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Decision

Matter of: Threat Management Group, LLC

File: B-413729

Date: December 21, 2016

J. Alex Ward, Esq., R. Locke Bell, Esq., and Damien C. Specht, Esq., Morrison & Foerster LLP, for Threat Management Group, LLC, the protester.
Richard B. Oliver, Esq., Mary E. Buxton, Esq., and J. Matthew Carter, Esq., Pillsbury Winthrop Shaw Pittman LLP, for R3 Strategic Support Group, Inc., the intervenor.
Erika L. Whelan Retta, Esq., and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.
Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the protester alleges that the agency issued an out-of-scope task order instead of competing a requirement, and the agency has failed to provide relevant documents addressing the scope of the task order, and where the limited documents available support the conclusion that some of the work is outside the scope of the underlying contract.

DECISION

Threat Management Group, LLC (TMG), of Ladson, South Carolina, protests the issuance of task order FA4452-13-D-0001-0076 (TO 76), by the Department of the Air Force, to R3 Strategic Support Group, Inc. (R3), of Coronado, California, for explosive ordnance disposal (EOD) support services at the Silver Flag site (Silver Flag), Tyndall Air Force Base (Tyndall), Florida. The protester alleges that training procured under TO 76 falls outside of the scope of R3's underlying indefinite-delivery/indefinite-quantity (ID/IQ) contract and that the Air Force violated the requirement in the Competition in Contracting Act of 1984 (CICA) for full and open competition when it did not compete the requirement.¹ See 10 U.S.C. § 2304(a)(1).

¹ Our Office has jurisdiction to hear protests challenging the award of a task order (of any value) that increases the scope, period, or maximum value of the contract

(continued...)

We sustain the protest.

BACKGROUND

On October 29, 2012, the Air Force awarded a single ID/IQ contract, No. FA4452-13-D-0001 (R3 contract), to R3 for EOD support services at various Air Force bases and locations, including Tyndall.² R3 Contract at 60.³ As relevant to this protest, with regard to training services to be provided to Air Force personnel, the R3 contract performance work statement (PWS) provided as follows:

1.1 Scope. The contractor shall provide EOD support services to USAF bases and Headquarter Staffs to include: managing EOD training and training documentation [. . .]

* * * * *

1.2.1.8 Provide training in order to maintain EOD Flights'⁴ proficiency for demolition and handling of explosives in accordance with DoD, Air Force (AF) and Air Force Office of Safety and Health (AFOSH) directives, and to Maintain Flights' accountability for issue and destruction of materials in accordance with all governing directives.

PWS §§ 1.1, 1.2.1.8.⁵ Task orders issued under R3's contract uniformly omitted a task order-specific PWS and simply described the scope of work as "EOD Support

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under which the order is issued. 10 U.S.C. § 2304c(e)(1)(a); Specialty Marine, Inc., B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130 at 4.

² The Air Force states that award was made to R3 on August 29, 2012. Contracting Officer's Statement of Fact (COSF) at 4. However, the R3 contract and subsequent modifications reflect that the contract was awarded on October 29, 2012. See, e.g., R3 contract, at 1, box 3; AR, Tab 14, at 1 (Amend. 0001), box 10b.

³ All references to the R3 contract are to the conformed contract at AR, Tab 6.

⁴ The agency explained that the "EOD Flight" includes only the Air Force staff assigned to Tyndall, and not personnel temporarily at Tyndall for training. GAO Conf. Call, Dec. 6, 2016.

⁵ Although the agency argues that other PWS sections address training, a close review shows that these are not relevant. See, e.g., PWS § 1.2.1.5 ("Conduct . . . EOD presentations . . . for federal, state and local civilian and law enforcement personnel/agencies.").

