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Decision

Matter of: AT&T Corporation

File: B-417107.4

Date: July 2, 2020

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DIGEST

1. Protest that the awardee had an impaired objectivity organizational conflict of interest is sustained where the record shows that the agency unreasonably concluded that there was no possibility of any potential conflicts arising from the awardee's performance of a related task order.
 2. Protest that the agency unreasonably evaluated the protester's past performance is dismissed as untimely where the protester was advised of the agency's interpretation of the solicitation in connection with the initial award.
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DECISION

AT&T Corporation, of Oakton, Virginia, protests the award of a contract to Verizon Business Network Systems, Inc., of Ashburn, Virginia, by the Social Security Administration (SSA), under request for proposals (RFP) No. 28321318R00000047, which was issued for the agency's Next Generation Telephony Project (NGTP). AT&T argues that Verizon has an organizational conflict of interest (OCI) that should have precluded it from receiving the award, and that the agency unreasonably evaluated the protester's proposal under the past performance factor.

We sustain the protest.

BACKGROUND

The SSA's NGTP will combine three legacy telephone systems into a single requirement: (1) the Headquarters Telephone System (HTS), (2) the Telephone System Replacement Project (TSRP), and (3) the National 800 Number Network (N8NN). Agency Report (AR), exh. 1, RFP, attach. A, Statement of Work (SOW) at 100.¹ The HTS provides voice services for the SSA headquarters campus in Woodlawn, Maryland, the Wabash Avenue Building in Baltimore, Maryland, and the National Support Center in Urbana, Maryland, and handles over 14 million calls per year. *Id.* at 101-02. The TSRP provides voice services for more than 1,500 agency locations inside and outside the contiguous United States, and handles over 90 million calls and 30 million faxes each year. *Id.* at 102-03. The N8NN provides voice services for the agency's main toll-free number for the public, and handles over 80 million calls per year. *Id.* at 103.

As relevant to this protest, the SSA's network (SSANet) carries all of the agency's data, video, and voice traffic. *Id.* at 103-04. As discussed below, the agency obtains SSANet services through a separate indefinite-delivery, indefinite-quantity (IDIQ) contract and task order. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 5-6. The NGTP RFP explains that SSANet "provides the critical foundation for all information exchanges within the SSA's enterprise network and will continue to do so for the future NGTP effort."² SOW at 103. Infrastructure support from the SSANet, for data, video, and voice traffic, will be provided by the government to the NGTP contractor. *Id.* at 182.

The SSA issued the NGTP solicitation on August 28, 2018, seeking proposals to provide support to replace the agency's three legacy telephone systems. RFP at 1. The RFP anticipated the award of a single IDIQ contract under which the agency may issue fixed-price, time-and-materials, and labor-hour task orders. *Id.* at 6. The contract will have a 1-year base period, nine 1-year options, and one 6-month option. *Id.* at 5-6. The contractor will be required to provide "telephony, video, presence, [instant messaging], Web-based applications, and Contact Center services in an enterprise solution on the SSANet" that continues and expands services provided under the three legacy systems. SOW at 107. The contractor must provide equipment to support internal and external communications, and operations and maintenance of the system. *Id.*

¹ Citations to the RFP and SOW are to the numbered pages of the conformed version provided by the agency at AR exh. 1, unless otherwise noted.

² The RFP noted that although the SSANet does not currently support the N8NN system, it will provide support for that system under the NGTP. COS/MOL at 4 n.5; SOW at 103.

The RFP advised offerors that proposals would be evaluated in three phases. RFP at 83. In phase I, proposals would be evaluated for compliance with Section 508 accessibility requirements.³ *Id.* at 86. Proposals that were assigned the highest ratings under the Section 508 requirements would advance to phase II of the evaluation.⁴ *Id.* In phase II, proposals were to be evaluated on the basis of price and the following five non-price factors: (1) NGTP system requirements⁵, (2) technical approach⁶, (3) management approach⁷, (4) relevant experience, and (5) past performance. *Id.* at 86-91. For purposes of award, the non-price factors were “significantly more important than price.” *Id.* at 93. Phase III of the evaluation was to evaluate whether the apparent awardee presents an acceptable level of risk for supply chain management. *Id.* at 91-93.

The SSA received proposals from seven offerors, including AT&T and Verizon, by the initial closing date of October 5, 2018. COS/MOL at 9. On July 25, 2019, the agency selected Verizon’s proposal for award. *Id.* Two disappointed offerors filed protests with our Office on August 19, challenging the award to Verizon: Tyto Athene, LLC (B-417107.2) and CSRA LLC (B-417107.3). On September 11, the agency advised our Office that it would take corrective action in response to the protests by cancelling the award to Verizon, reopening discussions with offerors, requesting revised proposals, and making a new award decision. *Tyto Athene, LLC*, B-417107.2, Sept. 13, 2019, at 1 (unpublished decision); *CSRA LLC*, B-417107.3, Sept. 13, 2019, at 1 (unpublished decision). We concluded that the agency’s proposed corrective action rendered the protests academic, and therefore dismissed them. *Id.*

On September 27, the SSA issued task orders to Verizon and CenturyLink to provide support for the SSANet, under the General Services Administration’s (GSA’s) Enterprise Infrastructure Solutions (EIS) multiple-award IDIQ contracts. Agency Req. for Dismissal, Apr. 13, 2020, at 14 n.11; COS/MOL at 4-5. Verizon was previously issued a

³ Section 508 refers to a provision in the Rehabilitation Act of 1973, as amended, which generally requires that agencies’ electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

⁴ For the 508 compliance evaluation, the agency assigned proposals a rating of excellent, good, poor, or unsatisfactory. RFP at 86.

⁵ The NGTP system requirements factor had three subfactors: (1) system architecture and design, (2) contact center solution, and (3) management information. RFP at 87-88.

⁶ The technical approach factor had three subfactors: (1) implementation services, (2) installation and transition, and (3) managed services. RFP at 88-89.

⁷ The management approach factor had five subfactors: (1) staffing, (2) key personnel, (3) project management, (4) training, and (5) subcontracting. RFP at 89-90.

task order in 2012 to provide support for the SSANet under GSA's Networx multiple-award IDIQ contracts, and continues to perform under the Networx order during the transition to the EIS task order. COS/MOL at 5 n.6; Agency Req. for Dismissal, Apr. 13, 2020, at 5-6.

On October 4, AT&T sent a letter to the agency arguing that the issuance of the SSANet task order to Verizon created an impaired objectivity OCI that should prohibit that firm from competing for the NGTP contract. Agency Req. for Dismissal, exh. 10, Letter from AT&T to SSA, Oct. 4, 2019, at 1. As discussed in detail below, the contracting officer reviewed the protester's allegations and concluded that there was no potential OCI. COS/MOL at 11-13. The contracting officer determined, however, that an amendment to the RFP was required because it did not contain provisions addressing OCIs. *Id.* at 13.

The agency issued solicitation amendment No. 0004 to the NGTP solicitation on October 18, which advised offerors that the agency would conduct discussions and solicit revised proposals.⁸ AR, exh. 6, RFP amend. 0004, at 1. The amendment also included a clause requiring offerors to identify potential OCIs that could arise from the award of the contract and to propose a plan for mitigating such conflicts. *Id.* at 2.

The agency received revised proposals from the four offerors that remained in the competitive range for the NGTP competition, including AT&T and Verizon, by the closing date of November 27. COS/MOL at 15. The agency found that proposals submitted by the protester, the awardee, and a third offeror satisfied the phase I Section 508 compliance requirements.⁹ See AR, exh. 12, Summary of Award at 17. The phase II evaluation of the protester's and awardee's proposals was as follows:¹⁰

⁸ On October 18, the agency issued RFP amendment No. 0005, which extended the date for submission of revised proposals and provided additional instructions for the revisions. AR, exh. 7, RFP amend. 0005, at 1-3.

⁹ The agency report did not provide information concerning the identity of the third offeror or the evaluation of its proposal.

¹⁰ For the NGTP system requirements, technical approach, and management approach factors, the agency assigned proposals one of the following ratings: highly successful, successful, somewhat successful, or not successful. AR, exh. 12, Summary of Award at 9-12. For the relevant experience factor, the agency assigned proposals one of the following ratings: extremely similar, similar, slightly similar, or not similar. *Id.* at 12-14. For the past performance factor, the agency assigned proposals one of the following ratings: excellent, very good, satisfactory, marginal, unsatisfactory, or neutral. AR, exh. 10, Past Performance Evaluation, at 3-4.

	AT&T	VERIZON
NGTP System Requirements	Successful	Successful
Technical Approach	Highly Successful	Highly Successful
Management Approach	Highly Successful	Highly Successful
Relevant Experience	Extremely Similar	Similar
Past Performance	Satisfactory	Very Good
Price	\$534,170,011	\$524,999,980

AR, exh. 11, Tradeoff Analysis, at 18.

The contracting officer, who was also the source selection authority, documented the agency's evaluation of the proposals and the tradeoff between the price and non-price factors for the phase II evaluation. The contracting officer noted that Verizon's proposal had a "slight comparative advantage" under the management approach factor, and a "higher degree of overall customer satisfaction reflected in the Past Performance ratings." *Id.* at 22. In contrast, the contracting officer found that "AT&T's higher rating for Relevant Experience alone does not provide sufficient value to consider it of higher overall non-price benefit" as compared to Verizon's proposal. *Id.* The contracting officer found that "Verizon's proposal is determined to be of slightly greater overall non-price benefit and lower overall performance risk than AT&T's proposal," and offered a lower price. *Id.* Based on these considerations, the contracting officer concluded that "Verizon's proposal represents the 'best value' to the Government." *Id.* The agency also found that Verizon's proposal satisfied the solicitation's phase III supply chain risk assessment requirements. AR, exh. 13, Source Selection Summary, at 1. The agency therefore awarded the contract to Verizon on March 3, 2020. *Id.*

The SSA provided a written debriefing to AT&T on March 5, and answered the company's written questions on March 20. COS/MOL at 22. This protest followed.

DISCUSSION

AT&T raises two primary challenges to the SSA's award of the contract to Verizon: (1) Verizon has a disqualifying OCI arising from its performance of the SSANet task order, and (2) the agency unreasonably evaluated the protester's proposal under the past performance factor. For the reasons discussed below, we conclude that the agency unreasonably found that there was no potential OCI associated with award to Verizon, but that the protester's challenge regarding the past performance evaluation is untimely. We therefore sustain the protest based on the OCI argument.

Organizational Conflicts of Interest

AT&T argues that the award of the NGTP contract to Verizon created a disqualifying OCI because the awardee's ability to perform the contract requirements will be impaired by its role as a contractor supporting the SSANet task order. Protest at 6-12.

Specifically, the protester contends that the NGTP SOW requires the contractor to advise the agency as to whether there are problems with the SSANet that affect the performance of the NGTP. *Id.* at 8-10. We find that the agency unreasonably concluded that there were no potential conflicts of interest.

The Federal Acquisition Regulation (FAR) requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, 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 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 also Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (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.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3. We review OCI investigations for reasonableness, 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. *TISTA Sci. & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6.

Timeliness

The agency and intervenor contend that the protester is untimely to argue that the award to Verizon creates a disqualifying OCI. The agency filed a request for dismissal with our Office on April 14, 2020, prior to filing the agency report, arguing that the OCI challenge was untimely because it should have been filed prior to the time for receipt of revised proposals in November 2019. Agency Req. for Dismissal, Apr. 13, 2020, at 7-10. The agency also argued, in the alternative, that the protest should have been filed in connection with the initial award in July 2019. *Id.* at 10-14. Our Office provided the protester and intervenor an opportunity to comment on the request for dismissal. On April 16, our Office denied the request for dismissal. We explain here the basis for that decision.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial quotations must be filed prior to that time; similarly, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested no later than the next closing time for receipt of quotations following the

incorporation. 4 C.F.R. § 21.2(a)(1). Protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their basis. 4 C.F.R. § 21.2(a)(2).

Our Office has explained that there are several considerations for when an OCI protest is timely. As a general rule, a protester is not required to file a protest that another firm has an impermissible OCI until after that firm has been selected for award. *Liquidity Servs., Inc.*, B-409718 *et al.*, July 23, 2014, 2014 CPD ¶ 221 at 9; *REEP, Inc.*, B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. A different rule applies, however, where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the agency advises the protester that a potentially conflicted firm is eligible for award. *Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6; *Abt Assocs., Inc.*, B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2. In such cases, the protester cannot wait until an award has been made to file its protest of an impermissible OCI, but instead must file the protest before the closing time for receipt of proposals. *Abt Assocs., Inc.*, *supra*. An agency's request that offerors provide additional information for evaluation as part of the agency's OCI analysis indicates that the agency has not made a final decision as to whether an offeror is eligible for award, with respect to OCIs. *Systems Made Simple, Inc.*, B-412948.2, July 20, 2016, 2016 CPD ¶ 207 at 5-6 (request for mitigation plan indicated the contracting officer had not made a final determination regarding eligibility for award).

The SSA argues that AT&T's protest is untimely because the protester knew or should have known as a result of the issuance of RFP amendment No. 0004 that the agency considered Verizon eligible for award. Agency Req. for Dismissal, Apr. 13, 2020, at 8-10. The agency notes that the amendment stated that negotiations would be reopened with "all Offerors in the competitive range," and argues that this necessarily included Verizon. *Id.* at 9 (*quoting* RFP amend. No. 0004 at 1). The agency also notes that the protester sent a letter on October 4, 2019, which identified the same OCI allegations raised in this protest concerning the issuance of the EIS task order to Verizon in September 2019 for performance of the SSANet requirements. Agency Req. for Dismissal, exh. 10, Letter from AT&T to SSA, Oct. 4, 2019, at 1-2. The agency contends, therefore, that the protester knew or should have known as a result of the reopening of discussions announced in RFP amendment No. 0004 that the agency had found Verizon eligible to compete for the award, notwithstanding the protester's OCI concerns. Agency Req. for Dismissal, Apr. 13, 2020, at 8-10.

AT&T responds that RFP amendment No. 0004 required offerors for the first time to submit an OCI mitigation plan, and also advised that the agency would evaluate those plans prior to award. Protester's Response to Agency Req. for Dismissal, Apr. 15, 2020, at 1-2. For this reason, the protester argues that it is timely to challenge the agency's OCI determination in connection with this new solicitation provision. We agree.

RFP amendment No. 0004 stated that the agency would conduct discussions and directed offerors to submit revised proposals. AR, exh. 6, RFP amend. No. 0004 at 1.

The amendment also included a new OCI provision that required new information from offerors regarding potential conflicts, as follows:

The nature of some services required under this IDIQ contract may increase the likelihood that the Contractor awarded this NGTP contract (whether through the initial award of NGTP or through the agency's issuance of some subsequent NGTP task orders to the Contractor) could have an OCI by virtue of the Contractor's performance under other previous or on-going acquisitions for the agency. This includes the Contractor's performance as either the prime Contractor, or as a Subcontractor. Work on other agency contracts by the Contractor that may give rise to an OCI could include, but is not limited to, work the Contractor may perform for the agency under GSA's government-wide Networkx and/or Enterprise Infrastructure Solutions (EIS) contracts, or other agency contracts related to the agency's telephony, telecommunications, and networking requirements. . . . Offerors are instructed to provide the Offeror's input as to whether, *if awarded this NGTP IDIQ contract, the Offeror would have a potential OCI*. If an Offeror so identifies a potential OCI, the Offeror is instructed to provide to the agency the Offeror's plan for mitigating the potential OCI, or inform the agency if the Offeror believes the potential OCI cannot be mitigated.

Id. at 2 (emphasis added). The OCI provision also identified a process for the identification and mitigation of OCIs during contract performance in connection with issuance of task orders. *Id.*

The OCI provision further stated that the agency would evaluate an offeror's mitigation plan, and could disqualify an offeror from award based on that plan, as follows:

SSA will evaluate every proposed mitigation plan to ensure it protects the agency's interests. SSA may:

1. accept the mitigation plan and incorporate it into the NGTP award or task order;
2. request modifications to the mitigation plan and incorporate the final mitigation plan into the NGTP award or task order; or
3. reject the mitigation plan (before or after requesting modifications) if the potential OCI cannot be mitigated to the agency's satisfaction. If the [contracting officer] rejects the mitigation plan, the [contracting officer] will notify the Contractor and the Contractor *may be deemed ineligible for award of the initial NGTP IDIQ contract* or the task order resulting from a particular RFTOP, as applicable, at the [contracting officer's] sole discretion.

Id. at 2-3 (emphasis added).

As discussed above, offerors must file a pre-award protest where an agency has expressly advised that it has completed its OCI review and determined that a potentially conflicted offeror is eligible for award. See *Honeywell Tech. Solutions, Inc., supra*; *Abt Assocs., Inc., supra*. Here, however, RFP amendment No. 0004 required offerors to submit information for the purpose of making an OCI determination. Under these circumstances, we do not find that the agency communicated through the amendment that it had made a final decision regarding Verizon's eligibility for award under the newly-issued OCI provision that triggered an obligation for AT&T to file a pre-award protest. See *Systems Made Simple, Inc., supra*. We therefore find that the issuance of RFP amendment No. 0004 did not require the protester to file a pre-award protest.

Alternatively, the SSA argues that AT&T's protest is untimely because the protester knew or should have known of the basis for its argument in connection with the initial award to Verizon in July 2019. Agency Req. for Dismissal, Apr. 13, 2020, at 10-14. The agency notes that Verizon was at that time providing support for the SSANet through the Networkx task order, and argues that AT&T was aware of this fact because it had unsuccessfully competed for the award of that task order. *Id.*

AT&T argues, and we agree, that while it did not challenge the initial award to Verizon, the agency's corrective action in response to the two protests filed against that award gave rise to new timely protest arguments. In this regard, the agency's corrective action in response to the two protests of the initial July 2019 award to Verizon included the issuance of an RFP amendment that required offerors to submit new information concerning OCIs and anticipated a new OCI decision that would be made on the basis of this information. In sum, we find that AT&T's OCI arguments are timely. See 4 C.F.R. § 21.2(a)(2) (protests other than those challenging the terms of a solicitation must be filed within 10 days of when a protester knew or should have known of their basis).

OCI Regarding NGTP and SSANet Requirements

AT&T argues that the solicitation requires the contractor to perform tasks that will cause Verizon to have an impaired objectivity OCI based on its other role as a contractor supporting the agency's SSANet. The NGTP contractor will be required to provide systems engineering support, which includes notifying the agency if there are problems with the government-provided network services as follows:

6.3.3 Continuous Systems Engineering

The Contractor shall provide ongoing systems engineering support to continually enhance the performance and reliability of the NGTP systems. The Contractor shall provide a failover testing strategy demonstrating frequency of reoccurrence as part of the Master Test Plan. Failover testing shall be performed in accordance with the approved schedule.

The Contractor shall provide a fault management application to monitor the health of the NGTP systems, equipment, applications, and infrastructure. The Contractor shall be responsible for responding to all faults generated by the NGTP systems.

The Contractor shall determine if network capacity, quality of service, bandwidth, and integration with other systems are meeting the needs of the NGTP solution. The contractor shall identify, document, and communicate any performance or quality of service issues with the Agency WAN [wide area network] to the [contracting officer's representative (COR)]. . . .

SOW at 143-44 (emphasis added). The SOW also states that the SSA will provide the NGTP contractor certain services as government furnished equipment (GFE). SOW at 182. As relevant here, telecommunications and WAN services are currently provided as GFE for each of the legacy systems, and “[t]hese services will continue to be GFE for the NGTP system.” *Id.*

As discussed above, AT&T contacted the SSA on October 4, 2019, to express concern about a potential OCI arising from Verizon’s role as one of the two contractors that will be providing SSANet services under the newly-awarded EIS task orders. Agency Req. for Dismissal, exh. 10, Letter from AT&T to SSD, Oct. 4, 2019, at 1-2. The protester argued that there will be a conflict because Verizon would be required under the NGTP SOW to advise the agency of problems encountered with the WAN services that Verizon provides under the SSANet task order. *Id.* at 2. The protester argued that this conflict could not be mitigated, and that the agency should exclude Verizon from the competition. *Id.*

The contracting officer states that he reviewed the protester’s letter and investigated whether the OCI allegations had merit. COS/MOL at 10-11. The contracting officer reviewed the terms of the SOW and consulted with agency counsel regarding the OCI provisions of the FAR, and consulted agency technical and management personnel regarding the requirements of the NGTP solicitation and the SSANet task orders. *Id.* at 11-13. Based on his review and consultations, the contracting officer concluded “[o]n or about October 16, 2019,” that Verizon did not have a disqualifying OCI:

I concluded that AT&T’s allegation did not raise even a potential OCI for Verizon, let alone a significant potential OCI or a substantive issue concerning a potential OCI as described in FAR 9.504. I determined that no potential OCI existed for Verizon related to section 6.3.3. of the NGTP

SOW as a result of its performance under one of the two EIS task orders for SSANet.

Id. at 12-13.¹¹

The contracting officer's conclusion that there was no potential OCI arising from the award to Verizon was based on two primary findings. We find that both of these findings are unreasonable and not supported by the record.

First, the contracting officer found that the SOW section 6.3.3 does not require the NGTP contractor to monitor or evaluate the performance of the SSANet contractor. COS/MOL at 13. In this regard, the contracting officer notes that the SOW provision requires the contractor to "monitor the health of the NGTP systems, equipment, applications, and infrastructure," to "determine if network capacity, quality of service, bandwidth, and integration with other systems are meeting the needs of the NGTP solution," and to "identify, document, and communicate any performance or quality of service issues with the Agency WAN to the COR." See *id.* (quoting SOW at 143-44). In essence, the contracting officer found that there was no OCI because the SOW does not require the NGTP contractor to specifically evaluate the performance of the SSANet contractor, but rather requires it to advise the agency if the quality and performance of the services provided by the SSANet contractor affects the NGTP contractor's ability to perform the contract. See *id.* We think this is a distinction without a difference.

AT&T argues that SOW section 6.3.3 requires the contractor to assess whether the agency-provided SSANet services meet the needs of the NGTP, and thus inevitably requires the contractor to assess the quality of those services. See Protest at 8-9. Specifically, the requirement to "identify, document, and communicate any performance or quality of service issues with the Agency WAN" requires the NGTP contractor to exercise its judgment as to whether there are problems with the services provided by the SSANet contractor that affect the NGTP. See *id.* As a consequence of this requirement, the protester argues that Verizon has a conflict in advising the agency about problems the awardee experiences in performing the NGTP contract that are caused by its performance of the SSANet task order. The protester contends that Verizon will be forced to decide whether to report a problem with the SSANet services, thereby highlighting a problem with its performance on that task order, or to not report the problem, thereby potentially jeopardizing its performance on the NGTP contract.

Our Office has explained that the concern in impaired objectivity situations, including evaluation of products or services, is whether a firm's ability to render impartial advice to

¹¹ As noted above, despite this conclusion, the contracting officer determined that the RFP required amendment to add the OCI provision. COS/MOL at 13. The agency therefore issued RFP amendment No. 0004 on October 18. The contracting officer states that his review of the awardee's OCI mitigation plan in its revised proposal did not affect his finding that Verizon did not have an OCI based on its performance of the SSANet task order. *Id.* at 15 n.13

the government will be undermined by its relationship to the product or service being evaluated. In *PURVIS Sys., Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7, we sustained the protest because the agency did not meaningfully consider potential OCIs arising from the award of a contract to a firm for the evaluation of weapons systems, including systems produced by the awardee and its competitors. In *Cognosante, LLC*, B-405868, Jan. 5, 2012, 2012 CPD ¶ 87, our Office found that an agency reasonably disqualified an offeror from a competition based on an OCI that arose because the contractor would be required to choose whether to conduct an audit under two different contracts, each of which had differing financial incentives.

Here, we find that the agency's OCI analysis relies on the unreasonable assessment that "section 6.3.3. of the NGTP SOW does not impose a requirement on the NGTP contractor to monitor or evaluate the performance of the SSANet contractors," and that "the NGTP SOW does not require the NGTP contractor to evaluate, test, or provide advice with regard to the WAN or the SSANet system as a whole." COS/MOL at 13, 31. The SOW, however, expressly requires the contractor to exercise its judgment by advising the agency when the government provided resources, such as the WAN, are experiencing problems that affect the NGTP. See SOW at 144. Although the SOW does not state that the NGTP contractor must directly evaluate the contractor performing the SSANet task order, the requirement to advise the agency of "performance or quality of service issues with the Agency WAN," in effect, will require Verizon to provide the agency advice about its own performance of the WAN requirements of the SSANet task order. Additionally, while this SOW provision does not require the contractor to monitor or evaluate the entirety of the SSANet, it unquestionably requires the contractor to assess the performance of the SSANet with regard to its effect on the NGTP contract. See *id.* On this record, we conclude that the contracting officer unreasonably concluded that Verizon could not have a potential OCI in connection with its performance of the requirements of SOW section 6.3.3.

Second, as a related matter, the contracting officer found that award of the contract to Verizon could not give rise to a potential OCI because the SOW does not require the NGTP contractor to be "responsible for the performance of the SSANet." COS/MOL at 12-13, 29. The agency also argues that it does not rely solely on the NGTP contractor to identify problems with the performance of the SSANet, and has other resources to monitor its performance. *Id.* at 11-12.

We agree with the agency that the SOW does not require the NGTP contractor to ensure that the SSANet task order requirements are performed successfully, and find no basis to question the agency's representation that the NGTP contractor is not the sole source of information for the agency about the quality of SSANet services. We nonetheless find that these facts do not alter the plain conclusion that Verizon will be required under the NGTP contract to evaluate the quality of services it provides under the SSANet task order. Thus, Verizon may have a conflict of interest in reporting to the agency problems experienced with the NGTP contract caused by services provided by Verizon on the SSANet task order. We therefore find that the agency's OCI determination here was also unreasonable.

In sum, we conclude that the contracting officer's determination that there was no potential OCI associated with the award to Verizon was unreasonable because it relies on unreasonable interpretations of the SOW.¹² We therefore sustain the protest.¹³

Past Performance Evaluation

AT&T also argues that the SSA unreasonably evaluated its proposal under the past performance factor because it failed to consider information required by the solicitation and submitted in its proposal. For the reasons discussed below, we conclude that this argument is untimely because the agency advised the protester, in connection with the initial award to Verizon, that the agency did not consider the RFP to require consideration of this information and the protester did not challenge this matter in connection with that award.

¹² AT&T also argues that the protest should be sustained because the agency failed to document its contemporaneous OCI analysis. Protester's Comments, May 11, 2020, at 3. In this regard, the contracting officer did not document either his October 2019 conclusion that Verizon did not have an OCI, or his review of the awardee's OCI mitigation plan submitted in response to RFP amendment No. 0004. Instead, the entirety of the agency's OCI analysis is documented by the contracting officer's statement in response to the protest. On the one hand, the FAR provides that a "contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists." FAR 9.504(d). On the other hand, RFP amendment No. 0004 clearly anticipated an evaluation of offerors' OCI mitigation plans. See RFP amend. No. 0004 at 1-2. Because we sustain the protest based on the agency's unreasonable OCI determination, we recommend as discussed below that the agency conduct a new OCI review and document those findings.

¹³ In addition to the SSA's responses to AT&T's arguments, Verizon argues that an OCI could not arise from its performance of the NGTP contract because there are two contractors providing support for the SSANet, Verizon and CenturyLink, and the NGTP contractor would not know which SSANet contractor is providing the WAN in any given location. Intervenor's Comments, May 11, 2020, at 5. We do not think that the fact that there are two SSANet contractors shows that there was no possibility of an OCI here. First, the awardee does not reasonably explain why Verizon would be unaware as to whether WAN services at a particular location were provided by Verizon or CenturyLink. Second, even if Verizon was unaware whether it was providing services at a particular location, the possibility remains that reporting a problem with the WAN could result in a negative finding regarding Verizon's performance of the SSANet task order if it is ultimately shown that Verizon was responsible for the problem. We therefore find no basis to conclude that the intervenor's observations regarding the fact that two contractors support the SSANet eliminates the possibility of an OCI.

The RFP's instructions stated that offerors' proposals must include information for no more than three projects where the offeror "performed a significant role in work that is similar in size, scope, and complexity to the work. . . ." RFP at 81. The solicitation stated that offerors' proposals must include the following information:

- a. Client's corporate name, address, point of contact, telephone number, and email address
- b. Contract number (if applicable)
- c. Contract period of performance
- d. Contract type (firm-fixed price, IDIQ, cost reimbursement, etc.)
- e. Description of products or services provided and the responsibilities of the contractor
- f. Significant accomplishments
- g. Problems encountered and resolutions
- h. Self-evaluation

Id. at 82.

The solicitation included a past performance questionnaire that offerors were required to provide to their references. *Id.* The references were to complete the questionnaires and send them to the contracting officer. *Id.* The RFP instructions also stated as follows: "The Government reserves the right to evaluate the contractor's past performance using other sources in addition to the submitted questionnaires. Such sources may include, but are not limited to, the Past Performance Information Retrieval System (PPIRS)." *Id.*

The RFP's evaluation criteria stated that offerors' past performance would be evaluated as follows:

In assessing past performance, the Government will consider information received in response to the questionnaires, and may consider information from other sources, including, but not limited to, information contained in Government past performance databases. The Government's evaluation of past performance will be based upon consideration of all relevant facts and circumstances. The Government will evaluate the quality of contractors' past performance and the probability of successfully performing the requirements in the solicitation based upon these references of past performance. Each reference will be evaluated separately. . . .

Id. at 90.

AT&T's proposal provided past performance information regarding two contracts. AR, exh. 8, AT&T Revised Technical Proposal, at 3-14. The protester's past performance references each sent completed questionnaires to the agency. *Id.* at 7. The protester argues that the agency's evaluation was inconsistent with the terms of the

solicitation because it considered only the questionnaires submitted by the references and did not consider information offerors were required to include in their proposals. Protester's Comments, May 11, 2020, at 26-28. Specifically, the protester argues that if the agency had considered its description of how it successfully performed the contracts and how it addressed certain "minor problems," this would have resulted in a higher rating for its proposal under the past performance factor. *Id.* at 26-27.

The SSA acknowledges that its evaluation of past performance was limited to the questionnaires, and that the agency did not consider any of the narrative information in the protester's proposal. Agency Response to GAO Questions, June 10, 2020, at 6-7. The agency argues that although offerors were required to submit the narrative information, the solicitation did not require the agency to evaluate it. *Id.* at 1-2. In this regard, the agency contends that the RFP stated that the agency would consider the questionnaires, and gave the agency discretion to consider other information: "In assessing past performance, the Government *will* consider information received in response to the questionnaires, and *may* consider information from other sources, including, but not limited to, information contained in Government past performance databases." *Id.* at 3 (*quoting* RFP at 90 (emphasis added)). For this reason, the agency contends that it reasonably limited the evaluation to the questionnaires. *Id.*; COS/MOL at 33-36.

We need not resolve this matter because we agree with the agency that the argument is untimely. As the agency notes, it advised the protester during the debriefing in connection with the original July 2019 award that the evaluation of its past performance was limited to the questionnaires. The following two questions were posed by the protester and answered by the agency:

5. Related to Factor 5 Past performance, please detail what drove AT&T's relatively low past performance rating.

ANSWER: The [contracting officer] found that, based on the [past performance questionnaire] information submitted for all projects, the offering Contractor's performance met contract requirements, and performance was accomplished with some minor problems for which corrective actions taken by the contractor were satisfactory. . . .

7. Did SSA consider any other past performances, beyond what we provided, to rate our past performance? If yes, please provide the information and sources used along with the rating and ranking.

ANSWER: In evaluating past performance, the Government relied on the information submitted in the past performance questionnaires only.

Agency Req. for Dismissal, exh. 7, Agency Responses to AT&T Debriefing Questions, Aug. 14, 2019, at 2.

The SSA contends that these questions and answers put the protester on notice of the agency's interpretation that the RFP required evaluation of the questionnaires, but treated the evaluation of all other information as discretionary. We agree. The questions and answers listed above only address the agency's evaluation of AT&T's past performance questionnaires. To the extent the protester believed that information in its proposal should also have been considered--to augment or offset information provided in the questionnaires--the protester knew or should have known from the agency's July 2019 debriefing that the agency had not taken this information into consideration. Additionally, nothing in the two RFP amendments issued after the agency took corrective action in response to the two protests challenging the initial award to Verizon stated that the agency would revise its approach to evaluating past performance. We therefore conclude that this protest argument is untimely. See *Savvee Consulting, Inc.*, B-408416.3, Mar. 5, 2014, 2014 CPD ¶ 92 at 6-7.

CONCLUSION AND RECOMMENDATION

We sustain the protest because the SSA unreasonably concluded that there was no potential OCI associated with the award to Verizon. We recommend that the agency conduct a new OCI evaluation that reassesses the potential for conflicts arising from Verizon's obligations under the NGTP contract and the SSANet task order, including that firm's OCI mitigation plan, and document its findings.

We also recommend that AT&T be reimbursed the costs of filing and pursuing its challenge to the agency's OCI determination, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1). AT&T should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel