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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Bland & Associates, PC

File: B-419924

Date: September 28, 2021

Scott A. MacGriff, Esq., Dickinson Wright PLLC, for the protester.
Daniel P. Graham, Esq., Tyler E. Robinson, Esq., John M. Satira, Esq., Olufunmilola Anifowoshe-Manning, Esq., Vinson & Elkins LLP, for Novitas Solutions, Inc., the intervenor.
Pamela Waldron, Esq., and William Shim, Esq., Department of Health and Human Services, for the agency.
Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of the terms of a solicitation filed on next business day after the time set for receipt of quotations is untimely, but because our Office was unexpectedly closed when the protest would have been due, we will consider the protest for good cause shown.

2. Protest alleging organizational conflicts of interest is denied where the protester has neither demonstrated that a conflict exists nor that the agency's consideration of potential conflicts was unreasonable.

DECISION

Bland & Associates, PC, of Omaha, Nebraska, protests the terms of request for quotations (RFQ) No. APP210813, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services, for audit services. The protester argues the agency erred by amending the solicitation to permit certain vendors with allegedly unmitigable organizational conflicts of interest (OCI) to compete.

We deny the protest.

BACKGROUND

On May 19, 2021, the agency issued the Medicare Audit Desk Review and Intern and Resident Information System Duplicates (MADRID) RFQ seeking a variety of audit and audit-related services. Memorandum of Law (MOL) at 2-3. The RFQ was issued to

contract holders of the General Services Administration's Multiple Award Schedule for Professional Services, Business Administrative Services, Category 541611, Administrative Management and General Management Consulting Services. *Id.* The RFQ contemplates the issuance of a single time-and-materials task order with a 1-year base period of performance and two 1-year option periods. Agency Report (AR), Tab 8.1, Amended RFQ Instructions at 1.

The RFQ requires vendors to include an OCI volume in their quotations to explain and mitigate any potential OCIs. *Id.* at 7. As initially issued, the RFQ additionally excluded three categories of vendors from the competition due to perceived unmitigable OCIs. AR, Tab 1.3, RFQ Clauses and Terms at 13. Relevant to this protest, the original RFQ excluded the 12 contractors currently performing as Medicare Administrative Contractors (MACs). *Id.* The solicitation explained:

> As the work to be performed by the successful offeror will correspond to traditional MAC work, a current MAC would be able to steer work from their MAC contract and workload to the MADRID contract, at potentially higher rates at a dis-advantage to the government. A potential conflict of impaired objectivity could exist if the successful offeror were to be a current MAC.

Id.

That is to say, the MACs are performed using a cost-plus-award-fee structure, and the MADRID will be a time-and-materials task order. Because the MADRID contractor will be performing backlog or overflow work of the same kind as that performed by the MAC contractors, the agency was concerned that the MADRID vendor could propose comparatively high time-and-materials rates and then manipulate its backlog to effectively reallocate work that would potentially be less remunerative under the MAC contract to the MADRID contract.[1]

Following the issuance of the RFQ, the agency received numerous questions from potential vendors and issued several amendments to the RFQ. MOL at 4. Of note, in response to one vendor's query, the agency reconsidered the issue of whether MACs should be categorically excluded from the MADRID competition. *Id.* Specifically, after internal discussion, the agency determined MACs would not necessarily be able to steer work to the MAC contract, and the categorical exclusion of all MACs was not defensible. *Id.* at 5. The agency concluded any potential MAC OCIs would be reviewed on a case-by-case basis during the evaluation process, and amended the solicitation to remove the exclusion of all MAC contractors. *Id.* at 6.

[1] We note that the parties assume this to be a potential risk in the event that a MAC could effectively steer work to the MADRID contract. However, as discussed below, even if that were the case, such a risk would be heavily dependent on the MADRID contract labor rates, and no vendors have yet proposed rates for the MADRID contract. Therefore, it is not yet clear whether this is a valid concern.

The RFQ required vendors to submit initial quotations by June 18, 2021, at 11:00 a.m. AR, Tab 8.1, Amended RFQ Instructions at 2. However, late in the day on June 17, 2021, the Juneteenth National Independence Day Act, Pub. L. No. 117-17 (2021) was enacted establishing Friday, June 18, as a federal holiday. Notwithstanding the holiday, the agency did not change the due date for quotations and Bland submitted a timely quotation before the 11:00 a.m. deadline on June 18. Although the agency moved forward with receipt of quotations on the federal holiday, our Office was closed on June 18 and Bland thereafter submitted a protest to our Office on Monday, June 21, at 1:14 p.m., challenging the terms of the solicitation.

DISCUSSION

The protester alleges the agency erred in amending the solicitation to permit MACs to compete because MACs have unmitigable OCIs. Protest at 9-11. Specifically, the protester contends MACs have unequal access to nonpublic information that will permit them to compete more effectively for the requirement. *Id.* at 10. Additionally, the protester argues because the MADRID contractor will perform backlogged work from the MAC contracts, having the same contractor on both efforts creates perverse incentives that will lead to impaired objectivity OCIs. *Id.* The protester maintains these OCIs are necessarily shared by all MACs, and cannot be mitigated, and therefore the agency erred by amending the solicitation to permit MACs to compete. *Id.*

Timeliness

As a preliminary matter, the agency argues this protest should be dismissed because it was not timely filed. *See* Agency Req. to Dismiss. Specifically, our Regulations require protests "based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." 4 C.F.R. § 21.2(a)(1). In this case, the protest was filed on June 21, 2021, at 1:14 p.m. approximately three days and two hours beyond the closing time of 11:00 a.m. on June 18.

Our Regulations also provide, when computing any "period of time," if our Office is closed for all or part of the last day, the period of time extends to the next day on which our Office is open. 4 C.F.R. § 21.0(d). However, our decisions have consistently stated that a time set for receipt of proposals or quotations is not a "period of time" in the sense contemplated by 4 C.F.R. § 21.0(d), and therefore the time for filing a protest of the terms of a solicitation is not extended when our Office is closed. *See*, *e.g.*, *FitNet Purchasing Alliance*, B-400553, Sept. 24, 2008, 2008 CPD ¶ 177 at 2; *Guam Shipyard*, B-294287, Sept. 16, 2004, 2004 CPD ¶ 181 at 3-4. As a result, our decisions have concluded that, when our Office will be closed at the time set for receipt of proposals or quotations, protests must be filed by 5:30 p.m. on the last day on which our Office is open prior to the closing time. *Id.*

Accordingly, under our Bid Protest Regulations this protest is untimely. Nevertheless, our Regulations also provide that we may consider an untimely protest for good cause

shown, or where we determine that a protest raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). We find that this case presents unusual facts that merit granting an exception to our timeliness rules for good cause shown.

Specifically, the timing of the enactment of the Juneteenth National Independence Day Act raises an unusual factual situation. The Act was signed into law shortly after 4 p.m. on June 17. Prior to that time no one, including the protester here, had reason to expect our Office would be closed on June 18. Once the closure was established by law, our Regulations, as interpreted by the two cases described above, would normally require that any protest challenging the solicitation here would have to be filed prior to 5:30 p.m. on June 17 in order to be viewed as timely. Assuming that the protester was aware of the enactment at the instant the new law was signed, the protester would have been left with slightly more than an hour in which to accelerate its preparation and file its protest. Under these unusual circumstances, the protester has shown good cause for its failure to file by 5:30 p.m. on June 17.

While we conclude that the time for filing under this circumstance can roll, in essence, to the next day our Office is open, we now consider whether the protest had to be filed by the same hour of the day as would have been required without the unexpected closing of our Office.

As stated above, under section 21.2(a)(1) of our Regulations the protest would normally have to be filed prior to the time of bid opening, or the time that proposals were due. The intervenor argues that, even if we agree that the protester had good cause for failing to file by 5:30 p.m. on June 17, our Office should apply the same hour of the day requirement that would apply under section 21.2(a)(1) on the next day our Office is open. *See* Intervenor's Req. to Dismiss at 2. We conclude our Regulations are silent on the imposition of an hour of the day deadline under the circumstances of an unanticipated closure, and we decline to adopt the rule urged by the intervenor.

In essence, the intervenor proposes an extension of our existing Regulations and decisions into this, as yet, uncharted territory. In our view, this circumstance is sufficiently unusual that no party could have known what the rule would be in this circumstance, and our Regulations do not compel any particular answer. In addition to the silence of our Regulations, our prior decisions have not addressed the situation here. To be specific, our decisions in *FitNet Purchasing Alliance* and *Guam Shipyard* did not address the situation where the closing of our Office could not be foreseen, and filing the protest on the first day our Office reopens is a reasonable solution to this timeliness challenge. For these reasons, we intend to consider this protest for good cause shown, despite the fact that it was not timely filed.

Organizational Conflicts of Interest

Turning to the substance of the protest, the protester argues MAC contractors have two unmitigable OCIs. Protest at 9-11. 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. The protester alleges MACs have both unequal access to information and impaired objectivity OCIs. Protest at 9-14.

Unequal Access

First the protester argues MACs have access to nonpublic information that will give them a competitive advantage in this procurement. Comments at 12-14. Specifically, the MACs allegedly have access to the agency's audit systems and non-public audit methodology for desk reviews and cost reports. *Id.* Moreover, the agency has specifically declined to publish these documents in the solicitation, because disclosing them would undercut the effectiveness of the audit methodology.[2] *Id.* The protester contends this non-public knowledge would aid the MACs in proposing a superior technical approach because the MACs have specific knowledge of the procedures to be used in carrying out the contract. *Id.* Additionally, the MACs have non-public information about the workload that has historically been necessary to perform the requirements. Comments at 12-13.

In support of its position, the protester notes the agency has acknowledged that access to non-public audit information is significant and could form the basis of an OCI. *Id.* at 12. Specifically, the solicitation provides that vendors may be ineligible for award due to an OCI if they have certain business relationships with Medicare providers or assist in the preparation certain Medicare cost reports, because of the risk of divulging the agency's audit procedures. AR, Tab 8.2, Revised RFQ Clauses and Terms at 13.

An unequal access to information OCI exists when a firm has access to nonpublic information as part of its performance of a government contract and when that information may provide the firm a competitive advantage in a later competition for a government contract. FAR 9.505(b); *CapRock Gov't Solutions, Inc.; ARTEL, Inc.;*

[2] In this regard, the agency notes that Medicare providers are required to submit cost reports, which are subject to audit. *See* AR, Tab 2, Pre-Solicitation Conflict of Interest Risk Assessment at 1-2. The agency has an established audit program that uses a non-public audit methodology. *Id.* According to the agency, the audit methodology must remain non-public to retain its audit effectiveness, and is only provided to contractors on an as-needed basis. *Id.* For example, a Medicare provider with access to the agency's audit methodology could leverage this information to "set up financial gains." *Id.*

Segovia, Inc., B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 25. 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.

It is well settled, however, that a vendor may possess unique information, advantages, and capabilities due to its prior experience under a government contract--either as an incumbent contractor or otherwise; further, the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. *CACI, Inc.-Fed.*, B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 at 10; *MASAI Techs. Corp.*, B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. *Council for Adult & Experiential Learning*, B-299798.2, Aug. 28, 2007, 2007 CPD ¶ 151 at 6; *Government Bus. Servs. Group*, B-287052 *et al*., Mar. 27, 2001, 2001 CPD ¶ 58 at 10.

Based on the record presented here, we have no basis to conclude the MACs have an unequal access to information OCI. Preliminarily, while the protester is correct that the solicitation provided that access to the agency's non-public audit methodology could create an OCI if a vendor has certain business relationships with Medicare providers, the OCI identified by the agency in that case is based on an impaired objectivity type OCI, not an unequal access to information OCI. *See* AR, Tab 8.2, Revised RFQ Clauses and Terms at 13. More significantly, the protester has not alleged that any MACs have business relationships with Medicare providers, so this concern is simply not relevant to the question of whether MACs have an OCI by virtue of their contract performance.

Further, while access to the agency's audit procedures and historical workload information may provide some competitive advantage to the MACs, there is nothing in the record that suggests that the MACs have access to source selection information or another firm's proprietary information, nor has any party alleged any evidence of inappropriate preferential treatment. That is to say, the fact the MACs are familiar with certain non-public agency procedures appears to be a normally occurring incumbent advantage that the agency is not obliged to neutralize. *See Superlative Technologies, Inc.; Atlantic Systems Group, Inc.*, B-415405; *et al.*, January 5, 2018, 2018 CPD ¶ 19 at 6-7 (no OCI where offerors had access to significant non-public mission information, but did not have access to another firm's proprietary information or source selection information.); *Onsite Health Inc*, B-408032; B-408032.2, May 30, 2013, 2013 CPD ¶ 138 at 8-10 (incumbent familiarity with non-public agency processes not an OCI). Accordingly, the fact that the MACs are familiar with the agency's audit procedures and

workload requirements as a result of their ongoing contract performance is not an unequal access to information OCI. This protest allegation is denied.

Impaired Objectivity

Next, the protester argues that the MACs have an unmitigable impaired objectivity OCI because the MACs will be able to steer work to the MADRID contract. Comments at 14-17. Specifically, the protester contends that, because the MACs establish their own audit plan, MACs have significant control over which work is performed and which work becomes backlog that will eventually be transferred to the MADRID contractor. *Id.* For example, a MAC contractor might seek to steer complex work that might be unprofitable under the MAC fee structure to the MADRID contract so it could be performed on a time-and-materials basis with potentially higher rates. *Id.* The protester also contends that the MADRID contractor acts, in effect, as a check on the MACs performance, and if the same contractor performs both functions they will not be able to discharge both roles objectively. *Id.*

In this vein, the protester notes that the agency initially identified this issue as an OCI, but later inexplicably reversed course and permitted MACs to compete. *Id.* In this regard, the protester highlights that the contemporary email correspondence within the agency does not provide any basis for the reversal other than a desire to avoid potential litigation from the MACs, which is an inappropriate reason to amend the solicitation. *Id.*

As relevant here, an impaired objectivity OCI arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR 9.505-3, 9.505(a); *see Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 12. 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. We review agencies' OCI investigations for reasonableness; 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. *TISTA Sci. & Tech. Corp., Inc.*, B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17 at 6

We find the protester's arguments unpersuasive. First, and most significantly, it does not appear from the record that MACs will actually be able to manipulate workflow or steer work from the MAC contract to the MADRID contract. While MACs propose their own audit plan, this audit plan must be approved by the agency. Comments at 11-12. Further it is the agency, not the MACs, that will determine which backlog cases will be assigned to a MADRID contractor for completion, and will decide whether to move work from a MAC to the MADRID contract. *See* Contracting Officer's Statement (COS) at 4. Put another way, the agency is in control of the flow of work between the contracts on both sides, and a MAC cannot effectively steer work to the MADRID contract.

Additionally, regarding the alleged OCI based on the protester's general assertion that the MADRID contractor acts, in effect, as a check on the MACs performance, this assertion is not supported by the record. As the contracting officer notes, the MADRID contract does not include any "look back" or compliance type reviews of previously completed MAC work; rather, the MADRID contract is focused on the completion of open or outstanding work not yet performed by MACs. COS at 3. A protester must identify "hard facts" that show the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *Telecommunication Systems, Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4 (*citing PAI Corp. v. United States*, 614 F.3d 1347, 1352 (Fed. Cir. 2010)). Here, there is nothing to support the allegation that the MADRID contractor will be reviewing the work of MACs, whether their own or that of other competing MACs. Accordingly, we see no basis to conclude that there is an impaired objectivity OCI on these facts.

Moreover, even assuming it is possible MACs could steer work to themselves as a MADRID contractor, it is not clear that this would, necessarily, impair the contractor's objectivity. For example, the eventual MADRID awardee may propose rates low enough that it would not be profitable to steer work from their MAC to the MADRID contract. In that case, there would be no financial incentive to steer work to themselves. That is to say, even if we grant, for the sake of argument, that there is potential for an OCI if a MAC makes an offer and proposes high rates, such an OCI is, at this stage, largely hypothetical.

The solicitation requires vendors to submit a proposal volume addressing OCIs, and it is possible that the agency, in its evaluation, may ultimately conclude that one or more MACs do, in fact, have an OCI. However, even if it is possible that one or more MACs may propose in such a way that creates an impaired objectivity OCI, we believe the agency was reasonable in concluding that all MACs need not be categorically excluded from the procurement.

Finally, while the protester is correct that the contemporaneous email correspondence does not provide a clear explanation for the contracting officer's reversal of the solicitation's previous exclusion of MACs, the contracting officer explains that the agency conducted numerous internal discussions about the subject, and those discussions may not have been captured in those emails. *See* COS at 2. Moreover, the contracting officer provides an explanation of the agency's decision to change the solicitation, which is consistent with the contemporaneous evidence. Specifically, the contracting officer states that following a series of internal discussions, the agency concluded that the MACs would not necessarily be able to steer work to the MADRID contract, and therefore a categorical exclusion of MACs was no longer appropriate or

defensible. *Id.* at 2. As discussed above, we agree that this was a reasonable conclusion. On the record before us, we see no basis to object to the agency's decision.

The protest is denied.

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General Counsel