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Decision

Matter of: Guidehouse, Inc.

File: B-421740; B-421740.2

Date: September 18, 2023

Brian G. Walsh, Esq., Tracye Winfrey Howard, Esq., Cara L. Sizemore, Esq., Jennifer Eve Retener, Esq., and Morgan W. Huston, Esq., Wiley Rein LLP, for the protester. David S. Cohen, Esq., John J. O'Brien, Esq., Pablo Nichols, Esq., and Rhina Cardenal, Esq., Cordatis LLP, for Deloitte Touche, LLP, an intervenor. Stephan Piel, Esq., Department of Defense, for the agency. Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that government official acting as the technical evaluation board chair has an apparent potential conflict of interest is sustained where the record does not show that the agency adequately considered the apparent potential conflict and failed to investigate other aspects of the matter or consider whether to require any avoidance or mitigation measures.

DECISION

Guidehouse, Inc., of McLean, Virginia, protests the issuance of a task order to Deloitte & Touche, LLP, of Arlington, Virginia, under request for quotations (RFQ) No. HQ003423R0124, issued by the Department of Defense, Washington Headquarters Services, for audit remediation and sustainment services for the Office of the Under Secretary of Defense (Comptroller). Guidehouse argues that the chair of the agency's technical evaluation board had an impermissible conflict that should have precluded this individual from participation in activities relating to the agency's acquisition, and that the agency also miscalculated quotations and made an unreasonable source selection decision.

We sustain the protest.

BACKGROUND

The RFQ contemplates the issuance, on a best-value tradeoff basis, of a hybrid fixed-price, labor-hours, and time-and-materials task order for a base year and four 1-year options, under the successful contractor's Federal Supply Schedule (FSS); competition was confined to holders of blanket purchase agreements (BPAs) that previously had been issued by the agency. RFQ at 19; RFQ amend. No. 0001, Supplemental Instructions to Offerors, at 2; RFQ amend. No. 0002, Revised Performance Work Statement and Evaluation Criteria, at 25-28.¹ Firms were advised that quotations would be evaluated considering price and two equally-weighted non-price factors, technical approach and capability, and management approach; the two non-price factors were each individually more important than price.² Prices would be evaluated for fairness and reasonableness, and option prices would be evaluated for balance. RFQ amend. No. 0002, Revised Performance Work Statement and Evaluation Criteria, at 30-31.

In response to the solicitation the agency received quotations from three firms. The agency evaluated the quotations and assigned ratings of outstanding to the Guidehouse and Deloitte quotations under both non-price evaluation factors. Agency Report (AR) Exh. 8, Source Selection Decision Document (SSDD) at 6. Guidehouse's total price was \$85,745,412, while Deloitte's total price was \$77,782,764.³ *Id.* at 5. On the basis of these evaluation results, the agency issued a task order to Deloitte, concluding that

¹ The agency report includes the original RFQ, and two amendments. RFQ amendment No. 0001 includes updated instructions to offerors, while amendment No. 0002 includes an updated performance work statement and revised evaluation factors. Citations in this decision are to the pertinent document.

² The RFQ included certain pass/fail factors that are not at issue in the protest. RFQ amend. No. 0002, Revised Performance Work Statement and Evaluation Criteria, at 29.

In addition, the RFQ includes an inconsistency in describing the evaluation factors. The RFQ identifies two non-price factors, technical approach and capability, and management approach. RFQ amend. No 0002, Revised Performance Work Statement and Evaluation Criteria, at 29-30. Elsewhere, the RFQ states that the two non-price factors are: "Factor 1 Technical Capability and Management Approach and Factor 2 Key Personnel Qualifications." *Id.* at 31.

The RFQ provided that the agency would assign adjectival ratings of outstanding, good, acceptable, marginal or unacceptable to the non-price factors. RFQ amend. No 0002, Revised Performance Work Statement and Evaluation Criteria, at 32.

³ The record includes two different figures for Deloitte's price. The first, \$78,302,239, appears on page 5 of the SSDD document, while a second, \$77,782,764, appears on pages 1 and 8 of that document. AR, Exh. 8, SSDD, at 1, 5, 8. In addition, the unsuccessful quoters notice sent to Guidehouse includes the figure \$78,302,239. AR, Exh. 9, Unsuccessful Quoter Letter. A review of the Deloitte quotation reflects a total price of \$77,782,764 submitted to the agency. AR, Exh. 4, Deloitte Quotation, at 78.

its quotation represented the best value to the government. After being advised of the agency's selection decision, Guidehouse filed the instant protest.

DISCUSSION

Guidehouse argues that the agency misevaluated its quotation and made an unreasonable source selection decision.⁴ Guidehouse also argues that the chair of the agency's technical evaluation board (TEB) has a potential conflict that the agency failed adequately to investigate or mitigate. As discussed below, we agree with the protester that the agency has failed to document that it adequately investigated and considered a potential conflict arising from the TEB's potential financial interest in Deloitte. We therefore sustain Guidehouse's protest on that basis. Accordingly, we conclude that Guidehouse's remaining allegation relating to the agency's evaluation of quotations and source selection decision are either premature or academic at this juncture.

Possible Conflict of the TEB Chair

The Federal Acquisition Regulation (FAR) sets forth clear and unambiguous guidelines concerning the conduct of government personnel that engage in contracting activities. The most fundamental guidance provides as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

FAR 3.101-1.

We have recognized that, where an agency fails adequately to investigate and resolve a question concerning whether an agency employee who actively and extensively engaged in procurement-related activities should have been recused from those

⁴ In its initial protest, Guidehouse advanced several allegations relating to the evaluation of quotations, including that the agency misevaluated the firms' respective understanding of the work; the firms' respective transition-in approaches; the firms' respective key employee resumes; and the firms' respective staffing plans. Guidehouse withdrew these allegations after reviewing the agency's report. Guidehouse Comments and Supplemental Protest at 1 n. 1. Guidehouse continues to maintain that the agency failed to credit its quotation with certain strengths under the technical approach and capability and management approach factors. *Id.* at 5-9.

activities, the existence of an actual or apparent a conflict of interest is sufficient to taint the procurement. *Satellite Tracking of People*, B-411845, B-411845.2, Nov. 6, 2015, 2015 CPD ¶ 347; see also *Teledyne Brown Engineering, Inc.*, B-418835, B-418835.2, Sept. 25, 2020, 2020 CPD ¶ 303. In such circumstances, the protester need not affirmatively demonstrate prejudice, since the potential harm flowing from such situations frequently is, by its nature, not susceptible to demonstrable proof of bias or prejudice. *Satellite Tracking of People*, *supra*; see also *Celadon Laboratories, Inc.*, B-298533, Nov. 1, 2006, 2006 CPD ¶ 158.

Here, as the protester contends, the record raises concerns relating to the nature, extent, and adequacy of the agency's efforts to investigate and analyze any actual or apparent potential conflict on the part of the agency's TEB chair. We also find that, to the extent the agency did perform an investigation into the question, the record presented to our Office is inadequate to support any determination the agency may have made. We discuss our conclusions in detail below.

The TEB chair is a former employee of Deloitte who worked for the company from December 2016 through May of 2020; during that time, this individual was a senior consultant for the firm. Declaration of the TEB Chair at 1.

The record shows that, apparently because the TEB chair previously had served as the contracting officer's representative (COR) on the predecessor contract for the solicited requirement, the TEB chair was asked to serve as a member of the TEB for the current requirement. Declaration of the TEB Chair at 1. Because the TEB chair was aware of the possibility that Deloitte might submit a quotation under the current solicitation, the TEB chair advised the agency on February 9, 2023, of her previous employment with Deloitte to find out whether that fact would preclude her from serving on the agency's TEB. *Id.* Based on this inquiry, the record shows that the agency's contract specialist instructed her to contact cognizant legal counsel at the agency, which she did via e-mail on March 1. *Id.*

On the basis of the TEB chair's inquiry, the record shows that the agency initiated a limited investigation of the matter. The agency's investigation appears to have been confined to considering whether the TEB chair had a disqualifying financial interest in Deloitte. In this connection, the record shows that the contracting officers assigned to the acquisition (there were two contracting officers) asked the TEB chair to contact agency ethics counsel for the Office of the Under Secretary of Defense (Comptroller) (the acquiring activity); and also contacted the acquisition directorate's office of counsel to solicit the opinion of an ethics attorney within that office. Contracting Officer's Supplemental Statement of Facts at 1-2.

The ethics attorneys advised the contracting officers of their conclusion that the TEB chair's employment with Deloitte and her financial holdings did not create a conflict that would prevent her from serving on the TEB. Based on the conclusions of agency counsel (and apparently without the conduct of any independent investigation by either of the contracting officers), the contracting officers decided to permit the TEB chair to

serve on the TEB. *Id.* at 2. We have concerns relating to the nature and extent of the limited investigation that the agency states it performed.

As noted, the record shows that the agency apparently performed an investigation relating to whether the TEB chair had a disqualifying financial interest in Deloitte. However, the agency has declined to provide any of the underlying contemporaneous documentation relating to its limited investigation. In this connection, the agency advanced the attorney-client privilege in response to a request by the protester and our Office for any contemporaneous documentation relating to its determination that the TEB chair did not have a conflict in connection with participating in the evaluation of quotations.

The agency specifically stated its position as follows:

The Agency is withholding certain communications (listed below) because the Department of Defense Standards of Conduct Office (SOCO) has determined that they are protected by attorney-client privilege. These documents include communications between [deleted] (the government employee selected as the Chairperson of the TEB) and agency counsel. SOCO takes the position that “the provision of ethics advice to agency personnel primarily serves to protect the Government from the potential negative repercussions associated with ethical violations by individual employees. Therefore, ethics advice provided by agency counsel to current employees is typically protected by the attorney-client privilege.” SOCO Advisory 20-06 at 2 (Attachment 1).⁵

Agency Response to Guidehouse Document Request, Aug. 3, 2023, at 1.

While it is the agency’s prerogative to advance the attorney-client privilege in these circumstances, an agency’s efforts to limit document production can frustrate the mandate of the Competition in Contracting Act, 31 U.S.C. §§ 3551-3557, for our Office to fairly resolve bid protests. *See CORTEK, Inc.*, B-412047, *et al.*, Dec 17, 2015, 2015 CPD ¶ 397 at 3. In this connection, such limited document production may preclude our ability to determine that an agency’s action were reasonable. Such is the case here.

The problem with the lack of any underlying record is particularly acute where there is no evidence of any independent investigation of any conflict, or the appearance of a potential conflict, by either of the involved contracting officers. It appears from the record that the contracting officers delegated the investigation and consideration of the potential conflict to agency ethics counsel and the contracting officers seek to justify their actions based on the conclusions made by counsel. Yet, the agency has withheld

⁵ The SOCO Advisory 20-06 document provided by the agency in support of its assertion of the attorney-client privilege is a policy guidance document issued by the Department of Defense to be used in connection with responding to Freedom of Information Act requests. *Id.* at 1.

the factual information and findings that underlie the agency's consideration of the issue, frustrating the ability of our Office to consider the reasonableness of the agency's actions.

As noted, the record shows that the agency's investigative effort appears to have been confined to considering whether the TEB chair had a disqualifying financial interest in Deloitte that would cause concern in connection with her serving as the chair of the TEB. However, because the agency has declined to produce any aspect of the record of its deliberations on this question, we cannot determine whether, in fact, the TEB chair has a financial interest in Deloitte, or whether any such interest would affect her ability to serve as the chair of the TEB. In a word, we can offer no opinion concerning whether the TEB chair has a financial interest in Deloitte because of the lack of information before us. Nonetheless, we have concerns about the agency's conclusion that the TEB chair does not have a conflict of interest because the limited record before our Office contains potentially contradictory evidence on the question of the TEB chair's financial interest in Deloitte.

Specifically, in an e-mail exchange dated April 5 between the contracting officer and the TEB chair, the contracting officer posed the following question: "Per email below from our Ethics attorney [name deleted], can you confirm that you do not have any financial interest in Deloitte (pension, retirement plan or other ownership stake that you may have retained after your employment with Deloitte)?" AR, Exh. 10, Correspondence Between the TEB Chair and Various Agency Personnel, at 19. In response to the contracting officer's query, the TEB chair stated as follows: "Absolutely, sorry I did not include the rest of the email chain. I do have a 401K account that Deloitte no longer contributes to, and I may also have a pension." *Id.*

Notwithstanding this exchange, the record includes a document titled "Certification for Personnel Participating in Source Selection Concerning Nondisclosure of Information, Conflicts of Interest and Rules of Conduct." AR, Exh. 10, Correspondence Between the TEB Chair and Various Agency Personnel, at 23-24. This document (without any attachments), was executed by the TEB chair on April 26 (three weeks after the email exchange quoted above) and includes the following representation:

To the best of my knowledge, I certify that neither I nor my spouse nor my dependent children, nor members of my household, nor personnel with whom I am seeking employment have any direct or indirect financial interest in any of the firms submitting proposals, or their proposed subcontractors or have any other beneficial interest in such firm except as fully disclosed on an attachment to this certification.

Id. The record thus includes contradictory information relating to whether the TEB chair has a financial interest in Deloitte that would raise a conflict concern for the agency. Specifically, the record includes a statement from the TEB chair stating that she has a 401(K) account and a possible pension from Deloitte as well as a statement that she does not have any direct or indirect financial interest from any firm submitting proposals. While it may be true that the TEB chair either no longer has a financial interest in

Deloitte, or that any remaining financial interest that the TEB chair may have does not present a concern for reasons adequately explored and resolved by the agency, the record is devoid of any analysis or explanation to support such a conclusion.

Such a financial interest could well give rise to concerns relating to her ability to objectively evaluate the quotations submitted in response to the solicitation (what would, in essence, be an “impaired objectivity” type of actual or apparent conflict of interest). See *Celadon Laboratories, Inc.*, *supra* at 6-8 (describing potential conflicts that may arise where agency officials have an official role in the procurement process and a personal stake in the outcome of the acquisition); see also *Satellite Tracking of People*, *supra* at 7-8 (describing the nature of a potential conflict on the part of an agency official with a prior relationship to the protester that could have led the official to favor another offeror); cf. *Guidehouse LLP*, B-419848.3 *et al* June 6, 2022, 2022 CPD ¶ 197 (describing potential “impaired objectivity” type conflict on the part of a contract awardee where the firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests).

Deloitte suggests that the assets referenced in the TEB chair’s e-mail (a 401(k) plan to which she states Deloitte no longer contributes, and a possible pension) do not necessarily give rise to a conflict because such assets are not necessarily “disqualifying” financial interests. Intervenor’s Supplemental Comments at 3-6. In a similar vein, the agency represents only that she does not have a “disqualifying” financial interest, not that she does not have an actual, current financial interest in Deloitte. See Supplemental Agency Memorandum of Law at 2. However, because the contracting officer has not provided any analysis of the precise nature of the assets that may be in the TEB’s portfolio and why they do not present a conflict, we are not in a position to reach any conclusions about whether the contracting officer adequately considered whether those assets would present an actual or apparent conflict for the TEB chair that would warrant her recusal from acquisition-related activities.

In addition to the limited record of the agency’s limited investigation into the question of whether the TEB chair had a disqualifying financial interest in Deloitte, the record gives rise to an additional concern that falls outside of the agency’s limited investigation.

The record reflects possible participation by the TEB chair at an earlier stage in the acquisition, before she actually sought an opinion from the agency relating to the propriety of her participation as a member of the TEB. The record shows that a draft version of the solicitation was provided to prospective offerors on February 28, AR, Exh. 8, SSDD, at 2, and the final RFQ was issued on April 10. The final RFQ specifically identifies the TEB chair as the agency’s contracting officer’s representative, as well as an agency point of contact for purposes of submitting invoices for services rendered under the resulting task order. RFQ at 18, 45.

There is no information in the record pertaining to whether the TEB chair participated in preparing the current RFQ (for example by preparing the solicitation’s statement of work or evaluation criteria). Given that the TEB chair was the COR on the predecessor

contract, and was specifically identified as the COR for the current requirement, there is a reasonable possibility that the TEB chair may have engaged in activities relating to preparation and issuance of the current solicitation.

We offer no opinion regarding whether, in fact, the TEB chair's participation in such activities might give rise to a concern in light of a possible financial interest in Deloitte (discussed above) at that time, because the nature and extent of any such activities is not clear from the record before our Office. It may well be that the agency could determine that any such activities would not be problematic. However, there also is the possibility that engaging in those activities while also having a financial interest in Deloitte, could give rise to additional concerns, such as those relating to whether the RFQ may have included improper provisions that could favor Deloitte over other competitors. See *Teledyne Brown Engineering, Inc.*, *supra* at 11 (detailing concerns about an individual with a potential conflict participating in acquisition-related activities in addition to proposal evaluation activities). The simple fact of the matter is that the agency never gave consideration to this issue.

Finally, there is no evidence in the record that the agency ever gave consideration to whether it should impose mitigation measures in light of the TEB chair's prior employment with Deloitte. While it may well be that no such measures would be necessary in the wake of a thorough, well-reasoned, and adequately documented investigation of the matter, we simply cannot conclude on this record that the agency adequately considered the possibility that such measures could be necessary under the circumstances.

In sum, we sustain Guidehouse's protest relating to the possibility that the TEB chair has an actual or apparent conflict that should have precluded her participation in acquisition-related activities for this procurement. Although the agency satisfied itself that there was no reason for concern, we simply cannot tell from the record presented to our Office whether the agency's conclusion is reasonable. In addition, the record reflects that the agency gave no consideration to whether participation of the TEB chair in other acquisition-related activities such as preparing the solicitation may have presented a conflict requiring mitigation, given the possibility that the TEB may have a financial interest in Deloitte.

Remaining Considerations

Because as discussed below, we recommend that the agency take corrective action, we dismiss the protester's remaining allegations. Taking any of the courses of action available to the agency, as set forth below would render a challenge to the agency's current evaluation and source selection either premature or academic at this juncture. See *Teledyne Brown Engineering, Inc.*, *supra* at 3.

RECOMMENDATION

We recommend as a first step that the contracting officer document her investigation into any actual or apparent possible conflict that the TEB chair may have by virtue of a possible financial interest in Deloitte. We further recommend that the agency consider whether it is necessary to take action to avoid, neutralize, or mitigate any actual or apparent conflict on the part of the TEB chair in performing her role as an evaluator or in her role in preparing the solicitation.

Such action could include, as appropriate, termination of the task order issued to Deloitte, cancellation of the current solicitation, and beginning the agency's acquisition efforts anew. The agency also could recuse the TEB chair from the acquisition team, followed by a reevaluation of the quotations and the preparation of a new source selection decision; or an affirmation of the agency's original evaluation and source selection decision after the agency determines that there was no apparent or actual conflict on the part of the TEB, and therefore no need for additional agency action.

Finally, we recommend that the agency reimburse Guidehouse the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester 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.

Edda Emmanuelli Perez
General Counsel