



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** AT&T Government Solutions, Inc

**File:** B-407720; B-407720.2

**Date:** January 30, 2013

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Daniel R. Forman, Esq., Grant J. Book, Esq., and Olivia L. Lynch, Esq., Crowell & Moring LLP, for the protester.

Robert J. Symon, Esq., and Aron C. Beezley, Esq., Bradley Arant Boult Cummings LLP, for Jacobs Technology Inc., the intervenor.

Lisa L. Baker, Esq., Major Michael C. Evans, United States Marine Corps, for the agency.

Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging the agency's evaluation of potential unequal access to information and impaired objectivity organizational conflicts of interests (OCIs) is dismissed as academic where, three days prior to our statutory 100-day deadline, the agency waived any OCI concerns under the authority granted by section 9.503 of the Federal Acquisition Regulation.

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### DECISION

AT&T Government Solutions, Inc., of Oakton, Virginia, protests the award of a task order to Jacobs Technology, Inc., of Tullahoma, Tennessee, under request for proposals (RFP)<sup>1</sup> No. N00024-12-R-3282, which was issued by the Marine Corps for information technology (IT) networking support services for the Marine Corps garrison classified secret internet protocol router network (SIPRNet). AT&T argues that the agency failed to meaningfully consider whether Jacobs had organizational

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<sup>1</sup> Although the solicitation anticipated the issuance of a task order under an indefinite-delivery, indefinite-quantity contract, the evaluation record here refers to "offerors" and "proposals." For the sake of consistency, and because the distinction between a quotation and a proposal has no bearing on our analysis in this protest, we adopt the usage of the terms "proposal" and "offerors" in this decision.

conflict of interests (OCIs) arising from unequal access to information and impaired objectivity.<sup>2</sup>

We dismiss the protest.

As relevant here, on July 3, 2012, the Marine Corps issued the RFP to contractors holding a Navy SeaPort-e multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contract. The RFP anticipated the award of a task order to provide IT networking support services for the Marine Corps garrison classified SIPRNet at five Marine Corps installations. The agency received proposals from five offerors, including AT&T and Jacobs. After the evaluation of proposals, the agency selected Jacobs' proposal for award on September 27.

On October 4, AT&T received a debriefing and subsequently filed an agency-level protest with the Marine Corps on October 9. On October 16, the agency notified AT&T that it was dismissing AT&T's agency-level protest without addressing the merits. AT&T filed its protest with our Office on October 23.<sup>3</sup>

AT&T contends that the Marine Corps failed to meaningfully consider whether the award to Jacobs was tainted by OCIs arising from the awardee's work on a related engineering and acquisition support task order in support of the program manager, Marine Corps network and infrastructure services (PM MCNIS) program office. In this regard, AT&T alleges that Jacobs' role as the PM MCNIS engineering and acquisition support contractor gave it access to non-public budget information and technical requirements that may have provided the awardee with a competitive advantage in responding to the SIPRNet solicitation. AT&T also contends that Jacobs' dual roles as both the PM MCNIS engineering and acquisition support contractor and the SIPRNet support service contractor could potentially undermine its ability to render impartial advice to the government. See Federal Acquisition Regulation (FAR) subpart 9.5; Aetna Gov't Health Plans, Inc.; Foundation Health

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<sup>2</sup> The protester raised and subsequently withdrew its other grounds of protest relating to the agency's evaluation of proposals and award decision.

<sup>3</sup> The Marine Corps requested that AT&T's protest be dismissed as untimely because it was filed with our Office more than 10 days after the debriefing, from which AT&T learned the basis for its protest. The Marine Corps argued that AT&T could not base the timeliness of its GAO protest on its filing of a timely agency-level protest, because the Marine Corps, in its view, lacks jurisdiction to consider an agency-level protest of a task order. We denied the agency's dismissal request, concluding that AT&T's protest was timely filed with our Office. For a detailed explanation of our rationale for finding the protest with our Office timely, see our decision in Logis-Tech, Inc., B-407687, Jan. 24, 2013, 2013 CPD ¶ \_\_\_, at 4-5.

Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 11-12 (describing types of OCIs).

In response to AT&T's protest, the agency conducted an investigation of the alleged OCIs. The agency's investigation, which was completed one day before the agency provided its report responding to the protest grounds, concluded that Jacobs had no actual or potential OCIs. Agency Report, Tab 29, OCI Investigation, at 1.

After the record was fully developed, the Government Accountability Office (GAO) attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference on January 18, 2013. See Bid Protest Regulations, 4 C.F.R. § 21.10(e) (2012). During this conference call, the GAO attorney indicated that our Office would likely sustain the protest because, despite the Marine Corps' investigation, the record showed that the agency failed to meaningfully consider whether Jacobs had unequal access to information and impaired objectivity OCIs. On January 22, the agency informed our Office that it would not take voluntary corrective action in response to the ADR conference.

On January 28, three days before the 100-day deadline for our Office to resolve the protest under the Competition in Contracting Act, 31 U.S.C. § 3554(a)(1) (2006), the Marine Corps advised that it had waived any OCIs regarding the award to Jacobs, and requested that our Office dismiss the protest as academic. In this regard, the FAR establishes that, as an alternative to avoiding, neutralizing, or mitigating an OCI, an agency head or designee, not below the level of the head of the contracting activity (HCA), may execute a waiver. Specifically, the FAR provides as follows:

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee.

FAR § 9.503.

Here, the Marine Corps' cognizant HCA prepared and executed a waiver under the FAR authority. The HCA's waiver stated as follows:

1. I exercise my authority under FAR 9.503 to waive any and all residual OCI concerns and potential impacts which are not completely eliminated or otherwise neutralized or mitigated by the circumstances described in the analysis developed in support of this waiver.
2. My conclusion that the waiver is appropriate is based upon:
  - a. My access to the complete supporting contract file materials;

b. My finding that the risk of any potential or real OCI existing under the subject contract is negligible to non-existent;

c. My finding that the potential residual impact of OCI in this procurement is insignificant in comparison to the estimated annual savings . . . and the substantive impact of disrupted support to the SIPRNET; and

d. My finding that other performance strategies are not acceptable options for this requirement due to the limited market of qualified sources that would result and the loss of critical support services during the time needed to conduct a re-procurement.

Agency Waiver, HCA Approval, (Jan. 28, 2013), at 1.

Our Office has previously recognized an agency's authority to seek and obtain a waiver under the FAR for "any organizational conflict of interest." See L-3 Servs., Inc., B 400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at n. 20; see also CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 13-14; MCR Fed., LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 4-5. To the extent AT&T argues that the exercise of a waiver does not render academic the protester's unequal access to information OCI allegation, we disagree. While AT&T's protest alleged that the award to Jacobs was tainted by a potential conflict, the FAR authority here permits waiver of any general rule or procedure within FAR Subpart 9.5. The issues in dispute in this case arise from the rules and procedures in Subpart 9.5, and, as of January 28, 2013, the application of these rules and procedures have been waived for this procurement by the Marine Corps, which renders the protest academic.

The protest is dismissed.<sup>4</sup>

Susan A. Poling  
General Counsel

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<sup>4</sup> To the extent AT&T seeks to protest the reasonableness of the Marine Corps' waiver, or seeks the cost of pursuing this protest, it may do so in accordance with our Bid Protest Regulations.