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Decision

Matter of: HBI-GF, JV

File: B-415036

Date: November 13, 2017

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DIGEST

Protest challenging agency's exclusion of a joint venture firm from participation in a procurement is denied where the agency reasonably determined that one member of the joint venture, through its involvement in a second joint venture, assisted in the preparation of specifications used by the agency in the solicitation, giving rise to an organizational conflict of interest.

DECISION

HBI-GF, JV, of Tampa, Florida, protests the exclusion of its proposal from the competitive range by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912EP-17-R-0008, for the construction of cutoff walls at the Herbert Hoover Dike (HHD) embankment, at Lake Okeechobee in Florida. The protester challenges the agency's decision to exclude HBI-GF due to an organizational conflict of interest (OCI), and alleges that the agency's OCI analysis was flawed.

We deny the protest.

BACKGROUND

The agency issued the RFP on April 3, 2017, anticipating the award of a contract for heavy construction services to complete over six miles of cutoff walls at the HHD embankment, from South Bay to Lake Harbor, Florida. The work is to be completed in four phases, and involves the construction of temporary earthen work platforms, the installation of a cutoff wall, performance testing, and site restoration. The RFP included extensive and detailed technical specifications and construction plans for the work.

HBI-GF is a joint venture of Hayward Baker, Inc., and Gannett Fleming, Inc. As relevant here, Gannett Fleming is also a part of Gannett Fleming/GEI Consultants Joint Venture (GF-GEI). On March 29, 2016, the agency issued GF-GEI a task order under contract W912EP-17-R-0008, to conduct a “Type II Independent External Peer Review (IEPR), Safety Assurance Review (SAR)” for the design phase of the cutoff wall construction project that is the subject of the current RFP. Agency Report (AR), Tab 7c, Task Order, at 2. The contract under which the task order was issued explains that:

[IEPRs or SARs] will include a review of the design and construction activities prior to the initiation of physical construction and periodically thereafter until construction activities are completed on a regular schedule sufficient to inform the Chief of Engineers on the adequacy, appropriateness, and acceptability of the design and construction activities for the purpose of assuring public health, safety, and welfare.

AR, Tab 7b, Contract, at 14.

As part of the IEPR, GF-GEI selected personnel, including a geotechnical engineer, to review HHD project design documents such as the construction plans and technical specifications. The IEPR team ultimately submitted more than 80 comments on the design phase of the HHD project, and prepared findings and lessons learned based on their review. GF-GEI’s final IEPR report was submitted to the agency on September 26, 2016, and included records of all IEPR comments and the agency’s responses.

Proposals in response to the RFP, including the proposal of HBI-GF, were received on June 6, 2017. On June 20, the agency advised HBI-GF that it had identified a potential OCI concerning Gannett Flemming’s participation in the IEPR as a part of the GF-GEI joint venture, and requested HBI-GF’s response.¹ On June 29, HBI-GF submitted its review of the organizational and consultant conflicts of interest under Federal Acquisition Regulation (FAR) subpart 9.5 and Gannett Flemming’s role in performance of the IEPR for the project, which concluded that the IEPR did not create a conflict of interest with respect to this RFP.

On July 24, the agency elected to create a competitive range of the most highly rated proposals. On that date, the agency notified HBI-GF that it was being excluded from the competitive range due to OCIs concerning the IEPR. The two-page notification letter explained that the “[a]gency’s investigation into the potential OCI presented by Gannett Fleming reveals evidence of both biased-ground rules OCI and unequal access

¹ Gannett Fleming had previously written to the agency in February, 2017, to request the agency’s agreement that participation in the IEPR would not create an OCI with regard to the construction work on the HHD project. The record does not indicate that the agency provided any response to the February letter.

OCI.” AR, Tab 8e, Exclusion Notice, at 1. HBI-GF responded to the agency on July 25, indicating its disagreement with the agency’s OCI determination. HBI-GF then filed this protest on August 3.

DISCUSSION

HBI-GF maintains that the agency’s decision to eliminate it from the competition was improper, because the agency’s OCI analysis failed to meaningfully consider relevant information and was otherwise unreasonable. With respect to the agency’s conclusion that HBI-GF suffered from a “biased ground rules” OCI, the protester asserts that the agency failed to meaningfully consider the limited scope of an IEPR review, the limited scope of Gannett Fleming’s involvement in the IEPR in this case, and the content of the IEPR report—which the protester argues was limited to clarifications and refinements of existing construction plans and technical specifications.² The protester also contends that the agency misapplied the OCI provisions of the FAR and prior decisions of our Office in concluding that an OCI exists.

The FAR instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.501, 9.504, 9.505; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The responsibility for determining whether a contractor has a conflict of interest and should be excluded from competition rests with the contracting officer, who must exercise “common sense, good judgment and sound discretion” in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR §§ 9.504, 9.505; Aetna Gov. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129 at 12.

The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. The FAR identifies general rules and cites examples of types of OCIs that may arise, and ways to avoid, neutralize, or mitigate those OCIs. FAR § 9.505. The general rules and examples,

² As discussed above, the contracting officer also based her decision to exclude HBI-GF from the competition on an unequal access to information OCI, where Gannett Fleming had obtained materials related to the specifications or statement of work for this procurement through the IEPR. An unequal access OCI requires that the materials obtained be non-public. Here, while the materials provided to GF-GEI in conducting the IEPR were not all made available to offerors as a part of the current RFP, the agency has not disputed HBI-GF’s contention that the materials were all, in some form, available to the public. Nonetheless, as discussed below, we conclude that the contracting officer had a reasonable basis to exclude HBI-GF from the competition on the basis of a biased ground rules OCI.

however, are not intended to be all-inclusive, and the FAR recognizes that “[c]onflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508.” *Id.*; see also, Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 4-5. As relevant here, a biased ground rules OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work. FAR §§ 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 6.

We review an agency’s OCI investigation for reasonableness, and where the agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable. Noonan & Assoc., B-409103, Jan. 10, 2014, 2014 CPD ¶ 29 at 4; Oklahoma State University, B-406865, Sept. 12, 2012, 2012 CPD ¶ 276 at 9. Our Office has previously recognized that even the appearance of an unfair competitive advantage may compromise the integrity of the procurement process, thus justifying a contracting officer’s decision to err, if at all, on the side of avoiding the appearance of a tainted competition. Lucent Techs. World Servs. Inc., *supra*, at 10.

Based on our review of the record here, we cannot conclude that the contracting officer’s OCI determination was unreasonable. The record shows that the determination was documented in a 15-page OCI investigation memorandum, and was based on interviews with agency personnel involved in the project; a review of the IEPR report, IEPR task order scope of work, the underlying task order contract, and other relevant IEPR materials; as well as a review of the HBI-GF proposal, a review of the relevant FAR provisions and case law; and consultation with technical advisors and legal counsel.

The memorandum demonstrates that the OCI investigation initially concerned the possibility that Gannett Fleming’s involvement in the IEPR created an impaired objectivity OCI—an OCI in which a firm’s work under one government contract will involve evaluating itself. Specifically, because an IEPR typically includes “a review of the design and construction activities prior to the initiation of physical construction and periodically thereafter until construction activities are completed,” the contracting officer noted that GF-GEI could be in the position of reviewing HBI-GF’s construction activities if HBI-GF were awarded the HHD construction contract. AR, Tab 7b, Contract, at 14. In this case, however, the contracting officer learned that the IEPR task order had expired after completion of the design review, and that GF-GEI had not been contracted to perform the IEPR of construction activities.

During the initial OCI investigation, however, the contracting officer became concerned that Gannett Fleming’s roles in the performance of the IEPR task order may have resulted in a biased ground rules OCI. In this regard, the contracting officer noted that the GF-GEI geotechnical engineer involved in the IEPR report was also heavily involved

in the HBI-GF proposal under this RFP. After additional review, the contracting officer found that during the IEPR, GF-GEI personnel submitted “more than 80 comments, most of which were incorporated into the subsequent solicitation,” and that “[m]any of the comments. . . contained substantive suggestions that indicate an intimate familiarity with the design and construction of this project.” AR, Tab 9, OCI Memorandum, at 5. The contracting officer also found that “the IEPR team worked closely with the Agency in resolving the comments,” and noted that the IEPR findings specifically stated that “based on discussions with the design team, the IEPR panel feels that the review added value to the project,” and that “[t]he value of the IEPR process is to provide recommendations as related to both standard engineering practice and incorporation of state-of-the-art methodologies.” Id.

Based on this investigation, the contracting officer concluded that Gannett Fleming, via GF-GEI, had access which allowed it “to possibly, by participating in the process of setting procurement ground rules, have special knowledge of the agency’s future requirements that may skew the competition in its favor or, at the very least, would give them an unfair advantage in the competition for those requirements.” AR, Tab 9, OCI Memorandum, at 14; citing, Turner Const. Co., Inc., v. U.S., 645 F.3d 1377, 1382 (2011).” Id. at 14. In summary, the contracting officer determined that:

Gannett Fleming’s role in providing the [United States Army Corps of Engineers] with an Independent External Peer Review placed it in an actual organizational conflict of interest because it received information and provided input and direction that gave them an unfair competitive advantage under FAR § 9.505. Furthermore, even if an actual conflict did not exist, it is clear that a key purpose of FAR subpart 9.5 is to avoid the appearance of impropriety in government procurements and to ensure the integrity of the procurement process.

AR, Tab 9, OCI Memorandum, at 15.

The protester presents two primary objections to the contracting officer’s investigation and OCI determination. First, HBI-GF alleges that the contracting officer failed to meaningfully consider the limited nature of an IEPR in general and specifically GF-GEI’s IEPR report in this case. HBI-GF asserts that participation in the IEPR would not have provided an opportunity to shape the specifications and construction plans in its favor, because nothing in the IEPR task order scope of work called for GF-GEI to recommend alternative approaches to the specifications or construction plans, and GF-GEI did nothing more than request clarifications. HBI-GF further argues that the agency’s own policies regarding “civil works review,” including IEPRs, exclude design work and limit review to specific questions that do not involve contributing to project design. The protester notes that this guidance specifically states that “review panels should be instructed to not make a recommendation on whether a particular alternative should be implemented, as the Chief of Engineers is ultimately responsible for the final decision.” Comments at 2.

Notwithstanding the IEPR scope of work or other agency guidance, we conclude that the contracting officer meaningfully considered the relevant documents concerning the IEPR and reasonably reached the conclusion that GF-GEI's IEPR included substantive suggestions and recommendations. Further, the contracting officer found that many of those suggestions were accepted by the agency.

For example, the record shows that the IEPR team questioned the agency's specification of 4-inch diameter core samples, stating that it was "the reviewer's experience that the tooling needed to produce a 4-inch diameter sample is not commonly used by most specialty geotechnical contractors and would therefore have cost implications." AR, Tab 7a, IEPR Report, at 62. The reviewer then recommended a specific make and model of core drilling tool, and advised the agency to "consider revision of the sample diameter requirement to reflect [the recommended tooling]." Id. The IEPR report shows that the agency concurred with the recommendation and stated that it "[w]ill revise language to use [recommended] core size." Id. The IEPR report also reveals comments through which the IEPR team suggested substantive changes concerning personnel requirements and construction and testing methods. Id. at 61, 81, 85.

The protester next alleges that the contracting officer erred in excluding HBI-GF under FAR § 9.505-2(a)(1), because that regulation only requires that a firm be excluded where it prepares and furnishes "complete specifications." HBI-GF contends that the contracting officer cannot reasonably conclude that there is an OCI where HBI-GF did not prepare the complete specifications for the RFP, and that the FAR specifically exempts contractors that, "acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives." FAR § 9.505-2(a)(1)

However, the record shows that the OCI determination did not rely on FAR § 9.505-2(a)(1) to exclude HBI-GF, but also considered FAR § 9.505-2(b)(1), which provides--subject to exceptions not relevant here--that "[i]f a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services . . . that contractor may not supply the system, major components of the system, or the services." Additionally, the contracting officer relied on the general rules set forth in FAR § 9.505 which provide that [c]onflicts may arise in situations not expressly covered" in the rules, and prior decisions by our Office and the Federal courts providing that "a contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained a competitive advantage, even if no actual impropriety can be shown, as long as the determination is based on hard facts and not mere innuendo and suspicion." AR, Tab 9, OCI Memorandum, at 12; citing, NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638 at 5; NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376-77 (Fed. Cir. 1986); Compliance Corp. v. United States, 22 Cl. Ct. 193, 199-204 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992).

In this case, the contracting officer's determination was based on hard facts showing that the IEPR completed by GF-GEI included specific recommendations for changes to the specifications and construction plans which were accepted by the agency. These facts support the contracting officer's conclusion that Gannett Fleming, though GF-GEI, assisted in the preparation of the specifications and was therefore in a position to skew the terms of the competition, intentionally or unintentionally, in its favor.³ Although we may agree with the protester that GF-GEI's recommendations and its overall participation in the process of setting the specifications were of a limited nature, the hard facts that are required are those which establish the existence of the organizational conflict of interest, not the specific impact of that conflict; even the appearance of an unfair competitive advantage may compromise the integrity of the procurement process, thus justifying a contracting officer's decision to exclude a firm from the competition. Lucent Techs. World Servs. Inc., supra.; Aetna Gov. Health Plans, Inc., supra.

Under these circumstances, we conclude that the decision to exclude HBI-GF from the competition was within the broad discretion available to contracting officers under FAR § 9.505 in performing their duties to identify and address conflicts of interest, and was not unreasonable. Lucent Techs. World Servs. Inc., supra., at 5-6.

The protest is denied.

Susan A. Poling
General Counsel

³ The protester also asserts that it could not have skewed the competition in its favor since the IEPR task order was completed months prior to Gannett Fleming's involvement with HBI-GF. However, our Office has previously explained that a biased ground rules investigation concerns the relationship between the firm's contribution and the specifications or statement of work, and does not require that the contractor be able to predict that its input will be incorporated into the RFP, or foresee that it will seek to compete under the RFP at a later date. See Energy Sys. Grp., B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 5-6.