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Decision

Matter of: URS Federal Services, Inc.

File: B-417643.2; B-417643.3

Date: February 24, 2020

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James Y. Boland, Esq., and Caleb E. McCallum, Esq., Venable LLP, for SimVentions, Inc., the intervenor.

Matthew Hawkins, Esq., and Candice Thomas, Esq., Department of the Navy, for the agency.

Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the contracting officer failed to properly evaluate an alleged impaired objectivity organizational conflict of interest in the prospective awardee's proposal is denied where the record shows that the evaluation was reasonable.
 2. Protest that the agency engaged in discussions with the prospective awardee, and permitted the firm to materially change its proposal without permitting other offerors the same opportunity, is denied where the record shows the exchange between the agency and prospective awardee occurred with respect to a potential organizational conflict of interest, was appropriate, and did not amount to discussions.
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DECISION

URS Federal Services, Inc., of Germantown, Maryland, protests a determination by the Department of Navy, Naval Surface Warfare Center, Dahlgren Division (NSWCDD), that SimVentions, Inc., of Fredericksburg, Virginia, did not have a significant potential organizational conflict of interest (OCI) under request for proposals (RFP) No. N00178-18-R-3014. URS challenges various aspects of the Navy's OCI determination, and alleges the agency unfairly conducted discussions by only engaging with SimVentions to the detriment of other offerors.

We deny the protest.

BACKGROUND

The RFP was issued on May 31, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, to holders of the Navy's SeaPort-e Zone 2 indefinite-delivery, indefinite-quantity (IDIQ) contracts to provide NSWCCD with systems engineering, software development, and test and evaluation subject matter expertise to "facilitate, plan, execute, and deliver Track Management products."¹ Agency Report (AR), Tab 1, RFP at 7; Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 2. The Navy received timely proposals from URS and SimVentions in response to the RFP.² COS/MOL at 2. After conducting discussions with both offerors and accepting final proposal revisions, the Navy evaluated revised proposals and made award to SimVentions on May 28, 2019. Id. URS, the incumbent contractor, protested the agency's award decision to our Office on June 6, challenging various aspects of the agency's evaluation of proposals and award decision, and arguing that SimVentions had an OCI that could not be mitigated. Protest at 6-7; COS/MOL at 2.

On June 17, the Navy informed our Office that it was taking corrective action in response to the protest by reevaluating URS's and SimVentions' technical and cost proposals and making a new award decision. Agency Notice of Corrective Action at 1. As a result of the agency's corrective action, we dismissed the protest as academic. URS Fed. Servs., Inc., B-417643, June 24, 2019 (unpublished decision).

The record shows that as part of the corrective action, a Navy technical evaluation team (TET) reviewed the OCI allegation raised by URS in its initial protest, focusing on the work to be done by one of SimVentions' proposed subcontractors, WR Systems, under the current solicitation, in conjunction with WR Systems' work under other Navy contracts. On July 26, the TET advised the contracting officer that it had identified a potential OCI in SimVentions' proposal regarding WR Systems' work on the Navy's WSN-12 system.³ AR, Tab 2, TET Email to the Contracting Officer, at 3. On August

¹ The solicitation explains that the Track Management program is "the identification, tracking, [and] characterization of attributes of sensor data which feeds the combat or command and control system." RFP at 7. The Track Management program is an integral part of several Department of Defense component warfare systems, and NSWCCD "is the systems engineering, software development, and combat system integration activity for numerous Track Management related components and programs." Id.

² Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors" who submit "quotations" and are "issued" task orders, the record and the parties' briefing primarily use the terms "offerors," "proposals," and "award." For the sake of consistency with the record, we refer to the firms that competed here as offerors who submitted proposals for award of a task order

³ As the TET explained, NSWCCD is working with several other government, industry, and academia partners to provide the "engineering rigor necessary to integrate current

19, the contracting officer informed SimVentions that the agency had identified a possible impaired objectivity OCI involving SimVentions' proposed use of WR Systems to participate in the review and evaluation of the WSN-12 system, and requested the firm submit a mitigation plan for this potential OCI. AR, Tab 3, Letter to SimVentions, at 2. On August 28, SimVentions submitted a mitigation plan, responding to the agency's identified OCI. AR, Tab 4, SimVentions Mitigation Plan.

The contracting officer reviewed SimVentions' mitigation plan and concluded that "the steps described in SimVentions' mitigation plan [were] sufficient in covering the potential OCI should it occur as part of specific tasking under the task order." AR, Tab 5, OCI Determination, at 3. The Navy thereafter informed URS of the results of the contracting officer's OCI determination. COS/MOL at 2; AR, Tab 6, Letter to URS. After receiving notice of the agency's OCI determination on November 6, URS filed this protest.⁴

DISCUSSION

URS raises various challenges to the reasonableness of the Navy's OCI determination, asserts that the mitigation plan submitted by SimVentions cannot mitigate the alleged OCI, and contends that we should sustain the protest because the agency improperly engaged in discussions with only SimVentions, to the prejudice of URS. While we only address the most significant of the allegations asserted by URS, we have considered all of the protest grounds raised and find that none provide a basis on which to sustain the protest.⁵

and future navigation components at the system of systems . . . level." AR, Tab 2, TET Email to the Contracting Officer, at 3. WSN-12 is a component of that systems of systems and involves the development of the Navy's "next generation ship gyro." COS/MOL at 7.

⁴ This procurement is within our jurisdiction to hear protests related to the issuance of orders under Department of Defense multiple-award IDIQ contracts, since the award value of the task order at issue exceeds \$25 million. 10 U.S.C. § 2304c(e)(1)(B).

⁵ For example, URS also contends SimVentions should be precluded from task order award because the firm lacks present responsibility. The protester argues that SimVentions' conduct "raises serious responsibility issues" because SimVentions (1) made a false statement by representing that there was no potential OCI in its proposal; and (2) failed to disclose the alleged OCI. Comments and Supp. Protest at 25-30. The agency disputes the protester's characterization and asserts that the allegation involves an affirmative responsibility determination that our Office should not consider. Supp. MOL at 7-8. While we conclude that URS's legal arguments are not supported by the record, we do not further address this issue because we find the allegation involves a matter of affirmative responsibility that our Office will not review. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility, absent limited exceptions. See 4 C.F.R. § 21.5(c); IBM Corp., B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 10-11. In this

Organizational Conflict of Interest

URS argues the agency failed to properly evaluate the OCI resulting from SimVentions' decision to subcontract with WR Systems, which, according to the protester, should preclude SimVentions from receiving the task order award. Protest at 12-16. The protester also asserts that SimVentions' OCI mitigation plan could not reasonably resolve the OCI. Id. at 16-18; Comments and Supp. Protest at 11-18. The Navy responds that it properly assessed and identified a potential OCI, and reasonably determined the potential OCI does not preclude SimVentions from award based on the submitted mitigation plan. COS/MOL at 6. In this regard, the agency asserts that the contracting officer "reasonably determined that while there existed the possibility of an apparent impaired objectivity OCI . . . , [SimVentions'] mitigation plan adequately neutralized the potential OCI." Id.

An impaired objectivity OCI 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 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. The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.504; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to whether an OCI exists, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6.

Relevant to the protest here, the RFP required offerors to identify any potential OCIs to the contracting officer and established that those offerors deemed to have a conflict of interest may be ineligible for award. RFP at 82. Additionally, the RFP cautioned that "technical proposals may be evaluated without consideration of any proposed [s]ub-contractor which is deemed to have an organizational conflict of interest." Id. Offerors were required to certify the OCI provisions of the solicitation, "or present an acceptable plan to neutralize any actual or perceived organizational conflicts of interest." Id. at 86.

context, because the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer's discretion, our Office only considers challenges to affirmative responsibility determinations where it is alleged that definitive responsibility criteria in the solicitation were not met, or protests that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. SumCo Eco-Contracting LLC, B-409434, B-409434.2, Apr. 15, 2014, 2014 CPD ¶ 129 at 3. Here, the exceptions that would allow for a review of an affirmative responsibility determination are not present.

URS's protest here (as well as its initial protest which resulted in the Navy's OCI inquiry) concerns an impaired objectivity OCI involving SimVentions subcontractor WR Systems and its work for the Naval Information Warfare Center Atlantic (NIWC/LANT) Little Creek Detachment (Little Creek). Protest at 13-14; Protest (B-417643) at 56-58. According to the protester, WR Systems is the primary support contractor for Little Creek, and "is heavily involved with WSN[-]12 development and integration, as well as supporting multiple other engineering initiatives for Little Creek." Protest at 14. URS asserts that the engineering support scope of work under the current solicitation "includes review and evaluation of work product from the Navy's NIWC[/LANT] Little Creek facility that includes the WSN-12 system and other systems." Id. at 15.

URS also speculates that SimVentions "must be exclusively relying on WR Systems to provide all of the expertise to the team in this area." Id. URS further alleges that "WR Systems' position would involve grading its own work, exactly the type of impaired objectivity barred by the FAR and caselaw." Id. at 16. The firm concludes that the Navy was therefore required to exclude SimVentions, and the agency's failure to do so materially prejudiced URS. Id. While URS alleges the Navy failed to reasonably assess SimVentions' OCI mitigation plan, and that the OCI could not be mitigated, our review of the record provides no basis to question the reasonableness of the agency's evaluation. Protest at 12-18.

As discussed above, during the course of reevaluating SimVentions' technical proposal, the TET found that a potential OCI existed with respect to two WR Systems' employees, and advised that the potential OCI should be mitigated prior to contract award.⁶ AR, Tab 2, TET Email to the Contracting Officer, at 3. In identifying the OCI to the contracting officer, the TET also noted that even if WR Systems' employees were precluded from performing work because of the OCI, SimVentions had "proposed a sufficient array of personnel covering these areas of this solicitation's statement of work so as not to increase risk to the government of not being able to complete the associated tasking without the two individuals from WR Systems." Id. Our review of the relevant portions of SimVentions' proposal does not cause us to question the TET's conclusion. For example, a review of SimVentions' technical proposal confirms the TET's review that the proposal shows the awardee and all five subcontractors (including WR Systems) have experience in the engineering support statement of work (SOW). AR, Tab 8, SimVentions Technical Proposal, at 83. SimVentions' proposal also explains that all work, including the engineering support SOW would be competed among the various subcontractors, "and will be awarded based on the quality of the candidates they provide." AR, Tab 9, SimVentions Oral Presentation Slides, at 227.

⁶ Specifically, the TET concluded that because WR Systems was involved in development of the WSN-12 system under the contract with Little Creek, and SimVentions proposed the use of two WR Systems employees "in the potential review and evaluation of those systems under the solicitation," there was "a potential OCI that must be mitigated prior to contract award." AR, Tab 2, TET Email to the Contracting Officer at 3.

Thus, contrary to URS's assertion that SimVentions "must be exclusively relying on WR Systems" with respect to the disputed review and evaluation work, the TET found, and the record confirms, that SimVentions could perform the engineering support work without conflict even if subcontractor WR Systems was conflicted from that specific SOW. This is precisely what SimVentions proposed to do in its OCI mitigation plan. In this regard, the plan states that "SimVentions has redundancy and overlap built into Team SimVentions covering most areas of the SOW in the event it is needed to exclude [WR Systems] from any particular tasking." AR, Tab 4, SimVentions Mitigation Plan, at 5.

The record also shows that the contracting officer relied on both the TET's analysis and SimVentions' OCI mitigation plan when determining there was not a significant potential OCI here. AR, Tab 5, OCI Determination, at 1. In her determination, the contracting officer found that the solicitation,

does not currently include a specific requirement to evaluate the WSN-12 system, the conflict applies only for one subcontractor of SimVentions, and even if WR Systems were to be excluded from any future WSN-12 review requirement, SimVentions, if awarded the contract, has the capability of performing that tasking or assigning to other members of its team.

Id.

The contracting officer further determined that SimVentions' mitigation plan was sufficient to mitigate the potential OCI, should it occur. Id. at 3. As the record reasonably supports the contracting officer's OCI determination URS's challenge to the reasonableness of the determination is denied.⁷ DV United, LLC, supra at 6.

URS also argues that the agency improperly limited the review of WR Systems' OCI. Comments and Supp. Protest at 5-9. In this regard, the protester argues, in essence, that the agency improperly limited its review to only the WSN-12 system discussed in

⁷ In its comments, URS also argues that SimVentions' mitigation plan failed to meet minimum requirements set forth in the solicitation. Comments and Supp. Protest at 11-15. In this regard, the protester argues that the solicitation set forth certain requirements for OCI mitigation plans that were required to be addressed, but were not addressed by SimVentions. Id. at 12-13. However, URS's arguments in this regard result from a misreading of the terms of the solicitation. Specifically, the relevant language in the RFP states that "[i]f the Offeror submits an OCI Mitigation Plan, the following shall be addressed, as a minimum, as applicable. . . ." RFP at 86. Contrary to the protester's arguments, offerors were not required to address all of the possible aspects listed in the solicitation for mitigation plans, but only those that were applicable. URS simply misapprehends the terms of the solicitation. As such, we are provided no basis to question the agency's evaluation of SimVentions' OCI mitigation plan in this regard.

URS's initial protest, but should also have considered all of the programs that WR Systems currently supports, of which, URS provides a list of eight additional items in its supplemental protest. Id. 5-6. The agency (as well as SimVentions, the intervenor) requests that we dismiss this challenge as an untimely piecemeal presentation of arguments. Agency Request for Dismissal 2-4; SimVentions Comments at 3-4. We agree.

Our Bid Protest Regulations require that protests other than those based on alleged solicitation improprieties shall be filed not later than 10 days after the basis of protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2). The regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions proving alternative or more specific legal arguments missing from earlier general allegations of impropriety. CapRock Gov't Sols., Inc. et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 24. Our Office will dismiss a protester's piecemeal presentation of arguments that could have been raised earlier in the protest process. Alfa Consult S.A., B-298164.2, B-298288, Aug. 3, 2006, 2006 CPD ¶ 127 at 3 n.2. Finally, the protest must set forth all information establishing the timeliness of the protest. 4 C.F.R. § 21.1(c)(6); Golight, Inc., B-401866, Sept. 10, 2009, 2009 CPD ¶ 184 at 1.

In its first protest, filed on June 9, 2019, URS asserted an OCI challenge to WR Systems' work as a support contractor for the WSN-12 work. Protest (B-417643) at 57-58. Only now does URS allege that WR Systems has conflicts with eight other Navy programs that would result from WR Systems' participation as SimVentions' subcontractor for the present solicitation. Protest at 14-15. Even after being given the opportunity to address the timeliness of this allegation in its comments to the agency's supplemental report, URS provides no explanation for why it could not have raised these issues earlier. See URS Supp. Comments at 20-25. Here, the protester neither elaborates on when it learned of WR Systems' work on the other programs it now asserts should have been considered in the agency's OCI determination, nor does URS explain why it could not raise these allegations in its June 9, 2019 protest. Id. Because URS provides no explanation or support regarding the basis for raising these new allegations, we conclude that URS has not met its burden of showing these new allegations were timely, and, therefore, the allegations are dismissed.⁸ CapRock Gov't Sols., Inc. et al., supra.

⁸ Moreover, URS's allegation here--consisting only of a bulleted list of eight additional programs without any explanation of what those programs are or why there is the potential for an OCI stemming from WR Systems' work on those programs and the instant requirement--fails to state a valid basis of protest. In this regard, our Bid Protest Regulations require that protests include a detailed statement of the legal and factual grounds of protest and that the grounds be legally sufficient. Systems Dynamics Int'l, Inc.--Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 4; see also 4 C.F.R. § 21.1(c)(4) & (f). This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the

In any event, the record reflects that the agency's review of WR Systems' work for NIWC/LANT was not as limited as URS asserts. In this regard, the TET explains that its analysis considered not only the firm's work on the WSN-12 system, but also its work on the WSN-7 inertial navigation systems, as well as "discussions about NIWC/LANT navigation products and NSWCDD's role in navigation programs with subject matter experts." AR, Tab 11, Declaration of TET Chair, at 1.

Unequal Discussions

URS also argues that the Navy improperly conducted discussions with SimVentions, and unreasonably allowed only SimVentions to make changes to its proposal, "that materially affected its proposed technical solution, staffing, pricing, experience and past performance." Comments and Supp. Protest at 18. The protester points to various aspects of SimVentions' OCI mitigation plan to support its allegation that the agency permitted SimVentions to make material changes to its proposal. Id. at 19-20. URS concludes that by permitting SimVentions to make material changes to its proposal, the agency's actions constituted discussions with one offeror, which required the agency to also conduct discussions with URS. Id. at 25.

According to the agency, however, it conducted a proper exchange with SimVentions that was limited to the potential OCI identified by the agency, and requested that the prospective awardee "develop an appropriate means to neutralize or mitigate the perceived OCI." COS/MOL at 4 citing AR, Tab 3, Letter to SimVentions. According to the agency, our Office "has consistently held that exchanges regarding an OCI issue or a mitigation plan are not considered to be discussions." Id. at 5

Although the regulations concerning discussions in procurements conducted pursuant to FAR part 15 do not, as a general rule, govern task order competitions conducted pursuant to FAR subpart 16.5, when an agency engages in exchanges with vendors in task order competitions, such exchanges must be fair. Tetra Tech, Inc., B-416861.2, B-416861.3, May 22, 2019, 2019 CPD ¶ 196 at 8; AT&T Corp., B-414886 et al., Oct. 5, 2017, 2017 CPD ¶ 330 at 4. Moreover, where an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large part, reflect the standards applicable to negotiated procurements. See, e.g., Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7.

Consonant with the agency's position, the FAR requires exchanges between the agency and prospective awardee where the agency determines there is a conflict of interest that cannot be avoided or mitigated. In this regard, the FAR states that the contracting officer "shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated." FAR § 9.504(e). Before the contracting officer decides to withhold award of the contract due to a conflict of interest that cannot be avoided or mitigated, the FAR instructs that the contracting

likelihood of the protester's claim of improper agency action. Id. Protests which fail to clearly state legally sufficient grounds of protest shall be dismissed. 4 C.F.R. § 21.5(f).

officer “shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.” Id. Thus, under these circumstances, where a potential OCI has been raised that could preclude award of the contract, the FAR instructs the agency to either award the contract, or permit the prospective awardee to respond to the allegation. Here, the agency chose the latter option.

The agency cites to our decision in Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185, to support its position that the exchanges here were properly held. In Overlook, the agency engaged in post-corrective action exchanges with the prospective awardee regarding a potential OCI, and, like here, the agency accepted a mitigation plan from the prospective awardee, in response to those exchanges. Id. at 6-7. The protester in Overlook objected to those exchanges arguing that the agency had improperly entered into discussions with the prospective awardee. Id. at 16. We disagreed with the protester in Overlook, finding that the regulatory scheme set forth in FAR section 9.504 “contemplates a review that occurs after evaluations are completed and after an apparent awardee has emerged. Nothing about this scheme suggests that the [contracting officer] would then be required to reopen discussions with all offerors.” Id. Ultimately, we concluded in Overlook that the exchanges that occurred regarding a potential OCI did not constitute discussions. Id.

Our review of the record here, shows that the rationale set forth in Overlook applies to this situation. When the facts of a procurement raise a concern that a prospective awardee might have an OCI, the FAR requires the agency to determine whether an actual or apparent OCI will arise, and to what extent the firm should be excluded from the competition. In this regard, the Navy identified SimVentions as the prospective awardee, and engaged in exchanges with that firm only to address a potential OCI that the TET identified was required to be mitigated prior to award. The notice to SimVentions from the contracting officer limited exchanges to neutralizing or mitigating the perceived OCI, and did not permit any revisions to the awardee’s technical or cost proposal. AR, Tab 3, Letter to SimVentions, at 1 (“The Government’s evaluation of the technical proposal or cost proposal that were submitted for this requirement will not be discussed and revisions to either of those proposals are not permitted.”).

Moreover, contrary to URS’s assertion that the agency permitted SimVentions to make material changes to its proposal, our review of the record leads us to conclude otherwise. As discussed above, SimVentions’ technical proposal shows that SimVentions and all five of its subcontractors (including WR Systems) have experience in the engineering support scope of work. AR, Tab 8, SimVentions Technical Proposal, at 83. SimVentions’ proposal also explains that all work, including the engineering support scope of work would be competed among the five subcontractors, “and will be awarded based on the quality of the candidates they provide.” AR, Tab 9, SimVentions Oral Presentation Slides, at 227. As such, a reasonable review of the record shows that even if WR Systems was not able to compete for certain work under the contract due to

an OCI, SimVentions would not necessarily need to change its performance approach, as URS suggests.⁹

Because we find that the agency reasonably evaluated the identified potential OCI with respect to WR Systems' performance as a subcontractor to SimVentions, we are provided no basis to object to the contracting officer's OCI determination in this regard. Moreover, since the agency did not engage in discussions with SimVentions, as the protester alleges, we find no basis to conclude that the agency was required to enter into discussions with URS, and permit proposal revisions, as the firm alleges. See Overlook Sys. Techs., Inc., supra.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁹ URS also argues SimVentions "relied on WR Systems' significant experience, past performance, technical capability, staffing history, and related capabilities regarding Navy navigation missions and systems" to support its assertion that the agency permitted SimVentions to materially change its proposal. Comments and Supp. Protest at 21. We disagree. The record does not support that the Navy permitted SimVentions to amend any aspect of its proposal other than submitting an OCI mitigation plan, as discussed above. Moreover, there is no indication from the record that WR Systems was precluded from otherwise performing as a subcontractor on this contract, other than situations where the mitigation plan is in effect. Thus, we see no reason why the agency could not continue to rely on those aspects of SimVentions' proposal relevant to WR Systems in its evaluation of proposals.