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Decision

Matter of: Absolute Business Solutions, Inc.

File: B-418184

Date: January 21, 2020

Lee Dougherty, Esq., Effectus, PLLC, for the protester.
David Edelstein, Esq., Laurence Schor, Esq., and Allison Geewax, Esq., Asmar, Schor & McKenna, PLLC, for The Buffalo Group, the intervenor.
Scott N. Flesch, Esq., Harry M. Parent, Esq., Lieutenant Colonel Stephen Hernandez, and Captain Jeremy D. Burkhart, Department of the Army, for the agency.
Robert T. Wu, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency failed to consider the awardee’s alleged organizational conflict of interest is denied where the protester’s allegation amounts to a dispute between private parties, which our Office will not review.
2. Protest challenging the agency’s evaluation of the protester’s proposal under the technical and management factors is denied where the record shows that the evaluation was reasonable and in accordance with the stated evaluation criteria.
3. Protest that the agency’s cost realism analysis of the awardee’s proposal was unreasonable is denied where the record shows that evaluation was reasonable.

DECISION

Absolute Business Solutions, Inc. (ABS), of Herndon, Virginia, protests the issuance of a task order to The Buffalo Group (TBG), of Reston, Virginia, under request for task order proposals (RTOP) No. W911W4-19-R-IIS1 issued by the Department of the Army, U.S. Army Intelligence and Security Command, for intelligence support services. The protester argues that the agency unreasonably failed to evaluate the awardee’s alleged organizational conflict of interest (OCI), and challenges the evaluation of proposals under the cost and non-cost factors.

We deny the protest.

BACKGROUND

The RTOP, issued on June 13, 2019, sought proposals from holders of the agency's global intelligence support services multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract to provide intelligence information services and intelligence automation support (IIS/IAS). Agency Report (AR), Tab 3, RTOP at 2. The solicitation contemplated the award of a task order on a cost-plus-fixed-fee, level-of-effort term basis for labor, and a cost-no-fee basis for other direct costs. Id. The resulting order was to include one 9-month base period, and four option years. Id. at 2-15.

Proposals were to be evaluated on a best-value tradeoff basis following the procedures set forth in Federal Acquisition Regulation (FAR) section 16.505. Id. at 38. The following factors were to be considered, in descending order of importance: (1) technical factor, (2) management factor, and (3) cost/price (cost). Id. at 40. Included under the technical factor were three subfactors: (1) development and programming support of .Net and SharePoint applications (subfactor 1); (2) administrative support to Microsoft and VMware environments (subfactor 2); and (3) administrative support to Microsoft SQL database environments (subfactor 3). Id. at 41-42. The management factor included two subfactors: staffing plan and transition-in plan. Id. at 42.

When combined, the non-cost factors were to be significantly more important than cost. Id. However, the solicitation cautioned that "the closer the [o]fferors' evaluations are in the non-cost. . . factors, the more important the cost [factor] becomes in the decision." Id. at 40-41. The cost evaluation was to consider total evaluated price (TEP), including whether the TEP is reasonable, realistic, complete and balanced. Id. at 43-44. Under the terms of the solicitation, the TEP was to equal the most probable cost to the government (MPC). Id. at 43.

Consistent with the evaluation factors, proposals were to be submitted in four volumes: technical factor, management factor, cost/price factor, and organizational conflict of interest (OCI) certification. According to the solicitation, the first three volumes were to be evaluated in accordance with section M of the RTOP, whereas, the OCI certification was required to be submitted, but was not to be evaluated. Id. at 25-26. With respect to the OCI certification, all offerors were required to make a preliminary disclosure of any potential OCI issues identified by the offeror, and, if identified, to submit a plan to negate or mitigate the potential OCI. Id. at 35-37. The OCI certification was to be incorporated into the resulting task order as an attachment. Id. at 37.

Six proposals were received in response to the solicitation, including those from ABS and TBG. The proposals were evaluated by a task order selection board, with the relevant evaluation results as follows:

	ABS	TBG
Technical Factor	Acceptable	Good
Subfactor 1	Good	Acceptable
Subfactor 2	Marginal	Redacted from Record
Subfactor 3	Acceptable	Redacted from Record
Management Factor	Good	Good
Staffing Plan	Good	Good
Transition-In Plan	Outstanding	Acceptable
Proposed Price	\$63,953,973	\$52,833,490
TEP/MPC	\$63,953,973	\$52,833,490

AR, Tab 18, Task Order Selection Decision (TOSD), at 1-13.

The source selection authority (SSA) conducted a tradeoff among proposals, including between ABS and TBG. Id. at 22. The SSA found that TBG’s proposal was more advantageous than ABS’s proposal. In this regard, the SSA found that ABS’s proposal had a critical weakness under subfactor 2 of the technical factor that created a high amount of risk to the government. Id. The SSA also noted ABS’s higher total evaluated price. The SSA considered these findings in determining that TBG’s proposal represented the best value to the government. Id. at 22-23. After making award to TBG, and providing the protester with a debriefing, this protest followed.¹ Protest at 2.

DISCUSSION

ABS, the incumbent, challenges various aspects of the agency’s decision to issue the task order to TBG. First, the protester argues that the agency failed to consider an OCI stemming from one of TBG’s corporate officers having access to ABS’s confidential information and trade secrets due to a prior private-sector work engagement. Protest at 12-13. Second, ABS challenges the agency’s evaluation of its proposal under subfactor 1 of the technical factor, and the staffing plan subfactor of the management factor. Id. at 14-17. Finally, ABS challenges the agency’s cost realism analysis of TBG’s cost proposal. Id. at 17-18. Although we do not address all of the protester’s arguments below, we have considered all of them and find that none provide a basis to sustain its protest.²

¹ This procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts, since the awarded value of the task order at issue exceeds \$25 million. 10 U.S.C. §2304c(e)(1)(B).

² For example, ABS also argued that the agency improperly failed to amend the solicitation after its requirements changed due to the issuance of a new policy that the protester asserts impacted certification requirements, as well as experience and salary levels for positions contemplated by the solicitation. Protest at 18-19. During the course of the protest, our Office requested that the parties brief whether this allegation
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Organizational Conflict of Interest

ABS argues that the agency failed to consider TBG's OCI stemming from one of TBG's corporate officers having access to ABS's confidential information and trade secrets. Protest at 12-13. In this regard, ABS argues that one of TBG's corporate officers previously served as a consultant hired by a third party to conduct due diligence into the possible acquisition of ABS. According to the protester, that individual was provided with "confidential information and highly sensitive [ABS] trade secrets" during the course of that transaction. Id. at 12. ABS argues that the individual's former role as a consultant and its current role as a corporate officer of TBG create an "unmitigatable conflict of interest" and afforded the awardee an unfair competitive advantage with respect to this procurement. Id.

The agency responds that the protester has presented only speculation, instead of hard facts, in support of its allegation. Memorandum of Law (MOL) at 18-19. Moreover, the agency argues that ABS has not shown that TBG had access to non-public information as part of its performance of a government contract, as required under the standards articulated in subpart 9.5 of the FAR. Id. at 19. According to the agency, the protester's OCI allegation is a dispute between private parties of the type our Office will not consider. Id. at 20 (citing Management Sciences for Health, B-416041, B-416041.2, May 25, 2018, 2018 CPD ¶ 197 at 5-6).

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was timely raised under our Bid Protest Regulations. According to the protester, it anticipated that the agency would amend the solicitation in response to the changed policy, but only found out the agency would not amend the solicitation during the firm's debriefing. Protester's Opposition to Dismissal, at 3. That date, October 7, 2019, is the one that the protester asserts should have been used to determine timeliness here. Id. The agency argues that the appropriate date, for timeliness purposes, is September 19, when the policy was published by the agency. Agency Request for Dismissal, at 9. ABS filed its protest with our Office on October 15, 2019.

An argument that a change in the agency's requirements should have been incorporated into the solicitation is a challenge to the terms of the solicitation, which must be raised prior to the time for receipt of proposals, or as is the case, here, where no proposals were due, within ten days of when the protester knew, or should have known, of the changed requirement. 4 C.F.R. 21.2(a)(1); NewSat North America, LLC, B-415138, Nov. 21, 2017, 2017 CPD ¶ 352 at 4 (protest challenging alleged defect in solicitation that became apparent after solicitation closing must be protested within 10 days of the defect becoming apparent). Here, the protester asserts that it received notice of the policy change on September 24. Protester's Opposition to Dismissal, at 3. Thus, viewing all facts in a light most favorable to ABS, the firm was required to protest to our Office no later than October 4, which it did not.

The FAR instructs agencies to avoid, neutralize, or mitigate significant OCI's 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. Subpart 9.5 of the FAR, and decisions of our office, broadly categorize OCIs into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. As relevant to the allegation here, an unequal access to information OCI exists 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), 9.505-4; Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6.

The solicitation required offerors to submit, as part of their proposals, a preliminary disclosure of any OCI issues identified, and an OCI mitigation plan addressing the conflicts identified. RTOP at 35-36. The RTOP adopted the definition of an OCI found in FAR subpart 2.1, and FAR subpart 9.5. Id. The RTOP further states that "OCIs exist when an Offeror would face an actual or potential conflict of interest if it worked on the proposed task order, due to its other business interests or due to the nature of the effort to be performed." Id. at 35.

ABS argues that the factual scenario it proffers above, falls within the OCI restrictions in the FAR and the solicitation. Protest at 12-13; Protester's Comments at 1-3. However, our review of the record shows that ABS has failed to allege a cognizable OCI. As stated, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract. Here, however, the protester is not alleging that TBG had access to nonpublic information as part of its performance on a government contract, but instead through TBG's hiring of an individual alleged to have obtained ABS's proprietary information through a private business transaction, with no involvement of the government.

As discussed in Management Sciences for Health, our Office has recognized that, "where information is obtained by one firm directly from another firm . . . this essentially amounts to a private dispute between private parties that we will not consider absent evidence of government involvement." Management Sciences for Health, supra, at 5. Here, the situation described by the protester does not involve access by TBG to nonpublic information obtained as part of the firm's performance on a government contract, nor do the facts otherwise implicate government involvement in the scenario. Based on our review of the record, we conclude that ABS's allegation, in this regard, presents a dispute between private parties and does not present a situation in which an unequal access to information would arise under FAR subpart 9.5. We therefore deny this ground of protest.³ Id. at 7-8 (concluding that protester's unequal access to

³ ABS also argues that TBG's corporate officer previously served as a corporate officer for another unidentified prime contractor with an unidentified agency contract, and

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information argument presents “a quintessential private dispute between private parties that our Office will not review”).

Technical Factor

ABS next protests the agency’s evaluation of the firm’s proposal under the technical factor, challenging two of the various weaknesses assigned. Protest at 14-17. Specifically, the protester challenges one of the two weaknesses assigned under subfactor 1 of the technical factor, for overreliance on the senior requirements engineer for quality assurance and quality control (QA/QC) functions. Protest at 14. ABS also challenges the assignment of two weaknesses under the staffing plan subfactor of the management factor assigned for a demonstrated misunderstanding of the common access card (CAC) and security clearance requirements, and the proposal’s lack of detail related to oversight of employees at the protester’s facility.⁴ Id. at 15.

In reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of

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alleges, without any support, that this individual “could have had access to confidential information and trade secret information” from various unidentified contractors working for the agency. Protest at 13. This protest allegation does not set forth hard facts that meet the standard for review of OCI protest arguments. We therefore conclude that the protester fails to state a valid basis for this portion of its protest, and it is, therefore, dismissed. See Bid Protest Regulations, 4 C.F.R. § 21.5(f); Science Applications Int’l Corp., B-406899, Sept. 26, 2012, 2012 CPD ¶ 282 at 8-9 (explaining that protester must “identify hard facts that indicate the existence . . . of a conflict; mere inference or suspicion of an actual or potential conflict is not enough”).

⁴ During the course of the protest, our Office requested additional information from the agency and permitted supplemental comments by the parties. As part of ABS’s supplemental filing, the firm argues for the first time that the agency used unstated evaluation criteria in evaluating subfactor 2 (administrative support to Microsoft and VMware environments) of the technical factor. Protester’s Supp. Comments at 2. In this regard, the record shows that during the firm’s debriefing, ABS was informed of a weakness under subfactor 2 for failing to provide sufficient detail regarding a certain aspect of its proposal. AR, Tab 15, Debriefing, at 14. ABS did not challenge the assignment of this weakness in its protest. After reviewing the record, the protester now argues, in essence, that the level of detail required by the agency for this aspect of the firm’s proposal was an unstated evaluation criterion. Protester’s Supp. Comments at 2. However, we conclude that the protester knew, or should have known, of the factual basis underlying this new argument at the time of its debriefing. As such, ABS could have raised an allegation challenging the agency’s evaluation under this subfactor within 10 days of the debriefing. Its failure to do so, however, renders the allegation untimely. 4 C.F.R. § 21.2(a); Building Operations Support Servs, LLC, B-407711, B-407711.2, Jan. 28, 2013, 2013 CPD ¶ 56 at 7 n.11.

proposals is a matter within the agency's discretion. Smiths Detection, Inc.; Am. Sci. and Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 6-7. Rather, we will review the record only to determine whether the evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id. We will not sustain a protest where the agency's evaluation is reasonable, and the protester's challenges amount to disagreement with the agency's considered technical judgments regarding the specific elements of an offeror's proposal. BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 at 5.

With respect to ABS's first challenge--to the assignment of a weakness for overreliance on the senior requirements engineer for QA/QC--the protester argues that the senior requirements engineer is only one position responsible for QA/QC functions, and the firm's proposal "in no way suggests an overreliance on the position." Protest at 14. The protester asserts that it devoted an entire section of its proposal to quality assurance functions, and "not once in that section is a reliance on a Senior Requirements Engineer stated or implied." Id. According to ABS, the agency's evaluation is not supported by the record. Id. at 14-15.

The agency responds that ABS's arguments are mere disagreement with its reasonable and well-documented evaluation. MOL at 21. The agency points to the evaluation language underlying this weakness, which states:

Although the Offeror identifies this reliance on the Senior Requirements Engineer as a risk mitigation strategy, it is problematic because it includes a single point of failure in the Senior Requirements Engineer. An inability to obtain or retain such an individual puts the entire development effort at risk. Further, while it is reasonable for the Senior Requirements Engineer to have some involvement in the QA/QC process, the responsibilities of QA/QC and the schedule should fall primarily on the Project Manager. . . . This delegation constitutes a weakness because these added tasks could be expected to divert the attention of the Senior Requirements Engineer away from the tasks normally associated with that role.

MOL at 22; AR, Tab 18, ABS Technical Factor Evaluation, at 10. The agency concludes that "the technical evaluators documented their reasonable concerns that led them to assess a weakness in Protester's proposal." Id. at 24.

Our review of the record provides no basis to question the agency's evaluation. Here, a review of ABS's proposal shows that the firm proposes to utilize the senior requirements engineer to execute a requirements-driven development process as a risk mitigation strategy for various risk areas, including QA/QC. AR, Tab 7, ABS Technical Volume, at 13. Thus, contrary to the protester's contention, the firm's proposal relies on the senior requirements engineer to execute the QA/QC function. Moreover, while ABS argues that the agency's evaluation statements are "verifiably false," the protester provides no substantive support for that statement, only making broad protestations that its proposal "directly contradicts the Agency's conclusion." Protester's Comments at 3.

Our review of the record, however, supports the agency's conclusions, as discussed above. The protest ground is denied.

Management Factor

ABS next challenges two weaknesses assigned to the firm's proposal under the staffing plan subfactor of the management factor. The first weakness was assigned for what the agency calls "misunderstandings" in the protester's proposal related to security clearance requirements for the firm's off-site personnel. AR, Tab 12, Management Factor Evaluation, at 7 ("The [o]fferor's assertion that a Secret-clearance is required to obtain a CAC [common access card] is inaccurate."). The protester argues that its proposal did not demonstrate a misunderstanding of the CAC and security requirements. Protest at 16. Instead, ABS argues that it gave the agency "a premium solution" by proposing to replace programmers without security clearances with those that have clearances to address a problem encountered by many software developers in the "classified space." Id. According to the protester, instead of being assigned a weakness, the firm's solution should have been recognized as a significant strength. Id.

The agency responds that while ABS "spends over a page discussing the merits of its security-cleared-remote-site-workers, it never directly addresses its own statement that a secret clearance is required to obtain a CAC, which was the basis of the assessed weakness." MOL at 25. As such, the agency argues that the protester has failed to show that the assigned weakness was unreasonable.

Our review of the record supports the agency's evaluation. In this regard, the record shows that the evaluators took issue with a portion of ABS's proposal, which asserted that a Secret-level clearance is required to obtain a CAC. AR, Tab 12, Management Factor Evaluation, at 7. A review of ABS's proposal confirms the factual basis underlying the assigned weakness, where it states:

While security clearance requirements are lessened for the off-site .NET and SharePoint Developers, a Secret security clearance is still required. Off-site work is conducted similar to telework, only in a more permanent fashion. The off-site developers will still access U.S. Government servers in order to reach the virtual environments through Horizon Manager. A DoD Common Access Card (CAC) is required to access these servers which, in turn, requires a Secret clearance to obtain. Team ABSC will mitigate this issue by sourcing Secret-cleared off-site developers to ensure ease of access to the DoD virtual environments.

AR, Tab 8, ABS Management Volume, at 9. As such, the assigned weakness is supported by the language of the protester's proposal.

Moreover, while ABS disagrees with the merits of this aspect of its proposal, the protester's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. WingGate Travel, Inc., B-412921, July 1,

2016, 2016 CPD ¶ 179 at 4-5. Here, the agency explains that ABS's proposal does not address hiring developers without a security clearance to work at the contractor facility. AR, Tab 12, Management Factor Evaluation, at 7. The agency also explains that it intends to leverage the larger pool of developers who do not possess security clearances so as to access a "much expanded" labor market, and that the absence of a security clearance requirement is a "significant enabler of rapid hiring." Id. According to the agency, because ABS "did not explain a different set of procedures for the individuals that do not require security clearances, there is an evaluated risk that [ABS] does not understand the clearance requirements associated with the [scope of work]." Id. We are provided no basis to question the agency's assessment of ABS's proposal in this regard, nor the assigned weakness based on that assessment.

The second weakness also was assigned to ABS's proposal under the staffing plan subfactor for failing to "adequately detail its plan and process related to how . . . off-Government-site personnel will be managed at its facility." Id. at 7-8. ABS challenges the assigned weakness, arguing that while the solicitation required offerors to describe how they "will manage the day-to-day operations of staff in order to ensure successful performance of service," nowhere in the solicitation "does the [a]gency require offerors to specify . . . how the Offeror will oversee employees at each specific location." Protest at 17. The agency responds that it was reasonable for the evaluators to consider the management of remote-site workers under the staffing plan subfactor. We agree.

While agencies are required to identify evaluation factors and significant subfactors, they are not required to identify all areas of each factor or subfactor which might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Intrepid Solutions and Servs., Inc., B-410431.5, Dec. 30, 2014, 2015 CPD ¶ 17 at 6 n.5.

Here, the staffing plan subfactor states, in relevant part, that the agency was to "assess the Offeror's proposed plan and process to manage the day-to-day operations of staff in order to ensure successful performance of services across all four task areas identified in the PWS [performance work statement]." RTOP at 42. The RTOP identified, as places of performance for the scope of work, agency facilities at Fort Belvoir, Virginia, and Arlington, Virginia; contractor facilities; and sites of approved telework specified in the contractor's approved plan. AR, Tab 3a, RTOP, Attachment 0001, PWS, at 3. In our view, as the solicitation called for the performance of work both on-site (in agency facilities), and off-site (in contractor facilities and approved telework locations), the agency's assessment of ABS's proposed plan and process for managing operations at both sites was reasonably related to the stated evaluation criteria. As such, we are provided no basis to question the evaluation in this regard.

Cost Realism

Finally, ABS argues that the agency's cost realism evaluation was arbitrary and capricious because it disregarded current market trends and conditions for the recruitment and retention of positions required by the solicitation. Protest at 17. In this

regard, the protester relies on its knowledge of market conditions and recruitment and retention issues as the incumbent contractor to argue that the agency “simply could not have performed a reasonable cost realism analysis, without, as part of that analysis, assigning to TBG a significant risk due to TBG’s offered price.” Id. at 18.

The agency responds that it “conducted a reasonable and well documented cost realism analysis of the awardee’s proposal.” MOL at 31. The agency points to the cost analysis performed which analyzed the labor categories of TBG’s proposal, compared them to the independent government cost estimate (IGCE), and reviewed the awardee’s supporting data in reaching its determination that the awardee’s proposal was realistic. Id. The agency also observes that while TBG’s price proposal was within the range of most other offerors, ABS’s proposed price, on the other hand, was “by far the highest of all six offerors.” Id. at 28.

Agencies are required to perform a cost realism analysis when awarding cost-reimbursement contracts to determine the probable cost of performance for each offeror. FAR §15.404-1(d)(2). Agencies are given broad discretion to make cost realism evaluations. Burns & Roe Indus. Servs. Co., B-233561, Mar. 7, 1989, 89-1 CPD ¶ 250 at 3. Consequently, our review of an agency’s cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

The RTOP states that the agency “will conduct a cost realism analysis in accordance with FAR 15.404-1(d) to determine the realism of the proposed single elements of cost for this effort.” RTOP at 43. The record reflects that the agency performed a detailed cost realism analysis of TBG’s proposal, that the evaluators determined that the firm’s proposal was realistic, and that no cost adjustments were required. AR, Tab 10, TBG Cost and Price Analysis Memorandum, at 5-13. The protester responds only with conclusory arguments attacking the reasonableness of the IGCE and the agency’s analysis. Protester’s Comments at 4-5. While the protester may disagree with the conclusions reached by the agency based on its analysis, it has not shown that the agency’s analysis or conclusions in this regard were unreasonable. Jacobs COGEMA, LLC, supra.

The protest is denied.

Thomas H. Armstrong
General Counsel