Services IAW [in accordance with] the PWS.” See, e.g., Agency Report (AR), Tab 63 at 3 (TO 44); Tab 79 at 4 (TO 60); Tab 81 at 4 (TO 62); Tab 94 at 4 (TO 75).⁶

On May 12, 2016, the Air Force issued a 4-month contract to TMG to provide contingency training services at Tyndall, at a fixed price of \$79,739.20 per month.⁷ Protest, Attach. C, TMG Contract, at 3-4. TMG employed 13 individuals who not only provided training, but also provided support services such as vegetation control and inventory and repair of training aids. Protest at 6; TMG Comments on Air Force Supp. Document Production, Nov. 28, 2016, Attach. 1, TMG Monthly Status Report, Aug. 16, 2016-Sept. 15, 2016, at 2-3.

In anticipation of the expiration of TMG’s contract, the EOD training manager, who also served as the contracting officer’s representative (COR) on the R3 contract, contacted the contract specialist at Scott Air Force Base, Illinois, about obtaining training services from R3. AR, Tab 12, Air Force Correspondence, July 15, 2016, at 1-2; Tab 16, Decl. of Contract Specialist, at 1. In this regard, the training manager/(COR) requested that the R3 PWS be amended to allow R3 to provide training. AR, Tab 12, Air Force Correspondence, July 15, 2016 (proposed changes include “teaching base populace Explosive Ordinance Reconnaissance or IED awareness” and “provides training and instruction . . . [in accordance with] approved lesson plans.”). On July 29, after internal discussion, the Air Force concluded that the anticipated training was already included in the PWS. AR, Tab 12, Air Force Correspondence, July 21, 2016, at 18; Contract Specialist Email to Training Manager, July 29, 2016.

On August 3, the Air Force emailed R3 regarding a new task order for services at Tyndall. AR, Tab 7, Air Force Email to R3, Aug. 3, 2016.⁸ The agency requested

⁶ The contract structure provided that contract line item numbers (CLINs) for EOD services had a unit price of \$1.00 and a quantity that equaled the not-to-exceed (NTE) amount for that year. R3 contract at 3, 5, 6, 8, 10. For example, the quantity for CLIN 0001 was 4,240,713.11 “Lot[s]”, and the NTE amount was \$4,240,713.11. Id. at 3. The task orders do not specify the number of full-time equivalents (FTEs) obtained with each task order, instead simply stating the total price per month and the number of months. See, e.g., AR, Tab 65, TO 46, at 4; Tab 68, TO 49 at 4.

⁷ From May 2012 to April 2016, TMG performed as a subcontractor under contract No. FA-8051-16-P-0017, which was awarded to Pioneer Technologies Corporation, for explosive ordinance disposal (EOD) contingency training at Tyndall. Protest at 5; Protest, Exh. C, TMG Training Contract.

⁸ This email is the only communication regarding TO 76 between R3 and the Air Force in the record. Air Force counsel requested documents related to R3’s training “from the Air Force EOD personnel stationed at Silver Flag, [but] they did not
(continued...)

13 flight support technicians, the same number of FTEs under TMG's contract. Id. ("Historically (based on a 2,080-hour work year), the man-hours for this additional support at Silver Flag has been 27,040 per year (27,040 divided by 2,080 equals 13). Therefore, we plan on issuing the task order based on this historical data.")⁹ See also AR, Tab 16, Decl. of Contract Specialist, at 1 ("COR told me he expected a need for 13 people.").

On August 12, R3 approached TMG's employees about the transition to TO 76. AR, Tab 4, TMG Agency Protest, at 1. The same day, TMG filed an agency-level protest contending that the Air Force had failed to follow CICA's requirements for full and open competition by not competing the requirement, as follows:

We first learned of your decision to circumvent CICA earlier today when representatives of R3 [. . .] presented themselves at the Silver Flag Exercise Site without warning, met with military representatives, then called OUR people together in the training room and informed them that the contract we are supporting was moving to R3,¹⁰ that it was a "done deal", that the task order has already been awarded, and that the R3[. . .] Team would be reaching out to each incumbent contractor via email to invite job applications and discuss salary options if they wanted to keep their jobs.¹¹

Id. at 3-5.

On August 16, the agency issued TO 76 with the following scope:

Provide EOD Support Services IAW [in accordance with] the PWS.
Silver Flag Exercise Site Tyndall AFB FL

(...continued)

respond to the request." Air Force Ltr. Re: Second Supp. Document Production, Dec. 1, 2016, n.2.

⁹ In contrast to the contemporaneous record, the training manager stated during the course of the protest that he ordered 13 FTEs in order to maximize the use of available funds. AR, Tab 17, Second Decl. of Training Manager, Nov. 21, 2016, at 2. The total value of TO 76 is \$1,628,510.13. AR, Tab 8, TO 76, at 1.

¹⁰ In response to the protest, the training manager asserts that the training previously provided by TMG is either being eliminated or self-performed by Air Force personnel. AR, Tab 10, First Decl. of Training Manager, Oct. 5, 2016, at 1. However, he also affirms that he "has no personal knowledge of" any training materials. AR, Tab 103, Third. Decl. of Training Manager, Dec. 1, 2016. The agency does not address this discrepancy.

¹¹ R3 hired all 13 of TMG's trainers to perform TO 76. R3 Email, Dec. 6, 2016.

Period of Performance: 19 Sep 16 - 18 Sep 17
3 months at \$134,199.39¹² per month
9 months at \$136,212.44 per month

COSF at 2; AR, Tab 8, TO 76, at 3. Id.

On September 12, the Air Force denied TMG's agency-level protest. In response to the protester's assertion that TO 76 is outside of the scope of the underlying contract, the agency concluded that because TO 76 "does not have its own performance work statement (PWS) and thus utilizes that of the basic contract," TO 76 is within the scope of the contract. AR, Tab 5, Agency Response to TMG Agency-Level Protest, at 3. TMG filed this timely protest within ten days of the agency's denial. See 4 C.F.R. § 21.2(a)(2).

DISCUSSION

The sole basis of protest here is whether TO 76 falls outside the scope of R3's ID/IQ contract.¹³ TMG contends that some of the training provided by R3 under TO 76 is not included in the PWS. For the reasons below, we sustain the protest.

Our decisions in this area are well-settled. Outside of exceptions not relevant here, CICA requires agencies to obtain "full and open competition" in procurement through the use of competitive procedures. See 10 U.S.C. § 2304(a). Where an agency issues a task order for work that is beyond the scope of the contract originally awarded, the agency violates CICA. This is the case because the agency has subverted competition by awarding without competition work that would otherwise be subject to the statutory requirement for full and open competition. Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 at 3 (sustaining protest where contract modification and task order were beyond the scope of the underlying ID/IQ contract).

In determining whether a task order is beyond the scope of the contract, GAO looks to whether there is a material difference between the task order and that contract. Id.; see also DynCorp Int'l LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6. To determine whether such a material difference exists, GAO reviews the

¹² When the agency issued TO 76, the monthly cost per worker rose by 68 percent, from \$6,133.73 to \$10,323.03. The Air Force states that the R3 contract was awarded "[a]s a cost saving measure." COSF at 4.

¹³ The parties have presented arguments as to whether the work previously provided by TMG falls within the scope of TO 76. AR, Tab 108, Third Decl. of Training Manager, Dec. 1, 2016, at 2; R3 Comments at 3. This inquiry is not relevant to the narrow question of whether TO 76 falls within the scope of the PWS.

circumstances attending the procurement that was conducted; examines any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considers whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. Makro Janitorial Servs., *supra*, at 3. See also DynCorp, *supra* (sustaining protest where task order for counterinsurgency support was outside the scope of a contract for counter-narcoterrorism training); Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6 (sustaining protest where task order for debt collection intake was outside the scope of a litigation support services contract); Indian & Native Am. Emp't & Training Coal., B-216421, Apr. 16, 1985, 85-1 CPD ¶ 432 at 3 (sustaining protest where task order for training work was outside the scope of a contract for financial support services). "The overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated." DynCorp, *supra*, at 6-7.

The Air Force contends that the task order issued to R3 is within the PWS' scope of work because the scope of work for both is the same. Memorandum of Law (MOL) at 5 (TO 76 "is for the exact same services called for in R3's IDIQ contract's PWS"). As to the scope of the PWS, the agency states that it "did not contemplate R3 providing instructors and teaching training courses." COSF at 8. See also AR, Tab 10, First Decl. of Training Manager, Oct. 5, 2016, at 2 ("I want to state clearly: R3 personnel will not provide instructor services at the Silver Flag Exercise Site."); AR, Tab 17, Second Decl. of Training Manager, Nov. 21, 2016, at 2 ("Under R3's contract, those employees are providing EOD support services, not training, as they had performed under the TMG contract.").

Although our decisions instruct us to compare the PWS for the task order against the underlying PWS, that approach is not useful here. Other than the request for 13 FTEs based on historical manning, there is no documentation of the specific services R3 was requested to perform on TO 76. Therefore, our review is based on the two documents provided by the agency relating to contract performance, R3's monthly progress reports for September and October of this year.

The R3 September monthly progress report provides that R3:

- Provided explosive safety training to civil engineer equipment personnel ensuring compliance with AFMAN [Air Force manual] 91-201, "Explosives Safety Standards"

* * * * *

- Provided controlled area training to Flight personnel; brought Flight back in compliance with AFI 31-101, "Integrated Defense"

AR, Tab 18, R3 September Monthly Progress Report, at 13.

The R3 October monthly progress report states that R3:

- Conducted training and refresher courses for Flight cadre; improved instructor expertise

* * * * *

- Provided explosive safety training to civil engineer equipment personnel; ensured compliance with AFMAN 91-201, "Explosives Safety Standards"

- Conducted USAF EOD Chemical, Biological, Radiological and Nuclear (CBRN) capability training for the Flight;

- Implemented and made a full transition to the Roboteam Micro Tactical Ground Robot (MTGR®) platform; newest robot in the USAF inventory added to training

* * * * *

- Fully integrated new, medical training mannequin; provides combat stress to medical training scenarios

AR, Tab 19, R3 October Monthly Progress Report, at 13.

Under the PWS, R3 is only permitted to provide training to Tyndall permanent staff on "demolition and handling of explosives in accordance with [various] directives" and "issue and destruction of materials." PWS § 1.2.1.8. With regard to the training described in the September progress report, "[p]rovid[ing] explosive safety training to civil engineer equipment personnel" falls within the PWS. In contrast, "[p]rovid[ing] controlled area training to Flight personnel," on its face, does not appear to fall within the scope of the underlying PWS. In addition, the record contains no documents from the training, such as slides or an outline, which might be useful in assessing the scope of the work provided here.

As for the training described in the October progress report, the explosive safety training described in the document again appears to fall within the scope of the PWS. However, as to the "training and refresher courses for Flight cadre," and the transitioning to the "Roboteam Micro Tactical Ground Robot," the record is inconclusive. Furthermore, the "chemical, biological, radiological and nuclear capability training" appears to fall outside of the scope of the PWS. Finally, the medical training mannequin, which could have been part of the "training and refresher courses," also appears to fall outside of the PWS, which is limited to demolition, handling, and destruction of explosive material. On the limited record before us, it appears that some of the training purchased here is outside of the scope of R3's contract.

Due to the absence of an independent PWS and the lack of documents that might have been prepared contemporaneously, our Office asked the agency “to provide additional documentation as to how it calculated the number of required personnel and priced the task order, as well as the information communicated to R3 about what tasks were to be performed and the skill sets of the relevant personnel.” GAO Email to Parties, Nov. 18, 2016. The agency did not provide any contemporaneous documentation.

Again, on November 29, the agency was requested to provide “[a]ny documentation--e.g., slides, schedules, roster of trainers--related to the training listed in the monthly progress reports[.]” GAO Email to Parties, Nov. 29, 2016. Again, no relevant documents were provided. In each instance, however, the agency submitted a supplemental declaration from the training manager, who is “responsible for EOD contingency training, and provide[s] executive management, direction, coordination, planning, and supervision of EOD pre-deployment training.” AR, Tab 10, First Decl. of Training Manager, at 1. He is also the contracting officer’s representative for the R3 contract. *Id.* However, the training manager explains only that he does not know whether documents related to R3’s training exist. AR, Tab 108, Third Decl. of Training Manager, Dec. 1, 2016, at 3 (“I have no personal knowledge of such materials.”). The training manager’s lack of knowledge regarding the existence of relevant materials is inconsistent with his assertion that the training provided by R3 is within the scope of the PWS. *See, e.g.*, AR, Tab 108, Third Decl. of Training Manager, Dec. 1, 2016.¹⁴

GAO has sustained protests in other contexts where the documentation is inadequate to permit a reasonable conclusion based on the record. For example, we will sustain a protest when the documentation in the record fails to support the agency’s judgment in evaluating proposals. *See LIS, Inc.*, B-400646.2, B-400646.3, Mar. 25, 2009, 2010 CPD ¶ 5 at 7. We will also sustain the protest where “the

¹⁴ The training manager’s statements are also inconsistent with other portions of the record. For example, the training manager states that “[u]ntil this summer, the government did not require that [EOD] support [from R3] at the [Silver Flag] site. . . .” AR, Tab 10, First Decl. of Training Manager, Oct. 5, 2016. However, the record shows that the Air Force issued TOs for R3’s services at Silver Flag during the training manager’s tenure. *See, e.g.*, AR, Tab 84, TO 75, July 1, 2016, at 4 (ordering 6 months of EOD services from R3 at the Silver Flag site); Tab 81, TO 62, Jan. 1, 2016, at 4 (ordering 3 months of EOD services from R3 at the Silver Flag site). Where the explanations are not credible and consistent with the record, we may sustain the protest. *Dismas Charities, Inc.*, B-292091, June 25, 2003, 2003 CPD ¶ 125 at 8-9 (giving little weight to post-protest documents that contained conflicting information). Given the inconsistencies in and lack of contemporaneous support for the training manager’s statements, we see no basis to rely on his post-protest assertions for our conclusions here.

agency's unwillingness or inability to establish and document" a relevant portion of the record "precludes a conclusion" that an agency's decision to cancel a procurement was "reasonable and appropriate." See Superlative Techs., Inc., B-310489.4, June 3, 2008, 2008 CPD ¶ 123 at 12-13. Here, where the record is so limited that we cannot conclude that a task order was within the scope of the underlying contract, and where the limited available evidence suggests it was not, we will sustain the protest.

In short, the record does not adequately address what specific services R3 was requested to perform under TO 76. The limited documentation provided indicates that some of the training is outside of the scope of R3's contract. Furthermore, agency representatives have either denied knowledge of any relevant documents, or failed to respond to document requests. On this basis, we sustain the protest because we cannot conclude that TO 76 was within the scope of the R3 contract.

CONCLUSION AND RECOMMENDATION

Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. SunGard Data Sys., Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 7-8. Here, the agency has provided an incomplete and inconsistent documentary response to the protester's allegation that TO 76 was outside of the scope of the R3 contract. Because reasonable documentation or document production could have resolved these issues, we find that the protester was prejudiced because it could have been in line for award, had the requirement been competed.

We recommend that the Air Force cancel TO 76 and determine the scope of the specific services and the number of personnel required. If the services are within the scope of R3's PWS, and the agency wishes to use R3's contract, we recommend that the agency draft a task order that clearly states the services required. If the services required are not within the scope of the PWS, we recommend that the agency conduct a full and open competition for these services or prepare the appropriate justification required by CICA to limit the competition. We also recommend that the agency reimburse the protester the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1).

The protester must submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the 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