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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Noonan & Associates

File: B-409103

Date: January 10, 2014

Patricia B. Noonan, Noonan & Associates, for the protester.
William R. Korth, Esq., Department of Veterans Affairs, for the agency.
Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably concluded that the protester had an organizational conflict of interest and properly eliminated it from the competition under a solicitation for the award of a training course, where the agency found that the protester's prior award of a curriculum development contract, which included the training course, created the appearance of an unfair competitive advantage.

DECISION

Noonan & Associates, of Sedalia, Colorado, protests its exclusion from the competition under request for quotations (RFQ) No. VA786-13R-00386, issued by the Department of Veterans Affairs, National Cemetery Administration (NCA), for NCA cemetery director intern mentor/protégé training. The agency eliminated Noonan from the competition based on the contracting officer's determination that Noonan had an organizational conflict of interest (OCI) arising from its work on a related curriculum development contract awarded in 2012, which included requirements to review the curriculum for the mentor/protégé training requirement solicited here. Noonan, who was the awardee of the predecessor mentor/protégé training requirement, contends that the contracting officer's determination was unreasonable.

We deny the protest.

BACKGROUND

The NCA cemetery director intern program is a two-year long training program designed to provide a high-quality, development experience to employees who are

competitively selected to participate. RFQ at 6. The program includes a number of courses, including the mentor/protégé course being solicited here. Id. In April 2012, Noonan was awarded a contract to complete an annual review of the curriculum for the cemetery director intern program (2012 curriculum contract).¹ Agency Report (AR), Tab 20, 2012 Curriculum Contract, at 1, 6. Shortly after receiving the 2012 curriculum contract, Noonan was also awarded a task order for the 2012 NCA cemetery director intern mentor/protégé training, which was the predecessor task order to the 2013 mentor/protégé training requirement. See AR at 1; AR, Tab 7, Contracting Officer Statement (CO Statement), at 1.

The RFQ for the competition here, which was posted on the General Services Administration's (GSA) e-Buy website on August 30, 2013, and was limited to federal supply schedule (FSS) contract holders, sought quotations to provide a mentor/protégé facilitation course and evaluation program for the development of a cadre of trained cemetery directors to support and manage NCA national cemeteries. RFQ at 6-7. The solicitation anticipated the issuance of a fixed-price task order to the FSS vendor providing the best value quotation based upon the evaluation of three factors: (1) past performance, (2) quality, and (3) price. RFQ at 21.

On September 13, 2013, the agency received quotations in response to the solicitation from three vendors, including Noonan. AR, Tab 7, CO Statement, at 2. As discussed in detail below, the contracting officer determined that Noonan had a potential OCI based on its award and performance of a contract to review and develop the overall NCA cemetery director intern program curriculum--which included the cemetery director intern mentor/protégé training. Id. The contracting officer also found that the protester had a disqualifying OCI because, based on the contracting officer's understanding, Noonan had authored the statement of work for the previous mentor/protégé solicitation. Id. The contracting officer concluded that Noonan should be eliminated from the competition.

Noonan received notification of the contracting officer's OCI determination, and its exclusion from the competition, on September 23. That same day, Noonan submitted an agency level protest, which the VA denied on October 1. Noonan filed a protest with our Office on October 17.²

¹ The 2012 curriculum contract was awarded for a base period and three 1-year option years running through 2015.

² Due to a lapse in funding, portions of the federal government--including our Office --were closed from October 1 through October 16. Thus, Noonan's protest, which was emailed to our Office on October 8, was considered filed on the first day the federal government re-opened, October 17, 2013; the protest is also timely, since it could not be filed at GAO prior to October 17. See 4 C.F.R. §§ 21.0(d), 21.2(a)(3) (2013)

DISCUSSION

Noonan maintains that the VA's decision to eliminate it from the competition was unreasonable. Specifically, the protester contends that the contracting officer's OCI determination did not demonstrate that Noonan had access to nonpublic information, and also argues that any competitive harm resulting from its performance of the 2012 curriculum contract is speculative.³ For the reasons discussed below, we conclude that the contracting officer's OCI determination and decision to eliminate Noonan from the competition were reasonable.⁴

The Federal Acquisition Regulation (FAR) requires that contracting officials 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 broadly categorized into three groups: biased ground rules, unequal access to

³ Noonan also asserts that it should not be excluded from the competition because the VA failed to notify Noonan that, if it received the 2012 curriculum contract, it might be ineligible for award to perform any future NCA cemetery director intern training class requirements due to a possible conflict of interest. We have held, however, that a contracting agency may properly disqualify a firm because of a conflict of interest even though prior notice was not given to the firm in the earlier contract. LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531 at 6; see also Energy Sys. Group, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 5-6.

⁴ Noonan also challenged the contracting officer's determination that an OCI existed based upon the contracting officer's belief that Noonan had authored the 2012 mentor/protégé solicitation's statement of work. As part of the agency's OCI investigation, the contracting officer reviewed the 2012 NCA cemetery director intern mentor/protégé solicitation, for which Noonan was selected as the awardee. The contracting officer concluded that an OCI existed because he believed that Noonan had authored part of the 2012 solicitation's statement of work due to a reference to Noonan in the metadata of the electronic file of the statement of work document. See AR, Tab 25, 2012 Mentor/Protégé Statement of Work, at 2. Based on our review of the record, we conclude that the agency's documentation does not support the contracting officer's finding that Noonan authored this document because the metadata do not definitively establish that the protester was the author of the document, as the contracting officer believed. See AR, Tab 31, Statement of Agency Official, at 1. Nonetheless, we find no possibility of prejudice because the contracting officer reasonably excluded Noonan from the competition based upon conflicts arising from its performance of the 2012 curriculum contract, for the reasons explained below.

information, and impaired objectivity. Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 5. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR § 9.505(b); CapRock Gov't Solutions, Inc., et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25.

The identification of conflicts 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 Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). We review an agency's OCI investigation for reasonableness, and where the 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. 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.

Here, the contracting officer considered 2012 curriculum contract, which was awarded in April 2012. AR, Tab 20, 2012 Curriculum Contract, at 1. The contracting officer noted that the statement of work for the 2012 curriculum contract stated that the goal of the project is to develop a clear and concise training curriculum for the NCA cemetery director intern program. Id. at 6. The 2012 curriculum contract also stated that the project would include: a review of the curriculum; a review of class assessments and data gathered on the success of each course; sequencing of classes; identifying resources needed for each course; and design and implementation of course evaluation surveys. Id. at 7. As relevant here, the 2012 curriculum contract also stated that the project would include the facilitation of a 2-day review and design of the curriculum with subject matter experts (SMEs), monthly curriculum reviews, and conference calls with SMEs. Id. at 6.

The contracting officer's investigation of the potential OCIs arising from Noonan's 2012 curriculum contract concluded that the contract permitted Noonan to "discuss the curriculum with NCA Subject Matter Experts and develop the overall Cemetery Director Intern program, to include the Mentor/Protégé program." AR, Tab 7, CO Statement, at 2. Based upon his review of the 2012 curriculum contract and the current mentor/protégé solicitation, the contracting officer concluded that Noonan's 2012 curriculum contract gave rise to the perception of an unfair competitive advantage because Noonan's work on the 2012 curriculum contract could be:

perceived as an unfair advantage for Noonan that other potential competitors do not have, as Noonan potentially has information regarding the overall Cemetery Director Intern program and would already have a better understanding of the government's needs and

requirements that would go into the evaluation factors concerning technical understanding, etc., that other competitors could not have.

Id. at 3.

Based upon our review of the record, we find that the contracting officer conducted a reasonable investigation in determining that Noonan's 2012 curriculum contract potentially gave it access to non-public information. Moreover, we think the contracting officer reasonably found that Noonan's role as a curriculum designer gave rise to an inherent competitive advantage in seeking a training contract for a class under its curriculum review. See Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 10. We also find reasonable the contracting officer's decision to eliminate Noonan from the competition based upon the contracting officer's conclusion that Noonan's 2012 curriculum contract provided nonpublic information and created the appearance of an unfair advantage that could compromise the integrity of the procurement process. See id.

While Noonan asserts that its role in the 2012 curriculum contract was as a facilitator for the subject matter experts and that it received no special knowledge, we conclude that the contracting officer gave meaningful consideration to whether a significant conflict of interest exists, and we will not substitute our judgment for the agency's. In this regard, a contracting officer may disqualify a firm from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on hard facts, and not mere innuendo or suspicion. Kellogg Brown & Root Servs., Inc., B-400787.2, B-400861, Feb. 23, 2009, 2009 CPD ¶ 54 at 8. For these reasons, we find no basis to sustain the protest.

The protest is denied.⁵

Susan A. Poling
General Counsel

⁵ Additionally, Noonan asserted that a former employee of the agency was biased against Noonan. In order for a protester to succeed in a claim of bias on the part of contracting officials, the record must establish that the officials intended to harm the protester; government officials are presumed to act in good faith; our Office will not attribute unfair or prejudicial motives to them on the basis of inference or supposition. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 2. Moreover, in addition to producing credible evidence of bias, a protester must show that any bias translated into action that unfairly affected the protester's competitive position. Id. Here, Noonan has failed to provide any support for its assertion that the alleged bias of the contracting officer representative had any effect on the contracting officer's OCI determination.