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-422409.2; B-422409.3

Date: July 22, 2024

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DIGEST

Protest challenging the agency's implementation of ongoing corrective action, which was taken in response to an earlier protest, is dismissed as premature where the protester merely anticipates improper prejudicial agency action.

DECISION

Peraton Inc., of Herndon, Virginia, protests the scope and conduct of corrective action taken by the U.S. General Services Administration (GSA), Federal Acquisition Service, on behalf of the Department of the Army in response to a prior protest of Peraton's exclusion from the competition under task order request No. 47QFCA24R0001 issued pursuant to GSA's ASTRO multiple award indefinite-delivery, indefinite-quantity data operations pool contract for open-source intelligence (OSINT) activities. The protester alleges that the agency's implementation of the corrective action is impermissible and unfair in several respects.

We dismiss the protest.

BACKGROUND

GSA issued the solicitation on behalf of the United States Army Intelligence and Security Command, Army OSINT Office (AOO), seeking a variety of OSINT related services. Contracting Officer's Statement (COS) at 1. On February 27, 2024, the contracting officer, following an investigation, notified Peraton that it was excluded from the competition. *Id.* The contracting officer concluded that, at minimum, there was the appearance of an organizational conflict of interest (OCI) and unfair competitive

advantage because Peraton hired "at least one" former AOO staffer and included them in its proposal. *Id.* Specifically, the exclusion notice explained that Peraton hired the former [DELETED], who we will refer to as Mr. X, and his name appeared in Peraton's proposal. Agency Report (AR), Tab 17, Notice of Exclusion from the Competition at 1-2. The contracting officer concluded that Mr. X had either knowledge of or access to significant non-public information due, in part, to his personal involvement in the predecessor contract for these requirements and in the development of requirements for the current procurement. *Id.* Additionally, because Peraton's proposal did not identify Mr. X's participation as a potential OCI, the contracting officer also concluded that Peraton had violated requirements to disclose potential OCIs established in both the solicitation and Federal Acquisition Regulation (FAR) section 3.101-1. *Id.*

On February 28, Peraton responded requesting, in effect, that the contracting officer reconsider the exclusion, or, in the alternative, provide the protester with a pre-award debriefing. COS at 1-2. On the same day, the contracting officer informed Peraton that he stood by his conclusion and scheduled a pre-award debriefing for March 5. *Id.* At the debriefing, the contracting officer delivered prepared remarks, and Peraton asked a handful of questions. *Id.* Most relevant here, Peraton asked why the agency had not reached out to Peraton concerning the alleged OCI prior to excluding the firm, and the contracting officer explained that, first, the agency intended to award without discussions and, second, Peraton had certified in its proposal that there were no real or potential OCIs. *Id.* The contracting officer opined that, had Peraton properly disclosed the potential OCI, it "would be a different matter." *Id.* at 2.

On March 7, Peraton filed a protest with our Office challenging its exclusion from the competition on several grounds. On March 16, the agency indicated that it would take corrective action, and Peraton subsequently objected to the agency's proposed corrective action on several grounds. On March 19, the agency clarified its proposed corrective action by explaining that it would: (1) stay any award decision related to the procurement; (2) re-open the investigation, affording Peraton an opportunity to respond to facts and information already gathered by the agency, as well as allowing Peraton to provide new or additional information in support of its position; (3) make, in good faith, a determination, new or revised, taking into consideration all information gathered from re-opening the investigation, to include all information and responses provided by Peraton; and (4) provide Peraton with an opportunity to respond to any final determination made. *See Peraton, Inc.*, B-422409, March 20, 2024 at 2-3 (unpublished decision). On March 20, we dismissed the protest as academic based on the proposed corrective action. *Id.*

On March 26, the contracting officer reopened the investigation regarding Peraton's appearance of an OCI and unfair competitive advantage and sent a letter to Peraton. COS at 3-4. The letter included information gathered during the contracting officer's investigation and on which the contracting officer's prior determination relied. *Id.* Of note, the contracting officer's letter explained that the original exclusion notice referred to "at least one" former AOO staffer, but the agency had actually identified two former AOO staffers in Peraton's proposal, Mr. X and a second individual who we will refer to

as Mr. Y. *Id.* at 3. Additionally, the contracting officer explained that his conclusions, in part, relied on his professional interactions with Mr. X when Mr. X was still employed by the government and working on requirements related to this procurement. *Id.* at 3-4.

Finally, the letter also provided Peraton an opportunity to address the issues raised in the letter and requested that Mr. X, Mr. Y, and Peraton respectively complete tailored questionnaires to facilitate the investigation. COS at 4. Among the questions included in the letter were questions addressed to Mr. X and Mr. Y concerning non-disclosure agreements (NDA) that Mr. X and Mr. Y allegedly signed while still in government service. *Id.* On April 2, Peraton requested that the government provide copies of the NDAs that Mr. X and Mr. Y allegedly signed. *Id.* The agency declined to provide those documents but explained that if Peraton needed the NDAs in order to respond to the government's initial assessment of a potential OCI, then Peraton should provide additional details about why it needed the documents. *Id.* at 4-5.

On April 2, the protester filed an agency-level protest and sent a request for an independent review of what the protester alleged was improper conduct in the agency's OCI investigation and the implementation of corrective action. COS at 5. On April 5, Peraton filed its response to the agency's investigative letter, but the agency took no action concerning Peraton's response due to the pending agency-level protest. *Id.* On April 15, the agency dismissed Peraton's agency-level protest for lack of jurisdiction because the protest involved a task order. *Id.* On April 16, the contracting officer offered Peraton additional time to revise or refine its earlier response, which the contracting officer had not yet reviewed because of the agency-level protest. *Id.* On April 18, this protest followed.[1]

DISCUSSION

The protester raises several arguments about the agency's conduct of its OCI investigation. First, the protester objects that the agency is impermissibly withholding relevant documents from Peraton by refusing to furnish the NDAs allegedly signed by Mr. X and Mr. Y. Protest at 20-24. Second, Peraton objects that the contracting officer cannot be an impartial investigator or adjudicator because he is relying on his own knowledge of Mr. X's involvement in the procurement, characterizing the contracting officer as a fact witness who should not be conducting the investigation. *Id.* Third, Peraton argues that the agency has taken steps inconsistent with its proposed plan of corrective action, is engaged in what the protester characterizes as "continued gamesmanship," and does not actually intend to reconsider its exclusion of Peraton from the competition. *Id.*; Comments at 2-8.

Lastly, during the course of this protest the protester raised a supplemental argument that, based on the tenor of the questions in the contracting officer's questionnaire, the

[1] The agency issued the request for task orders under GSA's ASTRO IDIQ contract, and our Office has jurisdiction to hear protests of such task orders when, as in this case, the anticipated value of the task order exceeds $10 million. 41 U.S.C. § 4106(f).

protester believes that the contracting officer is conducting a covert investigation of potential violations of Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act (PIA). Supp. Protest at 5-13. This is relevant, because the protester alleges that the contracting officer has not taken necessary steps required by the FAR prior to beginning a PIA investigation. *Id.* Specifically, the protester alleges that before beginning a PIA investigation a contracting officer is required to notify the Head of the Contracting Activity (HCA), and only the HCA is permitted to conduct an investigation of an alleged PIA violation. *Id.* at 6-7.

We dismiss the protest grounds because they are either premature or legally insufficient.[2] First, several of the protester's objections are premature for our consideration while the agency's corrective action investigation is ongoing. Following the agency's reopening of the investigation, the agency has reached no conclusions concerning the protester's exclusion from the competition or the presence or absence of an OCI. Indeed, the agency had sent a single letter to which it had not yet received a response before Peraton filed its agency-level protest. The agency has taken no final actions of any kind.

In this context, our Office has generally concluded that where an agency has not made a final determination concerning an OCI issue, a protest based on such an allegation is premature. *See McKissack-URS Partners, JV*, B-406489.2 *et al.*, May 22, 2012, 2012 CPD 162 at 7 n.10 (noting that "[u]ntil the protester has documentation of the agency investigation's conclusions or the agency moves forward with award" a protest of OCI issues is premature); *see also Government Bus. Servs. Grp.*, B-287052, *et al.*, Mar. 27, 2001, 2001 CPD ¶ 58 at 12. Put another way, where an agency has taken corrective action, a protest of the conduct of that corrective action is analogous to a pre-award protest. *See Shimmick Construction Co., Inc.*, B-420072.3, Mar. 17, 2022, 2022 CPD ¶ 125 at 4. Where ongoing corrective action does not alter the ground rules of the competition, a protest of the conduct of that corrective action is generally premature when brought before award or the protester's disqualification. *See, e.g.*, *Quotient, Inc.*, B-416473.4, B-416473.5, March 12, 2019, 2019 CPD ¶ 106 at 4; *WorldWide Language Resources, Inc.*, B-418767.5, July 12, 2022, 2022 CPD ¶ 180 at 6-9.

As a relevant example, the agency's denial of Peraton's request to provide the NDAs is not a final decision. The agency's denial of the request was conditional and specifically

[2] We do not address the merits of the protester's allegations of impropriety in the investigation but note in passing that the protester appears to make several logically incompatible complaints. For example, the protester objects both that the contracting officer "taints" the investigation, in part, because he is a fact witness, but also complains that the contracting officer has not continued various aspects of the investigation during the pendency of Peraton's protests. *Compare* Protest at 21-23 *with* Protester's Comments at 7-8. The protester cannot have it both ways in this regard, and these kinds of open-ended and overlapping concerns underscore why this protest is not ripe for adjudication.

contemplated that Peraton could provide more information about why it needed the NDAs, upon receipt of which the agency would reconsider whether to provide the NDAs. COS at 4-5. The protester provided no additional information prior to filing its agency-level protest. *Id.* While the protester subsequently filed a response that may include responsive information, the contracting officer has not yet reviewed Peraton's response, in part, because of the pendency of this protest which alleges the contracting officer should not be conducting the investigation because of his personal knowledge of the underlying facts. *Id.* Accordingly, any protest of the agency's initial and conditional refusal to provide the NDAs is entirely and obviously premature.[3]

Similarly, there are insufficient facts concerning the scope and impact of the contracting officer's personal knowledge and how it might or might not affect the investigation for us to reach any conclusion about whether the contracting officer's investigative actions are inappropriate, in part because almost no actions have been taken thus far. While the protester is correct that contracting officers are required to provide impartial, fair, and equitable treatment, the protester has not identified any specific statutory or regulatory requirement for a contracting officer to recuse themselves from an OCI investigation simply because they have personal knowledge of the underlying facts. Protest at 21-23; *cf. AAR Mfg., Inc., d/b/a AAR Mobility Sys.*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 8 (discussing the contracting officer's investigation of an alleged unequal access to information OCI, including "his own personal knowledge of agency communications with" another prospective offeror). Moreover, the protester has not alleged any evidence that would suggest bias or bad faith at this time, other than the facts that the contracting officer is relying to some extent on his personal knowledge and is conducting the investigation in a way that the protester dislikes.[4] Accordingly, these arguments are either premature or impermissibly speculative and are dismissed. *See* 4 C.F.R. § 21.1(c)(4) and (f).

Finally, the protester alleges the agency has undertaken an unauthorized and impermissible PIA investigation. In response, the agency contends that the contracting officer is not conducting a PIA investigation, but rather is only investigating a potential

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[3] To be clear, it is likely that even a protest of a "final" refusal to provide the NDAs would be premature if it preceded the agency's final decision concerning the OCI investigation, for the reasons discussed above.

[4] We 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. *JMark Servs., Inc.*, B-417331.2, July 22, 2019, 2019 CPD ¶ 277 at 7. The burden of establishing bad faith is a heavy one; the protester must present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. *AeroSage, LLC*, B-417289.2, May 14, 2019, 2019 CPD ¶ 180 at 2 n.2.

unequal access to information OCI and unfair competitive advantage. Supp. MOL at 2-4.

As a preliminary matter, it is not clear that the protester's interpretation of the regulations--that the contracting officer is prohibited from making any inquiry concerning potential PIA violations prior to referring the matter to the HCA--is correct. We note that FAR section 3.104-7 requires that contracting officers assess whether a procurement is impacted by a PIA violation or potential PIA violation *before* they notify the HCA. FAR 3.104-7(a). We do not understand the text of the FAR as prohibiting a contracting officer from conducting any inquiry whatsoever prior to notifying the HCA, and indeed a contracting officer may be required to make a significant inquiry to adequately assess whether the procurement is impacted by a potential PIA violation. *See, e.g., Lion Vallen, Inc.*, B-418503, B-418503.2, May 29, 2020, 2020 CPD ¶ 183 at 3-4 (discussing a contracting officer's performance of an inquiry concerning the impact of a PIA violation before signing a determination and findings, which was subsequently discussed with the HCA). Accordingly, even if the contracting officer were conducting an inquiry connected to a potential PIA violation, which is not clear on these facts, the contracting officer may simply be satisfying his regulatory obligation to determine whether the procurement is impacted by a potential PIA violation prior to notifying the HCA. *See* FAR 3.104-7(a).

The protester anticipates this argument and contends that the contracting officer has clearly already made his initial determination of impact and has proceeded to an impermissible investigation. *See* Supp. Protest at 11-13. However, the protester provides no evidence that the contracting officer has made such a determination. Rather, the protester only provides evidence that the contracting officer previously made, but is now reconsidering, a final determination about the appearance of an OCI and potential unfair competitive advantage, not that the contracting officer has previously or currently concluded that a PIA violation may have occurred. *Id.* Accordingly, the protester has not alleged a legally sufficient ground of protest with respect to this issue. 4 C.F.R. § 21.1(c)(4) and (f).

In the alternative, even adopting, for the sake of argument, the protester's framing of the requirements of the FAR, this protest ground would remain impermissibly speculative because the scope of the agency's investigation does not unambiguously involve an investigation of putative PIA violations. Rather the investigation appears focused on establishing whether Peraton has, or appears to have, an unequal access to information OCI or an unfair competitive advantage based on knowledge of or access to protected information subject to the PIA. *See*, AR, Tab 17, Notice of Exclusion from the Competition at 1; Tab 30, Investigation Letter at 1.

As the protester acknowledges, an OCI inquiry and a PIA inquiry could potentially overlap but are not necessarily coextensive. *See* Supp. Comments at 2. This is significant because, for example, an agency could conclude that an unequal access to information OCI (or the appearance of one) exists based on a former government official's mere knowledge of or access to sensitive information, but a former government official's mere access to protected information is not, of necessity, a violation of the PIA.

Here, it appears that the agency's inquiries and questionnaires are clearly targeted at establishing whether an unequal access to information OCI (or the appearance of one) exists.

The protester raises numerous arguments to the contrary, but we find the protester's arguments unpersuasive. For example, the protester alleges that the agency "expressly stated" that it was conducting a PIA investigation by referring to FAR subparts 3.101 and 3.104, which the protester alleges relate to the PIA rather than to OCI investigations. Supp. Comments at 2. This argument ignores both the text of the provisions the protester cites, and significant contextual information. For example, while the agency's letter to Peraton makes reference to FAR 3.101-1, that FAR section specifically discusses the avoidance of conflicts of interest and the appearance of conflicts of interest. *See*, AR, Tab 17, Notice of Exclusion from the Competition at 2; FAR 3.101-1. Similarly, while the agency made reference to FAR subpart 3.104, it was in a description of source-selection information to which Mr. X may have had access. *See* AR, Tab 30, Investigation Letter at 3 (explaining that specific information was "source selection sensitive information and subject to the procurement integrity regulations under FAR 3.104 as well as any other applicable statutes and regulations.") In neither case did the agency announce, expressly or implicitly, that it was conducting an investigation of a potential PIA violation.

Relatedly, the protester objects that the agency would have no reason to inquire about NDAs if the agency were not investigating an improper disclosure of protected information, and hence a PIA violation, but this ignores the actual text of the agency's question. Supp. Comments at 4. The agency specifically asked whether the employees signed an NDA in which they "agreed to a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest" related to the agency's requirements. *See, e.g.*, AR, Tab 31, Questionnaire for Mr. X at 1. This inquiry is clearly related to the agency's OCI investigation.

Likewise, the protester objects that the agency would have no need to include questions about ethics advice Mr. X received before leaving government employment or Mr. X's involvement in preparing Peraton's proposal if the agency were not attempting to establish a violation of various PIA provisions. Supp Comments at 4-5. However, the protester ignores that both of those queries are clearly and directly relevant to the agency's OCI inquiry and could simply reflect an attempt to understand the steps various parties took to identify and mitigate any potential or actual OCIs.

In short, nothing in the agency's questionnaires or conduct suggests that the agency has already identified or is necessarily investigating any PIA violations as opposed to the unequal access to information OCI or unfair competitive advantage that the agency has consistently identified as the scope of its inquiry. *See*, AR, Tab 17, Notice of Exclusion from the Competition at 1; Tab 30, Investigation Letter at 1. Simply because Peraton's answers to the questionnaires could potentially inform or provide evidence of a PIA violation not currently alleged or established, does not *ipso facto* render this inquiry a PIA investigation.

If the agency's OCI inquiry uncovers credible evidence of potential PIA violations that impact this procurement, the agency represents that it will notify the HCA consistent with the requirements of the FAR. Supp. COS at 2. However, at present, we concur with the agency that there is no evidence in the record that any party is alleging or investigating specific PIA violations. Accordingly, even if the protester is correct concerning the agency's obligations under the FAR, the protester's allegations concerning the scope of the agency's inquiry are speculative and therefore do not form a legally sufficient basis of protest. 4 C.F.R. § 21.1(c)(4) and (f).

The protest is dismissed.

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