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Decision

Matter of: Harkcon Inc.

File: B-412936.2

Date: March 30, 2017

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Otto S. Shill, III, Esq., and Eric D. Gere, Esq., Jennings, Strouss & Salmon, PLC, for Metris, LLC, an intervenor.
William H. Butterfield, Esq., United States Coast Guard, for the agency.
K. Nicole Willems, Esq., and Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to give adequate consideration to awardee's alleged organizational conflict of interest is denied where record shows the agency carefully investigated whether the awardee had an organizational conflict of interest and concluded that none existed.
 2. Protest that agency's technical evaluation was unreasonable is denied where record shows that the agency's evaluation was reasonable and consistent with the solicitation and applicable statutes and regulations.
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DECISION

Harkcon Inc., of Fredericksburg, Virginia, protests the award of a contract to Metris, LLC, of Gilbert, Arizona, under request for proposals (RFP) No. HSCG23-15-PFC999, issued by the Department of Homeland Security, United States Coast Guard (USCG), for training support services to be performed at Coast Guard training centers and support units throughout the country. Harkcon alleges that the agency unreasonably failed to analyze an alleged organizational conflict of interest (OCI) on the part of the awardee and consider a violation by the awardee of the Procurement Integrity Act (PIA). Harkcon also alleges that the agency failed to evaluate its technical proposal reasonably.

We deny the protest.

BACKGROUND

The procurement at issue in this protest is known as the Training and Analysis Support Services (TASS) procurement, which is distinct from the predecessor contract known as the Training and Technical Support Services (TTSS) contract. The RFP contemplates the award of a fixed-price indefinite-delivery, indefinite-quantity contract with a five-year ordering period. RFP at 2. The solicitation provided for award on a best-value basis, considering technical and management approach, past performance, and price.¹ RFP at 60-61. The RFP identified five subfactors for the technical and management approach factor and advised offerors that the subfactors were approximately equal in weight. RFP at 60. The RFP advised that the non-price factors, when combined, were significantly more important than price, but also advised that, as the proposals were found to be closer in merit under the non-price evaluation factors, price could become more important for source selection purposes. RFP, Amend. No. 5, at 2.

The agency received several proposals, including Harkcon's and Metris's, in response to the solicitation. The agency evaluated the proposals and assigned the following ratings:

Evaluation Criteria	Harkcon	Metris
Technical and Management Approach	Marginal/Moderate Risk	Good/Low Risk
Past Performance	Exceptional	Very Good
Total Evaluated Price	\$84,867,584.70	\$83,685,123.11

AR, exh. I, Award Memorandum at 12.

On the basis of these evaluation results, the agency made award to Metris without conducting discussions. AR, exh. I, Award Memorandum at 43. Harkcon received a debriefing on March 28, and filed a protest with our Office on April 1 alleging, among other things, that Metris had an impermissible OCI, and was in violation of the PIA. We dismissed Harkcon's protest on April 21 as a result of the agency's decision to conduct an investigation into these allegations. Harkcon Inc., B-412936, April 21, 2016 (unpublished decision). On December 5, the agency notified Harkcon that it was reaffirming the award to Metris. The agency briefed Harkcon on

¹ The record shows that, in evaluating proposals under the technical and management approach factor, the agency assigned adjectival ratings of superior, good, satisfactory, marginal or unsatisfactory, and risk ratings of high, moderate or low. Agency Report (AR), exh. I, Award Memorandum, at 10-11. In evaluating past performance, the agency assigned adjectival ratings of exceptional, very good, satisfactory, marginal, unsatisfactory or neutral. Id. at 11.

the results of its investigation on December 21, and this protest followed on December 23.

DISCUSSION

Harkcon alleges that Metris had an unequal access to information OCI that the agency failed to investigate based on Metris's employment of a former USCG employee. Harkcon also challenges the rating assigned to its proposal under the technical and management approach factor. We have considered all of the protester's arguments and find no merit to its protest. We discuss Harkcon's principal contentions below.

Alleged OCI

The protester alleges that Metris has an unequal access to information OCI based upon Metris's employment of an individual who recently retired from the USCG. Specifically, the protester asserts that this individual entered Metris's employ to assist the awardee in proposal preparation for the TASS competition, and to serve as its program manager (the MPM) for the TASS effort. According to the protester, the individual in question had access to competitively useful, nonpublic information about the protester and provided that information to the awardee during its proposal preparation efforts.

Federal Acquisition Regulation subpart 9.5, and decisions of our Office, broadly identify three categories of OCIs, biased ground rules, unequal access to information, and impaired objectivity. McConnell Jones Lanier & Murphy, LLP, B-409681.3, B-409681.4, October 21, 2015, 2015 CPD ¶ 341 at 13. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information, and that information may provide the firm a competitive advantage in a competition for a government contract. Systems Made Simple, Inc., B-412948.2, July 20, 2016, 2016 CPD ¶ 207 at 6. We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. Id. at 7.

The record shows that the MPM became chief of the USCG FORCECOM (Forces Readiness Command) Training Division in September of 2012. Agency Legal Memorandum at 4. In that role, the MPM had general oversight responsibility for training activities at training commands throughout the United States. Id. The MPM remained in that position until March 2015 when he began terminal leave from the USCG, leading up to his formal retirement on May 1, 2015. Id. The MPM's role as chief of the training division during the performance of the TTSS contract, and at the time the agency issued a request for information (RFI) which preceded the TASS solicitation, form the basis for the protester's allegations.

The record shows that, before leaving the USCG, the MPM sought and received a post-government-service employment ethics memorandum from the agency dated March 19, 2015, which specifically cleared the MPM to work as the program manager for a company with intentions to pursue the TASS procurement. AR, exh. D, Post-Government-Service Employment Ethics Memorandum, at 1.² Following his retirement, the MPM worked as a consultant for Metris during proposal preparation, and was hired by Metris to serve as the program manager for the TASS effort. AR, exh. H, Metris Proposal, Vol. I, at 1.

Harkcon alleges that an unequal access to information OCI exists because the MPM was chief of the training division during the time the predecessor TTSS contract was performed. In this connection, Harkcon worked on the TTSS contract as a subcontractor. The protester alleges that the MPM's role as chief provided him access to nonpublic, competitively useful information about Harkcon.

We find no merit to this aspect of Harkcon's protest. As noted, the agency performed an investigation into Metris's alleged OCI. The investigator's findings show that the MPM did not have access to procurement sensitive or competitively useful information either relating to performance of the TTSS contract, or to the proposals that were submitted for that contract when it was competed.

Generally speaking, the agency's investigation revealed that the MPM had no access to computer records that would have revealed labor rates, monthly invoices or performance issues on the TTSS contract. AR, exh. N, Investigative Report, at 104-107. More specifically, the investigator found no evidence to support the allegation that the MPM had access to the incumbent contractor's procurement-sensitive, financial, proprietary, and performance information related to the TTSS contract. Id. The investigator found that the MPM did not have access to the computer systems where the incumbent's procurement-sensitive documentation was stored, and there was no evidence that such information was provided to the MPM. Id.

The investigator also found that the MPM did not have access to any USCG systems that contained procurement-sensitive, financial, proprietary, or performance information. AR, exh. N, Investigative Report, at 104-107. In addition, the investigator concluded that the labor rates for the TTSS contract would not have been competitively useful to Metris in any event because they were well below the current market rate (approximately 21.1% lower than the next lowest bidder), were established by Leidos (the prime contractor under the TTSS contract) not Harkcon,

² The record shows that the MPM made his inquiry about this question in connection with possible employment prospects with a firm other than Metris. AR, exh. D, Post-Government-Service Employment Ethics Memorandum, at 1.

and all but two of the labor categories were subject to the Service Contract Act wage determinations which were posted publicly.³ Id. at 106.

The protester also contends that, because the MPM served as chief of the training division at the time the agency issued the RFI which preceded the solicitation, the MPM had access to the RFI responses. As to this allegation, the investigator found that the MPM did not have access to the RFI responses. AR, Tab N, Investigative Report at 50, 107. In any event, the information provided in those responses would not have been competitively useful.⁴

As a final matter, the protester suggests that an OCI exists because the MPM had subject matter expertise based on his USCG employment. However, an individual's familiarity with the type of work required under a solicitation from prior government employment is not, by itself, evidence of an unfair competitive advantage. Liquidity Servs., Inc., B-409718, et al., July 23, 2014, 2014 CPD ¶ 221 at 12. In light of the discussion above, we deny this aspect of Harkcon's protest.⁵

Technical Evaluation

Harkcon also challenges the agency's evaluation of its technical proposal, and the assignment of a marginal rating to its proposal under the technical and management approach factor. The protester disagrees with the agency's assignment of a deficiency to its proposal.

In reviewing protests challenging an agency's evaluation, our Office does not reevaluate proposals or substitute our judgment for that of the agency. Jacobs Technology, Inc., B-411784, B-411784.2, October 21, 2015, 2015 CPD ¶ 342 at 6. Rather, we review the record to determine whether the agency's evaluation was

³ The protester also suggests that the MPM had access to past performance information relating to the TTSS contract. Even if that were true, we do not understand--and the protester has not explained--how such information could have been competitively useful to Metris in preparing its proposal.

⁴ As the agency notes, the RFI was simply a sources-sought type solicitation that requested general expressions of interest and capability summaries, but did not solicit competitively useful information such as technical approaches or prices.

⁵ In a related allegation, Harkcon asserts that Metris and the MPM violated the PIA by exchanging restricted, nonpublic information, including source selection information, prior to award of the contract. The protester argues that Metris's program manager had the type of information contemplated by the PIA, and that he must have disclosed the information to Metris prior to its proposal submission. However, as discussed in detail above, the record shows that the MPM did not have access to the type of information contemplated by the PIA.

reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Id.

The record shows that the agency's evaluators assigned a deficiency to Harkcon's proposal under the staffing approach technical subfactor after concluding that five of Harkcon's proposed key personnel--including its proposed program manager--did not possess advanced degrees required by the RFP. RFP at 15-16; AR, exh I, Award Memorandum at 18. Harkcon's proposal received an overall technical rating of marginal.

The protester does not dispute that its proposed key personnel did not have the required credentials. Instead, Harkcon argues that the agency's assignment of a deficiency was unreasonable because the agency also recognized that the proposed key personnel had positive attributes like experience with the USCG.

We find no merit to this allegation. Notwithstanding that the agency may have identified positive attributes relating to the employees in question, the fact remains that the proposed personnel did not possess the qualifications required by the RFP, and the only possible solution to resolving this deficiency would have been for Harkcon to substitute five of its key personnel. Accordingly, the agency properly assigned a deficiency to Harkcon's proposal.

As noted above, the record shows that the agency assigned Harkcon's proposal a marginal rating, and the basis for this rating was the assignment of the deficiency discussed above. The apparent reason that the agency assigned the Harkcon proposal a marginal rating--as opposed to an unsatisfactory rating--is that the marginal rating was the more appropriate rating to be assigned before the agency decided to make award on the basis of initial proposals without discussions. In this connection, a marginal rating was defined as follows:

Proposal demonstrates a shallow understanding of the requirements and an approach that does not meet one or more performance or capability standard[s] necessary for minimal but acceptable contract performance. Deficiencies or weakness are correctable through discussions.

AR, exh. I , Award Memorandum, at 10 (emphasis supplied). In contrast, an unsatisfactory rating was defined as follows: "Proposal fails to meet requirements and one or more deficiencies exist for which correction would require a major revision or redirection of the proposal. A contract cannot be awarded with this proposal." Id. (emphasis supplied).

In the final analysis, although the record shows that the agency assigned the Harkcon proposal a marginal--rather than an unsatisfactory--rating, the fact remains that the agency properly identified a deficiency in the Harkcon proposal that

rendered it ineligible for award under either the marginal or unsatisfactory rating definitions.⁶

As a final matter, the protester argues that it was improper to assign a strength to Metris's proposal because Metris provided letters of intent for all of its proposed site team leads. According to the protester, the agency's actions were improper because letters of intent were not required by the RFP and were not specified in the solicitation as an evaluation factor. However, even if the protester were correct, the record shows that there were a number of other strengths assigned to the Metris proposal, and removal of this strength would not have rendered the proposal marginal or unsatisfactory. We therefore have no basis to object to the agency's actions for this reason.

The protest is denied.

Susan A. Poling
General Counsel

⁶ Harkcon also suggests that it was improper for the agency to evaluate risk, because the solicitation did not inform offeror's that risk would be considered. However, the evaluation of risk is unobjectionable, whether or not risk is specifically identified as an evaluation factor. TPMC-Energy Solutions Environmental Services 2009, LLC, B-408343.2; et al., August 23, 2013, 2013 CPD ¶ 215 at 11.