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Decision

Matter of: Peraton Inc.

File: B-416916.11

Date: February 8, 2021

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Paul F. Khoury, Esq., Brian G. Walsh, Esq., Cara L. Lasley, Esq., Lindy C. 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

Protest alleging that agency's requirements have materially changed since solicitation was issued is dismissed as untimely. At the time the protester learned of the changed requirements, the agency had not set a date for receipt of revised proposals and the protest was not filed within ten days of when the protester knew or should have known the basis of its protest as required by our regulations.

DECISION

Peraton, Inc., of Herndon, Virginia, challenges the terms of solicitation No. 19AQMM18R0065 following its prior protests of the issuance of a task order to ManTech Advanced Systems International, Inc., of Herndon, Virginia. 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 the solicitation no longer materially reflects the agency's needs due to the passage of time and intervening events such as a global pandemic.

We dismiss the protest.

BACKGROUND¹

The agency issued the request for proposals (RFP) on January 24, 2018, contemplating a single task order with both fixed-price and time-and-materials contract line items. B-416916.3, Agency Report (AR), Contracting Officer's Statement (COS) at 2; AR, Tab 20, RFP at 4, 44. The agency issued a task order to ManTech on September 27, 2019, and Peraton filed a protest of the award with our Office 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.

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 specific position. ManTech's letters, however, did not state or reference any specific positions, and, in some cases, it was unclear from the letters whether the signing individual knew the position for which they were being proposed.

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. 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

¹ This procurement has been the subject of multiple protests and related proceedings before our Office. See, e.g., *Vistronix, LLC*, B-416916.2, July 29, 2019, 2019 CPD ¶ 268 (dismissing as untimely a protest challenging the agency's conclusion that the protester had an unmitigatable organizational conflict of interest); *Peraton Inc.*, B-416916.5, B-416916.7, April 13, 2020, 2020 CPD ¶ 144 (denying protest of scope of agency's proposed corrective action when corrective action was narrowly focused on the only procurement fault identified in an outcome prediction alternative dispute resolution in a previous protest); *Peraton, Inc.*, B-416916.8, *et al.*, Aug. 3, 2020, 2020 CPD ¶ 248 at 8-9 (protest challenging agency corrective action is sustained when the agency permitted certain changes that would materially impact other aspects of the protester's proposal that it was not permitted to change and would effectively require the protester to submit a materially inconsistent proposal). Our discussion of the background here is limited to matters relevant to the resolution of the specific allegations of this protest.

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. B-416916.8 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. B-416916.8 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. B-416916.8 AR, Tab 54, Discussion Letter, Apr. 23, 2020, at 1.

Later that day, Peraton responded 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. 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. B-416916.8 AR, Tab 56, Discussion Letter, Apr. 24, 2020, at 1.

Unsatisfied with the agency's response, Peraton filed a timely protest challenging the limited scope of permitted proposal revisions. On August 3, we sustained that protest, concluding that the agency's action was unreasonably limited in scope because the solicitation required that proposal sections align, and the record demonstrated that the substitution of key personnel would materially impact other aspects of the protester's proposal that it was not permitted to change. *Peraton Inc.*, B-416916.8 *et al.*, Aug. 3, 2020, 2020 CPD ¶ 248 at 8-9. This would have effectively required the protester to submit a materially inconsistent proposal. *Id.*

Additionally, we noted that while the agency could have declined to permit Peraton to substitute key personnel in the first instance, once the agency permitted substitutions of key personnel the agency must also permit revisions to other materially impacted aspects of the protester's proposal. *Id.* at 6-7. Accordingly, we recommended that, if the agency intended to permit key personnel substitutions, the agency should 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. *Id.* at 9.

On October 30, 2020, the agency notified the offerors that it no longer intended to permit substitutions of key personnel and asked offerors to confirm whether their key personnel remained available and provide updated letters of commitment by November 13. AR, Tab 68, Letter from Contracting Officer to Peraton, Oct. 30, 2020. This protest followed.²

DISCUSSION

The protester alleges that the agency must amend the solicitation because it no longer meets the agency's needs due to changes in the agency's requirements over the two years since the solicitation was originally issued, as well as various intervening world events such as the COVID-19 pandemic. Protest at 8-12. Specifically, the protester alleges eight different ways in which the agency's requirements now differ from those described in the solicitation.³ Protest at 14-32. In response to inquiries by our Office, the protester argues that it first learned of the changes in the agency's requirements on various dates between May of 2020 and November of 2020. Protester's Briefing on Timeliness at 8-16. This protest was filed on November 9, 2020.

As a general matter, when a protester challenges an agency's failure to amend a solicitation based on the agency's changed requirements, such a protest is analogous to a challenge to the terms of a solicitation. See, e.g., *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; *Northrop Grumman Info. Tech., Inc.*, B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10. With respect to the timeliness of challenges to the terms of a solicitation, our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), provide, in relevant part, as follows:

In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

² The previous awarded value of this task order was \$129,995,272. 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).

³ The protester alleges that the agency's requirements have changed because of: (1) various funding shortfalls; (2) curtailment of non-emergency travel; (3) changes to hardware refresh implementation; (4) reductions in training; (5) decreased frequency of unclassified pouch shipments; (6) delivery of an inventory system that would address some of the current solicitation's requirements; (7) performance of other requirements by another contractor; and (8) reduced hardware repair requirements. Protest at 14-32.

This provision of our regulations was revised in 2018 to harmonize our timeliness rules, and to explain which rule applied in situations when a solicitation impropriety becomes apparent after proposals have been submitted, but where there is no established closing time or no opportunity to submit revised proposals. *Computer World Services Corporation*, B-418287.3, June 29, 2020, 2020 CPD 204 at 3-4. As we explained in the comments that were included with the revision to our regulations “the revision advances the principle that allegations of solicitation improprieties should be resolved as early as possible in the procurement process in order to promote fairness and efficiency.” 83 Fed. Reg. 13817, 13819 (Apr. 2, 2018).

The protester argues that its protest is timely filed because the appropriate measure of timeliness is whether it filed its challenge prior to the next time for receipt of proposals, which in this case was November 13.⁴ Protest at 6-7. In response, the agency and intervenor argue that, because the agency had not set a time for receipt of proposals until October 30, for all matters known to the protester prior to that date, the protester was required to file its protest within ten days of when it knew or should have known its basis of protest.⁵ Agency’s Briefing on Timeliness at 4-5; Intervenor’s Briefing on Timeliness at 1-2.

In this case, the agency and intervenor are correct that, between April 27 and October 30, no closing time had been established for this procurement. Absent an established closing date during this period, if the protester believed the solicitation needed to be amended to address changes in the agency’s requirements and the protester knew or should have known about the defects in the solicitation prior to October 30, under the plain terms of our regulations outlined above the protester was required to raise these issues within ten days. See, e.g., *Computer World Services Corporation*, *supra* (concluding that solicitation challenge that arose when no date for receipt of revised proposals had been set was subject to ten-day rule).

More specifically, in response to a request for additional briefing, the protester provided dates on which it alleges it first learned of its various grounds of protest. See Protester’s Briefing on Timeliness at 8-16. With respect to all but two of its protest grounds, the protester concedes that it learned of those protest grounds more than a month before October 30. *Id.* Accordingly, because the protester does not contest, as a factual matter, that it learned of the majority of its protest grounds more than a month before October 30--at a time when no closing time had been established for this

⁴ The protester also initially challenged the solicitation with respect to four other alleged changes in requirements, but subsequently withdrew those protest grounds when it became clear that the protester knew the basis of its protest grounds prior to April 27, 2020, the previous time for receipt of proposals under this solicitation. Protester’s Briefing on Timeliness at 5.

⁵ Additionally, as a substantive matter, the agency disputes that its requirements have actually permanently changed, but we need not address the substance of the issue because we conclude that the protest is untimely in its entirety.

solicitation--and did not file those protest grounds within ten days of when it learned of them, those protest grounds are untimely.

Additionally, we note that this procurement has been ongoing for more than two years, and has been the subject of six separate protests filed by Peraton. Peraton is the incumbent contractor on the effort that preceded this procurement, and has been performing the agency's requirements during the intervening two years. Despite the fact that, by its own admission, the protester learned of the factual basis of most of its current protest arguments months ago, the current solicitation challenge was only brought once the agency issued a discussion letter that made it clear that Peraton's proposal would likely be unawardable.

Permitting a protester to, in effect, hold solicitation challenges in reserve until it becomes clear that they are unlikely to prevail in a competition is antithetical to the idea that allegations of solicitation improprieties should be resolved as early as possible in the procurement process. Accordingly, we see no reason to conclude that the fact that the agency set a date for receipt of revised proposals after the ten-day filing period had run out should retroactively render these otherwise untimely protest grounds timely.

With respect to the remaining two protest grounds--concerning unclassified pouch shipments and changes in travel affecting the solicitation's special projects task--while the protester contends that it only learned of them recently, we conclude that the protester knew or should have known the basis of those protest grounds much earlier.

As to pouch shipments, the protester alleges that, while it had notice of restrictions concerning classified pouch shipments in March of 2020, it did not learn of similar restrictions to unclassified pouch shipments until November of 2020. Protester's Briefing on Timeliness at 5, 13. Peraton's arguments are not supported by the record.

Alongside the agency's March guidance restricting the use of classified pouch shipments, the agency also issued guidance on March 19, 2020, that, among other changes, specifically directed users of unclassified pouch mail systems to minimize non-essential use of unclassified pouches until further notice. AR, Tab 76, Diplomatic Pouch and Mail COVID-19 Guidance, at 1. While the protester argues that it did not know the full extent of the changes in the agency's unclassified pouch shipment needs until November, our decisions have repeatedly concluded that a protester need not await perfect knowledge before filing a protest. See, e.g., *Valkyrie Enters., LLC*, B-414516, June 30, 2017, 2017 CPD ¶ 212 at 3-4 n.2. In this case, the protester clearly should have known the factual basis of its allegations that the agency's unclassified pouch shipment needs had changed in March, and this protest ground is untimely because it was not filed within ten days of when the protester knew or should have known its basis of protest.

Concerning the agency's imposition of travel restrictions affecting the execution of the solicitation's requirements related to special projects, the protester concedes that as of August 10, 2020, it was aware of State Department announced travel restrictions that it

alleges would impair or prevent the execution of the agency's requirements. Protester's Briefing on Timeliness at 12. Nonetheless, the protester alleges that timeliness should be measured from October 27, 2020, when it learned of significant funding reductions and related hiring freezes that would also affect the execution of the requirements. *Id.* We disagree.

The same August 10 State Department message announcing the travel restrictions also explained that the agency would be making significant discretionary spending reductions and implementing hiring freezes. Protest, exh. 1, Message for the Field Regarding Post Cost Cutting Initiatives at 1-3. While the protester may have learned more details concerning the scope and nature of the funding reductions on October 27, the protester was clearly on notice as of August 10 that significant funding reductions were occurring. Again, a protester need not await perfect information before filing a protest. *Valkyrie Enters., LLC, supra*. Accordingly, this ground of protest should have been filed within ten days of August 10, 2020, and is untimely.

The protest is dismissed.

Thomas H. Armstrong
General Counsel