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Decision

Matter of: Peraton Inc.

File: B-416916.8; B-416916.9; B-416916.10

Date: August 3, 2020

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DIGEST

Protest challenging agency corrective action is sustained where agency decided to reopen discussions to allow offerors to revise their proposals to substitute key personnel, but limited proposal revisions only to key personnel resumes, letters of commitment, and a portion of a single staffing plan template. The agency's corrective action is unreasonably limited in its scope because the solicitation required proposal sections to align and the record demonstrates that the substitution of key personnel would materially impact other aspects of the protester's proposal that it is not permitted to change and would effectively require the protester to submit a materially inconsistent proposal.

DECISION

Peraton, Inc., of Herndon, Virginia, protests the scope of the agency's corrective action following its prior protest of 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 (DOS) Office of Consular Systems and Technology. Peraton argues that agency's corrective action is unreasonably restrictive.

We sustain the protest.

BACKGROUND

The agency issued the request for proposals (RFP) on January 24, 2018. B-416916.3, Agency Report (AR), COS at 2. The RFP contemplated the issuance of a task order with both fixed-price and time-and-materials contract line items. B-416916.3 AR, Tab 20, RFP at 4, 44. Additionally, the RFP provided that award would be made on the basis of a best-value tradeoff between three evaluation factors: (1) technical; (2) past performance; and (3) price. *Id.* at 44-45. The technical factor was divided into four subfactors: (1) technical approach; (2) management approach; (3) staffing plan and key personnel; and (4) corporate experience. *Id.* Relevant to this protest, the RFP required offerors to address the staffing plan and key personnel subfactor by proposing a staffing plan that describes how they will satisfy the contract requirements. *Id.* at 40. Additionally, the RFP directed offerors to submit a staffing matrix (using a provided template), key personnel resumes, and commitment letters. *Id.* The RFP further provided that the staffing plan and key personnel subfactor would be evaluated for, among other things, “[t]he extent to which the Offeror’s proposed staffing plan, to include Key Personnel and alignment of hours per labor category reflects an understanding of the Government’s requirement and aligns with the Offeror’s technical approach.” *Id.* at 46.

On September 25, 2018, the agency first issued a task order under this solicitation to Vistronix, LLC. Protest at 12-13. Peraton filed a protest of that award with our Office, alleging, among other things, that Vistronix had unmitigated organizational conflicts of interest (OCIs). *Id.* The agency took corrective action in response to that protest, and, following an investigation, concluded that Vistronix had an unmitigatable OCI. *Id.* Vistronix filed a protest of that determination with our Office, which we ultimately dismissed as untimely. *Vistronix, LLC*, B-416916.2, July 29, 2019, 2019 CPD ¶ 268.

The agency subsequently issued a task order to ManTech on September 27, 2019. B-416916.3 Memorandum of Law (MOL) at 3. Peraton filed a protest of the new award alleging, among other things, numerous evaluation errors and disparate treatment. Protest at 13. Prior to the agency report, the protester also filed a supplemental protest alleging additional instances of disparate evaluation. See B-416916.3 First Supp. Protest *generally*. The agency filed its report responding to the protest allegations on November 8. See B-416916.3 MOL.

On November 18, the protester filed a second supplemental protest alleging, among other things, that ManTech’s letters of commitment for key personnel did not meet the solicitation’s clearly stated requirements for such letters. See B-416916.3 Second Supp. Protest at 14-16. Following additional briefing by the parties, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) teleconference on December 20. During the teleconference, the GAO attorney informed the parties that the only protest argument that appeared meritorious concerned ManTech’s key personnel letters of commitment, which did not appear to meet the solicitation’s clearly stated requirements. Specifically, the solicitation required that commitment letters include the signature of key personnel confirming their intention

to serve in a stated position at contract award. RFP at 40. The awardee's letters of commitment, however, did not state or reference any positions, and, in some cases, it was unclear from the letters whether the signing individual knew the position for which they were being proposed. See B-416916.3, Tab 33, ManTech's Proposal with Tracked Changes, at 151-158.

Later, on December 30, the agency filed a notice of its intent to take corrective action in response to Peraton's protest by reopening discussions to confirm the availability of proposed key personnel, update letters of commitment, and validate proposals. B-416916.3 Corrective Action Memorandum. On January 8, 2020, we dismissed Peraton's protest as academic due to the agency's proposed corrective action. *Peraton, Inc.*, B-416916.3, B-416916.4, Jan. 8, 2020 (unpublished decision).

On January 9, 2020, Peraton filed a protest of the agency's corrective action with our Office, alleging that the agency's corrective action was both unreasonably narrow and reflected an unfair agency bias in favor of ManTech. B-416916.5 Protest at 12-27. We denied that protest on the basis that the agency's corrective action was narrowly focused on the only procurement fault identified in the outcome prediction ADR, and no other portions of an offeror's proposal would reasonably be affected by the proposed discussions, because the agency only sought confirmation of the availability of previously proposed key personnel. *Peraton Inc.*, B-416916.5, B-416916.7, April 13, 2020, 2020 CPD ¶ 144.

Following our denial of Peraton's corrective action protest, the agency issued a discussion letter seeking confirmation that each offeror's key personnel were available, and requesting updated commitment letters. Agency Report (AR), Tab 52, Discussion Letter, Apr. 14, 2020, at 1. On April 17, Peraton responded that it had replaced several of its key personnel and asked that offerors be allowed to substitute key personnel and submit new commitment letters and resumes without rejecting the proposal as technically unacceptable. AR, Tab 53, Letter from Peraton to Contracting Officer, Apr. 17, 2020, at 1. Of note, Peraton did not at that time request an opportunity to make any other proposal revisions. *Id.* On April 23, the agency acceded to Peraton's request and indicated that offerors would be permitted to substitute key personnel, but were not required to do so. AR, Tab 54, Discussion Letter, Apr. 23, 2020, at 1.

Later that day, Peraton responded that it believed that substitutions of key personnel would materially affect its technical and price proposals and requested that the agency also permit offerors to revise all aspects of their technical and price proposals. AR, Tab 55, Letter from Peraton to Contracting Officer, Apr. 23, 2020, at 1. On April 24, the agency responded that offerors who proposed key personnel changes were permitted to make changes only to their key personnel resumes, letters of commitment, and to the column on the staffing plan template labelled "Relevant Years of Experience and

Certifications.” See AR, Tab 56, Discussion Letter, Apr. 24, 2020, at 1. This protest followed.¹

DISCUSSION

The protester argues that the agency’s decision to limit proposal revisions to key personnel resumes, letters of commitment, and one staffing plan column is unreasonably narrow. See Protest at 24-33. First, the protester notes that the solicitation, among other things, requires the agency to evaluate “[t]he extent to which the Offeror’s proposed staffing plan, to include Key Personnel and alignment of hours per labor category reflects an understanding of the Government’s requirement and aligns with the Offeror’s technical approach.” *Id.* at 9 (*citing* RFP at 46). In this regard, the protester notes that its technical proposal discusses its previously proposed key personnel at length, either by name or by discussing their specific qualifications or credentials, and the agency’s proposed corrective action would preclude Peraton from making changes to these aspects of its proposal. *Id.* at 25-26, 30-31.

Further, the protester notes that its staffing plan submission included narratives discussing its key personnel, which the current corrective action would also prevent it from revising. Protester’s Comments and Second Supp. Protest at 12-14. Finally, the protester argues that its new staff may have different levels of experience than its originally proposed staff, and, accordingly, would have different labor rates which would affect its pricing. *Id.* at 28-29.

The protester contends that, by refusing to permit it to amend those aspects of its proposal, the agency is forcing the protester to submit a proposal that is both inconsistent on its face and would not comply with the solicitation’s requirement that key personnel and staffing be aligned with an offeror’s technical approach. *Id.* at 25-26. In this connection, the protester relies on our decision in *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355, in which we concluded that a similar corrective action was unreasonably restrictive. Protest at 27-28.

In response, the agency contends that changes to offerors’ technical approaches are unnecessary because the agency did not evaluate specific key personnel as part of its evaluation of any other technical subfactor. MOL at 8-9. Rather the agency argues that it evaluated alignment between the staffing plan and technical approach only by considering whether the level of effort proposed was adequate to perform the technical approach. *Id.* at 11-12, 17-18. This analysis would not be impacted by changes in the identity of key personnel. *Id.* The agency contends that key personnel were only individually assessed as part of the evaluation of the key personnel evaluation factor,

¹ The awarded value of this task order is \$129,995,272. B-416916.3 COS at 6. 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).

and that personnel resumes contain all information necessary to perform that evaluation. *Id.* at 18-20. Accordingly, the agency concludes that it can reevaluate proposals consistent with the solicitation's requirements without permitting broader revisions to proposals. *Id.*

Separate from the agency's substantive arguments, however, the agency also raises an argument concerning the unique procedural posture of this case. See MOL at 3-6, 33. As discussed above, following our decision denying Peraton's prior protest of the agency's corrective action, the agency sought confirmation from Peraton and ManTech concerning the continued availability of their key personnel. *Id.* ManTech's key personnel remained available, while several of Peraton's key personnel did not, and Peraton requested an opportunity to substitute key personnel. *Id.* In the interest of fairness and fostering competition, the agency agreed to permit key personnel substitutions, but limited the scope of those revisions. *Id.*

The agency contends that it is unfair for Peraton to now protest a change in the scope of the agency's corrective action that the agency undertook solely at Peraton's request.² *Id.* The agency contends that to sustain this protest would, in effect, penalize the agency for attempting to foster competition, noting that "no good deed goes unpunished." *Id.* at 33.

An agency's discretion when taking corrective action extends to the scope of proposal revisions. See, e.g., *Computer Assocs. Int'l., Inc.*, B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 5; *Rel-Tek Sys. & Design, Inc.--Modification of Remedy*, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions; an agency, in conducting discussions to implement corrective action, may, however, reasonably limit the scope of revisions. *System Planning Corp.*, B-244697.4, June 15, 1992, 92-1 CPD ¶ 516 at 3.

Where an agency's proposed corrective action does not also include amending the solicitation, we will not question an agency's decision to restrict proposal revisions when taking corrective action so long as it is reasonable in nature and remedies the established or suspected procurement impropriety. See *Consolidated Eng'g Servs., Inc.*, B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 3-4; *Computer Assocs. Int'l, supra*. In reviewing the reasonableness of an agency's restrictions on the extent of discussions to implement corrective action, we will consider whether the discussions, and permitted revisions in response to discussions, are expected to have a material impact on other areas of the offeror's proposal. *Evergreen Helicopters of Alaska, Inc.*, B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128 at 8; *Honeywell Technology Solutions, Inc.*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4; see also *Rel-TekSys. & Design*,

² Peraton, collaterally, challenges the agency's decision to permit substitution of key personnel because the basis of the agency's decision was inadequately documented. See First Supp. Protest at 7-10. We do not reach the issue as we are sustaining the protest of the scope of corrective action on other grounds.

Inc.--Modification of Remedy, supra; ST Aerospace Engines Pte. Ltd., B-275725.3
Oct. 17, 1997, 97-2 CPD ¶ 106 at 4.

In our prior decision concerning the agency's corrective action in this procurement, we did not object to the agency's decision to limit proposal revisions to areas in which our Office identified improprieties in the prior award decision. See *Peraton Inc., supra*. However, even when an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted. In this case, the proposed corrective action would prevent the protester from conforming many specific references to key personnel, which would effectively require the protester to submit a materially inconsistent proposal.

While the agency argues that it was only required to evaluate alignment between the staffing plan and technical approach by considering whether the level of effort proposed was adequate to perform the technical approach, it is not clear that such an evaluation approach is consistent with the solicitation or the record. The solicitation required that the agency evaluate "[t]he extent to which the Offeror's proposed staffing plan, to include Key Personnel *and* alignment of hours per labor category reflects an understanding of the Government's requirement *and* aligns with the Offeror's technical approach." RFP at 46 (emphasis added). This requirement appears to contemplate that the agency would assess both the key personnel identified in the staffing plan and the hours per labor category to determine whether they align with the offeror's technical approach. *Id.* It is not clear that the agency's position is consistent with the plain language of the solicitation. Put another way, if an offeror's technical approach narratives had, in the first instance, included references to entirely different key personnel than were described in that offeror's staffing plan, it would have been clearly unreasonable and contrary to the solicitation for the agency to ignore that inconsistency. However, that is essentially what the agency proposes to do now.

Furthermore, the evaluation record does not support the agency's argument that it has permitted offerors to amend all aspects of their proposals where the agency actually evaluated key personnel as individuals. Specifically, the agency's proposed corrective action would permit revisions only to one column in the staffing plan matrix, but not to the accompanying staffing plan narratives that the offerors included in their proposals. However, as the protester notes, information in those narratives was referenced in the agency's evaluation as part of the basis of a strength assigned to the protester's proposal. Protester's Comments and Second Supp. Protest at 12-14 (*citing* AR, Tab 37, Technical Evaluation Panel Report, at 10).

While we are sympathetic to the agency's fairness concerns, once the agency made an election to allow proposal revisions, the agency was required to seek these revisions in a reasonable manner. The limited scope of proposal revisions allowed by the agency, however, is unreasonable in this case. That is to say, the agency could have, consistent with our prior decision, declined to permit Peraton to substitute key personnel. See *Peraton Inc., supra*. However, because the agency has chosen to

permit substitutions of key personnel, the agency must permit offerors to conform the portions of their proposals that refer to key personnel whom they are no longer proposing, whether that reference is by name or to unique qualifications of those individuals that are not shared by the newly proposed personnel. To conclude otherwise would, in effect, force offerors to submit facially inconsistent proposals and force the agency to ignore the solicitation's requirement that it evaluate how proposed key personnel align with an offeror's technical approach.

Further, this is precisely the kind of limitation on proposal revisions that we concluded was unreasonably restrictive in our decision in *Deloitte Consulting, LLP, supra*. Specifically, in that case, the agency originally proposed corrective action in response to an earlier protest that would have permitted offerors to substitute key personnel and to make proposal revisions only to the key personnel and past performance subfactor of their proposals. *Deloitte Consulting, LLP, supra* at 4. However, the protester in that case, as with Peraton in this case, had made specific reference to its key personnel throughout its technical proposal and challenged the agency's decision to prevent it from conforming those references. *Id.* Our Office conducted an ADR in which we questioned the propriety of the agency's limitations to the scope of proposal revisions because they would prevent the protester from conforming material inconsistencies in its proposal. *Id.* at 4-5.

Following the ADR, the agency again took corrective action, and proposed to permit offerors to amend their technical proposals only by altering any references to specific key personnel or their qualifications, which Deloitte also protested. *Id.* at 5. We concluded that this expanded approach to proposal revisions remained unreasonably restrictive because the protester showed that changes in its key personnel would have material effects on its substantive technical approach. *Deloitte Consulting, LLP, supra* at 8-10. In short, our prior decision, on very similar facts, rejected precisely the same kind of limitation on proposal revisions advanced by the agency in this case, and, indeed, even rejected a less restrictive limitation.

In response, the agency relies on our decision in *ActioNet, Inc.*, B-416557.4, Feb. 27, 2019, 2019 CPD ¶ 97, but that reliance is misplaced. MOL at 6-8. In that decision we found no basis to object to an agency's decision to limit proposal revisions to substitutions of key personnel, but specifically distinguished *Deloitte Consulting, LLP, supra*, on the basis that the protester in *ActioNet* conceded that other portions of its proposal would be unaffected by changes to key personnel. *ActioNet, Inc., supra* at 7 n.10. Here, by contrast, the protester makes no such concession.

Further, the protester demonstrates how its proposed technical approach is meaningfully reliant on the qualifications or credentials of its key personnel. See Protester's Comments and Second Supp. Protest at 22-31. For example, the protester notes that its original approach to reducing transition risk was predicated, in part, on the fact that the personnel it proposed were incumbent personnel with many years of experience, who possessed security clearances, and who were trained on DOS-specific applications and systems. Protester's Comments and Second Supp. Protest at 28-30.

The protester credibly contends that this and other aspects of its technical proposal would require revision to reflect the differing skills and qualifications of its newly proposed personnel. Because the protester's substitute key personnel have different qualifications and experience, and the protester's technical approach meaningfully relied on the qualifications and experience of its originally proposed personnel, we agree that the permitted revisions should extend to revising references to substituted key personnel in Peraton's technical proposal as necessary to reflect the skills of its new personnel, or to otherwise address the proposal content impacted by the removal of the prior key personnel.

Finally, the protester contends that the agency's refusal to permit revisions with respect to price proposals is also unreasonable. Protest at 28-29; Protester's Comments and Second Supp. Protest at 19-20. However, the protester has not clarified in what way its pricing would be materially affected by the substitution of personnel, other than to argue that key personnel with differing levels of experience may have different labor rates, and that prevailing labor rates in general have changed since proposals were originally submitted due to inflation. *Id.* In the context of this task order, the protester proposed pricing for labor categories not for named individuals. See AR, Tab 32, Peraton's Pricing Table; see *also* Intervenor's Comments at 7 (arguing that the underlying contract constrains pricing for labor categories). The protester has not contended that its new personnel would be mapped to different labor categories, or, indeed, offered any specific explanation concerning how its rates would change beyond offering a hypothetical.³ Accordingly, it is unclear to what extent the protester would or could meaningfully change its prices in this context.

Further, in this case, the awardee's price has been publicly disclosed following award. Permitting price revisions when the awardee's price has been disclosed has implications for procurement integrity, and we have previously concluded that permitting price revisions is not required in similar circumstances. See *Consolidated Eng'r Services, supra* at 1, 4-5 (rejecting argument that agency must permit price revisions when permitting key personnel revisions where awardee's price has been disclosed and the number and nature of key personnel positions had not changed). We see no basis to conclude that the agency's limitation of revisions to price proposals is unreasonable on these facts.

RECOMMENDATION

³ We also note that the record does not reflect whether the protester is suggesting that its revisions would result in higher or lower pricing, which is particularly anomalous given that the protester has already identified its four substitute key personnel. Compare Protest at 2 (changes "may reduce price difference") with 28 (noting that labor rates have "increased across the industry").

We find that the agency's limitations on the scope of revisions in response to corrective action are unreasonably restrictive, where the limitations prohibit the protester from revising aspects of its technical proposal that are materially impacted by the corrective action. If the agency intends to permit key personnel substitutions, we recommend that DOS amend its proposal revision instructions to permit offerors to revise aspects of their technical proposals to the extent that the revisions relate to the permitted substitutions of key personnel, and thereafter reevaluate the offerors' revised technical proposals. We also recommend that Peraton be reimbursed the costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel