cloud EaaS blanket purchase agreement by the General Services Administration. AR, exh. 4, Request for Information, at 1. The RFI included a document entitled "Peace Corps Email as a Service (EaaS) DRAFT Requirements Document" that specified various desirable features that the agency had with respect to how the EaaS product might be configured. Id., attach. 1.

The agency received a response to its RFI directly from Microsoft (as opposed to a response from En Pointe), and also received a response from Onix. AR, exhs. 5, 12.² After evaluating the responses to the RFI, the agency concluded that only the Microsoft Office 365 product would meet its needs. AR, exh. 6, Peace Corps Decision Memorandum, at 4-5. Based on this conclusion, the agency decided to

² The record also shows that the agency discussed its prospective EaaS requirement with various other federal agencies. Contracting Officer's Statement of Facts at 3.

issue a modification to the En Pointe delivery order to add its requirements for the Microsoft EaaS product. Id. at 5-6; AR, exh. 7, En Pointe Contract Modification. After learning of the agency's actions on July 20, 2015, Onix filed this protest with our Office.

PROTEST

Onix maintains that the modification of the En Pointe delivery order is outside the scope of the original requirements that the agency was purchasing. For the reasons discussed below, we agree with Onix.

Interested Party Status

As a threshold matter, the Peace Corps argues that Onix is not an interested party because it cannot meet the agency's requirements. According to the Peace Corps, Onix's response to the agency's RFI demonstrates that Onix cannot provide an EaaS product meeting all of the agency's requirements. The agency has identified three specific aspects of Onix's response to the RFI that it maintains show that Onix cannot meet its needs.

Onix argues that its response to the agency's RFI cannot serve as a basis for finding that the firm is not an interested party because the RFI was not a solicitation for offers or quotations, and because the RFI did not definitively establish the agency's requirements. The protester points out that the RFI included only a draft statement of the agency's desired EaaS product features. Onix maintains that several of these features are unnecessary to meet the agency's actual requirements, and that, if this had been an actual solicitation rather than an RFI, it would have protested these features as unduly restrictive of competition.

The protester also notes that one of the features identified by the agency as favoring award of a contract for the Microsoft EaaS product--what is identified in the agency's decision memorandum as a "hybrid deployment model"--was not even listed among the agency's draft statement of its desired EaaS features. See AR, exh. 6, Peace Corps Decision Memorandum, at 5.

We find that Onix is an interested party for purposes of maintaining its protest. Our Bid Protest Regulations define an interested party as an actual or prospective offeror whose direct economic interest will be affected by the award of a contract, or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). The agency's RFI merely sought information about available EaaS products as part of the research the Peace Corps was conducting to explore the market for those products. As correctly noted by Onix, the RFI included only a draft statement of the agency's desired EaaS features; it did not definitively establish the agency's actual requirements, nor did it contemplate the award of a contract or the issuance of a delivery order. The RFI expressly states:

The Peace Corps is developing an acquisition strategy for a cloud-based E-mail as a Service (EaaS) requirement. As part of this process, we are seeking information about Vendors that are capable of providing the services outlined in the attached DRAFT Requirements Document. Please note that this is a market survey for informational purposes only and is NOT a Request for Quotes (RFQ). No contract will be awarded based on this announcement and no reimbursement will be made for costs associated with responding to this announcement.

AR, exh. 4, RFI at 1. Because the agency has not issued a solicitation that includes definitive requirements, there is no basis for our Office to conclude that Onix is incapable of meeting the agency's eventual requirements, whatever they ultimately may be.

Additionally, as noted, Onix maintains that certain of the agency's desired features, as expressed in the RFI, are restrictive of competition. Because the agency has not issued a solicitation that embodies its actual requirements, Onix has not had an opportunity to challenge the agency's eventual requirements. In this connection, a protest challenging the terms of the RFI would have been premature, since no solicitation has yet been issued. See CYIOS, Inc., B-402728.3, July 13, 2012, 2012 CPD ¶ 205 at 4 n.6 (protest filed before agency issued a solicitation dismissed as premature).

The protester also correctly notes that one of the desired features of the Microsoft EaaS product that the agency identified in its decision memorandum is something the agency calls a "hybrid deployment model." AR, exh. 6, Peace Corps Decision Memorandum, at 5. However, since this desired feature was never identified in the agency's RFI, there would have been no basis for Onix to know about it, or to provide the agency with information showing that Onix was capable of meeting such a feature. In any event, as with the other desirable features identified by the agency, Onix has not been afforded an opportunity to challenge this feature as necessary to the agency's eventual, actual requirements.

In the final analysis, Onix is not challenging the agency's conclusion--based on the Peace Corps' review of the Onix response to the RFI--that it is incapable of meeting the agency's requirements.³ Rather, Onix is challenging the agency's issuance of a

³ Onix does challenge the agency's finding for purposes of demonstrating its interested party status, but we need not resolve whether the agency's finding is reasonable. As discussed, the agency has yet to issue a solicitation that sets forth its actual requirements; it follows that we cannot resolve whether or not Onix meets the agency's requirements unless--and until--those requirements are identified.

modification to the En Pointe delivery order without conducting a competition. Because Onix represents that it is capable of meeting the agency's requirements for an EaaS product, and because the agency has issued a modification to En Pointe's delivery order for that requirement, we conclude that Onix is an interested party for purposes of maintaining its protest. The issuance of the modification to En Pointe is tantamount to the sole-source award of a contract, and Onix's direct economic interest is affected by the agency's failure to conduct a competition for these requirements for which Onix would have had an opportunity to compete. 4 C.F.R. § 21.0(a)(1); see also Master Security, Inc., B-274990, B-274990.2, Jan. 12, 1997, 97-1 CPD ¶ 21 at 3.

Modification of the En Pointe Delivery Order

Turning to the merits of the protest, Onix alleges that the agency's modification of the En Pointe delivery order amounts to an impermissible, out-of-scope, sole-source modification. Onix maintains that the original En Pointe delivery order was for the provision of software update services (along with technical support) for the Peace Corps' existing software products installed on the Peace Corps' IT enterprise system. The protester argues that the acquisition of an EaaS product--a cloud based service rather than maintenance/update services for existing, installed, software--is fundamentally different from what the agency originally had acquired under the En Pointe delivery order. Onix therefore argues that the agency is either required to conduct a competition for its EaaS requirement, or to execute a sole-source justification for acquiring its EaaS product from En Pointe, or any other authorized Microsoft reseller.

The agency argues that its modification is within the scope of En Pointe's original delivery order, and therefore, proper. The Peace Corps principally argues that the modification is within scope because the delivery order contemplated the acquisition of cloud based services, and that acquisition of an EaaS product is merely the next logical step in updating the agency's existing computing environment. The agency points out that the delivery order included a table entitled "future pricing." AR, exh. 16, En Pointe Delivery Order Future Pricing Chart. According to the agency, this table was included in the En Pointe delivery order to "lock in" prices for future products that the Peace Corps might want to purchase throughout the performance period of the delivery order. Contracting Officer's Statement of Facts at 4. The agency also identifies various sections of the delivery order's statement of work that it maintains allow the agency to add products to the delivery order throughout the period of performance. Id. at 4-5.

The Competition in Contracting Act generally requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 3301. Our Office generally will not review modifications to contracts, because such matters are related to contract administration and are beyond the scope of GAO's bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp.,

B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to our rule about reviewing modifications to a contract is where it is alleged that the modification is outside the scope of the contract originally awarded. Id. This is because the work covered by the modification would otherwise be subject to the statutory requirement for competition, absent a valid determination that the work is appropriate for procurement on a sole source basis. Id.

In determining whether a modification is outside the scope of an underlying contract (or in this case, a delivery order), our Office considers whether there is a material difference between the modification and the contract. DynCorp Int'l LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6; MCI Telecomms. Corp., supra. Evidence of a material difference is found by reviewing the circumstances attending the procurement that originally was conducted, examining any changes in the type of work, performance period, or costs between the contract as awarded and as modified, and considering whether the original solicitation adequately advised offerors of the potential for the type of work contemplated by the modification. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 5. The overall inquiry is whether the modification is of a nature that potential offerors reasonably would have anticipated competing for the goods or services being acquired through issuance of the modification. Id.

We agree with Onix that the modification of the En Pointe delivery order is an improper, out-of-scope, sole-source modification. As an initial matter, we note that there is a fundamental flaw in the agency's logic. As noted, the original competition for the En Pointe delivery order was limited to authorized Microsoft resellers because the agency concluded that only Microsoft products would meet its requirements. The agency's subsequent actions in connection with acquiring an EaaS product--notably its pilot program that tested the Google EaaS product, and its issuance of an RFI to sources other than Microsoft authorized resellers⁴--explicitly recognize that there are firms other than Microsoft authorized resellers, and products other than Microsoft's EaaS product, that are available to meet the agency's requirement.

Since the agency essentially concedes by its actions that there are EaaS products that potentially can meet its requirements, and since the competition for the En Pointe delivery order was confined to firms capable of providing Microsoft products and services, it necessarily follows that firms--such as Onix--could not reasonably have anticipated that the agency would acquire an EaaS product using the

⁴ The agency also states that it solicited responses to its RFI from firms offering an EaaS product manufactured by a third concern, Zimbra, although the Peace Corps did not receive any responses from these concerns. Contracting Officer's Statement of Facts at 2.

originally-competed delivery order. For this reason alone, we conclude that the modification is outside the scope of the original delivery order.

We also agree with the protester that, substantively, neither the original competition for the delivery order, nor the delivery order as issued, ever contemplated the acquisition of a cloud-based EaaS product or service. Specifically, a review of the RFQ and delivery order demonstrate that the agency was acquiring a renewal of its existing enterprise agreement with Microsoft for a discrete list of software products already owned by the Peace Corps. The statement of work in the RFQ (as well as the En Pointe delivery order) provides, in its entirety, as follows:

The Peace Corps requires renewal of its Microsoft EA [enterprise agreement] which provides software and maintenance services that cover the following:

- Licensing for required Microsoft software products authorized for use by Peace Corps;
- Software Assurance for authorized/licensed products, as appropriate;⁵
- Media sets, as appropriate;
- Access to Technical Support Assistance services to provide remote or onsite support to Peace Corps;
- Access to Problem Resolution services;
- Access to Technical Training on Microsoft products;

⁵ “Software assurance” is a term used by Microsoft to describe a proprietary service that it offers to provide periodic updates and technical support for previously-acquired software. See <https://www.microsoft.com/en-us/licensing/licensing-programs/software-assurance-default.aspx>. Significantly, Microsoft’s software assurance website states that software assurance helps any eventual purchaser by offering, among other things, the following service: “Use consulting services to plan new, on-premises and cloud based deployments.” *Id.* It also states: “Software Assurance benefits include new product version rights, deployment planning, technical and end-user training, support, and a unique set of technologies and services.” *Id.* (emphasis supplied). As described by Microsoft on its website, these software assurance services specified under the original delivery order included “new product version rights” for the software already owned by the Peace Corps, but did not include acquisition of any future, cloud based, products or services, which Microsoft itself describes as a “new” deployment.

- Technical Account Manager services to track assets and utilization of the technical support resources on the contract;
- Authorization for home use of Microsoft products for Peace Corps staff based on the “Home Use Program.”

The Peace Corps requires supply of its existing inventory of Microsoft licensed software under this Enterprise Agreement, according to the quantities required, as detailed in Appendix A. In addition, the Peace Corps requires technical support hours, problem resolution hours, and days of technical training, as detailed in Appendix B.

AR, exh. 3, Delivery Order RFQ, at 2 (emphasis supplied). Simply stated, there is nothing in this statement of work that contemplates the provision of an entirely new product or service, such as an EaaS product.

In addition, a review of the products and services listed in En Pointe’s original delivery order confirms that it never contemplated that En Pointe would provide Office 365, the Microsoft EaaS product. AR, exh. 2, En Pointe Delivery Order, at 5-9. While the delivery order does include a table entitled “future pricing,” id. at 10-12, a majority of the items identified as “Office 365” products do not have a price included in the table. AR, exh. 16, Future Pricing Table. Moreover, the modification issued to En Pointe lists an Office 365 part number that is not included on the future pricing table, or anywhere else in the original delivery order. Compare id. with AR, exh. 7, En Pointe Contract Modification, at 2.

Based on our review, it is clear that the original delivery order did not include any cloud based services such as the EaaS product being acquired by the Peace Corps. Rather, it was for maintenance and upgrade of the agency’s existing inventory of software products already installed in the agency’s IT environment.

As a final matter, we note that the agency appears to suggest that the original RFQ (and, correspondingly, the En Pointe delivery order) essentially contemplated the issuance of an indefinite-delivery, indefinite-quantity (IDIQ) type delivery order under which the agency may purchase, without limitation, new software licenses not already owned by the Peace Corps. Contracting Officer’s Statement at 4-5. We disagree.

The terms of the RFQ (as well as the En Pointe delivery order) are expressly limited to a discrete list of software products--identified by part number, and specified by quantity--already owned by the Peace Corps. AR, exh. 3, RFQ at appendix A; exh. 2, En Pointe Delivery Order, at 5-9. There is nothing in either the RFQ or the delivery order that suggests that the agency intended to (or did, in fact) issue an IDIQ-type delivery order. In fact, the RFQ specifically contemplates the award of a firm-fixed-price delivery order, AR, exh. 3, RFQ at 1. In addition, firms were

required to provide pricing in two line-item tables, appendix A (listing the software products and quantities owned by the agency) and appendix B (listing the technical support services required and the number of hours to be provided). Firms were required to provide lump-sum prices for each line item. The record therefore shows, contrary to the agency's suggestion, that the En Pointe delivery order was a firm-fixed-price instrument to acquire a discrete, enumerated, quantity of services.

In sum, we conclude that the modification to the En Pointe delivery order is an improper, out-of-scope, sole-source modification, for which the agency never conducted a competition, and for which the agency has not prepared the necessary justification and approval. We therefore sustain Onix's protest.

RECOMMENDATION

We recommend that the agency either meet its requirement for an EaaS product through the use of full and open competitive procedures, or execute the necessary justification and approval to acquire the EaaS product through other than full and open competitive procedures. Should the agency decide to meet its requirements using full and open competition (or some form of limited competition), we recommend that the agency terminate the modification issued to En Pointe's delivery order for the convenience of the government, and make award for its requirement to the firm the agency determines can best meet its requirements. Finally, we recommend that the agency reimburse Onix the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs 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.

Susan A. Poling
General Counsel