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## Decision

**Matter of:** International Business Machines Corporation

**File:** B-410639; B-410639.2

**Date:** January 15, 2015

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Scott E. Pickens, Esq., William M. Jack, Esq., Amba M. Datta, Esq., and Ayanna N. Vest, Esq., Barnes & Thornburg LLP, for SRA International, Inc., the intervenor.

Stephanie Beaty, Esq., Defense Logistics Agency, for the agency.

Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency reasonably concluded that the protester had an organizational conflict of interest (OCI) and properly eliminated the protester from the competition where the agency found that a member of the protester's team was involved in developing the statement of work, solicitation, and other key acquisition documents and strategies, resulting in a biased ground rules OCI.

2. Agency's exchanges with the protester regarding its potential organizational conflict of interest (OCI) were not misleading where the agency reasonably led the firm into the area of concern--that is, the apparent OCI associated with a member of the protester's team's involvement in developing and drafting the acquisition documents and strategies for this procurement--so as to enable the protester to furnish any information or analysis it had to address the OCI concerns.

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### DECISION

International Business Machines Corporation (IBM), of Bethesda, Maryland, protests the Defense Logistics Agency's (DLA) decision declaring the firm ineligible to compete due to an organizational conflict of interest (OCI) under request for proposals No. SP4701-14-R-0010, for replacement and upgrade of the Defense Retiree and Annuitant Pay System (DRAS). IBM contends that the agency's

determination that it had an OCI was unreasonable and that the agency engaged in misleading discussions.

We deny the protest.

## BACKGROUND

DLA reports that the Defense Retiree and Annuitant Pay System, which establishes and maintains retired military pay accounts for more than 2.6 million military retirees, former spouses, and survivor beneficiaries, is built on antiquated mainframe technology dating back to 1980 that has exceeded the end of its planned lifecycle. Agency Report (AR), Tab 1, at 3. According to the agency, the current system consists of 2.3 million lines of custom code, 40 internal interfaces between sub-components for data file transfers, and over 220 external interfaces; is highly susceptible to errors; and is difficult and costly to maintain or modify. Id.

The RFP, issued on May 5, 2014, contemplated the award of an indefinite-delivery/indefinite-quantity contract with a 12-month base period and four 12-month options. RFP at 54. The solicitation seeks a contractor to replace and upgrade the current system with the Defense Retiree and Annuitant Pay System 2 (DRAS2), which will have the capability to establish and maintain pay accounts; calculate, certify, distribute, and report payroll; provide customer service; implement changes; support interfaces; and allow data management. RFP at 5-6.

As relevant here, the RFP stated the following regarding potential organizational conflicts of interest:

### **Organizational Conflict of Interest**

The Government requires that a contractor-provided Organizational Conflict of Interest (OCI) mitigation plan be submitted if a perceived or actual OCI exists.

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Notice. The Contracting Officer has determined that this acquisition may give rise to an organizational conflict of interest (OCI). . . . The Contracting Officer shall not award a contract until the Government determines any conflict of interest is reasonably resolved. . . . [B]efore being eligible to receive an award, the Offeror shall submit an acceptable OCI plan (including mitigation plans for any identified OCIs). As such, the Government may communicate with any Offeror at any time during the evaluation process concerning its OCI plan.

RFP at 155-56.

The agency received proposals from [DELETED] offerors, including IBM and SRA. AR at 18. As relevant here, IBM proposed to team with Booz Allen Hamilton (BAH) in performing the requirements of the contemplated contract. IBM's proposal identified two BAH employees as key personnel. AR, Tab 30, IBM Proposal, at 69, 72. IBM's initial proposal did not identify any actual or potential OCI or propose a mitigation plan. AR at 18. After establishing a competitive range of [DELETED] offerors, including IBM, the agency opened discussions. AR at 20.

On September 20, the agency sent a letter to IBM stating the following regarding potential OCIs:

On page 155 of the RFP, it is stated that "The Government requires that a contractor-provided Organizational Conflict of Interest (OCI) mitigation plan be submitted if a perceived or actual OCI exists." Please review your proposal to ensure that it addresses the requirement.

AR, Tab 34, Letter from DLA to IBM, Sept. 20, 2014, at 2.

On September 22, the contracting officer provided IBM with the following additional information regarding potential OCIs identified by the agency:

The DLA has identified a potential Organizational Conflict of Interest (OCI) in your response to Request for Proposal SP4701-14-R-0010. Mr. [DELETED] was or is an employee of Horizon Industries, a subcontractor to Booz Allen Hamilton, which is one of your named subcontractors.

Mr. [DELETED] may have knowledge of sensitive information that could provide an unfair advantage in submitting a proposal in response to SP4701-14-R-0010.

Please address this potential OCI and provide a mitigation plan. If you are unable to provide information regarding Mr. [DELETED] directly due to a non-disclosure agreement, BAH [Booz Allen Hamilton] or its subcontractor may email the information to my attention. The response is due by September 23, 2014 at 12:00 PM eastern standard time.

AR, Tab 35, Email from DLA to IBM, Sept. 22, 2014.

In response, IBM informed the agency that there was no potential or actual OCI regarding itself or its subcontractor BAH. AR, Tab 36, BAH Response, 23, 2014, at 1-2, 7-8. In this regard, IBM indicated that BAH had stated that it does not have access to Mr. [DELETED]'s deliverables; that Mr. [DELETED] had signed a non-

disclosure agreement prohibiting him from providing non-public information to BAH; and that BAH's relationship with Mr. [DELETED] was limited to processing his invoices and time accounting, not reviewing his work products. Id. at 7-8.

On September 26, the contracting officer provided the following notice to IBM:

As per the terms of the solicitation regarding OCIs at p.156, "If the Offeror's proposed action to resolve an organizational conflict of interest is not acceptable, the Contracting Officer will notify the Offeror, providing the reasons why its proposed resolution is not considered acceptable and allow the Offeror a reasonable opportunity to respond before making a final decision on the organizational conflict of interest."

IBM is advised that its 9/22/14 OCI mitigation plan is not acceptable. For this solicitation, IBM has teamed with BAH whose agent, Mr. [DELETED], has and will continue to be involved in numerous aspects of the DRAS2 acquisition and its post-award implementation. In accordance with the foregoing provision, IBM has until the close of business today to respond.

AR, Tab 41, Email from DLA to IBM, Sept. 26, 2014, at 3.

In response, IBM stated that its subcontractor, BAH, would end its employment of Mr. [DELETED], effective September 30. In addition, IBM stated that BAH had certified that no actual or potential OCI existed, and that Mr. [DELETED] was firewalled from BAH's proposal team and did not participate in the proposal effort or provide BAH with any procurement-sensitive information. AR, Tab 41, Email from IBM to DLA, Sept. 26, 2014, at 4.

After reviewing IBM's responses, as well as gathering additional information, the contracting officer found that IBM, through its subcontractor BAH, and through BAH's "agent/subcontractor," Mr. [DELETED], had assisted in the development of the solicitation, the performance work statement, and other acquisition documents for this procurement. AR, Tab 32, OCI Determination, at 12. The contracting officer concluded that this participation resulted in a biased ground rules OCI because BAH, through its agent, Mr. [DELETED], was in a position to affect the competition, intentionally or not, in favor of BAH. Id. In this regard, the contracting officer noted that Mr. [DELETED]'s financial and contractual interests were aligned with BAH; according to the contracting officer, Mr. [DELETED] had a direct financial relationship with BAH, since BAH directly pays Mr. [DELETED] to fulfill BAH's contractual obligations to provide acquisition support for this procurement. Id. Moreover, the contracting officer concluded that the fact that BAH was not the lead offeror submitting a proposal here was not significant because BAH still stood to gain financially from IBM receiving the award. Id. at 13. Finally, the contracting

officer stated that IBM's effort to mitigate the OCI by having BAH terminate its employment of Mr. [DELETED] did not cure the OCI because "once a party has influenced the specifications, the harm has already been done." Id. The contracting officer therefore found that IBM had an unmitigated OCI that required its elimination from the competition. After receiving a debriefing, IBM protested its elimination to our Office.

## DISCUSSION

IBM maintains that the agency's decision to eliminate it from the competition was unreasonable. Specifically, the protester contends that the contracting officer's OCI determination did not demonstrate the hard facts necessary to exclude a firm on the basis of an OCI. Supp. Protest at 25-26. IBM also contends that the agency conducted misleading discussions by failing to specify that the agency perceived a biased ground rules OCI, as opposed to indicating an unequal access to information OCI. Supp. Protest at 21. For the reasons discussed below, we conclude that the contracting officer's OCI determination and decision to eliminate IBM from the competition were reasonable, and that the agency did not engage in misleading discussions.

### Organizational Conflict of Interest

One of the guiding principles recognized by our Office is the obligation of contracting agencies to avoid even the appearance of impropriety in government procurements. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 2 (citing Federal Acquisition Regulation (FAR) § 3.101-1; Celeris Sys., Inc., B-404651, Mar. 24, 2011, 2011 CPD ¶ 72 at 7; Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5). The FAR requires that contracting officials 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 organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.

The first group consists of situations in which a firm<sup>1</sup> has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a

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<sup>1</sup> While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, we have held that there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 5 n.3.

government contract. FAR § 9.505-4. In these “unequal access to information” cases, the concern is the firm could gain a competitive advantage. CIGNA Gov’t Servs., LLC, B-401068.4; B-401068.5, 2010 CPD ¶ 230 at 10; L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 5.

The second OCI group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2; CIGNA Gov’t Servs., LLC, *supra*; L-3 Servs., Inc., *supra*. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements. L-3 Servs., Inc., *supra*; Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 11.

Finally, the third OCI group comprises cases where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3; L-3 Servs., Inc., *supra*. In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. L-3 Servs., Inc., *supra*.

The identification of conflicts is a fact-specific inquiry that requires the exercise of considerable discretion. Noonan & Assoc., B-409103, Jan. 10, 2014, 2014 CPD ¶ 29 at 4; Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; *see Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). We review an agency’s OCI investigation for reasonableness, and where the 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. Noonan & Assoc., *supra*; Oklahoma State University, B-406865, Sept. 12, 2012, 2012 CPD ¶ 276 at 9.

Here, based on our review of the record, we find no basis to question the contracting officer’s OCI determination. First, we find that the contracting officer performed an extensive review of the facts related to IBM’s potential OCI and reasonably concluded that IBM’s proposed team member, BAH, through its agent Mr. [DELETED], was closely involved in developing the ground rules for this procurement. Second, the record reflects that BAH expressed interest in competing for this requirement during the time that its agent, Mr. [DELETED], was still participating in developing and drafting the documents related to this acquisition. Therefore, as set forth in more detail below, we find the contracting officer’s

determination that BAH's involvement in this procurement resulted in an OCI for IBM to be reasonable and supported by the record.

In the contracting officer's 15-page, single-spaced OCI determination, he found that, until September 26, 2014, Mr. [DELETED] was directly employed by or contracted for and paid by BAH. AR, Tab 32, OCI Determination, at 14. Specifically, on July 16, 2013, the agency awarded a task order for DRAS2 acquisition support services to Horizon Industries Limited, which subcontracted with BAH. AR, Tab 21, Program Manager Declaration, at 3. At that time, BAH provided its personnel, specifically Mr. [DELETED], to perform the acquisition support services required under the subcontract, including assistance with, and preparation of, the acquisition strategy, performance work statement, analysis of alternatives, work breakdown schedules, business case analysis, cost and financial management documentation, milestone reviews, and in-progress reviews. Id. at 3-4. In August 2013, Mr. [DELETED] signed a document naming both BAH and Horizon as his affiliate organizations. Id. at 5.

