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Decision

Matter of: LOGZONE, Inc.

File: B-416029; B-416029.2

Date: May 21, 2018

Wayne A. Keup, Esq., Wayne A. Keup, PLLC, for the protester.
Antonio R. Franco, Esq., Kathryn M. Kelley, Esq., Meghan F. Leemon, Esq., and
Timothy F. Valley, Esq., Piliero Mazza PLLC, for Cherokee Nation Red Wing, L.L.C., the
intervenor.

Captain Jeremy D. Burkhart, and Frank A. March, Esq., Department of the Army, for the
agency.

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

DIGEST

1. Protest that the awardee had disqualifying organizational conflicts of interest (OCIs) is denied where the agency investigated the protester's allegations and reasonably concluded that work performed by the awardee's proposed subcontractors did not provide the awardee with access to information that created an unfair competitive advantage.

2. The awardee's failure to list a task order in the OCI disclosure portion of its quotation does not provide a basis to sustain the protest where disclosure of that order was not required by the solicitation.

DECISION

LOGZONE, Inc., of Huntsville, Alabama, a small business, protests the issuance of a task order to Cherokee Nation Red Wing, L.L.C. (CNRW), of Huntsville, Alabama, also a small business, under request for quotations (RFQ) No. HQ0147-17-Q-0003, which was issued by the Department of Defense, Missile Defense Agency (MDA), for building and facility support services.¹ The protester argues that the agency failed to reasonably evaluate organizational conflicts of interests (OCIs) arising from the performance of

¹ MDA was represented in this protest by counsel from the Department of the Army.

work by the awardee's proposed subcontractors, which, in turn, provided the awardee unequal access to information.

We deny the protest.

BACKGROUND

MDA issued the RFQ on April 26, 2017, seeking quotations to provide facility support services for buildings located in Alabama, Virginia, California, and Hawaii. Agency Report (AR), Tab 3, RFQ, at 81.² The solicitation refers to these services as the Field Activity Support Services (FASS) task order. Id. at 80. Logistics Systems, Inc. (LSI) is the incumbent contractor for the current FASS task order; as discussed below, LSI was proposed as a subcontractor by LOGZONE. Contracting Officer's Statement (COS) at 3. The competition was conducted under the Federal Supply Schedule (FSS) provisions of Federal Acquisition Regulation (FAR) subpart 8.4, and was limited to vendors who hold FSS contracts. RFQ at 163. The solicitation was set aside for participants in the Small Business Administration's 8(a) program. Id.

The RFQ stated that the contractor will be required to provide services in two primary areas: (1) facilities operations and building maintenance support, and (2) facilities logistical support. Id. at 80. The awardee will be required to perform tasks including: painting, changing light bulbs, plumbing, inspecting fire extinguishers, systems furniture support, heating-ventilation-air conditioning maintenance, support for ceremonies and special events, snow/ice removal, pest control, grounds maintenance, packing and moving, support to business centers, and performing supply functions. Id. at 80-81, 90-97.

The RFQ anticipated the issuance of a fixed-price task order with a base period of 2 years and three 1-year options. Id. at 25-28, 67. The solicitation advised that vendors' quotations would be evaluated on the basis of the following three factors: (1) technical/management, (2) past performance, and (3) price. Id. at 168. For purposes of award, past performance was to be evaluated on a pass/fail basis, and the technical/management and price factors were of equal importance. Id. The RFQ further stated that "[t]he Government reserves the right to award to a higher priced, higher technically rated quotation should the Government deem it to be the best value." Id. at 168-69. As relevant here, the RFQ required vendors to disclose "all facts relevant to the existence or potential existence of organizational conflicts of interest as that term is used in FAR Subpart 9.5." Id. at 77.

MDA received quotations from three vendors, including LOGZONE and CNRW, by the closing date of May 31, 2017. COS at 3. The agency evaluated the quotations as follows:

² Citations to the record are to the page numbers added by the agency in its report.

	LOGZONE	CNRW
Technical/Management Factor	Good	Good
Past Performance Factor	Acceptable	Acceptable
Price	\$36,831,657	\$35,743,054

Id. at 4.

Based on the evaluation of the quotations, the contracting officer, who was also the source selection authority, selected CNRW for award of the task order. Id. This protest followed.

DISCUSSION

LOGZONE argues that MDA failed to reasonably evaluate whether CNRW had disqualifying OCIs arising from its access to information that was not available to all vendors. Specifically, the protester contends that contracts performed by two of CNRW's proposed subcontractors, Future Technologies, Inc. (FTI) and Venturi, Inc., provided those firms with access to non-public information, which in turn provided CNRW with an unfair competitive advantage in preparing its quotation. The protester also argues that CNRW's quotation violated the RFQ's OCI disclosure clause because it failed to disclose a subcontract performed by FTI. For the reasons discussed below, we find no basis to sustain the protest.³

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 unequal access to information OCI arises where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505(b); Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6. As the FAR makes clear, the concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of "[p]roprietary information that was obtained from a Government official without proper authorization," or "[s]ource selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." FAR § 9.505(b); see Arctic Slope Mission Servs., LLC, B-412851, B-412851.2, June 21, 2016, 2016 CPD ¶ 169 at 8.

³ LOGZONE also raises other collateral arguments regarding the agency's review of the OCI allegations. Although we do not address every issue, we have considered them all and find no basis to sustain the protest.

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.

OCIs Regarding FTI

FTI was a subcontractor to CSRA LLC under two task orders for the MDA's missile defense engineering and support services (MiDAESS) contract, which was awarded to CSRA in 2010.⁴ AR, Tab 2b, FTI OCI Review, at 3. The first task order was No. HQ0147-10-D-0022-0007, for facilities, logistics and space management (FLSM), which was performed from May 20, 2014, to June 21, 2016; the second task order was No. HQ0147-10-D-0019-0005, for budget execution and funds control (BEFC), which was performed from August 23, 2013, to March 6, 2017. Id. at 9, 16-17. LOGZONE argues that these task orders provided FTI with access to competitively useful non-public information, and that CNRW had access to that information through FTI.

In response to LOGZONE's protest, the contracting officer contacted CSRA and CNRW to investigate the OCI allegations. AR, Tab 2b, FTI OCI Investigation, at 9. The contracting officer requested and received responses from these firms regarding FTI's role as a subcontractor to CSRA. Id. The contracting officer also received and reviewed the performance work statement (PWS) for the MiDAESS contract and the PWSs that were provided to FTI. Id. at 9; Tab 2d, Letter from CSRA, Feb. 28, 2018; Tab 2g, Letter from CSRA, Mar. 14, 2018.

With regard to the FLSM task order, LOGZONE argues that FTI's work provided that firm access to information regarding MDA's planning and oversight of facility operations requirements, including information regarding workload data concerning the incumbent FASS contract. Protest at 4. The protester also argues that the awardee had access to certain internal agency documents, such as standard operating procedures (SOPs) and policies. Id. at 5. The protester contends that this information could have been provided to CNRW by FTI and used by the awardee to prepare its quotation.

⁴ The MiDAESS contract was awarded to Computer Sciences Corporation, which subsequently changed its name to CSRA LLC. The agency report refers to CSRA as the MiDAESS contractor.

The contracting officer reviewed the record and concluded that the protester's allegation regarding access to workload information regarding the incumbent FASS task order was not evidence of an OCI because this information was provided to all vendors in the RFQ. In this regard, the contracting officer noted that the RFQ provided detailed historical workload data regarding PWS tasks at each performance location. AR, Tab 2b, FTI OCI Investigation, at 13; see RFQ at 103-04.

With regard to internal agency SOPs and policies, the contracting officer found that two FTI employees performed work for CSRA that involved access to this information. AR, Tab 2b, FTI OCI Investigation, at 12. The contracting officer found that these two employees were not supervised by FTI managers, and instead worked directly for CSRA, the prime contractor. Id. The employees were terminated by FTI on June 21, 2016, upon the completion of FTI's subcontract, and neither has worked for FTI or CNRW since that time. Id. Both employees had signed nondisclosure agreements (NDAs) which prohibited disclosure of information received through performance of the task order to unauthorized parties. AR, Tab 2d, CSRA NDAs for FTI Employees, at 21-24. In light of the NDAs and representations by CSRA and CNRW, the contracting officer concluded that there was no evidence that FTI personnel, aside from the two supporting the FLSM subcontract, had access to the internal agency SOPs and policies, and no evidence the two FTI employees violated their NDAs. AR, Tab 2b, FTI OCI Investigation, at 12-13.

Additionally, the contracting officer found that, even if FTI had access to performance data from the incumbent FASS task order or internal agency SOPs and policies, such access could not have given rise to an unequal access to information OCI vis-à-vis LOGZONE, because the protester's proposed subcontractor LSI was the incumbent FASS contractor and also had access to this information. Id. at 13. Moreover, the contracting officer concluded that any such information possessed by FTI would have been stale, as compared to the information possessed by the protester, based on the June 2016 completion of FTI's subcontract--nearly a year before the issuance of the RFQ. Id. at 14-15. Based on this information, the contracting officer concluded that there was no basis to find that CNRW had any unequal access to information OCIs arising from the FLSM task order.

With regard to the BEFC task order, LOGZONE argues that FTI's work provided that firm access to MDA's budget information and internal agency procedures regarding facilities support. Response to Agency Request for Dismissal & Supp. Protest, Mar. 8, 2018, at 3-4. The protester contends that this information could have been provided to CNRW by FTI and used by the awardee to prepare its quotation.

The contracting officer reviewed the record and found that although the CSRA task order was for budget and funds control requirements, FTI did not perform those tasks as a subcontractor. AR, Tab 2b, FTI OCI Investigation, at 17-18. The contracting officer noted, however, that the two FTI employees who performed the work had access to a database listing all of MDA's contractors from November 2014 to July 2015, which included workforce management and staffing data. Id.

The contracting officer found that both FTI employees had signed NDAs that avoided potential OCIs, and concluded that there was no evidence that the employees violated those NDAs. Id. at 19. The contracting officer also found that the FTI employees worked on government computers which were subject to restrictions on the ability to store or transfer information. Id. at 18. The contracting officer concluded that the technological limitations provided a “level of firewall to ensure the data is segregated from the contractor network and not easily transferred to the contractor network.” Id. Based on these findings, the contracting officer concluded that there were no OCIs arising from the BEFC task order.

LOGZONE’s comments on the agency report do not directly address the contracting officer’s investigation or his conclusions that the two FTI task orders did not give rise to OCIs. Instead, the protester argues that the scope of the PWSs for the two task orders were broad and encompassed a number of tasks which could have given FTI access to competitively useful information. See Protester’s Comments at 4-9. The protester argues, generally, that the contracting officer’s investigation did not sufficiently investigate or address the possibility that FTI might have had access to competitively useful information and that FTI provided that information to CNRW.

Based on our review of the record, we have no basis to find that the agency’s conclusions regarding the OCI allegations were unreasonable. As discussed above, the contracting officer investigated the protester’s allegations and found that, with regard to all of the allegations raised by the protester, the scope of work performed by FTI was not relevant to the FASS task order, the FTI employees who performed the work had appropriate NDAs which mitigated any potential OCIs, or the alleged access to information was not unequal.

As our Office has explained, mitigation efforts that screen or wall-off certain individuals within a company from others, in order to prevent an improper disclosure of information, may be an effective means to address an unequal access to information OCI. See Axiom Resource Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 7 n.3. An agency may reasonably conclude that an NDA mitigates the possibility of an unfair competitive advantage arising from unequal access to information, provided the agency reasonably concludes that the terms of the NDA prohibited the use of the information in a way that would give a firm an unfair competitive advantage. Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 11-13. The record here shows that the affected FTI employees signed NDAs, and that CSRA had an OCI mitigation plan that covered subcontractor employees. AR, Tab 2b, FTI OCI Investigation, at 12-13; Tab 2d, CSRA NDAs for FTI Employees, at 21-24. The contracting officer found no basis to conclude that the two FTI employees violated their NDAs. AR, Tab 2b, FTI OCI Investigation, at 12-13, 18-19. LOGZONE does not argue that the contracting officer’s review of the NDAs for the FTI employees was unreasonable.

With regard to information that could give rise to an OCI, our Office has explained that an unequal access OCI arises where a firm has access to non-public information; where, as here, information such as historical workload data is provided to all offerors or vendors, that information cannot give rise to an OCI. See HBI-GF, JV, B-415036, Nov. 13, 2017, 2017 CPD ¶ 331 at 3 n.2. Our Office has also explained that an OCI does not arise where a protester complains that the awardee had access to the same information possessed by the protester. See ITT Corp.-Elec. Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 5. Here, even if LOGZONE were correct that FTI received the internal agency SOP and policy information through its performance of subcontracts for CRSA, the protester cannot demonstrate that there was an unequal access to information OCI because the protester acknowledges that it also possessed some of this information as well. See Protest at 4-5; Protest, attach. 3, Decl. of LSI Program Manager, Feb. 12, 2018, at 1-2 (describing SOPs and FASS performance metrics to which it had access through the performance of the incumbent FASS subcontract).

Although LOGZONE cites broad areas of the PWS where a contractor could have had access, the protester does not demonstrate that the contracting officer's investigation of the actual work performed by FTI was unreasonable. In this regard, the protester does not specifically challenge the contracting officer's findings, for example, that any workload data regarding the incumbent FASS contract received by FTI did not provide a competitive advantage because the RFQ here provided detailed--and more recent--workload data. On this record, we find that the agency conducted a reasonable investigation of the OCI allegations and reasonably concluded that there were no OCIs. We therefore find no basis to sustain the protest.

OCIs Regarding Venturi

Venturi was a subcontractor to Parsons Government Services under MDA contract No. HQ-0147-16-C-0039 for facilities life-cycle management (FLCM).⁵ AR, Tab 2c, Venturi OCI Review, at 14. This contract was performed from June 22, 2016, to June 21, 2017. Id. LOGZONE argues that Venturi's work as a subcontractor to Parsons provided it with unequal access to MDA facility budget and planning information through performance of the following objective: "The contractor shall engage in MDA real property planning, programming, budgeting, and execution for [Military Construction (MILCON)]; Research, Development, Test & Evaluation (RDT&E); Operations & Maintenance (O&M); Procurement; and FMS funded programs." AR, Tab 19, PWS, HQ-0147-16-C-0039, at 5; see also Protester's Comments at 13.

As with LOGZONE's protest concerning FTI, the contracting officer reviewed the OCI allegations by contacting Parsons, Venturi, and CNRW. AR, Tab 2c, Venturi OCI Investigation, at 9, 14-15. The contracting officer requested and received responses from these firms regarding Venturi's role as a subcontractor to Parsons. Id. The

⁵ LOGZONE withdrew an argument concerning another contract performed by Venti under contract/task order HQ0147-17-C-0034. Protester's Comments at 14.

contracting officer also received and reviewed the PWS for the Parsons contract and the PWS that was provided to Venturi. Id. at 14; Tab 2e, Letter from Parsons, Mar. 14, 2018.

The contracting officer found that two Venturi employees worked on the FLCM subcontract with Parsons, but that their work did not concern or provide any competitive advantage regarding the FASS contract. AR, Tab 2c, Venturi OCI Investigation, at 15. In this regard, the contracting officer found that the individuals prepared “military construction (MILCON) budget packages that get submitted to Congress, and [the employees] had no access to MDA contract budget or execution data.” Id. The contracting officer explained that the MILCON activities performed by these individuals “are related to construction of new facilities and are not related to the FASS contract.” Id. The contracting officer concluded that the work performed by Venturi did not give rise to an unequal access to information OCI that affected CNRW with regard to the FASS award. Id.

Here again, LOGZONE’s comments on the agency report do not specifically address the contracting officer’s review of the OCIs or conclusion that Venturi’s work did not give rise to an OCI. For example, the protester does not directly respond to the contracting officer’s conclusions regarding the work performed by the two Venturi employees or its relevance to the FASS task order. Protester’s Comments at 12-13. Instead, the protester points to the broad statement of work and argues that Venturi must have had access to information that conferred competitive advantage, and that this information must have been provided to CNRW. Id. at 13. On this record, we conclude that the agency conducted a reasonable investigation of the OCI allegations and reasonably concluded that there were no OCIs. We therefore find no basis to sustain the protest.

FTI Misrepresentation Regarding OCIs

Finally, LOGZONE argues that CNRW’s quotation contained a misrepresentation because it did not disclose FTI’s work for CSRA under the MiDAESS contract. The protester contends that this misrepresentation requires the agency to terminate the task order for default. Supp. Protest at 6-7. For the reasons discussed below, we find no basis to sustain the protest.

As discussed above, the RFQ required vendors to disclose information concerning potential or actual OCIs. RFQ at 77. Vendors were required to complete an OCI “Analysis/Disclosure” form concerning contracts with MDA to “facilitate disclosure and Contracting Officer approval.” Id.

The contracting officer’s review of the protester’s OCI allegations concluded that “the FTI effort under (MiDAESS) was not disclosed” in CNRW’s quotation. AR, Tab 2b, FTI OCI Investigation, at 9. The contracting officer noted, however, that the instructions for the OCI form in the RFQ required vendors to complete disclosure forms for current work, only: “Fill in the number and the short, official title by which the contract or subcontract requiring analysis and determination is formally known. This is work that

has already been awarded, is being performed by your company, and requires a comparison with that work described in Blocks 1-5.” RFQ at 156 (emphasis added). The contracting officer therefore concluded that FTI’s subcontract with CSRA was not required to be disclosed under the terms of the RFQ. AR, Tab 2b, FTI OCI Investigation, at 9.

LOGZONE acknowledges that the RFQ required vendors to disclose current contracts, and also acknowledges that FTI’s subcontracts with CSRA were completed at the time quotations were submitted. See Protester’s Comments at 12. The protester contends, however, that the solicitation’s OCI clause required vendors to represent that they have disclosed “all facts relevant to the existence or potential existence of organizational conflicts of interest as that term is used in FAR Subpart 9.5.” RFQ at 77. Additionally, the protester notes that the RFQ stated that in the event of “non-disclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract,” the agency has the right to terminate the contract for default. Id.

As discussed above, the RFQ’s disclosure form did not require FTI to disclose its subcontracts with CSRA because they were not “current.” Even if the protester were correct that the OCI clause required broader disclosures, the contracting officer reasonably found that there were no OCIs associated with FTI’s subcontract with CSRA; thus, the record provides no basis to conclude that the agency should have found CNRW ineligible for award based on an OCI. To the extent the OCI clause permits the agency to terminate the task order for default based on a non-disclosure or misrepresentation of information, this is a matter of contract administration, unrelated to the award of the task order, that our Office does not review. Bid Protest Regulations, 4 C.F.R. § 21.5(a); see ADC Ltd., B-255457, Oct. 25, 1993, 93-2 CPD ¶ 258 at 3 (GAO will not review protest that the agency should terminate a contract based on the awardee’s performance and conduct a new competition). We therefore find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel