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Decision

Matter of: Enterprise Resource Planned Systems International, LLC

File: B-413805.5; B-413805.6

Date: July 6, 2017

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Thomas A. Coulter, Esq., and Nicole Hardin Brakstad, Esq., LeClairRyan PC, for Optimal Solutions and Technologies, Inc., the intervenor.

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Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency was required to assess additional strengths to protester's proposal on the basis that the protester designated virtually all of its personnel as "key" is denied where agency reasonably determined that such designation by the protester did not provide meaningful benefit to the government that warranted assessment of additional strengths.
2. Protest that agency should have disqualified awardee on the basis of alleged organizational conflicts of interest due to prior performance of other contracts is denied where agency addresses each of the contracts on which the protest is based and the protester has not shown that the agency's basis for its determinations regarding the alleged conflicts was unreasonable.
3. Protest that agency was required to find awardee nonresponsible on the basis of a *qui tam* suit is denied where the protester has not shown that the agency ignored any information regarding the integrity of the awardee that should have been considered.

DECISION

Enterprise Resource Planned Systems International, LLC (ERPSI), of Laurel, Maryland, protests the Defense Health Agency's (DHA) issuance of a task order to Optimal Solutions and Technologies, Inc. (OST), of Washington, D.C., pursuant to request for proposals No. HT9402-16-R-0001, to provide information technology (IT) services

supporting DHA's e-commerce system (ECS).¹ ERPSI challenges the agency's technical evaluation of ERPSI's proposal; asserts that OST should have been disqualified on the basis of alleged conflicts of interest; and asserts that OST should have been disqualified as nonresponsible.

We deny the protest.

BACKGROUND

On June 30, 2016, the agency published the solicitation at issue, seeking proposals for a task order to "maintain, operate, and provide engineering and technical support for the DHA E-Commerce program" over a 1-year base period and four 1-year option periods. Agency Report (AR), Tab 2, RFP at 17, 216. The solicitation provided that award would be made on a best-value basis and established the following evaluation factors: technical,² past performance,³ and price.⁴

On July 22, 2016, proposals were submitted by 7 offerors, including ERPSI and OST. Thereafter, the proposals were evaluated; no discussions were conducted. Contracting Officer's Statement of Facts, May 8, 2017, at 3. In September 2016, the agency selected ERPSI for award. Id. Thereafter, two protests were filed. On October 20, the agency notified this Office that it intended to take corrective action by establishing a competitive range, conducting discussions, obtaining revised proposals, and making a new source selection decision. Thereafter, GAO dismissed the protests.

In November 2016, the agency established a competitive range that included ERPSI and OST and, thereafter, conducted discussions. Final revised proposals were

¹ The solicitation was issued to contractors holding National Institutes of Health Information Technology Acquisition and Assessment Center (NITAAC) Chief Information Officer-Solutions and Partners 3 (CIO-SP3) indefinite-delivery, indefinite-quantity (IDIQ) contracts. The task order at issue here is referred to as the e-commerce system support (EOSS) task order.

² Under the technical factor, the solicitation established the following three subfactors, listed in descending order of importance: staffing and personnel qualifications; technical approach and capabilities; and management approach and capabilities. RFP at 223-24. Under each subfactor, proposals were assigned ratings of outstanding, good, acceptable, marginal, or unacceptable. Id.

³ The solicitation provided that past performance would be evaluated on an acceptable/unacceptable basis. Id. at 225.

⁴ The solicitation provided that price and technical evaluation factors were of equal importance. Id. at 223.

submitted on February 2, 2017, and ERPSI's and OST's proposals were evaluated as follows:⁵

	ERPSI	OST
Technical		
Staffing/Personnel Qualifications	Outstanding	Outstanding
Technical Approach/Capabilities	Good	Good
Management Approach/Capabilities	Acceptable	Acceptable
Past Performance	Acceptable	Acceptable
Price	\$36,949,881	\$31,899,495

AR, Tab 5, Source Selection Decision, at 5, 9, 10.

In considering ERPSI's and OST's proposals, the source selection authority (SSA) reviewed the various evaluated strengths associated with each proposal and concluded that the proposals were technically equal. AR, Tab 5, Source Selection Decision, at 7-13. Accordingly, the SSA selected OST's proposal for award on the basis of its lower price. This protest followed.⁶

DISCUSSION

ERPSI protests that the agency should have assigned more strengths to its proposal under the technical evaluation factor; disqualified OST from the competition on the basis of alleged organizational conflicts of interest (OCIs); and found OST to be nonresponsible. None of ERPSI's allegations provides a basis for sustaining the protest.⁷

Technical Evaluation

First, ERPSI asserts that the agency was required to assign additional strengths to ERPSI's proposal due to the fact that ERPSI designated virtually every one of its proposed personnel as "key."⁸ Protest at 15. Noting that the agency assigned

⁵ The other offerors' proposals, and the agency's evaluation thereof, are not relevant to this protest and are not further discussed.

⁶ The awarded value of the task order at issue is \$31,899,495. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

⁷ In its various protest submissions, ERPSI has presented arguments that are in addition to, or variations of, those discussed below. We have considered all of ERPSI's arguments and find no basis to sustain its protest.

⁸ The solicitation contained an estimated level of effort for the task order requirements, RFP at 220-22; and identified certain positions that must be filled by key personnel,
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strengths to proposals in areas that exceeded the solicitation requirements, ERPSI refers to the “additional [redacted] key personnel” that it proposed, Protest at 16, and complains that “[w]hile proposing one or two additional Key Personnel may not be considered to exceed the Solicitation requirements to a degree warranting a strength, ERPSI’s proposal went far beyond a handful of additional key personnel.” Id. at 15. ERPSI concluded that “DHA’s failure to give additional strengths to ERPSI . . . for clearly exceeding the Solicitation’s requirements [regarding key personnel] was unreasonable.” Id. at 16.

The agency responds that in evaluating proposals, it assigned strengths where a solicitation exceeded the solicitation requirements in a manner that was deemed to be meaningfully beneficial to the government. Memorandum of Law, May 8, 2017, at 28-30; Agency Response to ERPSI Comments, June 27, 2017, at 2-13. The agency states that neither ERPSI’s proposal, nor its protest, provides any basis for concluding that ERPSI’s addition of [redacted] “key” personnel was beneficial to the government in a manner that warranted assignment of additional strengths. Id.

In reviewing protests of an agency’s evaluation and source selection decision, we do not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation’s evaluation criteria and applicable procurement laws and regulations. Jacobs Tech., Inc., B-411784, B-411784.2, Oct. 21, 2015, 2015 CPD ¶ 342 at 6-7. A protester’s disagreement with the agency’s judgment, by itself, is insufficient to establish that an agency acted unreasonably. Id. The evaluation of proposals is a matter within the discretion of the procuring agency; we will question the agency’s evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the solicitation. Hardiman Remediation Servs., Inc., B-402838, Aug. 16, 2010, 2010 CPD ¶ 195 at 3.

Here, we have reviewed the evaluation record and find no basis to question the agency’s assessments regarding ERPSI’s proposed personnel. In this regard, we note that both OST’s and ERPSI’s proposals received the highest possible rating (outstanding) under the staffing/personnel qualifications evaluation factor, and that ERPSI’s protest is based on the assertion that ERPSI’s proposal of an “additional [redacted] key personnel” should have precluded the agency from finding ERPSI’s higher-priced proposal technically equal to OST’s lower-priced proposal. Based on our review of the record, we find nothing unreasonable in the agency’s determination that ERPSI’s designation of virtually all of its proposed personnel as “key” was not beneficial to the government in a manner that mandated the agency’s assignment of additional

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stating “[k]ey personnel includes, at a minimum, the Program Managers, Project Manager (both if deemed necessary), and IAO [information assurance officer],” id. at 92; but permitted offerors to propose their own workforces and labor mixes—including the designation of additional personnel as “key.” Id. at 218-19.

strengths. Accordingly, we deny ERPSI's protest that the agency's technical evaluation was flawed.

Alleged OCIs

Next, ERPSI asserts that the agency should have disqualified OST from consideration for award based on alleged OCIs. More specifically, ERPSI asserts that one of OST's subcontractors, Irving Burton Associates (IBA), holds "current DHA contracts" through which it has obtained unequal access to information. Protest at 9-13.

First, based on its internet research, ERPSI refers to a task order awarded to IBA in July 2015, which ERPSI describes as providing "support [for] DHA's Health Information Technology Portfolio Management & Customer Relations (PfM&CR) Division," asserting that IBS "compiles, verifies, and tracks data, and establishes budgetary control for DHA Health Information Technology ('HIT')." Id. at 9-10. ERPSI asserts that "[t]hrough this task order, IBA has a working knowledge of assistance in populating the official Department of Defense CIO Department of Defense Information Technology Investment Portal," which "gives IBA access to budgetary information related to HIT projects under the Business Support Directorate, which includes the EOSS program." Id. at 10.

Next, ERPSI complains that in December 2016, IBA was awarded a task order to "provide program management support to the Health Information Technology Solution Delivery Division," under which IBA "performs requirements analysis, business process reengineering, program planning and execution support, change management support, administrative support, product oversight and support, and independent technical management support of products." Id. at 10-11. ERPSI asserts that one of the DHA systems supported by IBA under this task order is the TRICARE Encounter Data System (TEDS), which "is the entry point for private-sector health care claims" and provides IBA with "details on how DHA Health IT SDD [Solution Delivery Division] TEDS and EOSS Systems interact." Id. at 11-12. ERPSI asserts that the agency "failed to adequately and meaningfully consider the potential organizational conflicts of interest (OCIs) arising out of [these task orders]." Id. at 12.

The agency responds by describing the organizational structure of DHA, noting that the EOSS program is a component of DHA's Resource Management Directorate; that the task orders on which ERPSI bases its OCI allegations are administered by the United States Army Medical Research Acquisition Activity (USAMRAA); and that those contracts "are funded and managed in a manner not typically visible to [DHA's contracting office in Aurora, Colorado]." Memorandum of Law, May 8, 2017, at 6. The agency states that the contracting office for this procurement had no prior knowledge of IBA's performance of the task orders about which ERPSI complains, or any potential OCIs associated with OST's proposal, prior to ERPSI's protest. Id.

Nonetheless, upon receipt of the protest, the contracting officer conducted an investigation to determine whether IBA, in providing any support to other DHA offices, had access to competitively useful information that would have given OST an unfair

competitive advantage.⁹ Contracting Officer's Statement, May 4, 2017, at 10-11. In this regard, the agency reviewed all DHA task orders that had been performed by IBA since January 2014 and concluded that there were no OCIs. The agency has provided a detailed description of IBA's activities under each of the various task orders, explaining its basis for concluding that none of these activities provided unequal access to information that created an unfair competitive advantage for OST. Memorandum of Law, May 8, 2017, at 9-20.

The 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. In reviewing protests that challenge an agency's conflict of interest determinations, our Office reviews the reasonableness of the contracting officer's 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. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. MILVETS Sys. Tech., Inc., B-411721.2, B-411721.3, Jan. 14, 2016, 2016 CPD ¶ 42 at 5. 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. ViON Corp.; EMC Corp., B-409985.4 et al., Apr. 3, 2015, 2015 CPD ¶ 141 at 10.

Here, we have reviewed the detailed record regarding the agency's consideration of OCIs, and find no basis to question either the scope of the contracting officer's investigation or the reasonableness of his determinations. Although ERPSI expresses ongoing disagreement with the agency's assessments and conclusions, it has failed to establish that the agency's consideration of this matter was unreasonable. More specifically, although ERPSI complains about the timing of the agency's OCI investigation and offers ERPSI's general complaints and allegations, nothing in ERPSI's various protest submissions identify any hard facts establishing the existence of a conflict; rather, its general accusations and allegations merely reflect ERPSI's ongoing dissatisfaction and speculation. On the record here, ERPSI's protest that OST should have been disqualified on the basis of alleged OCIs is denied.

⁹ It is well-settled that an agency may properly investigate potential OCIs following receipt of a protest which raises this issue. See Q2 Admins., LLC, B-410028, Oct. 14, 2014, 2014 CPD ¶ 305 at 9 n.12; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 16.

OST's Responsibility

Finally, ERPSI asserts that the agency was required to find OST nonresponsible on the basis of a *qui tam* suit that alleged False Claims Act violations by OST and two of its principals. Protest at 13. On the basis of the allegations in the *qui tam* suit, ERPSI asserts that the agency was precluded from making an affirmative responsibility determination for OST.¹⁰ Id.

The agency responds that, at the time of award, the contracting officer consulted the System for Award Management (SAM) and the Federal Awardee Performance and Integrity Information System (FAPIIS), contemporaneously documenting the fact that there were “no negative ethics or integrity reports [regarding OST]” in those systems. AR, Tab 11, Responsibility Determination, at 1. Following the agency’s anonymous receipt of notification regarding the *qui tam* suit shortly after award, the contracting officer reviewed the *qui tam* complaint,¹¹ the motions to dismiss that complaint, and the Court’s ruling regarding those motions to dismiss. Memorandum of Law, May 8, 2017, at 25. The agency further states that it discussed the matter with the U.S Attorney’s office and was advised that the Department of Justice (DOJ) had not elected to join in the *qui tam* suit. On the basis of his review, the contracting officer reaffirmed his prior determination that OST was responsible, documenting that determination as follows:

After careful consideration of both the positive and negative information concerning OST, [redacted] and [redacted] [the two OST principals], I find the following facts persuasive for purposes of my inquiry into OST’s present responsibility: (1) the court dismissed the *qui tam* complaint as it pertains to OST itself and saw fit to differentiate between OST and [redacted] and [redacted]; (2) the case against [redacted] and [redacted] has not yet been tried on its merits; and (3) the U.S. Attorney’s Office did not intervene in the case and [redacted]; and (4) OST remains eligible for awards through NITAAC, and OST has not been suspended or debarred.

¹⁰ ERPSI acknowledges that the suit against OST has been dismissed “because the plaintiff did not state a claim against OST,” Protest at 13 n.10, but maintains that an affirmative responsibility determination was still precluded because the suit has not been dismissed against the two OST principals. Id.

¹¹ The agency states that the *qui tam* suit involves allegations that two OST principals were involved in fraudulently obtaining service-disabled veteran-owned small business (SDVOSB) status for another company, Memorandum of Law at 24, and notes that “[t]here are no criminal charges pending against OST [or the two OST principals].” Id.

Consequently, I find th[at] OST has a satisfactory record of integrity and business ethic and remains a responsible contractor according to the standards of FAR 9.104-1.

AR, Tab 11, Addendum to Responsibility Determination, at 7.

Accordingly, the agency maintains that the contracting officer's affirmative determination of responsibility was reasonable. We agree.

FAR § 9.103(b) provides that “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.” In making the responsibility determination, the contracting officer must determine, among other things, that the contractor has “a satisfactory record of integrity and business ethics.” FAR § 9.104-1(d). Further, “[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” FAR § 9.103(b). In addition, FAR § 9.105-2(b) requires that “[d]ocuments and reports supporting a determination of responsibility or nonresponsibility . . . must be included in the contract file.” FAR § 9.105-2(b).

As a general matter, our Office does not review affirmative determinations of responsibility by a contracting officer. 4 C.F.R. § 21.5(c) (2014); CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 26; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 4 C.F.R. § 21.5(c); see Southwestern Bell Telephone Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8 (sustaining protest of an affirmative determination of responsibility where the contracting officer had general knowledge through various media outlets of allegations of misconduct by the awardee's parent company but failed to obtain and consider sufficient information about the allegations).

Here, as discussed above, the agency considered the *qui tam* complaint, the motions to dismiss that complaint, and the Court's rulings regarding those motions to dismiss. Further, the agency discussed the matter with the U.S. Attorney's Office and was advised that DOJ had not joined in the *qui tam* suit.

On this record we reject the assertion that the contracting officer ignored any information that should have been considered in making the responsibility determination. Cf. Southwestern Bell Telephone Co., supra. To the contrary, here, the agency specifically considered the information on which ERPSI's protest relies, and concluded that OST was a responsible offeror. While ERPSI may wish that OST had been disqualified, and may even genuinely disagree with the agency's judgment, it has

failed to establish that the agency's responsibility determination was unreasonable. Accordingly, we reject ERPSI's protest challenging OST's responsibility.

The protest is denied.

Susan A. Poling
General Counsel