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Decision

Matter of: International Resources Group

File: B-409346.2; B-409346.6; B-409346.9

Date: December 11, 2014

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DIGEST

1. Protest that awardee gained an unfair competitive advantage by employing a former high-level agency official is sustained where the record demonstrates that the agency failed to meaningfully consider whether the official had access to non-public, competitively useful information.
2. Protest challenging the agency’s source selection is denied where the agency’s decision to make awards to proposals that were higher technically-rated and higher-priced than the protester’s proposal was reasonable, adequately-documented, and consistent with the solicitation’s evaluation criteria.
3. In a multiple-award procurement where the agency anticipated the award of approximately five contracts, with two awards reserved for small businesses, the agency’s decision to make a sixth award to a small business offeror that submitted a lower-rated proposal than the proposal submitted by the large business protester is unobjectionable where a portion of the awards were reserved for small businesses, and where the solicitation also reserved the right to make more, or fewer, awards.

DECISION

International Resources Group (IRG), of Alexandria, Virginia, protests the award of contracts to AECOM International Development, Inc., of Arlington, Virginia, Development Alternatives Inc. (DAI), of Bethesda, Maryland, and Tetra Tech ARD, of Burlington, Vermont, under request for proposals (RFP) No. SOL-OAA-13-000033, issued by the United States Agency for International Development (USAID) for services and technical support to assist USAID in achieving its goals and objectives related to water.¹ RFP, Exec. Summary, at 1. IRG contends that AECOM had an unfair competitive advantage that the agency failed to meaningfully consider. The protester also challenges various aspects of the agency's evaluation and source selection decision.

We sustain the protest in part and deny the protest in part.

BACKGROUND

In April 2013, USAID published its first global water and development strategy, which provided the framework for the agency's approach to water programming. Agency Report (AR), Tab 7, USAID Water and Development Strategy, at 1. Specifically, the strategy focuses on efforts to improve access to water, sanitation, and hygiene (WASH), as well as improved food security. Id. To this end, the strategy identifies two strategic objectives: (1) to "[i]mprove health outcomes through the provision of sustainable WASH;" and (2) to "[m]anage water for agriculture sustainably and more productively to enhance food security." Id. at 1-2.

USAID's Office of Water issued the solicitation, on May 13, 2013, as the agency's "sole central mechanism" to support the new water strategy. RFP at 14. The RFP contemplated the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) contracts for "cross-cutting services in the water sector" in 11 technical areas, including data collection and management, strategic planning and program design, capacity building and institutional strengthening, and water and food security support. Id. at 3, 14, 15-23. Under the contracts--referred to as the water and development IDIQs (WADI)--USAID bureaus and missions would place fixed-price or cost-plus-fixed-fee task orders that "reflect the Agency's strategic direction and focus on water programming." Id. at 3, 14. The RFP identified two categories of awards, an unrestricted category and a total small business set-aside category.

¹ IRG also protests an award to a small business offeror. The agency awarded small business set-aside contracts to the following small businesses: ECODIT LLC, of Arlington, Virginia, Natural Resources Consulting Engineers, Inc. (NRCE), of Oakland, California, and Mendez England & Associates (ME&A), of Bethesda, Maryland.

Id. at 14. Specifically, the RFP anticipated the award of “approximately five” contracts with two reserved for small businesses. Id. at 111. USAID “reserve[d] the right to award more or less awards than the anticipated number of contracts.” Id. at 111, 124. The combined, overall value of the WADI procurement was \$1 billion, and the RFP provided that each contract would be awarded for a 5-year period of performance. Id. at 3, 33.

The solicitation established that the contracts would be awarded on a best-value basis considering cost/price and the following five technical evaluation factors: (1) sample project design; (2) past performance; (3) consortium technical capability; (4) corporate/institutional capability and management; and (5) participation of U.S. small and disadvantaged business (SBD) concerns, non-governmental organizations (NGOs), and local organizations.² Id. at 124-26. Pursuant to the RFP, the sample project design and past performance factors were of equal weight and were “the most important” of the technical factors. Id. at 124. The third and fourth factors--consortium technical capability and corporate/institutional capability and management--were of equal weight and were more important than factor 5, participation of SBD concerns, NGOs, and local organizations. Id. The RFP further stated that all technical evaluation factors, when combined, were “significantly more important than cost/price.” Id.

USAID received 16 offers by the July 3 deadline for the submission of proposals, including from the protester and the awardees. AR, Source Selection Decision Document (SSDD), at 2. A 4-person USAID technical evaluation committee (TEC) reviewed the proposals and identified strengths, weaknesses, significant weaknesses, and deficiencies. AR, Tab 37, Final TEC Memorandum, at 1. The TEC established a competitive range of nine offerors that submitted the “most highly rated” proposals, and USAID entered into discussions with these firms on November 20. Contracting Officer’s (CO) Declaration at 3; see, e.g., AR, Tab 21, USAID Notification to IRG of Inclusion in Competitive Range, at 1. After adding an additional firm to the competitive range, the agency conducted a second round of discussions on January 14, 2014.³ AR, Tab 52, SSDD, at 2; e.g., AR, Tab 28, USAID Request to IRG for Final Proposal Revisions, at 1-5. The competitive range offerors submitted final proposal revisions (FPR) on January 31. AR, Tab 52, SSDD, at 2.

² The solicitation identified three subfactors under factor 1, eight subfactors under factor 2, three subfactors under factor 3, four subfactors under factor 4, and two subfactors under factor 5. RFP at 124-26.

³ A firm excluded from the competitive range filed a protest with our Office challenging the agency’s initial evaluation of its proposal. In response to the protest, the agency took corrective action and added this firm to the competitive range. AR, Tab 27, Notice of Corrective Action, at 1.

The TEC evaluated the FPRs and identified strengths and weaknesses in each proposal. AR, Tab 37, Final TEC Memorandum, at 9-52. The TEC documented its findings in a memorandum, in which the TEC provided a narrative assessment of each proposal under each factor and subfactor.⁴ Id. The TEC's memorandum reflects the following final consensus ratings and technical rankings for the awardees and the protester:

	Tetra Tech	AECOM	DAI	IRG
Technical Factors				
Sample Project Design	Excellent	Very Good	Very Good	Very Good
Past Performance	Very Good	Very Good	Very Good	Very Good
Consortium Technical Capability	Very Good	Very Good	Very Good	Satisfactory
Corporate/ Institutional Capability and Management	Very Good	Very Good	Very Good	Satisfactory
Participation of SBD Concerns and NGOs	Excellent	Very Good	Satisfactory	Satisfactory
Overall Technical Ranking⁵	1	2	3	5
Evaluated Price⁶	\$9,423,431	\$5,664,513	\$7,571,679	\$4,846,369

AR, Tab 37, Final TEC Memorandum, at 7; Tab 52, SSDD, at 6.

On August 4, the agency's source selection authority (SSA), who also served as the contracting officer, issued a source selection decision (SSD) in which the SSA documented a cost/technical tradeoff of the proposals. AR, Tab 52, SSDD, at 1-61.

⁴ The TEC assessed the technical proposals as excellent, very good, satisfactory, or unsatisfactory. AR, Tab 37, Final TEC Memorandum, at 5-6.

⁵ The overall technical rankings combine large and small business offerors.

⁶ Pursuant to the solicitation, the evaluated price was based on each offeror's cost/price proposal for an illustrative task order that was provided as an attachment to the RFP. RFP at 119, 127; Id., attach. J.3, Price and Level of Effort Evaluation Matrix for Illustrative Task Order, at 133-35.

In the SSD, the SSA first summarized the TEC’s findings with respect to each proposal. Id. at 7-17. For IRG, the SSA recognized various positive attributes of the proposal under the first two evaluation factors, which were the most important. Id. at 13. For example, the SSA noted that IRG’s sample scenario offered a “strong analytical and data-drive approach” and that “gender considerations are interwoven throughout the project, and not thrown in as an afterthought.” Id. The SSA also highlighted some of the issues the TEC had with IRG’s proposal under the remaining technical factors, which resulted in the satisfactory ratings. Id. at 13-14. With respect to price, the SSA noted that IRG’s price for the illustrative task order was the lowest of all offerors. Id. at 6, 14. The SSA then compared each of the proposals to all other competing proposals, including those submitted by the small business offerors. Id. at 22-59. Based on this review, the SSA provided the following best value rankings:

Best-Value Ranking	Offeror	Large/Small Business
1	Tetra Tech	Large
2	AECOM	Large
3	DAI	Large
4	ECODIT	Small
5	IRG	Large
6	NRCE	Small
7	Offeror A	Large
8	ME&A	Small
9	Offeror B	Large
10	Offeror C	Small

Id. at 22. Ultimately, the SSA decided to award the unrestricted contracts to the three highest-ranked large businesses, and award the set-aside contracts to the three highest-ranked small businesses. Id. at 61. In making this determination, the SSA documented his conclusions as follows:

Even though USAID anticipated the award of approximately five (5) IDIQs including two (2) small business set-asides, the TEC noted that six (6) offerors had the most highly-rated technical proposals and those offers provided a comprehensive and strategic approach to the [WADI] projects. . . . The RFP made clear the government could award more or less awards than the anticipated number of contracts stated above. In my opinion, there are clear separations between the six offerors that I am awarding to and the four offerors not receiving an award.

In a best-value analysis, it was clear that the three most highly-rated offerors were large businesses. Therefore, I am making an award to those three large businesses: Tetra Tech, AECOM and DAI. No small business will receive a full and open award.

Id. at 60. Thus, the SSA found that Tetra Tech, DAI, and AECOM provided the best value to the agency for unrestricted contracts; the SSA found that ECODIT, NRCE, and ME&A provided the best value to the agency for small business set-aside contracts. Id. at 61. Accordingly, USAID executed contracts with these firms on August 19 and 20.

On August 20, USAID informed IRG that its proposal was not selected for award. AR, Tab 43, Notice to Unsuccessful Offeror IRG, at 1-4. IRG received a written debriefing on August 26. This protest followed.

DISCUSSION

IRG alleges that AECOM had an unfair competitive advantage that the agency failed to meaningfully consider. IRG also challenges the agency's source selection decision, primarily arguing that it was improper for the agency to select a lower-rated small business for award over IRG's higher-rated proposal.⁷ As

⁷ In its initial protest, IRG raised numerous other challenges to the procurement, regarding the agency's evaluation and award decision. For example, IRG raised objections to the agency's technical evaluation and conduct of discussions. In response to the protester's allegations, the agency provided a detailed rebuttal in its agency report. IRG's comments on the agency report, however, failed to address the agency's responses. Consequently, we consider the protester to have abandoned these arguments and will not consider them further. See Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 3 n.3.

In supplemental filings, IRG also raised an allegation of unequal treatment on the basis that the agency disclosed aspects of its evaluation methodology--specifically, the definitions of the adjectival ratings assigned to proposals and definitions of strengths and weaknesses--to a competing offeror that was not selected for award. Protest (Sept. 22, 2014) at 7. Because this information was disclosed prior to the submission of FPRs, IRG asserts, without any specifics, that had it been provided the definitions, it could have "revised numerous aspects of its proposal." Comments/Supplemental Protest (Oct. 14, 2014) at 41. Here, we find no basis to sustain the protest because the protester has not demonstrated that it was prejudiced by the disclosure of the generic evaluation definitions to a firm that was ultimately not selected for award. See, e.g., Paragon TEC, Inc., B-405384, Oct. 25, 2011, 2011 CPD ¶ 240 at 9 (competitive prejudice is an essential element of a viable protest).

explained below, we conclude that the agency's conflict of interest investigation was unreasonable and sustain the protest on this basis. We deny all other aspects of the protest related to the agency's evaluation and award decision.

Unfair Competitive Advantage

IRG contends that AECOM had an unfair competitive advantage that the agency failed to meaningfully consider resulting from AECOM's employment of the former director⁸ of USAID's Office of Water. Protest at 14. As detailed below, the record establishes that the former director of USAID's Office of Water--the USAID office responsible for the WADI procurement--left USAID during the procurement and began employment with AECOM after the submission of initial proposals, and prior to the submission of FPRs. CO Declaration at 6. IRG contends that AECOM received an unfair competitive advantage due to the former director's access to non-public, competitively useful information. Protest at 17. IRG further complains that USAID "conducted no contemporaneous investigation . . . and took no steps" to avoid or mitigate the conflict, contrary to Federal Acquisition Regulation (FAR) requirements. Comments/Supplemental (Supp.) Protest (Oct. 14, 2014) at 5.

Additional Background

The record reflects that the individual at issue was employed by USAID beginning in September 2005 and headed the agency's 11-person Office of Water beginning in July 2012. AR, Tab 5, Declaration of Former Office of Water Director, at 1. In this capacity, the former director was consulted on and made "substantive contributions" to the agency's water and development strategy. *Id.* at 2. With regard to the WADI procurement, the former director tasked one of his direct subordinates with drafting the WADI statement of work (SOW), and later appointed this person as the lead for the WADI procurement. AR, Tab 4, Declaration of TEC Chairperson, at 1; Tab 53, Supp. Declaration of TEC Chairperson, at 10. The subordinate reported to the director each week with any updates or needs in relation to the procurement. *Id.* at 2. In addition, according to this employee--who later served as the TEC chairperson for this procurement--the former director "reviewed and commented on an early draft of the WADI SOW." AR, Tab 53, Supp. Declaration of TEC Chairperson, at 2. On February 14, 2013, the Office of Water published a draft version of the SOW; the solicitation was issued in May. AR, Tab 4, Declaration of TEC Chairperson, at 1.

The record further shows that "[s]ometime in mid-July 2013"--after the submission of initial proposals and while the TEC, led by the former director's subordinate, was conducting its evaluation--the former director spoke with an AECOM official and

⁸ Throughout this decision we refer to the individual as the "former director." We do not identify him by name.

explained that he was “considering a departure from Government service.” AR, Tab 5, Declaration of Former Office of Water Director, at 2. On July 15, the former director met with AECOM officials to discuss possible employment with the firm, and on July 17 the former director submitted a recusal letter to a USAID assistant general counsel for ethics and administration. Id. at 3. In the letter, which was also provided to the former director’s supervisor as well as the TEC chairperson, the former director recused himself from “personal and substantial involvement in any particular matters in which [AECOM] has a financial interest or may be a party or represent a party.” AR, Tab 18, Recusal of Former Director, at 2.

A week later, on July 22, AECOM offered the former director a position with the company as Director of Water and Infrastructure. AR, Tab 5, Declaration of Former Office of Water Director, at 3. The former director began his tenure at AECOM on October 1, prior to USAID notifying offerors of their inclusion in the competitive range. Id. The former director assisted in the preparation of AECOM’s FPR, but maintains that any input he provided was “stylistic or editorial in nature and, substantively, was based only on my general professional experience and education, and on information available to the public.” Id. at 4.

Agency Actions

The record shows that the CO did not contemporaneously investigate AECOM’s potential unfair competitive advantage prior to contract award. See Supp. CO Declaration at 1. Rather, in response to IRG’s protest, the CO obtained information from the former director and the TEC chairperson that, according to the CO, “confirmed that [the former director] did not have access to relevant procurement-sensitive information during his employment with USAID.” CO Declaration at 5. In this regard, the CO relied on the TEC chairperson’s declaration that the former director “had no involvement in the WADI procurement” after he delegated responsibility for the procurement to the TEC chairperson in February 2013. Id. at 6, quoting AR, Tab 4, Declaration of TEC Chairperson, at 1. The CO maintains that the former director did not “participate in” meetings at USAID involving WADI procurement-sensitive information, nor did he have access to any offeror’s proposal. CO Declaration at 6. The CO further notes that the former director “did not participate in the agency’s evaluation of proposals” and “was not involved in the source selection process in any way.” Id.

The CO also reviewed “approximately 750 e-mail records” concerning the former director and AECOM. Supp. CO Declaration at 2. Based on that review, the CO concluded that the former director “did not provide procurement-sensitive, non-public, competitively useful information during his employment with USAID which would give rise to an unfair competitive advantage to AECOM.” Id. Similarly, based on the former director’s declaration, the CO asserts that the former director “did not disclose to any AECOM employee source selection or bid and proposal information related to WADI” because he did not possess such information and was

aware that disclosure of such information was “illegal and wrong.” CO Declaration at 6; see also AR, Tab 5, Declaration of Former Office of Water Director, at 4. In his declaration, the CO explains, “Because [the former director] did not have access to proprietary or source selection sensitive information at USAID, I had, and have, no reason to believe that [the former director] could have shared such information with AECOM after going to work there.” CO Declaration at 6. The agency maintains that the CO’s investigation was reasonable and that the award to AECOM was not tainted by any conflicts. AR at 18.

Legal Framework for Conflict of Interest Determinations⁹

Contracting officers have an obligation to avoid even the appearance of impropriety in government procurements. See FAR § 3.101-1; Celeris Sys., Inc., B-404651, Mar. 24, 2011, 2011 CPD ¶ 72 at 7; Guardian Techs. Int’l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5. In this regard, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not on mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28.

The existence of an appearance of impropriety based on an alleged unfair competitive advantage depends on the circumstances in each case. As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual’s knowledge of non-public information, our Office has considered a variety of factors, including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful. See Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 13; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 8; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., et al., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 7-8. An unfair competitive advantage is presumed to arise

⁹ IRG styled its allegation as both an unfair competitive advantage and an “unequal access” organizational conflict of interest. Protest at 17. The unfair competitive advantage stemming from a firm’s hiring of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests alleging that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest. See Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28 n.15. As a result, our decision here references only the allegation in terms of an unfair competitive advantage.

where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. Health Net Fed. Servs., LLC, supra, at 28 n.15; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 18-19 n.16.

We review the reasonableness of a contracting officer's conflict of interest investigation 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. 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; CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12. 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., supra, at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). The identification of conflicts of interest are fact-specific inquiries that require the exercise of considerable discretion. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009).

Here, we conclude that the CO failed to meaningfully consider whether AECOM's employment of the former director of USAID's Office of Water provided the firm with access to competitively useful, non-public information that gave AECOM an unfair competitive advantage, and we sustain the protest on this basis. In this regard, the protester has proffered hard facts that demonstrate that the former director potentially had access to competitively useful non-public information, and the record shows that the CO failed to analyze the full extent of the former director's involvement in the procurement.

Former Director's Involvement in the Procurement

The CO determined that the former director had little involvement in the WADI procurement. However, the record demonstrates that the director had a deeper involvement in the procurement than the agency acknowledges, including, for example, helping to draft the SOW, commenting on the structure of the solicitation, and making a presentation to USAID's Board for Acquisition and Assistance Review to gain approval of the IDIQ; participating in numerous on-going discussions about the procurement; and helping to solicit and select members of the TEC, including

fielding their questions about the RFP and SOW.¹⁰ See, e.g., AR, Tab 51, Email Records, at 577-79, 618, 1138, 1536, 1557, 2298-313.

First, with respect to the preparation of the solicitation, the TEC chairperson stated in his declaration that the former director had “no involvement in the preparation of the RFP” “[o]ther than seeing an early draft of the SOW.” AR, Tab 4, Declaration of TEC Chairperson, at 2. The CO relied on this statement in reaching the conclusion that the former director did not have access to competitively useful information. However, as the protester points out, the email record contradicts the TEC chairperson’s declaration. Specifically, in a December 2, 2012, email, the former director substantively commented on the scope of the draft SOW, writing to the Office of Water team—including the TEC chairperson—that the draft SOW was “out of balance with the direction the agency is heading with water activities.” AR, Tab 51, Email Records, at 577-79. In the email, he provided additional guidance that the procurement “should be specifically designed/written to support achievement of the Agency’s objectives” stating, “I’m not comfortable with [water resource management] as the lens through which we evaluate and select contractors. The overview and technical approach needs to be re-written to reflect this.” Id.

In addition, numerous emails between the TEC chairperson and other agency stakeholders point to the former director as being significantly more involved with decisions related to the focus of the procurement than the CO’s analysis suggests. See, e.g., AR, Tab 51, Email Records, at 511, 610 (“[The former director] and I are still unsure of the role construction will play in the new [contract]”), 1022 (“[The former director’s] and my solution was to make the IDIQ more focused on implementation of the Strategy”), 696 (“[The former director] and I are still struggling with how to set up the SOW in order to best engage innovative thought in the water sector”), 784 (“We [the former director and the TEC chairperson] are exploring options for how to structure the procurement so that we best reach awardees who are specialists in their general fields . . . but may not have the capabilities across the broad spectrum of the water sector.”).

Similarly, the record shows that after incorporating some of the former director’s comments into a later draft of the SOW, the TEC chairperson emailed a copy back to the former director for review and further comment. The former director replied as follows:

I still have significant angst about this turning into ‘the same old thing.’
I’m not sure if we want the usual suspects offering us a broad range of
services. I guess that pushes the creativity and innovation down to

¹⁰ The agency produced for the record more than 2,300 pages of emails sent to or from the former director. See AR, Tab 51, Email Records.

the task order level, but I can't help but wonder if we could design this in such a way to get a more unique and focused group of contractors so that we were buying a little more technical and fewer layers of management. Right now I can be walked off this ledge . . . to safety or otherwise, but I think it is still worth throwing around.

Id. at 618. Although the CO states that he reviewed hundreds of emails--which, we note, were produced only during the course of the protest--there is no indication in the record that the CO acknowledged the former director's apparently substantive role--as demonstrated in these few examples--in developing the RFP. See CO Supp. Declaration at 2.

Next, the record also contradicts the TEC chairperson's statement--relied on by the CO--that the former director "had no involvement in the WADI procurement" after February 2013.¹¹ In this regard, the record shows that the former director was still participating in discussions after February, in which changes to the RFP were debated, and he was subsequently included on March emails disseminating iterations of various sections of the solicitation. See AR, Tab 51, Email Records, at 1407. Furthermore, the record includes additional emails in which the TEC chairperson was seeking input or guidance from the former director on various procurement-related milestones. See, e.g., id. at 1483 (March 15 email regarding releasing the RFP), 1494 (March 29 email updating the former director on the status of the procurement), 1505 (April 25 email updating the former director on status of procurement). Notably, in later correspondence, the TEC chairperson even requested that the former director review draft responses to questions on the RFP received from potential offerors. Id. at 1517. In addition, in a June 4 email to the TEC chairperson--several months after the TEC chairperson's declaration states that the director was no longer involved--the former director thanked him for "keeping me informed" and writing that "You can cut me out whenever appropriate." Id. at 1529. The TEC chairperson responded, writing, "I really appreciate all of your help and vision in shaping the IDIQ into something that is . . . useful." Id. Clearly, the email record here contravenes the TEC chairperson's statement that the former director had "no involvement in the WADI procurement" after February 2013. See AR, Tab 4, Declaration of TEC Chairperson, at 1. More troubling, the CO's investigation does not mention or acknowledge the continued involvement of the former director, even after his review of these email records.

¹¹ Specifically, in his declaration, the TEC chairperson states as follows: "At the end of February 2013, prior to the issuance of the RFP, [the former director] delegated all responsibility for the WADI procurement to me. He indicated to me that he was extremely busy with his duties as office director and did not have time to devote to the procurement. From that point forward, [the former director] had no involvement in the WADI procurement." AR, Tab 4, Declaration of TEC Chairperson, at 1.

Lastly, in addition to being involved in the development of, and through the issuance of, the RFP, the record demonstrates that the former director played a role in determining the composition of the technical evaluation committee itself. For example, on May 31, the former director explained to the TEC chairperson in an email that there was a “strong recommendation . . . to have 5 persons” on the TEC. AR, Tab 51, Email Records, at 1519. The TEC chairperson responded and identified a candidate for the committee. Id. On June 4, the former director was included on a different email in which the TEC chairperson was soliciting members for the TEC from a different USAID office, specifically seeking “folks with an expertise in household WASH I will be sending a separate message to folks with expertise in service delivery and urban environments I’m trying to capture a broad range of technical expertise in the panel.” Id. at 1522. The former director was also included on correspondence discussing the importance of having “the Africa regional perspective present on the TEC” and an expert with agricultural experience that could advise the TEC. Id. at 1524, 1611. Indeed, the record shows that the former director was included on numerous emails to various USAID individuals exploring the possibility of their participation as evaluators on the committee. See, e.g., id. at 1531-34. In fact, the former director responded on June 5 to one email in which he asked whether it was possible “to get someone else from the bureau or one of your field missions to participate? For example, [] would be an asset and we’d be happy to figure out how to fund her travel here.” Id. at 1535; see also id. at 1613 (email from TEC chairperson stating that the former director “gave me your contact information and suggested that you may be able to help me with some technical expertise for a TEC I’m currently chairing”).

Further, in a June 10 email, the TEC chairperson responded to a potential TEC member, included the former director as a recipient of the email, and wrote as follows:

*** Please do not forward this message as it contains procurement sensitive information ***

I think that you have misinterpreted a few aspects of the RFP.

* * * * *

The sample task is a hypothetical project design in Ethiopia in which we are asking the Offerors to meet some lofty targets. While the questions didn’t address the urbanization issue (I wouldn’t expect Offerors to tip their hands by asking strategic questions), I don’t see how they can achieve the targets without contemplating urbanization and service delivery issues. I’m pretty sure this is why [the former director] recommended that either you or [] be on the panel. [The former director] and I have talked about this on several occasions and we agree on the general approach.

Id. at 1557. The emails contained in the record demonstrate that the former director was privy to the identity of the TEC members, knew that the TEC did not include an Africa expert after all, and was aware that the panel relied on outside expertise on agricultural issues, all potentially useful non-public information. See id. at 1621-27.

In sum, we find that the record includes hard facts that contradict several of the conclusions reached by the CO in his review of whether AECOM received an unfair competitive advantage from hiring the director of USAID's Office of Water during the course of this procurement. Instead, the record shows that the former director potentially had access to non-public, competitively useful information, and his subsequent employment with one of the eventual awardees raised concerns that the agency did not thoroughly consider. In this regard, the record lacks a detailed agency inquiry into the extent of access to information that the former director had and what competitively useful information his access yielded. We note that it is not necessary for our Office to determine whether the former director actually used non-public, competitively useful information when he assisted with AECOM's FPR.¹² In this respect, as explained above, an unfair competitive advantage is presumed to arise where an offeror possesses non-public, competitively useful information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. Health Net Fed. Servs., LLC, supra. Our Office will sustain a protest if hard facts exist to demonstrate the existence of a potential conflict, even if not actual, that the agency failed to reasonably evaluate and avoid, neutralize, or mitigate. E.g., PCCP Constructors, JV; Bechtel Infrastructure Corp., supra, at 22. Accordingly, this protest allegation is sustained.¹³

¹² In fact, the record contains several examples of steps taken by the former director to obtain guidance from appropriate agency ethics officials regarding his plans to leave government service and his efforts to avoid violating statutory restrictions applicable to government officials. Our sustain here is focused on the adequacy of the CO's review of the situation.

¹³ The protester also identifies "revolving door" issues related to the former director's post-government employment with AECOM. Comments/Supp. Protest (Oct. 14, 2014) at 25-28. Specifically, IRG raises Procurement Integrity Act and Ethics Reform Act concerns that the agency did not consider. See id. Because, as outlined below, we recommend that the agency conduct a more thorough investigation of the former director's access to non-public, competitively useful information--to include an examination of the circumstances surrounding his departure from government service and subsequent employment with AECOM--such review should also consider these statutes.

Best-Value Award Determination

Next, IRG contends that USAID failed to properly conduct a price/technical tradeoff and best-value determination. Protest (Sept. 2, 2014) at 60. Specifically, IRG argues that this was an “extremely close competition” and that a “slight adjustment in any rating” would have resulted in an award to the firm. Comments/Supp. Protest (Oct. 14, 2014) at 42. IRG similarly argues that the agency failed to properly consider its price and differences in technical proposals, and that the SSA’s 61-page SSD “lacks substance.” Id. In addition, IRG complains that it was improper for the agency to select a small business offeror for its sixth award where the record shows that SSA ranked IRG’s proposal higher than it ranked the small business’s proposal. Id. at 30. For the reasons discussed below, we have no basis to sustain these protest allegations.

Source selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, and their judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria. Client Network Servs., Inc., B-297994, Apr. 28, 2006, 2006 CPD ¶ 79 at 9; Atteloir, Inc., B-290601, B-290602, Aug. 12, 2002, 2002 CPD ¶ 160 at 5. Where, as here, a solicitation provides for a tradeoff between the technical factors and cost/price, the agency retains discretion to make award to a firm with a higher technical rating, despite the higher price, so long as the tradeoff decision is properly justified and otherwise consistent with the stated evaluation and source selection scheme. TtEC-Tesoro, JV, B-405313, B-405313.3, Oct. 7, 2011, 2012 CPD ¶ 2 at 10. In reviewing an agency’s source selection decision, we examine the supporting record to determine if it was reasonable and consistent with the solicitation’s evaluation criteria and applicable procurement statutes and regulations. See Honeywell Tech. Solutions, Inc., B-406036, Jan. 3, 2012, 2012 CPD ¶ 43 at 5. A protester’s mere disagreement with the agency’s determinations as to the relative merits of competing proposals, or disagreement with its judgment as to which proposal offers the best value to the agency, does not establish that the source selection decision was unreasonable. General Dynamics-Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 8.

Here, we find that the SSA made a reasonable best-value determination that resulted in awards to the highest-rated large and small business offerors. In this regard, the SSA provided the following rationale for selecting the higher-rated proposals for award:

The large business consortiums were able to demonstrate a complete package when it came to technical and institutional capabilities and the diverse requirements needed for WADI. There are clear differences among the three large offerors receiving an award and the three large offerors not receiving an award. The large businesses not receiving an award . . . while generally satisfactory, did not raise to the

same level of the other three While IRG had very good ratings in the two most important factors (Factors 1 and 2), for an unrestricted award, it did not exhibit the full degree of capabilities in WASH required under WADI as did the three highest ranked large businesses; and, IRG's lower-priced TO [task order] does not compensate for lacking this strong capability In this RFP, as noted in Section M, technical factors were significantly more important than cost alone.

AR, Tab 52, SSDD, at 60. Specifically, with respect to IRG, the SSA acknowledged IRG's low price on the sample project design and noted the proposal's strengths (and weaknesses) under the first two factors. Id. at 13-14. The SSA also highlighted areas where the TEC had concerns under the remaining factors, which resulted in technical ratings that were lower than those assigned to the awardees' proposals. Id.

In addition, notwithstanding the protester's objections to the contrary, the SSA comprehensively compared IRG's proposal with each of the other competing offers and explained why the large businesses selected for awards offered "clearly superior" technical proposals. Id. at 28-30. For instance, in comparing IRG's proposal with Tetra Tech's, the SSA looked beyond the adjectival ratings and noted that Tetra Tech's proposal had "none or almost no weaknesses remaining" while IRG's proposal had "many weaknesses and a significant weakness remaining including a lack of clear WASH expertise." Id. at 29. As one of many specific examples, with respect to technical capability, the SSA highlighted that Tetra Tech offered "an appropriate mix of technical skills on [its] team with clearly defined team leads and niches for partners" whereas IRG's team's WASH "examples and [the] expertise demonstrated does not cover the breadth of skills and experience needed." Id. at 30. The SSA determined that the advantages of Tetra Tech's proposal in four of the five evaluation factors--even those where the same ratings were assigned--was "worth the substantial additional price." Id.

The record includes similar analysis and conclusions by the SSA with respect to the other awardees. See id. at 28 (comparing IRG's proposal with DAI's), 29 (comparing IRG's proposal with AECOM's). In other words, the SSA found that it was more valuable for the agency to obtain higher all-around technical quality than a lower price on what was a hypothetical task order. See id. at 60. Such a decision is contemplated in a best-value evaluation scheme. See FAR § 15.308. As noted above, the extent to which a lower price may be sacrificed for higher technical quality is only governed by the test of rationality and consistency with the evaluation criteria. See General Dynamics Info. Tech., Inc., B-406059.2, Mar. 30, 2012, 2012 CPD ¶ 138 at 6. The evaluation criteria here expressly provided that the technical evaluation factors were "significantly more important" than cost/price. RFP at 124. That the protester disagrees with the agency's cost/technical tradeoff does not demonstrate that it was unreasonable or contrary to the RFP's evaluation criteria.

Next, we find equally unavailing IRG's objection to the selection of a small business for the agency's sixth award. IRG complains that its proposal, which was ranked fifth overall, was "next in line for award" and the decision to "skip" its proposal was unreasonable. Comments/Supp. Protest (Oct. 14, 2014) at 30-31. The record shows that the small business awardee at issue, ME&A, was ranked 8th overall and third among the small business offerors. AR, Tab 52, SSDD, at 22. Therefore, the protester asserts that USAID was "required" to make its sixth award to IRG. Comments/Supp. Protest (Oct. 14, 2014) at 30. We disagree.

As discussed above, the solicitation contemplated the award of "approximately five" contracts with "two (2) anticipated to be reserved for small businesses." RFP at 111, 124. Further, the RFP provided that the agency "reserves the right to award more or less awards than the anticipated number of contracts stated above." *Id.* Pursuant to this flexibility, after examining the evaluation record, the SSA decided to make an award to a third small business. AR, Tab 52, SSDD, at 60. In making this decision, the SSA acknowledged the solicitation's award parameters, stating that "[e]ven though USAID anticipated the award of approximately five (5) IDIQs including two (2) small business set-asides The RFP made clear the government could award more or less awards than the anticipated number of contracts stated above." AR, Tab 52, SSDD, at 60. The SSA further explained that "[a]warding to an additional small business concern supports the Agency's commitment to socio-economic goals negotiated with the U.S. Small Business Administration to bolster small business participation." CO Supp. Declaration at 3.

We find that the award of a contract to an additional small business was neither contrary to the RFP nor otherwise improper. In accordance with this solicitation, the agency contemplated making awards on an unrestricted basis as well as setting aside contracts for small businesses. After the SSA's assessment of the evaluation reports, the SSA determined that "[n]o small business will receive a full and open award." AR, Tab 52, SSDD, at 60. Thus, each of the small business awardees, including ME&A, received contracts reserved exclusively for small businesses, a category of award for which IRG, as a large business, was not eligible. That is, the agency did not "skip" IRG's proposal and make an unrestricted award to a lower-ranked offer. Rather, the agency set aside an additional award for a small business pursuant to the discretion afforded it under the terms of the solicitation. A determination that a particular procurement, or, as is the case here, certain awards under a multiple-award procurement, should be set aside for small business participation is basically a business judgment within the broad discretion of the contracting officer. *See generally Admiral Towing & Barge Co.*, B-291849, B-291849.2, Mar. 6, 2003, 2003 CPD ¶ 164 at 3. Our Office will not question the set-aside determination of a contracting officer in the absence of a clear showing of abuse of discretion. *Id.* at 3-4; *American Med. Response of Connecticut, Inc.*, B-278457, Jan. 30, 1998, 98-1 CPD ¶ 44 at 2-3. IRG has not established that USAID abused its discretion in deciding to set aside an additional award.

In sum, contrary to IRG's assertion, the solicitation did not require the agency to make any additional awards solely on an unrestricted basis, even if the best-value ranking of one of the large businesses was higher than other small businesses. Put another way, the solicitation did not require the agency to forgo its small business commitments and goals when making additional awards under the RFP. Thus, IRG's objection to the sixth award to a small business lacks merit, and the protester's challenge to the source selection decision fails to provide a basis to sustain the protest.

RECOMMENDATION

We recommend that USAID conduct a thorough investigation of AECOM's alleged unfair competitive advantage to meaningfully consider the extent of the former director's potential access to non-public, competitively useful information. If, after review, USAID concludes that AECOM has an impermissible conflict, the agency should consider whether this conflict can be mitigated and take appropriate corrective measures. If USAID concludes that no feasible corrective measures would be adequate to address the conflict, we recommend that AECOM's contract be terminated and that the agency determine whether additional contract awards are warranted, consistent with the solicitation. We also recommend that IRG be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

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General Counsel