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Decision

Matter of: BAE Systems Technology Solutions & Services, Inc.

File: B-411810.3

Date: June 24, 2016

Michael R. Charness, Esq., David R. Johnson, Esq., Tyler E. Robinson, Esq., and Ryan D. Stalnaker, Esq., Vinson & Elkins LLP, for the protester.

Jerald S. Howe Jr., Esq., James J. McCullough, Esq., Aaron T. Tucker, Esq., and Samuel W. Jack, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for Leidos, Inc., the intervenor.

Wade L. Brown, Esq., and Fadette Berthold, Esq., Department of the Army, for the agency.

Jonathan L. Kang, Esq., and Cherie J. Owen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the award of a contract based on disqualifying personal and organizational conflicts of interest is denied where the record shows that the contracting officer gave meaningful consideration to the protester's allegations and reasonably concluded that no disqualifying conflicts existed.

2. Protest challenging the evaluation of the protester's and awardee's technical proposals is denied where the record shows that the agency's evaluation was reasonable and in accordance with the terms of the solicitation.

DECISION

BAE Systems Technology Solutions and Services, Inc., of Rockville, Maryland, protests the award of a contract to Leidos, Inc., of Reston, Virginia, under request for proposals No. W911WY-14-R-0056, which was issued by the Department of the Army, Army Materiel Command, for an automated installation entry solution at military installations. BAE argues that the Army failed to reasonably evaluate personal conflicts of interest (PCIs) and organizational conflicts of interest (OCIs) that should have barred Leidos from the competition. BAE also challenges the agency's evaluation of the offerors' proposals under the technical evaluation factor.

We deny the protest.

BACKGROUND

This procurement seeks an automated installation entry (AIE) solution for military installations. Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 1; RFP-056, attach. 1, Performance Specifications (Oct. 22, 2014), at 4. The AIE solution is intended to provide a solution consisting of hardware, software, and communications technology that will provide automated real-time vetting of personal credentials for each person who attempts to enter an Army installation. COS/MOL at 1. The AIE solution is intended to provide timely clearance of approved individuals, and to deny access to those identified as a security risk. Id. at 1-2. The contract awarded here is called the AIE-3 contract. The predecessor AIE-2 contract was awarded to BAE in 2010.

As discussed further below, in September 2013, the firm known as Science Applications International Corp (SAIC) was reorganized into two separate firms, one called SAIC and the other called Leidos, Inc. For purposes of clarity, this decision refers to the original SAIC entity as "Old SAIC," and the two firms that resulted from its reorganization as "New SAIC" and "Leidos."

The Army awarded a blanket purchase order (BPA) to Old SAIC to provide acquisition and program support to the Army's AIE requirements. Old SAIC provided support to the Army under the BPA in connection with the performance of the AIE-2 contract, and the competition for the AIE-3 contract. Old SAIC's acquisition and program support BPA was novated from Old SAIC to New SAIC in September 2013 at the time of the reorganization of Old SAIC.

The initial solicitation for AIE-3, RFP W911QY-12-R-0041, was issued on February 23, 2013.¹ The initial RFP provided that contractors supporting the Army during the competition were required to execute nondisclosure agreements with each offeror, which required the support contractors to protect the offeror's information from unauthorized use or disclosure. RFP-0041 at 198-99. Such firms were also prohibited from participating in the competition. Id. The solicitation identified two firms that would provide support to the agency: Old SAIC and Strategy and Management Services, Inc. Id.

¹ References to RFP-0041 or to the "initial RFP" are to the conformed version of RFP W911QY-12-R-0041 provided by the agency. References to RFP-0056 or to the "revised RFP" are to the conformed version of RFP W911WY-14-R-0056 provided by the agency, under which the challenged contract to Leidos was awarded.

The contract under RFP-0041 was awarded to L-3 National Security Solutions in April 2014. BAE filed an agency-level protest with the Army challenging the award to L-3. COS/MOL at 5. The agency concluded that BAE had been prejudiced by ambiguous references in the solicitation to access to state databases, and because 35 capabilities identified in the solicitation were not clearly described with regard to their impact on price. Id. The agency also concluded that its award decision did not adequately explain why BAE's higher-priced proposal did not merit award. Id. Based on these concerns, the agency cancelled the award to L-3 and cancelled the solicitation.

The Army issued revised RFP-0056 (the solicitation at issue here) on November 6, 2014. As discussed in detail below, the revised solicitation included provisions that addressed BAE's allegations concerning competitive disadvantage. The revised solicitation anticipated the award of an indefinite-delivery/indefinite-quantity contract, with fixed-price contract line item numbers, for a base period of 2 years and a 6-month option. The solicitation stated that proposals would be evaluated on the basis of four factors: (1) technical, (2) product demonstration, (3) past performance, and (4) price. RFP-0056 at 189. The technical factor had five equally-weighted subfactors: (1) technical solution, (2) systems engineering, (3) technical knowledge and methodology, (4) contractor logistics support, and (5) management of resources. Id. For purposes of award, the technical and product demonstration factors were equally important, and were each more important than the price factor; the price factor was more important than the past performance factor. Id.

As with RFP-0041, the revised RFP identified contractors that would provide support for the agency during the competition and that were prohibited from participating in the competition. These contractors were: Camber Corporation, Patricio Enterprises, Inc., SAIC/Defense Solutions Group (New SAIC), and Simulation Technologies, Inc. RFP-0056 at 160-61. Although Old SAIC had been barred from competing for the AIE-3 contract, Leidos concluded that, based on the changes in the revised RFP, it could compete for the award. Agency Report (AR), Tab 36g, Letter from Leidos to CO (Sept. 3, 2015), at 2.

The Army received three proposals in response to the revised RFP, and subsequently established a competitive range consisting of BAE and Leidos. AR, Tab 14, Competitive Range Memorandum (May 14, 2015), at 12. The agency awarded the contract to Leidos in July 2015. On July 22, BAE filed a protest with our Office (B-411810) challenging the award to Leidos. The protester raised the following primary arguments: (1) the Army unreasonably evaluated offerors' proposals under the technical factor; (2) the Army unreasonably evaluated offerors' past performance; (3) the Army failed to evaluate the realism of Leidos' proposed price, and (4) the Army failed to investigate potential PCIs and OCIs regarding Leidos.

On August 3, the Army advised our Office that it would take corrective action in response to BAE's protest by investigating the PCI and OCI allegations raised by the protester. Agency Notice of Corrective Action (Aug. 3, 2015) at 2. Based on the Army's notice of corrective action, we dismissed the protest as academic on August 6.

The Army conducted an investigation of potential PCIs and OCIs involving the award to Leidos. As discussed in detail below, the CO drafted a report dated October 22, 2015, concluding that there were no conflicts of interest that required disqualification of Leidos or cancellation of the award. Agency Report (AR), Tab 36, OCI Report. The agency affirmed the award to Leidos in November 2015.

On November 11, BAE filed a protest (B-411810.2) with our Office challenging the award to Leidos, raising the same four arguments in its prior protest (B-411810). The protester also updated its arguments concerning alleged PCIs and OCIs that BAE claimed tainted the award to Leidos. Protest (B-411810.2) at 3-9. On December 11, the Army advised our Office that it would take corrective action in response to BAE's protest by conducting a new price realism evaluation and making a new award decision. Based on the Army's notice of corrective action, we dismissed the protest as academic on December 15.

The Army conducted a new price realism evaluation and made a new award decision in March 2016. The agency's final evaluation of BAE's and Leidos' proposals was as follows:²

² Army assigned offerors' proposals one of the following ratings under the technical and product demonstration evaluation factors: outstanding, good, acceptable, marginal, or unacceptable. AR, Tab 31, SSDD, at 3. For the past performance evaluation, the agency assigned one of the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown/neutral confidence. Id.

	BAE	LEIDOS
TECHNICAL FACTOR	GOOD	GOOD
Technical Solution	Outstanding	Good
Systems Engineering	Acceptable	Good
Technical Knowledge and Methodology	Outstanding	Good
Contractor Logistics Support	Good	Good
Management of Resources	Acceptable	Good
PRODUCT DEMONSTRATION	GOOD	GOOD
PAST PERFORMANCE	SUBSTANTIAL CONFIDENCE	SUBSTANTIAL CONFIDENCE
PRICE	\$69,944,737	\$49,935,666

AR, Tab 31, Source Selection Decision Document (SSDD), at 4.

The source selection authority (SSA) noted that the offerors' proposals received "comparable adjectival ratings for their overall Non-Priced Factors." *Id.* at 10. He found that "[w]hile there were some differences" between the proposals under the five subfactors of the technical evaluation factor, both offerors received overall ratings of "good" for the technical and product demonstration factors, as well as ratings of "substantial confidence" for the past performance factor. *Id.* at 10.

In conducting his comparative analysis, the SSA identified discriminators between the two proposals under the technical and price factors. He found that "[t]he BAE proposed system architecture demonstrated a less degree of openness than that of Leidos, which can impact downstream competitive sourcing and the lifecycle cost," and also found that "BAE[s] price of \$69,944,737 for this solicitation is \$20,009,071 (about 40%) higher than that of Leidos, which is \$49,935,666." *Id.* at 11. The SSA concluded that, despite some "significant strengths" for BAE's proposal, the combination of Leidos' lower proposed cost and the "openness" of its proposed system merited award of the contract. *Id.* The Army provided a debriefing to BAE on March 14. This protest followed.

DISCUSSION

BAE argues that the Army's award to Leidos was improper based on what the protester argues were disqualifying PCIs and OCIs arising from Leidos' relationship with Old SAIC (its predecessor firm) and New SAIC (the second firm that was created at the same time as Leidos as the result of the reorganization of Old SAIC). The protester also argues that the agency unreasonably evaluated BAE's and

Leidos' technical proposals. For the reasons discussed below, we find no basis to sustain the protest.³

Personal and Organizational Conflicts of Interest

BAE argues that the award to Leidos was tainted by PCIs and OCIs that arose from the awardee's corporate history and its relationships with Old SAIC and New SAIC. The protester contends that Leidos should have been eliminated from the competition based on: (1) PCIs regarding an individual who worked for Old SAIC, and subsequently New SAIC, and who assisted the Army with the evaluation of proposals for the AIE-3 award; (2) an OCI arising from Old SAIC's role in assisting the Army's preparation of the solicitation, which BAE contends gave Leidos an unfair competitive advantage in the competition; and (3) an unequal access to information OCI arising from information that Old SAIC received during its assistance to the Army in connection with the AIE-3 procurement, which the protester contends would have also been available to Leidos.

These allegations were first raised by BAE in its July 22, 2015, protest of the initial award to Leidos (B-411810). The agency's investigation of the PCIs and OCIs consisted of the CO's consideration of information brought to her attention during the initial evaluation of proposals under RFP-0056, as well her investigation into the allegations raised by BAE in connection with the first protest of the award to Leidos

³ BAE raises numerous collateral arguments in connection with these primary arguments. Although we do not address every argument in detail, we have reviewed each issue and find no basis to sustain the protest. BAE also raised, but subsequently withdrew, arguments that the Army failed to reasonably evaluate the realism of SAIC's proposed price and the offerors' past performance. Protester's Comments (Apr. 28, 2016) at 1 n.1. Additionally, BAE's comments on the agency report argued that the award decision unreasonably relied on the SSA's conclusion that Leidos' proposal reflected a higher degree of "openness" (e.g., modular design, use of widely-supported standards, and capacity for facilitating future competition) than BAE's proposal. *Id.* at 43 (citing AR, Tab 31, SSDD, at 11). Although this discriminator was discussed in BAE's post-award debriefing, the protester did not challenge the SSA's reliance on this discriminator in its protest (B-411810.3), and instead first raised the matter in its comments. *See* AR, Tab 38, Debriefing Slides, at 44 ("Two major areas of difference between the two Offerors . . . The awardee's proposed system architecture demonstrated a higher degree of openness than that of BAE Systems.") Because BAE's challenge was not filed within 10 days of the debriefing, it is untimely. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (protests challenging other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known of their basis, including protests based on information disclosed in a requested and required debriefing).

(B-411810). The CO addressed the allegations in a 15-page report. With regard to each allegation, the CO concluded that there was no basis to disqualify Leidos on the basis of any PCIs or OCIs. AR, Tab 36, OCI Report (Oct. 22, 2015), at 13. For the reasons discussed below, we conclude that the CO's analysis of the allegations raised by Leidos was reasonable, and find no basis to sustain the protest.

The Federal Acquisition Regulation (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 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. As relevant here, 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 an unfair competitive advantage in a later competition for a government contract. FAR § 9.505(b); Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6.

Conflicts of interest may also arise in the context of individual contractor employees who assist the government during procurements, and are typically called PCIs. See FAR §§ 3.101-1, 3.1101; Savannah River Alliance, LLC, B-311126 et al., Apr. 25, 2008, 2008 CPD ¶ 88 at 23. A "personal conflict of interest" means a "situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract." FAR § 3.1101. As relevant here, a "covered employee" means an individual "who performs an acquisition function closely associated with inherently governmental functions and is--(1) An employee of the contractor." Id. Where, as here, a protester alleges that an individual is biased because of his or her past experiences or relationships, we focus on whether the individuals involved exerted improper influence in the procurement on behalf of the awardee, or against the protester. See George A. Fuller Co., B-247171.2, May 11, 1992, 92-1 CPD ¶ 433 at 4-5; Advanced Sys. Tech., Inc.; Eng'g and Prof'l Servs., Inc., B-241530, B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153 at 15.

The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). 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. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3. Our Office has held that once an organizational conflict of interest is established, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur. See McCarthy/Hunt, JV, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 at 10. Nonetheless, although we presume prejudice where a protest establishes facts that constitute an OCI or apparent OCI, that presumption is rebuttable. NetStar-1 Gov't Consulting, Inc., B-404025.2, May 4, 2011, 2011 CPD ¶ 262 at 8; Department of the Navy--Recon., B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 12; TDF Corp., B-288392, B-288392.2, Oct. 23, 2001, 2001 CPD ¶ 178 at 9. In reviewing protests that challenge an agency's conflict of interest determinations, our Office reviews the reasonableness of the determination; where an agency has given meaningful consideration to whether a conflict exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6.

Personal Conflict of Interest

BAE first argues that the Army failed to reasonably evaluate a PCI for an employee of New SAIC, who was formerly an employee of Old SAIC, with regard to his role advising the Army in the evaluation of proposals for the competition under the revised AIE-3 solicitation. The protester argues that this advisor's role in evaluating proposals for the revised solicitation was tainted because he held stock in Leidos during part of the evaluation.⁴ In essence, the protester argues that the agency's evaluation of the offerors' proposals was tainted by the New SAIC employee's ownership of Leidos stock, and that Leidos should therefore have been excluded from the competition.

⁴ BAE's comments on the agency report also argue that the work by New SAIC employees assisting the agency with the preparation of the revised RFP tainted the award as a result of their Leidos stock ownership. Protester's Comments (Apr. 28, 2016) at 13-15. We conclude that this argument was not timely raised. BAE's protest challenging the award to Leidos focused on the role of Old SAIC in assisting with the preparation of the initial solicitation and New SAIC employees providing support in evaluating proposals; these arguments did not allege that New SAIC employees had PCIs relating to their role in assisting with the revised solicitation, despite the protester's awareness of the issuance of Leidos stock to New SAIC employees. See Protest (B-411810.3) at 7-9. Because this issue was not raised in the protest, BAE's attempt to supplement its protest with this argument in its comments on the agency report responding to the third protest is untimely. 4 C.F.R. § 21.2(a)(2).

As discussed above, Old SAIC was issued a BPA to provide acquisition and program support for the Army in connection with its AIE requirements, including assistance with preparing the initial RFP for the AIE-3 contract. The advisor began working for Old SAIC in 2002, and began assisting with that firm's support of the Army's AIE requirements in 2009. AR, Tab 40f(1), Decl. of New SAIC Advisor (Sept. 10, 2015), at 1. When New SAIC and Leidos became separate companies as a result of the reorganization of Old SAIC in September 2013, the advisor became an employee of New SAIC. Id.

As relevant here, the advisor was assigned to assist the Army's source selection evaluation board (SSEB) in its evaluation of proposals for the initial and revised AIE-3 solicitations. Id. at 4; Tab 36, OCI Report, at 3. In connection with his assistance to the SSEB, the advisor, along with all other nongovernment advisors, was required to sign nondisclosure agreements (NDAs) that prohibited use or disclosure of offerors' information or agency source-selection sensitive information. AR, Tab 36, OCI Report, at 3; Tab 35a, Advisor NDA (July 22, 2009); Tab 35b, Advisor NDA (Aug. 1, 2014). Id. In addition, the advisor signed a source selection participation agreement (SSPA) with the Army, which outlined his duties as a member of the SSEB. AR, Tab 36h, SSPA (Oct. 24, 2014). The SSPA required the advisor to, among other things, certify that he did not have any financial interests in any potential offerors, and to notify the chairperson of the SSEB or the CO of any changes to his financial interests that could affect his representations. Id. at D-1, D-3.

The CO's investigation of the advisor's potential PCI primarily addressed his ownership of Leidos stock during the time he was assisting the SSEB with the competition under the revised RFP. AR, Tab 36, OCI Report, at 3-7. At the time of the Old SAIC reorganization, individuals such as the advisor were informed that shares in Old SAIC would be converted to Leidos stock. Id. at 3. In September 2014, during his work supporting the SSEB, but before the receipt of proposals in December 2014, the advisor was notified that "retirement" stock holdings in Leidos were "frozen" (i.e., no transactions could be made), and would be converted to a Vanguard retirement fund that December. AR, Tab 36i, Leidos Stock Notice (Sept. 8, 2014). The advisor explained in response to the CO's investigation that he was not aware until December 2014 that Leidos was a potential offeror for the AIE-3 procurement, and for that reason did not disclose his stock ownership prior to that time. AR, Tab 36r, Decl. of Advisor (Oct. 19, 2015) at 2. Upon discovering that Leidos was a potential offeror, the advisor disclosed his ownership of Leidos stock to the SSEB chair, and explained that he believed that the anticipated conversion of the Leidos stock would result in divestiture of any financial interest that would affect his role with the SSEB. Id.

In April 2015, the advisor became aware as result of a quarterly portfolio statement that he still held approximately \$22,000 in Leidos stock, and that this stock was not subject to the conversion described in the September 2014 notice. AR, Tab 36,

OCI Report, at 4; see Tab 36r, Decl. of Advisor (Oct. 19, 2015) at 2. The advisor notified the SSEB chairperson of the situation, and then took action to dispose of the stock. Id. The sale of the stock was completed in April 2015, approximately one month before the receipt of offerors' final revised proposals. AR, Tab 36, OCI Report, at 4; Tab 36j (transaction statement); Tab 36k (transaction statement).

The SSEB chairperson advised the CO of the advisor's stock ownership in April 2015. AR, Tab 36, OCI Report, at 4. The CO found that the advisor had confirmed divestiture of the stock holdings, and that the advisor's role was in the capacity of "a technical advisor, not a decision maker." AR, Tab 36, OCI Report, at 4. The CO concluded that, based on these facts and the fact that the award decision had not yet been made, there was no basis to exclude the advisor from assisting the SSEB or to otherwise cancel the procurement. AR, Tab 36, OCI Report, at 4.

In her subsequent OCI investigation in response to BAE's initial protest (B-411810), the CO acknowledged that the advisor's ownership of Leidos stock during the time he assisted the SSEB created the appearance of a potential conflict: "It is true that [the advisor] owned slightly more than the de minimus amount of stock in Leidos; therefore I have determined that the appearance of a personal financial conflict of interest exists in accordance with FAR 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions." Id. at 7. The CO nonetheless concluded there was "compelling evidence" that the advisor's role did not create a disqualifying PCI. Id.

The CO found that the advisor misunderstood that his stock in Leidos was "frozen" to transactions, and that it would be converted to shares in the Vanguard fund. AR, Tab 36, OCI Report, at 4; see Tab 36r, Decl. of Advisor (Oct. 19, 2015) at 2. The CO concluded that the advisor's stock ownership was therefore properly disclosed and addressed. COS/MOL at 32-33. The CO further concluded that the prompt disclosure and disposition of the stock essentially mitigated or avoided the appearance of a disqualifying conflict of interest. Id. at 34.

The CO also found that the advisor's actions did not give rise to PCI, based on what the CO viewed as the advisor's limited role in support of the SSEB. AR, Tab 36, OCI Report, at 4. In this regard, the CO stated that the advisor's role did not involve recommending ratings for an offeror's proposal, or recommending a particular offeror for award. Id. at 5. The CO acknowledges that the advisor did not prepare written materials, and the evaluation documents do not reflect specific input from the advisor. Id. Despite this lack of documentation, the CO concluded, based on statements from the advisor, the SSA, and SSEB members, that the advisor's role "did not unduly influence the decision-making process." COS/MOL at 35; see AR, Tab 36, OCI Report, at 5. In investigating this potential PCI, the CO received and reviewed declarations from the advisor, the SSA, and members of the SSEB, who explained that the advisor provided technical advice as requested by the SSEB, but did not recommend specific ratings for offerors or recommend any offeror for award.

AR, Tab 36, OCI Report, at 5; Tab 36n, Decl. of SSEB Member (Oct. 14, 2015), Tab 36o, Decl. of SSEB Chair (Oct. 14, 2015); Tab 36p, Decl. of Army Assistant Product Manager (Oct. 14, 2015); Tab 36q, Decl. of SSA (Sept. 3, 2015); Tab 36r, Decl. of Advisor (Oct. 19, 2015).

BAE argues that the CO's acknowledgement of the appearance of a conflict of interest should have been the end of the inquiry, and that the award to Leidos should have been found tainted as a result the advisor's ownership of Leidos stock. Protester's Comments (Apr. 28, 2016) at 8. In this regard, the protester notes that when reviewing potential conflicts of interest arising from the role of individuals under FAR subpart 3.1, agencies have an obligation to avoid even the appearance of impropriety in government procurements. See FAR § 3.101-1; FAR § 3.1103(a)(3)(iii); Celeris Sys., Inc., B-404651, Mar. 24, 2011, 2011 CPD ¶ 72 at 7. Our Office has recognized that the appearance of a conflict of interest is sufficient to warrant action to address that conflict, such as exclusion of an offeror from a competition, even where no actual impropriety can be shown, provided that the agency's determination is based on fact, and not mere innuendo and suspicion. KAR Contracting, LLC, B-310454, B-310537, Dec. 19, 2007, 2007 CPD ¶ 226 at 4.

We do not agree with the protester, however, that the CO's finding that there was an appearance of impropriety precluded further inquiry as to whether this conflict could be mitigated or avoided. Rather, as discussed herein, the CO further examined the record and concluded that the advisor's role did not give rise to a disqualifying conflict. In this regard, our Office has reviewed protests concerning conflicts of interest to determine whether an agency's efforts or other factors mitigated the appearance of a conflict of interest under the provisions of FAR subpart 3.1. E.g., The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194 at 14; International Resources Grp., B-409346.2 et al., Dec. 11, 2014, 2014 CPD ¶ 369 at 17. For these reasons, we think the CO reasonably continued her investigation to determine whether the advisor's stock ownership was a matter that was mitigated under the facts and circumstances here.

BAE also argues that the CO's conclusions regarding the advisor's understanding of his stock holdings, the size of the stock holdings and their significance, and the effect of his disposition of the stock were unreasonable, and did not address the appearance that the award to Leidos was tainted. Protester's Comments (Apr. 28, 2016) at 7-13. BAE further contends that the CO unreasonably concluded that the role of the advisor in support of the SSEB did not "unduly influence" the evaluation. As discussed above, however, where an agency has given meaningful consideration to whether a conflict exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. DV United, LLC, supra.

Here, we find that the CO considered the relevant available record and concluded that there was no basis to find that the advisor's role required exclusion of Leidos.

Because the advisor did not work for Leidos during the competition for the award under the revised AIE-3 solicitation, his ownership of Leidos stock was the sole connection that gave rise to a potential PCI. The CO exercised her judgment by reviewing the relevant facts and concluding that the advisor's prompt disclosure of information, subsequent disposition of the stock, and the scope of his role in advising the agency, addressed or mitigated any potential concerns regarding a PCI. On this record, we find no basis to conclude that the CO's judgment was unreasonable, and thus no basis to sustain the protest. Although the protester disagrees with the conclusions, and although different conclusions might reasonably have been drawn from the facts reviewed by the CO, these concerns do not provide a basis to sustain the protest.⁵

Biased Ground Rules OCI

Next, BAE argues that the work performed by Old SAIC assisting the Army with preparation of the initial solicitation resulted in a biased ground rules OCI that should have disqualified Leidos from the competition. In effect, the protester argues that Leidos should be viewed as the same entity as Old SAIC, because Old SAIC was able to skew the competition in a way that later benefitted Leidos.

As discussed above, Old SAIC provided assistance to the Army in connection with the preparation of the initial RFP, which was issued on February 23, 2013. Old SAIC was reorganized into New SAIC and Leidos in September 2013. Following the award to L-3 in 2014, and BAE's protest of that award, the agency cancelled the initial solicitation and issued the revised solicitation. Old SAIC was barred from participating in the original solicitation, and New SAIC was barred from participating in the revised solicitation. RFP-0041 at 198-99; RFP-0056 at 160-61.

⁵ BAE also argues that the advisor had a PCI arising from widespread ownership of Leidos stock among New SAIC employees. Protester's Comments (Apr. 28, 2016) at 13-16. In this regard, the protester contends that the advisor had a PCI because his work colleagues' and supervisors' financial interests would have been affected by an award to Leidos. Id. The protester contends that this conflict of interest could only have been avoided if every New SAIC employee was divested of any financial interest in Leidos. Id. at 16. We think that the divestiture in the manner advocated by the protester is not required by the FAR, and see no basis in our decisions to conclude that an agency must disqualify a firm based on a PCI if any of a covered employee's co-workers holds stock that could be affected by the covered employee's work. Although we think the FAR gives a contracting officer discretion to consider whether an employee's colleagues' financial interests could give rise to a conflict of interest, we do not think that it compels disqualification in the manner asserted by the protester here.

The CO's OCI investigation in response to BAE's initial protest (B-411810) concluded that there was no basis to find that Leidos should be excluded from the competition because of a biased ground rules OCI. AR, Tab 36, OCI Report, at 9. In this regard, the CO found that, in light of the reorganization of Old SAIC into Leidos and New SAIC, the relevant inquiry was whether Old SAIC's role in assisting the agency's preparation of the initial RFP created a taint that was carried over to Leidos in a manner that should have precluded Leidos' participation in the competition under the revised RFP. Id. at 7.

First, the CO noted the lapse of over 1 year between the reorganization of Old SAIC into Leidos and New SAIC, and the issuance of the revised RFP. AR, Tab 36, OCI Report, at 7-8. The CO discounted the possibility that Old SAIC could have anticipated that, despite being barred from competing under the initial RFP, there would be a sequence of events that would later permit that firm, or some version of it, to participate in the competition. Id. In this regard, the CO concluded that it was not foreseeable that the award under the initial solicitation would be made to L-3, that this award would result in a protest, that the Army would take corrective action in response to the protest by cancelling the initial solicitation and issuing a revised solicitation, and that the revised solicitation would be issued at a time after the reorganization of Old SAIC into two successor entities, one of which would compete for the award. Id.

The CO also concluded that changes in the revised solicitation mitigated the potential that Old SAIC's role could have skewed the competition in favor of Leidos--that is, affect the solicitation in a way that might favor a future, reorganized version of the company. Id. at 8-9. The CO also concluded, as a result of her OCI investigation, that there were "significant" changes to the initial RFP as a result of BAE's protest of the award to L-3. Id. at 3, 8. As the CO explained in her OCI analysis:

The original solicitation (Attachment 2) included unclear language as to whether connectivity to authoritative databases "could" be made via the Government's Interoperability Layer Services (IoLS) middleware, or whether it "must" be independent of IoLS. As a result of the ambiguous language, L-3 proposed to connect via IoLS, and the SSEB evaluators accepted L-3's solution -- based directly on the lack of clarity in the solicitation. BAE knew that this capability does not presently exist via IoLS, and will not be available in the foreseeable future. Consequently, BAE proposed a solution that did not depend on the Government's middleware.

Id. at 8 (emphasis in original). The CO explained that this flaw in the solicitation required the agency to take corrective action to "clarify this important programmatic issue." Id. The CO further explained that the revised solicitation made clear that offerors "may not rely on Government middleware." Id.

The CO also concluded that another “significant” change in the revised solicitation related to 35 “objective capabilities” in the original solicitation that were deleted and replaced with either new or revised requirements. Id. at 9 (citing AR, Tab 36y, Requirements Crosswalk (5-page summary detailing changes to capabilities)). The revised solicitation also added five key capabilities in sections L and M which specify how proposals would be evaluated:

- Vetting: Interoperability Layer Service (IoLS), Department of Motor Vehicles (DMV), in state and out of state law enforcement sources, National Crime Information Center (NCIC) III
- Registration: user interface, in-lane registration
- Driver’s License: use as a credential
- Information Assurance (IA) Hierarchical organizational unit structure: integration as part of overall system design
- Guard force reduction enablers: platooning, one guard operating multiple lanes, centralized monitoring and control, fingerprint and in-lane registration

Id. at 8-9; see RFP-0056 at 172, 191.

Finally, the CO noted in her OCI investigation that the Army was primarily responsible for preparation of important parts of the solicitation, such as the independent government estimate, the statement of work, and other requirements documents. AR, Tab 36, OCI Report, at 9. The CO concluded that these factors demonstrated that Old SAIC’s assistance to the agency in preparing the initial solicitation did not create an unfair competitive advantage that required disqualification of Leidos under the revised solicitation. Id.

BAE argues that Old SAIC’s role in preparing the initial RFP tainted the award to Leidos because, regardless of whether it was foreseeable that a successor to Old SAIC might compete in the future, the appearance of impropriety was impossible to avoid. We agree with the protester that our Office has generally held that foreseeability is not a dispositive inquiry as to whether a contractor’s role in preparing materials that are used in a solicitation gives rise to a biased ground rules OCI. See Energy Sys. Grp., supra, at 6. Instead, the relevant concern for a biased ground rules OCI is not simply whether a firm drafted specifications that were adopted into the solicitation, but, rather, whether a firm was in a position to affect the competition, intentionally or not, in favor of itself. L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 8.

Here, the CO found that the reorganization of Old SAIC and the passage of time between the award to L-3 and the issuance of the revised RFP demonstrated that Old SAIC was not in a position to favor a future corporate entity consisting of the part of itself that would emerge from the reorganization, i.e., Leidos. Given the CO’s consideration of the relevant facts here, and her judgment that those facts did

not put Old SAIC in a position to favor Leidos, we cannot conclude that the CO's OCI analysis was unreasonable.

Moreover, even if we were to agree with BAE that the changed circumstances regarding Old SAIC's reorganization and the passage of time did not address the possibility that Old SAIC could have skewed the competition to favor Leidos in the future, we conclude that the CO's OCI analysis reasonably found that the changes to the revised RFP after the reorganization of Old SAIC addressed or mitigated any potential conflict that might have attached to Leidos. See AR, Tab 36, OCI Report, at 9. Although the protester disputes the CO's characterization of the revisions as "significant," we do not think this disagreement provides a basis to sustain the protest. In this regard, the CO identified specific areas of the proposal that were changed as a result of BAE's challenge to the award to L-3, and why these changes altered the solicitation in a manner that avoided the possibility that Old SAIC's role could have favored Leidos. Id. On this record, we find no basis to sustain the protest.

Unequal Access to Information OCI

Finally, BAE argues that Leidos had unequal access to nonpublic information in the protester's proposal as a result of Old SAIC's support to the Army in connection with the AIE-2 contract and the AIE-3 procurement. The protester argues that Old SAIC's access to this information likely resulted in Leidos having an unfair competitive advantage in pursuing the award under the revised RFP.

The CO's conclusion in her OCI investigation that no unequal access to information OCI existed relied primarily on nondisclosure agreements (NDAs) signed by all contractor employees who were assigned to assist the agency in connection with the AIE-2 contract and the AIE-3 procurement. AR, Tab 36, OCI Report, at 10-11. The CO also noted that, per the terms of the two solicitations, all offerors were required to enter into NDAs with Old SAIC, under RFP-0041, or New SAIC, under RFP-0056, and that these NDAs prohibited the disclosure or improper use of offeror or source selection sensitive information. Id. at 11.

With regard to the award to Leidos, the CO noted that at the time the revised solicitation was issued, New SAIC staff who provided support to the Army in connection with the AIE-3 procurement were separate from Leidos. Id. at 11. For this reason, the CO concluded that there was no basis to believe Leidos had unequal access to information as a result of work performed by New SAIC. Id. With regard to Old SAIC's role in the competition, prior to its reorganization, the CO concluded that the NDAs between the contractor personnel and the government, and between Old SAIC and the offerors who submitted proposals, provided adequate assurance that Leidos did not receive access to competitively useful nonpublic information. Id.

Specifically, the CO found that all Old SAIC employees who had access to competitively sensitive information in connection with the AIE-2 contract and the AIE-3 competition had signed NDAs that addressed their obligations to safeguard offeror information. Id. at 9, 11. The CO also found that the New SAIC advisor (discussed above) was the only relevant employee who had access to offerors' proposals. Id. at 10. The CO noted that the advisor had signed numerous nondisclosure agreements throughout his support of the Army's AIE requirements, and was designated as the point of contact for an NDA between Old SAIC and BAE in March 2013 that specifically addressed the AIE-3 procurement. AR, Tab 40e, Old SAIC NDA with BAE (Mar. 1, 2013). The CO found that the terms of these NDAs prohibited the advisor from disclosing BAE information received during the AIE-3 procurement. AR, Tab 36, OCI Report, at 10-11.

BAE primarily argues that the existence of the NDAs could not have mitigated the disclosure of information. In this regard the protester argues that the CO's investigation did not adequately examine whether the NDAs were effective in avoiding the disclosure of information by the Old SAIC employees who had access to competitively sensitive information. For this reason, the protester argues that the CO's "after-the-fact" reliance on the NDAs did not address or mitigate the possibility that Leidos gained access to competitively useful nonpublic information as a result to Old SAIC's access to information during the performance of its acquisition and program support BPA. Protester's Comments (Apr. 28, 2016) at 29.

As our Office has held, mitigation efforts that screen or wall-off certain individuals within a company from others, in order to prevent an improper disclosure of information, may be an effective means to address an unequal access to information OCI. See Axiom Resource Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 7 n.3; Aetna Gov't Health Plans, Inc., supra, at 13. An agency may reasonably conclude that an NDA mitigates the possibility of an unfair competitive advantage arising from unequal access to information, provided the agency reasonably concludes that the terms of the NDA prohibited the use of the information in a way that would give a firm an unfair competitive advantage. Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 11-13.

The record here shows that the CO considered the potential OCIs arising from Old SAIC's access to competitively useful information, as well as the New SAIC advisor's access. Specifically, the CO concluded that the terms of the applicable NDAs prohibited the affected Old SAIC employees from disclosing nonpublic information that could have given other Old SAIC employees, and in turn Leidos employees, an unfair competitive advantage. In the absence of hard facts showing that the NDAs were ineffective in precluding Leidos from gaining access to information that could have provided an unfair competitive advantage, we find no basis to sustain the protest.

Technical Evaluation

Next, BAE argues that the Army's evaluation of the offerors' technical proposals was unreasonable. Although we do not address each issue, we have reviewed them all and find no basis to sustain the protest. We address two representative examples of the protester's challenges.

In reviewing protests challenging an agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. Del-Jen Educ. & Training Grp./Fluor Fed. Sols. LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria, applicable procurement statutes, and regulations; and adequately documented. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An offeror's disagreement with an agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. In addition, it is an offeror's responsibility to submit an adequately written proposal that establishes its capability and the merits of its proposed technical approach in accordance with the evaluation terms of the solicitation. Carolina Satellite Networks, LLC; Nexagen Networks, Inc., B-405558 et al., Nov. 22, 2011, 2011 CPD ¶ 257 at 4.

Evaluation of BAE's Proposal

The Army identified a weakness in BAE's proposal under the management of resources subfactor of the technical evaluation factor, based on an apparent error in the protester's proposal regarding its proposed level of small business subcontractor participation. The solicitation required offerors to propose to meet the following small business participation goals:

TYPE OF BUSINESS	PERCENTAGE
Small Business (TOTAL)	48%
Veteran-Owned Small Business (VOSB)	6%
Service-Disabled Veteran-Owned Small Business (SDVOSB)	6%
Small Disadvantaged Business (SDB)	13%
Woman-Owned Small Business (WOSB)	7%
Historically Underutilized Business Zone (HUBZone)	11%
Historically Black Colleges and Universities/Minority Institutions (HBCU/MI)	1%

RFP-0056 at 197. The revised RFP advised that “[t]he sum of all the percentages under each of the small business categories . . . need not equal 100% since individual subcontractors may be counted toward[] more than one category.” Id.

BAE proposed to meet all of the small business participation goals set forth in the solicitation, that is, the protester provided a chart that proposed participation at the same levels set forth in the RFP’s chart. AR, Tab 28, BAE Revised Proposal, Vol. II, at C-2. Additionally, the protester listed the following proposed subcontractors and the business size/status categories for each of those firms:

Subcontractor	Business Size/Status
[DELETED]	HBCU, SDB
[DELETED]	WOSB, SDB, 8(a)
[DELETED]	SDVOSB
[DELETED]	SB
[DELETED]	SB
[DELETED]	HUBZone, SDB

Id. at C-2-C3.

Although BAE’s proposal did not specify participation percentages associated with the proposed subcontractors, the Army was able to calculate percentages for certain business size/status categories by correlating them to the proposed participation rate for each category. Because [DELETED] was the only HBCU subcontractor proposed, because that subcontractor was also proposed as an SDB, and because the protester stated that HBCU participation was 1 percent, the agency inferred that [DELETED] should also represent 1 percent SDB participation. COS/MOL at 40; see AR, Tab 30, Final Evaluation Report, at 46. Similarly, because [DELETED] was the only WOSB subcontractor proposed, because that subcontractor was also proposed as an SDB, and because the protester stated that WOSB participation was 7 percent, the agency inferred that [DELETED] should also represent 7 percent SDB participation. Id. Finally, because [DELETED] was the only HUBZone subcontractor proposed, because that subcontractor was also proposed as an SDB, and because the protester stated that HUBZone participation was 11 percent, the agency inferred that [DELETED] should also represent 11 percent SDB participation. Id.

In sum, the Army concluded that these three proposed subcontractors should have represented 19 percent SDB participation. Id. Because BAE’s proposal listed only 13 percent SDB participation, the agency concluded that “[t]he apparent calculation error reduces confidence in the Offeror’s small business participation approach,” and that the error “decreases the probability of successful performance.” Id.; see also AR, Tab 31, SSDD, at 8 (concluding that one of the three weaknesses for BAE’s proposal was “an apparent calculation error in the Offeror’s small business

participation approach.”) Nonetheless, this weakness, on balance with other factors in the evaluation, led the agency to conclude that the “[r]isk of unsuccessful performance is low.” AR, Tab 30, Final Evaluation Report, at 46; Tab 31, SSDD, at 9.

BAE argues that the Army unreasonably assigned a weakness because its proposal met the exact minimum levels set forth in the solicitation. The protester contends that any arithmetic error regarding the calculation of total SDB participation was due to the solicitation’s instruction that the total of all business categories need not equal 100 percent, and that individual subcontractors “may” count towards more than one category. Protester’s Comments (Apr. 28, 2016) at 39. The protester contends that it was not therefore required to specify each subcontractor’s business size or status, and that the agency should not have evaluated this matter. Id.

As discussed above, however, BAE’s proposal clearly listed [DELETED], [DELETED], and [DELETED] each as falling under a particular size or status (HBCU, WOSB, or HUBZone) as well as also being an SDB. AR, Tab 28, BAE Revised Proposal, Vol. II, at C-2-C-3. Although the protester is correct that, under some circumstances, an offeror might propose subcontractors in a manner that would not allow the agency to calculate the percentages of participation for a particular category (e.g., where more than firm was proposed for a category), BAE’s proposed approach here clearly permitted such a calculation. We conclude that because the protester elected to list three subcontractors as SDBs, the agency reasonably expected the SDB total to reflect all of those firms. We also conclude that the agency reasonably assessed a weakness because the apparent error created doubt as to whether the protester’s representations regarding its proposed small business subcontractor participation were accurate.⁶

Evaluation of Leidos’ Proposal

BAE contends that the Army unreasonably evaluated Leidos’ proposed technical approach because it relied on what the protester describes as “rejected” technology provided by the awardee’s proposed subcontractors, [DELETED]. Protester’s Comments (Apr. 28, 2016) at 31. The protester contends that technological

⁶ Although not addressed by any party, it is not clear that a HBCU may also qualify as a SDB. See 14 C.F.R. § 124.1002 (stating that an SDB is a concern that must be “owned” by “individuals,” a definition which does not appear to apply to colleges or universities); 34 C.F.R. § 608.2; FAR § 19.304; FAR subpart 26.3. We need not resolve this issue however, as the protester listed [DELETED] as both a HBCU and SDB, and, in any event, removing that proposed subcontractor from the agency’s SDB calculation would still result in a discrepancy between the subcontractors identified as SDBs, and the proposed SDB participation level.

solutions provided by [DELETED] were used unsuccessfully in BAE's performance of the AIE-2 contract, and required an engineering change that directed BAE to use a different technical approach. Id.

The technical solution subfactor for the technical evaluation factor required offerors to provide a "a comprehensive description of its proposed AIE-3 System and architecture, including a description of the hardware and software, interfaces required and intended operation." RFP-0056 at 191. Offerors were required to address their technical approach, including vetting of credentials through state law enforcement agencies, user registration at gate entrances, and use of drivers licenses as a credential. Id.

The protester contends that the use of [DELETED] technologies did not permit the use of drivers licenses as credentials, as required by the RFP. Protester's Comments (Apr. 28, 2016) at 33. The protester contends that Leidos' proposed use of [DELETED] as subcontractors indicates that they will use the same "rejected" technology that caused performance problems for BAE on the AIE-2 contract. Protester's Comments at 31-33. For this reason, the protester argues that the awardee's proposal should have been found unacceptable, or in any event rated lower than BAE's proposed approach.

The Army concluded that Leidos' proposal was technically acceptable and merited a good rating under the technical solution subfactor of the technical evaluation factor. AR, Tab 30, Final Proposal Evaluation Report (PAR), at 21. Although the agency did not specifically address the reliance on [DELETED] technology in the technical evaluation, the agency states that it found the approach acceptable and that the agency was aware of risks and benefits of the [DELETED] technologies. COS/MOL at 26-27; Supp. COS/MOL (May 6, 2016) at 4-5.

Based on our review of the record, BAE does not demonstrate that Leidos will necessarily be using the same technology that caused performance problems for BAE in the AIE-2 contract, or that the technology will be used in the same way. Leidos' proposal states that its approach is "[DELETED]." AR, Tab 29, Leidos Final Revised Proposal, Vol. II, at 1. To the extent the protester believes that the awardee will simply reuse a "rejected" technology or approach, the record does not clearly support this inference. In fact, the protester appears to concede that the awardee could perform the contract with modifications to what the protester understands to be [DELETED] technologies. Protester's Comments (Apr. 28, 2016) at 35 ("This might then actually enable the system to meet the RFP's capabilities . . ."). On this record, we find that BAE's disagreement with the Army's judgment that Leidos' proposed technical approach was technically acceptable provides no basis to sustain the protest.

The protest is denied.

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General Counsel