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Decision

Matter of: Booz Allen Hamilton, Inc.

File: B-418449

Date: May 18, 2020

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Lois Hanshaw, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation requirement that prime contractor or its affiliate be an independent public accountant is unduly restrictive of competition where the agency does not show that the specifications are reasonably necessary to meet the agency's needs.
 2. Protest that task order requirement for performance of audit services by an independent public accountant exceeds the scope of an indefinite-delivery, indefinite-quantity, multiple-award contract for audit services is sustained where it was not reasonably foreseeable that the task order would limit performance of services to independent public accountants.
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DECISION

Booz Allen Hamilton Inc. (Booz Allen), of McLean, Virginia, protests the terms of request for quotation (RFQ) No. M95494-20-Q-0005, issued by the United States Marine Corps for financial statement audit support services. Booz Allen contends that the RFQ requirement that the prime contractor or its affiliate be an independent public accountant (IPA) is unduly restrictive of competition, and outside the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract. The protester also argues that the solicitation violates various procurement statutes and regulations.

We sustain the protest.

BACKGROUND

On May 8, 2018, the Navy awarded the Financial Improvement and Audit Readiness (FIAR) contract, which is a multiple-award, IDIQ contract for financial statement audit support, to Booz Allen and three other vendors.¹ Protest at 3. The RFQ was issued on January 15, 2020, under Federal Acquisition Regulation (FAR) subpart 16.5 to firms holding the FIAR IDIQ contract. AR, Tab 1, Email from Agency to IDIQ Holders, Jan. 15, 2020. The RFQ is seeking a contractor to help the Marine Corps with audit readiness for the fiscal year 2020 Full Financial Statement Audit by performing four key objectives: (1) audit remediation; (2) audit response/coordination; (3) audit coaching; and (4) Office of Management and Budget (OMB) A-123 Financial and Information Technology (IT) controls.² AR, Tab 3, RFQ at 10.

The RFQ contemplates the issuance of a fixed-price task order with a base period of 9 months and two 1-year option periods. *Id.* at 2.³ Award would be made on a best-value tradeoff basis, considering two factors: (1) price; and (2) technical and management approach. *Id.* at 7. The RFQ identifies the historical price range for similar services as being between \$34 and \$40 million. *Id.* at 6.

As relevant here, the RFQ also included a mandatory threshold requirement that a firm was required to meet before the agency would evaluate the remaining evaluation factors. *Id.* In this regard, the agency would evaluate whether the prime contractor was either an IPA (independent public accountant) or proposing an IPA affiliate in

¹ The FIAR program is designed to improve accuracy and reliability of financial information; establish and sustain internal controls processes and procedures; and provide a reliable financial environment that supports independent attestation and audit engagements of the Navy's financial statements. Agency Report (AR), Tab 7, FIAR IDIQ at 16. Although the Navy and Marine Corps are engaged in separate audits of their financial statements, the Marine Corps identified a requirement for FIAR financial audit support and the contracting officer (CO) here determined that using the Navy's FIAR IDIQ was in the best interest of the government. Agency Response to GAO Request for Information (RFI), at 4; Contracting Officer's Statement at 1; AR, Tab 14, Management Oversight Process for the Acquisition of Services (MOPAS), at 4. Accordingly, the FIAR IDIQ was modified to allow the Marine Corp to issue task orders for its efforts. Contracting Officer's Statement at 2.

² Audit remediation is the process of ensuring that an organization has proper controls, governance, and risk management processes available to improve its audit readiness posture. RFQ at 10. Audit response/coordination matures and enhances audit infrastructure for efficient and sufficient audit response and coordination. *Id.* Audit coaches provide strategic guidance and technical assistance for all phases of audit preparation and remediation, and OMB A-123 Financial and IT controls govern and enhance framework to ensure identification of financial and IT controls per OMB A-123. *Id.*

³ Citations to the RFQ are to the amended RFQ unless otherwise stated.

accordance with the performance work statement (PWS) requirements. *Id.* The RFQ does not define the term IPA; the agency describes an IPA as an independent entity responsible for performing an audit and reporting on an organization's financial statements in accordance with generally accepted auditing standards issued by the American Institute of Certified Public Accountants. Agency Response to GAO RFI, Apr. 27, 2020 at 1. The PWS required a contractor to maintain an IPA certification for the entirety of the contract. RFQ at 10. The agency would evaluate this requirement on a pass/fail basis; a rating of fail would render the entire quotation ineligible for award. *Id.* at 7.

