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Decision

Matter of: DRS Technical Services, Inc.

File: B-411573.2; B-411573.3

Date: November 9, 2015

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Brent Burris, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency's evaluation of awardee's proposed level of effort was unreasonable and inconsistent with the terms of the solicitation.
 2. Although protester raises an untimely challenge to the terms of the solicitation, we address it on the merits under GAO's exception to its timeliness rules, as it raises an issue of significant interest to the procurement community. Protest of solicitation's evaluation scheme is sustained where it failed to account for differences in offerors' transition plans and effectively penalized offerors that proposed to provide full staffing and operational performance on the first day of the task order and rewarded offers that proposed a phased approach to staffing and performance.
 3. Agency's organizational conflict of interest (OCI) investigation was not reasonable as it failed to meaningfully consider whether the awardee's performance of a portion of the work required under the anticipated task order would result in an impaired objectivity OCI.
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DECISION

DRS Technical Services, Inc., of Arlington, Virginia, protests the issuance of a task order to Lockheed Martin Integrated Services, Inc. (LMIS), of Bethesda, Maryland,

under request for task execution plan (RTEP) No. R2-3G-0726, issued by the Department of the Army, Army Materiel Command for system engineering, integrated logistics, and fielding/training support services. DRS argues that the Army erred in evaluating LMIS's proposal and in finding that the awardee did not have an OCI.

We sustain the protest.

BACKGROUND

On June 18, 2014, the Army issued the RTEP to firms holding an indefinite-delivery/indefinite-quantity (IDIQ) contract under the agency's Rapid Response Third Generation multiple-award contract program.¹ Contracting Officer's Statement (CO Statement) at 1-2. The RTEP contemplated the issuance of a cost-plus-fixed-fee task order with a 1-year base period and one, 1-year option. RTEP at 1. The solicitation sought contractor support for the Army's Distributed Common Ground System (DCGS), to include integration, testing, fielding, warehousing, and maintaining the hardware and software that comprise the DCGS, as well as training Army personnel on the use of the system.² Id.

The RTEP established that award would be made on a best-value basis considering the evaluation factors of technical, past performance, and cost/price.³ RTEP at 5. The RTEP provided that the technical factor was significantly more important than past performance and that when combined, the non-cost/price factors were significantly more important than cost/price. Id. With respect to the evaluation of cost, the RTEP provided that the Army would perform a cost realism analysis and adjust offerors' proposed costs to reflect their most probable cost. Id. at 7-8.

As relevant here, the RTEP required offerors to set forth in their technical proposals their proposed level of effort (LOE) to perform the solicitation requirements. Id. at 3. To assist offerors in this regard, the Army provided its estimated LOE in an

¹ The estimated value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award IDIQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

² According to the performance work statement (PWS) contained in the RTEP, the DCGS is a mobile, computer-based system that receives, integrates, fuses, and analyzes intelligence information and provides the results to battlefield commanders in near real-time. Agency Report (AR), Tab 11, PWS, at 1.

³ The RTEP provided that proposals would be rated as outstanding, good, acceptable, or unacceptable under the technical factor and would receive past performance ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. RTEP at 6-7.

attachment to the RTEP, which identified the agency's estimated labor hours for 36 labor categories for the base and option year. Id. According to the attachment, the agency's estimated LOE was based on an assumed full-time employee (FTE) productive year of 1,920 hours. RTEP, attach. 2, at 3. To the extent an offeror's proposed LOE deviated from the LOE estimated by the agency, the offeror was required to provide a justification for the deviation, explaining how the offeror intends to perform the requirements and why its proposed LOE is technically acceptable and realistic. Specifically, the RTEP provided as follows:

Offerors may propose fewer or more categories and/or hours. Offerors who choose to propose the LOE estimates [provided by the agency], shall state so within its technical proposal volume and are not required to submit additional justification. However offerors who choose to propose manpower (labor categories and/or hours) other than what is outlined within the LOE . . . shall submit a detailed basis of estimate describing how the offeror intends to execute the requirements and how it arrived at the LOE within the narrative explaining why its proposed manpower requirement is technically acceptable and realistic.

Id.

The RTEP also directed offerors to provide in their technical proposal a phase-in plan detailing how the offeror would "take over from the incumbent contractor ensuring minimal disruption of operations." Id. at 2. In this regard, the PWS provided that there would be no work stoppage as a result of the award and that the "contractor shall provide a plan to seamlessly transition work from the incumbent contractor immediately."⁴ AR, Tab 11, PWS, at 2.

On August 12, 2014, the Army received timely proposals from five offerors, including those from DRS and LMIS. CO Statement at 5. Only the technical proposals of DRS and LMIS were rated acceptable or better and therefore considered in the agency's best-value tradeoff analysis. AR, Tab 34, Source Selection Decision (SSD), at 18. The agency's evaluation results for the protester and awardee were as follows:

⁴ The record reflects that ManTech International Corporation and MacAulay-Brown, Inc. are the incumbent contractors currently performing the services required under the RTEP, and that DRS proposed to have both firms continue performance as its subcontractors. AR, Tab 27, DRS Technical Proposal, at 6.

	Technical	Past Performance	Total Proposed Cost	Total Evaluated Cost
DRS	Good	Substantial Confidence	\$(DELETED)	\$51,425,367
LMIS	Good	Substantial Confidence	\$(DELETED)	\$50,485,529

With respect to the evaluation of the non-cost factors, the technical evaluation team (TET) rated DRS's and LMIS's proposals as good under the technical factor, assigning each proposal a strength. Id. The TET also found, and the CO concurred, that although the strengths offered by the proposals were different, they were of equal value to the government. Id. As to past performance, the agency determined that it had a high expectation that both DRS and LMIS could successfully perform the required effort. Id. at 19. Based on the evaluation results, the CO, who served as the source selection authority, concluded that DRS's and LMIS's proposals were essentially equal in merit under the non-cost factors, and thus based his source selection decision on the offerors' total evaluated costs. Id.

Regarding the cost evaluation, because the LOE in DRS's technical proposal did not deviate from the labor categories and labor hours provided for in the agency's estimated LOE, the Army made no adjustments to this aspect of the protester's proposal. AR, Tab 37, DRS Cost/Price Report, at 1-6. The agency likewise found the other elements of the protester's cost proposal to be realistic and thus, DRS's total proposed cost was essentially the same as its total evaluated cost of \$51,425,367.⁵ Id.

LMIS's technical proposal, on the other hand, proposed three deviations from the agency's proposed LOE which impacted its total proposed and evaluated cost. AR, Tab 31, LMIS Technical Proposal, at 52-55. First, LMIS used a [DELETED]-hour productive work year per FTE as opposed to the 1,920-hour productive work year, which formed the basis of the agency's estimated LOE. Id. at 55-56. LMIS's proposal explained that the firm's annual productive work year of [DELETED] hours was based on the benefits and paid time off structure it has historically provided to its employees. Id. at 55. LMIS's proposal further explained that its productive work year is calculated using a [DELETED]-hour work year ([DELETED] hours per week),

⁵ Due to an agency error in the cost evaluation, DRS's and LMIS's proposed costs were increased by \$10,000 each. CO Statement at 8, n.1. Because both offerors costs were adjusted upward by the same amount, this error had no impact on the CO's award decision. Id.

less [DELETED] hours for holidays, [DELETED] hours for vacation, and [DELETED] hours for paid absence and training. Id. As a result of this deviation, LMIS's proposal identified a reduction in hours from the agency's LOE of [DELETED] hours for the base year and [DELETED] hours for the option year, resulting in a total reduction of [DELETED] hours. Id. at 53. Accordingly, LMIS's cost proposal did not include costs for these [DELETED] hours. AR, Tab 38, LMIS Cost Evaluation, at 4.

Second, LMIS proposed a phased staffing approach as part of its transition plan in which full staffing and operational performance would begin on the [DELETED] day after the issuance of the task order. Id. at 54. As a result of this phased staffing approach, LMIS's proposal represented a reduction of [DELETED] hours from the agency's LOE, which provided for an equal number of labor hours for the base and option years. Id. at 53, 55-56. Again, LMIS's cost proposal did not include costs for these [DELETED] hours. AR, Tab 38, LMIS Cost Evaluation, at 4.

Third, LMIS proposed an [DELETED] "ramp up" period following its [DELETED] transition period, in which LMIS proposed to staff the task order with [DELETED] FTEs, as compared to the 228 FTEs per year provided in the agency's LOE. Id. at 53. In this regard, LMIS's proposal noted that the agency had informed offerors that the incumbent contractor was currently performing with only 204 FTEs due to budget constraints. Id. Based on this, LMIS proposed [DELETED] FTEs during the [DELETED] through the [DELETED] months of the task order, and then increase staffing to 228 FTEs for the remainder of the contract. Id.

In evaluating LMIS's LOE, the Army found LMIS's proposed reduction to the LOE resulting from the awardee's [DELETED]-hour work year to be realistic and acceptable. AR, Tab 25, Technical Evaluation Report, at 4. Likewise, the agency found LMIS's transition plan and the associated reduced LOE to be acceptable. Id. at 4-5. The Army, however, did not accept LMIS's proposed ramp up period in which LMIS proposed [DELETED] FTEs rather than the agency-estimated 228 FTEs. Id. at 5.

The TET noted that in responding to questions, the Army had informed offerors that due to budget cuts, the incumbent contractor was employing only 204 FTEs. Id. The TET also noted, however, that the agency had instructed offerors to use 228 FTEs for evaluation purposes. Id. The agency further determined that LMIS had not otherwise substantiated its proposed reduction to [DELETED] FTEs, and as result, upwardly adjusted LMIS's proposed LOE to 228 FTEs for the entire non-transition base period. Id.

As a result of the Army's upward adjustment to LMIS's LOE and other cost realism adjustments not relevant here, the Army calculated LMIS's total evaluated cost to be \$50,485,529 (\$939,838 less than DRS's total evaluated cost). AR, Tab 34, SSD, at 17. Based on these cost savings, and the fact that the proposals were found to

be otherwise equal under the non-cost/price evaluation factors, the CO determined that LMIS's proposal represented the best value to the government. Id. at 19. Following a debriefing, DRS timely filed a protest with this Office, on May 26, 2015, arguing, among other things, that LMIS was ineligible for award due to an unmitigated OCI. Protest at 3. On June 24, we dismissed that protest as academic, based on the agency's representation that it would perform an OCI investigation to determine if LMIS was eligible for award. DRS Technical Services, Inc., B-411573, June 24, 2015. On July 21, the agency provided the protester with the OCI report resulting from the investigation, which concluded that LMIS was eligible for award, and DRS timely filed the instant protest with this Office on July 30. Protest at 11.

DISCUSSION

DRS contends that the Army's evaluation was flawed in that the agency failed to account for LMIS's reduced LOE as a consequence of its having proposed a productive work year of [DELETED] hours per FTE. Supp. Protest at 4-13. Similarly, DRS argues that the Army unreasonably failed to account for the fact that under the awardee's proposed transition plan, the Army would have to continue to pay the incumbent contractors to perform, whereas the agency would not incur any out-of-contract costs if award were made to DRS. Id. at 14-20. Finally, DRS contends that the Army erred when it determined that LMIS did not have an impaired objectivity OCI resulting from another task order currently held by the awardee. Id. at 20-37. For the reasons discussed below, we sustain the protest.⁶

Evaluation of LMIS's Proposal

It is a fundamental principle that an agency must evaluate proposals in a manner consistent with the terms of the solicitation and, while the evaluation of offerors' proposals generally is a matter within the procuring agency's discretion, our Office will question an agency's evaluation where it is unreasonable, inconsistent with the solicitation's stated evaluation criteria, or undocumented. Exelis Sys. Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 at 5; Public Commc'ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 17. Further, where an agency fails to document its evaluation or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for GAO to conclude that the agency had a reasonable basis for the source selection decision. Sys. Research & Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 12.

⁶ In its initial protest, DRS also argued that the RTEP overstated the Army's actual needs and that the agency failed to credit the protester's proposal with various strengths under the technical factor. Protest at 12-30. Following receipt of the agency report, DRS expressly withdrew these bases of protest. Supp. Protest at 2-3, n.1.

In the instant protest, DRS argues that the Army erred in finding realistic LMIS's [DELETED]-hour reduction to the LOE based on its use of a [DELETED]-hour productive work year per FTE, as opposed to the 1,920-hour work year set forth in the solicitation. Supp. Protest at 4-13. We agree. As discussed above, under the RTEP, if an offeror proposed a LOE that deviated from the agency's estimated number of labor hours, the RTEP required the offeror to provide a narrative explaining how the offeror would perform the requirements and how the offeror's proposed LOE was technically acceptable and realistic. RTEP at 3. Here, however, LMIS's proposal did not provide any justification--and the contemporaneous evaluation record does not reflect any consideration--as to how the awardee could accomplish the work required under the PWS with [DELETED] fewer hours than estimated by the agency.

LMIS's proposal did not, for example, assert that the reduced LOE was justified by labor-saving work processes or highly efficient personnel. Rather, LMIS's proposal simply noted that its [DELETED]-hour work year was based on its benefits and paid time off policies, and explained how the [DELETED] figure was calculated ([DELETED] hours less [DELETED] hours for various forms of paid time off). AR, Tab 31, LMIS Technical Proposal, at 55. Likewise, the record reflects that the agency simply accepted the reduced LOE without explanation or analysis. AR, Tab 25, Technical Evaluation Report, at 4. Because LMIS's proposal failed to demonstrate how it would meet the requirements of the solicitation with fewer labor hours than the agency estimated were necessary, we find the agency's evaluation of this aspect of the awardee's proposal unreasonable and inconsistent with the terms of the RTEP.

In reaching this conclusion, we find no merit to LMIS's contention that despite its [DELETED]-hour productive work year, its proposal demonstrated it would effectively provide the same LOE as the protester. In this regard, LMIS contends that the [DELETED]-hour difference between its productive work year and the agency's 1,920-hour work year is attributable to training required under the RTEP that the awardee proposed to charge as an indirect cost. Intervenor's Supp. Comments at 16-19. We find the intervenor's assertion to be unsupported by the record. First, there is no evidence in the contemporaneous record that the agency found the awardee's proposed [DELETED]-hour work year realistic and acceptable on the basis that LMIS was proposing [DELETED] hours of training but not including those hours as part of its productive work year. AR, Tab 25, Technical Evaluation Report, at 4. Second, LMIS's contention is directly contradicted by its own proposal, which provided that "[t]he productive hours per year is calculated as follows: [DELETED] hours for a year, less [DELETED] hours for holidays, less [DELETED] hours for vacation, less [DELETED] hours for paid absence and training for a total of [DELETED] hours." AR, Tab 31, LMIS Technical Proposal, at 55 (emphasis added). Thus, the record demonstrates that at least a portion of the [DELETED] hours at issue would be non-productive hours, *i.e.*, paid absence. Moreover, LMIS's proposal provides that the training not included in its productive

work year is “employee developmental training,” and there is no indication that this training is the same as the training required by the RTEP. Id.

Next, DRS argues that the Army’s evaluation of the awardee’s proposed transition plan was inconsistent with the terms of the RTEP, which the protester contends required offerors to provide full operational performance starting on the first day of the task order. Supp. Protest at 13-18. As such, the protester asserts that the agency should have found LMIS’s proposed transition plan unacceptable, since it did not provide for full staffing and performance until the [DELETED] day of the task order. Id. at 18. In support of its contention, the protester notes that the PWS provided that the successful “contractor shall provide a plan to seamlessly transition work from the incumbent contractor immediately.” AR, Tab 11, PWS, at 2. DRS takes the position that the term “immediately” indicated that the awardee must provide all of the required services at the start of performance. Supp. Protest at 14-15. We find DRS’s interpretation unreasonable, as it is at odds with the RTEP’s requirement that offerors propose a phase-in plan detailing how they would “take over from the incumbent contractor ensuring minimal disruption of operations.” RTEP at 2. In short, if full, immediate performance were required under the RTEP, the Army would not have requested firms to submit a transition plan in the first place. Rather, when read in context, we agree with the agency that the term “immediately” simply indicated that the successful contractor was to begin the transition of work immediately, not that full performance was required on day one. INFICON, Inc., B-410502, Jan. 5, 2015, 2015 CPD ¶ 24 at 4 (denying protest where protester’s interpretation of solicitation was not consistent with relevant provisions when read in context).

The protester also argues that the Army unreasonably failed to take into account that under the awardee’s proposed transition plan, the agency would be required to pay its incumbent contractors to continue performance. Protester’s Supp. Comments at 21-27. As discussed above, under the awardee’s proposal, LMIS would not begin full operational performance until the [DELETED] day of the base period, which in turn resulted in a LOE reduction of [DELETED] hours. AR, Tab 31, LMIS Technical Proposal, at 53. The protester contends--and the agency does not dispute--that the Army would need its incumbent contractors to continue to perform during LMIS’s proposed transition period in order to continue operational performance. Protester’s Supp. Comments at 21-24. By contrast, under DRS’s proposal, the incumbents would serve as subcontractors and provide full operational performance starting on the first day of the task order. Id. Citing our decision in L-3 Communications Titan Corp., B-299317 et al., March 29, 2007, 2007 CPD ¶ 66 at 11-13, DRS argues that the Army’s selection decision was irrational, as it was based on cost savings resulting from LMIS’s transition plan, which will in fact result in no real savings to the agency. Protester’s Supp. Comments at 26.

In response, the Army contends that the protester's argument is an untimely challenge to the evaluation scheme of the RTEP, as it was not raised prior to the solicitation's closing date. Supp. Memorandum of Law, at 12-13.

In L-3 Communications, a case with facts analogous to those at issue here, the incumbent protester and awardee proposed different levels of effort for the transition period, with the awardee's proposal resulting in higher out-of-contract costs to the government than the incumbent's proposal. L-3 Commc'ns Titan Corp., *supra* at 11. The agency's evaluation scheme, however, did not account for the offerors' materially different approaches to transition. *Id.* at 13. As such, we found that the evaluation scheme was not rational or reasonable, as it did not support a meaningful comparison and discrimination between the two proposals. *Id.* at 13. In L-3 Communications, however, we declined to address the agency's contention that the protester's argument was an untimely challenge to the terms of the solicitation, as we sustained the protest on two other grounds. *Id.* at 13, n.18.

In the instant protest, we find the protester's argument that the agency erred in failing to consider the relative costs of the offerors' different transition approaches to be untimely. As discussed above, the RTEP made clear that there would be "no work stoppage as a result of [the] award," but also directed offerors to propose a phase-in plan. AR, Tab 11, PWS, at 2; RTEP at 2-3. Moreover, the RTEP provided no indication that the agency would consider out-of-contract costs resulting from firms' transition plans as part of its cost evaluation. RTEP at 7-8. Rather, the solicitation simply indicated that the agency would calculate an offeror's total evaluated cost using the information provided in the firm's cost proposal, subject to any cost realism adjustments. *Id.* at 7. As such, DRS should have recognized that while it was proposing full performance at the start of the task order, other offerors could propose a transition period with a lower LOE, and that the agency's evaluation scheme would not capture the government's costs resulting from the incumbent contractors' continued performance. Thus, under 4 C.F.R. § 21.2(a)(1), DRS's argument is an untimely challenge to the terms of the solicitation. *See Cherokee Elecs. Corp.*, B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467 at 3 ("[S]ince it was obvious that the RFP, requesting fixed-price proposals, did not contemplate the consideration of transition costs, [the protester] should have filed any protest that such costs must be considered prior to the closing date for receipt of proposals."); *see also FirstLine Transp. Sec., Inc. v. United States*, 100 Fed. Cl. 359, 385-390 (2011) ("Because [the protester] did not protest the price evaluation scheme in the RFP before the submission deadline, it cannot now complain that the out-of-contract costs for [the awardee's] transition period were not considered in the evaluation of [the awardee's] price proposal."). As discussed below, however, we find this situation is appropriate for the use of the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c).

While our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation that are apparent prior to closing shall be filed prior to

closing, 4 C.F.R. § 21.2(a)(1), our Regulations also provide that GAO may consider an untimely protest that raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). In this regard, what constitutes a significant issue is to be decided on a case-by-case basis. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided. Satilla Rural Elec. Membership Corp., B-238187, May 7, 1990, 90-1 CPD ¶ 456 at 3. The issue here--whether an agency's evaluation scheme is reasonable where it fails to fairly account for offerors' differing transition approaches--is one which we did not squarely address in L-3 Communications given our resolution of the case on other grounds, and is one that can be expected to arise in future procurements for service contracts where there is an incumbent contractor competing with a non-incumbent. Accordingly, we will address this basis of protest on the merits.

It is a fundamental principle of government procurement that a contracting agency must provide a common basis for competition and may not disparately evaluate offerors with regard to the same requirements. See, e.g., Lockheed Martin Info. Sys., B-292836 et al., Dec. 18, 2003, 2003 CPD ¶ 230 at 11-12; Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5. Likewise, while it is up to the agency to decide upon some appropriate and reasonable method for evaluating offerors' costs, an agency may not use an evaluation method that produces a misleading result. See Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4; AirTrakTravel, et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. AirTrakTravel, et al., supra.

Here, the solicitation established that there would be "no work stoppage as a result of [the] award" and provided an estimated LOE based on full staffing of the agency's requirements during the entire base period of performance. AR, Tab 11, PWS, at 2; RTEP, attach. 2, at 3. This is exactly what DRS proposed and included in its cost proposal--full staffing from the first day of the task order. AR, Tab 25, Technical Evaluation Report, at 6-7. In contrast, LMIS proposed a transition period, also consistent with the solicitation, that reduced the agency's LOE by more than [DELETED] hours, as it would not be providing full operational performance during the [DELETED] of the base period. AR, Tab 31, LMIS Technical Proposal, at 54-55. The Army does not dispute that under LMIS's transition plan, the agency would be required to pay its incumbent contractors to continue performance during the transition period in order to prevent a stoppage of work. See Supp. Agency Legal Memorandum, exh. 1, Declaration of FOFH Director, at 2 (describing how agency expected LMIS to hire incumbent employees during phase-in period, "as mission allows"). Thus, by failing to account for these disparities in the offerors' proposals, the RTEP's evaluation scheme did not provide for an apples-to-apples comparison,

and effectively penalized offerors that proposed to provide full contract performance sooner than those offerors with a more prolonged transition period. See L-3 Communications Titan Corp., *supra* at 11-13; see also FirstLine, 100 Fed. Cl. at 387. Accordingly, we find that the agency's award decision was not reasonable or rational.

Impaired Objectivity OCI

DRS contends that award to LMIS will result in an impaired objectivity OCI because LMIS will be required to review and test the work it performs under a task order issued by the Army pursuant to another IDIQ contract (referred to by the parties as "task order 57"). Supp. Protest at 20-36. The record reflects that under task order 57, LMIS is responsible for modifying, enhancing, and integrating software for the DCGS. AR, Tab 46, OCI Report, at 4. DRS argues that the PWS for the task order at issue here (referred to by the parties as the "Field Office Fort Hood task order," or "FOFH task order") identifies various engineering tasks, including testing and evaluation, that will necessarily require LMIS to review the work it performs under task order 57. Supp. Protest at 27-32. In this regard, the PWS sets forth three sections related to engineering work: (1) section 3.1.1--engineering and technical documentation support; (2) section 3.1.2--test and evaluation; and (3) section 3.1.3--quality engineering. AR, Tab 11, PWS, at 6-7. The protester contends that all three sections of the PWS involve work that will create an impaired objectivity OCI for LMIS. Supp. Protest at 27-32.

As a general matter, the Federal Acquisition Regulation (FAR) requires that contracting officers avoid, neutralize or mitigate potential significant OCIs. FAR § 9.504(a). 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.

We review the reasonableness of a CO's OCI investigation and, where an 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. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. 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). A protester must identify "hard facts" that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential

conflict is not enough. TeleCommunication Sys. Inc., *supra* at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010).

As an initial matter, we address the agency's contention that the protester's OCI challenge is untimely. As discussed above, on July 30, DRS filed a protest with this Office, following DRS's receipt of the Army's OCI report. In that protest, DRS alleged that based on the findings of the OCI report, the PWS for the FOFH task order overstated the agency's actual requirements and thus prevented a fair competition. Protest at 12-21. In the alternative, to the extent the Army argued that the solicitation accurately reflected the agency's requirements, DRS contended that LMIS would have an impaired objectivity OCI as it would be responsible under the FOFH task order for evaluating the deliverables it produces under task order 57. *Id.* at 13, n.5. Following DRS's receipt of the agency report, which included the PWS for task order 57 and the declarations of several agency personnel prepared as part of the Army's OCI investigation, the protester withdrew its argument that the RTEP did not reflect the agency's requirements, and further expanded upon its OCI argument. Supp. Protest at 2-3, 27-32.

The agency contends that the protester's OCI argument is untimely, as it was not raised within 10 days of DRS's receipt of the OCI report, which the agency alleges provided the operative facts underlying the protester's OCI contention. Memorandum of Law at 17-22. The agency further argues that the protester's OCI argument, contained in a footnote in its July 30 protest, did not provide a sufficient legal and factual basis for protest, and that DRS's subsequent, more detailed OCI argument represents an untimely, piecemeal presentation of its argument. *Id.* Based on our review of the record, we find that the protester's OCI argument was timely raised. In this regard, the record reflects that DRS's OCI argument, filed as comments within 10 days of its receipt of the agency report, is premised on information contained in the PWS for task order 57 and the declarations of agency personnel supporting the OCI report. Supp. Protest at 24-36. Since these documents were first provided to the protester as part of the agency report, we find DRS's OCI argument timely.⁷ 4 C.F.R. § 21.2(a)(2).

Turning to the merits of the allegation, with regard to the test and evaluation engineering tasks contained in section 3.1.2 of the PWS, the Army's OCI report provides that the solicitation described the work "in a rather sloppy manner" that did

⁷ The record reflects that prior to filing the July 30 protest, counsel for DRS requested that the agency provide the PWS for task order 57 and the agency declarations prepared in support of the OCI report, but that the agency declined to do so. Protester's Supp. Comments, exh. 11, at 1. Thus, the development of the protester's OCI argument was the direct result of the agency's piecemeal production of documents.

not necessarily reflect the nature of the support required. AR, Tab 47, OCI Report, at 5. Specifically, the agency contends that the testing required under the FOFH task order is simply configuration and operational testing, in which “hardware is powered on and connected to ensure that it and the software loaded on it functions.” Id. The agency also notes, and the protester does not dispute, that the task order 57 software deliverables prepared by LMIS undergo official Army testing and evaluation before being delivered to the FOFH contractor for installation and operational testing. Id. at 4-5. As such, the agency contends that no impaired objectivity OCI will result from award to LMIS, given the relatively basic nature of the testing required under the FOFH task order and the fact that LMIS’s software deliverables under task order 57 have already been fully tested by the government. Memorandum of Law at 26-29.

With respect to the testing and evaluation requirement contained in section 3.1.2 of the PWS, we find that the agency’s OCI analysis was reasonable and supported by the record. As noted above, there is no dispute that the software delivered by LMIS under task order 57 is tested and vetted by the Army before delivery to the FOFH contractor. Furthermore, the record supports the agency’s determination that the testing at issue is focused on whether the various DCGS hardware and software components operate as a whole, not whether the specific software provided under task order 57 is functioning as intended. AR, Tab 11, PWS, at 7 (“testing activities will include operational functions necessary to determine acceptability”). Thus, we have no basis to question the agency’s conclusion that the testing work contained in section 3.1.2 of the PWS would not create a significant OCI for LMIS.

As to the other engineering work required under sections 3.1.1 and 3.1.3 of the PWS, however, we conclude that the Army did not adequately consider whether these tasks would result in an impaired objectivity OCI for LMIS. For example, the agency’s OCI report makes no mention of the PWS requirement that the awardee review and report issues with “system developer deliverables,” which DRS alleges would require LMIS to review the documentation deliverables it provides under task order 57. AR, Tab 11, PWS, at 6; Supp. Protest at 31. Indeed, consistent with the PWS, both DRS and LMIS proposed to review and audit software documentation deliverables provided by other contractors. AR, Tab 27, DRS Technical Proposal, at 10; AR, Tab 31, LMIS Technical Proposal, at 12, 16. Likewise, the agency’s OCI report does not discuss the PWS requirement that the awardee provide software code analysis/inspection, a task that, again, DRS alleges would require LMIS to review its own work under task order 57 and that both DRS and LMIS addressed in their proposals. AR, Tab 11, PWS, at 6; AR, Tab 27, DRS Technical Proposal, at 10-11; AR, Tab 31, LMIS Technical Proposal, at 13; Supp. Protest at 31-32.⁸ As

⁸ To the extent the agency contends that the PWS requirements were inaccurately described in the solicitation and not in fact required, this contention is contrary to the agency’s evaluation of the offerors’ proposals, which did not indicate that DRS or
(continued...)

such, we find that with agency's OCI investigation was not reasonable, as it did not meaningfully consider whether the relevant tasks contained in sections 3.1.1 and 3.1.3 would create an impaired objectivity OCI for LMIS.

Prejudice

With respect to LMIS's proposed [DELETED]-hour productive work year, DRS contends that it would have been the lowest-cost offeror had the agency made the appropriate LOE and associated cost adjustments. In this regard, the protester notes that LMIS's total evaluated cost was only 1.83% lower than DRS's total evaluated cost, while LMIS's total labor hours, which accounted for the majority of its costs, would increase by approximately [DELETED]% if they were based on a 1,920-hour work year. Id. at 12-13.⁹

The Army disputes DRS's assertion, arguing that adjusting LMIS's labor hours upward by [DELETED]% would increase LMIS's proposed costs by approximately \$[DELETED], which would not overcome the \$939,838 cost difference between the proposals. Supp. Memorandum of Law at 10. The agency acknowledges, however, that this figure is only an approximation and that it would be necessary to use "much deeper figures taking into account fringe and overhead" in order to accurately calculate the correct cost adjustment. Supp. Memorandum of Law, exh. 3, Declaration of Lead Contract Specialist, at 2. In addition, the record reflects that the agency's estimate is based on increasing LMIS's productive work year for [DELETED] FTEs. As the protester notes, however, the correct upward adjustment would require increasing the productive work year for 228 FTEs--the FTE level after the agency's upward adjustment of LMIS's LOE. Given that the agency's estimate is relatively close to the cost difference between the proposals, and that the agency's calculation does not account for all of the necessary upward cost adjustments, including the correct number of FTEs, we conclude that the protester has demonstrated a reasonable possibility of prejudice. In short, there is a very real possibility that an accurate adjustment to LMIS's costs could result in DRS becoming the lowest-cost offeror. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.--Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5.

(...continued)

LMIS misunderstood the solicitation or proposed to perform tasks that were not necessary. AR, Tab 25, Technical Evaluation Report, at 4-7.

⁹ The protester maintains that there is insufficient information in the record to precisely calculate the increase in LMIS's costs that would result from adjusting the awardee's LOE upward to account for its [DELETED]-hour work year. Protester's Supp. Comments at 13.

Furthermore, based on the analysis above regarding the cost impact of LMIS's lower-hour work year, it is readily apparent that the agency's failure to account for the offerors' different transition plans also prejudiced the protester. As discussed above, according to the agency's own estimate, accounting for the [DELETED]-hour LOE reduction attributable to LMIS's [DELETED]-hour work year would add more than \$[DELETED] to the awardee's costs. Thus, the nearly [DELETED]-hour difference attributable to LMIS's transition plan is more than sufficient to establish prejudice as to this basis of protest. See Kellogg, Brown & Root Servs., Inc.-- Recon., supra.

RECOMMENDATION

We recommend that the agency amend the solicitation to account for the cost impact resulting from offerors' different transition plan approaches, and reevaluate offerors' revised proposals consistent with the discussion above. Further, we recommend that the agency perform a more complete OCI investigation consistent with this decision prior to making a new award. We also recommend that the agency reimburse DRS 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.

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General Counsel