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Decision

Matter of: McTech Corporation

File: B-406100; B-406100.2

Date: February 8, 2012

Hilary S. Cairnie, Esq., Udyogi A. Hangawatte, Esq., and Andrene Smith, Esq., Baker & Hostetler LLP, for the protester.

Charles L. Webster III, Esq., Department of the Army, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably concluded that the protester had an organizational conflict of interest and properly eliminated it from the competition under a solicitation for the award of a construction contract, where the agency found that the close relationship between the protester and the designer of the construction project constituted an apparent conflict of interest that created the appearance of an unfair competitive advantage.

2. Protester's contention that information not considered by the contracting officer in the initial determination that the protester had an organizational conflict of interest (OCI) cannot be considered by GAO in resolving a protest challenging this determination is denied because an agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and GAO will consider such information in determining whether the contracting officer's OCI determination is reasonable.

DECISION

McTech Corporation, of Cleveland, Ohio, protests its exclusion from the competition under request for proposals (RFP) No. W9126G-11-R-0128, issued by the Department of the Army, U.S. Army Corps of Engineers, for the construction of dormitories, a conference center, and related improvements at the Department of Homeland Security's (DHS) Training Center, located in Harpers Ferry, West Virginia. The agency excluded McTech from the competition based on the contracting officer's (CO) determination that McTech had an organizational conflict of interest (OCI). McTech contends that the CO's determination was unreasonable.

We deny the protest.

BACKGROUND

The design of the dormitories and conference center at the DHS Training Center was completed under a contract awarded by DHS, U.S. Customs and Border Protection (CBP), to BrooAlexa Design Joint Venture LLC.¹ Agency Report (AR), Tab 26, DHS/CBP's Contract No. HSBP1010C02392. Mr. X was identified as the managing member of BrooAlexa Design Joint Venture LLC, as well as the project manager for the DHS Training Center design.² AR, Tab 21, Articles of Organization for BrooAlexa Design Joint Venture LLC (Sept. 9, 2009) at 2; Tab 26B, BrooAlexa LLC Letter to CBP (Mar. 10, 2010).

The RFP in question here, for the construction at the DHS Training Center designed by BrooAlexa Design Joint Venture LLC, was issued on August 29, 2011, by U.S. Army Corps of Engineers, Fort Worth District. On September 14, the agency conducted a site visit.

On September 27, the contract specialist for this procurement received an anonymous phone call, during which the unidentified caller alleged that McTech was closely linked to the designer of record, BrooAlexa Design Joint Venture LLC. Hearing Transcript (Tr.) at 337-38, 366.³ The contract specialist reviewed the sign-in sheets for the site visit, saw that McTech had attended the site visit, and surmised that McTech would probably submit a proposal in response to the solicitation. Tr. at 371-72. The contract specialist relayed the information regarding the telephone call from the anonymous source to the CO.

At the direction of the CO, the contract specialist searched the Central Contract Registry (CCR) database for documentation concerning McTech.⁴ Tr. at 338-39. The contract specialist discovered that McTech had entered into a series of six joint

¹ The award of the design contract to BrooAlexa Design Joint Venture was in October 2009, at an initial cost of approximately \$2,750,000.

² For privacy purposes, we decline to identify individuals by name.

³ Our Office conducted a hearing on January 17 and 18, 2012, to further develop certain protest issues, at which the CO, the contract specialist, and McTech's Director of Operations provided testimony.

⁴ CCR is the common source of vendor data for the government. Federal Acquisition Regulation (FAR) § 4.1100(b).

ventures with BrooAlexa LLC⁵, with each joint venture having a different DUNS number and CAGE code. Tr. at 339. According to the CCR database, Mr. X was identified as the primary point of contact for five of the six joint ventures, and all six of the joint ventures were identified in the CCR as “active.” AR, Tabs 8-13, CCR Results, BrooAlexa LLC/McTech Joint Ventures.

On September 29, the CO notified McTech that “[t]he question of an organizational conflict of interest has arisen” regarding this solicitation. AR, Tab 5, Agency Letter to McTech (Sept. 29, 2011), at 1. The letter listed the six joint venture agreements between McTech and “BrooAlexa,” stated that “BrooAlexa is under contract with the Government to provide the Scope of Work and is intimately involved with this solicitation process,” and cited FAR § 9.5 as providing guidance on identification of an OCI.⁶ Id. The agency letter closed by asking McTech to respond and include backup documentation, “[i]n order to ensure that no OCI exists.” Id. at 2.

Also on September 29, a potential offeror forwarded to the agency a package that it had received from an anonymous source, which contained various documents, such as news articles, database reports, and incorporation documents regarding McTech, the BrooAlexa/McTech Joint Ventures, BrooAlexa LLC, and the BrooAlexa Design Joint Venture LLC.⁷ AR, Tab 27B, Information Packet From An Anonymous Source. The information submitted showed, among other things, the corporate organization of BrooAlexa LLC and the BrooAlexa-McTech Joint Ventures, as well as BrooAlexa LLC’s exclusive management and control of BrooAlexa Design Joint Venture LLC. Id. at 21 (Articles of Organization of BrooAlexa Design Joint Venture LLC at 2). In this regard, this document indicated that BrooAlexa Design Joint Venture LLC would be managed by “[Mr. X], on behalf of BrooAlexa LLC, managing member,” and was signed by “[Mr. X] for BrooAlexa LLC Managing Member.” Id. The information also showed that the BrooAlexa LLC and BrooAlexa Design Joint Venture LLC had the same address in Dunbar, West Virginia. On September 29, the CO pulled additional documentation on McTech and BrooAlexa from various internet databases. AR, Tabs 16, 22, 24, and 25.

On October 5, McTech provided a response to the agency in which it stated that:

BrooAlexa LLC, with whom McTECH is a joint venture partner, is a separate legal entity from BrooAlexa Design Joint Venture LLC, with

⁵ As will be explained in full below, BrooAlexa Design Joint Venture LLC and BrooAlexa LLC are separate legal entities, although the CO reasonably found that they are affiliated.

⁶ The agency letter simply stated BrooAlexa, and made no distinctions between BrooAlexa Design Joint Venture LLC and BrooAlexa LLC.

⁷ Various handwritten editorial notations were on these documents.

whom McTech does not have a joint venture or other contractual interest.

AR, Tab 6, McTech Letter to Agency (Oct. 5, 2011) at 1. McTech stated that the two firms offer different services, with BrooAlexa LLC focusing on construction, masonry, and manufacturing work, and BrooAlexa Design Joint Venture LLC specializing in design, architecture and planning. McTech also advised that it had no plans to submit a proposal as a team, or joint venture, with BrooAlexa LLC or BrooAlexa Design Joint Venture LLC for this construction project. Id. at 1-2. McTech went on to explain that its joint venture agreements with BrooAlexa LLC were focused on bidding on a single government contract with the National Aeronautics and Space Administration.⁸ Id. at 1. McTech provided with this letter one of the joint venture agreements, which included the following sentence:

WHEREAS, [BrooAlexa LLC] and MCTECH have entered in to a SBA [Small Business Association] approved Mentor Protégé Agreement;

Id., attach 1, Joint Venture Agreement Between BrooAlexa LLC and McTech (Apr. 8, 2009), at 1. This joint venture agreement was signed by Mr. X, on behalf of BrooAlexa LLC. Id.

On October 18, the agency received proposals, including one from McTech, in response to the RFP. On October 25, the CO notified McTech that it was excluded from the competition under the RFP because the CO had determined that there existed an OCI, which could not be effectively mitigated due to the following:

Your firm has on ongoing partnership with an entity that served as the managing partner of the Joint Venture which designed [the DHS Training Center work covered by this RFP]. The fact that McTech has no existing or past contractual relationship with BrooAlexa Design Joint Venture LLC is not controlling. As reflected in public documents, BrooAlexa LLC and BrooAlexa Design Joint Venture LLC shared corporate offices in the recent past and are managed by the same principal.

AR, Tab 7, Agency Letter to McTech (Oct. 25, 2011) at 2. This letter discussed in detail certain relationships between the BrooAlexa entities and the McTech-BrooAlexa joint ventures, noting Mr. X's involvement. Id. at 1-2. This protest followed.

DISCUSSION

⁸ McTech also noted that none of the joint ventures received any contract awards. AR, Tab 6, McTech Letter to Agency (Oct. 5, 2011) at 1.

McTech maintains that the agency's decision to eliminate it from the competition because of an OCI is unreasonable, because the OCI determination is speculative and the agency lacks any evidence that nonpublic information has passed from BrooAlexa Design Joint Venture to McTech. According to McTech, the CO "did not make any assessment of how likely it was that nonpublic information was actually passed or could have been passed between the two companies." McTech's Hearing Comments at 7.

Appended to McTech's protest of its elimination from the competition was the Mentor-Protégé Agreement between BrooAlexa LLC (Protégé) and McTech (Mentor) approved by the SBA. Protest, attach. 5, Mentor-Protégé Agreement between BrooAlexa LLC and McTech Corp. (Sept. 24, 2008). Under this agreement, McTech agreed to assist and provide guidance to BrooAlexa LLC in such areas as contracting assistance, where "McTech will offer the opportunity for BrooAlexa to participate in the development and review of McTech's government proposals." Id. at 3. This agreement also stated:

McTech can provide training for BrooAlexa personnel at current federal project sites. Currently, the best opportunity for construction subcontracts will begin with the third quarter when the weather breaks at McTech's project in Harpers Ferry, WV.

Id.⁹ Mr. X signed the Mentor-Protégé Agreement on behalf of BrooAlexa LLC. Id. at 5.

The FAR requires that contracting officers avoid, neutralize or mitigate potential significant OCIs 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 FAR identifies general rules and cites examples of types of OCIs that may arise, and ways to avoid, neutralize or mitigate those OCIs. FAR §§ 9.505; 9.508. The general rules and examples set forth in the FAR are not intended to be all-inclusive, and the FAR recognizes that "[c]onflicts may arise in situations not expressly covered" in FAR Part 9. FAR § 9.505; see Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 8. Contracting officers are to exercise "common sense,

⁹ McTech has an ongoing multiphased contract awarded in 2008 by CBP at the Harpers Ferry site under which BrooAlexa LLC had received a subcontract. Tr. at 538-39, 575.

good judgment, and sound discretion” in assessing whether a significant OCI exists and whether it can be mitigated. FAR § 9.505.

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, 645 F.3d 1377, 1387 (Fed. Cir. 2011) (Fed. Cir. 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 CIGNA Gov’t Servs., LLC, B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

The CO concluded that an OCI existed based on McTech’s relationships with BrooAlexa LLC, which she reasonably determined was an affiliate of BrooAlexa Design Joint Venture LLC, the designer of the DHS Training Center construction project. In our view, the record strongly supports the CO’s conclusion that these entities are affiliated, given their shared address and BrooAlexa LLC’s management and control of the BrooAlexa Design Joint Venture LLC. For example, the CO noted that Mr. X, the project manager for the design, submitted documents to CBP regarding the design for the project in question here, on the letterhead of BrooAlexa LLC. Agency Hearing Comments at 7-8; see AR, Tab 26B, BrooAlexa LLC Letter to CBP (Mar. 10, 2010).

Moving from the reasonable conclusion that BrooAlexa LLC and BrooAlexa Design Joint Venture LLC are affiliated, the CO then reviewed the six active joint ventures of McTech and BrooAlexa LLC, and the SBA-approved mentor-protégé agreement between these firms. The project manager for BrooAlexa Design Joint Venture LLC responsible for the design of this project (Mr. X) was the primary contact listed for five of the six joint ventures, which he signed for BrooAlexa LLC. Mr. X also signed the mentor-protégé agreement on behalf of BrooAlexa LLC. As indicated above and as discussed by the CO at the hearing, the mentor-protégé agreement is still active and provides for sharing of information between McTech and BrooAlexa. Tr. at 59, 556. As stated by the CO, the mentor-protégé agreement “really solidified the

relationship between the two parties that it is an active participation, because in order to maintain that mentor/protégé agreement, they have to comply with certain guidelines that are set forth by the SBA.” Tr. at 60. The agency concludes that “[t]he undeniably close alignment of the parties (including an express agreement between McTech and BrooAlexa LLC that the parties would assist each other in the preparation of their respective proposals)” fully supported the CO’s determination that a significant OCI existed. Agency Hearing Comments at 14. Based on our review, we find that the CO conducted a reasonable investigation in determining that McTech’s relationship with the designer and its affiliates indicated the existence or potential existence of an OCI, and that this determination was based on “hard facts.”

McTech nevertheless argues that some of the evidence, for example, the mentor-protégé agreement, was not considered by the CO when she made her initial OCI determination and, therefore, should not now be considered by our Office in assessing of the reasonableness of the CO’s judgment. McTech’s Hearing Comments at 9 n.1. However, an agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and we will consider such information in determining whether the CO’s OCI determination is reasonable. See Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 6 n.3; see Turner Constr. Co., Inc. v. United States, 645 F.3d at 1386-87 (GAO, in resolving a protest, should consider a CO’s post-protest investigation and analysis of an OCI).

Finally, the protester denies that it received any information pertaining to the design from BrooAlexa LLC or BrooAlexa Design Joint Venture LLC, and that any information that could have been obtained would not have provided it with a competitive advantage because the specifications and drawings were published in the solicitation, and have been modified numerous times. Tr. at 410-15. As noted by the CO, however, the designer of the project has much more competitively useful information than the design itself and was responsible for such matters as answering specific design questions during the course of the project. Tr. at 95-97.

We have recognized that agencies may reasonably conclude that a contractor’s preparation of specifications for a contract gives that contractor an inherent advantage sufficient to warrant exclusion from the competition. See Lucent Techs. World Servs. Inc., supra, at 8; Basile, Baumann, Prost & Assocs., Inc., B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15 at 4-5. Indeed, as noted by the agency, FAR § 36.209 provides:

No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the head of the agency or authorized representative.

Our Office has stated that this “prohibition is obviously intended to prevent the apparent competitive advantage in seeking a construction contract that would flow to an [architect-engineer] firm (or its affiliates) that has prepared the specifications.” Lawlor Corp.--Recon., B-241945.2, Mar. 28, 1991, 91-1 CPD ¶ 335 at 2-3. Given the inherent competitive advantage of a designer in seeking a construction contract, we find reasonable the CO’s determination that McTech’s close relationship to the designer of the construction project here created the appearance of an unfair advantage that could compromise the integrity of the procurement process. Lucent Techs. World Servs. Inc., *supra*, at 8. In this regard, a CO may disqualify a firm from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on hard facts, and not mere innuendo or suspicion. Kellogg Brown & Root Servs., Inc., B-400787.2, B-400861, Feb. 23, 2009, 2009 CPD ¶ 54 at 8.

The protest is denied.

Lynn H. Gibson
General Counsel