



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: The Analysis Group, LLC

File: B-401726; B-401726.2

Date: November 13, 2009

Thomas L. McGovern III, Esq., Michael D. McGill, Esq., William F. Ferreira, Esq., and Edward C. Eich, Esq., Hogan & Hartson LLP, for the protester.

James. J. McCullough, Esq., Steven A. Alerding, Esq., and William S. Speros, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, an intervenor.

Liana D. Henry, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency allowed successful vendor to make material revision that made its quotation acceptable, but did not provide protester similar opportunity to revise its quotation, agency improperly engaged in discussions only with successful vendor, and protest on that ground is sustained.
 2. Protest that successful vendor has “impaired objectivity” organizational conflict of interest (OCI) is sustained where record (1) shows that successful vendor’s advice and assistance could lead to agency’s procurement of other products and services offered by successful vendor, and (2) does not show that agency adequately considered possibility of “impaired objectivity” OCI, or whether such a potential OCI could be avoided, neutralized or mitigated.
-

DECISION

The Analysis Group, LLC (TAG), of Falls Church, Virginia, protests the issuance of a task order to Science Applications International Corporation (SAIC), of McLean, Virginia, under request for quotations (RFQ) No. GSC-TFMG-09-32148, issued by the General Services Administration (GSA) to acquire--on behalf of the Department of the Air Force’s Deputy Chief of Staff for Operations, Plans, and Requirements, Strategic Plans and Policy Division (A5XP)--various support services in connection with A5XP’s mission. TAG asserts that the agency did not evaluate quotations in

accordance with the terms of the solicitation, improperly held discussions only with SAIC, and did not adequately consider circumstances showing that SAIC may have an “impaired objectivity” organizational conflict of interest (OCI).

We sustain the protest on the bases that the agency improperly conducted discussions solely with the winning vendor, SAIC, and did not adequately consider whether SAIC had an impaired objectivity OCI.

BACKGROUND

The RFQ was issued as a negotiated “best value” acquisition, specifying that a task order would be issued under the successful vendor’s Federal Supply Schedule (FSS) contract on the basis of price and several non-price considerations, with the non-price considerations being collectively more important than price. RFQ at 12-1. The agency received two quotations, from TAG and SAIC. After hearing oral presentations from both vendors and evaluating their quotations, the agency determined that SAIC’s quotation was the best value. In this regard, while SAIC’s quotation was higher priced than TAG’s, it was rated excellent overall, whereas TAG’s was rated acceptable. Agency Report (AR), exh. 19. The agency therefore made award to SAIC.

DISCUSSIONS

TAG asserts that the agency improperly conducted discussions with SAIC without similarly affording it an opportunity to revise its quotation. According to the protester, this was prejudicial because the agency identified a number of significant weaknesses in its quotation that it could have addressed in discussions.

Generally, discussions occur where a firm is afforded an opportunity to make a material revision to its proposal or quotation. Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 at 5.¹

Although the agency purportedly made award on the basis of initial quotations, without engaging in discussions with either party, the record shows that, subsequent to the submission of quotations and the oral presentations, the agency and SAIC had an exchange concerning the following indemnification provision included in SAIC’s quotation relating to performing contract activities in a high-threat environment:²

¹ Discussions may occur in the context of an FSS acquisition, and we will analyze the agency’s actions using the standards applicable to negotiated procurements. TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6 n. 3.

² Section 7.11 of the RFQ’s statement of work provided certain conditions that would be applicable in the event that contractor employees would be required to travel and perform contract requirements in high threat locations.

Customer agrees to save and hold harmless SAIC and its directors, officers, agents, employees and subcontractors (collectively, 'SAIC') from and against any demands, claims, suits, legal or administrative proceedings, damages, losses, costs, expenses, actions or causes of actions, and liabilities (including reasonable attorney's fees) ('Damages') that are asserted against or incurred by SAIC which arise out of, directly or indirectly, or relate in any way to any act or omission by SAIC, during the performance of services under this contract. SAIC agrees to promptly notify Customer of any claim for Damages against SAIC that is covered by this provision.

SAIC Written Price Quotation, Tab E, Assumptions and other Administrative Data, § 5.12.6. The record shows that the agency contacted SAIC in connection with this provision, AR, exh. 19, at 15, and that, in response, SAIC removed the indemnity provision from its quotation. AR, exh. 18. The agency asserts that its exchange with SAIC was merely a clarification of the quotation, and therefore did not trigger the requirement for it to hold discussions with TAG.

An open-ended indemnification clause such as this cannot legally be included in a government contract because it would subject the government to unknown liability; as a result, it creates a potential violation of the Antideficiency Act, 31 U.S.C. § 1341 (2006). Assumption by Gov't of Contractor Liability to Third Persons--Recon., B-201072, May 12, 1983, 83-1 CPD ¶ 501 at 6. Thus, the inclusion of the indemnification provision in SAIC's quotation rendered the quotation as submitted ineligible for selection. By affording SAIC an opportunity to remove the indemnification clause from its quotation, the agency essentially allowed SAIC to make its unacceptable quotation acceptable. This unquestionably constituted a material revision to the quotation and, therefore, discussions. Since discussions with SAIC occurred, the agency was obliged to afford TAG a similar opportunity to participate in discussions. Global Analytic Info. Tech. Services., Inc., supra.

The agency also asserts that, even if the exchange resulted in a modification of SAIC's quotation, this was unobjectionable because, in the context of an RFQ that does not include a late submission provision (the case here), agencies are free to accept late modifications to quotations. This argument is without merit. While the agency is correct that there is an exception to the general rule against acceptance of a late submission in the context of an RFQ that does not include a late submission provision, see KPMG Consulting, LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 at 11-12, the exception only applies where the agency's acceptance of such a late submission would not be prejudicial to any other competitor. Id. Allowing one firm an opportunity to revise its quotation without also allowing the other firms in the competition a similar opportunity--that is, unequal treatment--is precisely the prejudice to which the standard refers. Compare Payne Constr., B-291629, Feb. 4, 2003, 2003 CPD ¶ 46 at 6 (other competitors were not prejudiced by agency's acceptance of late submission from protester because they had been afforded an

opportunity to revise their quotations). Thus, while the agency indeed was permitted to accept a late modification from SAIC, it was required to provide equal treatment to the protester by providing it an opportunity to revise its quotation. Because the agency did not do so, we sustain the protest on this ground.

OCI

TAG asserts that SAIC has an “impaired objectivity” OCI. In this regard, the RFQ requires the successful firm to provide expertise to the Air Force in a number of subject areas. For purposes of this allegation, task number three in the statement of work is the focus of TAG’s protest. Under that task, the successful contractor will be required to provide a broad range of objective advisory and assistance services, technical analysis, and support in the area of counter-proliferation of weapons of mass destruction, specifically, combating chemical, biological, radiological and nuclear (C-CBRN) weapons. RFQ, Statement of Work (SOW), at 2-31 to 2-41. According to the protester, this poses an impaired objectivity OCI for SAIC because the firm also sells C-CBRN-related detection and prevention products and services. The protester maintains that SAIC will be unable to provide objective advice in this area because any advice given could affect sales of its products.

The agency responds that it considered whether SAIC might have an impaired objectivity OCI and concluded that it did not. In this connection, the record shows that the RFQ included a requirement for all concerns to submit an OCI statement disclosing information concerning actual or apparent OCIs. RFQ at 11-5. The agency asserts that the contracting officer reviewed SAIC’s information and determined that there was no reason to conclude that SAIC had an OCI. The agency also maintains that it intends to monitor SAIC during performance to ensure that there are no OCIs.³

Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible. Federal Acquisition Regulation (FAR) § 9.504. The FAR specifies that an OCI exists where, because of 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. See FAR § 2.101. Situations that create potential OCIs are further discussed in FAR subpart 9.5 and decisions of our Office. One type of OCI, an impaired objectivity OCI, is created when a contractor’s judgment and objectivity in performing contract requirements may be impaired due to the fact that the substance of the contractor’s performance has the potential to affect other interests of the contractor. Alion Sci. & Tech. Corp.,

³ The agency also states that SAIC submitted a draft OCI mitigation plan after issuance of the task order at the kick-off meeting for the contract. Neither the agency nor SAIC produced a copy of this draft OCI mitigation plan during the pendency of the protest.

B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 at 5-6. In order to ensure that the agency has acted in a manner consistent with these requirements, contracting officers are required to give meaningful, deliberate consideration to information that may shed light on potential OCIs. Toward that end, agencies must give consideration not only to information that may have been furnished by a firm, but also must consider, as appropriate, the scope of the products manufactured or services provided by the firm or its competitors. *Id.* at 11. In other words, an agency may not, in effect, delegate to the contractor itself complete responsibility for identifying potential OCIs.

Here, the record shows that the contractor will be involved in a full range of activities in support of the Air Force's C-CBRN program. Task three of the contract specifies the following activities:

The contractor shall support and provide AF [Air Force] unique C-CBRN operational & hazard expertise to inform and develop AF-wide DOTMLPF [doctrine, organization, training, material, leadership and education, personnel and facilities] counter WMD [weapons of mass destruction] solutions and capabilities. Support to this task area requires codifying counter WMD in AF operational plans, policy, doctrine, guidance and procedures; integrating and synchronizing AF efforts across the full counter WMD spectrum; supporting and executing the CSAF [Chief of Staff of the Air Force] C-CBRN Master Plan & Roadmaps; providing MAJCOM [major command] support to execute C-CBRN activities; developing and implementing C-CBRN CONOPS [concept of operations]; institutionalizing C-CBRN into AF education, training and exercises . . . ; leveraging science and technology (S&T) and research, development, test and evaluation (RDT&E) to refine hazards, reduce risk and demonstrate capabilities; incorporate counter WMD operational concepts into AF standards into programs and budgets; and manage AF C-CBRN operations globally. The contractor shall support the AF/A5XP mission by assisting them in establishing AF operational policy, strategy, CONOPS, and doctrine on combating WMD, CP [counter-proliferation], and C-CBRN programs.

RFQ at 2-32. In addition to the requirements for task three detailed above, the RFQ includes specific tasks ranging from conducting research and analysis and presenting the results of such efforts in briefing papers and other formats (subtask 3.1), to providing support in developing agency strategy, policy, doctrine and concepts of operations for the C-CBRN program (subtask 3.2). Additionally, and perhaps most significant, the RFQ calls for the contractor to perform detailed technical analyses that will relate directly and predictably to the agency's selection of C-CBRN products and services. In this regard, subtask 3.3 specifically provides:

The contractor shall provide technical analysis addressing issues from the point of view of 'what does this mean to the USAF' on questions

that arise in the C-CBRN technical domain. The contractor shall provide technical research and operational evaluations to assess, interpret, shape, and advise the Air Staff and other AF organizations regarding what tests results mean for the operator. This understanding along with good testing and analysis underpin the AF's policy, doctrine, tactics, techniques and procedures (TTPs), as well as what equipment is best to address the threat. The general categories of analysis and quantitative assessment the contractor shall perform include: Threat and Vulnerability Assessments, Basic Challenge Sources, Attack Characterization, Atmospheric Transport Dispersion Modeling, Chem-Bio Defense (CBD) Equipment Operations, AF Operations, Risk Assessment/Management, Hazard Modeling and Analysis, Detector Capability Analysis, Decontamination Requirements Analysis, Technical Design and Conduct of Laboratory and Field Testing, which support the development and implementation of the C-CBRN CONOPS and other supporting efforts.

RFQ at 2-36-2-37. Also specifically required under subtask 3.3 is contractor support to ensure that development and acquisition programs are consistent with Air Force key performance parameters (discrete standards that new equipment must meet before the Air Force will purchase it), as well as support in connection with the Air Force's operational testing and experimentation related to its analysis of C-CBRN products, services and procedures. RFQ at 2-37-2-38.

Thus, the contractor, while not performing acquisitions directly for the Air Force, will be engaged in a full spectrum of activities that, it appears, will lead directly and predictably to developing information that may be used by the Air Force to influence acquisition decisions.

Although performing the tasks under this order raises potential impaired objectivity OCI concerns, the record shows that the agency did little more than require the vendors to submit information that they felt was germane to determining whether or not they had an OCI. The agency did nothing to independently consider or evaluate whether SAIC had an OCI, despite that even a cursory review of the materials provided by SAIC in its quotation shows that the firm provides a full spectrum of C-CBRN products and services. AR, exh. 30. Notwithstanding that SAIC sells a full line of C-CBRN products and services, SAIC's quotation states elsewhere, in discussing the solicitation's requirement to assess C-CBRN test results, that its work "[e]nables objective based decisions on operational effectiveness of equipment; thereby influencing procurement and fielding decisions." SAIC Oral Presentation at 37. The record therefore appears to show that SAIC will be providing precisely the type of advice and assistance that could influence sales of its, or a competitor's, C-CBRN product line, but there is nothing to show that GSA actually considered these circumstances. The record as it relates to the agency's determination of whether SAIC had an OCI, consists, in its entirety, of the following:

SAIC acknowledges there are no known real or perceived conflicts of interest. SAIC agrees and certifies to disclose information concerning the actual or potential conflict with any proposal for any solicitation relating to any work in this effort, and to handle all actual or potential OCI situations in accordance with FAR subpart 9.5.

AR, exh. 19, at 6. While this statement addresses SAIC's own evaluation of whether there were any actual or apparent OCIs resulting from SAIC's performance of the work, there is nothing in the record showing that GSA ever made its own independent determination in this regard, as was required by FAR part 9.5. That is, there is no indication that GSA considered all of the available information in determining whether an OCI exists, or whether any potential OCI could be avoided, mitigated or neutralized. Rather, it appears that GSA essentially delegated this determination to SAIC. This was improper. Alion Sci. & Tech. Corp., *supra*. Accordingly, we also sustain the protest on this ground.

RECOMMENDATION⁴

We recommend that GSA reopen the acquisition and engage in meaningful discussions with TAG and, as necessary, with SAIC. We also recommend that the agency, in consultation with the Air Force, perform a detailed review, and document its consideration, of whether SAIC has a potential or actual OCI. If GSA identifies a potential or actual OCI, it should consider whether it can be avoided, neutralized, or mitigated. Finally, we recommend that the agency reimburse TAG the costs of filing and pursuing its protest, including reasonable attorneys' fees. TAG should submit its certified claim for its protest costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8 (f)(1) (2009).

The protest is sustained.⁵

Lynn H. Gibson
Acting General Counsel

⁴ We outlined our views concerning the merits of this protest during an outcome prediction alternative dispute resolution procedure, during which the cognizant GAO attorney recommended that the agency take corrective action consistent with the predicted outcome and our recommendation below. GSA declined to take the recommended action.

⁵ TAG raises numerous additional arguments challenging GSA's evaluation of quotations. These issues are academic in view of our recommendation that the agency reopen the competition and afford TAG and SAIC an opportunity to engage in discussions and submit revised quotations.