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Decision

Matter of: Nuance Communications, Inc.

File: B-418106

Date: January 8, 2020

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Frank V. DiNicola, Esq., and Kerry A. McGrath, Esq., Department of Veterans Affairs, for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest asserting that task order requirements are beyond the scope of the underlying indefinite-delivery, indefinite-quantity contract is denied, where the performance work statement for the underlying contract clearly encompassed the specific task order requirements and effectively advised offerors of the potential for the task order to be issued.

DECISION

Nuance Communications, Inc., of Burlington, Massachusetts, protests the Department of Veterans Affairs' (VA) issuance of a task order to Cerner Government Services, Inc., pursuant to indefinite-delivery, indefinite-quantity (IDIQ) contract No. 3610B18D5000 that was awarded to Cerner in May 2018 for delivery of a comprehensive electronic health record (EHR) system. Nuance asserts that the activities to be performed under the task order are beyond the scope of the IDIQ contract.

We deny the protest.

BACKGROUND

The VA and the Department of Defense (DOD) provide medical services to an overlapping patient population of service members and veterans; yet, each agency operates a separate EHR system. The two agencies have been attempting for several

years to make their EHR systems interoperable. See CliniCorp Int'l, Inc. v. United States, 134 Fed Cl. 736 (Fed. Cl. 2017), aff'd, 904 F.3d 1353 (Fed. Cir. 2018).

In 2014, DOD issued a solicitation for the acquisition of a commercial off-the-shelf EHR system using full and open competition; that procurement resulted in the 2015 award of a contract to Leidos, Inc. for delivery of a comprehensive EHR system to be used throughout the DOD. Agency Report (AR), Tab 4, VA Secretary's Determination and Findings (D&F), June 1, 2017, at 2. The "core" of Leidos's EHR system consists of "a commercial EHR developed by Cerner" that includes "significant cybersecurity enhancements to protect DOD data." Id.

In June 2017, consistent with the objective of making the two EHR systems interoperable, the Secretary of Veterans Affairs executed a Determination and Findings justifying the sole-source award of a broad IDIQ contract to Cerner for acquisition of "the EHR system being deployed by DOD." Id. at 5. In that D&F, the VA Secretary, among other things, noted the high priority of providing healthcare to veterans, recognized that the VA "operates one of the largest and most complex medical organizations, with 1,600 care sites across 50 states," and concluded:

A single common system across VA and DOD will facilitate the transition of active duty military members to VA and improve their timely access to the highest quality of care in a way never before experienced. Records residing in a single common system will eliminate the reliance on complex clinical interfaces or manual data entry between DOD and VA. A single common system and the adoption of common clinical workflows and order sets (i.e., pre-defined templates that provide support in making clinical decisions for a specific condition or medical procedure) will significantly reduce, and potentially eliminate, the variations between VA and DOD facilities, thereby facilitating a more consistent patient experience. . . . VA will be able to leverage and benefit from DOD's data hosting investments, standard workflows, and enhanced cybersecurity posture.

* * * * *

Based on the findings set forth above, I determine, pursuant to [applicable statutes and regulations], that it is in the public interest for VA TAC [Technology Acquisition Center] to issue a solicitation directly to Cerner for the acquisition of the EHR system being deployed by DOD and related services for deployment and transition across the VA enterprise in a manner that meets VA needs, and which will enable seamless healthcare to Veterans and qualified beneficiaries.

Under the contract, at a minimum, Cerner will provide the full scope of services, including integration, configuration, testing, deployment, hosting, organizational change management, training, and sustainment, and licenses necessary to deploy the DOD's EHR system in a manner that meets VA

needs. The contract will also address all EHR functions supporting clinical care including revenue cycle, in-patient, ambulatory, as well as home care, ancillaries, and specialties to include dental. The contract will also address non-clinical core functional requirements, which may include inventory management/supply chain capabilities.

Id. at 1-5.

In December 2017, the VA posted the entire solicitation package for Cerner's IDIQ contract, including the performance work statement (PWS) and various attachments, to the Federal Business Opportunities (FBO) website. The scope of the IDIQ was set forth in the PWS and associated attachments, and included the following statement:

The Contractor shall provide, host and deploy EHRM [EHR modernization] across the VA enterprise including the following areas: project management, change management, training, testing, deployments services, sustainment and other solutions encompassing the entire range of EHR requirements, to include hosting, software, and hardware incidental to the solution. . . . The Contractor shall support the Veterans Health Administration (VHA) revenue cycle reporting, business intelligence, data analysis and new employee/continuing education training activities and system optimization.

AR, Tab 5, IDIQ PWS, at 7.

On May 17, 2018, IDIQ contract No. 3610B18D5000, with an approximate value of \$10 billion, was awarded to Cerner. Since then, the VA has issued multiple task orders to Cerner under that contract.

In September 2019, the VA issued task order No. 0019 (TO 0019), with an estimated value of \$19 million, which requires Cerner to “develop, test and deploy encoding and CDI [clinical documentation improvement] functionality in support of the VA EHRM revenue cycle requirements for IOC [initial operating capability].”¹ AR, Tab 10, TO 0019 PWS, at 3. Nuance states that it “currently provides the VA with health information coding” under a separate contract which expires in September 2020; asserts that CDI “has been an optional task order” under that contract; and complains that issuance of TO 0019 has “denied Nuance the opportunity to submit proposals for

¹ Encoding is described by the VA as “the transformation of healthcare diagnosis, procedures, medical services or equipment into universally recognized standardized medical codes,” which are “essential to the patient medical record and to the medical billing process to communicate medical treatment information into claim information for payment by insurance carriers.” Agency Memorandum of Law, Nov. 15, 2019, at 3 n.1. CDI is described as “facilitat[ing] the accurate translation of a patient’s clinical status into coded data,” providing “oversight to the accuracy of the encoding process,” and “support[ing] appropriate healthcare revenue and claims reimbursement.” Id. at 3 n.2.

[these services].” Protest, exh. H, Email from Nuance to VA, Oct. 3, 2019, at 1; Protest at 5.

On October 4, Nuance filed this protest, asserting that the requirements should have been subject to a separate competition.

DISCUSSION

Nuance first complains that the IDIQ “contains very general requirements”; next, asserts that “encoding and CDI technologies and services do not appear anywhere in the Cerner IDIQ”; and, accordingly, concludes that the coding and CDI requirements of TO 0019 are “beyond the scope of the Cerner IDIQ.” Protest at 4, 6, 7. Alternatively, Nuance asserts that, to the extent coding and CDI activities are referenced within the IDIQ solicitation documents, such references are only general in nature and do not specifically refer to coding and CDI in the context of performing “Revenue Cycle requirements.” Id. at 7. Finally, Nuance asserts that, because it was allegedly advised by its “VA contacts” (whom Nuance has declined to identify) that the coding and CDI requirements would be separately competed, Nuance did not “understand [the IDIQ] to include CDI and coding.”² Id. In summary, Nuance asserts that the coding and CDI requirements must be separately competed.

The agency responds that the IDIQ solicitation and supporting attachments, which were posted to the FBO internet website in 2017, clearly incorporated both coding and CDI requirements, thereby notifying the public regarding the potential for issuance of task orders covering those activities. The agency further points out that, under a section of the PWS titled “Scope,” the solicitation for the Cerner IDIQ contract stated that the contract was to “encompass[] the entire range of EHR requirements,” to include “hosting, software, and hardware incidental to the solution,” and that the contractor “shall support . . . revenue cycle reporting.”³ AR, Tab 5, IDIQ PWS, at 7. In this context, the agency notes that revenue cycle reporting requires accurate identification, that is, coding, of all medical components of a patient’s care, and CDI supports the accuracy of the coding process. Finally, the agency states that, in addition to being clearly placed on notice of the IDIQ’s broad scope, Nuance was, in fact, well aware that coding and CDI requirements were within the scope of Cerner’s IDIQ contract, since

² Remarkably, despite this representation of its “understanding,” Nuance acknowledges that it engaged in “months of negotiation” with Cerner, during which Nuance sought to be selected by Cerner as a subcontractor to provide CDI technology and services to the VA under Cerner’s IDIQ contract. Protest at 7. After learning that Cerner had opted not to subcontract with Nuance, Nuance now asserts that TO 0019 “materially modifies and increases the scope of [Cerner’s IDIQ contract].” Protester’s Comments, Dec. 2, 2019, at 1.

³ Similarly, the VA Secretary’s D&F stated that the IDIQ contract “will . . . address all EHR functions supporting clinical care, including revenue cycle.” AR, Tab 4, VA Secretary’s D&F, at 5.

Cerner's proposal, submitted in October 2017, reflected the potential use of Nuance as a subcontractor to perform the CDI requirements, and specifically referenced and incorporated Nuance's input to that proposal. Contracting Officer's Statement, Nov. 15, 2019, at 6-7. In summary, the agency maintains that Nuance was clearly on notice that the scope of Cerner's IDIQ contract included the requirements of TO 0019.

In determining whether a task or delivery order is outside the scope of the underlying contract, and thus falls within the Competition in Contracting Act's competition requirement, our Office examines whether the order is materially different from the original contract, as reasonably interpreted. Evidence of a material difference is found by reviewing the circumstances attending the original procurement; any changes in the type of work, performance period, and costs between the contract as awarded and the order as issued; and whether the original solicitation effectively advised offerors of the potential for the type of orders issued. In other words, the inquiry is whether the order is one which potential offerors should have reasonably anticipated. Symetrics Indus., Inc., B-289606, Apr. 8, 2002, 2002 CPD ¶ 65 at 5. In this context, where there is a logical connection between a broad scope of work in an IDIQ contract and the services procured under a subsequent task order, potential offerors are on notice that such logically-connected services are within the scope of the IDIQ. See, e.g., Morris Corp., B-400336, Oct. 15, 2008, 2008 CPD ¶ 204 at 5-6. Finally, IDIQ statements of work need not include specific references to every type of task, particularly where the challenged task reflects an insignificant fraction of the total value of the IDIQ contract. Specialty Marine, Inc., B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130 at 6; Outdoor Venture Corp., B-401628, Oct. 2, 2009, 2009 CPD ¶ 200 at 3.

Here, we reject Nuance's assertions that the coding and CDI requirements of TO 0019 are outside the scope of the underlying IDIQ. As discussed above, the agency posted the entire procurement package for the IDIQ contract to the FBO website prior to award; that posting included the broad statement of work as well as a comprehensive EHR listing of the functional requirements. As noted above, the solicitation stated, among other things, that the contract would "encompass[] the entire range of EHR requirements," to include "hosting, software, and hardware incidental to the solution," and that the contractor would be responsible for "revenue cycle reporting." AR, Tab 5, PWS, at 7.

Based on our review of the record, it is clear that the coding and CDI requirements of TO 0019 are inherent to performance of the comprehensive EHR requirements, specifically including the requirement to provide support for the revenue cycle. Additionally, we note that the value of the TO 0019 is less than 1 percent of the total value of the IDIQ contract; accordingly, the fact that the IDIQ solicitation does not specifically describe the coding and CDI requirements in the context of revenue cycle reporting fails to provide a basis for asserting that those requirements are outside the scope of the IDIQ contract. See Specialty Marine, Inc., supra; Outdoor Venture Corp., supra. Finally, the record is clear that Nuance has, by its own admission, engaged in "months of negotiation" with Cerner, seeking to be selected as a subcontractor under Cerner's IDIQ to provide some of the precise services it now asserts are "beyond the

scope” of the IDIQ contract.⁴ On this record, Nuance’s assertions that the requirements of TO 0019 are beyond the scope of the underlying IDIQ contract are without merit.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ To the extent Nuance is protesting Cerner’s decision not to award a subcontract to Nuance, that matter is not within GAO’s bid protest jurisdiction. See 4 C.F.R. § 21.5(h); Peter Vander Werff Constr. Inc., B-415676, Feb. 6, 2018, 2018 CPD ¶ 67 at 2-3. Similarly, Nuance’s complaints regarding Cerner’s subcontracting process, and/or the agency’s oversight of that process, are not for our consideration.