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Decision

Matter of: SeKON Enterprise, Inc.; Signature Consulting Group

File: B-405921; B-405921.2

Date: January 17, 2012

William B. Barton, Esq., Byran R. King., Esq, and John R. Tolle, Esq., Barton, Baker, Thomas & Tolle, LLP, for SeKON Enterprise, Inc.; and Alexander J. Brittin, Esq., Brittin Law Group, P.L.L.C., and Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for Signature Consulting Group, the protesters.

Joseph P. Hornyak, Esq., and Megan M. Jeschke, Esq., Holland & Knight LLP, for Tantus Technologies, Inc., the intervenor.

Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where an agency misled the protester in discussions to increase its proposed staffing for the performance of a cost-plus-fixed-fee task order without consideration of the protester's technical approach for performing the work.
 2. Protest that an awardee had a potential organizational conflict of interest is denied where the contracting officer reasonably investigated the awardee's relationship with another firm and found that it would not affect the awardee's ability to render impartial advice to the agency as part of the awardee's performance of a government contract.
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DECISION

SeKON Enterprise, Inc., of Herndon, Virginia, and Signature Consulting Group, of Windsor Hill, Maryland, protest the award of a contract to Tantus Technologies, Inc., of Washington, D.C., under request for proposals (RFP) No. RFP-CMS-2011-8a-0020, issued by the Department of Health & Human Services, Centers for Medicare & Medicaid Services (CMS), for technical and program management support services for the agency's Financial Management Systems Group.

We sustain the protests in part and deny them in part.

BACKGROUND

The RFP, issued as a section 8(a) set-aside, provided for the award of a single indefinite-delivery/indefinite-quantity (ID/IQ) contract for technical and program management support services for a base year and 4 option years.¹ Offerors were advised that the agency would issue task orders to the contractor on both a fixed price and cost reimbursement basis. The RFP also provided that concurrent with the award of the contract the agency would issue two cost-plus-fixed-fee (CPFF) task orders to support the agency's Healthcare Integrated General Ledger Accounting System (HIGLAS) and Health Information Technology for Economic and Clinical Health Solutions system for 1 year. RFP § B.2, at 10, § M.1, at 117.

Offerors were informed that award of the contract would be on a best value basis, considering technical merit and cost where technical evaluation factors combined were approximately equal to cost. The RFP requested proposals for the performance of the two CPFF task orders and informed offerors that the technical proposals would be evaluated under the following factors and associated weighting:

	Contract	Task Order 1	Task Order 2	Max. Points
Technical Abilities and System Engineering		500	500	1,000
Managerial & Operational Approach		500	400	900
Knowledge of CMS Processes, HIPAA and Security		400	400	800
Past Performance	Pass/Fail			
Oral Presentation/Case Study	Pass/Fail			
OVERALL		1,400	1,300	2,700

RFP § M.3, at 122.

Subfactors (and associated points) were identified under each of the three technical factors. For example, under the managerial/operational factor, offerors were informed that the agency would evaluate the offeror's proposed labor mix, including key as well as non-key staff, for the performance of the task orders. See id. at 127.

¹ The RFP stated that the value of orders placed over the 5-year contract term would be a minimum of \$6 million and a maximum of \$50 million (inclusive of all costs and fees). RFP § B.4, at 10.

In this regard, offerors were instructed to provide an organization chart for their proposed personnel (including general/office staff managing the contract) that, for each task order, showed the quantity of full time equivalents (FTEs) for each labor function. See RFP § L.11, at 102-03. Offerors were also instructed to provide a work-breakdown structure addressing tasks required for each task order.

With respect to the oral presentation, the RFP provided that the purpose of the presentation was to highlight and augment the offerors' technical proposals, to present business (cost) proposals, and to conduct discussions. RFP § M.2, at 118. Offerors were informed that the agency would invite those offerors with the strongest combined technical and business proposals to provide oral presentations. Id. at 119.

The agency received proposals from five offerors, which were evaluated by the agency's technical evaluation panel (TEP). The proposals of Tantus, SeKON, and Signature were assigned the following point scores out of a maximum point score of 2,400:²

	Task Order 1 (1,400 pts.)	Task Order 2 (1,000 pts.)	Overall (2,400 pts.)
Tantus	1,131	891	2,022
SeKON	1,275	792	2,067
Signature	1,278	905	2,183

Agency Report (AR), Tab 23, Consensus Evaluation, at 2-4.³

All five offerors were invited to make oral presentations, after which the TEP reconsidered its ratings of the offerors' initial technical proposals. Contracting Officer's Statement at 5. Tantus's overall technical score increased to 2,288 points, and SeKON's and Signature's overall technical scores decreased to, respectively, 1,954 and 2,135 points. Id.; see also AR, Tab 23, Consensus Evaluation, at 5.

The agency also evaluated the offerors' business (cost) proposals, focusing primarily on a comparison of the offerors' proposed hours and FTEs with the

² In its evaluation of proposals, the evaluators changed the maximum available of points for task order 2 from 1,300 to 1,000 points. As a result, the maximum number of points here (2,400) does not match the maximum number of points set forth in the RFP (2,700). RFP § M.3 at 122. This has not been challenged in these protests.

³ The TEP's consensus evaluation report contains both the initial and revised evaluation scoring for each offeror.

agency's independent government cost estimate (IGCE) for the two task orders. The IGCE was \$8,386,329, which consisted of \$7,474,158 for task order 1 (based upon 21 FTEs), and \$912,171 for task order 2 (4 FTEs). See AR, Tab 42, Selection Determination,

at 4. With respect to Signature's business proposal for task order 1, for which Signature proposed [deleted] FTEs, the agency concluded that, although the firm's labor mix appeared reasonable, its proposed labor hours were understated. AR, Tab 31, Signature Business Proposal Evaluation, at 2.

CMS established a competitive range that included the proposals of Tantus, SeKON, and Signature, and conducted technical and cost discussions with these offerors. AR, Tab 42, Selection Determination, at 8. The agency informed Signature in discussions that its proposal of [deleted] FTEs for task order 1 appeared understated. Specifically, CMS informed Signature:

Relative to the Independent Government Cost Estimate, the Signature team apparently under-proposed in the categories of [deleted]. These positions can be TBD at this time, however we require the work requirements to be considered and budget allocated.

See AR, Tab 40, Evaluation of Signature Final Revised Proposal, at 3-4. In response to this, Signature increased its proposed FTEs for task order 1 to [deleted]. FTEs, increasing its proposed cost for this task order from \$[deleted] to \$[deleted]. See Contracting Officer's Statement at 7.

Revised proposals were received and evaluated. The awardee's and protesters' technical scores did not change after discussions. At the same time that the TEP was evaluating the offerors' responses to discussions, the contracting officer assessed the realism of the offerors' proposed costs, by comparing their overall FTEs and costs to the IGCE. See AR, Tab 42, Selection Decision, at 9. In addition, CMS reviewed the firms' proposed labor rates and indirect costs. See AR, Tab 37, Cost-Price Audit Report; Tab 38, Cost Realism Analysis. With respect to the awardee's proposed labor rates, the agency found that Tantus had based its rates on current employees that Tantus described as having similar skills and backgrounds. In response to the agency's request, Tantus provided a payroll journal and a salary survey, which the agency found supported the awardee's proposed rates. AR, Tab 37, Cost-Price Audit Report at 8.

The parties' final evaluation scores and evaluated costs were as follows:

	Tantus	SeKON	Signature
Technical Score	2,288	1,954	2,135
Evaluated Cost	\$5,080,023	[\$deleted]	[\$deleted]

AR, Tab 42, Selection Decision, at 8.

Because Tantus was found to have the highest technically rated and lowest cost proposal, the contracting officer selected that firm for award of the contract and issuance of the task orders. AR, Tab 42, Selection Decision, at 9-10. Following debriefings, SeKON and Signature protested to our Office.

DISCUSSION

SeKON and Signature challenge numerous aspects of CMS's technical and cost evaluation. In addition, Signature contends that the agency misled it in discussions to increase its proposed FTEs for task order 1, which resulted in the firm having a higher evaluated cost than Tantus. SeKON also argues that Tantus has an organizational conflict of interest (OCI).

As explained below, we agree with Signature that CMS misled the firm in discussions, and sustain its protest on this basis. We have reviewed all of SeKON's contentions, including that Tantus has an OCI, and find no basis to question the agency's determination that Tantus does not have an OCI or to uphold any of SeKON's other protest issues.

Meaningful Discussions

Signature contends that the agency misled the firm into increasing its FTEs, which resulted in the firm's evaluated costs being higher than Tantus's. Signature Protest at 14. Specifically, Signature complains that in directing the firm to increase its FTEs for task order 1, CMS ignored the firm's evaluated technical approach (which relied upon the use a subcontractor that was already performing the task order 1 work for CMS). Signature contends that, instead, CMS mechanically applied an unstated staffing level in the agency's IGCE. See Signature Comments at 14-15. In this regard, Signature states that the agency informed it during discussions that it needed to increase its FTEs because the agency "had funding for additional positions under Task Order 1 and wanted to obligate these funds." See id. at 14; see also Declaration of Signature President ¶ 12. The protester also contends that the contracting officer informed Signature at its debriefing that CMS requested the increased FTEs for task order 1 due to "budgeting concerns;" Signature states that the contracting officer represented that he did not know what the budget would be

for the next year, and increasing the FTEs would ensure the agency kept the necessary funding. Signature Protest at 18.

CMS denies that it requested that Signature increase its FTEs for task order 1 because of budget considerations. See Legal Memorandum at 15. CMS states that its discussions with Signature reflected the agency's concern that Signature had proposed less FTEs than the agency estimated as necessary in its IGCE. The agency argues that if Signature had not proposed additional FTEs, it would have adjusted the firm's costs in the agency's cost realism evaluation. Id.

It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See Federal Acquisition Regulation (FAR) § 15.306(d); The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 49.

Here, we find that Signature was misled during discussions. As explained below and contrary to CMS's arguments, the agency's direction to Signature during discussions--to increase its FTEs for task order 1--was not based upon an evaluation of the protester's proposed approach to performing the task order.⁴

Consistent with the RFP's instructions, Signature's technical proposal identified its approach and staffing allocation (approximately [deleted] FTEs) for performing task order 1. See, e.g., AR, Tab 65a, Signature Technical Proposal at 1, 4-6, 14-16. There is no document in the contemporaneous evaluation record showing that the agency had concerns about the level of Signature's proposed staffing for task order 1. Rather, the agency assigned 461 of 500 possible points to Signature's proposal under the managerial and operational approach factor (under which the RFP provided for the evaluation of proposed staffing). In addition, the agency identified eight strengths in the proposal, including that the protester was currently performing the task order 1 work. The one weakness identified was that Signature's [deleted] was offered for only [deleted] of an FTE, rather than [deleted] FTE. See AR, Tab 21, TEP Score Sheet for Signature, at 3. Also, the agency's documentation of Signature's oral presentation does not indicate any concern by the technical evaluators with Signature's staffing level for task order 1. See AR, Tab 25, Feedback on Signature Case Presentation.

⁴ We disagree with CMS's suggestion that during discussions with Signature the agency reasonably informed the firm that it could explain the basis of its proposed FTEs to perform task order 1. The agency's discussions with Signature did not ask the firm for any explanation of its proposed FTEs, but rather specifically directed the firm to increase its FTEs for specific labor categories. See AR, Tab 40, Evaluation of Signature Final Revised Proposal, at 3-4.

The agency's failure to assess the merits of Signature's approach to performing task order 1 is corroborated by the fact that, after the adjustment, no change was made to Signature's technical score for performing task order 1, despite the firm's 40 percent increase in FTEs.

Moreover, the contemporaneous record supports the protester's contention that CMS's direction to Signature to increase its proposed number of FTEs for task order 1 was based upon budget concerns and not upon an evaluation of the firm's technical approach. For example, in its direction to Signature to increase its FTEs for task order 1, the agency stated that the additional positions could be determined later but that the agency "require[d] the work requirements to be considered and budget allocated." See AR, Tab 40, Evaluation of Signature Final Revised Proposal, at 3-4.

We also find no merit to the agency's contention that, even without discussions, it could have simply increased Signature's proposed FTEs for task order 1 during the cost realism evaluation. Where, as here, an agency evaluates proposals for the award of a cost-reimbursement contract, the agency is required to perform a cost realism analysis to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under that offeror's technical approach, assuming reasonable economy and efficiency. See FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); Systems Tech., Inc., B-404985, B-404985.2, July 20, 2011, 2011 CPD ¶ 170 at 5. The record here is devoid of any evidence that these cost realism adjustments were based on an assessment of the offerors' likely costs of performance considering their proposed approaches to performing the task order work. That is, the record does not show that, for any of the competitive range offerors, CMS assessed the proposed hours and labor mix in light of the firms' individual approaches to performing the task order work. Absent such a reasoned assessment, the agency could not simply increase FTEs to an unstated staffing level.

In sum, the record shows that the agency's direction to Signature to increase its proposed FTEs for performance of task order 1 was not based upon a reasonable assessment of the realism of Signature's proposal. CMS has identified no reasonable basis for its direction to Signature to increase its FTEs by approximately 40 percent, thus increasing Signature's proposed costs for task order 1 by \$[deleted]. Absent this adjustment, Signature's overall costs would have been lower than the awardee's, which would have required the agency to conduct a cost/technical tradeoff analysis to determine which firm's proposal represented the best value to the government. Under these circumstances, we find that CMS prejudicially misled Signature during discussions by directing the firm to increase its FTEs for the performance of task order 1.

Conflict of Interest

SeKON contends--based on SeKON's review of Tantus's website--that Tantus has an organizational conflict of interest because Tantus will be directly responsible for performing oversight activities over the HIGLAS prime contractor, IBM Corporation. See SeKON Protest at 11. SeKON reaches this conclusion because Tantus's website claims that it has, in the past, partnered with IBM and several other major contractors. Given this relationship, SeKON contends that Tantus would be unable, or potentially unable, to render impartial assistance or advice in performing the contract work.

The 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. In making this determination, the 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; CACI, Inc.-Fed., B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 at 9.

The FAR recognizes that conflicts may arise in factual situations not expressly described in the relevant FAR sections, and advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. Situations in which an OCI may arise include, as relevant here, where a firm's ability to render impartial advice would be undermined by the firm's competing interests. FAR §§ 2.101, 9.505-3; Enterprise Information Services, Inc., B-405152, et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 8.

In reviewing bid protests that challenge an agency's conflict of interest 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). To demonstrate that an agency's OCI determination is arbitrary or capricious, 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. Turner Constr. Co., Inc. v. United States, No. 2010-5146, slip. op. at 17-18 (Fed. Cir., July 14, 2011); PAI

Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). 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.” Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer’s OCI determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the CO’s investigation and, where an agency has given meaningful consideration to whether an OCI exists, will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See CACI, Inc.-Fed., *supra*, at 9; CIGNA Gov’t Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

The contracting officer states that, in response to SeKON’s protest, he reviewed Tantus’s website, noting that Tantus identified a number of large firms, including IBM, Oracle Corporation, Booz Allen Hamilton, and Deloitte LLP, with which it had allegedly partnered at one time or another. The contracting officer noted that these firms are large companies, and that it was unlikely that Tantus had close and on-going relationships (or “teaming relationships,” in the contracting officer’s words) with all of these firms. AR, Tab 62, Contracting Officer’s Conflict of Interest Memorandum, Nov. 10, 2011, at 3. Rather, he considered Tantus’s references to business relationships with these companies to be “marketing fluff” and “puffery.” Id.

With respect to SeKON’s more specific allegation that IBM and Tantus have teamed together on another government contract, the contracting officer states that he investigated Tantus’s relationship with IBM and found that Tantus did not have a teaming arrangement with IBM. Rather, the contracting officer found that the only connection between Tantus and IBM was under a contract with the Federal Aviation Administration, under which Tantus was the prime contractor. He found that one of Tantus’s subcontractors under that contract had used two IBM employees in performance of its subcontract. The contracting officer determined that not only was there no direct relationship between Tantus and IBM, but that the two IBM employees provided under the second-tier subcontract were not critical to the contract work. Id. at 4-5. Based upon this review, the contracting officer determined that the relationship between Tantus and IBM was too attenuated to raise an actual or potential impaired objectivity OCI. Id. at 6.

We find that the contracting officer conducted a reasonable investigation of SeKON’s OCI allegations, giving meaningful consideration to whether the awardee’s alleged relationship with IBM created an impaired objectivity OCI. In addition, despite the fact that SeKON’s counsel was provided a copy of the contracting officer’s OCI review in the agency report, SeKON has not alleged or established any of the “hard facts” required before our Office would overturn, or second-guess, the contracting officer’s conclusions. See PAI Corp. v. United

States, supra. Although SeKON disagrees with the contracting officer's judgment in this regard, it has not shown that his judgment was unreasonable.

CONCLUSION AND RECOMMENDATION

In conclusion, we sustain Signature's protest that CMS misled the firm by directing it to significantly increase its proposed FTEs for performance of task order 1. CMS's direction to increase the proposed number of FTEs was unreasonable, because it was not based upon a reasonable cost realism assessment. That is, although the agency considered some aspects of the offerors' proposed costs, such as labor rates and indirect cost rates, it ignored the offerors' proposed labor hours and mix to accomplish the work, despite the RFP's provision for such consideration. The failure to consider the offerors' labor mix to accomplish the task order work is a fundamental flaw that calls into question the agency's judgment as to the realism of the offerors' proposed costs.⁵

We recommend that CMS properly assess the realism of the offerors' proposed costs, re-open discussions, obtain and evaluate revised proposals, and make a new source selection decision. We further recommend that the agency reimburse Signature the costs of filing and pursuing its protests, including reasonable attorneys' fees. 4 C.F.R. §21.8(d)(1) (2011). Signature's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

We sustain the protests in part and deny them in part.

Lynn H. Gibson
General Counsel

⁵ We recognize that both Signature and SeKON challenged other aspects of the agency's cost realism evaluation, such as the realism of Tantus' lower overall costs and average labor rate. None of the protesters' challenges, however, reach the essence of the fundamental flaw here. As a result, their cost realism challenges are denied.