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# Decision

**Matter of:** Wyle Laboratories, Inc.

**File:** B-416528.2

**Date:** January 11, 2019

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Alexander J. Brittin, Esq., Brittin Law Group, PLLC; and Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester. Keith R. Szeliga, Esq., and Adam A. Bartolanzo, Esq., and Shaunna E. Bailey, Esq., Sheppard, Mullin, Richter & Hampton LLP, for Deloitte Consulting LLP, the intervenor. Carl J. Verneti, Esq., Department of Homeland Security, for the agency. Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging the agency's rejection of a quotation for the issuance of a task order is denied where the agency reasonably concluded it would not be in privity of contract with the entity that would be performing the work.

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## DECISION

Wyle Laboratories, Inc., of Huntsville, Alabama, challenges the rejection of its quotation and the issuance of a task order to Deloitte Consulting LLP, of Arlington, Virginia, under request for quotations (RFQ) No. 01C18Q0106, issued by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), for professional, technical, and operational support services, in support of DHS's Office of Facilities and Asset Management. Wyle contends that the agency improperly failed to conduct a comparative assessment of the vendors' quotations prior to selecting Deloitte to receive the order.

We deny the protest.

## BACKGROUND

The CBP issued the RFQ on June 4, 2018. The competition was limited to firms holding one of the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) unrestricted pool 1, multiple-award indefinite-delivery,

indefinite-quantity contracts for professional, scientific, and technical services. The RFQ anticipated the issuance of a time-and-materials task order for a period of performance of five years.

The RFQ advised vendors that quotations would be evaluated on the basis of price, and the following two non-price factors: (1) technical and management approach, and (2) past performance. RFQ at 4. For purposes of award, the RFQ provided that the technical factor was more important than the past performance factor, and that the non-price factors, when combined, were significantly more important than price. Id.

With regard to the technical factor, the solicitation provided that quotations would be evaluated on the basis of: (a) the technical and management approach for completing the work in the statement of work (SOW); (b) sufficient and detailed descriptions of the vendor's capability and experience with successful projects of comparable scope; and (c) details on the work to be performed by each of the proposed staff and their specific roles and responsibilities. RFQ at 3.

With regard to past performance, the solicitation required that vendors provide at least two, and a maximum of four, past performance profiles, demonstrating "successful management and performance of work similar in size, scope, and complexity to that described in the SOW[.]" RFQ at 2-3. In responding to questions, the agency clarified that past performance submissions were limited to experience "from the prime contractor only." Id., amend. 0001, at 1.

On June 5, 2018, Wyle, which holds an OASIS contract, entered into an asset purchase agreement (APA) with Grant Thornton whereby Wyle transferred all of the "assets and liabilities used in or relating to the performance" of Wyle's OASIS contract to Grant Thornton. Protest at 6; Agency Report (AR), Tab 4, Wyle Quotation, at i. Grant Thornton currently does not hold an OASIS contract. Pursuant to the APA, Wyle is to "cooperate and provide commercially reasonable efforts to assist Grant Thornton with submission of [quotations] in response to requests for task order quotations, like the task order that is the subject of this protest, during the interim period and before a full novation is granted." Id.

On June 14, 2018, Wyle and Grant Thornton submitted documentation to GSA detailing the transaction and asking GSA to recognize Grant Thornton as the successor-in-interest to Wyle's OASIS contract, pursuant to Federal Acquisition Regulation (FAR) § 42.1204. Protest at 5. As of November 5, 2018, when CBP submitted its report responding to the protest, GSA had not yet recognized the novation agreement. AR at 2.

### Pre-Award Protest

The quotation submission deadline for the instant DHS procurement was June 29, 2018. RFQ, amend. 0002. Prior to that date, Wyle filed a protest with our Office challenging the solicitation's terms as unduly restrictive of competition. Specifically, Wyle disagreed with the RFQ provision limiting past performance information to only the

prime contractor, and argued that the solicitation should also allow for the submission of subcontractor past performance information. Our Office dismissed Wyle's pre-award protest on the ground that Wyle had failed to demonstrate a direct economic interest in the procurement and therefore was not an interested party under our Bid Protest Regulations.<sup>1</sup> Wyle Laboratories, Inc., B-416528, Sept. 7, 2018, 2018 CPD ¶ 315.

#### Agency Evaluation and Award

The agency received quotations from Wyle and Deloitte by the June 29 closing date. AR, Tab 7, Tech. Eval. & Award Decision, at 1; Contracting Officer Statement of Facts (COS) at 3. While Wyle's pre-award protest was pending before our Office, the contracting officer advised the technical evaluation team (TET) to begin evaluating the vendors' quotations; prior to issuance of our decision addressing Wyle's pre-award protest, however, the TET was only able to complete a "cursory technical review" of Wyle's quotation. AR, Tab 7, Tech. Eval. & Award Decision, at 1; COS at 3.

The agency's evaluation noted that our September decision dismissed Wyle's pre-award protest on the ground that Wyle had failed to demonstrate a "direct economic interest in the procurement," and therefore, Wyle was not "an interested party under the GAO's Bid Protest Regulations" eligible "to challenge the terms of the request for quotations." AR, Tab 7, Tech. Eval. & Award Decision, at 1. Ultimately, the agency determined that "awarding to Wyle would mean that CBP would not be in privity of contract with [the] entity (Grant Thornton) who would actually be performing the work," and that this "introduce[d] considerable risk, up to and including the fact that Wyle could switch out Grant Thornton with another contractor without first obtaining the approval of CBP." Id. Accordingly, the agency determined that "the quote received from Wyle [could not] be considered for award." Id. at 13.

The agency evaluated Deloitte's quotation as very good for technical and management approach, and assessed it a rating of satisfactory confidence for past performance. Id. Ultimately, the agency concluded that Deloitte's quotation, with a total evaluated price of \$65,390,017, represented the best value to the government, and decided to issue the task order to that firm. Id. at 2, 13. On October 2, 2018, the agency notified Wyle of its award decision. AR, Tab 8, Debriefing Letter, at 1. The agency also explained that

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<sup>1</sup> Specifically, our decision noted the following: Wyle acknowledged that the quotation had been prepared by Grant Thornton, and had been submitted by Wyle on behalf of Grant Thornton; Wyle acknowledged that it "[would] not be performing any of the work for the task order, but rather, Grant Thornton and its subcontractors [would perform] all of the work under the task order," and the record reflected that Wyle's purpose as the prime contractor was a legal requirement of the third-party asset purchase agreement, and that Wyle's only duties as the prime contractor were administrative responsibilities to allow Grant Thornton to perform under the contract until novation was finalized. Wyle Laboratories, Inc., B-416528, supra, at 4.

“[a]fter considering the GAO decision, a determination was made to forego a comparative analysis because your firm was considered ineligible for award.” Id. at 2.

This protest followed.<sup>2</sup>

## DISCUSSION

The protester challenges the CBP’s determination that Wyle’s quotation was ineligible for award, arguing that the agency improperly based its determination solely on information from our Office’s pre-award protest decision, rather than an assessment of Wyle’s quotation. In this regard, Wyle contends that the agency failed to conduct a comparative analysis of the vendors’ quotations prior to making an award determination, thereby improperly converting the procurement into a de facto sole-source acquisition. The protester also argues that the agency’s past performance evaluation improperly failed to consider information for Wyle’s proposed subcontractor.

For the reasons discussed below, we conclude that the agency reasonably evaluated Wyle’s quotation as ineligible for award.<sup>3</sup> Since we find that the CBP’s evaluation was reasonable in this regard, we need not address the protester’s other complaints.

In reviewing protests challenging the agency’s evaluation of quotations, including those procurements conducted pursuant to FAR subpart 16.5, our Office does not reevaluate quotations; rather, we review the record to determine whether the evaluation was reasonable and consistent with the solicitation’s evaluation criteria as well as applicable procurement laws and regulations. Tribalco, LLC, B-414120, B-414120.2, Feb. 21, 2017, 2017 CPD ¶ 73 at 7.

Here, as noted above, the RFQ contemplated award to an OASIS contract holder. Wyle’s quotation advised that it had been submitted by “Wyle Laboratories, Inc.,” but that “Grant Thornton [would] lead the team[.]” AR, Tab 4, Wyle Tech. Quotation, Vol. I, at i, 3. In this regard, the quotation explained that “[p]ursuant to an Asset Purchase Agreement, Grant Thornton acquired the OASIS Pool 1 Unrestricted contract assets from Wyle,” and therefore, “Grant Thornton is currently the owner of this OASIS Pool 1 Unrestricted asset and successor-in-interest to Wyle’s OASIS contract.” Id. at 2-3. Wyle’s quotation further explained that while “Wyle [would] serve as the prime contractor until novation of its OASIS Pool 1 Unrestricted contract assets,” its role would consist of “performing requisite prime contract administration responsibilities only during the novation period.” Id. at 3. In addition, the quotation explained that, at the time of

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<sup>2</sup> The estimated value of the task order at issue exceeds \$10 million, and therefore exceeds the threshold for GAO bid protest jurisdiction. 41 U.S.C. § 4106(f)(2).

<sup>3</sup> Although this decision does not address in detail every argument raised by the protester, we have considered each and conclude that none provides a basis to sustain the protest.

novation, “Grant Thornton, as successor-in-interest to Wyle, [would] become the prime contractor and assume these responsibilities.” Id.

As noted above, the TET began a technical evaluation of both quotations while Wyle’s pre-award protest was pending. Based on this review, the TET determined that Wyle’s quotation “had earned” an outstanding rating under the technical and management factor, and neutral confidence rating for past performance. AR, Tab 8, Debriefing Letter, at 2.

The protester argues that, even if preliminary, these ratings demonstrate that the agency must have believed that Wyle could perform the task order. Protester’s Comments at 2. This proves, the protester asserts, that the agency improperly relied solely on GAO’s decision in concluding that Wyle’s quotation was ineligible for award. Id. at 6.

We find no merit to the protester’s argument. The agency’s rating of Wyle’s quotation as outstanding under the technical and management approach factor does not show that the agency considered Wyle to be capable to perform the task order because the quotation provided for performance of the task order work solely by Grant Thornton. See generally AR, Tab 4, Wyle Quotation. The only mention of Wyle in the entire quotation relates to Wyle’s letterhead, the cover letters and administrative notations, and a brief explanation of the effect of the APA. See id. None of the substantive areas of the quotation contains any reference to Wyle or Wyle’s capability or intent to perform the task order, and Wyle admits that it does not intend to perform the task order. See id. Accordingly, any ratings assigned by the agency, whether preliminary or final, reflected the agency’s evaluation of the capability of Grant Thornton to perform the task order, not Wyle, and fail to establish that the agency considered Wyle to have the capability to perform the task order.

Next, we disagree with the protester that the agency was required to conduct a comparative assessment of the vendors’ quotations prior to determining that Wyle’s quotation was ineligible for issuance of the task order. The quotation proposed Wyle as the prime contractor (pending novation), but indicated that Grant Thornton would perform 100 percent of the work under the task order. The record reflects that the agency reviewed Wyle’s quotation and concluded that, “[i]t is not in the government’s best interest to award to a vendor who, by its own admission, lacks the capability to perform.”<sup>4</sup> AR, Tab 7, Tech. Eval. & Award Decision, at 1. In addition, the agency found that “awarding to Wyle would mean that CBP would not be in privity of contract

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<sup>4</sup> Although the evaluators referenced our Office’s decision on Wyle’s pre-award protest in the evaluation, the agency’s determination regarding eligibility was based on the CBP’s own assessment of Wyle’s quotation. In this regard, the contracting officer explains that his understanding regarding Wyle’s quotation “was bolstered by the GAO decision making the same findings,” which “cast serious doubt as to whether Wyle’s submitted quote [could] be considered eligible for consideration.” COS at 3.

with [the] entity (Grant Thornton) who would actually be performing the work,” and that this approach “introduces considerable risk,” including that “Wyle could switch out Grant Thornton with another contractor without first obtaining the approval of CBP.” Id. As the contracting officer explains in response to the protest, “[t]his level of risk could not be mitigated by technical strengths elsewhere in the proposal,” and therefore, “the [source selection authority] and I could not see any possible avenue to consider Wyle’s [quotation] for award.” COS at 3.

In our view, the record demonstrates a reasonable basis for the agency’s concern and assessment of risk. As a general matter, the evaluation of risk associated with a vendor’s quotation is unobjectionable, whether or not risk is specifically identified as an evaluation factor. Harkcon Inc., B-412936.2, Mar. 30, 2017, 2017 CPD ¶ 110 at 7 n.6. Here, Wyle’s technical approach relies on 100 percent performance by Grant Thornton. The agency’s concern is that it will not have a direct contractual relationship with the company that has been proposed to perform the work. In addition, if the novation request is not approved, there is a risk that the agency will not receive the performance proposed in Wyle’s quotation. Although the protester points to several scenarios which it asserts could make Wyle capable of performing the task order without Grant Thornton, the protester does not cite to any part of its quotation which describes any of these approaches.<sup>5</sup> In any event, we find nothing unreasonable regarding the agency’s evaluation in light of the uncertainty of the pending novation<sup>6</sup> and proposed approach here. In sum, we find it was reasonable for the agency to determine that Wyle’s quotation was ineligible for issuance of the task order and not further evaluated.

The protest is denied.

Thomas H. Armstrong  
General Counsel

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<sup>5</sup> For example, the protester contends that it has the capability to engage resources, independent from Grant Thornton, to perform the task order work if for any reason Grant Thornton fails to perform. See Declaration of Wyle, Senior Director, Contracts & Procurement (Oct. 2, 2018), at 1-2; Protester’s Comments at 4-5. Wyle also asserts that its capability to perform the task order is demonstrated by “the reality that Wyle was recently acquired by KBR and KBR has its own OASIS contract.” Protester’s Comments at 7 (“Given that KBR has its own OASIS contract, it goes without saying that the combined forces of KBR and Wyle have the capacity to perform the task order if necessary.”). To the extent Wyle relies on these examples, however, the protester does not cite to any part of its quotation which describes either of these approaches.

<sup>6</sup> See, e.g., Engility Corp., B-416650, B-416650.2, Nov. 7, 2018, 2018 CPD ¶ 385 at 3 (agency declining to approve novation request).