



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** Sumaria Systems, Inc.

**File:** B-413508.2

**Date:** December 29, 2016

---

James Y. Boland, Esq., and Michael T. Francel, Esq., Venable LLP, for the protester.

Alexis J. Bernstein, Esq., and Lt. Col. Damund E. Williams, Department of the Air Force, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Protest challenging the agency's decision to take corrective action is dismissed where the protester submitted an agency-level protest, which was denied, and the protester failed to protest to our Office within 10 days.

2. Protest challenging the terms of the solicitation with respect to key personnel requirements as being unduly restrictive of competition is denied where the record shows that the terms of the solicitation were reasonably necessary to meet the agency's needs.

---

### DECISION

Sumaria Systems, Inc., of Fairborn, Ohio, protests the terms of request for proposals (RFP) No. FA8650-16-F-4108 issued by the Department of the Air Force for laboratory support services. Sumaria challenges the agency's decision to take corrective action and argues that the terms of the solicitation as they relate to key personnel are unduly restrictive of competition.

We deny the protest in part and dismiss the protest in part.

### BACKGROUND

The RFP, issued on May 9, 2016, sought proposals from holders of General Services Administration (GSA) One Acquisition Solution for Integrated Services

(OASIS) - Small Business Pool 3 contracts to provide laboratory support services at the Air Force Research Laboratory located at Wright-Patterson Air Force Base (AFB), Ohio. RFP at 1. Award was to be made on a lowest-priced, technically acceptable basis, considering technical approach, management approach, price and past performance factors. Id. at 3.

Under the technical approach factor, the government was to evaluate the staffing proposed by offerors against the performance work statement (PWS). This evaluation would include an assessment of full-time equivalent (FTE) personnel, skill mix, skill levels, specific qualifications, and identified individuals. RFP at 6. Moreover, under the management approach factor, the agency was to assess an offeror's contract staffing, including its proposed approach to staffing. Id. at 7.

The scope of work required offerors to provide various personnel including, as relevant here, a contract program manager and an engineering technician VI (Lead Instrumentation Technician). PWS, at 17, 26-27. Of the 31 FTE positions identified in the RFP, 26 were covered by the Service Contract Act (SCA), including the Lead Instrumentation Technician (LIT). RFP, Attachment 3, Historical Labor, at 1. The position description for the LIT was as follows:

[P]roviding training to lower level technicians on laboratory equipment, materials, and advanced instrumentation installation techniques and procedures, performs sensor installation with little to no supervision, assists instrumentation engineer with the development of non-standard or unique sensor installation requirements, verifies all installations using standard instrumentation processes, leads the transport and installation of the test article along with the sensor connection and final end-to-end checkout, and provides input on instrumentation documentation and reporting. The Lead Instrumentation Technician is considered to be an expert in all areas of instrumentation.

PWS at 26-27.

Proposals were submitted by Sumaria, Peerless and a third firm. Agency Report (AR), exh. 8, Service Designated Official Decision Document (SDODD), at 1. Sumaria's evaluated price was \$29,003,422 whereas Peerless' price was \$30,117,089. Id. at 7. While Sumaria submitted the lowest-priced proposal, the firm's proposal was rated unacceptable under the technical approach factor due to its assessed failure to provide the qualifications for the contract program manager in its proposal. Id. at 5. The agency awarded a task order to Peerless as the firm submitting the lowest-priced, technically acceptable proposal. Id. at 6.

Sumaria protested the agency's award decision to our Office on August 3, 2016. In its protest, Sumaria argued that the agency improperly found its proposal to be

technically unacceptable, arguing that the RFP did not require offerors to identify individuals within their proposals or provide verification of personnel qualifications when no individual is proposed. AR, exh. 14, Protest of August 3, at 2. On August 26, the agency informed our Office that it intended to take corrective action because an error in the solicitation “resulted in unclear guidance to offerors regarding the resultant evaluation.” AR, exh. 17, Agency Memorandum to GAO, at 1. The agency indicated that it would terminate the award to Peerless, amend and reissue the solicitation, obtain revised proposals, and make a new award decision. Id. On August 30, we dismissed the protest as academic.

