U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Peraton Inc.

File: B-416916.5; B-416916.7

Date: April 13, 2020

J. Scott Hommer III, Esq., Rebecca E. Pearson, Esq., Emily A. Unnasch, Esq., Christopher Griesedieck, Esq., and Taylor A. Hillman, Esq., Venable LLP, for the protester.
Paul F. Khoury, Esq., Brian G. Walsh, Esq., Cara L. Lasley, Esq., Lindy 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 challenging scope of agency corrective action is denied where agency reasonably limited the scope of discussions to address narrow issues previously identified in outcome prediction alternative dispute resolution.

2. Original awardee qualifies as an intervenor under 4 C.F.R. § 21.0(b)(1) in a pre-award protest challenging the scope of agency corrective action when the original awardee and protester are the only offerors still eligible to compete and the protest alleged that the original awardee should be excluded from the competition.

3. Communications between agency counsel and intervenor's counsel concerning the scope or nature of agency corrective action are not privileged pursuant to the joint defense or common interest doctrine because the agency and intervenor lack a common legal interest in such communications.

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 Office of Consular Systems and Technology. Peraton argues that agency's corrective action is both unreasonable and reflects an unfair agency bias in favor of ManTech.

We deny the protest.

BACKGROUND

On September 25, 2018, the agency first issued a task order under this solicitation to Vistronix, LLC. Protest at 6-7. Peraton filed a protest of that award with our Office, alleging, among other things, that Vistronix had unmitigated organizational conflicts of interest (OCIs). *Id.* at 7. The agency took corrective action in response to that protest, and, following an investigation, concluded that Vistronix had an unmitigatable OCI. *Id.* at 7-8. 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 9. 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. B-416916.3, Agency Report (AR), Tab 4, Request for Proposals (RFP) at 41. 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 20, counsel for ManTech sent an email to agency counsel offering his view of the relevant GAO decisions governing the scope of agency corrective action following an outcome prediction ADR. Email from Intervenor's Counsel to Agency Counsel at 1-2. Of note, the email was marked as "COMMON INTEREST PRIVILEGED." *Id.* On December 30, agency counsel sent an email to counsel for

ManTech thanking him, and indicating that the agency intended to take corrective action in response to Peraton's protest. Email from Agency Counsel to Intervenor's Counsel at 1. Agency counsel briefly described the agency's proposed corrective action, but did not substantively engage with the content of the previous email. *Id.* Agency counsel also noted that Peraton would likely "still complain" about the corrective action. *Id.*

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, 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). This protest followed.[1]

DISCUSSION

The protester contends that the scope of the agency's corrective action is facially unreasonable for a variety of reasons. *See* Protest at 12-26. The protester additionally contends that the agency treated parties disparately in developing its corrective action, and that as a result, the corrective action was impermissibly biased towards ManTech. *See* Comments and Supp. Protest at 28-30. Further, the protester contends that the most appropriate corrective action in this case would be to exclude ManTech's proposal from the competition, but that broader discussions would also be appropriate. Comments and Supp. Protest at 13-15.

Procedural Matters

Intervention

As a preliminary matter, Peraton objected to the admission of ManTech as an intervenor in this case. *See* Peraton's Objection to Request to Intervene. Specifically, Peraton relied on our prior decision in *Vistronix*, arguing that permitting intervention in pre-award protests, such as protests of the scope of corrective action, is the exception, not the rule. *Id.* at 2-3 (*citing Vistronix*, *supra*). Peraton further argued that ManTech had failed to allege any special circumstances that would support its request to intervene. *Id.* We ultimately acknowledged ManTech as an intervenor in this protest over Peraton's objection.

While, as the protester noted, admitting intervenors in a pre-award protest is the exception, not the rule, there are several factors that suggested intervention was appropriate in this case. In our decision in *Vistronix*, we noted that our Office has admitted intervenors in a pre-award context where: the intervenor was the only other

[1] The task order is valued at $129,995,782, and, accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency indefinite-delivery, indefinite-quantity contracts valued in excess of $10 million. 41 U.S.C. § 4106(f)(2).

offeror, an agency established a competitive range including only one offeror, or the intervenor was the apparent awardee. *See Vistronix*, *supra* at 4 (*citing Bannum Inc.*, B-411074.5, Oct. 10, 2017, 2017 CPD ¶ 313; *Enterprise Services, LLC*, B-414513.2, *et al.*, July 6, 2017, 2017 CPD ¶ 241; and *The Austin Company*, B-291482, Jan. 7, 2003, 2003 CPD ¶ 41).

However, the decisions discussed in *Vistronix* related to protests of an offeror's exclusion from the competitive range rather than to a protest of the scope of corrective action. *Id.* Nonetheless, Mantech is, in this case, the only other offeror that will be eligible to compete during the corrective action, and was, prior to the corrective action, the awardee. *See* ManTech's Response to Objection to Intervention at 1-2. These facts are relevant to the question of whether Mantech has a substantial prospect of receiving award if the protest is denied.

Additionally, we note that the protester specifically urges the agency to find Mantech's proposal unawardable and exclude it from the competition, instead of reopening discussions. Protest at 25-26. We have previously admitted intervenors in protests of corrective action when the protester argued that the agency should exclude or disqualify the intervenor, in particular, from the competition. *See*, *e.g.*, *XYZ Corp.*, B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296 at 1, 3 (intervenor admitted where protest challenged agency's decision not to disqualify intervenor as part of corrective action).

Collectively, these facts suggest that Mantech had a substantial prospect of receiving award if the protest is denied, and that permitting Mantech to intervene was appropriate in this case. *See* 4 C.F.R. § 21.0(b)(1).

Assertion of Privilege

As part of its request for documents, the protester requested "[a]ll documents relating to or reflecting communications with ManTech or its representatives, including legal counsel, with respect to the nature and scope of the [a]gency's proposed corrective action." Protest at 27. In its responses to the document request, the agency indicated that agency counsel had exchanged emails with intervenor's counsel concerning the scope and nature of the proposed corrective action. Agency Response to Request for Clarification at 1. However, the agency indicated it did not intend to produce those communications because the agency considered them privileged communications covered by the joint defense doctrine. *See Id.*; Agency Response to Request for Additional Briefing at 1.

Subsequently, the protester filed a supplemental protest specifically alleging that the agency had breached its duty to treat all offerors fairly during the procurement process by communicating with intervenor's counsel, but not protester's counsel, concerning the scope of the corrective action. Comments and Supp. Protest at 28-30. Additionally, the protester alleged that the agency's assertion of privilege through the joint defense doctrine suggested an improper unity of interests between the agency and the intervenor. *Id.* at 10-11. In essence, the protester argues that the record suggested

improper bias or collusion between the agency and ManTech to preserve ManTech's award. *See*, *e.g.*, Supp. Comments at 9.

Because the scope and applicability of the joint defense doctrine (sometimes also called the common interest doctrine) was an issue of first impression in our forum, we requested that the parties brief the issue.[2] The primary published decision directly addressing the application of the joint defense or common interest doctrine in the bid protest context is *ARKRAY USA, Inc. v. United States*, 117 Fed. Cl. 22, 26-27 (2014). In that case, the Court of Federal Claims conducted *in camera* review of documents over which the government and intervenor asserted privilege through a joint-defense agreement; the court ultimately directed the parties to produce additional documents. *Id.* The court also expressed skepticism about the application of the joint defense doctrine in the bid protest context because the court doubted whether the legal interests of the government and intervenor could be sufficiently aligned.[3] *Id.* at 27 n.11.

In this case, however, we needed only to resolve the narrower question of whether the doctrine can apply to communications concerning the nature and scope of agency corrective action. We concluded that an agency and intervenor cannot have a common legal interest in crafting the nature and scope of agency corrective action because intervenors can, and routinely do, file protests of the scope of agency corrective action.

In this case, the agency and intervenor argued that they shared a common legal interest in defending the reasonableness of the agency's evaluation and award decision. However, even assuming that to be correct, a common interest in defending the agency's evaluation would not extend to the crafting of corrective action, which is more in the nature of setting the ground rules for a competition. Accordingly, we concluded that the communications should be provided, and the agency subsequently produced the emails in question.

Corrective Action

Turning to the merits of the protest, Peraton first argues that an agency may not request and evaluate another round of revisions with a specific intent to change a particular offeror's technical ranking or to avoid making award to a particular vendor. Comments and Supp. Protest at 13-14 (*citing Systems Plus, Inc.*, B-413703.8, May 10, 2017, 2017

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[2] The joint defense or common interest doctrine is a common law doctrine that extends the scope of an underlying privilege, such as the attorney-client privilege. *See*, *e.g.*, *B.E. Meyers & Co. v. United States*, 41 Fed. Cl. 729, 732-733 & n.4 (1998). Ordinarily, attorney-client privilege is waived by disclosures of privileged material to third parties. *Id.* However, the joint defense or common interest doctrine provides, subject to certain requirements, that communications of privileged material to third parties in furtherance of a common legal interest do not waive the underlying privilege. *Id.*

[3] Although we need not reach the broader question of whether the joint defense doctrine can apply in the bid protest context, generally, we share the Court's skepticism.

CPD ¶ 141 at 9). The protester contends that, in similar circumstances, our Office has typically recommended reevaluating existing proposals rather than reopening discussions. *Id.* (*citing*, *e.g.*, *Essex Corp.*, B-246536.3, June 25, 1992, 92-2 CPD ¶ 170). The protester alleges that the agency declined to take this simpler course of corrective action solely because it would result in ManTech's exclusion from the competition. *Id.* at 14-15. Specifically, the protester notes that because the solicitation contained clear requirements concerning letters of commitment and ManTech's letters of commitment did not meet those requirements, upon a reevaluation, the agency would have discerned that ManTech's proposal did not satisfy material requirements of the solicitation and was therefore unawardable. *Id.*

In the alternative, the protester argues that limiting the scope of the proposed discussion to confirming the availability of key personnel and updating letters of commitment is unfairly narrow. Comments and Supp. Protest at 17-27. Specifically, the protester notes that the proposed discussions appear tailored to permit ManTech to conform its letters of commitment to the solicitation's requirements, but will not permit the protester to address any of the agency's concerns with its proposal. *Id.* The protester also contends that the unreasonable narrowness of the corrective action will effectively prevent fair and meaningful discussions because other portions of proposals may be affected by revisions to key personnel. *Id.*

Peraton also contends that the agency erred by communicating with ManTech but not Peraton concerning the scope of the corrective action, and that, in effect, agency personnel were impermissibly biased in favor of ManTech. Comments and Supp. Protest at 28-29; Protester's Response to Communications Between Agency and ManTech at 4-9. The protester suggests that agency personnel have a duty of fairness towards offerors, and that agency counsel violated this duty by corresponding with the intervenor but not the protester. *Id.* Further, the protester contends that agency counsel's "disparaging remark" that Peraton will "still complain" about the proposed corrective action suggests bias against Peraton and in favor of ManTech. Protester's Response to Communications Between Agency and ManTech at 9. Finally, the protester argues that the corrective action proposed by counsel for ManTech was adopted more or less verbatim by the agency.[4] *Id.* at 4-9.

[4] Peraton raises several additional arguments not addressed in this decision. For example, the protester argues in the alternative that if the proposed corrective action does not constitute discussions, it amounts to an impermissible clarification with ManTech alone. Comments and Supp. Protest at 17-20. However, the proposed corrective action clearly contemplates allowing offerors to materially revise their proposals, which constitutes discussions, so we need not reach this argument. *See* B-416916.3 Corrective Action Memorandum. We have reviewed the other arguments and conclude that none of them provide a basis on which to sustain the protest.

Generally, in responding to discussions,[5] offerors may revise any aspect of their proposals as they see fit--including aspects that were not the subject of discussions. *Rel-Tek Sys. & Design, Inc.--Modification of Remedy*, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1 at 3. There may be circumstances, however, where an agency, in conducting discussions to implement a recommendation of our Office for corrective action may reasonably decide to limit the revisions offerors may make to their proposals. *Id.* As a general matter, the details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *MSC Indus. Direct Co., Inc.*, B-411533.2, B-411533.4, Oct. 9, 2015, 2015 CPD ¶ 316 at 5.

Preliminarily, the protester's suggestion that the agency should merely reevaluate existing proposals, and therefore exclude ManTech's proposal from the competition, is untenable because the issue of ManTech's letters of commitment should have been raised in discussions but was not. In arguing for ManTech's exclusion, the protester principally relies on our decision in *Essex Corp.*, *supra*, but the facts in this case are clearly distinguishable from the facts in that decision. *See Essex Corp.*, *supra* at 5. Specifically, in *Essex* the agency raised concerns about the awardee's letters of intent during discussions, and the awardee nonetheless submitted a non-compliant final proposal revision. *Id.* In that decision, we concluded that it would be inappropriate for an agency to allow an additional round of proposal revisions merely to provide an offeror an opportunity to provide information it was previously asked to submit. *Id.*

However, in this case, while ManTech's letters of commitment did not address the solicitation's requirements, ManTech's earlier proposal contained the same defects as its final proposal revision, but the agency did not raise the issue with ManTech during discussions. *See* B-416916.3 AR, Tab 33, ManTech's Proposal with Tracked Changes at 151-158, and AR, Tab 42, ManTech Discussion Questions at 3-4. As a general matter, discussions, when conducted, must be meaningful--that is, they must identify deficiencies and significant weaknesses that exist in an offeror's proposal. *See*, *e.g.*, *Mission Essential Personnel, LLC*, B-407474, B-407493, Jan. 7, 2013, 2013 CPD ¶ 22

[5] The agency conducted this procurement under Federal Acquisition Regulation (FAR) part 16. The regulations concerning discussions under FAR part 15 do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16. *Hurricane Consulting, Inc.*, B-404619 *et al.*, Mar. 17, 2011, 2011 CPD ¶ 70 at 6. In this regard, FAR § 16.505 does not establish specific requirements regarding the conduct of discussions in a task order competition; however exchanges in that context must be fair and not misleading. *CGI Fed. Inc.*, B-403570 *et al.*, Nov. 5, 2010, 2011 CPD ¶ 32 at 9. In this regard, when an agency engages in discussions with an offeror in a task order procurement, the discussions must be meaningful, that is, they must lead the offeror into the areas of its proposal that require correction or amplification. *See*, *e.g.*, *Sabre Sys., Inc.*, B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶ 128 at 6 (explaining, in the context of a task order procurement, that discussions must be meaningful).

at 5. Moreover, we will sustain a protest when the record shows that, although an agency held discussions, it failed to raise a deficiency that was present in an offeror's initial and revised proposals. *Id.* Accordingly, while the agency erred in making award to ManTech when ManTech's letters of commitment did not address the solicitation's requirements, the agency also erred by failing to identify that deficiency in discussions with ManTech when that issue was also present in ManTech's initial proposal. It would be improper for the agency to exclude ManTech's proposal on the basis of the first error without also resolving the second error, and resolving both errors is precisely what the agency now proposes to do.[6]

The protester's alternative argument, that the scope of the corrective action was unreasonably narrow, is also without merit. Our decisions have consistently concluded that agencies may focus corrective action to address procurement errors identified by our Office through the ADR process. *See*, *e.g.*, *Consolidated Eng'g Servs., Inc.*, B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 (protest challenging corrective action as unduly narrow is denied where corrective action focused on narrow issues identified in outcome prediction ADR); *Alliant Techsystems, Inc.*, B-405129.3, Jan. 23, 2012, 2012 CPD ¶ 50 at 7 (protest of scope of corrective action denied where agency reasonably focused its corrective action on addressing concerns raised in ADR). Moreover, we have specifically concluded that when reopening discussions to address a fault in a proposal that the agency improperly failed to raise in discussions, an agency may reasonably limit the scope of discussions, and go so far as to hold discussions with *only* the affected offeror. *Environmental Chem. Corp.*, B-416166.3, *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 20-21 (corrective action proposing to hold discussions with only one offeror was reasonable where the discussions and proposal revisions were limited solely to addressing a fault in offeror's proposal that should have been raised in discussions).

In this case, the agency focused its corrective action to address the only procurement issue identified as potentially meritorious in the outcome prediction ADR, the defects in ManTech's letters of commitment. In addition, as noted above, in order to address these defects, the agency is compelled to also remedy its error in the conduct of discussions with ManTech by raising the issue with ManTech and affording it an

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[6] Anticipating this point, the protester notes that in a prior decision in which an awardee's proposal was materially deficient, but the deficiency had not been addressed in discussions, our Office recommended that the agency re-open discussions broadly rather than focusing on the specific fault in the awardee's proposal. Comments and Supp. Protest at 14-15 (*citing Special Operations Grp., Inc.*, B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73*)*. That decision is inapposite, however, because in that decision we also identified several other procurement errors in need of resolution that might be resolved by broader discussions. *Special Operations Grp., Inc.*, *supra* at 5-6. In this case, by contrast, the only procurement errors to be resolved are the issues of ManTech's letters of commitment and attendant lack of meaningful discussions for ManTech.

opportunity to address the defects through another round of discussions. The agency intends to do this by reopening discussions with all offerors, albeit limited to matters concerning the availability of proposed key personnel and updating letters of commitment. Accordingly, on these facts, we conclude that the agency's proposed scope of corrective action is reasonable.[7]

Finally, the protester's arguments that agency counsel's communications with intervenor's counsel constitute unfair disparate treatment and reflect collusion or bias against the protester are also without merit. *See* Comments and Supp. Protest at 28-29; Protester's Response to Communications Between Agency and ManTech at 4-9. Our decisions have consistently explained that government officials are presumed to act in good faith, and a contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Lawson Envtl. Servs., LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5. The burden of establishing bad faith is a heavy one. *Id.* A protester must present facts reasonably indicating, beyond mere inference and suspicion, that the agency acted with specific and malicious intent to harm the protester. *Id.*

In this case, following the ADR teleconference, intervenor's counsel sent an email offering its view of the law in this case, but the agency's response did not engage with the substance of the intervenor's analysis. *See* Email from Agency Counsel to Intervenor's Counsel at 1. Rather, the agency's three-line response merely offered holiday greetings, briefly described the agency's proposed corrective action, speculated that Peraton may "still complain" about the corrective action, and thanked intervenor's counsel. *Id.* The agency's very limited response to intervenor's counsel simply does not support the protester's characterization of the exchanges.

First, the protester's suggestion that the agency unfairly colluded with the intervenor is untenable on these facts. The communications in question represent a lopsided conversation, at best--a single long email from the intervenor and a brief, polite acknowledgement from the agency more than a week later. *Id.* Furthermore, it is not clear from the record that the intervenor's email was prompted or requested by the

[7] As the protester notes, we have concluded that agencies cannot prohibit offerors from revising related areas of their proposals that are materially impacted by corrective action. *See* Comments and Supp. Protest at 17-19 (*citing Castro & Co. LLC*, B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74 at 3). However, because the agency's corrective action merely contemplates asking offerors to confirm the continued availability of their key personnel and does not contemplate permitting offerors to substitute key personnel, it is unclear that any other portions of an offeror's proposal would reasonably be affected by the proposed discussions in this case.

agency.[8] In any case, there was certainly no impediment to protester's counsel sending a similar email expressing its own view of the relevant law to agency counsel, and protester's counsel concedes it attempted to do precisely that, albeit through phone calls and voicemails.[9] *See* Comments and Supp. Protest at 12, n. 8.

Likewise, the protester's claim of bias rests primarily on an allegedly disparaging remark by agency counsel (that Peraton would "still complain" about the proposed corrective action) and the fact that the agency's corrective action closely resembled the corrective action suggested by the intervenor. Protester's Response to Communications Between Agency and ManTech at 4-9. Contrary to the protester's suggestion, agency counsel's mild expression of her (ultimately correct) view that Peraton was likely to protest the corrective action simply does not amount to a convincing proof of bias against the protester.

Furthermore, the fact that the agency's corrective action ultimately resembled the corrective action proposed by the intervenor is not, without more, evidence of bias. Put another way, on these facts, the agency is not foreclosed from pursuing a course of corrective action that is reasonable and consistent with applicable procurement laws and regulations simply because the intervenor suggested it. Because we see no convincing evidence of bias and the proposed corrective action is otherwise reasonable, we see no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

[8] The intervenor's email makes a passing reference to prior discussions, but it is unclear from the context of the email whether that referred to the immediately preceding ADR teleconference, or some other discussion. Email from Intervenor's Counsel to Agency Counsel at 1-2.

[9] While the protester makes much of the fact that the agency did not respond to its voice mails, as noted above, the agency only responded to the intervenor's email in a limited fashion and after a significant lapse of time. *See* Comments and Supp. Protest at 12, n. 8.