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Decision

Matter of: Tetra Tech, Inc.

File: B-420305.7

Date: November 15, 2022

Robert Nichols, Esq., Michael Bhargava, Esq., and Madison Plummer, Esq., Nichols Liu LLP, for the protester.

Samuel S. Finnerty, Esq., Katherine Burrows, Esq., and Lauren Brier, Esq., Piliero Mazza PLLC, for Credence Management Solutions, LLC, the intervenor.

John B. Alumbaugh, Esq., and Eugene J. Benick, Esq., U.S. Agency for International Development, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that a task order is void *ab initio* is denied where the record does not support a finding that the task order issuance was made contrary to statute or regulation due to improper action by the contractor, or that the contractor had direct notice that the procedures followed violated statutory or regulatory requirements.

DECISION

Tetra Tech, Inc., of Pasadena, California, protests the decision of the U.S. Agency for International Development (USAID) to continue performance of a task order by Credence Management Solutions, LLC, of Vienna, Virginia, while the agency implements corrective action in response to a prior protest. The task order, issued pursuant to request for task order proposals (RFTOP) No. 7200AA21R00029, is for onsite, direct advisory and administrative institutional services to USAID's Global Health Bureau. The protester asserts that continued performance under the task order is improper because the task order is void *ab initio*.

We deny the protest.

BACKGROUND

USAID issued the RFTOP to firms holding the General Services Administration's (GSA's) One Acquisition Solution for Integrated Services (OASIS) unrestricted pool 1

contract. Prior Amended Protest, exh. A, RFTOP amend. 5 at 2. The solicitation contemplated the issuance of a cost-plus-award-fee task order with an estimated duration of 8 years. *Id.* at 10. The task order would be issued to the offeror whose proposal represented the best value to the agency, considering cost and the following four technical factors, listed in descending order of importance: technical approach, management structure and key personnel, organizational capacity, and past performance. *Id.* at 112-113. The technical factors were significantly more important than cost. *Id.* at 112.

Tetra Tech submitted a timely proposal. Prior Amended Protest at 3. On June 10, Tetra Tech's proposed subcontractor forwarded the protester a USAID email that reflected the award of a task order with a 7-year period of performance. *Id.* Tetra Tech protested the issuance of the task order, arguing that "USAID awarded the Task Order with a shortened period of performance without amending the Solicitation, violating a material solicitation requirement and a mandatory regulation." *Id.* at 4. The protester argued that the agency's actions prejudiced Tetra Tech by depriving it of an opportunity to compete on the basis of the changed requirement. *Id.*

USAID advised GAO that it would take corrective action to cure the defective award of "the prior contract for a period of seven years at the proposed eight-year cost of the awardee." Revised Corrective Action Notice at 2. The agency indicated that it would (1) issue an amended solicitation with a revised period of performance; (2) provide Tetra Tech, another protester, and the awardee the opportunity to submit revised proposals; (3) issue a new source selection decision after a reevaluation of the revised proposals; and (4) take any other actions that would maintain the integrity of the procurement process. *Id.* at 1. The agency also stated that it did not intend to stay or suspend the current award for the first 120 days of the corrective action period.¹ *Id.* at 2. This protest followed.²

DISCUSSION

Tetra Tech challenges Credence's performance of the task order while USAID conducts corrective action because Tetra Tech argues the task order is void. Tetra Tech contends that "an agency may not authorize performance of a Task Order that is void *ab initio* for failure to comply with procurement law." Protest at 2. The protester argues that any performance of the task order by Credence is improper because USAID

¹ The protester acknowledged in its initial protest that Tetra Tech was not eligible for a required stay of task order performance. See Prior Amended Protest at unnumbered pages 10 (noting that "the required period for invoking the automatic stay under 31 U.S.C. 3553(d) has expired").

² The value of the task order issued to Credence is \$793,209,051. Prior Amended Protest, exh. B, Debriefing at 1. Because the order exceeds \$10 million, GAO has jurisdiction over this protest. 41 U.S.C. § 4106(f)(1)(B).

“committed an error by awarding a Task Order to Credence with terms that differed materially from those announced in the RFTOP.” *Id.*

A contract or task order is void *ab initio* when the award was made contrary to statute or regulation due to improper action by the contractor, or the contractor had direct notice that the procedures followed violated statutory or regulatory requirements. *RKR, Inc.*, B-247619, B-247619.2, Oct. 28, 1992, 92-2 CPD ¶ 289 at 5.

Here, the protester has made no showing that Credence engaged in any improper activity. Tetra Tech instead focuses its argument on the second criterion, whether Credence had direct notice that the procedures followed violated statutory or regulatory requirements, contending that “the illegality” “was plain on the face of the Task Order that Credence received, so [Credence] was on notice of the illegality.” Comments at 5. Tetra Tech’s assertions, however, do not address the relevant inquiry. The relevant inquiry is whether the contractor was on direct notice that the procedures followed in making the award violated statutory or regulatory requirements. *RKR, Inc.*, *supra*. Tetra Tech has not alleged as much, and, regardless, such an allegation is unsupported by the record.

Tetra Tech also asserts the relevance of the Federal Circuit’s decision in *CACI, Inc. v. Stone*, 990 F.2d 1233 (Fed. Cir. 1993), which was an appeal of a bid protest and involved the question of whether an improperly awarded contract should be suspended. Comments at 6. In *CACI*, the General Services Board of Contract Appeals (GSBCA) found the contract was improperly awarded in violation of law, because the procuring agency had not obtained a delegation of procurement authority from the GSA, as required by law, before proceeding with the procurement. The GSBCA declined to suspend contract performance. The Court concluded that the contract was void and reversed the GSBCA’s decision not to suspend contract performance. *Id.* at 1236-37. Tetra Tech argues that, “[s]imilarly, here, the illegality is plain.” Comments at 6.

We disagree with the protester that *CACI* compels a finding that the task order here is void. The Court found that the GSBCA could not “ratify a contract that the agency had no authority to create initially.” *CACI, Inc.*, *supra*, at 1236. Tetra Tech does not assert that the agency lacked contract authority here. See Protest at unnumbered page 4 (arguing that “USAID is improperly proceeding with performance of a Task Order that is a nullity because it was awarded in violation of fundamental procurement law”). The salient fact in *CACI* was that the agency--unlike USAID--lacked authority to contract. For that reason, we find *CACI* inapposite and the protester’s reliance on it unpersuasive.

Where an agency has procurement authority--which is undisputed here--one of two conditions must be met before we will find that a contract or task order is void *ab initio*: the award was made contrary to statute or regulation due to improper action by the contractor, or the contractor had direct notice that the procedures followed violated statutory or regulatory requirements. Again, Tetra Tech has not alleged that Credence’s improper action led to the issuance of the task order, or that Credence had “direct notice” that USAID’s procedures violated procurement law or regulation. The record

provides no basis on which to sustain the allegation that the task order is void, and we deny the protest.

Moreover, the record does not support a finding that the protester was prejudiced by Credence's performance of the contract during the agency's implementation of the corrective action. Competitive prejudice is an essential element of a viable protest, and when the record establishes no reasonable possibility of prejudice our Office will not sustain a protest even if a defect is found in the procurement. *Trandes Corp.*, B-411742.4, Feb. 22, 2016, 2016 CPD ¶ 61 at 6.

Tetra Tech asserts that it is competitively prejudiced by Credence's performance of the requirement because "[p]reserving the period of performance and funding of the awarded task order and avoiding an unnecessary transition that would be difficult to reverse are all important to ensuring Tetra Tech can fairly compete in the corrective action process." Protest at unnumbered page 8. The protester argues that Credence's performance of the task order during implementation of the corrective action will make the agency "feel less able to make award to an offeror other than Credence." *Id.* Performance of the task order "involves making professional personnel available to the Agency," and the protester contends that "[m]oving these employees between contractors and contracts is disruptive and difficult, as these personnel switch employers, benefits, and management." *Id.*

The protester does not cite any decisions of our Office in support of the assertion that the possible disruption to professional personnel or the anticipation of improper agency action constitute the competitive prejudice necessary to sustain a protest. *See id.* (citing no GAO decisions). Nothing in the record suggests that Tetra Tech will be unable to compete for the agency's requirements according to the terms of the revised solicitation. And while the protester suggests that the agency's selection officials may ultimately "feel less able" to make an award to a firm other than Credence, as we have explained, government contracting officials are presumed to be competent and to act in good faith, without unfair or biased motivations. *Career Innovations, LLC*, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8 (noting that government officials are presumed to act in good faith, and that we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition). Accordingly, the protester's suspicion of potential bias during the future selection process cannot support a finding of competitive prejudice.

The protest is denied.

Edda Emmanuelli Perez
General Counsel