On September 1, Sumaria filed an agency-level protest of the decision to take corrective action instead of correcting the evaluation error and making award to Sumaria. AR, exh. 20, Agency-level Protest, at 2. The agency denied the protest on September 14, affirming its decision to take corrective action as “appropriately tailored to address the error in the current acquisition.” AR, exh. 20.1, Agency-level Protest Response, at 1. Also on September 14, the agency released amendment 4 to the RFP. As relevant here, amendment 4 designated the contract program manager and LIT positions as key personnel, required offerors to submit resumes for key personnel demonstrating minimum education and experience, and required signed letters of intent/commitment from the individual identified in the resume. AR, exh. 21, amendment 4, at 3-4. With respect to the LIT position, amendment 4 added the following requirements for minimum education and experience:

The LIT shall possess at least four (4) years of formal training and ten (10) years of instrumentation experience, or twenty (20) years of instrumentation experience. The LIT shall have in-depth knowledge and experience of procedures and methods for application and installation techniques relevant to structural testing. The LIT shall have experience in the installation and buildup of high temperature fiber optic strain gages and flame spraying techniques for free filament strain gages.

AR, exh. 29, Revised PWS, at 26-27.

Proposals were due by the extended closing date of October 3. Sumaria protested to our Office on September 30, challenging the agency’s corrective action, including the terms of amendment 4.<sup>1</sup>

---

<sup>1</sup> At the time this protest was filed, our Office had jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million placed under multiple-award contracts created by civilian agencies. See 41 U.S.C. § 4106(f); Phacil Inc., B-406628, July 5, 2012, 2012 CPD ¶ 202 at 1 n.1. Subsequent to the filing of this protest, our Office’s authority to resolve protests in connection with civilian agency task and delivery orders in excess of \$10 million

(continued...)

## DISCUSSION

Sumaria argues that the corrective action to amend the RFP, reissue the solicitation and not make award to the firm was unreasonable. Protest at 16-17. The protester also challenges the terms of amendment 4, arguing that it is unduly restrictive of competition as the amended RFP defines the key personnel requirements for the LIT position so narrowly as to permit only the incumbent to compete, and that the agency's requirements can be met through less restrictive means. Id. at 12-16. We dismiss Sumaria's challenge to the agency's decision to take corrective action as untimely. We deny the remainder of the protest because we conclude that the specifications for the LIT position are reasonably necessary to meet the agency's needs.

### Untimely Protest Ground

Sumaria challenges the agency's decision to take corrective action instead of making award to the firm. In this regard, the protester argues that the agency improperly found its proposal technically unacceptable.

As noted above, on September 14, the agency denied Sumaria's agency-level protest of the decision to take corrective action. As a result, the agency asserts that Sumaria was required to protest the agency's decision to take corrective action to our Office within 10 days of the agency's decision on Sumaria's agency-level protest, and did not do so.<sup>2</sup> Agency Request for Dismissal at 4; See 4 C.F.R. § 21.2(a)(3). The protester responds that its objection to the decision not to award the contract to Sumaria affects the ground rules of the competition and is therefore subject to 4 C.F.R. § 21.2(a)(1) (challenges to alleged improprieties on the face of the solicitation must be filed prior to the next closing date for the solicitation). In essence, Sumaria argues that its protest need only have been filed with our Office before October 3.

---

(...continued)

expired. See 41 U.S.C. § 4106(f)(3); Analytic Strategies LLC; Gemini Indus., Inc., B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ at 4-5. Because the task order here was issued and protested prior to the expiration of our jurisdiction, we retain jurisdiction to resolve this protest. See Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107 at 5-6.

<sup>2</sup> The agency argues that the protester was required to submit its protest to our office by September 24. However, since September 24 was a Saturday, the protest had to be filed no later than Monday, September 26. See 4 C.F.R. § 21.0(d).

We conclude that Sumaria's protest of the agency's decision to take corrective action is untimely. Sumaria challenges the agency's corrective action, and not any particular changes to the ground rules of the procurement or to any alleged improprieties on the face of the solicitation. The record shows that Sumaria protested the decision to take corrective action with the agency, and that the protest was denied on September 14. Any subsequent protest challenging the agency's decision to take corrective action was required to be filed with our Office by September 26, and the protester's failure to do so renders this protest allegation untimely. See 4 C.F.R. § 21.2(a)(3).

#### Unduly Restrictive of Competition

Sumaria next argues that the LIT position's qualifications are unduly restrictive of competition as they are defined so narrowly as to permit only the incumbent to compete for the order and can be met through less restrictive means. The protester asserts that, while it was able to propose a highly qualified instrument technician, it could not locate, within the time permitted by the amendment, an individual who meets two of the experience requirements for the LIT position: that the individual have experience in the installation and buildup of high temperature fiber optic strain gages, and that the individual have experience in flame spraying techniques for free filament strain gauges. Protester's Supp. Brief at 4. Sumaria asserts that while the work contemplated is not complicated or complex in terms of the basic skillset required, some of the instrumentation used by the lab is used by very few organizations other than the Air Force's research laboratory. Id. at 3. Sumaria contends that this fact, coupled with a requirement for a security clearance and that the individual reside in Dayton, Ohio, means that the requirements are unduly restrictive of competition because the pool of candidates is limited to the incumbent's personnel. Id.

The protester concludes that there are less restrictive ways for the agency to meet its requirements. Sumaria asserts that the agency could remove these experience requirements as the firm's proposed instrument technician has the necessary skills to perform the services, and there is no evidence that an experienced instrumentation technician could not learn the two instruments and techniques quickly following basic orientation. Id. at 4. Alternatively, Sumaria argues that since it has received verbal assurances from the incumbent LIT that he will accept employment with Sumaria should the firm receive the order, the agency should delete the requirements to provide a resume and letter of commitment for this position.<sup>3</sup> Id.

---

<sup>3</sup> Sumaria also argues that it is unreasonable to designate the LIT position as key because the position is covered by the SCA, and the successful offeror will be required to offer the incumbent employee the right of first refusal. The record confirms that under the incumbent contract, the LIT is designated as an SCA-

(continued...)

Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. GlobaFone, Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 2. 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. Id. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

The agency contends that the LIT requirement is essential to the successful operation of its experimental test activities, and submits three declarations in support of its decision to designate the position key and to add the relevant experience requirements. Supp. Memorandum of Law at 1, exhs. 1-3. According to the agency, the need to execute ongoing experimental tests requires high temperature strain sensors, and all of these tests are dependent upon expertise for the selection and installation of high temperature strain gages. Id. at 3, Declaration of Chief, Structural Validation Branch. The agency also argues that it is critical that the laboratory not experience a gap in its high temperature instrumentation capabilities, and that the failure to provide a LIT with full capability on "Day 1" will result in delay of several multimillion dollar programs. Id. Finally, with respect to availability of qualified personnel, the agency asserts that it conducted market research and located at least six individuals working in the United States who could meet the requirements of the position. Id.

Our review of the record provides no basis to question the agency's need for a LIT with the qualifications stated in the solicitation. In our view, the agency has articulated a reasonable basis for why the solicitation's experience requirements are necessary to meet its needs. Moreover, we are provided no basis to question the agency's need to evaluate and have assurances that a qualified individual will be available to perform the LIT scope of work, assurances that are provided by the key personnel designation and requirement to submit a resume and letter of commitment.

---

(...continued)

covered position. AR, exh. 5.11, Historical Labor Question and Answer, at 1. For this procurement, however, the agency executed a determination and finding that the LIT position meets the exemption for professional employees under 29 C.F.R. § 541.300(2). AR, exh. 27, D&F, at 1. While the parties disagree on the agency's authority to designate the LIT position as exempt, this does not change the fact that the agency's need to both evaluate the proposed LIT personnel, and be assured of that person's availability, was reasonable.

The market research performed by both Sumaria and the agency shows that the skillset required for the LIT position is specialized; as reflected in the protester apparently not being able to locate qualified personnel other than the incumbent's LIT and the agency's recognition that it could locate only six individuals nationwide who could satisfy the requirements. Given the limited labor-pool of qualified applicants to satisfy this requirement, we conclude that it was reasonable for the agency to structure its procurement to allow it to evaluate and obtain assurances of availability with respect to the LIT position. While Sumaria argues that the verbal assurances received from the incumbent LIT should be sufficient to meet the agency's needs, the agency responds that verbal assurances do not provide it with the same level of certainty as a letter of commitment. In addition, without a resume the agency explains that it will not be able to evaluate the proposed LIT's qualifications. We agree.

We deny the protest in part and dismiss the protest in part.

Susan A. Poling  
General Counsel