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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Valor Construction Management, LLC

File: B-405306

Date: October 17, 2011

Steven L. Reed, Esq., and J. Daniel Puckett, Esq., Smith, Currie & Hancock LLP, for the protester.

Karen L. Mulcahy, Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., Jennifer Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that award was tainted by organizational conflicts of interest is denied where the record does not support allegations that awardee's subcontractor had participated in the preparation of a report used by the agency in drafting the statement of work or that the subcontractor had access to nonpublic information that would have provided a competitive advantage.

DECISION

Valor Construction Management, LLC, of Pahokee, Florida, protests the award of a contract to the Ale Group, Inc., of Naples, Florida, under request for proposals (RFP) No. VA-248-11-RP-0098, issued by the Department of Veterans Affairs (VA) for the correction of life safety deficiencies at the VA's Miami Medical Center. Valor argues that the Ale Group should have been excluded from the competition because one of its proposed subcontractors, Strollo Architects, Inc., has an organizational conflict of interest (OCI) stemming from its prior performance on a related VA contract. The protester also challenges the agency's evaluation of the Ale Group's proposal under the technical approach factor.

We deny the protest.

BACKGROUND

The project to be awarded under the RFP here has two major components: correction of a large number of life safety deficiencies that are itemized in the solicitation, and preparation of a report identifying any life safety deficiencies that

are not listed in the solicitation. The deficiencies listed in the solicitation were identified in a life safety assessment (LSA) report prepared by Gobbell Hays Partners, Inc., in its capacity as a consultant to Strollo, under a task order (for a LSA of the Miami Medical Center) issued to Strollo in 2009. The Gobbell report, which was provided as part of the solicitation, identifies over 500 specific safety deficiencies and the corrective actions needed to remedy the deficiencies. For example, deficiencies and corrective actions identified for the first floor of Building 1 of the Medical Center included the following:

- Room No. A126A4B: Penetration around duct--Provide appropriate penetration firestopping.
- Room No. E11: Electrical Room E-11 polyurethane sealant used--Remove polyurethane and provide appropriate penetration firestopping in smoke barrier.
- Room No. A124: Abandoned duct work, piping penetration--Cap and remove duct to extent feasible. Provide appropriate penetration firestopping.
- Room No. A124: Large duct abandoned--Cap and remove duct to extent feasible. Patch smoke barrier penetration as necessary.
- Room No. A124: Incomplete wall construction--Provide metal studs and drywall to extend smoke barrier to deck.

LSA Report – VA Project No.: 546-09-820, List of Defects and Corrective Actions, at 1-2. The Gobbell report also included an estimate as to the cost to correct the deficiencies identified on each floor.

The RFP advised offerors that the project was to be procured using two-phase design-build procedures, in accordance with Federal Acquisition Regulation (FAR) subpart 36.3. For phase I, offerors were required to submit information pertaining to their technical approach, technical qualifications, and relevant and recent past performance for similar projects in a hospital type environment. RFP at 8. After evaluation of the phase I proposals, up to five of the most highly qualified firms would be invited to submit phase II proposals. Under phase II, proposals were to be evaluated on the basis of design concepts, management approach, key personnel, and price; when combined, the non-price factors were more important than price. Id. at 8-9. Based on an evaluation of the phase II proposals, award was to be made to the firm whose proposal represented the best overall value to the government. Id. at 10.

Prior to the May 11 closing date, six firms, including Valor and the Ale Group, submitted phase I proposals. After evaluating the submissions, the agency selected four of the firms, again including Valor and the Ale Group, to submit phase II proposals.

In early June, a Valor representative advised the contracting officer that he was aware that the Ale Group intended to subcontract with Strollo, and that he thought

this might present an OCI problem. In response, the contracting officer reviewed the applicable regulations set forth in FAR subparts 36.3 and 9.5, and consulted the agency attorney, technical personnel, and policy and compliance officials regarding the possibility of an impermissible conflict. According to the contracting officer, the majority of those whom she consulted, including the supervisor of VA's Engineering Planning and Analysis section, were of the opinion that the "the LSA report was not the design of the project, as the project was a Design-Build, and the required corrections identified by the LSA report required designs for correction." Contracting Officer's Conflict of Interest Memorandum at 1. Based on her consultations, the contracting officer determined that the Ale Group should not be excluded from the competition. She explained the basis for her decision as follows:

The [LSA] Report is not considered a design. Strollo was not the designer of this project. No design was provided as part of the solicitation. The solicitation is issued as a "Design-Build," meaning that a design will be required for this project. . . .

. . . The report provided by Strollo simply identified Life Safety Corrections needing to be addressed by the facility, [and it] was made available to all offerors. The [contracting officer] believes that the provision of the report provided equal footing to all offerors. . . . Strollo did not determine the specifications for this requirement, . . . , [and] did not develop the work statement . . .

Id. at 2. The contracting officer further noted that even "if it is interpreted that the [SOW] 'grew' out of the [prior LSA report], the report was actually prepared by [Gobbell Hays] as a consultant to [Strollo]. Contracting Officer's Statement at 5.

On July 28, the VA awarded a contract to the Ale Group. After receiving a written debriefing, Valor filed this protest with our Office.

DISCUSSION

Valor contends that the Ale Group should have been excluded from the competition because its proposed subcontractor, Strollo, has both biased ground rules and unequal access to information OCIs.

The FAR generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504, 9.505; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. The FAR identifies general rules and cites examples of types of OCIs that may arise, and ways to avoid, neutralize, or mitigate those OCIs. FAR § 9.505.

The general rules and examples, however, are not intended to be all-inclusive, and the FAR recognizes that “[c]onflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508.” Id.; see also, Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 4-6.

In general, contracting officers must exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; Science Applications Int’l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Science Applications Int’l Corp., supra.

As relevant to the protester’s allegations, a biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the SOW or providing materials upon which a SOW was based. FAR §§ 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 6. An “unequal access to information” OCI arises in situations where a firm has access to non-public information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505-4; Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 at 8.

With regard to the protester’s claim of a biased ground rules OCI, Valor alleges that as the prime contractor for the project that resulted in the LSA report incorporated into the solicitation here, Strollo had a role in drafting the statement of work and cost estimates for this procurement. The contracting officer specifically determined, and the record confirms, however, that Gobbell Hays—not Strollo—was the entity that actually performed the tasks associated with the preparation of the LSA report including the estimated budget costs for the recommended safety corrections.¹ Implicit in the contracting officer’s focus on which entity in fact prepared the report is a recognition that Strollo’s and Gobbell Hays’ interests were not aligned. This conclusion was reasonable given that their relationship was not a firmly established

¹ While the protester contends that Strollo must have had some role with regard to these activities given that it was the prime contractor, it has offered little more than inference and suspicion to support such a finding whereas OCI allegations must be supported by “hard facts.” Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

financial relationship that extended beyond the life of the LSA task order, such as corporate affiliation, but rather reflected the ordinary relationship between a prime and subcontractor in performance of a single contract. Absent a firmly established continuing financial relationship between these firms, whereby the firms' interests could be considered effectively aligned, there was no basis to attribute Strollo's forward-looking self-interest (which is at the core of the alleged biased ground rules OCI) to Gobbell Hays' work in preparing the LSA report. Cf., L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 14-15 (finding that the relationship between firms which contemplated future work together, but later did not work together, was too attenuated to establish an OCI).

Moreover, even assuming for the sake of argument that Strollo's motivations as the prime contractor should be imputed to Gobbell Hays' performance as a subcontractor in the preparation of the LSA report, the record establishes that Gobbell Hays/Strollo's input to the current RFP was limited to identifying safety deficiencies and general approaches to remedying them. That is, Gobbell Hays/Strollo furnished no advice or recommendations regarding the scope of the work to be performed or the manner in which it was to be performed; it merely identified the instances in which safety violations were present. On this record, we have no basis to conclude that the contracting officer acted unreasonably in determining that the activities of Strollo did not present a biased ground rules OCI.²

Valor also argues that Strollo had access to nonpublic information such as its familiarity "with the extent of the deficiencies, the location of the deficiencies, and what is required to correct the deficiencies," see Protester's Comments at 10, which allegedly gave the Ale Group an unfair and improper competitive advantage. The record shows that these assertions were considered by the agency during its OCI analysis and found to be without merit. As explained above, the contracting officer noted that to the extent Strollo could be considered to have specific familiarity with the extent, and the location, of the deficiencies identified in the LSA report, this information was in fact released to all potential offerors, including Valor, as an attachment to the solicitation. In any event, to the extent Ale Group had any advantage because of its subcontractor's role in the LSA project, the agency pointed out that Valor had a similar or greater advantage because of its performance as the

² To the extent the protester also argues that Strollo, and thus Ale Group, should have been precluded from the competition given the prohibition in FAR § 36.209 against a construction project being awarded to the firm that designed the project without a written waiver, this allegation is without merit. First, based on a review of the record, the contracting officer reasonably concluded that the LSA report did not constitute a "design" as that term is defined in FAR § 36.102, since it did not result in the production of the technical specifications and drawings; rather, it merely identified needed corrections. Second, as noted above, Gobbell Hays prepared the report, not Strollo.

incumbent life safety corrections contractor. Under these circumstances, we cannot conclude that the agency's determination that Ale Group did not have unequal access to nonpublic information was unreasonable or otherwise reflected an abuse of discretion.

In short, Valor has not provided support for its assertion that the award to Ale Group was tainted by an OCI under either of the theories identified in the protest, and we have no basis to question the VA's award decision in this regard.

Valor also challenges the evaluation of Ale Group's proposal, alleging that the firm did not identify any trained and certified installers capable of installing fire stop systems and capable of using the 3M Fire Barrier Management System to document the before and after conditions, as required by the solicitation. Protester's Comments at 12-13. The agency responds that Ale Group's proposal did in fact address this solicitation requirement, specifically identifying the subcontractor that will perform these tasks. AR exh. 16, Ale Group Phase II Proposal, at 31. Thus, there is no basis for our Office to object to the evaluation.

The protest is denied.

Lynn H. Gibson
General Counsel