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Decision

Matter of: NikSoft Systems Corp.

File: B-406179

Date: February 29, 2012

Ron R. Hutchinson, Esq., and Gerald F. Doyle, Esq., Doyle & Bachman LLP, for the protester.

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DIGEST

1. Agency request that protest be dismissed on the basis that the protester is not an interested party due to an organizational conflict of interest (OCI) is denied, where the agency has not shown its OCI determination is based on hard facts showing the protester had unequal access to competitively-useful information.
 2. Protest challenging source selection decision in a best-value procurement is sustained where the agency selected awardee's higher-rated quotation without meaningfully considering the protester's lower price.
 3. Protest is sustained where agency failed to provide meaningful explanation of its evaluation of the protester's past performance.
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DECISION

NikSoft Systems Corp., of Reston, Virginia, protests the establishment of a blanket purchase agreement (BPA) and placement of an initial "call" or task order to LS3 Incorporated, of Odenton, Maryland, under request for quotations (RFQ) No. 2011Q_049, issued by the Department of Justice (DOJ), Office of Justice Programs (OJP), for federal identity, credential and access management (FICAM) services to support the Office of the Chief Information Officer. NikSoft challenges the agency's evaluation of quotations and source selection decision.

We sustain the protest.

BACKGROUND

The RFQ, issued under Federal Acquisition Regulation (FAR) part 8.4, Federal Supply Schedule (FSS) procedures, sought quotations from 10 vendors holding contracts under schedule 70, information technology equipment, software, and services. The RFQ provided for the establishment of a BPA with a 1-year term and four 1-year option periods, against which time-and-materials calls (that is, task orders) would be issued as needed, to acquire software and services to support OJP's FICAM framework. The RFQ provided a statement of work (SOW) for the BPA's general requirements, and for an initial call that would be awarded concurrently with the BPA. Vendors were informed that, under the initial call, the successful firm would select and purchase commercial software for the FICAM framework, provide detailed design for various interfaces, develop source code, and conduct system testing.¹ Agency Report (AR), Tab 13, BPA Call, SOW, at 388-389.²

Vendors were informed that the BPA would be issued on a best-value basis, considering price and the following non-price evaluation factors (listed in descending order of importance): corporate experience, past performance, technical qualifications of proposed personnel, and technical understanding and approach. RFQ at 44. The RFQ stated that technical merit was more important than price. Id.

Under the corporate experience evaluation factor, vendors were required to demonstrate a minimum of 3 years of experience providing FICAM support and implementation services. Id. at 46. Vendors were also to provide a narrative demonstrating relevant technical ability and experience related to the migration of data, implementation, maintenance, and training related to a FICAM system.

Under the past performance evaluation factor, vendors were required to submit a minimum of three past performance questionnaires that reflected the firm's experience in FICAM implementation, operability and support.³ The RFQ required vendors to submit completed and signed questionnaires with their quotations. Vendors were informed that "the burden of providing current, accurate and complete past performance information rests with the offeror."⁴ RFQ at 47. Furthermore,

¹ Prior to the issuance of the RFQ here, the agency prepared a "high-level" FICAM implementation plan, which outlined major objectives and a phased approach to reaching the agency's goals. AR, Tab 17, Extract from Draft FICAM Plan, at 436.

² Our citation to page numbers refer to the BATES numbers in the agency's report.

³ The questionnaires were provided in an attachment to the solicitation.

⁴ Vendors without relevant past performance would not be evaluated favorably or unfavorably; rather, they would receive a "neutral" rating. RFQ at 47.

vendors whose experience included performance as a subcontractor were permitted to submit past performance questionnaires that had been completed by representatives from a prime contractor. RFQ amend. 1, at 97.

Vendors were instructed to submit separate technical and cost volumes. The vendors' costs were to be based on the firm's current GSA contract labor rates, including any discounts. Vendors were also requested to submit pricing for the call. RFQ at 50. The RFQ stated that the agency's price evaluation would consist of evaluating the vendor's "budget submission."⁵ RFQ at 52. Further, although the SOW for the task order stated that vendors were to select and purchase software, the RFQ did not require firms to include this price in their quotation.

The agency received three quotations, including NikSoft's and LS3's. Both NikSoft's and LS3's quotations included various labor categories and proposed labor rates to perform the work under the BPA. With regard to the call, NikSoft proposed to accomplish the work using [DELETED] hours at a price of \$374,423, while LS3 proposed a total of [DELETED] hours at a price of \$494,122. NikSoft also quoted a price of [DELETED] to purchase the necessary software, while LS3's quotation did not include a software price.

The technical quotations were evaluated by the agency's source evaluation board (SEB) and given adjectival ratings.⁶ The SEB rated NikSoft's and LS3's quotations as follows:⁷

⁵ The RFQ did not explain this phrase.

⁶ The RFQ provided for rating quotations as exceptional, acceptable, marginal, or unacceptable. RFQ at 44, 45. The RFQ's standard for an exceptional rating was a quotation that contains significant strengths and no weaknesses; exceeds the SOW's performance and technical capability requirements; offers value-added methodologies; provides no doubt that the vendor can achieve the SOW requirements, and identifies and mitigates risks. The standard for an acceptable rating was a quotation that contains strengths that outweigh any weaknesses; meets the SOW's performance and technical capability requirements, and provides confidence that the vendor can achieve the SOW requirements. RFQ at 44.

⁷ The third vendor was found to be technically unacceptable. AR, Tab 9, Consensus Evaluation Report, at 251.

	NikSoft	LS3
Corporate Experience	Acceptable	Exceptional
Past Performance	Acceptable	Acceptable
Technical Qualifications of Proposed Personnel	Acceptable	Exceptional
Technical Understanding and Approach	Exceptional	Exceptional
Overall Rating	Acceptable	Exceptional

AR, Tab 9, SEB Consensus Report, at 251. The SEB’s consensus report also included brief narrative comments citing the strengths, weaknesses, and deficiencies for each vendor under each non-cost evaluation factor.⁸ This report recommended award to LS3 based on the firm’s exceptional rating. Id. at 258.

In a separate memorandum to the contracting officer (CO), the chair of the SEB informed the CO of the SEB’s award recommendation. AR, Tab 8, SEB’s Recommendation Memorandum, at 248. The memorandum stated that LS3 “possesses the most impressive mix” of the technical evaluation factors and represents “the best potential for success.” Id.

The CO then prepared an award recommendation for the source selection authority (SSA). The CO noted each vendor’s ratings under the technical evaluation, and summarized the cost evaluation, noting that LS3 and NikSoft had submitted labor categories and pricing based on their current FSS rates, and stating that “[d]ue to LS3 obtaining an exceptional rating[,] their pricing was evaluated. The hourly rates proposed by LS3 were below or above and well within 10% of the Independent Government Estimate (IGE).” Id. at 247. After noting that the technical merits outweighed cost considerations, the CO recommended award to LS3. The CO requested approval to award the BPA to LS3, and a call order to LS3 in an amount not to exceed \$844,122 (that is, \$494,122 for LS3’s labor plus \$350,000 for software).⁹

The SSA concurred with the recommendation, and the agency made award to LS3. NikSoft subsequently filed this protest with our Office.¹⁰

⁸ The consensus report stated, in contradiction to the RFQ, that all evaluation factors other than price were considered equal in weight. Id.

⁹ The solicitation failed to include a not-to-exceed amount of \$350,000 for purchase of the software, and thus the agency asked LS3 to revise its quotation to include the cost of the software prior to award. CO’s Statement at 22 n.3.

¹⁰ NikSoft initially filed an agency-level protest, which was denied. The agency has not stayed performance of the call because of the protest filed at our Office.

DISCUSSION

Organizational Conflict of Interest

As an initial matter, the agency asserts that NikSoft is not an interested party eligible to maintain this protest because the firm has an organizational conflict of interest (OCI).¹¹ In this regard, the contracting officer prepared an OCI determination after NikSoft filed its protest, finding that NikSoft's prior work preparing the draft FICAM implementation plan gave the firm access to information that gave NikSoft an unfair competitive advantage. See Motion to Dismiss, Contracting Officer's Determination, at 3. DOJ supports its allegation by pointing out that NikSoft's quotation was the only quotation to include a price for software, and that the amount quoted (\$350,000) was the exact amount allocated by the agency's IGE to obtain the software.¹²

The Federal Acquisition Regulation (FAR) generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. The FAR identifies general rules and cites examples of types of OCIs that may arise, and ways to avoid, neutralize, or mitigate those OCIs. FAR § 9.505.

¹¹ Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2011). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57.

¹² NikSoft asserts that our Office should give no weight to DOJ's OCI determination since the contracting officer made her determination "in the heat of litigation." Protester's Response to Motion to Dismiss, at 2. However, an agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and we will consider such information in determining whether the CO's OCI determination is reasonable. See Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 6 n.3; see Turner Constr. Co., Inc. v. United States, 645 F.3d at 1377, 1386-87 (GAO, in resolving a protest, should consider a CO's post-protest investigation and analysis of an OCI).

In reviewing challenges to an agency's conflict of interest determination, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). Thus, to challenge an agency's identification of a disqualifying conflict of interest, a protester must demonstrate that the agency's determination did not rely on hard facts, but was instead based on mere inference or suspicion of an actual or potential conflict, or is otherwise unreasonable. See Turner Constr. Co., Inc. v. United States, 645 F.3d at 1387; PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of conflicts of interest . . . are fact-specific inquiries that require the exercise of considerable discretion." Axiom Res. Mgmt., Inc., 564 F.3d at 1382.

The standard of review employed by this Office in reviewing a contracting officer's conflict of interest determination—including findings concerning actual or apparent improprieties arising from such conflicts under FAR part 3.1—mirrors the standard required by Axiom and Turner. In this regard, we review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether a conflict of interest exists, will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17.

An agency's decision to exclude an offeror from a competition based on a conflict of interest arising from unequal access to information must be supported by "hard facts," that is, the agency must specifically identify competitively useful, non-public information to which the offeror had access. See VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268; Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28.

This OCI was first raised by the agency in a dismissal request in response to NikSoft's protest to our Office.¹³ Specifically, the determination found that NikSoft had access to FICAM information through its work on the FICAM implementation plan as evidenced by its knowledge of the IGE for the price of software.

The record does not show that the agency's OCI determination was based on the "hard facts" necessary to find that NikSoft had unequal access to non-public

¹³ The FAR requires contracting officers to identify and evaluate potential OCIs as early in the acquisition process as possible. FAR § 9.504(a)(1). We note that the agency did not raise this concern in response to NikSoft's agency-level protest.

information that gave the firm an unfair competitive advantage. Instead, the agency's OCI determination merely concludes, without explanation, that such information was competitively useful. While the agency found that NikSoft had participated in the preparation of the FICAM implementation plan, the agency's OCI determination fails to provide any explanation for how this conferred an unfair advantage on NikSoft. As to NikSoft's knowledge of the estimate for the price of software, there is no evidence in the record that the estimate played any role in the source selection decision--indeed, DOJ provided the awardee with the software price prior to award and asked the firm to increase its quotation by that amount, as NikSoft had done. Given this, the agency has not provided any basis for its conclusion that NikSoft had access to information that provided it with an unfair competitive advantage. Absent such a showing of how the firm had an advantage, the agency has failed to demonstrate the hard facts necessary to support its OCI determination.¹⁴ Thus, the agency has not shown that NikSoft is not an interested party, and we therefore decline to dismiss the protest.

Source Selection Decision

NikSoft's protest challenges numerous aspects of the agency's technical evaluation and the resulting source selection decision. NikSoft specifically argues that the agency's source selection decision failed to meaningfully consider whether LS3's higher-priced quotation merited the associated cost premium.

Where, as here, a procurement conducted pursuant to FAR subpart 8.4 provides for award on a "best value" basis, it is the function of the SSA to perform a price/technical tradeoff, that is, to determine whether one quotation's technical superiority is worth its higher price. InnovaTech, Inc., B-402415, Apr. 8, 2010, 2010 CPD ¶ 94 at 2, 6 n.8; The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13. Specifically, FAR § 8.405-2(d) requires the agency to evaluate all responses received using the evaluation criteria provided in the solicitation and to consider the level of effort and the mix of labor proposed to perform the task in evaluating the offered prices. See Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 9-10. While we are mindful that, when an agency places an order under a BPA, limited documentation of the source selection is permissible, the agency must at least provide a sufficient record to show that the source selection was reasonable. FAR § 13.303-5(e); see also FAR

¹⁴ Prior to filing its agency report on this protest, the agency filed its dismissal request based on this alleged OCI, which included the agency's OCI determination. This request was opposed by the protester. Our Office's representative advised the agency that we would not dismiss the protest at that time, but specifically invited the agency to develop this argument in the agency report. There is no indication in the record that the agency performed any further investigation of the alleged OCI.

§ 8.405-2(e) (minimum documentation requirements include documenting the rationale for any tradeoffs when establishing a BPA or placing an order); e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8 (even for procurements conducted under simplified acquisition procedures, an agency must have a sufficient record to allow for a meaningful review).

Here, as indicated by the contemporaneous documentation set out above, there is no evidence that the agency gave any meaningful consideration to NetSoft's lower price in making the source selection decision. Rather, the record shows that the agency's selection decision was solely based on LS3's higher technical rating. Indeed, the contracting officer explains that the basis for the agency's selection decision was as follows: "Given [LS3's] rating of 'exceptional,' with no other bidders having received an equivalent or higher rating, thereby rendering further analysis under the trade-off approach unnecessary, LS3 was selected for award." CO's Statement at 413. Because the agency did not consider price as required by the solicitation and applicable regulations, we sustain NikSoft's protest on this basis.

Past Performance

NikSoft also challenges its acceptable rating under the past performance evaluation factor. In this regard, NikSoft asserts that it "received nearly perfect scores" on each of its three past performance questionnaires, and thus it should have received an exceptional rating. Protester's Comments at 9. In response, the agency asserts that its decision to rate NikSoft as merely acceptable was reasonable because NikSoft had failed to provide ratings from government officials, and had only provided ratings from prime contractors. We disagree.

The evaluation of past performance is a matter of agency discretion, and we will review the evaluation only to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. The evaluation by its very nature is subjective; an offeror's disagreement with the agency's evaluation judgments does not demonstrate that those judgments are unreasonable. All Points Int'l Distributors, Inc., B-405954, Dec. 16, 2011, 2011 CPD ¶ 281 at 3.

Here, the agency has failed to provide a meaningful explanation for why NikSoft received only an acceptable rating for past performance. Given that the RFQ specifically permitted vendors to provide questionnaires from prime contractors--and the RFQ did not indicate that these reviews would be viewed less favorably--the agency has failed to provide a meaningful response to the protester's challenge to its rating. Thus, we find that the agency has not reasonably explained why it assigned NikSoft an acceptable rating under this factor and we sustain the protest on this basis.

NikSoft also challenges LS3's acceptable rating under the past performance evaluation factor given that LS3 only provided two questionnaires with its quotation, even though the solicitation required vendors to provide three past performance questionnaires. In response, the CO states, without elaboration, that the agency did not consider this to be a weakness and that it had no impact on LS3's acceptable past performance rating. CO's Statement at 417. However, the CO provides no explanation for why the awardee's non-conformance with the solicitation's mandatory requirements in this regard should not affect the awardee's ratings, given the technical evaluation rating criteria. This is a matter that should be considered in the corrective action recommended below.

Evaluation Documentation

We also note that there are certain discrepancies in the evaluation documentation that call into question the reasonableness of the source selection decision. For example, with regard to the corporate experience factor, the consensus report noted the exact same strength for LS3's and NikSoft's quotations--that the firm had "significantly more than the 3 years of experience in providing FICAM support and implementation services"--and identified an additional strength in NikSoft's quotation (that the firm had "demonstrated capabilities to accomplish a smooth transition, with a superior solution while maintaining sufficient resources showing corporate dedication for meeting program objectives"). AR, Tab 9, SEB Consensus Report at 254, 256. Even though no weaknesses or deficiencies were identified for either vendor under this factor, LS3's quotation was rated exceptional, and NikSoft's was rated acceptable. Thus, it is apparent that the SEB consensus report does not support the relative ratings of the quotations under this factor. However, in responding to the protest, the agency does not rely upon the consensus report, but instead relies upon the individual evaluator's ratings and comments contained on the evaluator's worksheets, which it asserts supports the various ratings. The discrepancies in the evaluation documentation are also a matter that the agency should consider in the corrective action recommended below.

RECOMMENDATION

Because DOJ believes that NikSoft may have an OCI, we recommend that DOJ investigate whether NikSoft has a significant OCI and document its determination. We also recommend that DOJ perform and document a new best value selection decision consistent with our decision. If LS3's quotation is not found to reflect the best value to the government and given that performance has not been stayed, the agency should consider the feasibility of terminating the call issued to LS3, and should terminate the BPA awarded to LS3. The agency should then issue the BPA and call to the vendor whose quotation is determined to be the best value to the government. We further recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protesters' certified claims for such costs,

detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel