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Decision

Matter of: North Wind, Inc.

File: B-404880.7

Date: November 5, 2012

Kevin P. Mullen, Esq., Charles L. Capito, Esq., and J. Alex Ward, Esq., Jenner & Block LLP, for the protester.

Richard P. Rector, Esq., and Dawn E. Stern, Esq., DLA Piper US LLP, for Navarro Research and Engineering, Inc., the intervenor.

Richard J. McCarthy, Esq., National Aeronautics and Space Administration, for the agency.

Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an offeror had an immitigable unequal access to information organizational conflict of interest that should have disqualified it from the competition is denied, where the agency reasonably concluded that the offeror's performance of a bridge contract for the same services did not provide access to the protester's non-public, proprietary information.

DECISION

North Wind, Inc., of Idaho Falls, Idaho, protests the terms of amendment No. 6 to request for proposals (RFP) No. NNJ10336475R issued by the National Aeronautics and Space Administration (NASA) for environmental compliance and restoration work at the White Sands test facility in Las Cruces, New Mexico. The protester argues that in issuing the amendment, the agency failed to account for an organizational conflict of interest (OCI) that provides another offeror, Navarro Research and Engineering, Inc., an unfair competitive advantage.

We deny the protest.

On June 26, 2012, NASA issued RFP amendment No. 6 in response to a decision by our Office sustaining an earlier protest of North Wind. See North Wind, Inc.; Earth Resources Tech., Inc., B-404880.4 et al., Nov. 4, 2011, 2011 CPD ¶ 246. To

better understand the allegations present in the current protest we provide the following background.

History of the Procurement

The initial solicitation was issued on July 27, 2010, as a 100-percent small business set-aside, and sought environmental compliance and operations (ECO) services under an indefinite-delivery/indefinite-quantity (ID/IQ) contract. On February 28, 2011, NASA notified the offerors that it had awarded the contract to Navarro. On March 14, North Wind filed a protest with our Office challenging NASA's evaluation of North Wind's technical and cost proposals, and the award decision. North Wind filed a supplemental protest arguing that NASA improperly considered 56 pages of mandatory basis of estimate (BOE) data in Navarro's proposal that fell outside the RFP's 50-page limit for mission suitability proposals. On May 24, NASA advised our Office of its intent to take corrective action in response to North Wind's supplemental protest by removing the 56 challenged pages from consideration and re-evaluating Navarro's proposal. Our Office dismissed North Wind's initial and supplemental protests on May 31.

On July 19, NASA notified the parties that it had again awarded the contract to Navarro. On July 29, North Wind filed a protest with our Office challenging NASA's re-evaluation of Navarro's proposal and subsequent award decision. On September 15, during the pendency of North Wind's protest, the agency awarded a sole-source letter contract (ECO bridge contract) to Navarro to provide the ECO services at NASA's White Sands test facility.¹ The agency's sole-source award was not protested by North Wind.

On November 4, we sustained North Wind's protest, finding that NASA's willingness to essentially waive the BOE data requirement for Navarro, without disclosing this willingness to all of the offerors and providing them an opportunity to submit revised proposals, was prejudicial to the offerors who provided the required BOEs within the page limitation imposed on the mission suitability proposals. We recommended that NASA appoint a new source evaluation board, consider amending the solicitation to remove or increase the 50-page limit for mission suitability proposals, conduct meaningful discussions if appropriate, obtain and evaluate revised proposals, and make a new source selection decision.

On November 28, North Wind delivered a letter to NASA requesting that the agency declare Navarro ineligible for the award due to an OCI resulting from Navarro's

¹ The ECO services were previously provided by Enterprise Advisory Service, Inc. (EASI) under its facilities and operations support contract (FOSC) with NASA. Contracting Officer's Statement (CO Statement) at 2. North Wind was one of four subcontractors to EASI on FOSC. Id.

access to North Wind's proprietary information under the ECO bridge contract. CO Statement at 2. Shortly thereafter, NASA began an investigation into North Wind's OCI allegations.

On January 20, 2012, NASA issued its proposed corrective action plan in response to our November 4, 2011 decision. On January 27, North Wind filed an agency level protest challenging the agency's corrective action plan and reasserting its November 28, 2011, OCI allegations. On February 28, 2012, the agency dismissed North Wind's agency level protest as untimely with regard to North Wind's OCI allegations.²

On February 29, NASA advised North Wind that the OCI Inquiry Officer had completed his investigation and had concluded that there was "no evidence to substantiate the allegation that Navarro received proprietary data belonging to North Wind resulting from NASA's decision to award Navarro a sole source bridge contract for ECO remediation work at the NASA WSTF [White Sands test facility]." Agency Report (AR), Tab 11, OCI Investigation Files, at 3195. On March 15, North Wind responded to NASA's OCI determination, alleging that the agency failed to identify and investigate important issues. *Id.* at 3198-99. In response, NASA reaffirmed its earlier decision finding no evidence to substantiate North Wind's OCI concerns. Protest, Exhibit 9, NASA letter to North Wind (Apr. 5, 2012), at 1-2.

Current Solicitation and Protest

On June 26, NASA issued amendment No. 6 for the ECO re-competition. On July 16, the agency issued amendment No. 7 for the purpose of answering questions from offerors, including a question regarding Navarro's eligibility to compete for award. In this regard, NASA stated "the Government is not aware of any unmitigated organizational conflict of interest involving any offeror in the on-going acquisition." RFP, amend. 7, attach. 1, at 8. North Wind filed its protest with our Office on July 25, prior to the August 10 due date for receipt of proposals.

DISCUSSION

North Wind asserts that the agency failed to meaningfully investigate an unequal access to information OCI arising out of Navarro's work on the ECO bridge contract. North Wind argues that the agency's failure to reasonably investigate potential OCIs

² NASA dismissed North Wind's claims regarding its challenge to the corrective action plan without prejudice due to related judicial proceedings in Federal Court. CO Statement at 2.

concerning Navarro resulted in the agency improperly issuing amendment No. 6 on an unrestricted basis.³

As an initial matter, we find that North Wind timely filed its OCI challenge as a pre-award protest to the agency's issuance of the RFP amendment prior to the August 10 date for receipt of proposals. We have previously stated, as a general rule, a protester is not required to protest that another firm has an impermissible OCI until after that firm has been selected for award. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. However, a different rule applies where a solicitation is issued on an unrestricted basis, the protester is aware of facts giving rise to a potential OCI, and the protester has been advised by the agency that it considers the offeror affected by the potential OCI to be eligible for award. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6-7; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2. In such cases, the protester cannot wait until an award has been made to file its protest of an impermissible OCI, but instead must protest before the closing time for receipt of proposals. Honeywell Tech. Solutions, Inc., supra. Accordingly, North Wind's protest is timely.

With regard to the substance of North Wind's OCI claims, 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 responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly

³ North Wind also argues throughout its protest that the bridge contract awarded to Navarro in September 2011 was improperly awarded because, the protester contends, NASA did not follow the proper procedures for a non-competitive award. As a result, the protester argues Navarro was improperly placed in a position to hire the protester's employees and obtain its proprietary information. While the protester acknowledges that an incumbent contractor may enjoy certain advantages that do not constitute an OCI, e.g., QinetiQ North America, Inc., B-405008, B-405008.2, July 27, 2011, 2011 CPD ¶ 154 at 12, the protester contends that the bridge contract was improperly awarded and that any incumbent advantages enjoyed by Navarro are not legitimate. As discussed above, however, North Wind did not protest the award of the bridge contract to Navarro. Because the protester did not timely challenge the award of the bridge contract, we do not consider any of the protester's arguments based on the alleged flaws in awarding the bridge contract, separate and apart from its OCI allegations.

categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 5. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR § 9.505(b); CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25.

We review an OCI investigation for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17. 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., supra, at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). The identification of conflicts of interest are fact-specific inquiries that require 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).

Here, North Wind contends that Navarro's performance under the ECO bridge contract created an unequal access to information OCI. Specifically, the protester argues that Navarro's performance of the contract and its hiring of former North Wind and EASI employees gave it access to North Wind's proposal for the prior ECO competition, as well as the following information concerning North Wind's performance of FOSC contract: labor rates, wrap-rate (i.e., labor rates inclusive of direct costs), staffing approach, work plans, schedules, labor resource mix and allocations, project labor estimates and other contract documents. We find that NASA's OCI Inquiry Officer performed an independent review of the allegations, reasonably concluded that Navarro's performance of the ECO bridge contract did not create an OCI, and reasonably concluded that Navarro's proposed mitigation approach would avoid any OCI in the future.

In this regard, the Inquiry Officer interviewed various NASA personnel including individuals who were directly involved with the bridge contract, the ECO source evaluation board, and budgetary and technical administration of the prior contract that was awarded to EASI. See AR, Tab 11, OCI Investigation Files, at 3201-05. The Inquiry Officer also sent a letter, through the CO, to Navarro concerning the OCI allegations, requesting further information from Navarro regarding potential OCIs as well as an explanation of the steps Navarro had taken and will take to

avoid, neutralize, or mitigate any conflicts. AR, Tab 10, OCI Contract Files, at 3117-18.

On January 13, in response to the Inquiry Officer's request, Navarro submitted a letter to NASA, which provided in relevant part:

1. Navarro is NOT in receipt of any written information (whether in writing or verbal), regarding Northwind's labor rates, wrap-rate and staffing approach for the environmental work that Northwind performed at White Sands Test Facility.
2. Navarro is not in possession, nor has it received from a Government employee, any of Northwind's monthly invoices, quarterly or monthly contractor financial management reports for FOSC, or Northwind's wrap rates, labor rates, staffing approach or labor hours for remediation work, proposal and/or staffing strategy for the EASI subcontract and the on-going ECO procurement.
3. Navarro does not have any knowledge of any proprietary rate information of Northwind. . . . Following a standard business practice, Navarro, as part of our normal hiring interview, asked each individual their current salary. However, this is done by individual, not by job classification.
4. While Navarro did hire employees of Northwind and EASI for the current bridge contract, as NASA is well aware, Navarro does not allow any financial project individual to prepare or even participate on competitive proposal cost rate development. . . . our staff that are former employees of Northwind have stated that they had no involvement and no knowledge of the rates proposed in response to the ECO RFP. None of the Northwind or EASI employees were employed by Navarro at the time of proposal submission and they will not be participating in any cost strategy or cost rate preparation in response to a corrective action on this procurement.

* * * * *

6. Navarro did receive examples of the format for SF 533 and the new invoice format preference, but no rate information from any company was given to Navarro as part of this transmission of that information.

AR, Tab 11, OCI Investigation Files, at 3361-62. Navarro also submitted an OCI mitigation plan to NASA, as well as conflict of interest and non-competition agreements with its employees.

As a follow-up to its initial response, Navarro additionally submitted sworn statements regarding the OCI allegations from the former North Wind and EASI employees it had hired. The signed statements provided:

I, _____, hereby affirm that I have not provided directly or indirectly any proprietary information of North Wind, Inc. ("North Wind") to any employee, officer or official of Navarro Research and Engineering, Inc. ("Navarro") and that no one at Navarro has requested any such information. In the hiring process, I did share my salary information with Navarro, but this information is my proprietary information and I have a right to use it to negotiate employment. I also understand that to prevent any potential or perceived organizational conflict of interest, no former employee of North Wind (or Enterprises Advisory Services, Inc. ("EASI")) will participate in any proposal activities related to the Environmental Compliance and Operations ("ECO") procurement. Navarro management has instructed me of this requirement and has not solicited that I participate in any proposal activities.

AR, Tab 26, Navarro Statements, February 2012, 6336-6426.

As part of his OCI investigation, the Inquiry Officer determined the following regarding North Wind's cost data: (1) the data were submitted directly to EASI and not to NASA, since North Wind was one of four subcontractors to EASI on the FOSC effort; (2) upon receipt of the cost information, EASI processed North Wind's costs with its other subcontractors' costs, and reported the cost as a single subcontract line item on its NASA form 533--monthly and quarterly financial management reports; and (3) the reports EASI sent to NASA were reviewed only by NASA personnel to track contract costs and stored on a server in a controlled environment. AR, Tab 11, OCI Investigation Files, at 3203-05. Furthermore, the Inquiry Officer's interviews with NASA personnel and investigation of the NASA form 533 reports led him to conclude that EASI's cost submittals did not report costs that were specific to North Wind, and that EASI's form 533 subcontractor costs did not include labor rates, wrap-rates, or other financially proprietary information of North Wind. Id. at 3203-04.

The Inquiry Officer also concluded the following regarding NASA personnel: (1) there was no evidence that NASA personnel provided EASI's completed monthly and quarterly financial management reports to Navarro or that Navarro had or has access to these reports by way of the bridge contract; (2) there was no evidence that NASA personnel, other than source selection evaluation board members, had access to North Wind's labor rates, wrap-rates, or proposal and/or staffing strategies; and (3) there was no evidence that Navarro solicited or received North Wind's proprietary or source selection information from NASA personnel. Id. at 3204-05.

Based upon this information, and his own independent review of the handling of North Wind's proprietary and source selection information, the Inquiry Officer concluded that there was no evidence that Navarro's performance of the ECO bridge contract enabled it to obtain North Wind's proprietary information. Id. Additionally, in response to North Wind's agency protest, the Inquiry Office noted that an OCI mitigation requirement had been added to Navarro's contract. Id. at 3196.

With regard to the agency's review of the cost data, North Wind argues that anyone familiar with the FOSC effort could derive all of North Wind's highly sensitive labor and pricing data. North Wind, however, fails to identify hard facts that indicate the existence, or potential existence, of a conflict here. North Wind's mere inferences and speculation are insufficient to sustain the protest. Oklahoma State University, B-406865, Sept. 12, 2012, 2012 CPD ¶ __ at 10.

Next, North Wind argues that NASA's OCI review was inadequate as a general matter because it relied on the representations by Navarro in reaching its conclusion that no OCI existed. As our Office has held, an agency may not rely on a contractor's self-assessment of whether an OCI exists, or rely on a contractor's mitigation plan where that plan was not evaluated by the agency. L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 12-13. Here, however, the record shows that NASA did more than merely ask for Navarro's opinion as to whether an OCI existed. As discussed above, the agency conducted an investigation of the potential OCI allegations, reviewed the available information --including Navarro's proposed mitigation approach--and independently concluded that no OCI existed.

North Wind also argues that NASA's OCI review was inadequate because it was not undertaken until after the bridge contract was awarded. The protester cites to a decision by the Court of Federal Claims which expressed doubt as to the effectiveness of OCI mitigation efforts that are undertaken after the discovery of an OCI. See Netstar-1 Gov't Consulting Inc. v. United States, 101 Fed. Cl. 511, 528 (2011). This case is inapposite, however, as the CO here reasonably determined that no OCI existed.

Finally, North Wind complains that Navarro hired former North Wind personnel with direct knowledge of the substance of North Wind's ECO proposal and obtained North Wind's proprietary technical data. As discussed above, the agency concluded that there was no merit to these allegations. AR, Tab 11, OCI Investigation Files, at 3204-05. In light of the former North Wind and EASI attestations, as well as Navarro's bridge contract mitigation plan, and employees signed conflict of interest and non-competition agreements, we find that these

allegations also provide no hard facts that indicate the existence, or potential existence, of a conflict or a basis to question the agency's findings.⁴

In sum, the record shows that the Inquiry Officer conducted a thorough investigation of North Wind's OCI allegations, including the information to which Navarro may have had access and whether that information could have provided an unfair competitive advantage. The Inquiry Officer interviewed NASA employees, researched and reviewed documentation, and requested information from Navarro regarding North Wind's claims. After reviewing all of the information, the Inquiry Officer concluded that Navarro did not have access to North Wind's proprietary information. Furthermore, the Inquiry Officer determined that the former North Wind and EASI employees did not provide any proprietary information to Navarro, and did not and will not provide input to Navarro's proposal team. Thus, the Inquiry Officer concluded that Navarro did not possess an unequal access to information OCI and that, accordingly, there was no reason to exclude Navarro from the competition. While North Wind challenges the manner and extent of investigation, we find nothing unreasonable about NASA's investigation or conclusions.

The protest is denied.

Lynn H. Gibson
General Counsel

⁴ In this regard, after the protest was filed, Navarro provided NASA with signed declarations from the former North Wind and EASI employees it had hired, affirming that each employee: (1) was "firewalled" from the preparation of Navarro's response to the revised RFP; (2) had not been part of or consulted with the Navarro proposal team, or otherwise participated in preparing Navarro's proposal; (3) had not disclosed, directly or indirectly, any proprietary information of North Wind, Inc., its subcontractors, or EASI, to the Navarro team preparing the proposal; and (4) will continue to observe the Navarro OCI mitigation plan and not disclose information from his or her former employer. AR, Tab 27, Navarro Statements, July 2012, at 6384-6426.