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Decision

Matter of: NetStar-1 Government Consulting, Inc.

File: B-404025.2

Date: May 4, 2011

William Bainbridge, Esq., John J. O'Brien, Esq., and William F. Savarino, Esq., Cohen Mohr LLP, for the protester.

Douglas L. Patin, Esq., Lewis P. Rhodes, Esq., and Steven A. Pozefsky, Esq., Bradley Arant Boult Cummings LLP, for the intervenor.

Jennifer L. Longmeyer-Wood, Esq., and Chris Vetter, Esq., Department of Homeland Security, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee had an unequal access to information organizational conflict of interest that should have disqualified it from the competition is denied where record shows that the awardee had in place a firewall segregating the team that prepared its price quotation from on-site employees with access to pricing information.
 2. Protest challenging the agency's evaluation of the awardee's experience and past performance is denied, where the agency reasonably found that the awardee had performed tasks similar to the solicited requirements and that references for the awardee's past performance provided high ratings.
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DECISION

NetStar-1 Government Consulting, Inc., of Rockville, Maryland, protests the issuance of a blanket purchase agreement (BPA) to ALON, Inc., of Springfield, Virginia, under request for quotations (RFQ) No. HSCEMS-10-Q-00015 issued by the Department of Homeland Security, Immigration and Customs Enforcement (ICE), for program management support services. NetStar maintains that ALON should have been disqualified from the competition because the awardee has an impermissible unequal access to information organizational conflict of interest (OCI). NetStar also challenges the agency's evaluation of ALON's experience and past performance, and the agency's selection decision. We deny the protest.

BACKGROUND

The RFQ, issued using Federal Supply Schedule (FSS) procedures, provided for the issuance of a BPA for fixed-price, time-and-materials and/or labor-hour task orders for a base year and 4 option years. See RFQ at 1, 4. The agency provided the RFQ to 13 vendors holding FSS contracts under schedule 874, mission oriented business integrated services; schedule 520, financial and business solutions; and schedule 70, information technology (IT) equipment, software, and services. Agency Report (AR) at 2.

A detailed statement of work (SOW) informed vendors that the BPA was for providing various support services for ICE's Office of the Chief Information Officer (CIO). See SOW at 2. These services included, among other things, program, financial, budget, and acquisition management support, as well as technical and engineering support. Id. at 3-10. The SOW identified labor categories that the vendor could use under the BPA. Id. at 10-18. The RFQ also identified an estimated level of effort for each labor category. See RFQ amend. 2, attach. B, Price Schedule.

The RFQ provided for issuance of the BPA on the basis of a cost/technical tradeoff, and identified the following non-price evaluation factors, in descending order of importance: technical/management approach, experience, and past performance. RFQ amend. 1, at 20-21. Vendors were advised that the non-price factors, when combined, were significantly more important than price, but that price would become more important in making the award determination as technical quotations became more equal. Id.

With regard to the experience factor, the RFQ instructed vendors to identify up to three projects they were currently performing, or had performed within the last 3 years, that were similar in scope, magnitude, and complexity to the agency's requirements. Id. at 14-15. With regard to the past performance factor, the RFQ instructed vendors to submit client surveys for each of the three projects and stated that the agency would evaluate vendor past performance based on information in the surveys and from other sources. See id. at 15, 17-18.

With regard to price, the RFQ instructed vendors to provide labor rates for the 34 labor categories identified in the SOW. The RFQ stated that the agency was soliciting discounts from the vendors' FSS labor rates and instructed vendors to indicate if they were offering any discounts. See id. at 15-16. The RFQ provided that the agency would evaluate price by adding the vendor's total base year price (determined by multiplying the vendor's quoted labor rates against the applicable estimated hours) and each of the total option year prices. Vendors were also informed that the agency could do a price realism analysis for the limited purpose of measuring the vendor's understanding of the RFQ requirements and assessing risk. Id. at 18.

The RFQ also included Homeland Security Acquisition Regulation (HSAR) clause 3052.209-72, Organizational Conflict of Interest (2006), which informed vendors that the effort may result in an actual or potential OCI. RFQ amend. 1, at 9. The RFQ stated that the nature of the OCI related to these program support services was unknown.¹ Id. HSAR clause 3052.209-72 requires vendors to either: (1) certify that they are not aware of any facts which create an actual or potential OCI related to award of the contract; or (2) include all information regarding the OCI and provide a mitigation plan if the vendor believes that the OCI could be avoided or neutralized. The clause also provides that, where an actual or potential OCI exists, award would not occur before the CO evaluated whether the mitigation plan adequately neutralizes the OCI and the agency approves the plan. See id.

The agency received five quotations, including NetStar's (the incumbent)² and ALON's, which were evaluated by the agency's technical evaluation team (TET). CO's Statement at 3. ALON and NetStar both indicated in their quotations that they were unaware of any facts which would create an actual or potential OCI. NetStar's Price Quotation at App. E-2; see ALON's Technical Quotation at 15; AR, Tab 24, CO's OCI Determination, at 1.

ALON's quotation was rated as very good overall.³ Specifically, ALON's quotation was rated very good under the technical/management approach factor, and outstanding under the experience and past performance factors.⁴ AR, Tab 6,

¹ The contracting officer (CO) believed that NetStar and ALON may have potential OCIs, but that the nature of their conflicts was unknown. See AR at 3; Tab 24, CO's OCI Determination, at 6-10. NetStar and ALON each hold ICE contracts for, among other things, program, financial, budget, and acquisition management support to various CIO activities. See NetStar's Technical Quotation at 1, 2-1--2-6; ALON's Technical Quotation, attach. D, at 1.

² NetStar is the incumbent on the Atlas Program Support Contract, a multi-year project for design, acquisition, and integration of hardware and software for automating and modernizing CIO's IT infrastructure. See NetStar's Technical Quotation at 2-1. The agency states that the majority of the work to be performed under the BPA supports the Atlas program. See AR, Tab 24, CO's OCI Determination, at 8.

³ Under the technical/management approach and experience factors, as well as overall, quotations were evaluated as outstanding, very good, acceptable, marginal, or unacceptable. See AR, Tab 7, Award Decision Document, at 3-4. Under the past performance factor, quotations were rated as outstanding, very good, acceptable, marginal, unacceptable, or neutral.

⁴ The TET assigned very good ratings to ALON's quotation under each of the non-price evaluation factors. The contract specialist reviewed the TET's ratings and
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Technical Evaluation Consensus Report, at 12. With regard to the experience factor, the TET noted, among other things, that ALON had performed the same or similar work, including program management, financial, and IT support. Id. at 13. The TET also noted that ALON had direct knowledge of the requirements and that the agency could expect little or no learning curve because ALON currently had a BPA with the agency supporting the agency's CIO. With regard to the past performance factor, the TET found that ALON received top ratings from all surveys and that the Past Performance Information Retrieval System (PPIRS) listed outstanding and excellent ratings for similar services.

NetStar's quotation was rated outstanding overall and under each of the non-price evaluation factors. Id. at 4. The TET found that NetStar demonstrated a thorough understanding of SOW requirements and provided a number of outstanding technical and management approaches. With regard to the experience and past performance factors, the TET found that NetStar had identified past projects of similar size and complexity, and that the firm had received top ratings from its references. Id. at 4-5.

The vendors' quoted prices were evaluated by the contract specialist for reasonableness and realism. ALON's final revised price was [DELETED], and NetStar's final price was [DELETED]. See AR, Tab 2, Contract Specialist Declaration, at 5-6. The contract specialist determined that the difference between the prices was that NetStar quoted higher labor rates for off-site hours [DELETED]. Id.

The contract specialist concluded that ALON's quotation offered the best value to the agency. Id. at 6; AR, Tab 7, Award Decision Document, at 13. In this regard, she noted that ALON had demonstrated successful experience providing services at a satisfactory level or above, and has been able to recruit and retain qualified personnel under its current BPA. The contract specialist concluded that, although NetStar had received the highest technical rating based upon a number of outstanding technical approaches and solutions, NetStar's technical superiority was not worth the [DELETED]. See id.; see also AR at 6.

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concluded that the evaluators had not consistently applied the evaluation factors in assessing quotations. See AR, Tab 2, Contract Specialist's Declaration, at 3. As a result of the contract specialist's communications, the TET raised ALON's ratings for the experience and past performance factors from very good to outstanding. This did not change ALON's overall very good rating.

The CO, who was the source selection authority for the procurement, agreed with the contract specialist, and the agency issued the BPA to ALON. AR, Tab 7, Award Decision Document, at 13; CO's Statement at 7.

NetStar protested to our Office, arguing, among other things, that ALON should have been eliminated from the competition because it had an unmitigated OCI that gave ALON an unfair competitive advantage over other vendors. NetStar pointed out that ALON provides acquisition, budgeting, and engineering services to CIO under various contracts and task orders and has access to acquisition-sensitive pricing information, including NetStar's historical discounted labor rates, which, NetStar alleged, permitted ALON to underbid NetStar.

Prior to submitting a report in response to the protest, the agency informed our Office that it would review NetStar's OCI allegations. See Agency Corrective Action Letter, Oct. 25, 2010. The agency suspended performance of the BPA, and we dismissed the protest as academic.

The CO reviewed the RFQ and related contracts concerning program management support services to CIO, and interviewed various agency personnel.⁵ AR at 7. The CO determined that, despite ALON's and NetStar's statements in their quotations that the firms were unaware of any actual or potential OCIs, both vendors had potential OCIs because of the firms' access to various government databases. See id.; Tab 24, CO's OCI Determination, at 6-10. The CO requested that ALON and NetStar provide mitigation plans, addressing the vendors' access to agency shared network drives, software, and budget execution plans (BEP) containing information that could give the vendors an unfair competitive advantage. AR, Tab 37, Agency Mitigation Plan Requests.

The agency received OCI mitigation plans from ALON and NetStar. ALON informed the agency that, among other things, all of its employees, including on-site employees with access to agency acquisition and procurement data, software, or BEPs, were "firewalled" from ALON's pricing team and did not participate in the preparation of ALON's price quotation. See AR, Tab 25, ALON Mitigation Plan, at 2-3; ALON Declarations at 1-2, 13-24. ALON also provided affidavits from the

⁵ The agency also requested that NetStar provide any information that it had concerning ALON's alleged OCIs. AR at 7. However, the record shows that NetStar provided little substantive information to support its concern that ALON had an unequal access to information OCI that provided the firm with an unfair competitive advantage. Id. at 12-13; see AR, Tab 18, NetStar's Objection to Agency Document Request, Oct. 22, 2010; Tab 21, NetStar's Response to Agency Document Request, Nov. 1, 2010; Tab 23, NetStar's Response to Second Agency Document Request, Nov. 12, 2010.

four individuals who prepared its price quotation. These individuals declared under penalties of perjury and the False Statements Act, 18 U.S.C. § 1001, that they: (1) did not have access to, nor use, non-public or proprietary budget, acquisition, or historical contract information; (2) did not have access to any information regarding NetStar's or any other competitor's rates for work performed at ICE; (3) did not have any non-public information concerning the RFQ; and (4) did not ask any ALON employees who were working under another ICE contract any questions about the RFQ, or about NetStar's, or any other competitor's, rates and pricing information.⁶ See id.

The agency concluded that, although both vendors had access to information that raised potential OCI concerns, the firms' mitigation plans were acceptable. See Contracting Specialist's Declaration at 7-8; AR, Tab 27, OCI Mitigation Plan Evaluation, at 1-4. With respect to ALON's alleged unequal access to information for this procurement, the contract specialist found that ALON had in place established business practices that prevented the disclosure of advantageous and confidential information to employees working on ALON's response to the RFQ. Id.

The CO determined that ALON did not have an unequal access to information OCI and that its quotation still presented the best value to the agency. See AR, Tab 29, Addendum to Award Decision Document, at 2. This protest followed.

DISCUSSION

Organization Conflict of Interest

NetStar protests that ALON, through its performance of contracts with the agency, had an unequal access to information OCI. Specifically, NetStar contends that ALON had access to: a database that ALON employees created to track CIO workflow and acquisition data; a shared network drive where CIO acquisition documents are developed and stored; and, financial information regarding the Atlas program, including information used to modify NetStar's current Atlas contract. Protest at 13-14. NetStar also claims that ALON collects budget data and develops Budget Execution Plans (BEP), including cost projections on CIO acquisitions. Id. According to the protester, ALON's access to such information, which includes NetStar's historical discounted labor rates, gave ALON a competitive advantage which enabled it to underbid NetStar. See id. at 10-15. The protester disputes that

⁶ One pricing team member, however, declared that she researched potential competitors' publicly-available FSS schedule rates, but that these rates were of little use to the team because vendors were requested to offer discounts from their published rates and the team had no way of knowing competitors' discounts. See AR, Tab 25, Declaration of ALON Pricing Team Member, at 16-17.

ALON had firewalls or a plan in place during the procurement to mitigate its competitive advantage and maintains that neither the agency nor ALON tracked what information ALON employees accessed. Comments at 7-9. NetStar also complains that ALON's firewall and mitigation plan could not be effective because the agency was neither aware of, nor involved in, monitoring ALON's plan. See Protest at 11, 13, 16; Supp. Comments at 5.

The responsibility for determining whether a conflict of interest exists rests with the procuring agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254297.15, et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. In making this determination, the Federal Acquisition Regulation (FAR) expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. FAR §§ 9.504, 9.505.

Where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. CIGNA Gov't Servs., LLC, B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12. In reviewing bid protests that challenge an agency's conflict determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." Id. Our standard for reviewing a contracting officer's OCI determination mirrors the standard required by the Court in Axiom. CIGNA Gov't Servs., LLC, supra, at 12.

Here, the record shows that the agency conducted a thorough investigation in response to the protester's OCI allegations. The CO reevaluated the RFQ and related contracts for program management support services; interviewed relevant agency employees; reviewed information regarding the alleged OCI; consulted with agency counsel; and requested and evaluated mitigation plans from both NetStar and ALON. The agency's investigation found that, although some on-site ALON employees had access to CIO databases, shared drives, and BEPs, which included acquisition-sensitive information and NetStar's historic labor rates, those employees were effectively firewalled from the team that prepared ALON's price quotation. Moreover, the record shows that ALON's pricing team did not solicit or access NetStar's historic labor rates or pricing information. Accordingly, the record shows that the agency gave meaningful consideration to NetStar's OCI allegations and provides no basis to challenge the reasonableness of the agency's conclusion that ALON did not have an actual OCI or had not properly mitigated any potential OCIs.

The protester, nevertheless, insists that access to NetStar's historic labor rates and pricing information by any of ALON's employees alone establishes that NetStar was competitively prejudiced. See Protest at 15; Comments at 18-19. In this regard, NetStar states, citing our decision in Aetna, supra, at 17, that there is a presumption of prejudice to competing offerors where an OCI is not resolved.

Although we presume prejudice where a protest establishes facts that constitute an OCI or apparent OCI, that presumption is rebuttable. See TDF Corp., B-288392; B-288392.2, Oct. 23, 2001, 2001 CPD ¶ 178 at 9; Department of the Navy--Recon., B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 12 (where protest establishes facts that constitute conflict or apparent conflict, we will presume prejudice unless record affirmatively demonstrates its absence). Even where a potential conflict of interest exists, we will not sustain a protest where the record demonstrates that there was no prejudice to the protester. Id. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. See, e.g., Special Servs., B-402613.2, B-402613.3, July 21, 2010, 2010 CPD ¶ 169 at 4.

Here, as described above, the employees of ALON that had access to NetStar's historic labor rates were firewalled from the pricing team that prepared ALON's quotation.⁷ Moreover, the protester has neither alleged that the ALON employees inappropriately shared information with ALON's pricing team, nor challenged the credibility of the pricing team's affidavits. In short, the record shows that NetStar was not prejudiced by the access of some of ALON's employees to NetStar's pricing information. We accordingly find no basis to sustain the protest. See Chenega Fed. Sys., LLC, B-299310.2, Sept. 28, 2007, 2007 CPD ¶ 196 at 5; IT Facilities Servs.-Joint Venture, B-285841, Oct. 17, 2000, 2000 CPD ¶ 177 at 14.

⁷ In general terms, NetStar complains that the agency did not address the effectiveness of ALON's firewalls with respect to the employees of ALON who prepared ALON's technical quotation. NetStar's protest (as well as its earlier protest), however, only complained about ALON's access to NetStar's historic labor rates or "proprietary bidding processes," which NetStar asserted permitted ALON to underbid NetStar. See Protest at 10-19; Comments at 2-19; Supp. Comments at 1-4. This general objection does not provide a basis to question the agency's conclusion that ALON should not be disqualified from award here, given that the protester neither describes what proprietary NetStar information ALON allegedly had access to, nor alleges that ALON used any such information in developing its technical quotation.

Experience and Past Performance Evaluation

NetStar also protests the agency's evaluation of ALON's experience and past performance. The protester claims that contract information in the Federal Procurement Data System shows that ALON lacks experience performing projects of a similar scope, magnitude and complexity. Protest at 20-21. In this respect, NetStar calculates that all of ALON's federal contracts for the past 5 years have a total value of \$88.9 million, which is less than the value of the requirement here. Id. NetStar also contends that ALON lacks experience providing overall program management, governance, and engineering/IT support, including experience and subject matter expertise with the Atlas program, and thus cannot compete with NetStar's technical superiority and experience in performing the Atlas requirements.⁸ Id.; Comments at 20.

The agency maintains that ALON's experience managing large and complex contracts in program management, financial support, and IT were of similar scope, size, and complexity to the SOW. AR at 22. With respect to ALON's past performance, the agency received past performance evaluation forms from relevant projects, for which ALON received excellent and very good ratings. Id.; Tab 6, Technical Evaluation Consensus Report, at 13-14. In addition, the agency states that it reviewed the PPIRS, and all of ALON's ratings in the system were outstanding and excellent.

Where, as here, an agency issues an RFQ to FSS contractors and conducts a competition under FAR subpart 8.4, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. CMI Mgmt., Inc., B-404645, Mar. 2, 2011, 2011 CPD ¶ 66 at 4; GC Servs. Ltd. P'ship, B-298102, B-298102.3, June 14, 2006, 2006 CPD ¶ 96 at 6. In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Maybank Indus., LLC, B-403327, B-403327.2, Oct. 21, 2010, 2010 CPD ¶ 249 at 5; OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. The evaluation of an offeror's experience and past performance is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method

⁸ NetStar also complains that the contract specialist exerted improper influence on the TET to change its evaluation of ALON's quotation under the experience and past performance factors from very good to outstanding. Protest at 25; Comments at 20. The record does not show that the contract specialist exerted improper influence. Rather, the record supports the agency's explanation that the contract specialist acted appropriately in reviewing the TET's evaluation for consistency, and asking the TET to respond to perceived inconsistencies.

for accommodating them, and we will not substitute our judgment for reasonably based past performance ratings. See MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10.

We find that the agency's evaluation of ALON's experience and past performance was reasonable and consistent with the RFQ. The RFQ solicited program, financial, budget, and acquisition management support, as well as technical, engineering, and IT support. In this regard, the record shows that the tasks provided by ALON on other projects, whose complexity clients described as "difficult," comprise program and project management (including for the Department of Justice's CIO); budget and financial analysis; acquisition, engineering and technical support; and IT.⁹ Id. at 2, 7, 12, 15. Moreover, the client surveys and PPIRS listings also uniformly assigned high ratings to ALON's past performance. See AR, Tab 15, ALON Past Performance, at 3-5, 7-10, 13-15, 17, 21.

Best Value Determination

Finally, NetStar protests the agency's best value determination, arguing that there were significant differences between the quotations that the agency failed to consider in its analysis. Protest at 32. Specifically, NetStar contends that it should have received award based upon its superior technical/management approach and superior experience. See Comments at 21.

The record shows that the CO in her cost/technical tradeoff analysis credited NetStar for its superior technical/management approach and outstanding experience and past performance. See AR, Tab 7, Award Decision Document, at 11. Nevertheless, the CO concluded that NetStar's superiority was not worth [DELETED], given her determination that ALON's quotation indicated a high degree of success with low risk. Id. Even where a solicitation issued under FAR subpart 8.4 emphasizes technical merit over price, an agency properly may select a lower-priced, lower-rated quotation if the agency reasonably concludes that the price premium involved in selecting a higher-rated, higher-priced quotation is not justified

⁹ Indeed, in arguing that ALON has an impermissible OCI, the protester complains about the "depth to which ALON is immersed in financial management tasks" and concedes that "any attempt to minimize the activities that ALON performs" are refuted by the SOWs in its existing ICE contracts. See Comments at 4-5. In this regard, NetStar points out that under various SOWs, ALON provides budget planning, formulation, tracking, reporting, and analysis; financial management; and review of, and subject matter expertise on, IT acquisitions over \$2.5 million. Id.; Protest at 13. NetStar also points out that ALON implemented a database to track ICE's CIO acquisitions, which requires ALON staff to gather biographic and workflow data and perform operation and maintenance.

in light of the acceptable level of technical competence available at a lower price. George G. Sharp, Inc., B-401077, B-401077.2, Apr. 15, 2009, 2009 CPD ¶ 87 at 6; LEADS Corp., B-311002, B-311002.2, Mar. 26, 2008, 2008 CPD ¶ 86 at 3.

The protest is denied.¹⁰

Lynn H. Gibson
General Counsel

¹⁰ NetStar raised a number of other challenges to the agency's selection of ALON's quotation for award, including that the agency failed to conduct a price realism analysis and that the awardee improperly proposed individuals that it did not intend to provide during performance. See Protest at 26-32. We do not address these additional protest grounds because the protester withdrew one of them and abandoned others.