



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Western Pilot Service; Aerial Timber Applicators, Inc.; Evergreen Flying Services, Inc.; G.B. Aerial Applications, Inc.

File: B-415732; B-415732.2; B-415732.3; B-415732.4

Date: March 6, 2018

John R. Prairie, Esq., Gary S. Ward, Esq., and Sarah B. Hansen, Esq., Wiley Rein LLP, for Western Pilot Service; Katherine S. Nucci, Esq., Scott F. Lane, Esq., and Jayna M. Rust, Esq., Thompson Coburn LLP, for Aerial Timber Applicators, Inc.; Frank S. Murray, Esq., David T. Ralston, Jr., Esq., Micah T. Zomer, Esq., and Krista A. Nunez, Esq., Foley & Lardner LLP, for Evergreen Flying Services, Inc.; and Gary J. Campbell, Esq., and Kelley P. Doran, Esq., Womble Bond Dickinson LLP, and Jessica Rothenberg, Esq., Pepper Hamilton LLP, for G.B. Aerial Applications, Inc., the protesters. Amy M. Siadak, Esq., Department of the Interior, for the agency. Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that task order request for proposals seeks services beyond the scope of the underlying multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts are sustained, where the protesters could not have reasonably anticipated that the agency would seek to procure air tanker flight services for extended, guaranteed periods at specific locations when the IDIQ contracts are limited to air tanker flight services on an as-needed, on-call basis.

DECISION

Western Pilot Service (WPS), a small business of Phoenix, Arizona; Aerial Timber Applicators, Inc., (ATA) a small business of Cooperstown, North Dakota; Evergreen Flying Services, Inc., a small business of Rayville, Louisiana; and G.B. Aerial Applications, Inc., (GBAA) a small business of Plains, Texas, protest the terms of a task order request for proposals (TORP) issued by the Department of the Interior (DOI), Interior Business Center, for single engine air tanker (SEAT) flight services to support the Bureau of Land Management's (BLM) wildfire suppression operations in the continental United States. The protesters assert that the SEAT flight services sought under the TORP for extended, guaranteed periods of performance are beyond the scope of the protesters' indefinite-delivery, indefinite-quantity (IDIQ) contracts.

We sustain the protests.

BACKGROUND

BLM's SEAT program is a key component of the national response framework for wildland fire suppression throughout the country. Agency Report (AR), exh. 3, On-Call Acquisition Plan, at 2.¹ Since 1984, BLM has relied on contractor-operated and maintained aircraft to transport fire retardant materials and/or suppressants to wildland fires as directed by the government. *Id.* at 1-2. Traditionally, DOI acquires SEAT flight services for BLM under two parallel acquisitions. Consistent with this approach, in September 2016, DOI issued two solicitations for SEAT flight services to fulfill the latest need for aviation assets to support BLM's fire suppression mission.

One solicitation sought proposals for SEAT flight services on an "on-call" basis. AR, exh. 6, On-Call Request for Proposals (RFP) (No. D16PS00512), at 6. Under the on-call procurement, a contractor's aircraft was not committed to the agency for any specific time period; instead, the aircraft was to be available on an on-call basis when the need for fire suppression services arose.² *Id.* at 9. Even then, offerors would have the option to accept or decline work. *Id.* at 42-43. Pursuant to the solicitation, offerors proposed a daily rate for their SEAT flight services (paid based on the length of time the aircraft would be dedicated to the mission), plus an hourly rate for flight time for each aircraft offered. *Id.* at 7. The solicitation, which did not limit the number of contracts to be awarded, contemplated that multiple IDIQ contracts would be awarded on a best-value tradeoff basis.³ *Id.* at 34, 68. The acquisition had a \$110 million value for a base year and four option years. AR, exh. 3, On-Call Acquisition Plan, at 1.

The other solicitation sought SEAT flight services for the exclusive use of BLM for guaranteed periods of at least 100 days. AR, exh. 5, Exclusive-Use RFP (No. D16PS00182), at 6. Unlike the on-call solicitation, the "exclusive-use" RFP specifically identified three overlapping 100-day periods (that coincided with the May-September wildfire season) during which the contractor's aircraft and pilots would be reserved exclusively for BLM support at specific locations. *Id.* at 43. Under this procurement, the SEAT contractor would be obligated to commit its aircraft for the full 100-day task order. *Id.* at 10. DOI would pay the contractor a fee to have the aircraft available for the entire prescribed period (*i.e.*, the 100 days), as well as an additional

¹ Our Office consolidated the protests prior to the submission of an agency report. Accordingly, the agency submitted a single report responding to the protesters' concerns.

² The minimum guarantee under the on-call procurement was simply an order to have all required items (*e.g.*, aircraft, fuel service vehicle) available for inspection. On-Call RFP at 9, 35.

³ Under the on-call solicitation, the non-price evaluation factors were "significantly less important" than price. On-Call RFP at 65.

amount for any flight hours actually flown. Id. at 8-10. The exclusive-use solicitation contemplated contracts for 33 aircraft, awarded on a best-value tradeoff basis.⁴ Id. at 6, 68. This procurement had a \$185 million ceiling over the same 5-year period of performance as the parallel on-call acquisition. AR, exh. 4, Exclusive-Use Acquisition Plan, at 1. According to the agency's acquisition plans, the exclusive-use aircraft represent the "base organization" for BLM's wildfire suppression mission, and the on-call procurement was for "surge capability." Id. at 2.

In December 2016, DOI awarded six contracts for the requisite 33 aircraft under the exclusive-use solicitation.⁵ Contracting Officer's Statement (B-414238.7, B-414238.9) at 2-3. Thereafter, Evergreen and another disappointed offeror protested with our Office the awards of the exclusive-use contracts. Following prompt corrective action, the agency selected the same firms for awards in February 2017. Evergreen and the other offeror again protested the contracts.⁶ Following a supplemental protest filed by Evergreen, the agency elected to cancel the solicitation. In making this determination, the agency advised that it did not have sufficient time to reevaluate proposals and make new award determinations prior to the 2017 wildfire season.⁷ See AR (B-414238.7, B-414238.9), exh. 10, Notice of Corrective Action, at 1-2. Our Office subsequently dismissed Evergreen's protests as a result of the cancellation of the solicitation at issue. Evergreen Flying Servs., Inc., B-414238.5, B-414238.6, May 4, 2017 (unpublished decision).

In April 2017, prior to its cancellation of the exclusive-use procurement, DOI awarded 15 IDIQ contracts for on-call fire suppression services; an additional firm was awarded an on-call contract through the solicitation's vendor onboarding procedures.⁸ Contracting Officer's Statement (COS) at 2; see AR, exh. 12, Representative On-Call Contract,

⁴ Under the exclusive-use solicitation, the non-price evaluation factors were "significantly more important" than price. Exclusive-Use RFP at 65.

⁵ WPS, ATA, and GBAA were among the awardees.

⁶ Our Office dismissed the protest filed by the other offeror on the basis that the firm was not an interested party to pursue its protest. See Fletcher Flying Servs., Inc., B-414238.4, Apr. 7, 2017 (unpublished decision).

⁷ Evergreen and one of the awardees of an exclusive-use contract protested the agency's decision to cancel the procurement. Our Office concluded that the agency's decision to cancel the exclusive-use procurement was reasonable based on the various justifications advanced by the agency. Henry's Aerial Serv., Inc.; Evergreen Flying Servs., Inc., B-414238.7, B-414238.9, Aug. 10, 2017, 2017 CPD ¶ 257.

⁸ The period of performance for the on-call contracts is a base year through April 30, 2018, four option years, and a 6-month extension. On-Call RFP at 42; AR, exh. 12, Representative On-Call Contract, at 1-2.

at 1, 37-38; exh. 15, On-Call RFP, amend. 3, at 38 (onboarding procedures).⁹ Because the exclusive-use procurement was cancelled, the 16 on-call contracts were BLM's sole vehicle for SEAT flight services during the 2017 wildfire season.

Following the 2017 wildfire season, instead of issuing a new solicitation for exclusive-use SEAT flight services, DOI issued the task order request for proposals (TORP), challenged here, on November 17 under the on-call IDIQ contracts. The TORP contemplates the issuance of more than 40 task orders for SEAT flight services for guaranteed, fixed periods at 21 locations throughout the continental United States. AR, exh. 33, TORP, at 1-2. The periods of performance for each of the locations, which are identified in the TORP's pricing schedule, range from 75, 90, and 100 days. Id. at 2. As an example, the first line on the TORP's pricing schedule seeks two aircraft at Roswell, New Mexico, for 100 days beginning on May 23, 2018. Id.

For each location in the TORP that an offeror is interested in competing for, the solicitation instructs the offeror to identify its proposed aircraft and propose a daily availability rate, an hourly rate for flight time, and a cost for mobilization to the location. Id. at 2. The total proposed cost for each order would be the daily rate multiplied by the number of days, combined with the hourly rate multiplied by the number of days (as an estimate for flight time) and the fixed mobilization cost. Id. Pursuant to the TORP, an offeror's proposed prices could not exceed the rates under the firm's on-call IDIQ contract for the first option year (which covers the 2018 wildfire season).¹⁰ Id. at 3.

The TORP contemplates the issuance of the task orders on a best-value tradeoff basis considering the following evaluation factors: aircraft capability, aircraft location, aircraft availability, past performance, and cost/price.¹¹ Id. at 3. The TORP further provides that price would be "substantially more important than non-price factors." Id. (emphasis removed). According to the TORP, while an offeror may propose the same aircraft for

⁹ The on-call RFP's onboarding procedures provide a process where DOI, through competition, can award additional IDIQ contracts to other small businesses. On-Call RFP, amend. 3, at 38.

¹⁰ The agency represents that it intends to exercise the first option year prior to issuing any task orders under the TORP. Memorandum of Law (MOL) at 2.

¹¹ Aircraft capability would be assessed as pass/fail based on information provided for each proposed "Type 3 Airtanker" under the original on-call solicitation. TORP at 3. Aircraft location would not be separately evaluated; instead it would be considered based on the proposed mobilization costs as part of the total price. Id. Aircraft availability was merely the offeror's representation that the aircraft would be available for performance. Id. Past performance would be assessed based on an offeror's performance on previous orders under the on-call IDIQ; adjectival ratings would be assigned. Id.

multiple task orders, once an aircraft is selected for award for a particular location, it will not be considered for any other task order.¹² Id. at 1.

Task order proposals were due by December 1. On November 27, WPS, ATA, Evergreen, and GBAA--holders of on-call IDIQ contracts--protested to our Office.¹³

DISCUSSION

The protesters contend that the SEAT flight services contemplated under the TORP are beyond the scope of their on-call IDIQ contracts. In this respect, the protesters argue that the way in which flight services will be provided pursuant to the TORP is materially different than how services are provided under the on-call contract. In addition, the protesters point to decades of prior practice and the relevant procurement history as evidence that exclusive-use SEAT flight services and on-call SEAT flight services warrant separate procurements. According to the protesters, because they could not have anticipated that their on-call contracts would be the vehicle used to procure SEAT flight services for extended, guaranteed periods of time, the TORP reflects an out-of-scope modification of their contracts.

The agency maintains that the SEAT flight services sought under the TORP are encompassed by the protesters' on-call IDIQ contracts. MOL at 7. The agency further asserts that, to the extent the TORP can be construed as requiring out-of-scope services, the protesters cannot demonstrate prejudice since they are not precluded from competing for the task orders.¹⁴ Id. at 5-6, 9-10.

¹² The government would make awards for the 100-day task orders first, then the 90-day orders, and the 75-day periods last. TORP at 1.

¹³ Our Office is authorized to hear protests of task orders that are issued under multiple-award contracts where the task order is valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B). We retain jurisdiction, without regard to the procurement value, to hear protests that an order increases the scope of the underlying contract, which is the protesters' primary argument here. See 41 U.S.C. § 4106(f)(1)(A). However, some protesters raise other, ancillary allegations, such as Evergreen's complaint that the TORP contains defects unrelated to scope and GBAA's arguments that the TORP will result in an improper down-selection and is ambiguous. See, e.g., Evergreen Protest at 30; GBAA Protest at 12-14. The agency represents that the task orders to be issued under the TORP will be "much less than" \$10 million, which is the requisite threshold for our Office to resolve protests of other aspects of a task order under multiple-award IDIQ contracts. DOI Dismissal Request at 3. As such, GAO lacks jurisdiction to hear any protest grounds unrelated to scope, and these arguments will not be considered further. See Qwest Gov't Servs., Inc., B-404845, Mar. 25, 2011, 2011 CPD ¶ 77 at 3.

¹⁴ DOI also argues that since the protesters can compete for the orders, they are not interested parties to challenge the TORP. DOI Dismissal Request at 5-7. We disagree. The fact that a vendor holds a multiple-award IDIQ contract does not remove their

(continued...)

Under the Federal Acquisition and Streamlining Act of 1994, as modified by the National Defense Authorization Act for Fiscal Year 2008, our Office is authorized to hear protests of task orders that are issued under multiple-award contracts established within civilian agencies (or protests of the solicitations for those task orders) where the task order is valued in excess of \$10 million, or where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is issued. 41 U.S.C. § 4106(f); see Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 4.

Task orders that are outside the scope of the underlying multiple-award contract are subject to the statutory requirement for full and open competition set forth in the Competition in Contracting Act of 1984 (CICA), absent a valid determination that the work is appropriate for procurement on a sole-source basis or with limited competition. 41 U.S.C. § 4106(c); 41 U.S.C. § 3301; see DynCorp Int'l LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6.

When a protester alleges that the issuance of a task or delivery order under an IDIQ contract is beyond the scope of the underlying contract, and thus falls within CICA's competition requirement, our Office examines whether the order is materially different from the original contract, as reasonably interpreted. DynCorp Int'l LLC, supra; Floro & Assocs., B-285451.3, B-285451.4, Oct. 25, 2000, 2000 CPD ¶ 172 at 6. Evidence of a material difference is found by reviewing the circumstances attending the original procurement; any changes in the type of work, performance period, and costs between the contract as awarded and the order as issued; and whether the original solicitation effectively advised offerors of the potential for the type of orders issued. Symetrics Indus., Inc., B-289606, Apr. 8, 2002, 2002 CPD ¶ 65 at 5. Additionally, we consider whether the agency itself has historically procured the task order services under a separate contract, such that it appears that the agency itself has viewed the task order services as separable and essentially different in nature. Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6. The overall inquiry is whether the order is of a nature which potential offerors reasonably would have anticipated. DynCorp Int'l LLC, supra, at 7-8 (sustaining protest of out-of-scope task order where services required under a TORP were not reasonably contemplated when the IDIQ contracts were awarded, even though there was some overlap in the services requested in the TORP and those required under the IDIQ contracts).

Here, we find that SEAT flight services for guaranteed periods of at least 75 days at predetermined locations are beyond the scope of the protesters' on-call contracts. At

(...continued)

status as an interested party to protest agency actions related to task or delivery orders issued thereunder. Under the circumstances here, we conclude that the protesters, as prospective offerors whose direct economic interests are affected by the issuance of orders or failure to be issued orders, are interested parties to raise the concerns regarding the scope of the TORP. See 4 C.F.R. § 21.0(a)(1).

the outset, we recognize that both the IDIQ contracts and the TORP at issue involve the acquisition of SEAT flight services to assist BLM in the suppression of wildland fires.¹⁵ Our analysis on scope issues, however, does not focus solely on a comparison of the specific services being procured. In this respect, as explained above, a variety of factors are pertinent to our Office's assessment of whether an order (or solicitation for an order) falls within the scope of an underlying contract. As discussed below, we agree with the protesters that the obligations of the contractors under the on-call contract, as compared to what is contemplated by the TORP, are materially different. Consequently, the protesters could not have anticipated a task order competition for extended, guaranteed periods of performance at the time they submitted proposals. We sustain the protest on this basis.

The TORP essentially converts the on-call contracts into exclusive-use procurement vehicles; the agency's contentions otherwise are unavailing.¹⁶ The two types of SEAT flight services, however, rely on fundamentally different service models. As noted above, the on-call orders provide for SEAT flight services for emergencies or surge requirements: services are sought when needed, on a daily basis, for ostensibly shorter periods of time, with the aircraft transitioning from and mobilizing to various locations throughout the wildfire season, depending on the emergent wildfire conditions. See AR, exh. 12, Representative On-Call Contract, at 6-9; exh. 3, On-Call Acquisition Plan, at 1, 4. The exclusive-use TORP, on the other hand, contemplates that aircraft will be prepositioned at one location by a predetermined date for an extensive period of 75 days or more, reserved exclusively for BLM use during the full performance period. TORP at 1-2. We agree with the protesters that the structure of how the SEAT flight services will be performed under the TORP, which generally mirrors what was contemplated under the exclusive-use procurement, is notably different than what was anticipated pursuant to the on-call contracts.

Similarly, the on-call solicitation and the subsequently awarded contracts make no reference whatsoever to any long-term, guaranteed performance period for SEAT flight services. Indeed, as elaborated further below, the protesters prepared and submitted their proposals based on their reasonable assumption that the agency would be conducting separate procurements for the different types of SEAT flight services, as it had done for decades. Therefore, we conclude that the TORP's guaranteed, extended periods of performance at predetermined locations represent a material departure from

¹⁵ In addition, no specific provision in the on-call contracts expressly restricts the agency from issuing the TORP.

¹⁶ For instance, as evidence that the TORP does not seek exclusive-use services, the agency highlights that the TORP does not alter the on-call contracts' requirement that a contractor's primary flight crew work 12 days on and 2 days off, whereas the cancelled 2016 exclusive-use solicitation required slightly different crew requirements. See MOL at 7. We find this argument, and other similar ones focusing on discrete aspects of the cancelled exclusive-use solicitation, to be unpersuasive.

the on-call IDIQ contracts as competed and awarded. See Ervin & Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 8-9 (sustaining protest alleging out of scope task order even though the ordered accounting services were “quite similar” to what was required under the contract, but potential offerors could not have reasonably anticipated an order for the services at issue).

In addition, the manner in which the agency typically administers the on-call contracts evidences the uniqueness of the TORP. While the on-call contracts generally advise that task orders would be issued on a best-value tradeoff basis, historically the agency actually procured its on-call needs under a somewhat unconventional methodology.¹⁷ AR, exh. 12, Representative On-Call Contract, at 43. Specifically, promptly after contract award in April 2017, the agency issued two task orders to the awardees: one covered on-call SEAT flight services for DOI/BLM and the other for the U.S. Forest Service. See id.; see also, e.g., AR, exh. 17, WPS Orders and Modifications, Order No. D17PD00510, at 1-3 (task order for BLM fire suppression); id., WPS Orders and Mods., Order No. D17PD00511, at 1-2 (task order for Forest Service fire suppression). Then, as requests for services--referred to as dispatches--were accepted by the SEAT contactor, DOI would modify the applicable, previously issued task order to include the new work. See, e.g., AR, exh. 17, WPS Orders and Mods., Order No. D17PD00510, Modification Nos. 1-22; COS at 5; WPS Comments at 4. Although permitted to do so under the on-call contracts, the agency does not conduct a best-value task order competition resulting in the issuance of new task orders for each on-call dispatch.¹⁸ See AR, exh. 3, On-Call Acquisition Plan, at 4 (explaining that task orders under the on-call contract would not be competed due to the unpredictable nature of wildland fires).

Instead, in determining which vendor to utilize for a specific, urgent need for SEAT aircraft, the protesters explain that DOI generally first focused on the firm with the available aircraft closest to the fire at the lowest price.¹⁹ See WPS Protest at 3; ATA Protest at 8, 14; GBAA Protest at 6. If that contractor’s crew and aircraft were

¹⁷ Given the emergent and unpredictable situations resulting from wildland fires, DOI executed a class justification for an exception to the requirement that vendors be provided a fair opportunity to compete for task orders for these on-call, surge SEAT flight services. AR, exh. 10, Class Justification for Exception to Fair Opportunity, at 1-3, citing FAR § 16.505(b)(2)(i)(A). In addition, the on-call contracts provide that the government’s “urgency in acquiring services may be a factor and override any other criteria. . . .” AR, exh. 12, Representative On-Call Contract, at 43.

¹⁸ Indeed, as Evergreen points out, a traditional task order competition would be at odds with the real-time urgency underlying the on-call dispatch decisions. See Evergreen Protest at 10.

¹⁹ The contracts require the awardees to keep the status (i.e., available, unavailable, committed) and location of their aircraft updated. AR, exh. 12, Representative On-Call Contract, at 43.

unavailable or the vendor declined the tasking, the agency would move to the next lowest-priced contractor until one accepted the work. See ATA Protest at 8. At that point, a written or verbal resource order was provided and the previously issued task order was modified to add the effort.²⁰ E.g., ATA Protest, exh. D, ATA Sample Resource Orders, at 1-4. Of significance here, the contracts' ordering procedures, and the methodology actually utilized by DOI, did not (1) discuss or otherwise provide for revised pricing or (2) refer to the contract rates as ceiling prices for a subsequent task order competition.

The protesters represent that the dispatch methodology utilized by the agency during the 2017 wildfire season was consistent with DOI practice for at least the past 20 years, a point not contested by the agency. ATA Protest, exh. E, Dec. of ATA President, ¶ 6. In this respect, and significantly, DOI has not previously issued a TORP to on-call contractors to solicit new pricing for extended, guaranteed periods of performance at predetermined locations, as DOI is attempting to do here.²¹ ATA Comments at 3-4; Evergreen Comments, exh. 1, Dec. of Evergreen President, ¶ 2. Similarly, neither the terms of the contracts nor the agency's action placed the on-call offerors on notice that their proposed pricing would be treated as ceiling prices for later-competed exclusive-use work. See Evergreen Protest at 29; GBAA Protest at 11.

Indeed, given the agency's prior practice in how dispatches were determined and administered, we agree with the protesters that they could not have anticipated at the time they submitted offers in response to the on-call solicitation that the on-call contracts would become the vehicles through which the agency would compete and award the long-term, guaranteed period SEAT flight services that separately were being solicited under the exclusive-use solicitation. In our view, the on-call solicitation simply did not effectively advise offerors of the potential for the type of orders contemplated by the TORP. See Data Transformation Corp., supra, at 6-7 (sustaining protest of task order as outside the scope of the underlying contract where services provided under the order were beyond the contemplation of offerors when the underlying contract was awarded).

In addition, the agency's own historical procurement record demonstrates that DOI understood the character of these SEAT flight services to be distinct. In this respect, we consider it significant that DOI has for decades procured its SEAT flight services under two separate contracts: one for extended, guaranteed periods at specific locations and the other for surge or emergency on-call needs. Indeed, DOI remained faithful to its

²⁰ The agency responds that urgent dispatches are placed from different offices, and each office may select contractors in a different manner. MOL at 12.

²¹ On this point, we agree with the agency that the mere issuance of a TORP, while unusual for this contract, does not, without more, establish a violation. See MOL at 10-11. The protesters, though, are not objecting to just the issuance of a TORP. See GBAA Comments at 5.

historical preference for separate procurements in 2016, when the agency prepared two distinct acquisition plans, issued two solicitations for the different types of SEAT flight services, and awarded separate contracts for the different services.

That the agency solicited for and awarded contracts under separate tracks for the different types of SEAT flight services further supports our view that exclusive-use services under the on-call contract were beyond the contemplation of offerors when the on-call contracts were awarded. See Sprint Communications Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60 at 10 (sustaining protest of an out-of-scope contract modification where the agency previously solicited for the different services under separate procurements, demonstrating that the agency itself viewed the services as separable); Neil R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 3-4 (sustaining protest of modification of contract where agency itself viewed the services being added to the contract as separable); see also Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 at 4 (sustaining protest alleging out-of-scope task order where contemporaneous letters and memorandum from agency officials regarding the intent and purpose of the underlying IDIQ contract supported that the ordered services were not contemplated under the original contract).

In sum, following its decision to cancel the exclusive-use procurement in April 2017, the agency was left without a stand-alone contract vehicle to procure SEAT flight services for guaranteed, extended periods of time, as it anticipated it would have in place. However, the agency's attempt to obtain the exclusive-use flight services under the current on-call procurement simply does not withstand scrutiny. In this respect, given the distinguishing characteristics of how the SEAT flight services are provided under the different models, the pre-award perceptions and expectations of the protesters, as well as taking into account the agency's decades of procurement practice, we conclude that the type of SEAT flight services sought under the TORP are materially different than those encompassed under the on-call IDIQ contracts. For this reason, we sustain the protests.

Competitive Prejudice

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 an award, there is no basis for finding prejudice, and our Office will not sustain the protest. Threat Mgmt. Grp., LLC, B-413729, Dec. 21, 2016, 2017 CPD ¶ 9 at 9. GAO resolves doubts regarding prejudice in favor of a protester; a reasonable possibility of prejudice is sufficient to sustain a protest. SITEC Consulting, LLC, et al., B-413526.4 et al., Apr. 3, 2017, 2017 CPD ¶ 164 at 15.

As an initial point, we acknowledge that the protesters, as on-call contract holders, are not precluded from competing for the out-of-scope orders. This consideration, singularly relied on by the agency, is important, but it is not the sole metric in our assessment of prejudice. We also scrutinize any other form of competitive harm asserted by the protesters.

Here, we find credible the protesters' contentions that they are prejudiced because the task order competition for the out-of-scope work results in the offerors not competing on a level playing field, as would be the case if the procurement was a full and open competition. See WPS Response to DOI Dismissal Request at 4; Evergreen Response to DOI Dismissal Request at 9. In this respect, the protesters are constrained under the TORP by the aircraft, pricing, and overall proposal strategy utilized for the on-call contract. However, as demonstrated above, the TORP is an unanticipated departure from what the protesters expected when they submitted offers for their on-call contracts.

More specifically, as outlined above, the economics of the two types of SEAT flight services are fundamentally different. In this respect, the methodology historically utilized by the agency to dispatch aircraft under the on-call contract provided an advantage to the lower-priced contractors, as those were the companies that agency officials usually contacted first. ATA Protest, exh. E, Dec. of ATA President, ¶ 4. Additionally, the 2016 on-call solicitation, which did not cap the number of contracts to be awarded, weighed price as significantly more important than the non-price evaluation factors, and also provided that contractors would not be obligated to accept any (presumably unprofitable) dispatches under the on-call contract. On-Call RFP at 42-43, 65; see ATA Response to DOI Dismissal Request at 2.

On the other hand, at the same time the protesters were competing for their on-call contracts, which placed a premium on low price, they also were competing for the 2016 exclusive-use procurement. That solicitation, though, placed less emphasis on price. See Exclusive-Use RFP at 65. In addition, the exclusive-use procurement was, historically, the more advantageous contract because fewer contracts were awarded and the contractor was able to spread its operational costs over the guaranteed, exclusive-use period. ATA Protest at 9. As the acquisition plans convey, the on-call contract was meant to fulfill surge requirements not met by the exclusive-use SEAT flight services. AR, exh. 4, Exclusive-Use Acquisition Plan, at 2, 4.

Thus, as the protesters represent, the fact that they were simultaneously competing for both procurements in late 2016 "played a significant role in how they structured their pricing" proposals. ATA Protest, exh. E, Dec. of ATA President, ¶ 6; Evergreen Response to DOI Dismissal Request at 10. In this respect, the protesters competed for the on-call contract with the expectation that the agency would separately procure exclusive-use SEAT flight services under a different procurement. WPS Comments at 8. As articulated above, they did not anticipate that their on-call daily availability, flight hour, and mobilization rates would become ceiling prices for a task order competition for the exclusive-use services, something that had not been done previously. See ATA Response to DOI Dismissal Request at 3. Had the protesters known that the on-call contract would encompass exclusive-use SEAT flight services, the companies represent that they would have structured their proposals differently and altered their pricing accordingly. See GBAA Protest, exh. 2, Dec. of GBAA President, ¶ 17.

Now, by soliciting task order proposals for extended, guaranteed periods of performance and allowing price reductions, DOI is materially changing the framework upon which the offerors competed for their on-call contracts. Consequently, the protesters are not competing under the TORP on a “fair and level playing field,” as they would if the competition was subject to full and open competition, because the protesters are constrained by the proposal strategy and rates applicable to their on-call contracts. See ATA Comments at 3; WPS Comments at 1-2. The result is that contractors with higher on-call rates have more competitive flexibility under the TORP as compared to those with more aggressive on-call pricing.²² Indeed, the protesters represent that the ceiling pricing constraints limit their ability to compete for all locations identified in the TORP.²³ By attempting to procure services beyond the scope of the on-call contracts, the agency is “arbitrarily handicapping” the protesters’ ability to compete for the unanticipated work. See WPS Response to DOI Dismissal Request at 4.

We conclude that these explanations advanced by the protesters demonstrate that the agency’s actions in seeking services outside the scope of their on-call contracts prejudice the protesters. Had these firms known that their on-call contracts would be the vehicles for future orders for extended, guaranteed periods of performance, the record supports that they would have structured their offers differently at the time they were competing for on-call contracts. Instead, here, they are forced to compete for unanticipated services beyond the scope of their contracts, unpredictably and unevenly constrained by their range of on-call prices. Such a scenario places the protesters at a competitive disadvantage and results in competitive prejudice due to the agency’s improper action. See Crane & Co., Inc., B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 9 (sustaining protest where flawed procurement resulted in a competitive disadvantage for the protester even though firm was not altogether precluded from competing for the contract).

RECOMMENDATION

We recommend that DOI cancel the TORP. To the extent the agency has a requirement for SEAT flight services for guaranteed, longer-term periods of time, we recommend that the agency either conduct a new procurement under competitive procedures, in accordance with the statutory and regulatory requirements, or prepare

²² WPS, for example, has the [DELETED] daily availability rate of the on-call contractors. AR, exh. 35, Comparison of Pricing, at 1.

²³ GBAA represents that it did not bid on every location under the TORP because it would potentially be “operating at a loss” at certain sites. GBAA Response to DOI Dismissal Request at 3-5. Evergreen likewise did not submit an offer for “multiple” locations due to the imposed pricing constraints. Evergreen Response to DOI Dismissal Request at 9-10, 13; id., exh. 1, Dec. of Evergreen Official, ¶¶ 7-8.

the appropriate justification required by CICA to modify the on-call IDIQ contracts to add the new scope of work. See 41 U.S.C. § 3304.

We also recommend that the protesters be reimbursed the reasonable costs of filing and pursuing their protests, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claims for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Thomas H. Armstrong
General Counsel