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Decision

Matter of: Health Innovation and Technology Venture

File: B-411608.2

Date: September 14, 2015

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Services, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency did not meaningfully consider whether task orders held by awardee's subcontractor created an impaired objectivity organizational conflict of interest is denied where the protester failed to present hard facts indicating the existence of a conflict.
 2. Protest challenging agency's cost realism evaluation is denied where agency's cost evaluation errors did not result in competitive prejudice to the protester.
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DECISION

Health Innovation and Technology Venture (HIT), of Arlington, Virginia, protests the issuance of a task order to Edaptive Systems LLC, of Owings Mills, Maryland, under request for proposals (RFP) No. HHSM-500-2015-XXXXX, issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS). The RFP sought comprehensive testing strategy and testing support services for information technology (IT) systems. The protester argues that the agency erred in finding that the awardee did not have an organizational conflict of interest (OCI) and in evaluating the awardee's proposal.

We deny the protest.

BACKGROUND

CMS issued the RFP on January 9, 2015, under the National Institutes of Health Information Technology Acquisition and Assessment Center (NITAAC),¹ Chief Information Officer-Solutions and Partners 3 (CIO-SP3) GWAC for IT solutions and services.² Contracting Officer's (CO's) Statement at 2. The RFP, which was restricted to small businesses, contemplated the issuance of a cost-plus-award-fee task order with a 1-year base period and four 1-year options. Id.; RFP at 1-2. The RFP sought contractor assistance with the testing of various IT systems that are used by HHS to operate a health insurance marketplace pursuant to the Affordable Care Act. CO's Statement at 1.

The RFP provided that award would be made in accordance with section 16.505 of the Federal Acquisition Regulation (FAR), using a best-value trade off between cost and four non-cost evaluation factors, with a fifth evaluation factor--Section 508 compliance--rated on a pass/fail basis.³ AR, Tab 2.D.3, Evaluation Factors, at 1. The non-cost evaluation factors considered in the tradeoff were, in descending order of importance: (1) technical approach and understanding; (2) personnel and management; (3) project organization and management plan; and (4) corporate experience and past performance.⁴ Id. The RFP further provided that the non-cost

¹ NITAAC is a federal Executive Agent housed within HHS that is authorized by the Office of Management and Budget to administer three government-wide acquisition contracts (GWACs) for IT procurement, including CIO-SP3. See <https://nitaac.nih.gov/nitaac/> (last visited Sept. 8, 2015). The GWACs administered by NITAAC can be used by any federal civilian or Department of Defense agency to acquire IT products, services, and solutions. Id.

² The estimated value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1).

³ Section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires that agencies' electronic and information technology (EIT) be accessible to people with disabilities. See 29 U.S.C. § 794d. Under the RFP, offerors were directed to submit documentation demonstrating their ability to comply with established EIT accessibility standards. AR, Tab 2.D.3, Evaluation Factors, at 5. CMS assigned all offerors a rating of pass under this evaluation factor. AR, Tab 7, Source Selection Decision (SSD), at 4.

⁴ The RFP provided that the agency would evaluate offerors' technical proposals for strengths, weaknesses, deficiencies, and risks. AR, Tab 2.D.3, Evaluation Factors, at 1. The possible adjectival ratings for the non-cost evaluation factors (other than 508 compliance) were excellent, highly acceptable, acceptable, or not acceptable. Id.

evaluation factors, when combined, were more important than cost, but that cost would become more important as proposals became more equal in merit under the non-cost factors. Id. at 5. With respect to the evaluation of cost, the RFP provided that CMS would conduct a cost realism analysis of offerors' business proposals in accordance with FAR § 15.404-1(d). Id. at 5.

As relevant here, the RFP provided that the anticipated task order could involve significant potential OCIs, including impaired objectivity OCIs resulting from an offeror's other contracts with the government. RFP at 47. In this regard, the solicitation provided that the CO believed an impaired objectivity OCI would exist if the awardee or one of its subcontractors also held a contract for the "infrastructure, design, development, or operation and maintenance" of one of the IT systems that comprised the health insurance marketplace. Id. In order to facilitate the agency's evaluation of possible OCIs, the RFP directed offerors to submit a Business Ethics, OCI, and Compliance (Ethics/OCI) proposal. As part of their Ethics/OCI proposals, offerors and their subcontractors were to identify any actual, perceived, or potential OCIs that could result from their receipt of the task order, and to provide a proposed mitigation plan for any OCI identified. AR, Tab 2.D.2, Instructions to Offerors, at 8-9; AR, Tab 2.D.4, Ethics/OCI Compliance Form, at 2-3.

CMS received timely proposals from six offerors, including those from HIT and Edaptive. CO's Statement at 2-3. With respect to HIT's proposal, the technical evaluation panel (TEP) rated it as acceptable under all of the non-cost evaluation factors and found that it offered two strengths under the technical approach and understanding factor and one strength under the personnel and management factor. Tab, 5.A.2, HIT Technical Evaluation, at 1-2. Under its cost realism evaluation, CMS made no adjustments to HIT's proposed costs, resulting in a proposed and evaluated total cost of \$78,445,373. AR, Tab 7, SSD, at 6.

With regard to Edaptive's proposal, CMS rated it as highly acceptable under the personnel and management factor and acceptable under the other non-cost evaluation factors. AR, Tab 5.A.3, Edaptive Technical Evaluation, at 1. The TEP evaluated Edaptive's proposal as having two strengths under the technical approach and understanding factor and one significant strength under the personnel and management factor. Id. at 1-2. As to the latter, the agency found that Edaptive's staffing plan proposed to employ [deleted] individuals who are currently providing marketplace testing services to the agency, and that utilizing such a large number of incumbent staff would provide several benefits to the agency, including a low-risk transition and continuity of services.⁵ Id. at 2. Under its cost realism

⁵ The record reflects that for the base year of the task order, Edaptive proposed to employ approximately [deleted] individuals, although not all were proposed to work full-time. AR, Tab 4.A.2.1, Edaptive Cost Proposal, at Staffing Matrix Summary Tab, lines 4-141.

evaluation, CMS did not adjust Edaptive's proposed costs, resulting in a proposed and total evaluated total cost of \$69,952,991. AR, Tab 6.C.1, Edaptive Cost Evaluation, at 11.

In conducting the best-value tradeoff analysis, the CO considered Edaptive's proposal, which the TEP ranked first overall under the non-cost evaluation factors, and the three proposals evaluated as lower in cost than Edaptive's proposal. AR, Tab 7, SSD, at 4-6. Thus, while the CO considered HIT's proposal to be ranked second in overall technical merit, it was not considered in the CO's tradeoff decision as it was higher-priced and lower-rated than Edaptive's proposal. Id. at 6. Prior to issuing the task order to Edaptive, the CO reviewed Edaptive's Ethics/OCI proposal and concluded that Edaptive and its proposed subcontractors had no significant OCIs that could not be mitigated. AR, Tab 8, Pre-Award OCI Memorandum (OCI memo), at 11.

CMS provided HIT with a written debriefing on June 2, 2015, and HIT timely filed the instant protest with this Office on June 5. Protest at 2.

DISCUSSION

HIT contends that CMS unreasonably determined that task orders held by Edaptive's subcontractor, Quality Software Services, Inc. (QSSI), did not create an impaired objectivity OCI. Comments at 1-4. The protester also argues that the awardee proposed unrealistically low labor rates that the agency improperly failed to consider in evaluating cost and the personnel and management factor. Id. at 5-7. For the reasons discussed below, we deny the protest.⁶

As a general matter, the FAR requires that contracting officers avoid, neutralize or mitigate potential significant OCIs. FAR § 9.504(a). An impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR § 9.505(a); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the

⁶ In its protest and comments, HIT also argued that (1) its technical proposal warranted higher ratings; (2) CMS unreasonably evaluated Edaptive's technical proposal with respect to staffing levels; (3) QSSI's participation in the procurement created an unequal access to information OCI; and (4) Edaptive's proposal did not comply with solicitation clause FAR 52.219-14, Limitations on Subcontracting. The agency responded to these arguments and the protester did not take issue with, or otherwise seek to rebut, the agency's responses. Under such circumstances, we view these arguments as abandoned. Earth Res. Tech., Inc., B-403043.2, B-403043.3, Oct. 18, 2010, 2010 CPD ¶ 248 at 6.

government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B. 293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

We review the reasonableness of a CO's OCI investigation 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. In this regard, 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., *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).

In the instant protest, the record reflects that Edaptive's Ethics/OCI proposal included an OCI analysis and mitigation strategy submitted by Edaptive's subcontractor, QSSI. AR, Tab 4.A.3, Edaptive Ethics/OCI Proposal, at 43-46. As relevant here, QSSI's OCI submission discussed possible OCIs arising from two task orders--HHSM-500-T0007 and HHSM-500-T0010--issued by CMS to QSSI for work related to marketplace IT systems. *Id.* With respect to HHSM-500-T0007, QSSI provided that it had developed and currently maintains the data services hub (DSH) of the marketplace, as well as performed work relating to the marketplace exchange operations center (XOC). *Id.* at 45. QSSI's OCI submission also acknowledged the CO's belief, expressed in the RFP, that an offeror holding contracts for the development or maintenance of the DSH or XOC would have an impaired objectivity OCI. *Id.* QSSI, however, contended that testing of the DSH and XOC was not in fact within the scope of the RFP, and as such, it would not have a conflict under the anticipated task order because it would not be required to review or evaluate its own work related to these systems. *Id.*

Similarly, QSSI acknowledged that under task order HHSM-500-T0010, it provides products and services for the Enterprise Identity Management system (EIDM), also a component of the marketplace. *Id.* at 45-46. QSSI's OCI submission provided, however, that CMS had recently announced that the EIDM will largely be replaced by a system developed by another contractor, and as a result, QSSI anticipated that only a small fraction of marketplace users would continue to use the EIDM. Thus, QSSI contended, the anticipated task order would involve only a limited amount of testing related to the EIDM. *Id.* QSSI further noted that the RFP required testing of EIDM integration with the marketplace, not of internal EIDM functions, thus further limiting the scope of testing related to QSSI's work under HHSM-500-T0010. *Id.* at 46. Finally, QSSI's submission provided that to the extent that testing of the DSH,

XOC, or EIDM was required, Edaptive would avoid this conflict by assigning the work to its own employees or one of its other subcontractors. Id. at 45-46.

The record reflects that after reviewing Edaptive's Ethics/OCI proposal, the CO prepared an OCI memo for the contract file, in which the CO specifically concurred with the conclusions and mitigation strategy set forth by QSSI. AR, Tab 8, OCI memo, at 11.

HIT argues that CMS failed to meaningfully consider whether QSSI's existing task orders created an OCI. Comments at 1-4. In this regard, the protester points out that the CO's OCI analysis pertaining to QSSI is primarily "cut and paste" from QSSI's OCI submission. Id. at 4. As an initial matter, we note that in addition to quoting QSSI's analysis, the OCI memo reflects that the CO obtained the TEP's review and approval of Edaptive's Ethics/OCI proposal and also confirmed, via internet and contract database searches, that QSSI had identified all relevant contracts. AR, Tab 8, OCI memo, at 3-4. Moreover, as discussed above, in challenging an agency's OCI determination, the onus is on the protester to identify hard facts that indicate the existence or potential existence of a conflict. Cyberdata Technologies, Inc., B-411070, et al., B-411070.2, May 1, 2015, 2015 CPD ¶ 150 at 7-9. As set forth below, the protester has failed to meet this standard, and we therefore have no basis to conclude that the agency's acceptance of QSSI's OCI analysis and mitigation plan was unreasonable.

With respect to the DSH and XOC, the protester asserts that QSSI's OCI analysis was inconsistent with the RFP, which provided that the CO believed an OCI would exist for an offeror that developed or maintained these systems. Comments at 3. The record reflects, however, that upon reviewing QSSI's OCI analysis, the CO determined that the subcontractor's prior work with these systems would not result in an OCI, as they were not systems that would be tested under the anticipated task order. AR, Tab 8, OCI memo, at 6. Further, QSSI's OCI analysis is supported by the RFP's statement of work, which did not include the DSH or XOC on the list of systems that would be tested. AR, Tab 2.B.2, Statement of Work, at 3; Tab 2.B.6, Questions and Answers, RFP Amendment 1, at answer 63 ("testing of the Federal Data Service Hub is out of the scope of this contract"). Because HIT has provided no facts or rationale to refute QSSI's conclusion that it would not be required to test its own work on the DSH and XOC, we find that CMS acted reasonably in accepting QSSI's OCI analysis regarding task order HHSM-500-T0010. See Diversified Collection Servs., Inc., supra, (denying protest that awardee had an impaired objectivity OCI where protester presented no hard facts demonstrating the existence of a potential OCI that could not be mitigated).

The protester also challenges QSSI's OCI analysis regarding the EIDM, arguing that QSSI provided no factual support for its contention that CMS will replace this system. Comments at 3. The protester, however, has offered no evidence that the EIDM will not be replaced, and the record reflects that the agency reviewed and

concurred with QSSI's statement. AR, Tab 8, OCI memo, at 3, 7. Moreover, HIT has failed to show that Edaptive could not mitigate any potential conflict by having non-QSSI employees perform the required EIDM integration testing. Although the protester asserts there is nothing in the record which demonstrates that Edaptive could segregate the testing of the EIDM from the testing of other systems, HIT offers no evidence or explanation as to why this could not be done. Comments at 3-4.

HIT also argues that QSSI's mitigation strategy is not feasible because in the base year of the task order, Edaptive's proposed testing team [deleted].⁷ Id. at 4. As a result, the protester suggests there may be an insufficient number of [deleted] employees to conduct the testing that QSSI cannot perform because of a conflict. Id. The record reflects, however, that Edaptive will [deleted] employ at least [deleted] members of the testing team at the start of performance, and HIT offers no reason as to why these employees would be unable to handle any testing that QSSI could not perform due to an OCI. AR, Tab 4.A.2.1, Edaptive Cost Proposal, at Staffing Matrix Summary Tab, lines 23, 24, 28-30, 37, 38. In sum, we find that HIT has not demonstrated that QSSI's existing task orders will result in an OCI that cannot be mitigated under the anticipated task order. See Diversified Collection Servs., Inc., supra.

Next, HIT contends that CMS's cost realism analysis failed to recognize that Edaptive proposed unrealistically low labor rates. Comments at 5-6. In this regard, the protester notes that Edaptive proposed to reduce the hourly rates for [deleted] key personnel and [deleted] non-key personnel during the option years of the task order. Id. As discussed in Tantus Technologies, Inc., B-411608, B-411608.3, Sept. 14, 2015, __ CPD ¶ __ at 9-12, we find that the agency's cost realism evaluation was flawed to the extent that it did not recognize that Edaptive proposed to significantly reduce the labor rates for some employees during the option years of the task order. In the instant protest, however, we agree with CMS that HIT was not prejudiced by the cost evaluation errors it alleges. According to the agency's calculations, which the protester does not dispute, even if all of the labor rates identified by HIT were adjusted as the protester claims they should have been, Edaptive's total cost would increase by only [deleted].⁸ Supplemental Agency

⁷ The record reflects that Edaptive proposed to hire a substantial portion of [deleted] employees [deleted]. AR, Tab 4.A.2.1, Edaptive Cost Proposal, at Staffing Matrix Summary Tab.

⁸ CMS also notes that Edaptive proposed to relocate the worksite of [deleted] personnel identified by HIT from the Baltimore, Maryland area to [deleted] during the option years of the task order. Supplemental Agency Report, at 3, n.4. The agency contends that the lower labor rates proposed for these individuals are realistic, as they reflect the relatively lower cost-of-living and wages in [deleted]. Id. Regardless, as discussed above, even if the rates of all of the employees HIT

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Report, at 3-4; AR, Tab 6.D.1, CMS Cost Realism Review. Given that the total evaluated cost of HIT's proposal was approximately \$8.5 million higher than the total evaluated cost of Edaptive's higher-rated proposal, we find that the protester was not prejudiced by the cost realism errors it alleges. Competitive prejudice is an essential element of a viable protest; where, as here, the record establishes no reasonable possibility of prejudice, we will not sustain a protest even if a defect in the procurement is found. Wyle Laboratories, Inc., B-288892, B-28892.2, Dec. 19, 2001, 2002 CPD ¶ 12 at 14.

Finally, HIT argues that CMS unreasonably failed to consider the risk that Edaptive would be unable to retain those employees that would experience a decrease in pay under Edaptive's proposal.⁹ Comments at 6-7. Although we agree that the agency's cost realism evaluation was flawed, we do not agree that CMS was required to consider Edaptive's unrealistic labor rates under the personnel and management factor. As a general matter, where a solicitation informs offerors of the possibility that the agency will consider the results of its cost evaluation in evaluating non-cost factors, the agency may make a cost realism adjustment to account for an offeror's unrealistic labor rates, as well as assess the impact the unrealistic rates could have on technical performance. See Northrop Grumman Technical Servs., Inc.; Raytheon Technical Servs. Co., B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 25 at 24-25. In the instant protest, however, the RFP did not indicate that the agency would consider the results of its cost evaluation under the non-cost factors. Thus, under these circumstances, we conclude that CMS was not

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identified are adjusted upward, the increase in Edaptive's cost is not sufficient to overcome the significant cost difference between HIT's and Edaptive's proposals. Furthermore, to the extent HIT alleges that additional Edaptive labor rates are unrealistic, we find that the protester has failed to establish prejudice, as it has not identified any such rates, or the impact that adjusting these rates would have on Edaptive's cost proposal.

⁹ HIT also argues in its supplemental comments that the agency erred when it failed to consider, under the personnel and management factor, Edaptive's proposed relocation of a portion of its workforce to [deleted]. Supplemental Comments at 4. We dismiss this argument as untimely because it was not raised within 10 days of the protester's receipt of the agency report, which identified Edaptive's relocation strategy in the awardee's business proposal. AR, Tab 4.A.2, Edaptive Business Proposal, at 23. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our regulations do not contemplate the piecemeal presentation or development of protest issues. Planning & Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13.

required to consider the realism of Edaptive's proposed labor rates in its evaluation of the personnel and management factor.

The protest is denied.

Susan A. Poling
General Counsel