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Decision

Matter of: L3Harris Technologies, Inc.

File: B-420490

Date: May 3, 2022

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Lieutenant Colonel Matthew W. Ramage-White, Kevin P. Stiens, Esq., and Erika Whelan Retta, Esq., Department of the Air Force, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency failed to properly consider an impaired objectivity organizational conflict of interest (OCI) is denied where the record shows that the contracting officer gave meaningful consideration to whether the awardee had an OCI and there is no clear evidence in the record that the agency's conclusion was unreasonable.

DECISION

L3Harris Technologies, Inc., of Palm Bay, Florida, protests the award of a contract to Peraton Inc., of Herndon, Virginia, under request for proposals (RFP) No. FA7022-21-R-0001, issued by the Department of the Air Force for software development and engineering services support. L3Harris argues that the agency failed to adequately consider whether Peraton has an organizational conflict of interest that would preclude award to it.

We deny the protest.

BACKGROUND

This protest involves the procurement of the Mission System Support 2 (MSS-2) contract, which serves as the successor to the MSS-1 contract. Under both contracts, the contractor is responsible for providing highly specialized software development and

engineering services to support the Air Force Technical Applications Center (AFTAC) Nuclear Test Ban Treaty mission.¹ Contracting Officer's Statement (COS) at 2.

MSS-1 Contract

The agency originally awarded the MSS-1 contract to Northrop Grumman Mission Systems. COS at 5. In February 2021, during the final year of the MSS-1 contract, Peraton acquired the business unit of Northrop Grumman responsible for performing the MSS-1 contract. *Id.* As a result, Peraton became the MSS-1 contractor and is the incumbent contractor for the instant requirement.

MSS-2 Solicitation

The Air Force issued the MSS-2 solicitation on December 18, 2020, using the procedures of Federal Acquisition Regulation (FAR) part 15. Agency Report, Tab 4, RFP at 1; COS at 3.² The solicitation sought a contractor to support AFTAC's mission at Patrick Space Force Base, Florida, by developing, updating, and maintaining legacy and current system configurations and software. COS at 2.

The solicitation anticipated award of a cost-plus-fixed-fee contract for a base year with four 12-month options. RFP at 3-8, 89. Award was to be made on a best-value tradeoff basis considering technical capability, past performance and cost/price.³ RFP at 111. As relevant here, the solicitation's performance work statement (PWS) included a requirement for independent verification and validation (IV&V) and system testing, which requires that "[t]o ensure system sustainability, the contractor shall plan and conduct IV&V of the new developments intended for system integration." Protest, exh. 2, RFP, PWS § 2.1.4.⁴

¹ As explained in the RFP, "AFTAC provides national authorities with quality technical measurements to monitor nuclear treaty compliance and develops advanced proliferation monitoring technologies to preserve our nation's security." AR, Tab 4, RFP at 89. In furtherance of this mission, AFTAC "uses automated information systems and software applications" that "require maintenance and sustainment to ensure cybersecurity and reliability." *Id.* In addition, "software development is required to keep pace with newly identified areas of interest and technological advancements." *Id.*

² The solicitation was amended three times. Citations to the RFP are to the conformed copy through amendment 3.

³ The RFP also provided for the evaluation of proposals using the following two factors: access to a DIA-approved Sensitive Compartmented Information Facility (SCIF) and small business participation commitment. The SCIF factor was to be evaluated on a pass/fail basis and the small business factor on an acceptable/unacceptable basis. RFP at 111, 117.

⁴ The complete PWS is classified, but our Office was provided with an extract of the unclassified requirements.

The Air Force received proposals from two offerors, Peraton and L3Harris. COS at 4. The agency concluded that Peraton's proposal represented the best value to the government and awarded the contract to that firm. *Id.* On January 19, 2022, the agency notified L3Harris that its proposal had not been selected. AR, Tab 18, Notice of Unsuccessful Offer at 2. In the Notice, the contracting officer also noted that a "potential OCI concern" had been brought to her attention regarding Peraton's participation in another contract--the Expert Scientific and Analytical Support (ESAS) 2 contract--prior to evaluation of proposals. *Id.* at 3. The contracting officer advised that she "formally determined that there was no current or potential organizational conflict of interest that would preclude Peraton's bidding on or being awarded this contract (MSS-2)." *Id.* After requesting and receiving a debriefing, L3Harris filed this protest with our Office.

DISCUSSION

L3Harris argues that the agency failed to meaningfully consider the impermissible "impaired objectivity" organizational conflict of interest arising from Peraton's dual roles on the ESAS-2 contract, which requires the contractor to develop and upgrade hardware and software prototypes and modules for the AFTAC Information Systems, and the subject MSS-2 contract, which requires the contractor to provide independent verification and validation services.⁵ Protest at 1,9,18. L3Harris maintains that this potential OCI should have precluded Peraton from receiving the solicited contract.

Timeliness

As a preliminary matter, the intervenor argues that we should dismiss the protest as untimely, asserting that L3Harris learned on August 30, 2021, that the agency had "affirmatively determined that no OCI issued existed." Intervenor's Comments at 2. As a result, the intervenor contends, L3Harris was required to file its OCI protest allegations within 10 days of that date.

⁵ In its protest, L3Harris also argued that the agency improperly found that its proposal presented "moderate risk" based on the unreasonable assessment of two technical weaknesses. Protest at 20. Our Office dismissed this allegation as failing to state a valid basis for protest because the protester failed to allege facts demonstrating a reasonable possibility of prejudice, which is an essential element of any viable protest. See *Interfor US, Inc.*, B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7. In this regard, apart from contesting its proposal's risk rating, the protester did not challenge the evaluation of proposals, and the record reflected that even if the agency erred in rating L3Harris's technical proposal as moderate risk, Peraton would remain the higher-rated, lower-priced offeror. See AR, Tab 18, Notice of Unsuccessful Offer at 2 (showing that Peraton had a lower evaluated cost/price and received a higher rating under the only factor/subfactor (other than technical risk) for which the two proposals were not rated the same).

As a general rule, a protester is not required to 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. We have, however, applied a different rule where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award. *Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6. In such cases, the protester cannot wait until an award has been made to file its protest of an impermissible OCI, but instead must protest before the closing time for receipt of proposals. *Abt Assocs., Inc.*, B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2.

In support of its position, the intervenor relies on an agency email that stated, “[i]t has been examined and determined by the [contracting officer] for ESAS 2 that there is no OCI issue present.” AR, Tab 12, Agency Email, Aug. 30, 2021 at 1. The intervenor maintains that this email “unequivocally informed” L3Harris that the contracting officer for the MSS-2 procurement had determined that there was no OCI and that Peraton was eligible for award. Intervenor’s Comments at 4. We do not agree with the intervenor that the email provided such notice. Rather, the email indicates only that the contracting officer for the other procurement--ESAS 2--had determined that there was not an OCI issue.

Moreover, the record reflects that the MSS-2 contracting officer continued to investigate the alleged OCI after August 30, 2021. See AR, Tab 14, L3Harris Email, Oct. 4, 2021 (providing agency with additional information requested by the contracting officer); Tab 15, L3Harris Letter dated Sept. 29, 2021 (attachment to L3Harris’s October 4, 2021 email); AR, Tab 5, Peraton Email, Oct. 21, 2021 (providing OCI mitigation plan as requested by the contracting officer); Supp. Comments, exh. 2, Email, Oct. 22, 2021 at 1 (email from contracting officer informing L3Harris that she was “actively reviewing” L3Harris’s “OCI concern” and would be “in contact once we have further information to provide.”). It was not until the January 19, 2022 notice of award that the contracting officer advised L3Harris that she had “formally determined that there was no current or potential organizational conflict of interest that would preclude Peraton’s bidding on or being awarded this contract (MSS-2).” AR, Tab 18, Notice of Unsuccessful Offer at 3.

Based on the foregoing, we are not persuaded that the protest is untimely. Accordingly, we decline to dismiss it on that basis.

Organizational Conflict of Interest

Turning then to the merits of the protester’s argument, contracting officers are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. FAR 9.504. The FAR provides that an OCI exists when, because of activities or relationships with other persons or organizations, a person or organization is unable or potentially unable to render impartial assistance or advice to the government. See FAR 2.101. Situations that create potential conflicts are further discussed in FAR subpart 9.5 and the decisions of this Office. Specifically, an “impaired

objectivity” OCI is created when a contractor’s judgment and objectivity may be impaired because the contractor’s performance has the potential to affect other interests of the contractor. FAR 9.505, 9.508; *Alion Science & Technology Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 6.

Broadly speaking, we have recognized the potential for an “impaired objectivity” OCI in two situations, namely, where a firm may be called upon to evaluate the work it has performed under another contract, or where a firm is called upon to perform analysis and make recommendations regarding products manufactured by it or by a competitor. *L-3 Services, Inc.*, B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 13-14. The primary concern in these cases is that the firm’s ability to render impartial advice to the government will be undermined by the firm’s competing interests such as a relationship to the product or service being evaluated. FAR § 9.505-3; *ORBIS Sibro, Inc.*, B-417406.2, B-417406.3, Nov. 19, 2019, 2019 CPD ¶ 404 at 12; *PURVIS Sys., Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

In reviewing protests that challenge an agency’s conflict of interest determination, our Office reviews the reasonableness of the contracting officer’s investigation and, where an agency has given meaningful consideration to whether an OCI exists, even when this consideration is given after award, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. See *Deloitte Consulting, LLP et al.*, B-411884 *et al.*, Nov. 16, 2015, 2016 CPD ¶ 2 at 17; *TISTA Science & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. *Diversified Collection Servs., Inc.*, B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 6.

Peraton is currently performing under the Expert Scientific and Analytical Support 2 (ESAS-2) contract. This contract was awarded on September 28, 2018.⁶ COS at 8. As noted above, the ESAS-2 contract requires the contractor to develop and upgrade hardware and software prototypes and modules for the AFTAC Information Systems. Protest, exh. 5, ESAS-2 PWS § 1.8. To date, the agency has issued two task orders under the ESAS-2 contract. The first task order was the “SIMTOOL 2’ prototype task included in the ESAS-2 request for proposal.” COS at 8. The purpose of this 2-year task was to “replace a legacy training and simulation package that was embedded in the mission system.” *Id.* Task order one “was completed successfully,” and a second task order was awarded to “enhance the functionality of the delivered SIMTOOL 2 software.” *Id.* The task order 2 “software delivered by the ESAS 2 contractor was evaluated and accepted by the government.” *Id.* at 8-9.

As discussed above, the PWS for the MSS-2 solicitation includes a requirement for independent verification and validation and system testing, which requires that the contractor “conduct IV&V of the new developments intended for system integration.”

⁶ ESAS-2 was originally awarded to Perspecta, Inc. Peraton became the contractor for ESAS-2 after acquiring Perspecta in the first half of calendar year 2021. COS at 6.

Protest, exh. 2, RFP, PWS § 2.1.4. L3Harris argues that this requirement includes verifying, validating, and testing software developed and delivered by AFTAC's ESAS-2 contractor--that is, Peraton. The protester asserts that, "by allowing the same contractor to perform these dual roles, the [a]gency has created a textbook case of an unmitigable impaired objectivity [OCI]." Protest at 1-2.

L3Harris first notified the MSS-2 contracting officer of a potential OCI regarding Peraton in April 2021. AR, Tab 6, OCI Background Memorandum (Memo) at 1. L3Harris advised the agency of Peraton's intent to acquire Perspecta, Inc. AR, Tab 7, Email at 1. At that time, Perspecta was the ESAS-2 contractor. *Id.* L3Harris asserted that completion of the acquisition would create a potential OCI between the MSS-2 and ESAS-2 contracts. *Id.* L3Harris questioned whether the ESAS-2 OCI clause would be triggered by the Peraton acquisition of the ESAS-2 contractor, Perspecta. AR, Tab 9, L3Harris Email; Tab 10, ESAS-2 RFP Q&A; Tab 16, Agency Email.

The MSS-2 contracting officer examined the potential for any OCI concerns. As part of her investigation, she contacted the ESAS-2 contracting officer, as well as other agency officials. AR, Tab 6, OCI Background Memo at 1. The ESAS-2 contracting officer verified that the ESAS-2 contract contained OCI clauses, but noted that he did not foresee any OCI between the ESAS-2 and MSS contract, and that remediation actions were therefore not needed at that time for ESAS-2. *Id.*; Tab 8, Agency Email at 1; COS at 6. On August 30, 2021, the agency notified L3Harris via email that "[i]t has been examined and determined by the [contracting officer] for ESAS 2 that there is no OCI issue present." AR, Tab 12, Agency Email, Aug. 30, 2021, at 1.

Thereafter, during a phone call on September 28, 2021, the MSS-2 contracting officer requested additional information from L3Harris regarding the potential for an OCI concerning the MSS-2 procurement based on Peraton's participation in the ESAS-2 contract. L3Harris provided the requested information on October 4. AR, Tab 14, L3Harris Email; Tab 15, L3Harris Letter. The MSS-2 contracting officer also requested additional information from Peraton on October 7, 2021; Peraton responded on October 21, 2021. AR, Tab 6, OCI Background Memo at 3; Tab 5, Peraton OCI Plan, Oct. 21, 2021.

The record shows that the MSS-2 contracting officer consulted with the contracting officer for the ESAS-2 contract, the program offices for the MSS, MSS-2 and ESAS-2 contracts, and the AFTAC Legal Advisor. AR, Tab 6, OCI Background Memo at 1; AR, Tab 18, Notice of Unsuccessful Offer at 2. Of relevance here, the MSS-2 contracting officer considered the differences between the services performed under the ESAS-2 and MSS contracts, as well as the evolution of the ESAS-2 contract. COS at 7; AR, Tab 6, OCI Background Memo at 2. In the latter connection, the ESAS-2 program manager explained that although the requirement of ESAS-2 was to "update the mission software," the "program pivoted its efforts" from "a large development effort" to "rehost[ing] the existing mission software to address an impending hardware obsolescence issue." COS at 8; AR, Tab 6, OCI Background Memo at 3. The ESAS-2 program manager further explained that because of this shift in focus, "there were no

tasks to be added beyond the first two task orders.” COS at 8; AR, Tab 6, OCI Background Memo at 3.

According to the MSS-2 contracting officer, the agency officials with whom she consulted “all concur[red] that there is no potential for conflicts of interest if Peraton executes under both contracts.” AR, Tab 18, Notice of Unsuccessful Offer at 3. Based on the input received, the contracting officer found that “[t]he two contracts deal with separate parts of AFTAC’s mission set” and “MSS2 does not involve any [advisory and assistance services].” *Id.* The contracting officer further stated that, “[a]lthough ESAS 2 originally contemplated [advisory and assistance services] work, none has yet been awarded” and “any [advisory and assistance services] work that could be awarded under that contract will be separated from any work performed under MSS2.” *Id.* The contracting officer concluded that “[s]ince no conflict of interest or potential conflict of interest exists, Peraton’s proposal under this solicitation was considered without limitation.” *Id.*

The protester argues that the contracting officer’s OCI analysis improperly considered whether the ESAS-2 contractor could be called upon to provide advisory and assistance services in support of the MSS-2 contract, rather than whether the MSS-2 contractor could be called upon to provide verification, validation, and testing of the ESAS-2 contractor.⁷ Comments at 8.

In response to L3Harris’s assertions, the contracting officer explained that Peraton did not have an impaired objectivity OCI arising from the MSS-2 PWS requirement that the contractor verify, validate, and test software developed and delivered by the ESAS-2 contractor. The contracting officer concluded that “[w]hile the MSS 1 contract did verify, validate and test [ESAS-1] contractor work product,” this “work was complete and would not continue into the MSS 2 contract.” Supp. COS at 2. The contracting officer confirmed that there have been only two task orders issued under the ESAS-2 contract. COS at 8. The contracting officer also confirmed that there was no testing, verification, or validation performed by the MSS-1 contractor of any ESAS-2 product under either of these task orders. *Id.* at 9. The contracting officer further confirmed that no potential ESAS-2 work will be evaluated under MSS-2. *Id.*

In addition, the contracting officer confirmed that the agency “does not anticipate issuing any additional task orders under the [ESAS-2] contract and does not intend to exercise the option to extend the contract; therefore, the contract will expire September 27, 2022.” AR Tab 6, OCI Background Memo at 3; COS at 9. Further, the contracting officer represents that “[a]ny future testing of contractor work under the [ESAS-2] contract will be verified, validated, or tested by government personnel.” Supp. COS at 2. This representation is consistent with the record, which reflects that the only work performed to date under the ESAS-2 contract was evaluated and accepted by the government, not the MSS-1 contractor. See AR, Tab 6, OCI Background Memo at 2.

⁷ L3Harris states that it “does not challenge the [a]gency’s administration of the ESAS-2 contract.” Protest at 10, n.4.

We find nothing unreasonable regarding the contracting officer's OCI review. The record reflects that the contracting officer reasonably investigated and considered whether an OCI exists. Based on the gathered information, the contracting officer reasonably found that that the MSS-2 contractor would not be required to review any of Peraton's work under the ESAS-2 contract. Thus, we have no basis to question the contracting officer's conclusion that Peraton's participation in the MSS-2 procurement does not raise potential OCI concerns. Although L3Harris argues that the contracting officer should have conducted a more in-depth analysis, and also generally disagrees with the contracting officer's findings, such disagreement does not rise to the hard facts necessary to support a valid challenge. See *Liquidity Servs., Inc., supra*, at 10.

The protest is denied.

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General Counsel