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Decision

Matter of: Booz Allen Hamilton, Inc.--Costs

File: B-414822.4

Date: May 7, 2018

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Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's request that GAO recommend reimbursement of protest costs is granted where the agency unduly delayed taking corrective action in response to clearly meritorious challenges to the agency's evaluation of organizational conflict of interests (OCIs) and the vendors' oral question and answer responses.
 2. Reimbursement of costs is not recommended for protest arguments that are not clearly meritorious and relied upon distinct and unrelated factual and legal bases.
 3. Protest is not clearly meritorious where the agency had a defensible legal position concerning an OCI protest argument based on conflicting GAO decisions regarding conflicts between a vendor's OCI mitigation plan and its technical proposal. In addition to not recommending reimbursement based on this issue, GAO clarifies that a decision suggesting that conflicts between these two elements of a proposal need not be considered or reconciled will no longer be followed.
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DECISION

Booz Allen Hamilton, Inc. (BAH), of McLean, Virginia, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its initial protests (B-414822, B-414822.2, B-414822.3) challenging the issuance of a task order to Raytheon Intelligence, Information & Services, of Dulles, Virginia, under task order request (TOR) No. ID04160057, which was issued by the General Services Administration (GSA) for services in support of the Department of the Army, Army Research, Development and Engineering Command. The protester argues that the

protest was clearly meritorious and that the agency failed to take timely corrective action in response to that protest.

We grant the request in part and deny it in part.

BACKGROUND

GSA issued the solicitation on December 30, 2016, seeking proposals to provide systems engineering and computer resource engineering support for the Army's Software Engineering Directorate (SED). Agency Report (AR), Tab 26A, TOR, at 1. SED provides support services at the request of entities such as the Department of Defense and other federal agencies, cooperative research and development and education agreement partners, and Foreign Military Sales (FMS) customers. Id. at 17. The competition was limited to firms holding GSA's One Acquisition Solution for Integrated Services (OASIS) pool 3 indefinite-delivery, indefinite-quantity (IDIQ) contracts. Id. at 8. The TOR anticipated issuance of a cost-plus-fixed-fee task order with a base period of 1 year, two 1-year options, and one 6-month option. Id. at 13. The task order will require the awardee to perform lifecycle support services to: "define concepts, define requirements, plan, manage, develop, sustain, modify, improve, test, train, field, and retire systems and system computer resources in a time frame necessary to meet customer needs." Id. at 17; AR, Tab 49, Award Decision, at 6.

The solicitation advised vendors that proposals would be evaluated based on the following four factors: (1) oral questions and answers; (2) capability plan; (3) past performance; and (4) cost. TOR at 116. Vendor's proposals were to be evaluated on a pass/fail basis for the capability plan factor. Id. The agency was to assign confidence ratings to offerors' proposals under the oral questions and answers factor and the past performance factor, and then was to assign a numerical value to those ratings.¹ Id. The numerical ratings were to be used to establish a quality-infused pricing (QIP) adjustment factor, which would reflect the non-cost merits of the proposals. Id. at 126. The QIP adjustment factor was to be applied to vendors' evaluated costs (established based on a cost realism analysis) to produce the total assessed value of each proposal. Id. The vendor whose proposal had the highest total assessed value--as reflected by its lower QIP-adjusted cost--was to be selected for award. Id. at 126-127.

GSA received proposals from BAH and Raytheon by the closing date of January 30, 2017. AR, Tab 49, Award Decision, at 12. As relevant here, the agency concluded that BAH's evaluated cost was \$687,978,402, and its total assessed value, as modified by

¹ For the oral questions and answers factor, the agency was to assign one of the following ratings: high confidence, significant confidence, medium confidence, little confidence, or no confidence. TOR at 120-21. For the past performance factor, the agency was to assign one of the following ratings: high confidence, significant confidence, medium confidence, little confidence, no confidence, or unknown confidence (neutral). Id. at 124-125.

the QIP adjustment factor of 0.851200, was \$585,607,216. Id. at 138. The agency concluded that Raytheon's evaluated cost was \$690,267,983, and its total assessed value, as modified by the QIP adjustment factor of 0.843072, was \$581,945,609. Id. The contracting officer, who was also the source selection authority, selected Raytheon's proposal for award based on its total assessed value--as reflected by its lower QIP-adjusted cost. Id. at 138-140.

BAH filed its protest (B-414822) on June 19, arguing that the award to Raytheon was improper based on the following three primary arguments: (1) Raytheon had an unmitigatable impaired objectivity organizational conflict of interest (OCI) that should have disqualified it from award; (2) the agency unreasonably evaluated the vendors' proposals under the oral questions and answers factor, and (3) the agency unreasonably evaluated the realism of BAH's proposed costs.² On July 17, the protester filed a supplemental protest (B-414822.2), arguing that the agency failed to consider the costs of using different contractors to perform work that Raytheon would be precluded from performing as part of the awardee's OCI mitigation plan. GSA filed its report responding to the protest on July 19 and its report addressing the supplemental protest on July 21. On July 31, BAH filed its comments on the agency report and supplemental report, and also filed a second supplemental protest (B-414822.3) raising additional arguments concerning the OCI evaluation and the oral questions and answers factor evaluation. GSA filed its report responding to the second supplemental protest on August 11. On August 18, BAH filed its comments on the second supplemental agency report.

On August 30, at the request of GSA, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference.³ The GAO attorney advised that he would likely draft a decision sustaining the protest concerning the protester's allegations regarding OCIs and the technical evaluation.

On September 1, GSA advised that it would take corrective action in response to the protest. Specifically, the agency stated that it would take the following actions:

² The awarded value of the task order at issue exceeded \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts that were awarded under the authority of Title 41 of the U.S. Code. 41 U.S.C. § 4106(f)(1)(B).

³ In an outcome prediction ADR conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. Bid Protest Regulations, 4 C.F.R. § 21.10(e); see First Coast Serv. Options, Inc., B-409295.4, B-409295.5, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. The purpose of such outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. Id.

GSA intends to review the scope of its analysis of Organizational Conflicts of Interest (OCI) and correct and/or supplement that analysis and/or take other action as it deems necessary to ensure the OCI analysis sufficiently addresses the impaired objectivity OCI concerns or otherwise satisfies the Federal Acquisition Regulation subpart 9.5. GSA also intends to review the evaluation record with respect to OCIs and Raytheon's proposal and Oral Question and Answers (Oral Q&A), and with respect to both Raytheon and BAH proposals regarding Oral Q&A 18, to ensure they were evaluated in accordance with the stated evaluation criteria and perform re-evaluation(s) as it deems appropriate. Based on the corrective action results, GSA will make any required adjustments to the Quality Infused Pricing values and/or the determination of the offeror representing the best value.

Agency Notice of Corrective Action, Sept. 1, 2017, at 1.

On September 8, our Office dismissed the protest, concluding that the agency's proposed corrective action rendered the protest academic. Booz Allen Hamilton, Inc., B-414822 et al., Sept. 8, 2017, at 2 (unpublished decision).⁴ On September 8, BAH filed this request for a recommendation by our Office that GSA reimburse its costs for pursuing its initial protest.

DISCUSSION

BAH requests that our Office recommend that GSA reimburse the protester's costs of filing and pursuing its initial protest (B-414822, B-414822.2, B-414822.3). We address the following three primary arguments raised in BAH's initial protest: (1) the agency's evaluation of potential OCIs regarding Raytheon, (2) the agency's evaluation of the vendors' oral questions and answers responses, and (3) the agency's evaluation of the realism of the protester's proposed costs.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, we

⁴ After our Office dismissed the initial protest as academic, BAH filed a protest (B-414822.5) with our Office challenging the terms of the corrective action. Our Office denied the protest, finding no basis to conclude that the corrective action was unreasonable. Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4. Following its corrective action, GSA made a new award to Raytheon. On January 2, 2018, BAH filed a protest (B-414822.6) with our Office challenging the award; the protester again argued that the agency unreasonably evaluated potential OCIs regarding Raytheon, and also argued that the solicitation's workload estimates were no longer reliable. On February 1, the GSA senior contracting officer issued a waiver of the application of the OCI provisions of Federal Acquisition Regulation (FAR) subpart 9.5 to the solicitation and task order. OCI Waiver, Feb. 1, 2018, at 3. On February 7, BAH withdrew its protest.

determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest; we generally do not consider it to be prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. We will recommend reimbursement only where the underlying protest is clearly meritorious, i.e., not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

As a general rule, a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. Burns & Roe Servs. Corp.--Costs, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3.

For the reasons discussed below, we agree that the protest was clearly meritorious with regard to the first (OCI) and second (oral questions and answer responses) protest issues identified above. Because the agency took corrective action after submitting its reports responding to each argument, and after BAH was required to file comments on the agency report, we conclude that the corrective action was not prompt. Alsalam Aircraft Co.--Costs, *supra*. With regard to the third protest issue (cost realism), we conclude that the argument is not clearly meritorious and also conclude that it is severable from the other arguments.

Organizational Conflicts of Interest

BAH's initial protest argued that GSA failed to reasonably evaluate whether Raytheon should have been precluded from award consideration based on unmitigatable OCIs. The protester contends that this argument was clearly meritorious because a reasonable inquiry by the agency would have disclosed the absence of a defensible legal position. For the reasons discussed below, we agree with the protester that its initial protest argument concerning OCIs was clearly meritorious.

The FAR requires that contracting officers 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 categorized into three groups: (1) biased ground

rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an impaired objectivity conflict arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR § 9.505-3; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

The identification of conflicts of interest 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 also Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). 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., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. We review agencies' OCI investigations for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, even when this consideration is given after award, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. TISTA Sci. & Tech. Corp., Inc., B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6; TeleCommunication Sys., Inc., *supra*.

BAH argued that GSA failed to reasonably evaluate potential impaired objectivity OCIs that could arise from Raytheon's performance of tasks in the solicitation's performance work statement (PWS). The protester contended that the awardee would be required to provide services for SED concerning programs supported by the awardee or where the awardee could compete in the future.

The solicitation required vendors to identify in their proposals potential OCIs and a proposed plan to mitigate them. TOR at 62-66. Raytheon's OCI statement acknowledged that "[a]s an Original Equipment Manufacturer (OEM) for a large number of the SED supported platforms, there is the potential for actual, potential or perceived OCIs to arise during the life cycle support of these platforms under the [Strategic Systems Engineering Services (SSES)] effort." AR, Tab 14A, Raytheon OCI Mitigation Plan, Encl. 1, at 1-12. Raytheon's proposed "Avoidance Strategy" for impaired objectivity OCIs stated as follows:

Avoidance Strategy: Raytheon will not advise the Government on tasks which involve [DELETED] where Raytheon or its affiliated organizations or entities is a current provider or may become a future provider, thus, eliminating the potential for an impaired objectivity OCI under the SSES program. If there was a case where the Government could not move such tasking to another contractual vehicle, Raytheon could propose an approach where a non-conflicted party or individual could perform the effort, subject to Contracting Officer approval. Further, Raytheon will ensure none of our subcontractors will be given scope that would cause an impaired objectivity OCI.

Id. at 1-14.

GSA evaluated Raytheon's OCI statement and mitigation plan, which identified [DELETED] areas of potential conflict based on Raytheon's current and anticipated work, and proposed a mitigation approach of not performing assignments from SED which might give rise to OCIs. AR, Tab 24, OCI Analysis, at 5. GSA agreed with Raytheon's assessment that the [DELETED] areas identified in its OCI statement created potential conflicts. Id. GSA nonetheless concluded that because SED is a fee-for-service entity that receives funding for its activities by providing work for customers (e.g., federal agencies, certain private-sector partners, and FMS customers), SED could avoid OCIs by refusing to assign work to Raytheon under the task order if such work might give rise to an OCI. Id.

GSA assessed the scope of the potential OCIs by reviewing Raytheon's mitigation plan and information concerning SED's recent work. The agency reviewed statements of technical instructions (SOTIs) from prior SED requirements to identify possible areas where Raytheon's performance of PWS requirements could give rise to OCIs. Id. at 2. The agency also reviewed labor data from the AMRDEC⁵ Contract Tracking System (ACTS), which recorded work from the predecessor task order, to assess the amount of work associated with the SOTIs that could create OCIs for Raytheon. Id. The agency concluded, based on its review of the SOTIs, that the potential OCIs could affect Raytheon's ability to perform up to 6.17 percent of the work that could be required during the base year of the task order; in an alternative analysis, based on its review of the ACTS database, the agency concluded that Raytheon could be precluded from performing 7 percent of the work. Id. at 3-4. The agency concluded that OCIs could be avoided by ensuring that Raytheon did not perform tasks relating to those areas, and that this approach to mitigating the OCIs was acceptable. Id. at 5.

BAH raised numerous challenges to GSA's evaluation of OCIs. The GAO attorney assigned to the protest advised the parties during the outcome prediction ADR that GSA's review of potential OCIs for Raytheon was unreasonable because (1) it relied on an unreasonable understanding of impaired objectivity conflicts, (2) was based on a flawed search for potential areas of conflict, and (3) failed to account for the effect of the OCI mitigation plan on Raytheon's proposed technical approach.

First, BAH argued that GSA unreasonably excluded from its OCI analysis potential conflicts arising from work where Raytheon would be in a position to make recommendations regarding its competitors' products in favor of its own products. For example, the protester noted that the PWS requires the contractor to "participate in Independent Verification and Validation (IV&V) activities for a program." PWS § C.3.2.13. The protester argued that performance of this work would permit the

⁵ AMRDEC is the Army Aviation and Missile Research Development and Engineering Center, which provides aviation and missile capabilities. See AMRDEC Website, <https://www.army.mil/info/organization/unitsandcommands/commandstructure/amrdec#org-about> (last visited May 2, 2018).

awardee to “influence how the Government views the current performance of Raytheon’s competitors for hardware and software contracts in the Strategic domain and related markets.” Protester’s Comments, July 31, 2017, at 16.

The agency’s OCI analysis did not specifically address the issue of Raytheon’s evaluation of its competitors’ products. See AR, Tab 24, OCI Analysis. Instead, the agency’s response to the protest argued that this concern could not have given rise to an OCI. In this regard, GSA did not dispute that Raytheon could be required to perform work relating to IV&V activities, but contends that this work could not give rise to an OCI because the PWS requires “participation” in IV&V work, as opposed to full responsibility for this work. Contracting Officer’s Statement (COS) at 28-30. The agency emphasizes that Raytheon would not have responsibility for IV&V decisions because it would be only “[p]roviding technical assistance to the Government or other contractors that are performing IV&V effort. . . .” Supp. COS, Aug. 11, 2017, at 43.

Our Office has explained that a firm’s participation in work that could affect its own interests or the interests of its competitors can give rise to an impaired objectivity OCI. See PURVIS Sys., Inc., supra at 10-11. The fact that the agency retains final approval or decision-making authority does not absolve the agency of assessing whether a conflict can arise; in this regard, the FAR requires the agency to consider whether a contractor’s advice to the government might be tainted by conflicting interests or obligations. Nortel Gov’t Solutions., Inc., B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 at 6-7; Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 12. Here, we conclude that the agency’s reliance on the fact that Raytheon might be only “participating” in certain activities, such as IV&V efforts, as opposed to having final responsibility for those efforts, did not excuse the agency from considering whether the awardee might have an impaired objectivity OCI.

Next, BAH argued that GSA’s OCI analysis was unreasonable because it relied on a flawed search to identify potential OCIs. GSA’s search of the SOTIs to identify areas of conflict for Raytheon relied on search terms that were acronyms of the programs or systems the awardee had identified as potentially giving rise to OCIs. AR, Tab 24, OCI Analysis, at 2-3; COS at 7. Based on this analysis, as discussed above, the agency concluded that Raytheon would have conflicts arising from approximately 6.17 percent of the PWS requirements. AR, Tab 24, OCI Analysis, at 2-3.

BAH argued that the agency’s analysis was inadequate because the agency’s search failed to identify SOTIs that used the full name of a program or system, rather than its acronym. The protester identified additional areas where the agency’s limited searches failed to identify potential conflicts for Raytheon. See Protester’s Comments & Supp. Protest, July 31, 2017, at 10-11.

GSA acknowledged that the use of acronyms in its OCI review resulted in the failure to identify additional SOTIs that had terms or names related to the conflicts identified in Raytheon’s OCI statement and mitigation plan. See Supp. COS, Aug. 11, 2017, at 26; Supp. MOL, Aug. 11, 2017, at 9. In response to the protest, however, the agency states

that an AMRDEC technical representative reviewed the additional areas of potential conflict identified by the protester and concluded that these newly-identified SOTIs did not create any potential OCIs for Raytheon. AR, Tab 73, Decl. of AMRDEC Technical Representative, at 2-3.

In the ADR outcome prediction conference, the GAO attorney assigned to the protest advised that the additional review by the technical representative did not address the protester's arguments because there was no evidence in the record that the contracting officer had specifically considered the new potential conflicts and made a judgment regarding these matters. As discussed above, the FAR requires the contracting officer to identify and evaluate potential conflicts of interest, and to avoid, neutralize, or mitigate significant potential conflicts before contract award. FAR § 9.504(a). Here, the contracting officer's response to the supplemental protest merely stated that "SED technical personnel reviewed the SOTIs and find that NONE of the SOTIs would represent a potential or actual OCI for Raytheon. . . ." Supp. COS, Aug. 11, 2017, at 27.

Our Office will consider a contracting officer's assessment of OCIs that was made after a protest was filed. Science Applications Int'l Corp., B-406899, Sept. 26, 2012, 2012 CPD ¶ 282 at 9. Here, however, the agency's response to the supplemental protest did not explain why the contracting officer believed that the technical representative's analysis was correct.⁶ Rather, the contracting officer simply noted that the representative had reviewed and concluded that there was no basis to find additional OCIs. We conclude that the record here does not explain why the contracting officer concluded that the additional analysis performed by the technical analyst was reasonable and supported the conclusion that the OCIs concerning Raytheon were adequately mitigated.

In sum, based on our review of the protester's arguments concerning the agency's assessment of Raytheon's potential evaluation of its competitors and the agency's flawed use of only acronyms as search terms to identify potential conflicts, the protester's challenge to the agency's OCI evaluation was clearly meritorious. In this regard, the agency's judgment that potential OCIs arising from Raytheon's performance were acceptable and could be managed was not reasonable because that judgment relied on an incomplete assessment of the scope of the potential conflicts. We

⁶ BAH raised numerous other arguments concerning the adequacy of this review. In light of our discussion herein, we need not address these challenges. In addition, the protester argued that the agency's OCI analysis should have affected the evaluation of Raytheon's costs, to the extent the agency did not assess the costs of using alternative sources to perform work where Raytheon was precluded by OCIs. Because this argument is closely related to the other OCI arguments, we need not address it separately, but include it in our recommendation for reimbursement. See The Salvation Army Cmty. Corr. Program--Costs, supra; Burns & Roe Servs. Corp.--Costs, supra.

therefore grant the request to recommend reimbursement of BAH's costs for pursuing this protest issue.

In addition to the two arguments above, BAH also argued that GSA unreasonably evaluated the effect of Raytheon's proposed mitigation of its acknowledged conflicts on its proposed technical approach. As discussed above, Raytheon's proposed "Avoidance Strategy" for OCIs stated the firm could avoid conflicts by not performing assignments from SED which could give rise to a conflict. AR, Tab 14A, Raytheon OCI Mitigation Plan, Encl. 1, at 1-14. GSA concluded that because the SED contractor will perform work at the request of other agencies, work that gives rise to a Raytheon conflict could be directed to other contractors. AR, Tab 24, OCI Analysis, at 5. In response to the protest, the agency stated that it was "ultimately and absolutely protected," by its discretion not to assign work to Raytheon that might give rise to a potential conflict. Supp. MOL, Aug. 11, 2017, at 7.

BAH argued that GSA's mitigation assessment was unreasonable because, among other things, the agency ignored the effect on the awardee's technical evaluation. In this regard, the protester argued that allowing OCIs to be mitigated by not requiring the awardee to perform work that could give rise to a conflict was not reconciled with the agency's evaluation of the awardee's technical approach--which credited the awardee with its ability to perform certain types of work which would not be performed, per the awardee's OCI mitigation plan. The GAO attorney assigned to the protest agreed with the protester's argument because, in effect, GSA evaluated offerors on an unequal basis to the extent the agency was giving Raytheon evaluation credit for work that the agency concluded that the awardee would not perform. For this reason, the GAO attorney advised during the outcome production ADR conference that he would likely draft a decision that sustained the protest based on this argument as well.

The GAO attorney, however, acknowledged during the ADR conference that GAO decisions on this matter had potentially divergent guidance. On the one hand, our Office's decision in Meridian Corp., B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129 at 5, explained that even where OCI consideration is not included under the technical evaluation factor, "an agency should consider the effect of an offeror's OCI avoidance plan on its technical proposal where the information obtained during the review of such a plan clearly contradicts representations in the offeror's technical proposal, calling into question the evaluators' conclusions concerning its merits." On the other hand, our decision in The LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197 at 7-8, stated that where there is a pass/fail OCI evaluation factor, agencies are not required to consider the effect of an offeror's OCI mitigation plan in the evaluation of its technical proposal. Although The LEADS Corp. has never been expressly overturned by our Office, other decisions by our Office have followed the view in Meridian Corp. that agencies should consider the effect of an OCI mitigation plan on an offeror's proposed technical approach. See Nortel Gov't Solutions, Inc., *supra* (citing Meridian Corp. and stating that as part of GAO's recommended action, "[t]he agency's review should include an evaluation of the reasonable impact on [the awardee's] technical approach in the event that its OCI mitigation plan relies on having the review performed or

augmented by government personnel and/or other contractors.”); Alion Sci. & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 12 (“We further recommend that the agency evaluate the reasonable impact on the quality of performance that will be caused by [the awardee’s] reliance on ‘firewalled’ subcontractors to perform conflicted contract requirements.”).

We conclude that the principle set forth in Meridian, and our decisions following that principle in Nortel and Alion, are consistent and properly explain how an agency should evaluate offerors’ OCI mitigation plans. To the extent The LEADS Corp. sets forth a different principle, we will no longer follow that decision.

For purposes of BAH’s request here, we agree with GSA that the decisions by our Office discussed above show a potential disagreement as to whether agencies should consider the effect of OCI mitigation plans on an offeror’s or vendor’s proposed technical approach. In other words, GSA had a defensible legal position based on its reliance on The LEADS Corp. For this reason, we do not conclude that this issue was clearly meritorious in a manner that warrants recommending reimbursement of costs. However, because the other concerns regarding the agency’s OCI analysis are clearly meritorious, we conclude that the entirety of the protest arguments concerning OCIs merit reimbursement. See The Salvation Army Cmty. Corr. Program--Costs, supra; Burns & Roe Servs. Corp.--Costs, supra.

Oral Questions and Answers Evaluation Factor

Next, BAH argued that GSA unreasonably and unequally evaluated the vendors’ proposals under the oral questions and answers evaluation factor. The GAO attorney assigned to the protest advised the parties during the ADR conference that he would have drafted a decision that would have sustained this argument. For the reasons discussed below, we conclude that this argument was also clearly meritorious.

In reviewing protests of awards in task order competitions, we do not reevaluate proposals but examine the record to determine whether the evaluations and source selection decision are reasonable and consistent with the solicitation’s evaluation criteria and applicable procurement laws and regulations. DynCorp Int’l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 7. A protester’s disagreement with the agency’s judgment regarding the evaluation of proposals, without more, is not sufficient to establish that the agency acted unreasonably. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 4-5.

The record shows that the agency assigned a weakness to BAH’s proposal under oral question and answer (OQA) No. 18 regarding data fusion, which is “a process that takes different data, associates it and processes it in a way that provides a more accurate, modified data element than existed in either original data element.” Supp. COS, Aug. 11, 2017, at 18. The agency’s evaluation noted that the protester proposed a [DELETED] for developing and testing data, but assessed a weakness to the proposal because the protester did not provide details in the following areas: “parametric data,

varying data source resolutions, covariance data, and latency concerns.” AR, Tab 37, BAH Consensus Evaluation Report, at 22. The protester argued that Raytheon’s proposal also did not address this information, and that the agency therefore treated vendors differently because Raytheon was not assessed a similar weakness. The protester also argued that the agency treated vendors unequally with regard to the evaluation of track/data management.

GSA’s supplemental report did not directly address the protester’s unequal treatment argument with regard to the information absent from both vendors’ proposals. See Supp. COS, Aug. 11, 2017, at 18. Instead, the agency argued that the BAH answer was insufficient because it focused on track/data management, rather than what the agency considered to be data fusion. Id. In this regard, the agency argued that, unlike BAH’s answer, Raytheon’s answer addressed the TOR data fusion requirements because it “was not a discussion of ‘merged tracks, split tracks’ which are track management considerations and not data fusion algorithm issues.” Id.

Although the agency’s response addressed what it viewed as the basis for the assessment of a weakness to BAH’s proposal, the agency did not address the protester’s argument--that Raytheon’s proposal lacked the same information, specifically, detail regarding “parametric data, varying data source resolutions, covariance data, and latency concerns.” AR, Tab 37, BAH Consensus Report, at 22. Additionally, despite the agency’s assertion that the awardee’s answer “was not a discussion of ‘merged tracks, split tracks,’” the agency assigned the awardee the following strength: “Raytheon discussed important testing considerations for data fusion algorithms, including both nominal and negative testing (i.e. dropped, merged, and split tracks) through stimulation (C.3.2).” AR, Tab 37, Raytheon Consensus Report, at 20-21. Based on this record, the GAO attorney assigned to the protest advised GSA that he believed he would likely draft a decision sustaining this protest ground.

GSA’s response to BAH’s request for a recommendation for reimbursement of costs “acknowledges the GAO’s ADR concern on [OQA] #18, but maintains that unequal treatment was . . . a close call.” Agency Response, Sept. 25, 2017, at 6. As discussed above, however, the agency did not meaningfully respond to the protester’s argument concerning unequal treatment. Additionally, the agency’s response to the protest relied on a statement regarding the evaluation of the awardee’s proposal that was contradicted by the record. For these reasons, we conclude that the agency’s evaluation was not reasonable, and that the protest was clearly meritorious because a reasonable inquiry into this matter should have revealed the absence of a defensible position. We therefore grant the request to recommend reimbursement of BAH’s costs for pursuing this protest issue.

Cost Realism Evaluation

Finally, BAH’s initial protest argued that GSA did not reasonably evaluate the realism of its proposed costs. The protester’s request for a recommendation for reimbursement of costs did not specifically argue that its arguments concerning the agency’s cost realism

evaluation was clearly meritorious. See Request for Recommendation for Reimbursement, at 6. Instead, the protester argues that it should be reimbursed for all costs associated with its initial protest.

We see no basis in the record to conclude that the facts and legal arguments concerning the evaluation of BAH's own proposed costs is related to the evaluation of Raytheon's potential OCIs or the treatment of the vendors with regard to their oral question and answer responses. We therefore conclude that the cost realism arguments are severable from the other issues in the protest. See Hewlett Packard Enter. Co.--Costs, B-413444.3, Mar. 3, 2017, 2017 CPD ¶ 85 at 8-9 (price realism evaluation arguments are severable from technical evaluation arguments).

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that BAH's arguments concerning the evaluation of Raytheon's potential OCIs and the evaluation of the vendors' oral questions and answer responses were clearly meritorious and that the agency failed to take timely corrective action in response to these arguments. We recommend that GSA reimburse BAH's costs for filing and pursuing its initial protest (B-414822, B-414822.2, B-414822.3) challenging the agency's award to Raytheon, with the exception of those protest costs associated with the protester's challenge to the evaluation of the realism of its proposed costs. We also recommend the agency reimburse the protester the reasonable costs of filing and pursuing this request for reimbursement. BAH should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

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General Counsel