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Decision

Matter of: C2C Innovative Solutions, Inc.

File: B-416289; B-416289.2

Date: July 30, 2018

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Brian A. Darst, Esq., Odin Feldman Pittleman PC, for MAXIMUS Federal Services, Inc., the intervenor.

Douglas Kornreich, Esq., and Lucy G. Mac Gabhann, Esq., Department of Health and Human Services, for the agency.

Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency failed to evaluate a potential impaired objectivity organizational conflict of interest is sustained where the awardee's wholly-owned subsidiary would review decisions on appeal from the parent company's own claims decisions, and the agency did not meaningfully consider whether this structure created an impaired objectivity organizational conflict of interest.

2. Protest that the agency failed to evaluate a potential unequal access to information organizational conflict of interest is sustained where the record does not demonstrate that the agency reasonably evaluated a potential unequal access to information conflict arising from the relationship between the awardee and one of its subsidiaries.

DECISION

C2C Innovative Solutions, Inc. (C2C), of Jacksonville, Florida, protests the issuance of a task order to MAXIMUS Federal Services, Inc. (MAXIMUS), of Reston, Virginia, under letter request for proposals (RFP) No. 171751, which was issued by the Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS) under its indefinite-delivery, indefinite-quantity (IDIQ) contract for qualified independent contractors (QICs). The solicitation sought proposals from QICs to provide

reconsiderations of denials of Medicare claims related to durable medical equipment.¹ The protester alleges that CMS failed to meaningfully consider whether the issuance of a task order to MAXIMUS would create an organizational conflict of interest (OCI) as a result of the more senior appeals review role currently performed by a MAXIMUS subsidiary.

We sustain the protest.

BACKGROUND

CMS issued the solicitation on June 5, 2017, under Federal Acquisition Regulation (FAR) subpart 16.5, which addresses the competition for task orders under IDIQ contracts. Agency Report (AR), Tab 15, Negotiation Memorandum, at 8. The agency sent the RFP to the four QIC IDIQ contract holders: C2C, MAXIMUS, Q2

¹ QICs are responsible for issuing reconsideration decisions and serve as the second level of the Medicare appeals process; the agency describes the levels as follows:

Once an initial claim determination is made, any party to that initial determination, such as beneficiaries, providers, and suppliers – or their respective appointed representatives – has the right to appeal the Medicare coverage and payment decision.

* * * * *

The [appeals] levels are:

1. Redetermination by a Medicare Administrative Contractor (MAC)
2. Reconsideration by a QIC
3. Decision by the Office of Medicare Hearings and Appeals (OMHA) or Administrative Law Judge (ALJ)
4. Review by the Medicare Appeals Council
5. Judicial Review in Federal District Court

See <https://www.cms.gov/Medicare/Appeals-and-Grievances/OrgMedFFSAppeals/index.html> (last visited July 11, 2018). For more information on the role of QICs, see our Office's decisions in Q2 Administrators, LLC, B-410028, Oct. 14, 2014, 2014 CPD ¶ 305 and MAXIMUS Fed. Servs., Inc., B-410359, Dec. 17, 2014, 2015 CPD ¶ 11. See also <https://www.cms.gov/Medicare/Appeals-and-Grievances/OrgMedFFSAppeals/OMHA-ALJ-Hearing.html> (last visited July 26, 2018).

Administrators (Q2A),² and a fourth contractor.³ The RFP provided for the issuance of a fixed-price task order consisting of a 3.5-month transition period, a 1-year base period, three 1-year options, and a 4-month close-out period. AR, Tab 11F, RFP at 1-7. The solicitation anticipated award to the QIC offering the best value to the agency, considering various non-price factors and price. Id. at 30.

The solicitation contained a section dedicated to COIs, which stated that it was “imperative that the Contractor and the services provided under this contract be free, to the greatest extent possible,” of all COIs. RFP at 11, § H.⁴ The solicitation required an offeror to disclose in its proposal either information that had changed from its most recent COI certificate or a statement affirming the accuracy of that certificate. RFP at 29. The RFP provided that the apparent awardee and its COI statement would be reviewed for COIs. Id. at 34. If the contracting officer determined that a COI existed that could not be avoided, neutralized or mitigated, then award to that vendor would not be made, absent a waiver of the COI under FAR § 9.503 by the contracting officer that doing so was in the best interest of the United States. Id.

As relevant to this protest, the RFP defined an impaired objectivity COI as one “where a firm has an interest (typically financial) that may conflict with” the agency’s interest. RFP at 14. In this regard, “[i]f the firm is providing recommendations, judgment or

² Q2A is a wholly-owned subsidiary of MAXIMUS. AR, Tab 13, MAXIMUS COI [Conflict of Interest] Compliance Plan, at 6. As relevant here, Q2A also holds a CMS contract in which it serves as the administrative QIC (AdQIC). In the Medicare appeals process, the AdQIC may refer an appeal of an OMHA or ALJ (level 3) decision to the Medicare Appeals Council (level 4) if the level 3 decision overturned a QIC (level 2) decision. Protester’s Comments at 5.

³ The QIC IDIQ contract was first awarded in 2004 and has been renewed every 3 years thereafter in accordance with its terms. AR, Tab 2A, QIC IDIQ Contract, at 7, 21. QIC contractors, under their umbrella IDIQ contracts with CMS, are required to submit annual COI certificates disclosing in detail the firm’s financial interests in other entities, contractual relationships, organizational structure, and program for identifying and mitigating conflicts of interests, among other things. AR, Tab 2A, QIC IDIQ Contract, at 24-26; AR, Tab 13, Protester’s 2017 COI Compliance Plan. QIC contractors must also update that certificate as necessary during the period between certifications. AR, Tab 2A, QIC IDIQ Contract, at 26.

⁴ COIs included conflicts relating to business ethics, organizational and personal conflicts and/or compliance information. RFP at 34. COIs specifically covered “direct or indirect [corporate] relationships, including, but not limited to, the Contractor and its parent company, subsidiaries” Id. at 13. An organizational COI was defined as when, “because of other activities or relationships with other persons, a person is unable, or potentially unable, to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is, or might be, otherwise impaired, or a person has an unfair competitive advantage.” Id.

advice, and its other business interest could be affected by that recommendation, judgment or advice, the firm's objectivity may be impaired." Id. Similarly, the RFP defined an unequal access to information COi as when "a firm has access to nonpublic information (including proprietary information and non-public source-selection information) as part of its performance of a Government contract and that information may provide the firm with a competitive advantage in a later competition for a Government contract." Id.

C2C and MAXIMUS submitted proposals by the June 25 deadline, and, as instructed by the solicitation, provided their most recent annual COi certifications and updated COi disclosure statements. Contracting Officer's Statement (COS) at 3. The two proposals were evaluated as follows:

Factor	C2C	MAXIMUS
Technical Rating	Excellent	Very Good
Price	\$122,642,537	\$105,763,308

Protest, Exh. C, Award Notice, Apr. 18, 2018, at 1. The agency made award to MAXIMUS on March 29 and provided a combined notice of award/written debriefing to C2C on April 18.⁵ This protest followed on April 23.⁶

During the pendency of the protest, CMS supplemented its OCI analysis and, as discussed in more detail below, concluded that no OCI existed as a result of Q2A holding the AdQIC task order and MAXIMUS concurrently being awarded the QIC task order at issue here. AR, Tab 148, Pre-Award OCI Memo with June 6 Addendum, at 4. As to whether any potential impaired objectivity OCI was created by the review structure, the agency determined that none existed because the AdQIC did not provide performance evaluations of the QICs. Id. at 8-9. As to the possibility of an unequal access to information OCI, CMS decided that none existed because although the C2C data accessible by Q2A "includes access to appeals statistics/data (e.g. appeal categories, timeliness activities, dispositions of appeals, etc.), reconsideration decision letters, case file documents, and any other information regarding appeals," this data was "neither the property of nor proprietary to the QIC that adjudicated the appeal decision." Id. at 9. The agency's supplemented analysis did not include a discussion of

⁵ The agency had previously made award to C2C at a price of \$131,434,028. Protest, Exh. A, Award Notice, Oct. 2, 2017, at 1. MAXIMUS filed a complaint with the CMS Ombudsman, and the agency stopped work on the contract and requested revised proposals from MAXIMUS and C2C. COS at 3.

⁶ Since the awarded value of the task order exceeds \$10 million, this procurement is within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of \$10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

the RFP's standards for impaired objectivity or unequal access to information OCIs. Id. at 8-10.

DISCUSSION

C2C contends that MAXIMUS has multiple OCIs that cannot be mitigated. Protest at 19-22. The protester argues that the agency failed to meaningfully consider potential OCIs related to impaired objectivity and unequal access to information. Supp. Protest at 5-19. Id. at 20. In addition, the protester contends that the agency failed to engage the appropriate personnel when performing the limited OCI analysis. Id. at 13. For the reasons below, the protest is sustained in part and denied in part.⁷

⁷ C2C also argued that: the agency's corrective action was not rational (protest at 22); the agency failed to perform a price realism analysis (id. at 25); the evaluation and award were not adequately documented (id. at 28); and the agency failed to adequately defend its decision to take corrective action (id. at 29). The agency requested that we dismiss the first three of these protest bases. Req. for Dismissal, May 9, 2018. The record shows that the protester knew of the basis for its challenge to the corrective action as early as November 2017, and subsequently submitted two revised proposals, the first later in November, and the second in February 2018. Protest at 18-19; COS at 4. Therefore, we dismiss the challenge to the scope of the corrective action as untimely. 4 C.F.R. § 21.2(a)(1). We dismiss the protest ground arguing that the agency failed to perform a required price realism analysis as factually insufficient on the basis that the solicitation does not require any price realism analysis. 4 C.F.R. § 21.5(f); see generally RFP. We also dismiss as legally and factually insufficient the protest grounds alleging insufficient documentation and inadequate defense of the corrective action decision. 4 C.F.R. § 21.5(f).

In addition, MAXIMUS argues that the OCI allegations are untimely because C2C did not challenge them prior to the deadline set for receipt of revised proposals. MAXIMUS Req. for Dismissal, May 9, 2018, at 2. The intervenor also contends that "C2C should have objected to that firm's participation as the AdQIC during one of the earlier renewals of the AdQIC task order." Intervenor Comments at 5. A protest concerning an alleged OCI need only be filed prior to the closing date for receipt of proposals where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award. Honeywell Tech. Sols., Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6. Because the record does not establish that CMS advised C2C that the agency considered MAXIMUS eligible for award prior to award, we decline to grant MAXIMUS' request to dismiss the OCI protest ground as untimely. Finally, we have considered all of C2C's arguments. To the extent that an argument is not discussed here, it has been considered and provides no additional basis upon which to sustain the protest.

Abandoned Issues

As an initial matter, C2C made a number of assertions that it subsequently abandoned. In this regard, where an agency provides a detailed response to a protester's assertions and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. IntegriGuard, LLC d/b/a HMS Federal--Protest & Recon., B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241 at 5.

In its original protest, C2C argued that CMS failed to conduct meaningful discussions with it and that the discussions were unequal between it and MAXIMUS. Protest at 30-31. CMS provided detailed responses to these allegations in the agency report. C2C made no further mention of the argument in its comments filed in response to the agency's initial report. Furthermore, C2C indicated in its comments that it was no longer defending this aspect of its protest. We find that C2C abandoned its protest ground related to discussions.

Similarly, C2C alleged that CMS engaged in an improper "bait-and-switch" by proposing key personnel who were not readily available. Protest at 31-32. CMS provided a detailed response to this allegation in both the agency report and the supplemental agency report. C2C made no further mention of the argument in its supplemental comments filed in response to the agency's supplemental report. Furthermore, C2C indicated in its supplemental comments that it advanced only its initial and supplemental OCI grounds. Supp. Protest at 1. We therefore find that C2C also abandoned this protest ground.

Contractor Relationships

Next, we note the relationship between Q2A, the AdQIC, and MAXIMUS, the prospective QIC under this task order. The record shows that, although MAXIMUS and Q2A are nominally separate companies, in practice they operate as a single entity. For example, although Q2A was awarded the AdQIC task order, MAXIMUS holds itself out as the AdQIC, indicating that any corporate separation is essentially meaningless. See <https://www.maximus.com/appeals> (last visited June 27, 2018) ("MAXIMUS is an Administrative Qualified Independent Contractor (AdQIC), providing support to the Centers for Medicare and Medicaid Services (CMS) and the other fee-for-service contractors. As an AdQIC, we take up where a QIC leaves off, after a decision has been rendered by an Administrative Law Judge (ALJ)."). As to management, the general manager of Q2A is also the president of MAXIMUS. AR, Tab 24, Q2A 2017 COI Certification, at 12. In addition, MAXIMUS' vice president for contracts and compliance sits on the board of Q2A. Id. The record not only shows that the two companies share some of the same management, but also suggests that their management at times considers them to be the same entity.

Impaired Objectivity OCI

C2C contends that MAXIMUS has an impaired objectivity OCI by holding both the AdQIC task order (through Q2A) and the QIC task order. The protester describes the conflict as follows:

The SOW [statement of work] duties of the AdQIC conflict with the loyalty they have for their own company or parent company and the duty of objectivity owed to CMS. As the AdQIC, Maximus, is financially motivated to withhold issues regarding its own processing of QIC reconsiderations while at the same time, emphasizing to CMS any discrepancies or aberrancies in the reconsideration processing of its competitors, including C2C's, or any other non-affiliated QIC's. Maximus' selective notifications of questionable processing to CMS tarnish the reputation of their competitors' and help Maximus gain corporately when the task order is re-competed.

Protest at 20.

The FAR provides that an OCI exists when, because of other activities or relationships with other persons or organizations, a person or organization is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage. FAR § 2.101. Under the FAR, contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and avoid, neutralize, or mitigate significant potential conflicts of interest before contract award. FAR § 9.504(a). The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting officer. Innovative Test Asset Sols., LLC, B-411687, B-411687.2, Oct. 2, 2015, 2016 CPD ¶ 68 at 17.

We review the reasonableness of a contracting officer's OCI investigation and, where an 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. DRS Tech. Servs., Inc., B-411573.2, B-411573.3, Nov. 9, 2015, 2015 ¶ CPD 363 at 11. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Id. 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. Id. at 11-12. Nonetheless, once it has been determined that an actual or potential OCI exists, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur. AT&T Gov. Sols., Inc., B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 6.

Subpart 9.5 of the FAR, and decisions of our Office, broadly identify three categories of OCIs: biased ground rules, unequal access to information, and impaired objectivity. McConnell Jones Lanier & Murphy, LLP, B-409681.3, B-409681.4, Oct. 21, 2015, 2015

CPD ¶ 341 at 13. The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; NCI Info. Sys., Inc., B-412870.2, Oct. 14, 2016, 2016 CPD ¶ 310 at 12 citing RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

The protester contends that, “[a]s the AdQIC, Maximus, through its wholly owned subsidiary Q2 Administrators, is authorized to make referrals to the Appeals Council of administrative decisions that overturn or partially overturn reconsideration decisions made by Maximus,” an ability also acknowledged by the agency and the intervenor. Protester Comments at 5-6; see also Intervenor Comments at 8; Supp. MOL at 9. Although this structure presents “hard facts” that indicate a potential conflict of interest, in that Q2A is in the position of reviewing requests for further appeal of decisions issued by Q2A’s parent, the parties disagree as to whether this is properly an impaired objectivity OCI and if so, whether there are factors that mitigate the inherent conflict. As relevant here, an impaired objectivity OCI exists where a firm’s ability to render impartial advice to the government will be undermined by the firm’s competing interests, such as a relationship to the product or service being evaluated. FAR § 9.505-3; Alion Sci. & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 at 5-6.

CMS and MAXIMUS assert that, despite the relationship between MAXIMUS and Q2A, no OCI exists because the AdQIC is examining only the sufficiency of the intervening level 3 ALJ review. Supp. MOL at 9; Intervenor Comments at 8. During the pendency of this protest, CMS reexamined MAXIMUS’ potential OCIs in light of C2C’s allegations. AR, Tab 14B, Pre-Award OCI Memo with June 6 Addendum, at 8. The agency concluded that there was no potential OCI if MAXIMUS and its subsidiary served concurrently in the QIC and AdQIC roles because the AdQIC does not have formal responsibility for performance evaluation of the QICs. Id. at 8-9. CMS also relied on MAXIMUS’ own conclusions as to the absence of any conflict. Id. at 4.

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. Alion Sci. & Tech. Corp., B-297022.3, supra, at 8; see also PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 10-11. The record indicates that the agency did not give meaningful consideration to the potential impaired objectivity OCI involving Q2A’s and MAXIMUS’ dual roles as the AdQIC and the QIC. We think that the structure here, where the AdQIC can refer for further review ALJ decisions that overturn a QIC reconsideration, could present the opportunity for the AdQIC to offer biased recommendations. The record shows that here, CMS did not investigate whether the presence of related firms operating within the same chain of review created an impaired objectivity OCI. In this regard, the agency characterized the AdQIC role as merely reviewing ALJ decisions, sidestepping the fact that the ALJ decision is itself a review of the QIC reconsideration. Furthermore, the substance of the

agency's inquiry was limited to whether the AdQIC participated in the performance evaluations of the QICs. CMS relied on the contractors' own OCI conclusions as to the absence of any other conflict.⁸ Because the record shows that the agency has not meaningfully examined whether Q2A (in essence, MAXIMUS itself) could render objective advice to the agency while simultaneously serving as both the QIC and the AdQIC, we sustain the protest.⁹ Nortel Gov't Sols., Inc., B-299522.5; B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 at 5-7; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 17.

Unequal Access to Information OCI

Next, C2C argues that MAXIMUS has an unequal access to information OCI, in that MAXIMUS' subsidiary Q2A has access to non-public, competitively useful information held in the Medicare appeals system as a result of Q2A's role as the AdQIC and the AdQIC's corresponding access to the system. See, e.g., Protester Supp. Comments at 10-11. Specifically, the protester claims that Q2A has access to C2C's complete and non-public case files of reconsideration decisions of durable medical equipment claims. Id. at 10.

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.,

⁸ The agency's pre-protest OCI analysis primarily focused on a review of the websites of MAXIMUS' subcontractors and did not examine the potential for any OCI created by the structure described here. Instead, the agency seems to have relied on the COI certifications provided by MAXIMUS and Q2A and, more importantly, did not consider any potential conflict posed by Q2A holding the position of AdQIC. AR, Tab 19, Final Proposal Review Memo, Mar. 7, 2018, at 40-41. MAXIMUS' COI certificate discloses its ownership of Q2A and the role of the latter as the AdQIC, and refers to Q2A's certification. AR, Tab 13, MAXIMUS 2017 COI Certification, Exh. C, at 4. Q2A's certification concludes that, "[a]s a QIC, MAXIMUS Federal Services, Inc. has on file with CMS an approved COI plan, which documents that MAXIMUS Federal Services, Inc. has no other Medicare business, nor any other business, which constitutes a conflict, or the appearance of a conflict, with respect to QIC work, including the QIC services provided to CMS by the legal subsidiary Q2A." AR, Tab 24, Q2A 2017 COI Certification, at 9. In addition Q2A asserts that "[a]s a wholly owned subsidiary of MAXIMUS Federal Services, Inc., Q2 Administrators thus has no QIC related conflict, or appearance of conflict, with respect to its parent, because MAXIMUS Federal Services, Inc. and MAXIMUS [the holding company] themselves are absent of conflict." Id. at 3.

⁹ To the extent that Q2A itself may have ever been awarded a QIC task order while simultaneously serving as the AdQIC, no related facts or legal arguments have been raised by any party here.

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. Here, the RFP defines an unequal access to information conflict of interest more broadly than the FAR, as follows:

[S]ituations in which a firm has access to non[-]public information (including proprietary information and non-public source-selection information) as part of its performance of a Government contract and that information may provide the firm with a competitive advantage in a later competition for a Government contract.

RFP at 14. Thus, for an unequal access to information conflict of interest to exist under the terms of the RFP, the information itself need only be non-public, and the competitive advantage need only be a possibility.¹⁰ Id. Our prior decisions also provide that, in the context of an unequal access to information OCI, the protester need not demonstrate prejudice by establishing that the awardee’s access to competitively useful nonpublic information provided an actual advantage. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 18-19.

Here, “[t]he AdQIC contract allows Q2A access to all information within the Medicare Appeals System (MAS) relative to level 2 appeals. This includes access to appeal reconsideration decision letters, case file documents, and any other information regarding appeals within the MAS.” Tab 14B, Pre-Award COI Memo with June 6 Addendum, at 10. Although the parties have not been entirely clear about the totality of the information that can be accessed by Q2A, MAXIMUS, through an affidavit submitted by the Q2A AdQIC project manager, appears to acknowledge the non-public nature of the information and raises several arguments that allegedly mitigate the advantage provided by such access.¹¹ Intervenor Comments, Exh. 1, Decl. of Q2A

¹⁰ The underlying IDIQ permits the contracting officer to take a variety of actions in the event that a conflict of interest is created during the life of the contract. AR, Tab 2A, QIC IDIQ, at 24.

¹¹ These include the argument that Q2A, in its role as the AdQIC, can verify that MAXIMUS did not access the non-public information. Intervenor Comments, Exh. 1, Decl. of Q2A AdQIC Project Manager ¶¶ 14-19. Q2A also alleges that, despite the presence of shared management, including the dual roles held by the Q2A general manager and MAXIMUS president, the intra-company relationship is minimal: “Q2A does not share or utilize any facilities, resources, or personnel of MAXIMUS . . .” in its
(continued...)

AdQIC Project Manager ¶¶ 14-19. The protester's allegation and the intervenor's mitigation efforts provide a sufficient basis for the agency to inquire, as the RFP requires, whether the awardee has an unequal access to information conflict of interest under the RFP.

The agency's review was not comprehensive. In this regard, the OCI investigation performed by CMS did not address whether Q2A had access to any of C2C's non-public information. Instead, the agency concluded that the AdQIC's access to information in the MAS did not grant Q2A unequal access to information because, in the agency's view, the information was neither the property of, nor proprietary to, C2C. AR, Tab 14B, Pre-Award COI Memo with June 6 Addendum, at 10. The agency also found that no unequal access to information conflict exists since C2C is the incumbent on this task order, and therefore C2C's access to its own files was equivalent to Q2A's access to C2C's files. Id. In our view, the agency's analysis fails to address the substance of the conflict of interest inquiry required by the RFP, namely, whether the information was non-public and, if so, whether it might provide a competitive advantage.

Furthermore, our Office has explained that unequal access to non-public information about a competitor, whether or not that information is proprietary, may nevertheless create an unequal access OCI. Dell Servs. Fed. Gov't, B-414461.3 et al., June 19, 2018, 2018 CPD ¶ 213 at 8-9 (sustaining protest where awardee "may have an unequal access to information OCI" and the agency made no "effort either to investigate, or to avoid, neutralize or mitigate, any possible OCI"). In short, the record shows that the agency failed to reasonably identify and evaluate the extent of OCIs associated with Q2A's performance of the AdQIC. Accordingly, we sustain the protest because we find that the agency's OCI investigation failed to address the apparently non-public nature of the information or weigh whether it could have been competitively useful to MAXIMUS. Ktech Corp., B-285330, B-285330.2, Aug. 17, 2000, 2002 CPD ¶ 77 at 6.

CMS Compliance Officer Review

Finally, C2C contends that its protest should be sustained because CMS did not have the alleged or potential OCI independently evaluated by the CMS compliance officer. C2C Supp. Comments at 6. The protester argues that FAR section 9.504(b) requires agencies to obtain the advice of appropriate technical specialists when evaluating OCIs. C2C contends that the contracting officer's decision not to obtain a formal assessment from the CMS compliance officer was an error, because it is possible "that the [CMS] Compliance Officer's assessment of the situation may have resulted in the finding of an inappreciable and unmitigable OCI held by Maximus and Q2." Protester Supp. Comments at 7.

(...continued)

"perform[ance of its] duties as the AdQIC." Compare id. ¶ 7 with AR, Tab 24, Q2A 2017 COI Certification, at 12.

As described above, 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. Innovative Test Asset Sols., LLC, supra, at 18. The allegation that an OCI should be found to exist simply because the CMS compliance officer was not involved in the review does not meet this standard and this protest ground is denied.

RECOMMENDATION

We recommend that the agency investigate whether MAXIMUS’ performance of the QIC task order while Q2A holds the AdQIC task presents an impaired objectivity OCI or an unequal access to information OCI, taking into consideration the actual scope of any review tasks for which the AdQIC contractor is responsible. Should the agency conclude that MAXIMUS does have an OCI, we recommend that the agency either determine what actions would be appropriate to avoid, neutralize or mitigate the identified OCI, or determine that a waiver of the identified OCI would be appropriate. Alternatively, should the agency conclude that MAXIMUS does not have an OCI, as defined both under the FAR and in the RFP, the agency should document the basis for that conclusion. Finally, we recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel