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Decision

Matter of: Department of Veterans Affairs--Reconsideration

File: B-412187.2

Date: April 4, 2017

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Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's request for reconsideration of a decision sustaining a protest that the agency failed to meaningfully consider potential conflicts of interest arising from the awardee's performance of two task orders is denied where the request does not demonstrate that the decision contained errors of fact or law that warrant reversal or modification of the decision.

DECISION

The Department of Veterans Affairs (VA) requests that we reconsider our decision in ASM Research, B-412187, Jan. 7, 2016, 2016 CPD ¶ 38, in which we sustained the protest filed by ASM Research, of Fairfax, Virginia, which challenged the VA's issuance of a task order to Booz Allen Hamilton, of McLean, Virginia, under request for task execution plans (RTEP) No. T4-0671, for operation and maintenance support of computer cloud environments. The VA argues that our decision, which concluded that the agency failed to meaningfully consider whether the award to Booz Allen was tainted by organizational conflicts of interest (OCI), contained errors of law and fact that warrant reconsideration of our decision.

We deny the request for reconsideration.

BACKGROUND

The VA issued the RTEP for mobile infrastructure services (MIS) to contract holders under the Transformation Twenty-One Total Technology multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contract. ASM Research, supra, at 1-2. The MIS contractor will be responsible for hosting and maintenance of the infrastructure, platforms, and tools that house the development, testing, and production environments for mobile software applications (apps). MIS Performance Work Statement (PWS) § 1.0. Currently, the MIS platform hosts four enclaves¹ relating to apps; the one pertinent to this protest is the Mobile Application Environment (MAE) for web and mobile app development. Id. The MAE includes six environments “to create, test, and deploy VA mobile applications,” which include: development integration; software quality assurance (SQA); verification and validation (V&V); performance; maintenance; and continuous integration. See id. § 5.5.1.

Only ASM and Booz Allen submitted proposals in response to the RTEP. ASM Research, supra, at 1-2. The agency issued the MIS task order to Booz Allen on September 14, 2015, and ASM filed its protest (B-412187) on September 29. Of importance to the protest and this request for reconsideration, prior to the issuance of the MIS RTEP and task order, the agency awarded two task orders under the same ID/IQ contract to Booz Allen. Id. at 3. One of the task orders was for SQA services and the other for V&V services. Id.

As relevant here, ASM’s protest argued that Booz Allen had an unmitigatable OCI because the PWS for the MIS task order would require the awardee to support the development of applications, and the SQA task order would require Booz Allen to evaluate its own work by performing quality assurance testing of the mobile apps developed under the MIS task order.² ASM Research, supra, at 4. The agency primarily argued that there were no actual or potential OCIs because the MIS contractor does not develop mobile applications that might be subject to the oversight or testing requirements implemented by the SQA contractor, and because the SQA contractor will not be required to evaluate the enclaves supported and maintained by the MIS contractor. See Contracting Officer’s Statement (Oct. 29, 2015) at 6-10; Agency Supp. Response (Nov. 20, 2015) at 5-13, 17-25.

¹ An enclave is a segment of a cloud infrastructure/platform devoted to one overarching business requirement such as testing and developing. See PWS § 1.0.

² ASM raised other arguments concerning conflicts arising from Booz Allen’s performance of other task orders. Our discussion here is limited to those issues addressed in our decision and challenged by the agency in its request for reconsideration.

In our decision, we found that “Booz Allen as the SQA contractor will play a significant role in the testing of apps that will be hosted in the cloud and enclaves for which Booz Allen as the MIS contractor will be responsible.” ASM Research, supra, at 9. We sustained ASM’s protest, finding that, based on the record presented, the VA did not give meaningful consideration to whether Booz Allen’s performance of the MIS task order could give rise to an OCI due to its performance under the SQA task order, and recommended the agency meaningfully reconsider, evaluate, and document its findings. Id. at 10. In the event the agency identified an OCI, we recommended that it consider requesting mitigation plans from Booz Allen, or requesting a waiver of the OCI. Id.

DISCUSSION

The VA requests that we reconsider our decision sustaining ASM’s protest for three primary reasons: (1) our decision erred in applying the standard of law for reviewing OCI protests; (2) our decision contained errors of fact regarding the MIS and SQA task order requirements; and (3) our decision unreasonably found that ASM was an interested party to argue that the award to Booz Allen was tainted by a potential OCI because, the agency argued, an award to ASM would be tainted by the same OCI. For the reasons discussed below, we find no basis to reconsider our decision.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out factual and legal grounds upon which reversal or modification of the decision is warranted, specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.14(a), (c). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Id.; Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. Additionally, a party’s failure to make all arguments or present all information available during the course of the protest does not warrant reconsideration of our prior decision. Walker Dev. & Trading Grp.--Recon., B-411246.2, Sept. 14, 2015, 2015 CPD ¶ 284 at 2.

Legal Standard for Review of OCI Allegations

The VA contends that our decision erred as a matter of law by not giving deference to the agency’s OCI analysis. In this regard, the VA argues that the contracting officer gave meaningful consideration to all aspects of Booz Allen’s performance of the MIS and SQA task orders and reasonably concluded that there were no actual or potential conflicts. See Request for Reconsideration at 12-18. The agency also argues that our decision erred as a matter of law because we improperly substituted our judgement for the agency’s by, in effect, conducting our own OCI analysis and concluding that Booz Allen would have an impaired objectivity OCI based on its performance of both task orders. Id. at 18.

An impaired objectivity OCI, as addressed in Federal Acquisition Regulation (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 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. Our Office reviews the reasonableness of a contracting officer'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. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

The VA's arguments regarding alleged errors of fact and law are largely intertwined, to the extent the agency argues that the contracting officer's OCI analysis addressed all of the potential areas in which an OCI could have arisen. As discussed in our decision, and addressed in further detail below, we concluded that the contracting officer did not give meaningful consideration to the potential conflict that could arise from the support that Booz Allen would provide to app developers under the MIS task order, and the requirement for Booz Allen to perform quality assurance testing and evaluation of the apps under the SQA task order. ASM Research, supra, at 9-10. Although the contracting officer's analysis of the MIS and SQA task orders concluded that the MIS contractor will not be required to develop apps that the SQA contractor will be required to evaluate, we concluded that the agency's focus was limited to the development of apps, rather than the potential affect the MIS contractor's support for developers could have on the apps. Id.

The VA also argues that our decision substituted our judgment for the agency's by, in essence, making independent judgments concerning the facts and conclusions addressed in the agency's OCI analysis. Request for Reconsideration at 10-12. The role of our Office in reviewing protests concerning alleged OCIs is not to determine whether a conflict exists; rather, our Office reviews allegations to determine whether there are hard facts which give rise to a potential OCI, and whether the agency has given meaningful consideration to whether, in fact, an OCI exists. See TeleCommunication Sys. Inc., supra; AT&T Gov't Solutions, Inc., B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 7. Although the VA

contends that our decision substituted our judgment for the agency's, our decision did not and was not intended to reach independent conclusions as to whether the award to Booz Allen was tainted by an OCI. Instead, consistent with our Office's role in reviewing agency OCI determinations, we concluded that the record did not show that the VA gave meaningful consideration to the record regarding areas of potential conflict identified by the protester. For that reason, we recommended that the agency "meaningfully reconsider, evaluate, and document its findings about whether Booz Allen would have an OCI arising from its performance of the MIS task order and its prior task orders." ASM Research, supra, at 10.

In sum, we conclude that our decision cited the correct standard of law for review of OCI protests, and that our decision also followed that standard in finding that the agency did not meet its obligation to meaningfully consider OCIs. We therefore find no basis to reconsider our decision.

Alleged Errors of Fact Regarding MIS and SQA Orders

Next, the VA argues that our decision contained the following three errors of fact regarding the requirements of the MIS and SQA task orders: (1) the MIS contractor's responsibility for "developing" the cloud in which the enclaves, including as relevant here, the MAE enclave, will reside; (2) the SQA contractor's responsibility for evaluating the infrastructure of the MAE enclave, in particular the SQA test environment; and (3) the role of the MIS contractor in developing apps that will be evaluated by the SQA contractor.³ For the reasons discussed below, we conclude that none of the protester's arguments provides a basis to reconsider our decision.

First, the VA argues that our decision erred in stating that the MIS contractor will be responsible for developing the cloud wherein the MAE enclave will reside. Our decision addressed the MIS task order requirements and concluded that "the VA's conclusion that the MIS contractor will have little or no role in developing the cloud, or in app development, is not supported by the MIS PWS." ASM Research, supra, at 6. The VA argues that its response to the protest fully addressed the requirements of the MIS task order PWS, and explained that these provisions do not require the contractor to develop the cloud, as contrasted with the enclaves within the cloud (e.g., the MAE enclave). Request for Reconsideration at 26-27. The agency contends that our decision did not cite specific requirements in the PWS which directly or implicitly require the MIS contractor to develop the cloud. Id. at 26-28.

³ The VA raises other collateral arguments in its request for reconsideration. Although we do not address every argument, we have considered all of them and find no basis to reconsider our decision.

Section 5.5 of the MIS PWS requires the contractor to “develop, implement and maintain the following commercial standard, cloud-based enclaves and all associated environments in support of VA MIS,” including the MAE enclave at issue in the protest. See also MIS PWS § 5.5.1 (“The Contractor shall develop, implement and maintain the MAE, cloud based enclave and all associated environments.”). Although this PWS language refers to the MAE enclave, we recognize that our decision specifically stated that the “plain language of the MIS PWS” will require the contractor to “implement/deploy the cloud, and develop, implement and deploy the MAE.” ASM Research, supra, at 6. We further stated that this plain language showed that “the VA’s conclusion that the MIS contractor will have little or no role in developing the cloud, or in app development, is not supported by the MIS PWS.” Id.

To the extent our decision conflated developing the cloud and developing and implementing the enclaves within the cloud, we do not see a basis to reconsider our decision. Even if, as the agency contends, our decision incorrectly found that the MIS contractor will develop the cloud, this conclusion does not affect our basis for finding that Booz Allen will be required, under the MIS task order, to support app developers through implementation of the MAE, and that this support could affect the quality of the apps that will be evaluated by Booz Allen under the SQA task order.⁴

Second, VA argues that we erroneously concluded that the SQA contractor will be responsible for evaluating the infrastructure of the SQA test environment (within the MAE enclave) that will be supported and maintained by the MIS contractor. In this regard, the agency argues that our decision’s conclusion that “[t]he terms of the SQA PWS do not support the agency’s narrow interpretation of the SQA contractor’s role in testing apps,” ASM Research, supra, at 7, shows that our analysis relied on a conclusion that the SQA contractor’s role in evaluating apps will also include evaluating the infrastructure of the SQA test environment supported and maintained by the MIS contractor. Request for Dismissal at 29-30.

Our decision did not state that the SQA PWS requires the contractor to evaluate the infrastructure of the SQA test environment provided by the MIS contractor. See ASM Research, supra, at 6-8. Although the protester’s and agency’s briefing disputed whether the requirement in SQA PWS § 5.2 for “infrastructure testing”

⁴ The VA also states in its request for reconsideration that the requirements for the development of the cloud will be performed by another contractor, which, the agency contends, further supports its argument that the MIS contractor will not develop the cloud. Request for Reconsideration at 26-27. The agency does not explain why this argument could not have been raised during the initial protest; we therefore conclude that this information does not provide a basis to reconsider our decision. See Walker Dev. & Trading Grp.--Recon., supra.

states or implies that the SQA contractor must perform tests on the SQA test environment infrastructure, our decision did not specifically address this issue, and our OCI findings did not rely upon a conclusion in this regard. For this reason, we find no basis to reconsider our decision.

Third, the VA argues that our decision erred by concluding that the MIS contractor will be responsible for developing apps that will be evaluated by the SQA contractor. Our decision stated that “[w]e find in this regard that Booz Allen, as the SQA contractor, will play a significant role in the testing of apps that will be hosted in the cloud and enclaves for which Booz Allen, as the MIS contractor, will be responsible.” ASM Research, supra, at 4. The agency contends that our decision erred by finding that Booz Allen, as the MIS contractor, will develop apps that will be also evaluated by Booz Allen as the SQA contractor.

Our decision did not state that the MIS contractor will be responsible for the actual development of apps. In this regard, we agree with the agency that the MIS PWS requires the contractor to support app developers, and that the MIS contractor will not actually develop apps. Instead, our decision found that the agency’s review of the actual or potential OCIs that could arise from Booz Allen’s performance of the MIS and SQA task orders did not meaningfully consider the affect that the MIS contractor’s support for developers could have on apps and the potential OCI that could arise from Booz Allen’s evaluation of those apps under the SQA task order. Id. at 6, 9-10. Our decision cited areas where the MIS contractor will be required to provide support to app developers through the development, support, and maintenance of the MAE, which includes computing resources for app development, as well as providing “all programming tools required for app development, testing, configuration control, and release to the production as applicable to each logical environment inside of each of the individual enclaves.” ASM Research, supra, at 6 (citing MIS PWS §§ 5.5.1, 5.5.2, 5.6.2, 5.6.3.4, 5.6.4).

The VA’s response to the protest acknowledged that the MIS contractor will be required to support app developers, but argued that this support did not result in the MIS contractor becoming the developer of an app, itself. See Agency Supp. Response (Nov. 20, 2015) at 3-10. Although the VA’s OCI analysis addressed whether the MIS contractor will actually develop an app or author code, we concluded that it did not meaningfully address the potential affect the MIS contractor’s support for developers could have on the development or deployment of apps. See ASM Research, supra, at 6, 9-10. For this reason, we concluded that “a potential impaired objectivity OCI exists if an app fails to perform as anticipated,” in that “Booz Allen, as the SQA contractor, would be left with the choice of assigning responsibility for the failure to itself, as the MIS infrastructure contractor, or to the third party app developer.” Id. at 4.

In its request for reconsideration, the VA also argues that the SQA PWS does not “require, or allow, the SQA tester to assign any responsibility for test failures (nor

will the Agency consider any assignment of responsibility from the SQA contractor).” Request for Reconsideration at 25-26. Although the role of the SQA contractor was clearly addressed by the parties’ briefing during the protest, the agency did not raise the argument concerning root cause analysis until filing its request for reconsideration.⁵ Because this issue could have been, but was not, raised by the agency during the protest, it does not provide a basis for reconsideration. See Walker Dev. & Trading Grp.--Recon., supra.

ASM’s Interested Party Status

Finally, the VA argues that our decision unreasonably rejected its argument that ASM was not an interested party to argue that the award to Booz Allen was tainted by an OCI because, in the agency’s view, award to ASM would give rise to the same OCI. The VA argued that, to the extent Booz Allen’s roles as both the MIS contractor and the SQA contractor give rise to an impaired objectivity OCI, ASM would have “the same” OCI because the protester is performing two task orders for app development, each of which contains requirements to evaluate and validate the quality of those apps. Agency Supp. Response (Dec. 10, 2015) at 5-6. The VA’s request for reconsideration contends that our Office’s rejection of the agency’s assessment regarding ASM was an improper substitution of our judgment for the agency’s.

Our decision concluded that the agency did not demonstrate that ASM’s development of apps under two task orders would give rise to the same kind of OCI. ASM Research, supra, at 10 n.7. In this regard, our decision drew a distinction between the requirement for third-party evaluation of apps and the development of apps, and found no basis to support the agency’s contention that “the testing requirements under [ASM’s] task orders would present the same type of concerns as associated with the requirement under Booz Allen’s SQA task order to test third party apps.” Id. In effect, our decision did not find that the agency relied upon hard facts demonstrating an actual or potential OCI concerning ASM.

The VA’s request for reconsideration merely repeats arguments that were raised in the initial protest. See Agency Supp. Response (Dec. 10, 2015) at 2-7; Request for Reconsideration at 19-23. Such previously-raised arguments do not provide a basis to reconsider a decision. Veda, Inc.--Recon., supra. In any event, our decision did not preclude the VA from conducting a further investigation of any potential OCIs concerning ASM. In this regard, we stated that “given the recommendation below to evaluate and document any conflict for Booz Allen, the agency may also

⁵ Additionally, the VA’s request for reconsideration does not point to any SQA PWS provisions which contain what the agency represents is a prohibition on the SQA contractor’s evaluation of the root cause of app failures. See Request for Reconsideration at 25-26.

want to investigate more fully whether ASM has a conflict, and, if so, consider how any such conflict should be addressed.” ASM Research, supra, at 10 n.7.

The request is denied.

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