As part of his OCI determination, the contracting officer obtained copies of the subcontract agreements under which BAH and its agent, Mr. [DELETED], were performing the acquisition support services. In reviewing these subcontract agreements, the contracting officer found that the base contract and option year contract both contained the full text of the DRAS2 program management office support services performance work statement. AR, Tab 32, OCI Determination, at 5. In this regard, the contracting officer noted the following with respect to BAH's (and Mr. [DELETED]'s) responsibilities in support of the DRAS2 program:

The [BAH] Task Order PWS states that its objective is to take DRAS2 "from its initiation to a fully operational interface." To do so, tasks "will include system drafting and compiling the [Business Capability Lifecycle] BCL acquisition documentation package as it evolves from a developmental to a functional baseline system. Support all acquisition life cycle activities from the BCL Investment Management phase through Full Deployment." . . . As per Task 1 of the PWS, and as set forth below, those required acquisition support services include, but are not limited to the performance, preparation, revision and updating of items such as the Acquisition Strategy, Performance Work Statements, Analysis of Alternatives, Work Breakdown Schedules, Business Case Analysis and Milestone Reviews:

1. Acquisition Strategies
2. Business Case Analysis
3. Business Process Reengineering Plans
4. Analyses of Alternatives
5. Test and Evaluation Strategy
6. Acquisition Program Baseline

7. Information Assurance Strategies
8. Information Support Plans
9. Communications Plans
10. Configuration Management Plans
11. Change Management Proposals
12. Performance Work Statements/Statements of Work/Statement of
13. Objectives
14. Work Breakdown Schedules
15. Service Level Agreements and related documentation.
16. Cost and Financial Management documentation.
17. Data Management Strategy
18. Risk Management activities
19. System Engineering activities, documentation and reviews
20. Investment Review Board certification activities

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Other relevant requirements of Task Order 0007 also include, but are not limited to, the following:

Task 1 Program Support Services--

- “Support by providing strategic direction and objectives recommendations for the program . . .”
- “Provide advice and recommendations for all elements in acquisition plans, including approaches, options, strategies, risks, contracting methods, competition, sources, cost, milestone schedule, etc.” . . .
- Provide advice, recommendation, and document support in all areas of the acquisition. This effort includes supporting program offices in researching and drafting specifications and standards, including Performance-based Work Statements (PWS); developing performance measures, providing consultation and recommendations; coordinating requirements documents and developing evaluation criteria. . . .

Id. at 2-3 (internal citations to the Task Order omitted; emphasis in original).

The contracting officer also received input from the agency’s program management office regarding Mr. [DELETED]’s role in developing the ground rules for this procurement. Specifically, an individual from that office who also served as a member of the source selection evaluation board advised the contracting officer that Mr. [DELETED] was “intimately involved in the development of the RFP documents, PWS [performance work statement], IGCE [independent government cost estimate], and Q&As [solicitation questions and answers].” AR, Tab 32, OCI Determination at 8. The program management office employee also informed the contracting officer that “[t]here is not an area of the DRAS2 program that [Mr. [DELETED]] hasn’t worked on.” Id. Finally, the contracting officer obtained a copy of

Mr. [DELETED]'s resume, which confirmed Mr. [DELETED]'s role in developing the acquisition documents for this procurement. Id. Based on all of the foregoing information, the contracting officer concluded that BAH, as a result of its employee's role in developing the ground rules for this procurement, had an actual or potential biased ground rules OCI.

Our review of the record indicates that the contracting officer, in his OCI determination document, reasonably concluded that IBM, through its subcontractor BAH and BAH's agent, assisted in the development of the RFP, the performance work statement, the IGCE, the solicitation amendments, and the responses to questions submitted by interested firms. AR, Tab 32, OCI Determination, at 12. As noted, the contracting officer concluded that this resulted in a biased ground rules OCI.<sup>2</sup>

Further, our review of the record indicates that, while Mr. [DELETED] was performing work on the acquisition documents and strategy for this procurement, BAH determined that it was interested in potentially competing for the procurement. Specifically, in April 2014, while Mr. [DELETED] was still assisting with the development of the acquisition documents and before the issuance of the solicitation, BAH sent an e-mail to the agency advising that it planned to submit a proposal in response to the solicitation, and asserting that no OCIs existed. Supp. Protest at 4; AR, Tab 29, April 21 Email from BAH to DLA, at 2. The e-mail did not request, and the agency did not provide, a response. AR, Tab 29, April 21 Email from BAH to DLA, at 1-4; AR at 14; Supp. Protest at 6. Ultimately, BAH decided to compete for the procurement as a subcontractor to IBM, rather than as a prime contractor.

Given the extensive involvement of Mr. [DELETED] in drafting and advising on the ground rules of this procurement, and given that there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules are at issue, L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 5 n.3, we find that the protester has not shown the contracting officer's OCI determination to be unreasonable. In this regard, although IBM responded to the contracting officer's OCI inquiries by asserting that Mr. [DELETED] was firewalled from BAH, and stating that BAH would end its employment of Mr. [DELETED], we believe that the contracting officer reasonably concluded that IBM had failed to mitigate the potential OCI here. As our Office has

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<sup>2</sup> The OCI determination also briefly discussed a perceived unequal access to information OCI. However, since we find that the agency reasonably identified a biased ground rules OCI, and since the agency's filings in response to the protest focus primarily on the biased ground rules OCI, we need not resolve whether the record supports the contracting officer's conclusion that an unequal access to information OCI also existed.

previously noted, due to the ultimate relationship of one entity to another, including an identity of interests between the entities, a firewall does not resolve an organizational conflict of interest involving biased ground rules. The LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197 at 5-6. Further, as noted by the contracting officer, termination of Mr. [DELETED]'s employment after he had influenced the ground rules for the procurement in no way avoided any potential harm in this regard.

While IBM disagrees with the contracting officer's determination to eliminate it from the competition because of an apparent conflict of interest, it has not shown that the contracting officer's conclusion was unreasonable or not based on hard facts. In its protest, IBM argues that the contracting officer's identification of a biased ground rules OCI is unreasonable since Mr. [DELETED] was unaware of the fact that BAH intended to compete for the procurement, and therefore he would have had no motivation to influence the ground rules of the procurement in a manner that would be potentially beneficial to BAH. However, BAH (and IBM) failed to inform the agency of the factual predicate for this argument (Mr. [DELETED]'s ignorance of BAH's intent to compete) during the contracting officer's investigation of the OCI. That is, even after the contracting officer raised concerns that Mr. [DELETED] had been involved in numerous aspects of the DRAS2 acquisition, the protester failed to inform the agency that Mr. [DELETED] was unaware of BAH's intent to compete under this procurement. Since the protester had the opportunity to furnish this information to the agency prior to its final OCI determination, but failed to do so, this claim provides no basis for concluding that the contracting officer's determination was unreasonable. In sum, because the agency has given meaningful consideration to whether a conflict of interest existed and its judgment has not been shown to be unreasonable, we will not substitute our judgment for that of the agency.

#### Discussions

Finally, IBM contends that the agency conducted misleading discussions because its communications with IBM regarding the potential OCI led the firm to believe that the agency was primarily concerned with an unequal access to information OCI, when the agency's "true concerns were biased ground rules and impaired objectivity OCIs." Supp. Protest at 21.

This argument is without merit. As an initial matter, we note that our Office has held that, where an agency conducts exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions. CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 15; Cahaba Safeguard Adm'rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 at 10; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 21.

Further, while a contractor is entitled to a reasonable opportunity to respond to perceived OCIs before a contracting officer withholds an award on the basis of an OCI, FAR § 9.504(e), we find that the agency fulfilled its responsibilities in this regard and that the agency's exchanges with IBM regarding the potential OCIs were not misleading. Here, the agency repeatedly put IBM on notice of the existence of a potential OCI resulting from Mr. [DELETED]'s involvement in this procurement. In fact, the agency specifically advised IBM that its decision to team with "BAH whose agent, Mr. [DELETED], has and will continue to be involved in numerous aspects of the DRAS2 acquisition and its post-award implementation," was the source of the potential OCI. AR, Tab 41, Sept. 26 OCI Emails, at 3. Thus, the agency's exchanges with IBM reasonably led the firm into the area of concern--that is, the apparent OCI associated with Mr. [DELETED]'s involvement in developing and drafting the acquisition documents and strategies for this procurement--so as to enable IBM to furnish any information or analysis it had to address the OCI concerns.

The protest is denied.

Susan A. Poling  
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