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Decision

Matter of: Enterprise Information Services, Inc.

File: B-405152; B-405152.2; B-405152.3

Date: September 2, 2011

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Kenneth D. Brody, Esq., and Thomas K. David, Esq., David, Brody & Dondershine, LLP, for Superlative Technologies, Inc., the intervenor.
Marvin K. Gibbs, Esq., Department of the Air Force, for the agency.
Jonathan L. Kang, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Challenge to the evaluation of the protester's quotation as unacceptable is denied where the protester's failure to respond to one of the performance work statement requirements was based on the protester's unreasonable interpretation of the solicitation as permitting vendors to not address "optional" requirements.
2. Protest that the awardee's subcontractor had an unmitigated unequal access to information organizational conflict of interest is denied where the record shows that, although the contracting officer did not follow the requirements of the Federal Acquisition Regulation to ensure that contractors enter into non-disclosure agreements with other contractors to prevent competitive harm arising from disclosures of information, there was no competitive prejudice to the protester because the contracting officer obtained different kinds of non-disclosure agreements from the awardee's subcontractor's personnel, which provided adequate protections of the protester's confidential and proprietary information.
3. Protest that the awardee's subcontractor had an unmitigated impaired objectivity organizational conflict of interest arising from its contract with the procuring agency is denied where the record shows that the contracting officer investigated the matter and determined that the subcontractor's work under its contract did not involve the subject matter implicated by the protested procurement.

DECISION

Enterprise Information Services, Inc. (EIS), of Vienna, Virginia, protests the award of a task order to Superlative Technologies, Inc. (SuprTEK), of Ashburn, Virginia, by the Department of Defense, U.S. Transportation Command (USTRANSCOM), under request for quotations (RFQ) No. HTC711-11-Q-D0008, for support of the agency's Information Tool Suite (ITS) program. EIS argues that USTRANSCOM unreasonably evaluated its quotation, and failed to reasonably address organizational conflicts of interest (OCI) that the protester contends should have precluded SuprTEK from receiving the award.

We deny the protest.

BACKGROUND

The RFQ was issued on January 19, 2011, and was amended on February 8. The solicitation sought quotations to provide services to support the ITS, which is a series of databases for support of USTRANSCOM activities. RFQ amend. 1, Performance Work Statement (PWS), ¶ 1.2. The services required under the PWS include web interface services and enhancements, portal development and maintenance, database management, hardware and software installation and management, troubleshooting, and generation and updating of documentation. Id.

The competition was limited to vendors holding contracts under the Streamlined Technology Acquisition Resources for Services (STARS) contract, which is a multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contract awarded by the General Services Administration to participants in the Small Business Administration's 8(a) program. The RFQ anticipated issuance of a task order to the successful vendor with labor hour and fixed-price contract line items (CLIN), for a 4-month base period followed by up to three 1-year options.¹ Vendors were advised that they would be evaluated on the basis of price, and the following equally weighted non-price factors: (1) past performance; (2) staffing approach; and (3) technical approach. RFQ amend. 1, at 12-15. For purposes of award, the solicitation stated that the non-price factors, when combined, were "significantly more important than price." Id. at 12.

¹ We denied USTRANSCOM's request that our Office dismiss the protest because it concerns the issuance of a task order under an ID/IQ contract awarded by a civilian agency under the authority of Title 41 of the U.S. Code. The agency argued that with the sunset of 41 U.S.C. § 4106(f) (2006 & Supp. IV 2010), our Office no longer has jurisdiction to hear such protests. For the reasons discussed in our decision in Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107, our Office has retained jurisdiction to consider protests of task orders issued under ID/IQ contracts awarded by a civilian agency, notwithstanding the sunset.

USTRANSCOM received six quotations by the closing date of February 14. The agency convened a source selection evaluation team (SSET), which evaluated each vendor's quotation. The SSET provided a report to the contracting officer (CO), who served as the source selection official for the procurement. The final ratings for the vendors were documented in the source selection decision (SSD), which was approved by the CO, and which assigned the following ratings to SuprTEK and EIS:

	SUPRTEK	EIS
PAST PERFORMANCE	Significant Confidence	Significant Confidence
STAFFING APPROACH	Met Requirements	Did Not Meet Requirements
TECHNICAL APPROACH	Met Requirements	Did Not Meet Requirements
PRICE	\$13,270,784	\$9,384,576

Agency Report (AR), Tab 15, SSD, at 11.

The agency concluded that EIS's quotation had a deficiency under the staffing approach factor—and therefore did not meet the requirements for the factor—because the protester did not provided staffing or labor hours for one of the CLINS.² Id. The agency concluded that EIS's quotation also had a deficiency under the technical approach factor—and therefore did not meet the requirements for the factor—because the protester “failed to submit a sound plan to accomplish the tasks required in the PWS.” Id. at 5.

The agency also concluded that none of the four other vendors were technically acceptable. Id. at 11-12. In this regard, the CO concluded that the quotations of all vendors, other than SuprTEK, would require either “significant changes” or “complete re-write[s]” in order to be technically acceptable. Id.

The CO concluded that SuprTEK's quotation merited award because

[a]lthough SuprTEK's price is the highest of all offerors, their combination of past performance, staffing, [and] technical approach is superior to all other offerors, justifying the price which is only slightly higher (2.34%) than the [independent government cost estimate],

² A deficiency, as defined in the RFQ, was “a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.” RFQ amend. 1, at 15.

clearly making it the best value offeror, price and non-price factors considered.

Id. at 12. USTRANSCOM notified EIS of the award on May 25, and this protest followed.

DISCUSSION

Evaluation of EIS's Staffing Plan

EIS argues that USTRANSCOM unreasonably assessed its quotation with a deficiency under the staffing approach factor. The evaluation of a vendor's proposal or quotation is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation, our Office will not reevaluate proposals or quotations but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

The RFQ contained 19 CLINs, which required vendors to perform 17 task areas of the PWS and contained 2 CLINs covering travel and other direct costs. Under the staffing approach factor, the RFQ stated that the agency would evaluate vendors' quotations "to determine: (1) the adequacy of their unique approach to accomplishing the required effort, ensuring a quality service will be provided and (2) that the schedule contractor clearly and reasonably communicates an understanding of the effort that is consistent with the PWS requirements." RFQ amend. 1, at 17. The solicitation required vendors to provide a "personnel matrix which identifies the personnel resources . . . [that] shall correlate each labor category by hours to each PWS task and sub-task (if applicable)." RFQ amend. 1, at 14. The price factor required vendors to "insert unit prices and extended amounts as required in the Pricing Schedule . . . as well as complete the Pricing Recap." Id. at 16.

As relevant here, CLIN 17 required vendors to submit a fixed-price for PWS task area 17, "ITS Cyber Security Requirements." RFQ amend. 1, at 4. The PWS provided that subtasks 4 through 14 of task area 17 were "OPTIONAL SUBTASKS," and further stated that the "Contractor will be given a minimum 30-day notice before Optional Tasks 5.4 – 5.14 are exercised."³ RFQ amend. 1, PWS ¶ 1.3.17. The price schedule

³ Although this provision refers to "Optional Tasks 5.4 – 5.14," this reference clearly refers to PWS subtasks 17.4 through 17.14.

confirmed that, under CLIN 17, “[subtasks] 4-10, 11-14 are Optional.” RFQ amend. 1, at 4.

In its quotation, EIS’s personnel matrix addressed staffing, labor categories, and labor hours for tasks 1 through 16, but did not include any information for task area 17. AR, Tab 9a, EIS Technical Proposal, at 2-8. Under the technical approach section of its quotation, EIS generally addressed the experience requirements for PWS task area 17, but did not specifically address its technical or staffing approach for these requirements. Id. at 23.

USTRANSCOM’s evaluation of EIS’s quotation assessed a deficiency under the staffing approach factor. The agency found that “EIS’ staffing approach failed to meet the requirements of the PWS” because the protester’s quotation did not provide staffing or labor hours for task 17, as required by the RFQ. AR, Tab 15, SSD, at 11. The agency also noted that “EIS’ proposed Task 17 pricing [of [deleted]] was [deleted] under the [independent government cost estimate].” Id. at 4. USTRANSCOM expressed concern that “EIS does not fully understand the Cyber Security requirement and how to staff it appropriately.” Id. The agency found that “[s]ince there was no technical or staffing approach to validate the [deleted] price for Task 17, we were unable to substantiate their proposal amount.” Id. at 11. The agency concluded that EIS’s quotation “would require a complete technical re-write” to be acceptable. Id.

EIS acknowledges that it chose “not to offer a technical solution and specifically price for the [task area 17] optional subtasks.” Supp. Protest at 8. The protester argues, however, that USTRANSCOM’s assessment of a deficiency under the staffing approach factor was unreasonable because, the protester contends, vendors were not required to submit staffing for the optional portions of CLIN 17. EIS primarily argues that the term “optional” meant that vendors were permitted to choose whether or not to submit quotations for the “optional subtasks” under PWS task area 17. In support of its interpretation, the protester notes that CLIN 17 was fixed-price, and the pricing schedule required vendors to submit a single price and did not provide for separate pricing of the optional and non-optional subtasks. The protester contends that, because vendors were only allowed to quote a single fixed-price, the agency could not award the contract and then separately exercise the optional tasks. For this reason, EIS contends that the only possible interpretation of the RFQ was that vendors were free to propose a price that reflected either: (1) both the optional and non-optional tasks, or (2) only the non-optional tasks.

Where a dispute exists as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, an interpretation of a solicitation must be consistent with such a reading. The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 35.

The RFQ cannot reasonably be read as permitting offerors the option of whether to submit prices and personnel resources for any, all or part of PWS task area 17. In this regard, the RFQ unambiguously required each offeror to submit a “matrix which identifies the personnel resources . . . [that] shall correlate each labor category by hours to each PWS task and sub-task (if applicable).” RFQ amend. 1, at 14. Nothing in this or any other provision excepted task area 17 from the requirement that offerors submit a staffing matrix and price for all PWS tasks and subtasks, including those which had been designated as optional.⁴ Moreover, contrary to the protester’s argument, nothing in the RFQ reasonably implied that agency’s designation of certain subtasks of task area 17 as optional meant that it was the vendor’s option whether it would agree to perform this work, or to submit the required price and labor matrix. Indeed, consistent with Federal procurement practice, the RFQ made clear that this option was to be exercised by the agency.⁵ RFQ amend. 1, PWS, ¶ 1.3.17 (optional subtasks could be exercised by the agency within 30 days).⁶ Thus, EIS had no reasonable basis to fail to provide the required price and staffing matrices for all subtasks included in task area 17.

In any event, EIS’s arguments do not address its failure to submit a staffing matrix for any portion of PWS task area 17, which included non-optional subtasks. As indicated above, this violated the unambiguous requirement that a staffing matrix be provided for “each” PWS task.

Moreover, not only did EIS violate the terms of the RFQ by providing no staffing matrix or explanation for CLIN 17, but the protester provided no basis for the agency to understand that it had elected to exclude the subtasks the protester viewed as optional from its quotation. On this record, we think the agency reasonably concluded that “EIS does not fully understand the Cyber Security requirement and

⁴ As noted by USTRANSCOM, EIS was the only one of the six vendors that failed to adequately respond to task area 17 of the PWS. See CO Statement at 14.

⁵ The protester’s argument is also inconsistent with the common meaning of the term “option,” as used in the Federal Acquisition Regulation (FAR): “[A] unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.” FAR § 2.101.

⁶ Even if the protester’s interpretation of CLIN 17 was reasonable, this interpretation would at best create an alleged patent ambiguity in the solicitation, which must be protested prior to the closing time for receipt of proposals to be considered timely. 4 C.F.R. § 21.2(a)(1) (2011); Rehal Int’l Transport., B-401090, Apr. 7, 2009, 2009 CPD ¶ 81 at 3. The protest here was filed after award was made.

how to staff it appropriately,” and that its quotation was unacceptable.⁷ AR, Tab 15, SSD, at 4.

Organizational Conflict of Interest

Next, EIS argues that the award to SuprTEK was tainted by OCIs arising from the work performed by the awardee’s proposed subcontractor, Paragon Technology Group, Inc., under the program management office support (PMOS) contract for USTRANSCOM.⁸ The protester alleges that Paragon’s performance of the PMOS contract gave it access to non-public information concerning the protester’s proposed subcontractor, Ross Technologies, Inc. (RTGX), under that company’s current and completed contracts for USTRANSCOM.⁹ EIS also argues that, as part of Paragon’s duties under the PMOS contract, Paragon will be in a position to monitor and evaluate SuprTEK’s and Paragon’s performance of the ITS contract. For the reasons discussed below, we find no basis to sustain the protest.

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 responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397 *et al.*, July 27, 1995, 95-2 CPD ¶ 129 at 12. The situations in which OCIs arise, as described in FAR subpart 9.5 and the

⁷ EIS raises other challenges to the evaluation of its quotation under the staffing approach and technical approach factors. Because we denied the challenge to USTRANSCOM’s evaluation of the protesters’ staffing approach under task area 17, which rendered EIS’ quotation unacceptable, we need not address its other complaints concerning the evaluation of its quotation.

⁸ As discussed above, SuprTEK was found to be the only eligible vendor that submitted an acceptable quotation. If the protest were sustained based on the OCI grounds raised by EIS, SuprTEK could be found ineligible for award, and USTRANSCOM could be faced with resoliciting the requirement. Under these circumstances, EIS would be eligible to compete on such a resolicitation, and is therefore an interested party under our Bid Protest Regulations to raise these OCI arguments. See 4 C.F.R. § 21.0(a)(1); Executive Protective Sec. Serv., Inc., B-299954.3, Oct. 22, 2007, 2007 CPD ¶ 190 at 3 n.3.

⁹ RTGX currently performs the information resource management database repository (IRMDR) contract for USTRANSCOM, and previously performed the Defense Personal Property System (DPS) contract for the agency. Decl. of RTGX Business Manager at 1.

decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. EIS's protest arguments concern the latter two types of OCIs.

An unequal access to information OCI arises where a firm 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. FAR §§ 9.505(b), 9.505-4; Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 at 8. As the FAR makes clear, the concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of “[p]roprietary information that was obtained from a Government official without proper authorization,” or “[s]ource selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.” FAR § 9.505(b); see ITT Corp.–Elec. Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 5. 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 § 9.505-3; see Aetna Gov't Health Plans, Inc., *supra*, at 13.

In reviewing bid protests that challenge an agency's conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the “arbitrary and capricious” standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt, Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). To demonstrate that an agency's OCI determination is arbitrary or capricious, 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. Turner Constr. Co., Inc. v. United States, No. 2010-5146, slip. op. at 17-18 (Fed. Cir. July 14, 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that “the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.” Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer's OCI determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the CO's investigation and, where an agency has given meaningful consideration to whether an OCI exists, will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See CACI, Inc.-Fed., *supra*, at 9; CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

Unequal Access to Information

EIS argues that Paragon had access to RTGX's proprietary information, and that this access created an unequal access to information OCI. Under the PMOS contract, Paragon provides support to USTRANSCOM for acquisition of information

technology goods and services. CO Statement at 24. Paragon's duties include management of cost, schedule, performance, and risk for a variety of agency requirements, such as program control, resources management, requirements management, configuration management, test and evaluation, systems engineering, program management support, risk management, information technology administrative support, and acquisition support. Id. at 24-25. EIS contends that under the PMOS contract Paragon had the ability to access RTGX's proprietary technical and cost information, such as RTGX's rates, which created an unequal access to information OCI. Supp. Protest at 38.

In her initial response to the protest, the CO stated that Paragon did not have access to confidential or proprietary RTGX information under the PMOS contract:

Paragon's PMOS contract does not provide it with access to any contractor rates or prices. Even though Paragon may be privy to some of the Programs of Records estimates, neither IRMDR contractor rates nor ITS information are included in this system. In addition, a contractor's proposal or labor rates would not be available for any Paragon employee or any other contractor to access. Contractor rates are not entered into any system accessible to, or maintained by, the PMOS contractor.

CO Statement at 25.

The CO also noted that the PMOS contract required each Paragon employee to sign a non-disclosure agreement (NDA) with the agency. Id. at 26. These agreements stated in relevant part as follows:

This Non-Disclosure Agreement is a standard agreement designed for use by contractor (including subcontractor) employees assigned to work on USTRANSCOM contracts. Its use is designed to protect non-public government information from disclosures and prevent violations of federal statutes/regulations.

* * * * *

3. In the course of performing under contract/order/solicitation # [GS-35-F-0484N] or some other contract or subcontract for the USTRANSCOM, I agree to:

a) Use only for Government purpose any and all confidential business information, contractor bid or proposal information, and/or source selection sensitive information to which I am given access. I agree not to disclose "non-public information" by any means (in whole or in part, alone or in combination with other information, directly or indirectly or derivatively) to any person except to a U.S. Government official with

a need to know or to a non-Government person (including, but not limited to, a person in my company, affiliated companies, subcontractors, etc.) who has a need to know related to the immediate contract/order, has executed a valid form of this non-disclosure agreement, and receives prior clearance by the contracting officer. All distribution of the documents will be controlled with the concurrence of the contracting officer.

b) "Non-public information", as used herein, includes trade secrets, confidential or proprietary business information (as defined for government employees in 18 USC 1905); advance procurement information (future requirements, acquisition strategies, statements of work, budget/program/planning data, etc.); source selection information (proposal rankings, source selection plans, contractor bid or proposal information); . . .

c) Not to use such information for any non-governmental purposes, including, but not limited to, the preparation of bids or proposals, or the development or execution of other business or commercial ventures.

AR, Tab 10, Sample NDA, at 1-2.

In its comments and supplemental protest, and supported by a declaration of RTGX's Business Manager, the protester contended that RTGX's proprietary information, such as labor categories, cost data, and other performance-related data, were available in a networked computer system to which Paragon had access through its performance of the PMOS contract. Decl. of RTGX Business Manager at 1. Id. The protester also contended that RTGX provided invoices and other proprietary data to a Paragon employee in connection with Paragon's performance of the PMOS contract. Id. at 2.

In response, the CO acknowledged that her initial view of the potential access to information Paragon had under the PMOS contract was not correct. In her supplemental statement, the CO stated as follows:

[I]n investigating EIS's allegation, I did find an instance where a Paragon employee . . . in the DPS program office may have had access to RTGX rate information from invoice reviews as part of the duties under the PMOS support contract. However, [the Paragon employee] had previously signed a non-disclosure statement which is on file, and is included as an attachment in [the PMOS CO's] declaration (PMOS CO Declaration, Attachment 1). Even if [the Paragon employee] did have access to rates on invoices, he was precluded from disclosing this

information to Paragon or using this information by the terms of his nondisclosure agreement.

Supp. CO Statement, July 20, 2011, at 8.

Notwithstanding her revised understanding of the information to which Paragon may have had access under the PMOS contract, the CO confirmed her finding that no disqualifying OCI existed because the NDAs signed by Paragon employees prohibited any disclosure which could have affected the ITS competition. *Id.* Specifically, the CO stated that she viewed the NDAs as precluding Paragon employees from disclosing the information to any parties not authorized to receive the information, including other Paragon employees not covered by the NDAs. *Id.* at 12, 14.

As our Office has held, mitigation efforts that screen or wall-off certain individuals within a company from others, in order to prevent an improper disclosure of information, may be an effective means to address an unequal access to information OCI. See Axiom Resource Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 7 n.3; Aetna Gov't Health Plans, Inc., *supra*, at 13.

EIS argues, however, that the CO did not reasonably conclude that the NDAs mitigated the potential OCI that arose from Paragon's performance of the PMOS contract. EIS first argues that the CO's reliance on the NDAs signed by Paragon employees was unreasonable because the FAR requires a different form of NDA. In this regard, FAR § 9.505-4(a) states that "[w]hen a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed." In order to mitigate the potential competitive harm, the FAR mandates the following actions:

A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

FAR § 9.505-4(b).

We agree with the protester that the PMOS CO failed to comply with the express requirements of FAR § 9.505-4(b). The record shows that, contrary to the requirements set forth above, Paragon did not enter into an NDA with RTGX for the PMOS contract, nor did the PMOS CO require that Paragon do so. Supp. CO Statement, July 20, 2011, at 14; PMOS CO Statement at 2. Despite this error, we do not think that the protester was prejudiced here. Competitive prejudice must be

established before we will sustain a protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving the award but for the agency's actions, we will not sustain a protest, even if deficiencies in the procurement process are found. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

Although the NDAs obtained by the PMOS CO did not take the form required by FAR § 9.505-4(b), we think that the CO for the ITS contract nonetheless concluded that the NDAs adequately mitigated the possibility that Paragon had an unequal access to information OCI. While the protester contends that the NDAs apply only to "government information," the record shows that the agreements cover a broad range of contractor business information, including "any and all confidential business information, contractor bid or proposal information, and/or source selection sensitive information." AR, Tab 10, Sample NDA, at 1-2. The NDAs prohibit Paragon employees from disclosing this information to "a non-Government person (including, but not limited to, a person in my company, affiliated companies, subcontractors, etc.)" unless that person has a valid "need to know," has executed a NDA, and has received prior clearance from the CO. Id. at 2. Finally, the NDA prohibits use of the information for "any non-governmental purposes, including, but not limited to, the preparation of bids or proposals." Id. Thus, we think the CO could reasonably find that the NDAs apply to any information provided by RTGX to Paragon employees in the course of either party's performance of any contract with USTRANSCOM, and place appropriate restrictions on the disclosure or use of that information. On this record, we conclude that the CO reasonably exercised her judgment by relying on the NDAs as mitigating the possible OCI arising from Paragon's access to RTGX information under the PMOS contract.

EIS argues, however, that the company-to-company agreements required under the FAR and the PMOS contract (which contains a requirement that mirrors FAR § 9.505-4, AR, Tab 19, PMOS Contract, at 51-52) provide protections that are not provided by the NDAs between Paragon and the government. Specifically, the protester contends that "only a company-to-company agreement, as required by the FAR and OCI clause, establishes a binding contracting commitment with legal remedies in the event a company's proprietary data has been improperly used by a contractor acting on behalf of the government." Supp. Comments, July 25, 2011, at 5 n.1. However, the absence of additional protections and benefits that might be afforded to contractors under a company-to-company agreement does not render unreasonable the CO's judgment that the NDAs adequately mitigated the possible OCIs in question here.¹⁰

¹⁰ Our Office has no role in determining whether EIS or RTGX has a private cause of action against SuprTEK or Paragon. Moreover, Paragon's compliance with the PMOS contract provision is a matter of contract administration that we will not review. 4 C.F.R. § 21.5(a); Solar Plexus, LLC, B-402061, Dec. 14, 2009, 2009 CPD ¶ 256 at 2-3.

In sum, we find that although the PMOS CO did not follow the requirements of the FAR to obtain company-to-company NDAs for the PMOS contract, this error did not prejudice the protester. In this regard, we conclude that the CO for the instant award gave meaningful consideration to the record, and reasonably relied on those NDAs as addressing the potential for an unequal access to information OCI that arose from Paragon's performance of the PMOS contract.¹¹ Thus, notwithstanding the agency's error concerning the type of NDA obtained, we find no basis to sustain the protest.¹²

Impaired Objectivity OCI

Finally, EIS argues that Paragon's role as the PMOS contractor creates an impaired objectivity OCI because the company will be in a position to evaluate both SuprTEK and itself during the performance of the ITS contract. Specifically, the protester contends that the scope of statement of work for the PMOS contract could potentially require oversight of the ITS contract.

The CO states that she "began to work [on] OCI issues during the early stages of the procurement, including the Request for Information (RFI) and requirements definition stages." CO Statement at 27. After receiving an expression of interest in the ITS contract from Paragon, the CO states that she "initially had concerns with its submission and potential to be a bidder on the ITS requirement as a result of its role as [the PMOS] contractor." *Id.* The CO concluded, based on her detailed and

¹¹ The CO states that upon her review of the record, she found that two of the required NDAs for Paragon employees were not on file. The CO stated that she was advised by the PMOS contracting officer's representative that the absence of these NDAs from the file was likely a clerical error. The CO states that she contacted the two Paragon employees for whom NDAs could not be found, and concluded that their duties did not involve the work performed by RTGX, and that they did not have access to RTGX data. Supp. CO Statement, Aug. 3, 2011, at 1.

¹² EIS also argues that the information that the CO acknowledges could have been accessed by Paragon may have been only the "tip of the iceberg," and that there may have been more information to which Paragon employees could have accessed under the PMOS contract. Protester's Supp. Comments, July 25, 2011 at 3; Protester's Supp. Comments, Aug. 2, 2011, at 3. The parties disagree as to the scope of information to which Paragon employees may have been able to access under the PMOS contract, and whether this data was proprietary or competitively useful. We need not resolve these issues because, as discussed above, we think that the CO reasonably concluded that the NDAs addressed any kind of unequal access to information OCI arising from Paragon's access to RTGX's information as part of the PMOS contract.

documented review of the PMOS contract, that it would not involve oversight of the ITS contract. Id. at 28. In preparing her response to the protest, the CO also consulted with the PMOS CO, who confirmed that the PMOS contract would not involve oversight of the ITS contract. Supp. CO Statement, July 20, 2011, at 13, 15. Specifically, the PMOS CO stated that “[c]ertain USTRANSCOM IT and IT-related contracts are not assigned to the PMO and do not fall within the IT programs managed by the PMO,” and the “ITS acquisition falls within [the] group of programs that are not assigned to the PMO.” PMOS CO Statement at 1.

Although EIS argues that the scope of the PMOS contract could, on its face, potentially include oversight of the ITS contract, the protester provides no basis to rebut the PMOS CO’s representation that the ITS contract is specifically excluded from oversight by the PMOS contractor. On this record, and in the absence of any specific evidence from the protester demonstrating that the PMOS CO’s representation is incorrect, we think that the CO reasonably concluded that Paragon’s performance of the PMOS contract did not create an impaired objectivity OCI with regard to the award of the ITS contract to SuprTEK.

The protest is denied.

Lynn H. Gibson
General Counsel