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## Decision

**Matter of:** NCI Information Systems, Inc.

**File:** B-412870.2

**Date:** October 14, 2016

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Daniel P. Graham, Esq., Bryan T. Bunting, Esq., and Tyler E. Robinson, Esq., Vinson & Elkins LLP, for the protester.

Kevin J. Maynard, Esq., Tara L. Ward, Esq., Gary S. Ward, Esq., and Nina S. Rustgi, Esq., Wiley Rein LLP, for HP Enterprise Services, LLC, an intervenor.

William B. Blake, Esq., Department of the Interior, for the agency.

Young H. Cho, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest alleging that agency failed to consider unmitigated organizational conflict of interest (OCI) is sustained where the agency failed to document its consideration of an impaired objectivity OCI identified by the awardee in its proposal.

2. Protest challenging the reasonableness of the agency's price realism is sustained where the various analyses undertaken by the agency did not support the agency's conclusion that awardee's price was consistent with its technical approach.

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### DECISION

NCI Information Systems, Inc. (NCI), of Reston, Virginia, protests the issuance of a task order to HP Enterprise Services, LLC (HPES), of Herndon, Virginia, by the Department of the Interior under request for proposals (RFP) No. D15PS00661, for information technology (IT) services. The protester argues that the agency failed to consider an organizational conflict of interest (OCI) and challenges the agency's evaluation.

We sustain the protest.

## BACKGROUND

The National Guard is a joint activity of the Department of Defense (DoD) comprised of reserve components of the United States Army and United States Air Force, the Army National Guard (ARNG) and Air National Guard (ANG). RFP,<sup>1</sup> Performance Work Statement (PWS) at 1. The National Guard Bureau (NGB), located in the Washington, DC area, known as the National Capital Region (NCR), is responsible for administering programs for the development and maintenance of the ARNG and ANG units in the 50 states, the Commonwealth of Puerto Rico, the District of Columbia, the Virgin Islands, and Guam. Id.

This procurement was conducted by the Department of the Interior (Interior) under the agency's franchise fund authority for the NGB. Agency Report (AR), Memorandum of Law (MOL) at 1. The RFP was issued by the Department of the Interior on September 4, 2015, under Federal Acquisition Regulation (FAR) subpart 16.5, to firms that had been issued a Department of the Army, Information Technology Enterprise Solutions - 2 Services (ITES-2S), indefinite-delivery, indefinite-quantity (IDIQ) contract, for IT services<sup>2</sup> to be provided to the ARNG, ANG, and other DOD agencies operating within the NCR. RFP at 1.

The solicitation contemplated the award of a single fixed-price task order with optional time-and-materials and fixed-price contract line item numbers (CLINs) to be exercised at the discretion of the government.<sup>3</sup> Id. The period of performance was to include one 12-month base period and three 12-month options and a final option period to end in April 2020. RFP, PWS at 8. Award was to be made on a best-value basis, considering the following factors: technical, past performance, and price. RFP at 39. The technical factor contained two subfactors (technical capability and management approach) and was more important than past performance. Id. When combined, the technical and past performance factors were significantly more important than price. Id. As relevant here, the solicitation stated that "[t]he [g]overnment reserves the right to evaluate price realism, should it be determined necessary." Id. at 41. The solicitation also stated that the

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<sup>1</sup> For administrative reasons, the solicitation was cancelled and reissued on October 6, 2015. The solicitation was amended five times. All citations to the RFP are to the conformed RFP provided by the agency.

<sup>2</sup> The services include network and telephone management, desktop support (classified and unclassified), information assurance, software engineering, and both server and desktop virtual infrastructure management, for 6,500 end users in the NCR. See generally RFP, PWS.

<sup>3</sup> These optional CLINs were for government directed initiatives (GFI) that would be initiated in response to special needs that may arise during the performance of the task order. See RFP, PWS at 43, 47.

government was more concerned with obtaining superior technical performance than lowest price. Id. at 39.

As relevant here, the solicitation required that offerors submit under the technical factor's management approach subfactor, a work breakdown structure (WBS) that identified labor categories and estimated hours for each labor category necessary for the successful completion of the effort. Id. at 37. The offerors were instructed not to submit any pricing or labor rate information in their technical proposals. Id.

For the price proposal, offerors were instructed to complete and submit price proposals using only a spreadsheet format provided by the solicitation, which required, as relevant here, offerors to provide the monthly price for each CLIN<sup>4</sup> for the base and option periods. Id. at 38; see also RFP, Price Sheet. The RFP did not require the submission of detailed information showing labor categories, labor rates, or hours in determining the offerors' fixed price. Instead, the RFP required pricing per CLIN (with quantities, monthly price, and total price). Id.; see also AR, Tab 39, Award Summary at 27.

Prior to the issuance of the solicitation, the contracting officer (CO), who was also the selection official for this procurement, concluded that a significant potential conflict of interest existed under the solicitation and established a general mitigation plan to substantially reduce potential conflicts of interest. AR, Tab 4, OCI Mitigation Plan. The mitigation plan acknowledged that under the task order, the contractor would manage all existing infrastructure and systems, and would use subjective judgment to provide technical expertise to the government concerning better use of existing resources, new IT and telecommunication equipment and system selection, and technology refresh activities. Id. at 2. The mitigation plan identified six specific tasks that could create a potential conflict of interest for the contractor because the contractor would "be in a highly influential position to determine ARNG and ANG systems' basic concepts and subsequently procure these items."<sup>5</sup> Id. The

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<sup>4</sup> There was a total of 13 CLINs, some encompassing multiple PWS areas; while others corresponded to a single PWS section. See RFP, Price Sheet.

<sup>5</sup> These tasks are: PWS section 3.8.1 (architecture management support, where contractor will assist in tool/hardware/software selection and advise the government of the system's inefficiencies and suggest improvements); PWS section 7.0 (ARNG Information System Division (ARNG-IMS) web and application services support, where the contractor will work with the government to establish requirements for web applications and identify needs for database-related tools and applications); PWS section 8.3 (local and metropolitan area network support, where contractor will propose enhancements to the infrastructure to ensure compliance with ANG, Air Force, and other DoD rules and regulations); PWS section 8.9.1 (architecture management support, where contractor will assist in tool hardware and software selection); and PWS sections 8.17 and 9.0 (GFI requirements, where contractor will

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mitigation plan explained that the identified tasks “include situations in which the contractor assists the [g]overnment with preparing partial technical specifications for either new or improved infrastructure/systems and then furnishes these items either as a prime contractor or through a subcontractor.” Id. at 3. The plan further observed that “[t]he contractor’s financial interest in recommending a particular product or system can be perceived to impair the contractor’s impartial objective assistance or advice to the [g]overnment, since it will be the contractor fulfilling the need based on the aforementioned specifications.” Id.

As a result, the mitigation plan anticipated several protective measures. First, the mitigation plan stated that the government would retain all decisionmaking authority pertaining to all final work products and recommendations. Id. at 3. Further, when required to present any technical specifications or system recommendations, the contractor would be required to present a minimum of one alternative technical solution, unless the requirement is waived by the government, to ensure that the government would be able to make an unbiased and objective decision. Id.

The mitigation plan also recommended the inclusion of several provisions in the solicitation and resulting task order “[t]o mitigate the instances of conflicts of interest” and to “protect the [g]overnment’s interests both during the solicitation phase and resultant task order.” See id. at 3-7. As relevant here, the mitigation plan recommended the inclusion of a provision that identifies the OCI and allows potential contractors to certify whether the company “is subject to an OCI situation, and if so, notify the [c]ontracting [o]fficer of the conflict and submit a mitigation plan.” Id.

As a result, the solicitation included section 3.4.3, titled “Organizational Conflict of Interest Certificate.” RFP at 48-51. As relevant here, this provision provided that:

b. This task order, in whole or in part, provides for the contractor to draft and/or furnish specifications in support of ARNG and ANG Information Technology (IT) infrastructures and/or systems. Further, this order may task the contractor to prepare or assist in preparing technical specifications that directly, predictably and without delay are used by the prime contractor to procure product[s] and services on behalf of the [g]overnment on the subject task order.

c. When required to prepare or assist with any technical specifications or system recommendations, the contractor shall present all possible

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define the work to be accomplished for the government and provide a quote to perform the requirement). AR, Tab 4, OCI Mitigation Plan at 2.

options to include all known possible alternatives to ensure [g]overnment will be able to make an unbiased and objective decision.

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e. In addition to the statements above, the contractor shall disclose any existing potential OCI of which it is aware . . . .

Id. at 49.

The agency received two timely responses, from NCI (the incumbent contractor) and HPES. As relevant here, HPES's proposal included an OCI disclosure statement indicating that "HP plans to separate into two new, publicly traded [companies]: one comprising HP's enterprise technology infrastructure, software and services businesses, which will do business as Hewlett Packard Enterprise Company (HPE), and one that will comprise HP's printing and personal systems businesses, which will do business as HP Inc. and retain the current logo." AR, Tab 10, HPES Initial Technical Proposal at B-4. The proposal also stated that "[t]o clarify and to mitigate, HPES has prepared a mitigation plan to remediate this concern, as well as, provide a corporate separation statement which further mitigates any concerns relating to HPES (soon to be HPE making recommendations for HP products, specifically printers and copiers.)" Id.

The mitigation plan submitted by HPES stated that HPES has reviewed its existing contracts and current assignments "to verify there are no known potential or actual [OCIs] existing [] for this effort." Id. at B-5. The mitigation plan also stated that, "[b]ased on the scope of the [PWS], the HPES team does foresee a potential OCI issue associated with making hardware and software purchasing recommendations associated with the [t]ask [o]rder," based on HP's announced plans to separate into HPE and HP Inc. Id.

HPES's mitigation plan further stated that it "establishes practices and procedures for the identification and mitigation of OCI at the [task order] level based on HPES'[s] participation in this effort performing as a prime contractor." Id. In this regard, the mitigation plan stated that "[t]he primary objective of this OCI [m]itigation [p]lan is to implement an organizational firewall" between the National Guard and "any outside entities."<sup>6</sup> Id. The mitigation plan also set forth HPES's process for

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<sup>6</sup> In this regard, the mitigation plan stated that this organizational and physical isolation establishes the environment to enable HPES to "(1) identify and properly disposition all projects for any potential OCI and (2) provide unbiased, impartial, and objective advice and assistance to NGB by preventing the inappropriate flow of information into or out of the program which might otherwise serve to provide an

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identifying OCIs, beginning “immediately upon receipt of the proposed project [s]tatement of [w]ork [SOW] or upon activation of an optional CLIN” and possible mitigation measures, including applying appropriate “[t]ask [o]rder [m]itigation [l]evels” to mitigate OCI issues presented during the performance of the task order.<sup>7</sup> Id. at B-5, B-8, B-11.

A technical evaluation panel (TEP) comprised of evaluators from the NGB evaluated the proposals.<sup>8</sup> Discussions were conducted with both offerors, who submitted final proposal revisions (FPRs) on November 23, 2015. The FPRs were evaluated as follows:

	NCI	HPES
Technical	Excellent	Satisfactory
Technical Capability	Excellent	Excellent
Management Approach	Excellent	Satisfactory
Past Performance	Low Risk	Very Low Risk
Price	\$97,292,670	\$53,823,589
IGCE	\$112,577,839	

AR, Tab 39, Award Summary at 9, 18-19, 32-33.

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unfair competitive advantage or bias.” AR, Tab 10, HPES Initial Technical Proposal at B-5.

<sup>7</sup> HPES proposed five levels of mitigation. AR, Tab 10, HPES Initial Technical Proposal at B-11. The proposal explained that level 1 represented “the standard OCI measures,” which “include the rigorous information control measures which mitigate and avoid any information advantage-type OCI”; that to mitigate specific concerns a firewall would be established at level 2; that “only when a specific potential OCI has been identified,” a firewall with additional enhanced OCI measures would be implemented at level 3; that level 4 measures “may require the assignment of the work to a non-conflicted subcontractor who will perform the tasking with the OCI issue and report the results of its work directly to the [g]overnment”; and that “[l]evel 5 recognizes that [task order] performance cannot be effectively mitigated; thus HPES will not bid as either a prime contractor or a subcontractor.” Id.

<sup>8</sup> Prior to the TEP’s evaluation of the price proposals, the independent government cost estimate (IGCE) was revised from \$214 million to \$112,577,839 based on the current actual hours required to accomplish the mission, adjusted for known mission growth, and the incumbent’s ITES-2S contract rates. AR, Tab 39, Award Summary at 9, 32.

HPES's satisfactory rating for the management approach subfactor reflected an excellent rating for three elements under the subfactor, and a poor rating for one element.<sup>9</sup> AR, Tab 28, HPES Final Technical Evaluation at 1-5. Of significance to this decision, the poor rating assessed for one element under the management approach subfactor reflects the assessment of three strengths and two significant weaknesses. Id. at 3-4. The first significant weakness was assigned because the TEP determined that, even as revised, the number of hours proposed by HPES did not appear to be sufficient to satisfy the requirements listed in the PWS.<sup>10</sup> Id. at 4. As an example, the TEP stated the IGCE identified considerably higher hours for PWS areas 4.0 and 7.0<sup>11</sup> and that overall, "the hours proposed are only [DELETED] of the government's estimate of hours needed to satisfy the requirements of the PWS." Id.

The second significant weakness was assigned because the TEP found that HPES's revised "WBS seems to show a considerable amount of shared resources across the proposed WBS."<sup>12</sup> Id. The TEP further explained that while it might be possible to share a limited number of resources across the contract, the majority of the technical positions needed to be fully dedicated to their tasks because "[e]ach of the PWS areas is highly specialized and requires full-time subject matter experts to

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<sup>9</sup> Under the element rated as poor, the government assessed the contractor's ability to manage and execute day-to-day program operations, staff capabilities and experience. See RFP at 40.

<sup>10</sup> The TEP noted in its evaluation of HPES's initial proposal that based on "experience and knowledge of the requirements, the number of hours listed does not appear to be sufficient to satisfy the requirements listed in the PWS." See AR, Tab 14, HPES Initial Technical Evaluation at 6.

<sup>11</sup> Under PWS section 4.0, the contractor is responsible for managing all aspects of a data processing center that hosts a multitude of ARNG-wide applications. RFP, PWS at 28. Under section 7.0, the contractor is to develop and maintain applications for web content management, web training, software applications, database applications, and web services. Id. at 30-33. The solicitation emphasizes that these "are customer service portals and quick [turn-around] is of paramount importance." Id. at 33.

<sup>12</sup> The TEP noted that the WBS in HPES's initial proposal did not contain sufficient detail to determine whether the labor mix was sufficient to support the requirement. See AR, Tab 14, HPES Initial Technical Evaluation at 6; AR, Tab 10, HPES Initial Technical Proposal at WBS-1 - WBS-2. HPES submitted a revised table that provided more detail for the WBS, however, the TEP found that this information indicated that "many of the positions do not show full FTE [full-time equivalent] hours to support a particular PWS requirement." Compare AR, Tab 24, HPES Final Technical Proposal at 8-10 with AR, Tab 28, HPES Final Technical Evaluation at 4.

adequately satisfy the requirement of the PWS . . . Sharing resources across task[s] creates holes in the coverage of areas of responsibility and is not efficient and effective.” Id.

In assigning a satisfactory rating for the management approach, the TEP also included the following note: “We do not believe that it is possible for this vendor to correct all of the significant weaknesses before the contract is awarded, should it be awarded to them; i.e.: The level of effort proposed on the revised proposal could not be corrected and there is still great risk with the staffing plan.” Id. at 5. The TEP nonetheless stated that “[t]aking this into account, we [assign] this vendor [a satisfactory rating] for the overall management approach.” Id.

Although the CO and the contract specialist evaluated price proposals, the TEP was asked to provide comments to the CO regarding the prices. As relevant here, the TEP provided a general observation that, “[b]ased on knowledge of the requirements and historical knowledge, it is believed that the prices and labor hours quoted by HPES are so low that HPES will not have the ability to satisfactorily satisfy the requirements.” AR, Tab 29, HPES Final Price Evaluation at 1. In this regard, the TEP noted that HPES’s proposed number of labor hours was [DELETED] percent of the government’s labor estimate (which was also identified in the technical evaluation), and HPES’s price was 52 percent of the IGCE. Id.

As relevant here, the CO noted the TEP’s concerns with regard to HPES’s proposed level of effort, in particular in PWS sections 4.0 and 7.0, and asked the TEP to articulate the specific risks raised by HPES’s proposed level of effort for those PWS sections. See AR, Tab 30, HPES Final Technical Evaluation Clarification at 3. The CO also asked the TEP to explain why NCI’s proposed level of effort for these areas, which was also lower than the IGCE, resulted in an excellent rating for NCI, while HPES’s proposed level of effort (also lower than the IGCE) resulted in a poor rating. Id.

In its response, the TEP explained that for section 7.0, NCI’s deviance from the IGCE was less than 10 percent, which in the TEP’s view, “provides adequate resourcing to meet the requirements of the PWS.” Id. at 1. In contrast, the TEP noted that HPES deviated from the IGCE by [DELETED] percent.<sup>13</sup> The TEP also noted that HPES proposed to “gain efficiencies by sharing resources across the different departments supported.” Id. The TEP further articulated that:

Although [DELETED] FTEs does provide overlap, it does not provide redundancy; there is too much work for one person to accomplish in the event the other FTE is not available to work, which places the

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<sup>13</sup> The IGCE estimated six FTEs, NCI proposed six FTEs, and HPES proposed [DELETED] FTEs. See AR, Tab 39, Award Summary at 35.



deliverables for this area at risk. Many of the areas within the PWS are highly specialized, which means FTEs in one area may not have the technical expertise to support deliverables in other areas. Further, since the proposed HPES work force is significantly reduced from the [g]overnment IGCE, the [g]overnment does not think HPES will be able to share resources without placing multiple deliverables at risk. [An area] such as [w]eb [s]ervices simultaneously supports the approximately 2500 [NGB] employees, to include a member of the Joint Chiefs of Staff; the 54 States, Territories, and the District of Columbia; and the [ANG]. Without proper FTE resourcing, the support to this area is at risk.

Id.

With regard to PWS section 4.0, the TEP acknowledges that the IGCE was based on historical data for a physical information system environment, whereas PWS section 4.0 reflects efficiencies gained from moving to a virtual information system environment. Id. The TEP also explained that, notwithstanding efficiencies gained in a virtual environment, there was still a need for what the TEP refers to as “touch labor”; and that under this PWS section, the “touch labor” pool would have to be divided between two locations based on the requirements of the solicitation. Id. In this regard, the TEP did not think that the HPES proposal provided enough personnel to adequately support the two locations. Id.

Because the TEP noted realism concerns with both the level of effort and the price proposed by HPES, the agency decided it needed to conduct a price realism analysis. AR, Tab 39, Award Summary at 26. The agency performed several different analyses in this regard, and found that “[w]hile the price proposed by HPES may present some degree of risk, the information presented clearly shows that the proposed price is commensurate with the proposed technical approach and reflects realistic labor category pricing.” Id. at 26-31. The agency also concluded that “the government cannot reach a determination that HPES’[s] proposed price is clearly unrealistic” based on “all circumstances presented and the fact that the vast majority of this effort is [fixed price], which significantly reduces risk to the government.” Id. at 31.

In the CO’s tradeoff analysis, the CO acknowledged that the overall level of effort proposed by both offerors was less than that of the IGCE; and that as between the two offerors HPES proposed a lower level of effort than NCI. Id. at 34. The CO also acknowledged that the TEP identified as a risk to the government, HPES’s proposal to utilize “less staff devoted to the effort” than NCI. Id. The CO then compared the difference in the proposed level of effort between the offerors by CLIN (or groups of CLINs), considering the allocation of the level of effort identified in the IGCE by CLIN (or groups of CLINs). Id. at 34-35. As a result, the CO noted that HPES’s proposed level of effort for PWS sections 4.0 and 7.0, which the TEP

had identified as areas of concern, were in task areas that were relatively low staffed in the IGCE.<sup>14</sup> Id. at 34-35. The CO concluded, therefore, that “any actual performance problems in these identified areas due to low staffing levels could be corrected with relatively minor staffing changes,” and that “[m]inor staffing changes, or other action, necessary to correct less than satisfactory performance would be provided under the [fixed-priced task order].” Id. at 35. The CO also noted that while the offerors’ prices were “built upon an intended level of effort,” the proposed levels of effort were not contractually binding. Id. Thus, since the anticipated contract here is task-driven, if the contractor’s performance is less than satisfactory, the contractor would be obligated to make the necessary changes at no additional cost to the government. Id.

The CO’s tradeoff analysis focused on the “balance between the risk associated with HPES’[s] proposed management approach/WBS and the higher price presented by NCI.” Id. The CO acknowledged that in addition to the risks noted with HPES’s proposed estimated level of effort, “HPES would require more time to achieve full security clearances and would likely have more staff turnover than NCI as the incumbent contractor.” Id. However, the CO found that considering the ratings, the evaluated strengths and weaknesses provided by the TEP, and the weights assigned to the price/non-price factors/subfactors as specified in the solicitation, “NCI’s prime premium of an evaluated \$43,469,080.85 more than HPES is not worth the reduced risk presented in NCI’s proposal. While there is little doubt that NCI can meet or exceed the requirements, HPES’[s] technical ratings equate to an ability to successfully perform the requirements at a price that is substantially less.” Id. As a result, HPES’s proposal was determined to offer the best value and was selected for award. Id.

On June 27, 2016, NCI was notified of the award decision. The protester was debriefed on July 1, and this protest followed.

## DISCUSSION

NCI argues that the agency failed to consider an unmitigated OCI, challenges the reasonableness of the agency’s price realism analysis, and raises other evaluation challenges.<sup>15</sup> We have fully considered all the arguments raised by NCI but sustain the protest only on the grounds discussed below.

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<sup>14</sup> These sections were contained in CLINs that represent approximately 14 and 5 percent, respectively, of the total level of effort. AR, Tab 39, Award Summary at 35.

<sup>15</sup> In filing and pursuing this protest, NCI has made arguments that are in addition to, or variations of, those discussed below.

In reviewing protests of an agency's evaluation and source selection decision, our Office will not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria, and applicable procurement laws and regulations. Velos, Inc., B-400500.8, B-400500.9, Dec. 14, 2009, 2010 CPD ¶ 13 at 11; Keeton Corrections, Inc., B-293348, Mar. 4, 2004, 2005 CPD ¶ 44 at 6. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, undocumented, or not reasonably based. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 4-5.

### Organizational Conflict of Interest

NCI argues that the government failed to consider HPES's unmitigated impaired objectivity OCI. Protest at 7-9; Comments at 3-11. The protester contends that HPES is a wholly-owned subsidiary of HPE, and that much of the existing IT infrastructure to be maintained is manufactured and supplied by HPE. Protest at 7-8. The protester argues that HPES's corporate affiliation with HPE creates an obvious conflict of interest that prevents HPES from performing "countless tasks" under the PWS in an objective and impartial manner. Id.

In its response to the protest, the agency states that it "recognize[s] that a potential conflict exists because HPES could be in a position to recommend products manufactured by its parent company." AR, COS at 6. The agency explains, however, that it reasonably anticipated the potential conflict posed by the procurement; planned and implemented a mitigation strategy; reviewed and accepted HPES's proposed mitigation plan; and determined that HPES's proposal did not present an OCI that would prevent an award. Id. at 6-7; AR, MOL at 4; Agency's Response to GAO Request for Additional Information (RFI) at 2-5.

In its comments, NCI points out that the agency's OCI mitigation plan was a "generic plan for any offeror and does not even mention HPE or HPES." Comments at 5. NCI further points out that the PWS contained numerous tasks for which HPES would uniquely be assessing the performance of equipment manufactured and sold by its corporate parent; recommending its parent's products; and choosing and evaluating products against which its recommendations will be compared. See id. at 6-8. NCI argues therefore that the agency's mitigation plan does not in any way mitigate HPES's impaired objectivity OCI. Id.

With regard to HPES's mitigation plan, NCI argues that the plan does not address HPES's ability to make unbiased and objective decisions regarding servers and infrastructure products manufactured by HPE. Id. at 8. Indeed, NCI contends that HPES's mitigation plan does not discuss these products at all. Id. NCI further points out that while HPES proposed an organizational firewall, the proposed

firewall does not wall off HPES's parent, HPE, and in any event, that no firewall procedure could adequately mitigate HPES's conflict of interest here. Id. at 9. An impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, 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(a); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6. The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

The primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.504; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Once an agency has given meaningful consideration to whether an OCI exists, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. See DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6; Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

Contracting officers are assigned several responsibilities in this area. First, a CO is required to identify potential conflicts of interest as early in the acquisition process as possible. FAR § 9.504(a)(1). Second, a CO is expected to anticipate potential significant conflicts, and recommend steps to resolve such conflicts, before the solicitation is issued. FAR § 9.504(c). As relevant here, if a CO determines that an apparent successful offeror has a conflict that cannot be avoided or mitigated, the CO is required to either: (1) notify and advise the contractor of the conflict and allow the contractor to address the conflict; (2) withhold the award, if after notifying the contractor, the CO concludes that the conflict cannot be resolved; or (3) submit a request to waive the conflict. FAR § 9.504(e).

During the development of the protest, our Office requested that the agency provide any existing documentation of the CO's analysis regarding HPES's OCI mitigation plan, as opposed to the analysis performed in the solicitation planning phase. GAO RFI. In response, the agency stated that "[o]ther than what has already been submitted in the [a]gency [r]eport, there is no other documentation regarding the [CO's] analysis of HPES's OCI mitigation plan."<sup>16</sup> Agency Response to GAO RFI at 2. In that response, the agency reiterated that it recognized the potential for an

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<sup>16</sup> The agency report, as submitted, does not include any documentation of an analysis by the CO of an OCI mitigation plan from HPES. Further, although HPES may have anticipated establishment of a firewall, a firewall arrangement is virtually irrelevant to an OCI involving potentially impaired objectivity. See, e.g., Nortel Gov't Solutions, Inc., B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 at 6.

OCI and developed a mitigation plan prior to releasing the solicitation, resulting in a solicitation that is structured to avoid OCIs because: (1) the contractor is required to propose alternative solutions in the event that it makes recommendations for hardware or software; (2) the government retains the right to make the ultimate decision regarding which hardware and software items to be procured; and (3) the CLINs under which equipment can be procured are optional, and allow the government to procure the items outside the HPES task order. Id. at 2-3. The agency contends that on these bases any “actual OCIs” are eliminated. Id. at 3.

We disagree that the agency’s OCI mitigation plan effectively mitigated the impaired objectivity OCI identified by HPES. Here, the fact that the agency identified a potential conflict of interest during the solicitation planning process, and attempted to provide generalized mitigation measures in the solicitation, did not address whether an award to a particular offeror, like HPES, would create an OCI. This is especially true where, as here, an offeror disclosed that it had a potential OCI and provided a mitigation plan. In a situation where an offeror has identified a potential OCI in its proposal prior to award, we have no ability to review whether the CO meaningfully considered the OCI where the agency has not documented its consideration.

Accordingly, since there is nothing in the record documenting that the agency meaningfully considered HPES’s potential impaired objectivity OCI or its proposed mitigation measures prior to award, we conclude that the agency’s actions here were not reasonable, and sustain this ground of protest.

#### Price Realism

NCI also challenges the reasonableness of the agency’s price realism analysis. See Protest at 15; Comments at 18-20. The protester contends that the CO unreasonably disregarded the TEP’s identified concern that HPES’s proposed prices and labor hours were so low that HPES would not be able to satisfactorily perform the work. See Comments at 18-20.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable, that is, whether proposed prices are too high. FAR § 15.402(a). A price realism evaluation, in contrast, applies cost realism analysis techniques to fixed prices, and is intended to evaluate whether proposed prices are too low by assessing an offeror’s understanding of the requirements. FAR § 15.404-1(d)(3); Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8. Where, as here, an agency states in a solicitation that it “reserves the right” to conduct a price realism analysis, the decision to conduct such an analysis is a matter within the agency’s discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 13 n.9.

Price realism may be used by the agency to evaluate whether an offeror can realistically perform its technical solution at the fixed price proposed in order to assess the risk inherent in an offeror's proposed approach. DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9; Triad Int'l Maint. Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 8. This is so because, unlike a cost realism analysis where a probable cost of performance is determined, no adjustment to price is permitted in a fixed-price contract. See id. Analyzing whether an offeror's fixed price is so low that it reflects a lack of understanding of solicitation requirements is the crux of a price realism evaluation. Science Applications Int'l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 10. A price realism analysis may also include consideration of whether an offeror's fixed price is so low that it creates a risk that the firm cannot perform its proposed technical solution at the price offered. See NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8. Where an agency elects to conduct a price realism evaluation, we will review that evaluation for reasonableness. Solers, Inc., B-409079, B-409079.2, Jan. 27, 2014, 2014 CPD ¶ 74 at 4.

The record shows that the TEP's evaluation of HPES's management approach raised concerns that HPES's proposed level of effort was too low and, in addition, that HPES's WBS indicated that this low level of effort was based on a plan to rely on a significant number of shared resources. AR, Tab 28, HPES Final Technical Evaluation at 4. As a result, the agency concluded it should conduct a price realism analysis to determine whether HPES's low price was consistent with its technical approach, reflected realistic unit pricing, and reflected an understanding of the requirements. AR, Tab 29, HPES Final Price Evaluation at 1; AR, Tab 39, Award Summary at 26. The various analyses undertaken by the agency, however, did not provide any logical support for a conclusion that HPES's low price was consistent with its technical approach.

For example, in determining whether HPES's proposed price was consistent with its technical approach, the agency compared HPES's proposed task order price to a price the agency calculated by applying the labor rates from HPES's ITES-2S IDIQ contract to the level of effort provided in HPES's WBS. AR, Tab 39, Award Summary at 27. The agency posited in its award summary that if its calculated price using the IDIQ labor rates was significantly higher than HPES's proposed price, the analysis would "suggest that the proposed price is not reflective of the proposed technical approach and is, therefore, unrealistic." Id. The agency concluded that because the comparison reflected a [DELETED] percent discount from the labor rates included in HPES's IDIQ contract, HPES's proposed price was consistent with HPES's technical approach. Id. However, this analysis does not address HPES's technical approach, nor does it consider the proposal's extensive use of shared resources--which the TEP identified as a concern.

Here, the various analyses performed by the agency do not provide any insight into whether HPES's proposed approach can be performed at the low price proposed or

whether HPES's low price reflected a lack of understanding of the solicitation's requirements. On this record, we cannot find reasonable the agency's conclusion that the various analyses performed by the agency "clearly shows that the proposed price is commensurate with the proposed technical approach and reflects realistic labor category pricing." Id. at 31. We also cannot find reasonable the agency's conclusion that the agency's analyses support the statement that "the government cannot reach a determination that HPES' proposed price is clearly unrealistic." Id. Accordingly, this protest ground is sustained.<sup>17</sup>

## RECOMMENDATION

As set forth above, we sustain the protest because the agency failed to document its consideration of the impaired objectivity OCI identified by HPES in its proposal. We also sustain the protester's challenges to the agency's price realism analysis. As a result, we recommend that the agency meaningfully consider and document its consideration of HPES's potential OCI and mitigation plan, as well as conduct a price realism analysis consistent with this decision.

We also recommend that the agency reimburse NCI its reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling  
General Counsel

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<sup>17</sup> NCI also argued that after submission of FPRs but prior to award, HPE announced a plan to spinoff HPES and merge it with CSC by March 2017, and that the agency failed to consider whether the announced divestiture of HPES and its merger with CSC would have any impact on HPES's proposed technical and management approaches; and failed to consider whether additional OCIs would be created. See Protest at 9-10; Comments at 22-23. During the development of the record, HPES has also acknowledged that one of its proposed key personnel is no longer available. See HPES Supplemental Declaration. In light of our decision sustaining this protest, the agency may want to take into consideration the potential impact of these changes.