On August 29, 2019, in preparation for issuing the RFQ, the agency sent an RFI to contract holders asking whether the vendor is an IPA, is currently or has previously audited entities with appropriations or a balance sheet exceeding \$10 billion, and soliciting feedback on the draft PWS. AR, Tab 5, RFI at 1-2. In reviewing responses, the agency determined that Booz Allen was not capable of meeting the threshold requirement. AR, Tab 14, MOPAS at 3. Specifically, the agency stated that although Booz Allen could perform the required tasks, it could not bring the level of subject matter experience that an IPA firm or its affiliate could provide. *Id.* at 3-4.

When the agency issued the solicitation on January 15, 2020, it requested questions regarding the solicitation be submitted by January 21. AR, Tab 1, Email from Agency to IDIQ Holders, Jan. 15, 2020. The protester submitted a question, requesting that the agency define the term affiliate for the purposes of being an IPA. RFQ at 59. Specifically, the protester asked whether the term included subcontractors, and if it did not, the protester requested that the agency identify the type of entities that met the requirement of affiliate. *Id.*

On February 4, the agency issued amendment 01, incorporating its responses to vendors' questions. AR, Tab 4, Email from Agency to IDIQ holders, Feb. 4, 2020. The amended solicitation defined the term affiliate as being related to another company through an official attachment or connection, through licensing, or as subsidiary. RFQ at 59. The RFQ further stated that the definition did not include subcontractors and could not be satisfied through a prime contractor and subcontractor relationship. *Id.*

Amendment 01 also extended the closing date for receipt of quotations from February 6 at 10 a.m. to February 10 at 10 a.m. On February 6 at 4:47 p.m., Booz Allen protested to our Office.⁴ Electronic Protest Docketing System No. 1.

⁴ The estimated value of the task order at issue exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 10 U.S.C. § 2304c(e).

DISCUSSION

Booz Allen raises various challenges to the terms of the solicitation. For the reasons explained below, we sustain Booz Allen's challenges that the IPA requirement is unduly restrictive of competition and exceeds the scope of the IDIQ contract.⁵

Timeliness

The agency argues that the protest is untimely and should be dismissed under 4 C.F.R. § 21.2(a)(1). Memorandum of Law (MOL) at 3. Specifically, the agency contends that even though amendment 01 extended the closing date to February 10, the protester was required to file its protest by the initial closing date of February 6 at 10 a.m. because the protester's challenge was based on defects in the initial solicitation. *Id.* In support of this argument, the agency relies on our decision in *Cashman Dredging & Marine Contracting Co, LLC*, B-417213.3, B-417213.4, 2019 CPD ¶ 259, where our Office dismissed that protest as untimely, concluding that the protester could not rely on an amendment that extended the closing date for submitting proposals to protest defects found in the initial solicitation. *Id.* at 4.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based

⁵ Although not discussed herein, the protester raises other collateral arguments that do not provide a basis to sustain the protest. For example, the protester challenges the agency's decision not to include past performance as an evaluation factor. Protest at 30. Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the absence or presence of particular evaluation factors, so long as the factors used reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. *ViON Corp.*, B-256363, June 15, 1994, 94-1 CPD ¶ 373 at 10. Under FAR part 16 procurements, a contracting officer has discretion in determining whether to consider past performance as an evaluation factor. See FAR § 16.505(b)(1)(v)(A). Additionally, given that the IDIQ provided the agency discretion as to which non-price evaluation factors to consider in task order RFQs, we find no basis to challenge the agency's decision not to include past performance in the RFQ's evaluation factors. See AR, Tab 7, FIAR IDIQ, at 40.

We also disagree with the protester's contention that the National Defense Authorization Act for Fiscal Year 2020 requires the agency to consider past performance when awarding contracts for audit remediation services. Protest at 30. The plain text of the statute requires that selection of audit remediation service providers be based on qualifications, relevant experience and capacity, rather than past performance. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, div. A, title X, § 1003, 133 Stat. 1198, 1572 (2019) (codified at 10 U.S.C. § 240b).

upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

We disagree with the agency. In *Cashman Dredging, supra*, unlike here, the amendment was issued after the initial closing date had passed. Here, however, the amendment was issued on February 4, prior to the closing date initially set for February 6 at 10 a.m. Accordingly, the issuance of the amendment effectively rendered the February 6 closing date moot and extended the closing date. As a result, February 10 became the “new” initial closing date. Thus, the protest filed on February 6 is timely.

IPA Requirement

The protester contends that the requirement that the prime contractor or its affiliate be an IPA unduly restricts competition and that the agency lacks a reasonable basis for concluding that this requirement could not be met by a subcontractor. Protest at 27-28.

In response, the agency contends that obtaining an unmodified opinion is of the utmost priority to the agency and that the IPA requirement is necessary to meet this need.⁶ MOL at 9-10. In this regard, the agency asserts that an IPA’s specialized experience--for example, the requirement to comply with the standards of the Public Company Accounting Oversight Board and professional practice standards dealing with auditing, and its specialization in auditing other firms--allows an IPA to better understand and more credibly advise the Marine Corps on how to achieve an unmodified opinion. *Id.* at 9; Agency Response to GAO RFI, Apr. 27, 2020 at 1-2, 11.

The agency justifies its conclusions regarding an IPA’s specialized experience by offering an email from the program manager for the procurement to the contracting officer. MOL at 9 (citing AR, Tab 9, Email from Program Manager to CO, Nov. 15, 2019). This email essentially states that the agency would likely receive an unmodified opinion by using an IPA because an IPA’s consulting services would yield more credible and relevant advice due to the auditing experience and culture of an IPA firm. AR, Tab 9, Email from Program Manager to CO, Nov. 15, 2019. The agency argues that it is perfectly reasonable to request this specialized experience given that the agency has not previously used an IPA firm for audit remediation services for its financial statement audit and as a result has not been able to obtain an unmodified opinion. MOL at 12.

⁶ The agency explains that an unmodified opinion occurs when outside auditors examine and conclude that an agency’s financial statements are presented fairly in all material respects and in compliance with applicable standards. Agency Response to GAO RFI, Apr. 27, 2020, at 12. The agency explains that accomplishing the four key objectives of the RFQ should allow the agency to timely resolve audit findings and eliminate material weaknesses and scope limitations, which would result in an unmodified opinion. *Id.* at 13.

A contracting agency has the discretion to determine its needs and the best method to accommodate them. See *Pitney Bowes, Inc.*, B-413876.2, Feb. 13, 2017, 2017 CPD ¶ 56 at 3. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs. *Total Health Res.*, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 2. To the extent a protester challenges a specification as unduly restrictive, the procuring agency has the burden to establish that the specification is reasonably necessary to meet its needs. *Pitney Bowes, Inc.*, *supra*; *Smith and Nephew, Inc.*, B-410453, Jan. 2, 2015, 2015 CPD ¶ 90 at 5. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. *NCS Technologies, Inc.*, B-403435, Nov. 8, 2010, 2010 CPD ¶ 281 at 3. If an agency's explanation is inadequate, or does not respond to the issue raised, our Office has no basis for concluding that the challenged provision is reasonably related to the agency's minimum needs. *Navajo Nation Oil & Gas Co.*, B-261329, Sept. 14, 1995, 95-2 CPD ¶ 133 at 5.

Based on our review of the record, we conclude that the agency has not established that the IPA requirement is reasonably necessary to meet its needs. The agency's justification for the IPA requirement appears to be based solely on the program manager's belief that an IPA will provide high quality work, rather than any empirical or other evidence for why an IPA is uniquely qualified to perform the services of the RFQ. Indeed, the record shows that the agency's considerations did not include any assessment of whether an IPA can perform the four objectives the agency identifies as necessary to obtain an unmodified opinion. Moreover, we find that it does not automatically follow that an IPA will provide high quality work solely by virtue of being an IPA. Consequently, we find the requirement to be unduly restrictive.

The protester also challenges the requirement that neither an IPA nor its affiliate can be a subcontractor. In response, the agency advances two primary arguments to support its contention that a prime or prime-affiliate relationship, rather than a prime contractor-subcontractor arrangement, is necessary to meet the agency's minimum needs. First, the agency asserts that a prime contractor-subcontractor relationship is characterized as a partnership for a specific project rather than "[t]he bond between true subsidiaries[, which] lends itself to the culture of the organization and accounting being a core competency of that organization." AR, Tab 13, Email from Program Manager to CO, Jan. 23, 2020. Second, the agency also asserts that in auditing an agency the size of the Marine Corps, it would be preferable to contract with an IPA that has audited large companies, rather than with a non-IPA firm that lacks experience subcontracting with an experienced IPA. MOL at 12.

In our view, neither of the agency's purported justifications reasonably explain why a prime or prime-affiliate relationship is necessary to meet the agency's minimum needs. In this regard, the record does not demonstrate how either rationale makes an IPA

prime contractor or affiliate uniquely qualified to meet the agency's minimum needs.⁷ Instead, the record again shows that the agency's views on the bond and culture of subsidiary relationships appear to be based solely on unsupported assertions of the program manager. See AR, Tab 9, Email from Program Manager to CO, Nov. 15, 2019. As a result, we find the agency's decision to restrict the IPA requirement to a prime or prime-affiliate relationship does not withstand logical scrutiny.

In sum, while we recognize that the Marine Corps is entitled to great discretion in establishing its needs, we find that here, the agency has failed to provide reasonable justifications for the challenged specifications. Therefore, because we are unable to conclude that the challenged specifications are reasonably necessary for the agency to meet its needs, we sustain this protest ground.

Scope

The protester also contends that the task order exceeds the scope of the FIAR IDIQ and that had it known future task orders would require services be performed by an IPA, it would have affected the protester's pricing and teaming methodology. Protest at 28-29.

In determining whether a task order is beyond the scope of a contract, our Office will examine whether there is a material difference between the task order and the underlying contract. *DynCorp Int'l LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6. Evidence of such a material difference is found by, among other things, examining any changes in the type of work as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. *Western Pilot Serv.; Aerial Timber Applicators, Inc.; Evergreen Flying Servs., Inc.; G.B. Aerial Applications, Inc.*, B-415732, *et al.*, Mar. 6, 2018, 2018 CPD ¶ 104 at 6. The overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated. *Anteon Corp.*, B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 5.

⁷ To the extent the agency also argues that the requiring activity was concerned about the lack of a coordinated and interrelated relationship between a prime contractor and its subcontractor that could result in the agency terminating the agreement and losing time in the inflexible audit schedule, we note that the record does not include a discussion of this basis. See MOL at 12 (stating the agency was concerned that the "risk of fissure" between a prime contractor and its subcontractor). As a result, we conclude that the agency's argument finds no support in the underlying record. See *Global SuperTanker Servs., LLC*, B-414987; B-414987.2, Nov. 6, 2017, 2017 CPD ¶ 345 at 7. Additionally, we also find unsupported the agency's alternate assertions that it was willing to accept increased costs for an IPA to obtain more relevant and credible contractor services, and that having an IPA requirement performed by a prime contractor, rather than a subcontractor, would decrease the risk of extraneous markup costs. MOL at 10, 13. Without any quantitative analysis to support its conclusion, we find the agency's assertions regarding the expectation for final pricing of quotations to be speculative.

As an initial matter, the protester and the agency agree that the audit support work sought under the task order is similar to the audit work contemplated by the FIAR IDIQ. The parties disagree, however, as to whether firms could reasonably anticipate that the agency would require that work be performed by only an IPA. See Protest at 28-29; MOL at 14.

In support of its position, the agency states that the IDIQ reasonably advised firms of the IPA requirement and points to provisions in the background and scope sections in the IDIQ. MOL at 14. According to the agency, these sections identify the need for contractors to address past findings while preparing for and responding to future audits and to have comprehensive knowledge of the audit process in order to predict the IPA's documentation requests/expectations and to successfully respond to IPA recommendations. *Id.* (citing AR, Tab 7, FIAR IDIQ at 16-17); Agency Response to GAO RFI, Apr. 27, 2020, at 13-14.

The agency additionally contends that the combination of the IDIQ's responsibilities and tasks, type of work, defining characteristics of those servicing the contract, and the fact that two of the four IDIQ holders are IPAs made it reasonably foreseeable that future task orders could contain an IPA requirement. MOL at 14. Underlying the agency's rationale is the belief that a contractor with an IPA accreditation would be in the best position to predict requests from an IPA firm. *Id.* Additionally, the agency contends that firms should have been reasonably aware of a potential IPA requirement based on the language of the strategic support labor category, which notes that services will be performed by professionals with experience in supporting a large and complex organization in its goals and objectives to receive an unmodified opinion. Agency Response to GAO RFI, Apr. 27, 2020, at 13-14.

We find that the task order exceeds the scope of the IDIQ. Here, we understand the agency to represent that the work to be performed under this RFQ--*i.e.*, audit remediation, audit response/coordination, audit coaches, and OMB A-123 financial and IT controls--is inseparable from the entity performing the work (an IPA). Although the RFQ and IDIQ involve the same audit remediation services, the RFQ requirement that the services be performed by an IPA is materially different from the IDIQ, which only required that firms have comprehensive knowledge of the audit process and the ability to predict and respond to the Department of Defense's (DOD) IPA. See, *e.g.*, *Western Pilot, supra* at 7 (concluding that RFQ and IDIQ were materially different even though the same services were requested).

Based on our review of the record, the IDIQ's background and scope sections contain the only three references to the term IPA. The first identifies the IPA firm contracting with the DOD to perform the Navy's full financial statements audit. AR, Tab 7, FIAR IDIQ at 16. The second reference indicates that FIAR IDIQ holders will need to predict and respond to DOD's IPA; and the third states that comprehensive audit knowledge is essential to predicting and responding to DOD's IPA. *Id.* at 16-17.

We conclude that these general references provide background and context for the work to be performed, rather than reasonably making contract holders aware that future task orders will be limited to contract holders that are themselves an IPA. Similarly, the agency fails to show how the general references to audit readiness in the strategic support labor category would make IDIQ holders aware that future task orders would be narrowed to allow only an IPA to perform services. Accordingly, we find the requirement to perform FIAR IDIQ services as an IPA exceeds the scope of the IDIQ contract and sustain the protest on this basis.

CONCLUSION

In sum, we find the RFQ requirement that audit remediation services be performed by only an IPA that is the prime vendor or its affiliate is unduly restrictive of competition. We also find that the RFQ exceeds the scope of the IDIQ to the extent the services must be performed under the currently unduly restrictive terms.

RECOMMENDATION

We recommend that the Marine Corps reassess its need with respect to the IPA requirement, taking into account the issues identified in this decision, to include a reassessment of the requirement that the prime vendor must be an IPA, or be affiliated with an IPA. We also recommend that the Marine Corps, based upon the results of its reassessment, either modify its procurement strategy or delete the IPA requirement. We also recommend that Booz Allen be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Booz Allen should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. *Id.* § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel