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Decision

Matter of: Deva & Associates, PC

File: B-415508.11

Date: June 21, 2019

David S. Cohen, Esq., John J. O'Brien, Esq., and Daniel J. Strouse, Esq., Cordatis LLP, for the protester.

Victor A. Kubli, Esq., Law Office of Victor A. Kubli, PC, for TFC Consulting, Inc., the intervenor.

Michael Kiffney, Esq., and Christopher Reames, Esq., Department of Homeland Security, for the agency.

Robert T. Wu, Esq., Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of quotations under various non-price factors is denied where the record shows that the evaluation was reasonable and in accordance with the stated evaluation criteria.
 2. Protest that the awardee should have been excluded from the competition due to an unmitigable impaired objectivity organizational conflict of interest is denied where the contracting officer gave meaningful consideration to the alleged conflict and reasonably concluded that the factual circumstances make the possibility of a conflict too unlikely or speculative to be disqualifying.
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DECISION

Deva & Associates, PC, of Rockville, Maryland, protests the issuance of a task order to TFC Consulting, Inc., of Rockville, Maryland, by the Department of Homeland Security (DHS), Transportation Security Administration (TSA) under request for quotations (RFQ) No. HSTS01-17-Q-FIN001 for financial and performance audit services. Deva challenges the agency's evaluation of its and TFC's quotations, and argues that the awardee should have been excluded from the competition due to an unmitigable organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

The agency issued the RFQ on March 29, 2017, seeking quotations from small businesses holding one of the General Services Administration's Federal Supply Schedule (FSS) Professional Services Schedule contracts in accordance with procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab1, RFQ at 1. The RFQ contemplated the issuance of a fixed-price task order to provide internal control support services, financial statement audit support, and certain optional services to the TSA's Office of Finance and Administration (OFA), Financial Management Division (FMD).¹ Id. at 2-7. Specifically, the contractor was to assist with: planning, testing, and documenting internal controls over financial reporting (ICOFR); the agency's management control program (MCOP); work related to the Improper Payments Elimination and Recovery Act; and supporting financial statement audits. Id. at 10-21.

Issuance of a task order was to be made to the responsible vendor whose quotation, conforming to the solicitation, represents the best value to the government, price and other factors considered. Id. at 105. Quotations were to be evaluated considering the following non-price factors, listed in descending order of importance: corporate experience, technical approach, management and staffing approach, and past performance. Id. at 105-106. The non-price factors, when combined, were significantly more important than price. However, the RFQ stated that as the ratings for the non-price factors become more equal, the importance of price would increase. Id. at 106.

Seven quotations were evaluated, including those of Deva and TFC. AR, Tab 8, Source Selection Decision Document (SSDD), at 2. The relevant evaluation results were as follows:

	TFC	Deva
Corporate Experience	Outstanding	Outstanding
Technical Approach	Outstanding	Good
Management and Staffing Approach	Outstanding	Good
Past Performance	Acceptable	Acceptable
Price	\$13,772,704	\$13,388,635

¹ As explained in the RFQ, the Federal Managers' Financial Integrity Act of 1982 requires agencies to evaluate and annually report on their systems of internal accounting and administrative control. Office of Management and Budget (OMB) Circular A-123 and its supporting appendices provide specific requirements for federal agencies to establish internal controls, assess those internal controls, correct internal control deficiencies, and provide an assertion about the reliability of internal controls. Id. at 10.

Id. at 3, 7. The source selection authority (SSA) conducted a detailed tradeoff analysis among the various vendors, and ultimately decided that TFC's quotation represented the best value to the government. Id. at 10-13. As part of her analysis, the SSA recognized the price premium of TFC's quotation over Deva's, but found that the premium would be offset by the substantial benefits offered by the non-price factors, and specifically the technical benefits of TFC's quotation. Id. at 13.

On March 8, Deva received notice of award to TFC and a written brief explanation of the award decision. Protest at 12. This protest followed.

DISCUSSION

Deva challenges various aspects of the agency's evaluation of its own quotation and that of TFC's, and the best-value tradeoff decision. The protester also argues that TFC's quotation should have been excluded from the competition due to an unmitigable impaired objectivity OCI. We address each argument in turn.

Technical Evaluation and Tradeoff

Deva challenges the assignment of two strengths to TFC's quotation under the corporate experience factor and one strength under the technical approach factor. Protester's Comments at 13-19. The protester also argues that its quotation was evaluated unequally vis-à-vis TFC's and that the evaluators should have recognized at least four additional strengths in Deva's quotation and additional discriminators between its and TFC's quotation. Id. at 16-24. Finally, Deva argues that the agency placed undue reliance on the labor hours proposed by TFC in its tradeoff decision. Id. at 12. While we only address a few of these allegations by way of example, we have fully considered each argument and find no basis to sustain the protest.

Where, as here, an agency issues an RFQ to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. Digital Solutions, Inc., B-402067, Jan. 12, 2010, 2010 CPD ¶ 26 at 3-4; DEI Consulting, B-401258, July 13, 2009, 2009 CPD ¶ 151 at 2. In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 4. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. DEI Consulting, supra.

Deva challenges the assignment of a strength to TFC's proposal under the corporate experience factor for "developing innovative efficiencies upon existing IT [information technology] internal controls program in coordination with the applicable IT offices." Protester's Comments at 14; citing AR, Tab 6, Technical Evaluation Team (TET) Consensus Report, at 439. In this regard, the protester argues both that TFC's

quotation “provides no support for the claim that TFC’s experience . . . produced the ‘innovative efficiencies’ on which the TET based this strength,” and, in any event, the terms of the solicitation did not contemplate the assignment of such a strength to TFC’s quotation. Protester’s Comments at 14.

The agency responds that the TET properly evaluated TFC’s quotation and assigned a strength because this aspect of the firm’s quotation exceeded the requirements of the RFQ in a beneficial way to the government. Agency Response at 3. In this regard, the agency points to aspects of TFC’s quotation evidencing corporate experience that the agency asserts was “a significant effort that requires substantial IT expertise and innovative approaches” that the TET reasonably concluded was a strength. Id. Moreover, the agency asserts that Deva inaccurately characterizes the role for IT testing as being “very limited” arguing instead that there was no such limiting language in the RFQ, and that IT testing is a key aspect of OMB Circular A-123. Id. at 3-4. Given these assertions, the agency concludes that “Deva’s perception of the relative importance of the requirements is flawed” and the strength was reasonably assigned in accordance with the stated evaluation criteria. Id. at 4. We are provided no basis to object to the agency’s evaluation.

First, a review of the disputed strength reveals a specific citation to the relevant language of TFC’s quotation upon which the evaluators based their later conclusion, cited above.² As such, the record does not support Deva’s argument that TFC’s proposal provides no support for the evaluators’ conclusion. Specifically, the evaluators

² The full text of the strength is as follows:

Section 1.3 (page 5) of the quote notes that the Quoter has “supported DHS HQ RM&A [Risk Management and Assurance] over the past two fiscal years in designing and implementing DHS’s revised IT internal controls program. . . . Our clients at DHS RM&A were recently awarded the DHS HQ Peer-to-Peer award from the DHS CFO [Chief Financial Officer] for these efforts. We will use this experience, as well as our multidisciplinary team, to provide TSA with an integrated approach to ITGC and business process internal control assessments. We will leverage our experience to provide TSA with enhanced ICOFS solutions.” Evaluation Factor 1 requires the Quoter to demonstrate experience with evaluations of internal controls over financial systems. This award indicates that they have experience not just executing evaluations over financial systems, but also developing innovative efficiencies upon existing IT internal controls program in coordination with the applicable IT offices. TSA could use this expertise to develop a stronger IT internal controls program. This is considered an element of the quotation which appreciably exceeds a requirement of the RFQ in a beneficial way to the Government.”

AR, Tab 6, TET Consensus Report, at 439.

quoted the portion of TFC's quotation that the TET believed supported its conclusion. See AR, Tab 6, TET Consensus Report, at 439. To the extent that Deva disagrees with the TET's assessment that this aspect of TFC's demonstrated corporate experience evidences experience with "developing innovative efficiencies," it has not shown why such an assessment was unreasonable. DEI Consulting, supra.

To Deva's second challenge--that the terms of the solicitation did not contemplate the assignment of such a strength--a review of the solicitation shows that the scope of work requires the contractor to perform testing over IT in the context of internal controls over financial systems. RFQ at 15. Moreover, the corporate experience evaluation factor required vendors to demonstrate corporate experience, resources, and knowledge to satisfy the requirements within the statement of work, including evaluations of internal controls over financial systems. Id. at 106.

As we have consistently stated, where a solicitation indicates the relative weights of evaluation factors, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish their relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency's needs. ViroMed Laboratories, Inc., B-310747.4, Jan. 22, 2009, 2009 CPD ¶ 32 at 4. With specific regard to the consideration of innovations to distinguish the relative quality of proposals, an agency can properly consider the extent to which proposals exceed the solicitation's requirements in this regard. See Id.; IAP World Servs, Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199. We conclude that the TET's consideration of TFC's experience developing innovative efficiencies, which exceed the RFQ's requirements, was reasonably contemplated by the stated evaluation criteria, and did not exceed the scope of the solicitation, as the protester alleges.³

³ Deva cites to our Office's decision in Information International Associates, Inc., B-416826.2 et al., May 28, 2019, 2019 CPD ¶ __, arguing that here, like there, the evaluation was unreasonable because the agency assigned a strength that "was not properly tied to work that will be performed under the [s]olicitation." Protester's Supp. Comments at 3. In Information International Associates, our Office sustained the protest, in part, because we found little relationship between that solicitation's requirement for a website and the agency's recognition of a benefit in that offeror's proposal for gained efficiencies related to moving other websites to the cloud environment. Id. at 5. Here, however, TFC's quotation was to be evaluated based on corporate experience, resources and knowledge to satisfy various requirements including a requirement to perform testing over IT in the context of internal controls, which included, among other things, the development or updating of IT test plans. RFQ at 15, 106. It was reasonable for the agency to conclude that TFC's experience with designing and implementing DHS's revised IT internal controls program directly related to the work called out here, and to assign a commensurate strength for the perceived benefit TFC's experience could bring to strengthening the agency's IT internal controls program. Therefore, here, unlike in Information International Associates, the relevant portions of the solicitation have a direct link to the strength assigned by the evaluators.

As another example, Deva challenges the assignment of a strength to TFC's quotation under the corporate experience factor for its experience with developing tools, metrics, and monitoring techniques to support programmatic improvement. The protester argues that TFC's quotation itself only evidences limited experience in this regard, and does not support "a broad expertise with MCOP" that Deva asserts is expressed in the assigned strength. Protester's Comments at 17. In the alternative, Deva argues that its quotation should have received a commensurate strength, and the fact that Deva did not, evidences evaluation of quotations on an unequal basis. Id.

The agency responds that Deva unreasonably minimizes TFC's quotation, and points to various aspects of TFC's quotation supporting the assigned strength. Agency Reply at 4-5. Moreover, the agency asserts that Deva's quotation did not warrant a corresponding strength because it only met, and did not exceed, the RFQ's requirements. Id. at 5. Based on the substantive difference between TFC's and Deva's quotations, the agency argues that Deva's disparate treatment argument "falls flat." Id.

A review of the record shows that the evaluators credited TFC's quotation for demonstrating experience not just with performing evaluations of internal controls over operations (as required by the evaluation factor), but also experience with developing tools, metrics, and monitoring techniques to improve the program itself. The evaluators also noted that "TSA could use this expertise and exceptional features to improve the Management Control Program." AR, Tab 6, TET Consensus Report, at 439. Contrary to Deva's protestations, we do not read the agency's assignment of the strength as evidencing "broad expertise" or otherwise quantifying the magnitude of TFC's experience in this regard. Instead, the evaluators simply credited the experience stated in TFC's proposal and explained the basis for why they found it to be a strength. As the distinction Deva attempts to draw with respect to the magnitude of TFC's experience in this regard is not evident from the record, and the strength is otherwise supported by the plain language of TFC's quotation, we are provided no basis to question the agency's evaluation in this regard.

Deva also argues that, based on the TET's evaluation of TFC's quotation, its own proposal should have received a commensurate strength. A review of the record shows that the TET assigned TFC the disputed strength because TFC "has provided key support to [Customs and Border Patrol] in standing up a sustainable MCOP for their IT operations, which involved the implementation of tools to enable programs to conduct self-assessments that fed metrics and monitoring." Id. Deva points to the following language in its own proposal to support assignment of a matching strength:

Support in conducting Management Control Council meetings;
dissemination of management control information and checklists for field offices, airports, and Headquarters operations designated as High Risk; *meeting/working with MCOP program offices to develop MCOP testing techniques*; and consolidation of TSA-wide information collected for preparation of the annual Management Control Plan.

Protester's Comments at 17 (emphasis in original). The protester asserts that its experience developing MCOP testing techniques also showed experience with developing tools, metrics, and monitoring techniques. Id. As a plain reading of this language shows a material difference in the experience proposed by Deva and TFC, we are again provided no basis to question the agency's evaluation in this regard.

Having addressed Deva's significant challenges to the evaluation of TFC's quotation, a review of the record supports the agency's conclusion that TFC's quotation was evaluated as having greater technical merit than Deva's.⁴ See generally AR, Tab 8, SSDD, at 10-14. While Deva does raise other challenges to the evaluation of the quotations, which we have reviewed and conclude are without merit, given the evaluated merit of TFC's quotation as compared to Deva's, we need not discuss those additional challenges further. In this regard, even reviewing Deva's remaining challenges in a light most favorable to the protester, the record does not support the conclusion that Deva could reasonably show competitive prejudice. See Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4 (competitive prejudice is an element of every viable protest). As such, Deva's protest of the agency's evaluation of proposals under the non-price factors is denied.

Organizational Conflict of Interest

Deva also argues that TFC should have been excluded from the competition because of an unmitigable impaired objectivity OCI resulting from TFC's subcontractor also performing work under a DHS contract that Deva asserts directly affects the performance of work under this contract in two respects. Protest at 37. First, according to Deva, as part of its support for DHS' RM&A Division, TFC's subcontractor supports the preparation of the DHS CFO's annual "Internal Control Playbook" and assists in the development of templates that are used by subordinate agencies (including TSA) in performing certain testing work.⁵ Protest at 40-41. Second, Deva asserts that DHS RM&A, and thus TFC's subcontractor, provides review and approval of deliverables from TSA that fall within the scope of work of the instant procurement. Id. at 42. Deva argues, for example, that TFC's subcontractor designs the templates that are used to

⁴ For example, under the heaviest-weighted corporate experience factor, despite both quotations receiving an outstanding rating, the source selection authority recognized the superiority of TFC's proposal for including "several more strengths under this Factor that provide significantly more value to the Government." Id. at 10. TFC also received higher ratings than Deva under both the technical approach and management and staffing approach factors. Id.

⁵ TSA is a subordinate agency within DHS. The DHS Financial Accountability Act requires the Secretary of Homeland Security to include, in the Agency Financial Report, an audit opinion on DHS' internal controls over financial reporting. DHS' RM&A Division provides guidance to the DHS components on overseeing internal control activities, including activities at TSA. RFQ at 10.

perform work under the protested contract, develops lists of tests and other compliance activities, and then evaluates the results of such activities. Id. at 38. Consequently, Deva concludes that TFC's subcontractor would be partly responsible for defining the work and evaluating the work products that TFC will provide under the protested contract. Id.

The agency responds that it properly determined that there was no basis on which to find an OCI after considering quotations under the provisions in the solicitation.⁶ Memorandum of Law (MOL) at 13. Further, the agency argues that it conducted and documented a supplemental review in response to the OCI allegations raised by Deva in a prior protest, and having addressed these issues, Deva's protest should be denied.⁷ Id. at 13-14; see generally AR, Tab10, OCI Review and Supporting Documentation.

An impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, 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(a); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.504; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. In this regard, FAR § 9.504 requires contracting officers to analyze planned acquisitions in order to: (1) identify and evaluate potential organizational conflicts of interest; and (2) avoid, neutralize, or mitigate significant potential conflicts before contract award. In evaluating a potential OCI, the FAR advises that "[e]ach individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise

⁶ According to the contracting officer, steps taken by the agency to address any potential OCI's included: the agency prevented TSA contractors and subcontractors currently providing work under the TSA OFA from consideration of award; the RFQ included Homeland Security Acquisition Regulation (HSAR) Clause 3052.209.73, Limitation of Future Contracting (June 2006), and HSAR Clause 3052.209-72, Organizational Conflict of Interest (June 2006); and the solicitation required vendors to submit draft organizational conflict of interest mitigation plans to address the vendor's approach to mitigating any potential conflicts of interest. AR, Tab10, OCI Review and Supporting Documentation, at 1.

⁷ Deva first raised its impaired objectivity allegation in a protest to our Office on October 9, 2017. Protest at 11. Subsequent to that protest (B-415508.1), the agency agreed to take corrective action to analyze and document a determination with respect to the allegation. Id. Deva withdrew its protest in response to the corrective action. Id.

of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.” FAR § 9.505. Once an agency has given meaningful consideration to whether an OCI exists, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. See DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6.

The contracting officer states that he discussed the allegations with the leadership at TSA’s Office of Financial Administration, as well as with DHS officials responsible for the RM&A contract held by TFC’s subcontractor. AR, Tab10, OCI Review and Supporting Documentation, at 1, 5. The contracting officer documented various levels of review and controls by federal employees on any work conducted by TFC’s subcontractor. Id. at 5. With respect to the templates that Deva alleges could be used by TFC’s subcontractor to define the work performed by TFC on the protested contract, the contracting officer found, for example, that the templates have been established for several years, and are only modified based on direction and approval from federal employees. Id. at 1. Also, according to the contracting officer, contractors do not determine what content is updated in the templates. Id. Finally, guidance such as playbooks, timelines, templates and submission requirements, provided by DHS RM&A to the various DHS components are provided across all components. Therefore, the contracting officer noted that any support provided by TFC’s subcontractor would not be component specific, which he found would mitigate any potential conflict between TFC’s subcontractor’s role on the TSA contract and its work for DHS RM&A. Id. at 6.

With respect to review of work submitted by TSA to DHS RM&A, the contracting officer found that DHS performed a high-level review of the overall processes, such as a review of whether correct documents and templates are being used, and not specifically a review of testing work being submitted. Id. at 2. Moreover, any work product submitted by TSA would have been previously reviewed by a TSA employee. Id. Further, while contractors assist in monitoring and reviewing the internal testing results from the various DHS components, federal employees are heavily involved in the process, including reviewing any analysis performed by the contractor, and approving any recommendations or conclusions provided by the contractor, including TFC’s subcontractor’s work on the DHS RM&A contract. Id. at 5. Finally, the contracting officer documented that all component deliverables are reviewed and assessed by federal employees at multiple points during the multi-stage review process. Id.

The contracting officer summarizes his determination as follows:

In confirming my decision, I have taken into consideration the multi-staged structure of the [RM&A] Division Federal assessments, reviews, and approvals at the DHS level, coupled with the multi-staged structure of Federal assessments, reviews, and approvals at TSA. I have also considered the maturity of both of these well-established programs and the fact that the guidance being developed at the Department is consistent

across all DHS agencies, not developed for just TSA. Finally, I have taken into consideration the fact that the work being described will be further audited by an additional independent 3rd party. Taking all of this into consideration. . . I have concluded that there is very little to zero risk of a contractor possibly influencing the agency by providing biased advice.

Id. at 8.

Even after the agency documented its OCI analysis in response to Deva's allegations, the protester argues that the agency's analysis focuses on the wrong question. Protester's Comments at 5. In this regard, Deva argues that the issue "is not whether there is a large or small risk that the contractor's biased advice will influence the agency. The issue is whether the contractor's advice will possibly be biased." Id. The protester goes one step further to argue that "GAO's impaired objectivity case law does not consider whether the agency can successfully resist biased contractor inputs. It asks whether biased inputs may be given." Id. Our review of the record provides no basis to object to the agency's supplemental analysis or the contracting officer's conclusions.

As discussed, once an agency has given meaningful consideration to whether an OCI exists, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. See DV United, LLC, supra, at 6. Here, the agency has conducted a detailed OCI analysis specifically responsive to the allegations raised by Deva. Our review shows that the agency's analysis is adequately supported in the record, and thus our remaining review is to determine whether the contracting officer's determination was reasonable, which we conclude it was.

In conducting his analysis, the contracting officer specifically looked at the type of work that TFC's subcontractor would be performing on the protested task order and the DHS RM&A contract. The contracting officer determined that the multi-stage review process of RM&A contractor work by federal employees, the structural controls at both agencies, as well as the prospect of an independent, third-party audit of the work, make the possibility of a conflict too unlikely or speculative to be a disqualifying OCI. Moreover, it is reasonable to conclude from the contracting officer's analysis that the "high-level review," monitoring and administrative functions performed by DHS RM&A (and thus its contractors) is not of the type that likely permits subjective judgments or evaluations that would give rise to a significant impaired objectivity OCI.

Our Office has recognized that an agency may reasonably find that certain relationships between companies or corporate affiliates are too remote or that the possibility of a conflict is too unlikely or speculative to conclude that there is a disqualifying OCI. See MAXIMUS Federal Services, Inc., B-410359, Dec. 17, 2014, 2015 CPD ¶ 11 at 12 (discussing various decisions supporting this proposition). Our Office has also found that activities, such as monitoring, do not necessarily create the potential for impaired objectivity where the contractor's responsibilities are not based on subjective judgments

or evaluations. See, e.g., Computers Universal, Inc., B-292794, Nov. 18, 2003, 2003 CPD ¶ 201, at 2-3.

Contrary to the protester's assertion, the focus of the contracting officer's analysis was not on the "wrong question," but instead reasonably looked to determine the possibility of a significant OCI arising under the circumstances, which the contracting officer concluded it would not. Compare Protester's Comments at 5 with AR, Tab10, OCI Review and Supporting Documentation, at 8. We see no reason why the contracting officer couldn't reasonably conclude that given such considerations as the nature of the input provided by the DHS RM&A contractor and the prevalence of federal employee review and approval, that the possibility of a conflict was too unlikely to conclude that there is a disqualifying OCI. Consequently, we find no basis to sustain the protester's contention that the contracting officer failed to give meaningful consideration to the alleged conflict. Protester's Comments at 6.

The protest is denied.

Thomas H. Armstrong
General Counsel