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Decision

Matter of: Oracle America, Inc.

File: B-420181

Date: November 30, 2021

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DIGEST

1. Protest that a task order solicitation exceeds the scope of the underlying multiple-award contract is denied where the record shows that services are reasonably encompassed within the contract's scope of work and the protester's allegations are based on facts not reflected in the record.
 2. GAO lacks jurisdiction to consider protest challenging the terms of a task order solicitation issued under a National Aeronautics and Space Administration contract where the estimated value of the task order is less than \$25 million.
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DECISION

Oracle America, Inc. (Oracle), of Reston, Virginia, protests request for quotation (RFQ) No. SP4701-21-Q-1000 issued by the Defense Logistics Agency (DLA) under the National Aeronautics and Space Administration (NASA) Solutions for Enterprise-Wide Procurement (SEWP) V indefinite-delivery, indefinite-quantity (IDIQ) governmentwide acquisition contract (GWAC) for Appian Enterprise Software as a Service (SaaS) user licenses. The protester asserts, among other things, that the products sought under the RFQ are beyond the scope of the SEWP V contract.

We deny the protest in part and dismiss the protest in part.

BACKGROUND

The Department of Defense (DOD) has used the Standard Procurement System (SPS) as its contract writing software for 25 years. Contracting Officer's Statement and

Memorandum of Law (COS/MOL) at 6. In 2017, DOD established a September 2023 “sunset date” to retire SPS, and appointed DLA to lead the effort to research and develop the next generation software to replace SPS for the Fourth Estate.¹ Agency Report (AR), Exh. 7, Office of the Under Secretary of Defense Memos at 2. DLA is now launching a limited “capability assessment pilot” (CAP) to assess the feasibility of using a solution developed by the Air Force, Contracting-Information Technology (CON-IT), as the potential next generation software.² COS/MOL at 6-7.

To undertake this pilot, DLA is procuring both services and products. The requirement under this solicitation is to acquire the software licenses, *i.e.*, the “products” for the pilot. In conjunction with this solicitation, DLA also issued RFQ No. SP4709-21-Q-1053, a task order solicitation under the DLA J6 Enterprise Technology Services (JETS) IDIQ contract for the services to install, configure, and integrate an instance of CON-IT within DLA’s Procurement Integrated Enterprise Environment, *i.e.*, the “services” for the pilot.³

On September 16, 2021, DLA issued the subject RFQ as a small business set-aside, seeking quotations for Appian Business Process Management (BPM) software subscriptions necessary for the pilot. *Id.* at 8; AR, Exh. 1, RFQ at 2. Under the RFQ, the vendor will supply 340 Appian Enterprise SaaS user licenses and the maintenance of those licenses. RFQ at 6.

The agency issued the RFQ under the SEWP V contract. RFQ at 7. SEWP V is a multiple-award IDIQ GWAC for “Information and Communications Technology (ICT) and Audio Visual (AV) products including hardware; software; maintenance; warranty; product based engineering, installation and implementation services; and product training.” AR, Exh. 2, SEWP V Statement of Work at 5-6. Dozens of vendors, including small businesses and other-than-small businesses, hold SEWP V contracts. See *generally* AR, Exh. 14, SEWP V Contract Holders. Oracle does not hold a SEWP V contract. See *generally id.*

DLA prepared a justification for an exception to fair opportunity because the solicitation seeks a brand-name product. AR, Exh. 6, Justification for an Exception to Fair Opportunity. That justification relies on DLA’s charge to assess CON-IT, the Air Force developed GOTS product, as a potential SPS replacement for the Fourth Estate. Because CON-IT relies on Appian’s BPM low-code application platform as “the essential enabling capability,” no other provider’s application platform is compatible for

¹ The “Fourth Estate,” as used by the agency, refers to DOD organizations, other than military services. COS/MOL at 6 n.2. It includes the DOD agencies and field activities.

² CON-IT is a software tool developed by the Air Force and provided as a government-off-the-shelf (GOTS) product that uses the low-code application platform from Appian, a software company. AR, Exh. 6, Justification for an Exception to Fair Opportunity.

³ Oracle has also protested the JETS task order solicitation to GAO. That protest is addressed in a separate decision. *Oracle America, Inc.*, B-420136.1 *et al.*, Nov. 30, 2021, 2021 CPD ¶ __.

use. *Id.* at 4. According to the justification, without the Appian licenses, “the GOTS application cannot be accessed, utilized, or otherwise assessed, rendering it unusable and unable to be evaluated as part of the planned CAP.” *Id.*

[DELETED] vendors submitted quotations by the RFQ's deadline. AR, Exh. 9, Abstract of Quotations. The value of the task order to be issued under the RFQ--based on the agency's internal estimate and the quotations received--is approximately \$[DELETED]. *Id.*; COS/MOL at 9. Oracle timely filed this protest before the deadline for the submission of quotations on September 21.

DISCUSSION

Oracle asserts two main grounds of protest. First, the protester contends that the RFQ exceeds the scope of the SEWP V contract. Second, Oracle asserts that the solicitation includes brand-name specifications for a non-commercial item, without justification and in violation of the Federal Acquisition Streamlining Act of 1994 (FASA), (codified, as amended, at 10 U.S.C. § 2377). Protest at 9-18. In filing and pursuing this protest, Oracle has made arguments that are in addition to, or variations of, those discussed below. While we do not address every issue raised, we have considered all of the protester's arguments, and conclude that none furnishes a basis to sustain the protest.

Challenge to the Scope of the Task Order

The protester essentially argues that the RFQ exceeds the scope of the umbrella IDIQ contract because, according to Oracle, SEWP V is “a general purpose IT support contract” and “[n]o credible basis exists to assert that any potential NASA SEWP V offeror . . . would have reasonably anticipated that DLA would eventually use the SEWP V contract as a means to develop, test, and deploy a next generation brand name contract writing solution to the entire Fourth Estate.” Protest at 10. In response, the agency asserts that Oracle is mischaracterizing the scope of the solicitation, and that 340 Appian licenses--which are being sought under the RFQ--are consistent with the broad and varied products available under the SEWP V contract. COS/MOL at 10-15.

Under FASA, as modified by the National Defense Authorization Act of Fiscal Year 2017, our Office is authorized to hear protests of task orders and task order solicitations that are issued under multiple-award contracts established under title 10 of the United States Code where the task order is valued in excess of \$25 million, or where the protester asserts that the task order would increase the scope, period, or maximum value of the contract under which the order is issued.⁴ 10 U.S.C. § 2304c(e); *California*

⁴ NASA is subject to the procurement provisions found in title 10 of the United States Code, rather than those found in title 41. 10 U.S.C. § 2302; *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 2-3 n.2. For purposes of determining the applicable dollar value threshold for our

Indus. Facilities Resources, Inc., d/b/a CAMSS Shelters, B-406146, Feb. 22, 2012, 2012 CPD ¶ 75 at 2. Task orders that are outside the scope of the underlying multiple-award contract are subject to the statutory requirement for full and open competition set forth in the Competition in Contracting Act of 1984 (CICA), absent a valid determination that the work is appropriate for procurement on a limited or other than full and open competitive basis. 10 U.S.C. § 2305(a)(1)(A)(i); *DynCorp Int'l LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6.

When a protester alleges that a solicitation would result in the issuance of a task order beyond the scope of the underlying multiple-award contract, we review the protest in essentially the same manner as those in which the protester argues that a modification is outside the scope of the contract. *DynCorp Int'l LLC*, *supra*. In determining whether a task order is outside the scope of the underlying contract, and thus falls within CICA'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 task order solicitation; and whether the original umbrella solicitation effectively advised offerors of the potential for the type of orders issued. *Symetrics Indus., Inc.*, B-289606, Apr. 8, 2002, 2002 CPD ¶ 65 at 7. In other words, the inquiry is whether the order is one which potential offerors reasonably would have anticipated.

Relevant here, the RFQ requires a vendor to supply 340 Appian Enterprise SaaS user licenses and the maintenance of those licenses. RFQ at 6. The period of performance is 12 months. *Id.* The RFQ seeks only the software; as explained above, DLA is procuring the services associated with the pilot separately. COS/MOL at 14-15.

We find Oracle's allegation that the RFQ exceeds the scope of the underlying multiple-award IDIQ contract is without merit. Noteworthy, here, is that Oracle's arguments do not actually address the scope of the RFQ as issued. Oracle does not argue that Appian licenses are outside the scope of the SEWP V contract. See Comments at 22 (essentially conceding that Appian licenses are offered on SEWP V). Nor could Oracle reasonably make such an argument, given the broad range of products and product-based services encompassed within SEWP V. See, e.g., AR Exh. 3, NASA SEWP V GWAC Guide at 4. Indeed, the current SEWP V online guide specifically identifies the Appian Enterprise SaaS user licenses and the maintenance of those licenses among the millions of products available under the SEWP V contract. COS/MOL at 12 (citing AR, Exh. 5, NASA SEWP V Provider Lookup). The record thus confirms that the RFQ is within the scope of the contract. See *Erickson Helicopters, Inc.*, B-415176.3, B-415176.5, Dec. 11, 2017, 2017 CPD ¶ 378 at 7-8 (denying allegation that task order

Office's jurisdiction to hear protests in connection with the issuance or proposed issuance of a task or delivery order, we look to the authority (i.e., Title 10 or Title 41) under which the IDIQ contract was issued. *Analytic Strategies LLC; Gemini Indus., Inc.*, *supra* at 5.

exceeded the scope of the underlying IDIQ contract where the underlying contract expressly provided for the task order services).

Instead of addressing the scope of the RFQ as written, Oracle contends that DLA has “objectives” to “advance Appian-based GOTS to become the Fourth Estate contract writing tool,” and that those objectives exceed “the lawful scope of the SEWP [V] GWAC.” Comments at 22-23. Oracle insists that “the protested RFQ and DLA’s broader Appian-GOTS acquisition strategy cannot be separated” because the RFQ is “on the critical path for DLA’s strategy to implement the Appian-GOTS tool across the Fourth Estate.” *Id.* at 2. Oracle relies on this characterization of DLA’s acquisition strategy to assert that the RFQ here, which seeks commercial software licenses, violates FASA and “FAR Part 12, both of which mandate a preference for commercial item solutions (e.g., COTS) over developmental or government-owned (e.g., GOTS products).” Protest at 15-18; see *also* Comments at 10-18.

DLA acknowledges that the RFQ “stems from the impending sunset of” SPS, and DLA’s charge to review and evaluate CON-IT as a potential replacement. COS/MOL at 6-7. The agency continues, however, that this RFQ is not designed to provide a contract writing solution for the Fourth Estate, but rather designed as a small purchase of software licenses “to conduct a limited capability pilot of a hybrid Appian/GOTS contract writing solution” as one possible SPS replacement. *Id.* at 7 n.4, 10-11. According to DLA, if the agency were to “expand the use of CON-IT to support the entire Fourth Estate,” it would be through a different procurement action, and “Oracle would be free to challenge any such action.” *Id.* at 21.

Based upon our review of the record, it is evident that Oracle’s objection is not that the Appian software licenses for this pilot are beyond the scope of the underlying SEWP V contract. Oracle’s objection is to what Oracle claims this RFQ portends: a plan that “falls on the critical path for DLA’s strategy to implement the Appian-GOTS tool across the Fourth Estate.” Comments at 1-2.

Under CICA and our Bid Protest Regulations, we review protests of alleged violations of procurement statutes and regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551, 3552; 4 C.F.R. § 21.1(a). This means that we review only specific procurement actions, such as solicitations or proposed awards. See *Doug Boyd Enters., LLC*, B-400390, Oct. 2, 2008, 2008 CPD ¶ 188 (declining to consider protester’s argument because there was no pending solicitation). In addition, protests that merely anticipate allegedly improper agency action are speculative and premature. *Dayton-Granger, Inc.--Recon.*, B-246226, B-246226.2, Feb. 28, 1992, 92-1 CPD ¶ 240 at 2. Consequently, there is no basis for us to consider the protester’s claim about what DLA will do for the full Fourth Estate at this time. See *Digital Forensic Servs., LLC*, B-419305.3, Feb. 25, 2021, 2021 CPD ¶ 106 at 6-7 (dismissing as premature a protester’s concerns about a potential “forthcoming solicitation”); *MINACT, Inc.*, B-414615, B-414615.2, July 12, 2017, 2017 CPD ¶ 221 at 5 (dismissing as premature a protest arguing that “the agency has indicated its intention to issue a future

solicitation” as a set-aside so that the protester would be unable to compete “in retaliation”). We therefore will not entertain Oracle’s argument, as it is unmoored from this or any active solicitation, and challenges what Oracle speculates the agency will do in the future.

In sum, Oracle does not articulate any basis for us to conclude that this task order solicitation is outside the scope of the SEWP V contract, and we decline to entertain Oracle’s attempt to challenge DLA’s alleged broader acquisition strategy not reflected in the RFQ at issue. See *Nat’l Customer Eng’g*, B-250641, Oct. 5, 1992, 92-2 CPD ¶ 226 (finding allegations of violations that are not in connection with a specific procurement “are insufficient to constitute a valid protest”). Accordingly, this allegation is denied.

Task Order Jurisdiction

Next, the protester raises several arguments challenging the terms of the solicitation. For example, Oracle argues that the RFQ is improper because DLA seeks a brand-name product without sufficient justification and without allowing vendors an opportunity to submit a quotation for a technically equal product. Protest at 11-15; Comments at 19-22.

As discussed above, our Office is authorized to hear a protest of a task order (or of the solicitation for that task order) that is issued under multiple-award contracts subject to title 10 of the United States Code where the task order is valued in excess of \$25 million, or where the protester can show that the order increases the scope, period, or maximum value of the contract under which the order is issued. 10 U.S.C. § 2304c(e)(1)(B); Federal Acquisition Regulation (FAR) 16.505(a)(1); *Global Dynamics, LLC*, B-417776, Oct. 23, 2019, 2019 CPD ¶ 366 at 3 (dismissing for lack of jurisdiction protest arguing that the task order solicitation denied offerors a fair opportunity to compete where the task order was valued at less than \$25 million).

Here, Oracle has not disputed that the agency’s assertion that the estimated value of this task order is approximately \$[DELETED]--well below the threshold of our jurisdiction to review protests of task orders. See COS/MOL at 9; AR, Exh. 9, Abstract of Quotations. In light of our decision denying Oracle’s contention that the RFQ exceeds the scope of the underlying SEWP V contract, and because there is no dispute the value of the task order is less than \$25 million, our Office does not have jurisdiction to consider the challenges to the terms of the task order solicitation, including challenges to the justification for a brand name product.⁵ *Erickson Helicopters, Inc.*, *supra* at 13-14 (finding that GAO did not have jurisdiction to review remaining allegations of protest

⁵ The agency also contends that the protester is not an interested party to raise the remaining challenges to the terms of the task order solicitation because Oracle has not been awarded a contract under SEWP V. COS/MOL at 19-20. Since we lack jurisdiction to review those challenges to the terms of the RFQ, we need not address this argument.

where value of task order was under \$25 million and allegations that task order exceeded the scope of the underlying IDIQ contract were denied).

Finally, Oracle argues that these protest grounds do not fall afoul of the task order jurisdiction bar because “DLA never had authority to solicit any solution designed around the Appian-GOTS tool, so it is irrelevant to GAO’s jurisdiction that DLA happened to structure those unlawful specifications as an RFQ under SEWP [V].” Comments at 5. Specifically, Oracle argues that its protest “facially involve[s] a task order but more fundamentally challenge[s] the agency’s authority to proceed with its underlying acquisition strategy.” *Id.* at 5-7. According to Oracle, its protest should be construed as a challenge to the IDIQ contract overall, rather than to the terms of the RFQ, as issued.⁶ *Id.* To make this argument, Oracle analogizes its protest to, for example, our decision in *LBM, Inc.*, B-290682, Sept. 18, 2002, 2002 CPD ¶ 157.

In *LBM*, the protester challenged the agency’s decision to acquire services under an IDIQ contract when those services were “previously provided exclusively by small business concerns” and “should be set aside for small business competition.” *LBM, supra* at 1. Our Office declined to dismiss the protest, finding that the limitation on our bid protest jurisdiction did not apply. *Id.* at 4. There, although the protester’s challenge was triggered by the issuance of a task order, our Office found that the protest essentially challenged the terms of the underlying IDIQ solicitation.⁷ *Id.* In other words, the question was whether the agency could legally include the services on the IDIQ contract, not whether the agency complied with any procurement laws and regulations in the issuance of the specific RFQ.

As discussed in the *LBM* decision, the protester’s challenge there could be separated from the specific task order, because the argument was focused on whether services of a particular nature and history could be procured under an IDIQ contract. Here, the argument cannot be separated from the specific task order, because Oracle is not contesting that services of this nature could never be procured consistent with FASA and FAR part 12 under the SEWP IDIQ contract. Thus, Oracle’s challenge does not escape the jurisdictional bar based on the reasoning of *LBM* or similar decisions. See *iTility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD ¶ 412 at 18 (declining to consider an agency’s acquisition planning); *MayaTech Corp.*, B-419313, Nov. 9, 2020, 2020 CPD ¶ 366 at 4-5 (rejecting a protester’s attempt to argue that a protest was a

⁶ Oracle also invokes cases from the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit to argue that we have jurisdiction. Comments at 7-8. We are aware of the decisions interpreting the courts’ bid protest jurisdiction under the Tucker Act. The bid protest jurisdiction of our Office, however, arises from CICA and not the Tucker Act. 31 U.S.C. §§ 3551, 3552. Thus, we do not find persuasive the protester’s reliance on decisions interpreting the courts’ jurisdiction under the Tucker Act to interpret GAO’s jurisdiction here.

⁷ The solicitation in *LBM* involved requirements for environmental remediation services by the Army Corps of Engineers. *LBM, supra* at 4. The Corps stated that it intended to award both the base IDIQ contract and the first task order simultaneously. *Id.*

scope challenge within our jurisdiction because it would render the task order protest bar meaningless). Accordingly, the remaining allegations are dismissed.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel