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Decision

Matter of: Oracle America, Inc.

File: B-420136; B-420136.2; B-420136.3

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 by a Department of Defense agency 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. SP4709-21-Q-1053 issued by the Defense Logistics Agency (DLA) under the DLA J6 Enterprise Technology Services (JETS) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract for the Enterprise Contract Writing Module (ECWM) configuration and integration support pilot. The protester asserts, among other things, that the services sought under the RFQ are beyond the scope of the JETS 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 7. 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. 12, Office of the Under Secretary of Defense Memos at 5. DLA then established the ECWM Office to perform a “limited capability ECWM pilot” 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 7-8.

To undertake this pilot, DLA is procuring both services and products. The requirement under this solicitation is to acquire installation, configuration, and integration work, *i.e.*, the “services” for the pilot. In conjunction with this solicitation, DLA also issued RFQ No. SP4701-21-Q-1000, a task order solicitation under the National Aeronautics and Space Administration Solutions for Enterprise-Wide Procurement (SEWP) V IDIQ governmentwide acquisition contract for Appian software licenses, *i.e.*, the “products” for the pilot.³

On July 22, 2021, DLA issued the subject RFQ as a small business set-aside, seeking quotations for the ECWM configuration and integration support pilot. AR, Exh. 1, RFQ at 1, 3. The agency issued the RFQ under the JETS contract. *Id.* at 1. JETS is a multiple-award IDIQ contract that provides “the full range of [information technology (IT)] services, technical and management expertise that support applications, software, hardware, infrastructure, and systems, across the DLA IT Enterprise.” AR, Exh. 7, JETS Solicitation at 10-12. Over 100 vendors, including small businesses and other-than-small businesses, hold JETS IDIQ contracts. AR, Exh. 10, JETS Awardees at 3.

[DELETED] vendors submitted quotations by the RFQ’s deadline. COS/MOL at 23. 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.*; AR, Exh. 13, RFQ Acquisition Plan at 3; AR, Exh. 19, Abstract of Quotations at 4.

Oracle, which does not hold a JETS contract, learned of the RFQ on August 10. See *generally* AR, Exh. 10, JETS Awardees at 3; AR, Exh. 14, Oracle Agency-Level Protest at 5. On August 20, Oracle filed a protest with the agency, asserting that the RFQ exceeded the scope of the underlying JETS contract and otherwise violated procurement law and regulation. AR, Exh. 14, Oracle Agency-Level Protest at 1.

¹ The “Fourth Estate,” as used by the agency, refers to DOD organizations, other than military services. COS/MOL at 8. 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. COS/MOL at 8. CON-IT uses the low-code application platform from Appian, a software company.

³ Oracle has also protested the SEWP V task order solicitation to GAO. That protest is addressed in a separate decision. *Oracle America, Inc.*, B-420181, Nov. 30, 2021, 2021 CPD ¶ __.

On August 27, Oracle learned from the agency that quotations had been accepted up until the submission deadline of August 26. Protest at 3. Oracle filed this protest with our Office on September 7.⁴

DISCUSSION

Oracle asserts two main grounds of protest. First, the protester contends that the RFQ exceeds the scope of the JETS 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 15-25. 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, the solicitation "seeks a contractor to convert the never competed Appian-based GOTS contract writing tool into the next-generation contract writing system for the entire Fourth Estate," and such work is beyond the scope of "a general purpose IT support contract" like JETS. Protest at 15-17. In response, the agency asserts that Oracle is mischaracterizing the scope of the solicitation, and that the work to support a limited pilot--which is being sought under the RFQ--is consistent with the broad and varied types of work permitted under the JETS contract. COS/MOL at 23-31.

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 within the DOD 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. 10 U.S.C. § 2304c(e); *California 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 a full and open competitive basis. 10 U.S.C. § 2305(a)(1)(A)(i) (2006); *DynCorp Int'l LLC*, B-402349, Mar. 15, 2010, 2010 CPD ¶ 59 at 6.

⁴ Oracle asserts that its protest is timely because it was filed within 10 days after Oracle learned of "initial adverse agency action." Protest at 3 (*citing* 4 C.F.R. § 21.2(a)(3)). Oracle interprets the "adverse agency action" here to have been the notice of the agency's decision to proceed with the receipt of quotations. *Id.* (*citing* 4 C.F.R. § 21.0(e)). The agency does not challenge the timeliness of Oracle's protest.

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, JETS has a broad scope, providing "the full range of IT services, technical and management expertise that support applications, software, hardware, infrastructure, and systems, across the DLA IT Enterprise." AR, Exh. 7, JETS Solicitation at 10-12. This includes support for information systems, software installation, integration of IT services, installation of software applications, and project testing. See *id.* The protested RFQ explains that "[t]he objective of the ECWM Pilot is to standup initial contract writing functionality, utilizing a business process management (BPM)-based on [CON-IT], and a limited subset of capabilities and security provisions provided by the Procurement Integrated Enterprise Environment (PIEE)," which is a "suite of procure-to-pay (P2P) tools/applications that support the Department of Defense and its supporting agencies." RFQ at 4; COS/MOL at 2 n.1. The specific scope of the RFQ is to "install, configure, and integrate an instance of a government provided contract writing solution," CON-IT, within the PIEE. RFQ at 4. The pilot is intended to "enable limited contract writing capability to approximately 300 users" and "[w]hile the government intends to incrementally add and deliver additional ECWM capability and in future iterative Phases, this solicitation is not intended to support work beyond the Pilot." *Id.* at 4-5. The period of performance is 12 months. *Id.* at 55. The RFQ seeks only the installation, configuration, and integration services; as explained above, DLA is procuring the software necessary for the pilot separately.⁵ COS/MOL at 36.

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 the limited services to "install, configure, and integrate" software are outside the scope of the JETS contract. See Oracle Comments & Supp. Protest at 24 (essentially conceding

⁵ Oracle made arguments in this protest related to the justification for an exception to fair opportunity issued in connection with the SEWP V task order solicitation for software licenses. Comments & Supp. Protest at 10-15. We address those arguments in a separate decision. *Oracle America, Inc.*, B-420181, *supra*.

that the services are offered on JETS). Nor could Oracle reasonably make such an argument, given the broad range of IT support services included in the JETS contract's statement of work (SOW), especially the array of relevant services covered under the following SOW task areas: Task Area 4 - Defense Business Systems Life Cycle Management; and Task Area 15 - Configuration Management Support.⁶ See AR, Exh. 7, JETS Solicitation at 24-29, 48-49. Rather, Oracle focuses its arguments on its claim that the scope of the JETS contract envisions primarily the servicing of commercially available off-the-shelf (COTS) software products. Protest at 22 ("The JETS Solicitation indicates that DLA may ask contractors to provide initial response support for a variety of COTS, GOTS, and custom-developed applications that exist on DLA's systems, but the Solicitation's primary emphasis relates to JETS contractor support of COTS.") (citations omitted).

That the JETS contract does not specifically identify CON-IT or Appian by name does not automatically render the installation, configuration, or integration services for CON-IT or Appian-based applications outside of the task areas identified in the JETS SOW. Where there is no difference in the type of work, performance period, and cost associated with the challenged solicitation and the broad categories of work provided for in the IDIQ contract, we will not sustain a scope protest. See, e.g., *California Indus. Facilities Resources, Inc. d/b/a CAMSS Shelters*, B-403421, et al., Nov. 5, 2010, 2010 CPD ¶ 269 at 2-5 (denying protest alleging that tents and shelter systems were outside the scope of an IDIQ contract for operational logistical equipment with a stated purpose "to provide all equipment necessary for special operations forces to perform their missions"); *Symetrics Indus., Inc.*, supra at 10 (denying protest alleging that retrofitting of prototypes was outside the scope of an IDIQ contract that included tasks for "depot level maintenance" because retrofitting "reasonably falls within the definition of depot level maintenance").

Instead of addressing the scope of the RFQ as written, Oracle asks that our analysis go beyond this "single, isolated task order for commercially available support services needed to run a limited pilot" because "DLA's own market research for the protested RFQ confirms it falls on the critical path for DLA's strategy to implement the Appian-GOTS tool across the Fourth Estate. . . ." Comments & Supp. Protest at 2. Oracle then argues that "[n]o credible basis exists to assert that any potential offeror in 2015 would have read the JETS Solicitation and reasonably inferred that DLA would eventually use JETS to develop, test, and deploy a next generation brand name contract writing solution to the entire Fourth Estate." Protest at 17; see also Comments & Supp. Protest at 3.

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 7-8.

⁶ For example, JETS task area 4 includes work to install and configure applications--consistent with the RFQ's scope to "install, configure, and integrate" an instance of the CON-IT application--in an application database, such as PIEE. See AR, Exh. 7, JETS Solicitation at 29; RFQ at 4; COS/MOL at 2 n.1.

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 limited capability pilot “to determine if utilizing the [Air Force’s] CON-IT solution within existing DLA systems may be a feasible option to meet future contract writing needs,” citing to the background and scope provisions of the RFQ. *Id.* at 8-9. DLA denies Oracle’s claim that this RFQ reflects DLA’s selection and implementation of “CON-IT as the contract writing solution for the entire Fourth Estate,” reiterating that the issued RFQ is a pilot solicitation for commercial services to configure, integrate, and install software for approximately 300 users.⁷ *Id.* at 28-30.

Based upon our review of the record, it is evident that Oracle’s objection is not that the commercial services for this ECWM pilot are beyond the scope of the underlying JETS contract. Oracle’s objection is to what Oracle claims that this RFQ portends: a plan to “expand the government-owned Appian-GOTS tool across the entire DOD Fourth Estate.” Comments & Supp. Protest at 10-11.

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 JETS IDIQ 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.

⁷ The agency asserts, and Oracle has not disputed, that this represents a “relatively small test program,” meaning just a portion of the Fourth Estate user base. *See* COS/MOL at 28-29.

Task Order Jurisdiction

Next, the protester raises several arguments challenging the terms of the solicitation. For example, Oracle complains that the RFQ's identification of a brand name (Appian) software solution violates the requirement for full and open competition and is unjustified. Protest at 17-21. Oracle also argues that "DLA's use of JETS to further develop, modify, test, and deploy a GOTS contract writing solution violates [FASA] and [Federal Acquisition Regulation (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." *Id.* at 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 DOD multiple-award contracts 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 to be issued. 10 U.S.C. § 2304c(e); 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 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 23; AR, Exh. 13, RFQ Acquisition Plan at 3; AR, Exh. 19, Abstract of Quotes at 4. In light of our decision denying Oracle's contention that the RFQ exceeds the scope of the underlying JETS 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.⁸ *Erickson Helicopters, Inc.*, B-415176.3, Dec. 11, 2017, 2017 CPD ¶ 378 at 13-14 (finding that GAO did not have jurisdiction to review remaining allegations of protest 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 JETS." Comments & Supp. Protest at 4. 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 4-5. According to Oracle, its

⁸ 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 JETS. COS/MOL at 34-35. Since we lack jurisdiction to review those challenges to the terms of the RFQ, we need not address this argument.

protest should be construed as a challenge to the IDIQ contract overall, rather than to the terms of the RFQ, as issued.⁹ Supp. Comments at 4. 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 2. 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.¹⁰ *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 JETS 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 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

⁹ 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 GAO has jurisdiction. Comments & Supp. Protest at 6-8; Supp. Comments at 5-6. 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.

¹⁰ 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.*