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Decision

Matter of: Peraton Inc.

File: B-416916.12; B-416916.13

Date: May 28, 2021

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Paul F. Khoury, Esq., Brian G. Walsh, Esq., Cara L. Lasley, Esq., Lindy C. Bathurst, Esq., and Nicholas L. Perry, Esq., Wiley Rein LLP, for ManTech Advanced Systems International, Inc., the intervenor.

Tudo N. Pham, Esq., Department of State, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging awardee's proposal contained "bait and switch" material misrepresentation is dismissed where the protester concedes that the awardee's proposed key personnel are currently employed by the awardee, and failed to allege facts establishing that the awardee lacked a reasonable basis to expect to furnish those key personnel.

2. Protest alleging a task order exceeds the scope of the underlying contract is dismissed as untimely when the terms of the solicitation established that any task order issued would have exceeded the scope of the underlying contract, and the protester did not challenge this solicitation defect before the next time for closing time for receipt of submissions.

DECISION

Peraton, Inc., of Herndon, Virginia, challenges the issuance of a task order to ManTech Advanced Systems International, Inc., of Herndon, Virginia under solicitation No. 19AQMM18R0065. The task order was issued through the National Institutes of Health CIO-SP3 governmentwide acquisition contract, for server and software deployment services for the Department of State's Office of Consular Systems and Technology. Peraton argues ManTech's proposal contained material misrepresentations, and the task order cannot be issued to any competitor because it exceeds the scope of the underlying contract.

We dismiss the protest.

BACKGROUND

By way of background, the agency issued the request for proposals (RFP) on January 24, 2018, contemplating the issuance of a single task order with both fixed-price and time-and-materials contract line items.¹ B-416916.3, Agency Report (AR), Contracting Officer's Statement (COS) at 2; B-416916.11, AR, Tab 20, RFP at 4, 44. The RFP provided for issuance of task order with a 1-year base period of performance and eight 1-year options. RFP at 10. Relevant to this protest, the RFP required that offerors propose named individuals for certain key personnel positions, and include letters of commitment signed by those individuals. *Id.* at 41

The agency first issued a task order under this solicitation to Vistronix, LLC, on September 18, 2018, but following a protest, the agency subsequently rescinded that task order. *See Vistronix, LLC*, B-416916.2, July 29, 2019, 2019 CPD ¶ 268 at 3. Following an additional protest, the agency issued a task order to ManTech on September 27, 2019. *See Peraton Inc.*, B-416916.8 et al., Aug. 3, 2020, 2020 CPD ¶ 248 at 2. A series of further protests followed, and on April 21, 2021, the agency reaffirmed its previous award to ManTech at a price of \$129,995,782.² *See* Protest, exh. 4 and exh. 5 at 3. Peraton requested and received a debriefing, and this protest followed.

¹ This procurement has been the subject of multiple protests and related proceedings before our Office. *See, e.g., Vistronix, LLC*, B-416916.2, July 29, 2019, 2019 CPD ¶ 268 (dismissing as untimely a protest challenging the agency's conclusion that the protester had an unmitigatable organizational conflict of interest); *Peraton Inc.*, B-416916.5, B-416916.7, April 13, 2020, 2020 CPD ¶ 144 (denying protest of scope of agency's proposed corrective action when corrective action was narrowly focused on the only procurement fault identified in an outcome prediction alternative dispute resolution in a previous protest); *Peraton, Inc.*, B-416916.8, et al., Aug. 3, 2020, 2020 CPD ¶ 248 at 8-9 (protest challenging agency corrective action is sustained when the agency permitted certain changes that would materially impact other aspects of the protester's proposal that it was not permitted to change and would effectively require the protester to submit a materially inconsistent proposal). Our discussion of the background here is limited to matters relevant to the resolution of the specific allegations of this protest.

² Because the awarded value of the task order exceeds \$10 million, this protest is within our jurisdiction to consider protests of task orders placed under civilian agency indefinite-delivery, indefinite-quantity multiple award contracts. *See* 41 U.S.C. § 4106(f)(1)(B).

DISCUSSION

Peraton contends the agency's award was flawed in two respects. First, Peraton argues ManTech's proposal contained a material misrepresentation concerning the availability of its project manager. Protest at 22-25. Second, Peraton alleges the task order's nine-year period of performance violates procurement law because it exceeds the scope of the underlying contract by nearly three years.³ *Id.* at 25-28.

Concerning the project manager, Peraton argues the awardee's proposal contained a material misrepresentation because ManTech's proposed project manager is currently a key person on a different Department of State contract. *Id.* at 22-25. Accordingly, Peraton contends ManTech knew or should have known the proposed project manager would not be available for this effort.⁴ *Id.* Moreover, Peraton maintains ManTech is currently hiring for a position that looks extremely similar to the required project manager position under this contract. *Id.*

The issue of whether personnel identified in an offeror's proposal, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See 4 C.F.R. § 21.5(a); *Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc.*, B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 14-15. Nonetheless, our Office will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement

³ The protester also filed a supplemental protest alleging the agency improperly downgraded its proposal with regard to key personnel or waived certain requirements related to key personnel. See Supp. Protest *generally*. However, the only evidence the protester offers in this regard is an unusually close reading of a remark made by agency counsel in the agency's request to dismiss. *Id.* Specifically, agency counsel noted that the protester, after repeatedly requesting to substitute key personnel, "miraculously" managed to propose all of its original key personnel in its final proposal revision. See First Agency Request to Dismiss at 2.

While the protester contends this statement constitutes an admission that the agency did not find the protester's letters of commitment to be credible, the statement simply cannot bear the weight the protester's arguments have placed on it. In this case, a single sarcastic comment by counsel in the heat of litigation cannot be reasonably read as conveying any facts about the evaluation. This is especially so where the protester's debriefing indicated the protester was not assigned any weaknesses or deficiencies for key personnel. See Protest, exh. 5 at 2. This allegation is devoid of factual support and is dismissed. 4 C.F.R. § 21.5(f).

⁴ In its initial protest, Peraton also alleged that another named key person would not be available. See Protest at 22-25. However, the record reflects ManTech did not actually propose that individual as a key person, and Peraton withdrew this protest ground. Protester's Response to First Agency Request to Dismiss at 2 n.1.

system. *Ryan Assocs., Inc.*, B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6. Our decisions frequently refer to such circumstances as a “bait and switch.” *Id.* In order to establish an impermissible “bait and switch,” a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency’s reliance on the misrepresentation had a material effect on the evaluation results. *CACI Techs., Inc.*, B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 at 4-5.

This protest ground is legally insufficient because it does not allege facts establishing that ManTech lacked a reasonable basis to expect to furnish the personnel it proposed. All parties agree that the project manager in question is currently employed by ManTech, albeit working on another contract. See Protest at 23. While ManTech has posted a job listing for a “program manager” position and indicated that experience with the Department of State and logistics are preferred, the job posting is not unambiguously related to this task order. See Protest at 23-24. A job listing for a superficially similar position is not sufficient to establish that ManTech did not have a reasonable basis to expect to furnish its proposed project manager, especially when, as here, that project manager currently works for ManTech.

More significantly, the protester has identified no legal or practical obstacle to ManTech’s reassigning the project manager from the other contract to this one, other than the possibility the agency might object to the staffing change and pursue contractual remedies (such as refusing to approve a substitute for the individual on the other contract). Protest at 23. Preliminarily, we note the agency has not indicated that it intends to do as the protester suggests. However, even if the agency objected to the staffing change and pursued contractual remedies, the agency cannot compel the project manager to remain on the other effort. This issue, at best, amounts to a matter of contract administration concerning the performance of the other contract, which is not for our consideration. 4 C.F.R. § 21.5(a).

Moreover, the protester’s argument is impractical: if merely staffing employees on other contracts were sufficient to render those employees unavailable to propose as key personnel, it would effectively require firms to keep such employees idle throughout the procurement process. In this case, ManTech would have been required to keep key personnel employed but idle for more than two years. This is clearly an unreasonable outcome, and the protester has cited no decision in which we found a material misrepresentation on similar facts.

Next, the protester alleges that the task order exceeds the scope of the underlying contract. Protest at 25-28. Specifically, the underlying CIO-SP3 governmentwide contract provides that no task order may extend more than 60 months beyond May 31, 2022. Protest, exh. 14 at 22. That is to say, task orders issued under the CIO-SP3 contract must end by May 31, 2027. Protest at 26. However, the task order awarded here contemplates a nine-year period of performance; if all options are exercised, the

order would extend until April 21, 2030--nearly three years beyond the CIO-SP3 deadline. *Id.* In the protester's view, the contemplated task order illegally exceeds the scope of the underlying contract, and the solicitation is unawardable in its current form. *Id.* at 27-28.

Preliminarily, we note the solicitation's nine-year period of performance has exceeded the CIO-SP3 deadline since May 31, 2018. In that time, the agency has not amended or proposed to amend the solicitation's period of performance. The protester has had notice of this fault in the solicitation for nearly three years. More significantly, in the intervening years, the agency has made three awards under this solicitation, and Peraton has filed seven separate protests of this procurement, the first of which was filed on October 2, 2018. This is the first time the protester has raised concerns about the period of performance.

As a general matter, when a protester challenges an agency's failure to amend a solicitation such a protest is analogous to a challenge to the terms of a solicitation. See, e.g., *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; *Northrop Grumman Info. Tech., Inc.*, B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10. With respect to the timeliness of challenges to the terms of a solicitation, our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), provide, in relevant part, as follows:

In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

While it is unclear, nearly three years later, whether a closing time was then established on May 31, 2018, the agency received final proposal revisions on July 23, 2018, and made its first award under this solicitation in September of 2018. B-416916.1 Protest at 11. Accordingly, the protester should have raised this fault in the solicitation either within ten days of May 31, 2018, or prior to the next time set for receipt of proposals in July of 2018, if that closing time was then established. In either case, this protest ground, filed years later, is untimely.

Responding to this concern, the protester argues its protest is timely because it was filed within ten days of its debriefing after award. Protester's Response to First Agency Request to Dismiss at 13-14. In the protester's view, it is the issued task order that exceeded the scope of the underlying contract and not the solicitation. *Id.* Because any task order issued under this solicitation after May 31, 2018, would have the same defect, we do not agree. However, even if the protester were correct in this regard, this protest would still be untimely.

Peraton did not raise this issue in its protest of the agency's first award under this solicitation to Vistronix on October 2, 2018. At that time, the period of performance of the task order, if all options were exercised, already exceeded the deadline established by the underlying contract by several months. After rescinding the award to Vistronix, on September 27, 2019, the agency issued a task order under this solicitation to ManTech. Peraton also protested that award, but again did not raise this issue, even though the period of performance of the task order would have exceeded the deadline by more than a year. Therefore, even under the protester's preferred theory of timeliness, this protest ground remains untimely and is, at best, an impermissible piecemeal presentation of issues. See *DRS ICAS, LLC*, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21 (the fact that an agency made a new selection decision after taking corrective action does not provide a basis for reviving an otherwise untimely issue where the basis of the otherwise untimely protest allegation was not affected by the subsequent corrective action). As such, we conclude that with regard to both the protester's allegation and response, this protest ground is plainly untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel