U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: MAR, a Division of Oasis Systems, LLC

File: B-414810.5

Date: July 26, 2018

Scott A. Freling, Esq., J. Hunter Bennett, Esq., Nooree Lee, Esq., and Tyler Evans, Esq., Covington & Burling, LLP, for the protester.
Eric Whytsell, Esq., G. Lindsay Simmons, Esq., Hopewell H. Darneille, III, Esq., and Rodney W. Stieger, Esq., Jackson Kelly PLLC, for Applied Research Associates, Inc., an intervenor.
William B. Blake, Esq., Department of the Interior, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee has an "impaired objectivity" type of organizational conflict of interest (OCI) is denied where record shows that agency thoroughly investigated the question and concluded (1) that award of the contract to the entity in question did not, in and of itself, present an OCI; (2) to the extent that issuance of future task orders might present a possible OCI, the agency will evaluate the question at the time those task orders are issued; and (3) there are robust safeguards in place to prevent the awardee from exerting improper influence in performing the contract.

2. Protest challenging agency's price evaluation is denied where record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

MAR, a Division of Oasis Systems, LLC, of Rockville, Maryland, protests the award of a contract to Applied Research Associates, Inc. (ARA), of Albuquerque, New Mexico, under request for proposals (RFP) No. E16PS00140, issued by the Department of the Interior, Bureau of Safety and Environmental Enforcement, for the operation and maintenance of the agency's Ohmsett facility. MAR maintains that ARA has an

organizational conflict of interest, and that the agency's evaluation of the proposed prices was unreasonable.[1]

We deny the protest.

BACKGROUND

The contract at issue is for the operation and maintenance of Ohmsett, the National Oil Spill Response Research and Renewable Energy Test Facility, located on the grounds of the Naval Weapons Station Earle. The principal asset at Ohmset is a 2.6 million gallon saltwater test tank where full-scale oil spill response equipment testing, research and training can be performed in a marine environment with oil under controlled environmental conditions, and where research and testing of wave energy conversion devices also may be performed.[2] The successful offeror will be required to operate and maintain the Ohmsett facility, and to conduct testing and training on behalf of government, academic, and industry customers.

The RFP contemplates the award, on a best-value tradeoff basis, of an indefinite-delivery, indefinite-quantity (IDIQ) contract for a base year and four 1-year options, considering price and several non-price considerations, with the non-price considerations deemed more important than price. RFP at 71. Proposals were submitted by the protester and ARA. The agency evaluated the proposals, engaged in discussions, and solicited, obtained, and evaluated revised proposals. The agency's actions during the procurement, and the results of the agency's evaluation under the non-price evaluation factors are not in dispute, and the record shows that ARA was rated technically superior to MAR under every non-price evaluation factor except past performance, where MAR was rated slightly superior to ARA. Agency Report (AR) exh. 17, Initial Source Selection Document (SSD), at 10. ARA's evaluated price was higher than MAR's, but the agency selected the ARA proposal, finding that its technical superiority merited the cost premium associated with award to that firm.[3] Id. at 27.

After learning of the agency's award, MAR filed a protest with our Office challenging the agency's section decision.[4] The agency took corrective action in response to that

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[1] In its initial protest, MAR also argued that ARA proposed certain key personnel that will not be provided under the contract. The agency provided a detailed response to this protest allegation, but MAR made no further mention of this argument in its comments. We deem this aspect of MAR's protest to be abandoned. Batelco Telecomms. Co. B.S.C., B-412783 et al., May 31, 2016, 2016 CPD ¶ P 155 at 4 n.5.

[2] See https://www.ohmsett.com (last visited on July 26, 2018).

[3] We discuss the agency's price evaluation in detail below.

[4] MAR filed an earlier protest challenging the terms of a solicitation amendment, which it subsequently withdrew. B-414810.

protest, advising our Office that it intended to engage in further discussions and solicit, obtain, and evaluate revised proposals. Based on the agency's corrective action, we dismissed that protest as academic. B-414810.2, B-414810.3, Sept. 22, 2017 (unpublished decision).

The agency performed its corrective action and again selected ARA for award. The record shows that the agency again rated ARA's proposal superior to the MAR proposal under every non-price evaluation factor except past performance, where the agency, upon reevaluation, rated both firms equally. AR, exh. 26, First Addendum to the SSD, at 3-4. Once again, ARA's evaluated price was found to be higher than MAR's, but the agency selected ARA over MAR based on the technical superiority of ARA's proposal. Id. at 6, 13. MAR filed another protest when it learned of the agency's new selection decision. The agency once again proposed to take corrective action--to reevaluate proposals and make a new source selection decision--and we dismissed that protest as academic. B-414810.4, Mar. 27, 2018 (unpublished decision).

The agency performed a reevaluation of proposals and made a new source selection. The record shows that the agency's corrective action was confined to a reevaluation of price, and a consideration of whether ARA had an organizational conflict of interest. AR, exh. 32, Second Addendum to the SSD. The agency affirmed its selection decision, finding that, although ARA had a higher evaluated price in comparison to MAR, the cost premium associated with award to ARA was merited based on the technical superiority of its proposal. Id. at 5. After learning of the agency's latest selection decision, MAR filed the instant protest.

PROTEST

MAR raises two protest issues. First, MAR maintains that ARA has an "impaired objectivity" type of organizational conflict of interest because it will be required under the terms of the contract to perform testing on products in which ARA has a commercial interest. Second, MAR maintains that the agency's price evaluation of the proposals was unreasonable because it did not accurately take total cost to the government into consideration. We discuss these allegations below.

Organizational Conflict of Interest

MAR argues that ARA has an "impaired objectivity" type of organizational conflict of interest (OCI) because it may have occasion during performance of the contract to test products in which it has a commercial interest. According to the protester, ARA has a commercial interest in, among other things, acoustic methods for measuring the thickness of oil in normal, controlled, and arctic conditions; surfactants and water clean-up technologies; and remotely operated vehicles and autonomous underwater vehicle technologies. MAR also argues that ARA will be in a position to influence the evaluation of competitors' products because it will be responsible for planning, scheduling, creating procedures, establishing quality metrics, assessing quality, reporting test results to the scientific community, and establishing standards for the Ohmsett facility in particular,

and the oil spill and environmental industries in general. MAR therefore argues that it was improper for the agency to award ARA the contract.

We find no merit to this aspect of MAR's protest. Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and avoid, neutralize, or mitigate significant potential conflicts of interest before contract award. Federal Acquisition Regulation (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 officer. Innovative Test Asset Solutions, LLC, B-411687, B-411687.2, Oct. 2, 2015, 2016 CPD ¶ 68 at 17. We review 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. Id. at 18. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Id.

MAR raised its OCI concerns in each of its two earlier post-award protests, and the agency gave consideration to those concerns. In performing its corrective action responding to MAR's last protest, the agency executed a document entitled "OCI Waiver Determination." AR, exh. 31, OCI Waiver Determination. That document, along with other information in the record, memorializes the agency's position on the subject of whether or not ARA has an OCI.[5]

First, the agency points out that much of the work under the subject contract is for operation and maintenance (O&M) of the Ohmsett facility, and that performance of this work does not present the possibility of an OCI on ARA's part because none of it involves the performance of any sort of product testing. AR, exh. 31, OCI Waiver Determination, at 2-3. The agency notes that the overall scope of the contract contemplates the performance of 21 task areas, and 16 of those areas relate to performance of O&M work where there is no possibility of testing any products. The agency also notes that only a portion of the remaining tasks relate to performing testing, and that training and incidental construction relating to facility upgrades are included in the remaining tasks. Contracting Officer's Statement of Facts at 11.

[5] The protester argues--and the agency concedes--that this document was ineffective to waive any possible OCI on the part of ARA because it was not executed in conformance with the requirements of FAR § 9.503. The agency nonetheless asks our Office to consider the document as an accurate, robust articulation of the contracting officer's findings regarding whether ARA has an OCI, and notes as well that the document was approved at the level of the head of the contracting activity. We consider this document--along with other materials in the record--as an expression of the agency's position on the question of whether or not ARA has an OCI.

Second, the agency explains that the nature of the work contemplated under the contract is such that it is not possible to determine in advance whether any particular task order will present a potential OCI. In effect, the testing performed at the facility is "customer driven," that is, the agency simply does not know in advance what testing may be performed under the contract until such time as a definitized requirement is presented by an organization requesting use of the facility, at which point the agency will issue a task order for the requirement. AR, exh. 31, OCI Waiver Determination, at 4. The agency therefore concluded that it would be more appropriate to address any potential OCI at the task order level on an as-needed basis. Id. Our Office has expressly recognized that OCIs that may arise under subsequent awards--in this case the issuance of individual task orders--are properly analyzed at the time of those subsequent actions. Nuclear Production Partners LLC; Nuclear Production Solutions LLC, B-407948, et al., Apr. 29, 2013, 2013 CPD ¶ 112 at 21.

Third, the agency concluded that the nature of the testing to be performed provides virtually no opportunity for the contractor operating the facility to influence improperly the objectivity of the testing procedures or the results of the tests themselves. The agency states as follows:

> The entity requesting the testing knows the identity of the contractor performing the tests and operating the testing equipment. The tests are carried out using standards developed by independent groups.[6] The selected contractor will follow standard test protocols rather than make or influence determinations of whether a device works or is acceptable. Moreover, all testing at the Ohmsett facility is performed with substantial government oversight and, when testing commercial equipment, the equipment developers observe and are actively involved in the testing. When considering the use of standard test protocols together with the level of Government and outside client scrutiny, the contractor has virtually no opportunity to use its own judgment and if it did, the government is in position to immediately recognize that the contractor's judgement could be impaired. Additionally, the contractor is not entitled to use any data it collects as a result of client testing, except the data in the public domain, which is stated in Contract Clause H.19(d).

AR, exh. 31, OCI Waiver Determination, at 4-5.

In light of the consideration outlined above, we have no basis to object to the agency's conclusion that awarding the contract to ARA does not present a currently-identifiable OCI, and to the extent that a potential OCI may arise during contract performance, the agency appropriately has concluded that it will evaluate the situation at that time and

[6] The contracting officer notes that the testing procedures used are developed by such standard-setting bodies as the American Society for Testing and Materials (ASTM). Contracting Officer's statement of Facts at 11.

make a determination regarding whether performance of a particular task order would present an OCI. Moreover, the record also shows that the majority of the work contemplated under the contract does not present even the possibility of an OCI, and even where ARA will be performing testing activities, those activities will be carefully monitored by government and "customer" representatives. Under the circumstances, we deny this aspect of MAR's protest.

Price Evaluation

MAR also protests the propriety of the agency's price evaluation. By way of background, offerors were required to present pricing information in their proposals in two different ways. First, offerors were required to respond to a sample task and provide the agency with fixed prices that reflected the offeror's staffing approach (labor categories and staffing mix) to accomplishing the work. The sample task represents the actual work for all contract years to be performed in connection with providing the O&M services at Ohmsett, and formed the basis for the issuance of the first task order under the contract. RFP at 65-66. Second, offerors were required to provide the agency with a matrix of individual labor rates for the broader IDIQ contract. RFP at 64. These labor rates will be used to price individual task orders to be issued subsequently for all other work under the contract.

The record shows that, in arriving at a total evaluated price for each offeror, the agency used the fixed prices presented for the sample task, and then extrapolated a total evaluated price based on historical data regarding the ratio of work performed in connection with providing the O&M work compared to the work performed in connection with all remaining task orders. Specifically, the agency's historical data showed that 48.46 percent of the work performed under the predecessor contract was for the provision of the O&M services, and 51.54 percent of the work was for the provision of all other task orders. AR, exh. 32, Second Supplemental SSD at 2. MAR's fixed price for the sample task order was $7,383,200 and the agency extrapolated that its total evaluated price was $15,234,802. Id. ARA's fixed price for the sample task order was $9,427,529, and the agency extrapolated that its total evaluated price was $19,453,155. Id. The record shows that, in addition to these calculations, the agency also examined the offerors' individual proposed labor rates, comparing them to each other, and to labor rates found in the General Services Administration's "contract awarded labor category" tool (also referred to as CALC), which provides data on labor rates found in awarded contracts.[7] AR, exh. 23, IDIQ Labor Rate Comparison.

MAR argues that the agency's approach to calculating total evaluated price failed to consider differences between the solicited contract and the predecessor contract, differences in the labor categories proposed by the two offerors, and differences between the labor categories and staffing profile that might be used in connection with performance of the O&M work versus the non-O&M work. According to the protester, a

[7] See https://calc.gsa.gov (last visited on July 26, 2018).

method of calculating total evaluated price that took these considerations into account would have shown that the price difference between the two offerors was greater than that determined by the agency in its price evaluation.

We have no basis to object to the agency's price evaluation. Agencies are required by statute to consider the cost or price to the government of entering into a contract. 41 U.S.C. § 3306(c)(1)(B). In the context of IDIQ contracting, this often is difficult because of uncertainty regarding what ultimately will be procured. Agencies have developed a variety of methods or strategies to address this difficulty, including the use of estimates for the various quantities of labor categories or units to be purchased under the contract, see Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 3; the use of sample tasks, FC Bus. Sys., Inc., B-278730, Mar. 6, 1998, 98-2 CPD ¶ 9 at 3-5; hypothetical or notional plans that are representative of what requirements are anticipated during contract performance, Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 11; and hypothetical pricing scenarios reflecting various cost or price eventualities. PWC Logistics Servs., Inc., B-299820, B-299820.3, Aug. 14, 2007, 2007 CPD ¶ 162 at 11-15. Underlying each of these methods is the central objective of evaluating the relative total cost or price of competing proposals in order to provide the agency's source selection authority a meaningful understanding of the cost or price implications of making award to one or another concern.

As noted, offerors were required to provide fixed prices for the sample task, which was actually the requirements for performing the O&M portion of the contract for the entire 5-year period of the contract. There is no dispute that the prices for the sample task order accurately reflect the actual cost to the government of performing that aspect of the requirement. The agency also examined all of the hourly rates proposed by the offerors to determine that those rates were reasonable and realistic for the labor categories in question. The protester has not argued or demonstrated that the hourly rates proposed by ARA are either unreasonable or unrealistic. The only remaining question, therefore, relates to the propriety of the agency's extrapolation of the sample task prices.[8]

We agree with the protester that the agency's extrapolation does not capture the possible impact of using different labor rates or staffing profiles for task orders to perform non-O&M work. However, the protester has not explained, and it is not apparent to us, how the agency's use of the extrapolated total evaluated prices was prejudicial to its interests. The protester speculates that using the labor rates that were not included in calculating the sample task, or calculating prices based on differing staffing profiles, would show that its price was even more advantageous than it

[8] MAR has offered no evidence to show that the requirements of the predecessor contract and the solicited contract are materially different. In addition, the agency did consider differences in the labor categories proposed by each firm. The record includes what amounts to "crosswalk" comparisons between the two firms' labor categories. AR, exhs. 14, Final Labor Rate Comparison Spreadsheet; 23, IDIQ Labor Rate Comparison.

appeared to be when the agency made its source selection. However, the protester has introduced no evidence to demonstrate that this is, in fact, the case.

Again, determining the cost to the government of awarding an IDIQ contract to one concern versus another is inherently difficult because of uncertainty about what ultimately will be procured. Here, there was nothing inherently improper in the agency's use of a sample task order in an effort to measure the likely cost to the government of awarding the contract to one concern versus another.[9] There also was nothing inherently improper in the agency's evaluation of the individual labor rates for reasonableness and realism. Had the agency ended its analysis there, we would have no basis to object to the agency's evaluation of prices in this context, given that the agency is awarding an IDIQ contract.

The fact that the agency also generated extrapolated prices for the entire requirement did not prejudice the protester, since those extrapolated prices did not distort the price differential between the two concerns reflected in their prices for the sample task; a comparison of either the sample task prices, or the extrapolated prices results in a finding that ARA's price was approximately 27 percent higher than MAR's. In the final analysis, the agency was attempting to arrive at what amounted to a rough-order-of-magnitude idea of the total cost to the government of awarding the contract to one firm versus another. While the agency's calculation accurately captured the historical division of O&M versus non-O&M work, it did not entirely capture what would amount to differences in the offerors' prices that would result from changes to the labor categories or staffing mix under any particular task order that may ultimately be awarded in the future. Nonetheless, the protester has not demonstrated how this fact alone was prejudicial. Since prejudice is an essential element of every viable protest, General Dynamics Information Technology, Inc., B-414387, B-414387.2, May 30, 2017, 2017 CPD ¶ 176 at 8, and since the protester has not shown how it was prejudiced by the agency's actions, we deny this aspect of its protest.

The protest is denied.

Thomas H. Armstrong
General Counsel

[9] The solicitation was clear that the sample task order was confined to the O&M aspect of the overall requirement. To the extent that MAR's protest can be read as essentially a challenge to the representative nature of the sample task order in relation to all of the contract's requirements, this amounts to an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1).