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Decision

Matter of: The MayaTech Corporation

File: B-419313

Date: November 9, 2020

Jonathan D. Shaffer, Esq., and Todd M. Garland, Esq., Smith Pachter McWhorter PLC, for the protester.

Kayleigh Scalzo, Esq., and Michael Pierce, Esq., Covington & Burling, LLP, for National Opinion Research Center, the intervenor.

Tami S. Hagberg, Esq., and Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.

Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that the agency improperly increased the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract by failing to follow the evaluation criteria set forth in the request for task order proposals is dismissed because the Government Accountability Office does not have jurisdiction to review the matter; where the protester's arguments reflect only its disagreement with the manner in which the agency evaluated the task order proposal and does not otherwise demonstrate that the task order is outside the scope of the underlying IDIQ contract.

DECISION

The MayaTech Corporation, of Silver Spring, Maryland, protests the issuance of a task order to the National Opinion Research Center (NORC), of Chicago, Illinois, under request for task order proposals (RFTOP) No. 75P00120R00117, issued by the Department of Health and Human Services (HHS), for technical assistance and logistics support services. MayaTech argues that the agency failed to provide it with a fair opportunity to compete and improperly increased the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract.

We dismiss the protest for lack of jurisdiction.

BACKGROUND

The RFTOP, issued on July 6, 2020, under HHS's Program Support Center (PSC) multiple-award IDIQ contract, sought professional resources to provide technical assistance and logistics support to the Office of Population Affairs.¹ Agency Req. for Dismissal, exh. 1, RFTOP at 1, 3. The RFTOP contemplated the award of a single time-and-materials task order with one 12-month base period and four 12-month option periods. Award was to be made on a best-value tradeoff basis, considering the following technical evaluation factors, listed in descending order of importance: personnel qualification and organizational capacity; technical approach; understanding the issues and scope of work; and section 508 compliance.² *Id.* at 29, 49, 55-56. The solicitation advised that the non-price evaluation factors when combined were significantly more important than the price factor.³ *Id.* at 56.

As originally issued, the solicitation stated that, with the exception of the section 508 compliance evaluation factor (which would be evaluated on an acceptable/unacceptable basis), the technical factors would be evaluated using a "point method" to assign a numerical rating of up to 100 points for technical proposals. *Id.* at 56.

The solicitation was subsequently amended three times. In amendment 1, the agency provided the distribution of points to be assigned to each of the technical factors. Agency Req. for Dismissal, exh. 2, RFTOP amend. 1 at 2. In amendment 2, among other things, the agency provided details about each evaluation factor and also stated that the agency would evaluate the technical proposals using a color/adjectival coded rating scheme. Agency Req. for Dismissal, exh. 3, RFTOP amend. 2 at 5-8. Finally, in amendment 3, the agency deleted the adjectival rating scheme for the technical factors. Agency Req. for Dismissal, exh. 4, RFTOP amend. 3.

On October 1, 2020, MayaTech was notified that the task order was issued to NORC and that the value of the task order was \$8,403,926. Protest at 8-9; Unsuccessful

¹ Although this is a task order competition under a multiple-award IDIQ contract, the agency issued the solicitation as an RFTOP rather than a request for quotations and refers to the submissions of proposals from offerors instead of quotations from vendors, as well making an "award" decision. For consistency and ease of reference to the record, we do the same.

² Though not at issue in this decision, section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires that agencies' electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

³ Although past performance was to be considered as part of the selection decision, the RFTOP only identified what information offerors were required to provide for the agency to evaluate past performance. The RFTOP, however, did not specify how the evaluation factor would be assessed (*e.g.*, adjectival rating or on an acceptable/unacceptable basis). RFTOP at 53-56.

Offeror Award Notice. Following a written debriefing, MayaTech filed this protest with our Office.

DISCUSSION

MayaTech contends, among other things, that the agency failed to provide MayaTech a fair opportunity to compete because the selection decision was contrary to the base contract ordering clause and the RFTOP's terms. According to the protester, the IDIQ contract's ordering clause states that the issuance of any task order would be in accordance with section 16.505(b) of the Federal Acquisition Regulation, which, in MayaTech's view, mandates that any award would be made based on the evaluation terms contained in the RFTOP. Protest at 10. MayaTech contends that the agency "materially changed the scope of the base multiple award IDIQ task order contract by removing the requirement in the [o]rdering [c]lause that [the agency] would award based on the RFTOP criteria." *Id.* In this regard, the protester argues that had the agency followed the ordering clause and the RFTOP, MayaTech would have received a full 100 point score or close to it--making it higher rated than NORC--and would have received the award. *Id.* at 11. As a result, the protester maintains that the agency denied MayaTech a fair opportunity to compete and otherwise unreasonably altered the scope of the underlying IDIQ contract. *Id.* at 10.

Prior to the agency report due date, the agency requested that our Office dismiss MayaTech's protest because the protest concerns the issuance of a task order valued under \$10,000,000. The agency asserts the protester has not demonstrated that the task order at issue has increased the scope, period, or maximum value of the contract under which the task order was issued, and therefore, should be dismissed for lack of jurisdiction. Agency Req. for Dismissal at 1. The agency further argues that MayaTech's arguments merely challenge an amendment to the RFTOP that changed the agency's application of the evaluation criteria, which is not a sufficient basis to establish jurisdiction on the ground that the change increased the scope of the base contract. *Id.* at 2.

MayaTech responds that our Office has jurisdiction to hear the protest because according to the protester, the agency increased "the scope of the base contract" by making a task order award without regard to the base contract's ordering clause. Resp. to Req. for Dismissal at 3. The protester also argues that the agency's actions "effectively rewrote the base IDIQ contract" by removing a material requirement from the ordering clause "that task orders be awarded through fair opportunity to award and in accordance with the RFTOP criteria," which offerors competing for the original base IDIQ contract could not have anticipated. *Id.* at 4. As a result, MayaTech contends that its "protest fits squarely within GAO's jurisdiction where an agency increases the scope of an IDIQ contract through the agency's conduct of a task order procurement." *Id.* at 5.

Under the Federal Acquisition and Streamlining Act of 1994, as modified by the National Defense Authorization Act for Fiscal Year 2017, 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); *Adams and Assocs., Inc.*, B-417249, Feb. 26, 2019, 2019 CPD ¶ 96 at 3.

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, absent a valid determination that the work is appropriate for procurement on a sole-source basis or with limited competition. 41 U.S.C. § 3301; 10 U.S.C. § 2305(a)(1)(A)(i); see *DynCorp Int'l LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6.

The analysis of whether a task order is outside the scope of an IDIQ contract is the same as the analysis of whether a contract modification is outside the scope of a single-award contract. *People, Tech. and Processes, LLC*, B-417273, May 7, 2019, 2019 CPD ¶ 173 at 4; *Anteon Corp.*, B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 4-5. In determining whether a task order is beyond the scope of the contract, GAO and the courts look to whether there is a material difference between the task order and that contract. *People, Tech. and Process, supra*; *Anteon Corp., supra* at 5; *MCI Telecomms. Corp.*, B-276659.2, Sept. 28, 1997, 97-2 CPD ¶ 90 at 7. Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. *Anteon Corp., supra* at 5; *Data Transformation Corp.*, B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6. The overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated. *Id.*

In entertaining protests related to the issuance of task orders, we have consistently understood scope to refer to the scope of work authorized in the underlying contract. *Colette, Inc.--Recon.*, B-407561.2, Jan. 3, 2013, 2013 CPD ¶ 19 at 2; *California Indus. Facilities Res., Inc., d/b/a CAMSS Shelters*, B-403421 *et al.*, Nov. 5, 2010, 2010 CPD ¶ 269 at 4; *DynCorp Int'l LLC, supra*.

Here, MayaTech does not contest that the task order at issue falls below the \$10 million threshold, nor does it allege that the task order issued to NORC increased the scope of work the underlying IDIQ contract. Rather, MayaTech's argument focuses on the manner in which the agency conducted the task order competition, which, in MayaTech's view, resulted in an increase of the scope of the base IDIQ contract. Specifically, MayaTech asserts the following:

The Ordering Clause requires that orders would be awarded through fair opportunity and in accordance with the RFTOP criteria. MayaTech relied on that contract term in competing for the multiple award task order

contract, and the RFTOP term provided for objective competitions and the assurance of regularity. MayaTech had no notice that PSC would not follow the Ordering Clause; the original solicitation did not effectively inform offerors of the potential for the type of order issued (i.e., an order issued under terms different than the RFTOP and contract Ordering Clause.) MayaTech could not have anticipated this material change that increased the scope of the base contract by allowing the agency unfettered discretion to change the evaluation criteria *after award of the base contract and before award of the task order here. Removal of the Ordering Clause assurances thus increased the base contract scope.*

Protest at 20 (emphasis in original). MayaTech's attempt to expand the definition of "scope" is not persuasive. In this regard, MayaTech provides no support in the statutory text, legislative history, or our prior decisions for its expansive reading of scope. MayaTech's expansive definition of "scope" would render the task order protest bar meaningless because any departure from the task order solicitation or underlying contract would result in a task order that exceeds the scope of the contract, and all protests related to task orders would fit within the "increases the scope" exception set forth in 41 U.S.C. § 4106(f). Moreover while the protester asserts that "MayaTech's protest fits squarely within GAO's jurisdiction where an agency increases the scope of an IDIQ contract through the agency's conduct of a task order procurement," it does not cite to a single decision in which our Office permitted a task order protest challenging flaws in the evaluation process to proceed under the "increases the scope" exception in 41 U.S.C. § 4106(f).

In sum, because MayaTech's protest reflects only its disagreement with the manner in which the agency evaluated the task order proposals--which the exception to the task order protest bar does not encompass--our Office lacks jurisdiction to hear MayaTech's protest. *Colette, Inc.--Recon., supra* at 3; *see also Solute Consulting v. United States*, 103 Fed. Cl. 783, 791-92 (2012). The remainder of MayaTech's protest challenges the weaknesses assessed to its proposal. Protest at 11-19. Because there is no dispute that the value of the value of the task order at issue here is less than \$10 million, the protester fails to show that its protest falls within the exception provided in the statute for hearing a protest. Consequently, we lack jurisdiction to review the matter. 41 U.S.C. § 4106(f).

The protest is dismissed.

Thomas H. Armstrong
General Counsel