U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Comptroller General
of the United States

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Decision

Matter of: ViiNetwork, Inc. d/b/a ViiMed

File: B-422439

Date: June 24, 2024

Michael J. Gardner, Esq., and Timothy M. McLister, Esq., Greenberg Traurig, LLP, for the protester.
J. Scott Hommer, III, Esq., Rebecca E. Pearson, Esq., Christopher G. Griesedieck, Esq., and Kelly M. Boppe, Esq., Venable LLP, for Peraton, Inc., the intervenor.
Colby L. Sullins, Esq., Timothy J. Haight, Esq., Christopher F. Hirl, Esq., Defense Health Agency, for the agency.
Charmaine A. Stevenson, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly issued a task order outside the scope of a basic ordering agreement (BOA), awarded as part of a commercial solutions opening (CSO) procurement, is dismissed for failing to state a valid basis of protest, where the record shows that the order was properly issued in accordance with the terms of the CSO and the BOA.

2. Protest that an order issued under a BOA awarded pursuant to the terms of a CSO creates unmitigable organizational conflicts of interest is dismissed where the protester's assertions do not present hard facts necessary to demonstrate that any actual or potential organizational conflicts of interest exist.

DECISION

ViiNetwork, Inc., doing business as ViiMed, a small business of Washington, D.C., protests the issuance of order No. HT0038-24-F-0005 pursuant to basic ordering agreement (BOA) No. HT0038-22-G-0002 to Peraton, Inc., of Reston, Virginia, for healthcare delivery modernization. The protester argues that the agency improperly issued an order outside the scope of a BOA awarded to Peraton. The protester further contends that issuance of the order creates unmitigable organizational conflicts of interest.

We dismiss the protest.

BACKGROUND

The Defense Health Agency, on behalf of the Department of Defense, Joint Operational Medicine Information Systems (JOMIS) program office, requires operational medicine capabilities as part of its healthcare delivery modernization effort to enable the capture and transmission of healthcare data. The effort will address critical gaps in the transmission of healthcare information to document preventative healthcare and patient encounters; manage patient data, ancillary data, and maintain patient visibility; and provide decision support to healthcare providers for active and deployed military service members. Agency Report (AR), Tab 12, CSO at 1, 5.

The agency conducted the acquisition in accordance with Class Deviation 2018-O0016, now superseded by Class Deviation 2022-O0007, Defense Commercial Solutions Openings (CSO). Contracting Officer's Statement (COS) at 2. The use of CSOs as a form of general solicitation was first authorized as a pilot program under section 879 of the fiscal year (FY) 2017 National Defense Authorization Act (NDAA), Pub. L. No. 114-328, § 879, 130 Stat. 2000, 2312-2313 (2016), and permanently authorized under section 803 of FY 2022 NDAA. Pub. L. No. 117-81, § 803, 135 Stat. 1541, 1814-1816 (2021).

Under a CSO, the Department of Defense may competitively select proposals received in response to a general solicitation, similar to a broad agency announcement, based on a review of proposals by scientific, technological, or other subject-matter expert peers. Use of a CSO in accordance with this class deviation is a competitive procedure for the purposes of 10 U.S.C. chapter 221 and Federal Acquisition Regulation (FAR) section 6.102. COS at 3. Here, the agency issued CSO No. HT0038-22-S-C001, which stated that the potential instruments awarded could be FAR-based contracts; basic ordering agreements (BOAs), including orders; blanket purchase agreements, including calls; or prototype other transactions (OTs); and that regardless of the type of instrument negotiated, the pricing would be fixed price. CSO at 3. In addition, the CSO stated:

> Awards made under this CSO constitute competitive procedures. The Government may award OTs for prototype projects that provide for the award of a follow-on production FAR-based contract or OT for production to participants in the OT for prototype projects, or a recognized successor in interest to the OT, without the use of further competitive procedures, if the participant in the OT for prototype projects successfully completes the prototype project, as permitted by 10 U.S.C. § 2371b(f).
>
> A contract or OT for a prototype awarded under this CSO shall allow for an iterative prototyping process. An iterative prototyping process will allow the Government to modify, by mutual agreement, the scope of a prototype contract or OT to allow for the adaptation and modification of the technology being prototyped to meet additional unique and discrete

> purposes/mission sets. The sequential prototype iterations may result in a separate prototype project rather than a modification of the original prototype contract or OT.

Id.

The CSO procurement included several separate phases, as follows: (1) abstract; (2) pitch; (3) full proposal; (4) negotiation; (5) compliance; and (6) post-award design. *Id.* at 8-11. As relates to the final post-award design phase, the CSO stated:

> Once an instrument is awarded, the Government will request the agreed upon initial design and will work iteratively with the contractor to refine a design to maximize the satisfaction of the required outcome. Once a design is approved, the design will be utilized to measure performance and the satisfaction of "requirements" derived from the agreed upon design. The Government expects that the design will be different from the proposed solution in a way that considers the evolution of available information, circumstances, and decisions made by the Government.

Id. at 11.

At the end of the abstract phase, [DELETED] applicants were invited to participate in the pitch phase. COS at 9. Two rounds of the pitch phase were conducted in January and March 2022. *Id.* On April 5, 2022, both Peraton and ViiMed were notified that they had been selected to move on to the full proposal phase. *Id.* at 12. Ultimately, the agency issued BOAs to both offerors on May 10 under the post-award design phase. AR,
Tab 19, Peraton BOA; Tab 20, ViiMed BOA.

Thereafter, both Peraton and ViiMed received initial prototype orders, however on July 22, the agency notified Peraton that it did not anticipate further prototyping at that time but that its BOA would remain active. COS at 17-18. On September 30, the agency issued a second prototype order to ViiMed to further refine its design, and a third prototype order on September 29, 2023. *Id.* at 20-21. However, on February 14, 2024, the agency notified ViiMed that it had decided to discontinue prototyping ViiMed's solution and would not extend its then current order or issue a new one. *Id.* at 21.

Concurrently, on October 27, 2023, the agency provided Peraton with a draft performance work statement (PWS) and advised that the agency intended to proceed with its iterative prototype design process. On November 27, the agency provided Peraton with a request for proposal, and Peraton timely submitted a proposal to the agency on December 11. COS at 21-22. On January 10, 2024, the agency issued a second prototype task order to Peraton pursuant to its previously awarded BOA. AR, Tab 44, Peraton Order No. HT0038-24-F-0005. This protest followed.

DISCUSSION

The protester contends that the January 10 order issued to Peraton is outside the scope of Peraton's BOA and that it creates unmitigable organizational conflicts of interest (OCIs).[1] The first argument about the scope of Peraton's BOA is premised on the fact that the order issued to Peraton directs that ViiMed's subcontractor on ViiMed's previous prototype orders, T6 Health Systems (T6), will continue prototype development as a subcontractor to Peraton. Protest at 4-5. The protester states that the agency has admitted that T6 will build components of ViiMed's solution and continue to build T6's portion of the work as defined in ViiMed's third prototype order and argues that the scope of work in the Peraton BOA does not encompass development of ViiMed's specific components. *Id.* The agency argues that the protest should be dismissed because the order was properly issued in accordance with the terms of the CSO and Peraton's BOA, and the allegations are legally and factually insufficient to demonstrate any violation of statute or regulation. Memorandum of Law (MOL) at 13-19.

Here, as noted above, the CSO stated that an iterative prototyping process would allow the Government to modify the scope of a prototype contract to allow for the adaptation and modification of the technology being prototyped to meet additional unique and discrete purposes, and the sequential prototype iterations could result in a separate prototype project rather than a modification of the original prototype contract. CSO at 3. Further, the BOAs awarded to Peraton and ViiMed were virtually identical, and both stated: "The sequential prototype iterations may result in a separate prototype project rather than a modification of the original prototype contract." AR, Tab 19, Peraton BOA at 2; Tab 20, ViiMed BOA at 2. In addition, the record shows that T6 was included as a proposed subcontractor to Peraton in its January 4, 2022, abstract phase submission, and remained a Peraton team member throughout the procurement. AR, Tab 6, Peraton Abstract Submission; Tab 11, Peraton Pitch Phase Proposal; Tab 15, Peraton Prototype Proposal.

The record also shows that although the agency initially pursued development of ViiMed's prototype, the agency eventually concluded that ViiMed's solution was "complicated," and a more streamlined approach should be pursued. AR, Tab 58, Decl. of JOMIS Deputy Program Manager at 4. The agency also concluded that ViiMed was underperforming in its role under the prototype task order, "delivering a sub-optimal user experience, and doing so at a slower pace, and consistently receiving negative Service feedback regarding poor functionality during engineering drops." *Id.* at 4-5. This conclusion contrasted with the role performed by ViiMed's subcontractor T6, which the agency concluded possessed the medical expertise to perform its role and provided a solution that had proven easily adaptable to support the requirements. *Id.* at 5. However, because T6 did not have its own BOA, the agency determined that moving

[1] Following its review of the agency report, the protester withdrew its initial protest allegations that the agency had failed to conduct market research, violated the rule of two, which required the agency to set the procurement aside for small business concerns, and improperly awarded a sole-source order to Peraton. Comments at 1.

forward with the work performed by T6 would require that the agency "revisit[] the BOA awardee, Peraton, who was an original teaming partner with T6, and still holds a valid BOA." *Id.*

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.,* B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.,* B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

On this record, we conclude that the protester has failed to set forth a factual or legal basis sufficient to demonstrate that a violation of applicable procurement law or regulation has occurred. 4 C.F.R. § 21.5(f). As discussed, the record shows that the agency awarded ViiMed and Peraton virtually identical BOAs. The agency then initially developed ViiMed's prototype, which included work performed by T6, the same subcontractor proposed by Peraton. However, contrary to the protester's contention, the record shows that the agency does not intend to further pursue ViiMed's solution. Rather, the agency will develop Peraton's prototype, which will include components of the prototype developed by T6 under its subcontract with ViiMed; such actions are permissible under the terms of the CSO and Peraton's BOA, and therefore within the scope of that BOA. Accordingly, we dismiss this allegation.

The protester also contends that the order results in unmitigable OCIs, premised again on the fact that the order directs Peraton to subcontract with T6. Protest at 5-7. The agency argues that these allegations should be dismissed because the fundamental elements required to demonstrate an OCI are absent from the facts presented by ViiMed. In support of its position, the agency notes that the CSO competition is already complete and T6 is not an agency contractor and T6 has not performed a prime contract through which a conflict could arise. MOL at 20-24.

Regarding OCIs, the FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which organizational conflicts of interest (OCIs) arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly

categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. ViiMed alleges the first two types of OCIs.[2]

A biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract. FAR 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. *Energy Sys. Grp.*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 4.

An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR 9.505-4; *Tatitlek Techs., Inc.*, B-416711 *et al.*, Nov. 28, 2018, 2018 CPD ¶ 410 at 4; *Cyberdata Techs., Inc.*, B-411070 *et al.*, May 1, 2015, 2015 CPD ¶ 150 at 6. The concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of proprietary information furnished by the government or source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract. *See* FAR 9.505(b); *Phoenix Mgmt., Inc.*, B-406142.3, May 17, 2012, 2013 CPD ¶ 154 at 3 n.6.

The protester argues that a biased ground rule OCI is present because the agency awarded the order to Peraton, conditioned on the involvement of T6 as its subcontractor, while T6 was performing its subcontract with ViiMed. The protester contends that under the subcontract with ViiMed, T6 was entrenched with the services covered under the PWS for ViiMed's third prototype order and was in a prime position to set the ground rules for another government contract for the same services. Protest at 6. The protester asserts that the record confirms that Peraton, T6, and the agency collectively wrote the PWS for the order to Peraton and thereby set the ground rules for the procurement. Comments at 6.

The protester also argues that T6 was given unequal access to information by virtue of its role as a subcontractor under ViiMed. According to the protester, the agency provided T6 with direct access to critical information before granting access to the same critical information to ViiMed or withholding the same critical information from ViiMed entirely, and T6 thereby gained a competitive advantage for its subcontract with Peraton. Protest at 7; Comments at 5.

A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *AAR Mfg. Inc., d/b/a AAR Mobility Sys.*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 5. Here, ViiMed fails to identify any facts--let alone hard facts--indicating the evidence of

[2] Although the protester initially alleged that the issuance of the order to Peraton also created an impaired objectivity OCI, this allegation was subsequently withdrawn. Comments at 1.

an actual or potential OCI involving Peraton and T6. Indeed, it appears that ViiMed simply objects to the agency proceeding with any work performed by T6 because the agency is no longer pursuing ViiMed's portion of its prototype solution. Nevertheless, as already discussed, the CSO competition was already complete and the issuance of orders under the BOAs awarded to ViiMed and Peraton did not require further competition. Furthermore, the iterative prototyping process described in the CSO and BOAs permitted the agency to award an order for a separate prototype project rather than modify the original prototype design in a way that considers the evolution of available information, circumstances, and decisions made by the agency. CSO at 3, 11.

Further, in response to the OCI allegations, the contracting officer states: "T6 would have had access to the PWS and deliverables, insomuch as the prime permitted to support the work by the prime/sub relationship or for the subcontractor to complete their prototype work." COS at 25-26. The contracting officer also states that any iterative design work performed by T6 as a subcontractor to ViiMed is proprietary to T6, but that T6 was not provided any proprietary information or non-public source selection information that would provide it with a competitive advantage. *Id.* at 26-27. In addition, an agency official responsible for overseeing the performance of the requirements states as follows:

> To the best of my knowledge and belief, T6 is not a contractor providing any advice or assistance to the [cognizant program offices]. To the best of my knowledge and belief, none of the decisions made respecting acquisition strategies for [healthcare delivery modernization] were the result of any improper advice, persuasion, or influence of T6 or any of its employees.

AR, Tab 58, Decl. of JOMIS Deputy Program Manager at 8.

Here, we reject ViiMed's strained attempts to create an actual or potential OCI. Regarding a biased ground rules OCI, we find this allegation fails to state a valid basis of protest because there could be no competitive advantage to Peraton or T6; the CSO competition is over, and the agency was permitted to adapt and modify the technology being prototyped pursuant to the iterative prototyping process established by the CSO included in both ViiMed's and Peraton's BOAs. Moreover, ViiMed has not explained how T6 could have set the ground rules for the order issued to Peraton aside from a vague allegation that T6 was somehow involved with drafting the PWS for Peraton's order.

For similar reasons, ViiMed's allegation of an unequal access to information OCI also fails to state a valid basis of protest; any information received by T6 could be used to perform under the BOA already awarded to Peraton, and any subsequent orders issued thereunder are not subject to further competition. Without a further competition, there was no competitive advantage for Peraton or T6 to have gained as a result of its access to information, unequal or otherwise. In addition, ViiMed has not identified what "critical information" T6 had access to that gave it a competitive advantage other than T6's own

work on ViiMed's prior prototype order.[3] On this record, ViiMed's assertions regarding an alleged OCI fail to state valid protest bases of protest and do not warrant further consideration. *See MartinFederal Consulting, LLC*, B-420626, May 11, 2022, 2022 CPD ¶ 117 at 6-7.

The protester also argues that because the agency did not meaningfully consider whether an OCI would result from simultaneous performance by T6 under both ViiMed's and Peraton's prototype orders, it failed to properly investigate and document whether a potential or actual OCI exists. Comments at 5-6. Absent any of the requisite elements that would give rise to the existence of an actual or potential OCI, we conclude that the contracting officer was not required to conduct and document such an investigation. As discussed, the agency's inclusion of T6 in Peraton's order was permissible under the terms of the CSO and Peraton's BOA, which clearly contemplate that the agency would leverage any work performed--subject to available funding and without further competition--to achieve healthcare delivery modernization.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

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[3] ViiMed asserts that it worked with T6 on its phase 2 proposal that included both of their costs and that the agency provided T6 with access to endpoint communication methods for sending messages in the product. Comments at 5. However, as noted above, the order issued to Peraton was not subject to competition so it is not clear how knowledge of ViiMed's costs, if it had any, would have provided T6 with a competitive advantage. Nor has ViiMed explained how access to the endpoint communication methods provided T6 with a competitive advantage.