



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: ActioNet, Inc.--Costs

File: B-416557.3

Date: February 4, 2019

Gregory H. Petkoff, Esq., and Carla J. Weiss, Esq., Jenner & Block LLP, for the protester.

Damien C. Specht, Esq., Rachael K. Plymale, Esq., and R. Locke Bell, Esq., Morrison & Foerster LLP, for ASRC Federal Data Network Technologies, the intervenor.

William B. Blake, Esq., Department of the Interior, for the agency.

John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of costs of filing and pursuing protest of agency's organizational conflict of interest evaluation is recommended where the agency unduly delayed taking corrective action when a reasonable agency inquiry into protest allegations would have shown that the agency failed to meaningfully evaluate organizational conflicts of interest.

DECISION

ActioNet, Inc. of Vienna, Virginia, requests that our Office recommend that it be reimbursed the costs associated with filing and pursuing its protest (B-416557, B-416557.2) challenging the issuance of a task order to ASRC Federal Data Network Technologies (AFDNT) of Beltsville, Maryland, under request for quotations (RFQ) No. 140D0418Q0172, issued by the Department of the Interior (DOI), Interior Business Center, Acquisition Services Directorate, for Defense Healthcare Management Systems (DHMS) sustainment and systems integration support services. ActioNet asserted that the agency incorrectly determined that it had a potential organizational conflict of interest (OCI), and alleged disparate treatment with respect to the OCI. The protester also challenged various aspects of the agency's evaluation of quotations.

We grant the request as it pertains to the protester's challenge to the agency's OCI evaluation.

BACKGROUND

DOI issued the RFQ on behalf of the Program Executive Office (PEO) DHMS for the procurement of sustainment and systems integration support services for various Defense Medical Information Exchange (DMIX) products. RFQ at 1.¹ The RFQ was issued to holders of the National Institutes of Health Information Technology Acquisition and Assessment Center, Chief Information Officer – Solutions and Partners 3 (CIO-SP3) indefinite-delivery, indefinite-quantity multiple-award contract, seeking quotations for four different task areas: information technology (IT) services for biomedical research, health sciences, and healthcare; IT operations and maintenance; integration services; and software development. The performance work statement (PWS) required the awardee to provide continual reporting of systems operational status and metrics that track the quality of DMIX Program Management Office (PMO) products; sustainment services for certain DMIX PMO products; and systems integration for the DMIX PMO products.² Agency Report (AR), Tab 14, PWS § 1 at 1.

The requirement was a consolidation of two previous task orders that both ended in fiscal year 2018, one for DMIX sustainment services and one for DMIX systems integration services. AR, Tab 11, Award Summary at 2. Because both support services were for the same DMIX systems, the agency decided to consolidate these requirements to “provide a full range of systems integration, engineering, and sustainment support services to DMIX under one task order[.]” Id.

The RFQ contemplated the award, on a best-value tradeoff basis, of a time-and-materials and fixed-price task order with a 1-year base period and four 1-year option periods. RFQ at 1-3. Offerors were advised that the agency would use a comparative analysis method of evaluation, and make award to the offeror that provided the overall best value considering four technical evaluation factors and price. The four technical evaluation factors, listed in descending order of importance, were: management and technical approach; personnel qualifications; organizational experience; and past performance. Id. at 12. All four non-price factors collectively were significantly more important than price. Id.

The RFQ also contained a customized OCI clause that stated:

This contract is for the performance of DMIX Systems Integration and Sustainment Support for PEO DHMS and its clients and program offices.

¹ Citations to the RFQ are to Amendment 4, which was the final amended RFQ.

² The DMIX PMO products are Bidirectional Health Information Exchange share, Data Exchange Service, Joint Legacy Viewer, Clinical Health Data Repository, James A. Lovell Federal Health Care Center, Medical Single Sign On and Context Management and Enterprise Service Bus, and associated data map tables. Agency Report (AR), Tab 14, PWS § 1 at 1.

The [contracting officer] has determined that this acquisition may give rise to a potential organizational conflict of interest. Services to be provided under this contract will require Contractor evaluation of other Contractor deliverables and potential access to proprietary information, and may include but not be limited to the following activities:

- The DMIX systems integration function supports the overarching program testing and schedule timelines, supports the program software performance reporting, [configuration management] functions, and supports all Software Assurance activities throughout the system development lifecycle.

As a result of performance under this contract, the Contractor's judgment as an evaluator of DMIX Product software code developed and delivered under other contracts may be biased.

Id. at 30-31. The RFQ also stated that the awardee may review proprietary information from other contractors during performance of this contract and, as a result, offerors had to implement certain safeguards to protect this information. Id. at 31.

The RFQ further provided:

if an actual or potential organizational conflict of interest is anticipated prior to contract award or discovered after the award of this contract, the Contractor will immediately notify the Contracting Officer, in writing, of the nature of the conflict. The Contractor shall submit a mitigation plan to the Contracting Officer with their quote . . . or within 30 days of notification if after contract award, outlining the actions the Contractor has taken or proposes to take to avoid, neutralize, or mitigate the actual or potential organizational conflict of interest.

Id. In response to the RFQ, the agency received five quotations, including ones from ActioNet and AFDNT. AR, Tab 11, Award Summary at 5. Quotations were evaluated by the Technical Evaluation Committee (TEC), which sent its evaluations to the contracting officer for final review. Id. A contract specialist prepared an award summary, which the contracting officer reviewed and approved. Id. at 21.

With respect to the OCI, the TEC found that all five offerors:

fail[ed] to acknowledge and mitigate the potential conflict of interest with the delivery from the sustainment staff of developed software code to the system integration staff on this contract. This combination of the developer and system integrator for [three DMIX PMO products] presents an implied impaired objectivity of the contractor evaluating its own work.

AR, Tab 10, Consensus Technical Evaluation at 12-13.³ In addition, the TEC characterized AFDNT's failure to address potential OCIs as only a "minor negative," but did not similarly downplay this failure for any of the other offerors. Id. at 13. In the award summary, the contracting officer noted the failure to address potential OCIs for only some offerors, including ActioNet. See AR, Tab 11, Award Summary at 13, 15-16. However, the contracting officer did not mention the failure of the awardee, AFDNT, to address the potential OCIs, see id. at 12, 14, nor is AFDNT's failure to address OCIs otherwise mentioned in the agency's contemporaneous evaluation documentation.

Despite having concluded that all offerors had failed to address potential OCIs, the agency proceeded to make its source selection without further inquiry or analysis. The agency found that AFDNT offered the best value to the government and issued a task order to AFDNT with an estimated value of \$89,985,991.87. Following a debriefing, ActioNet protested to our Office.⁴

In its August 20, 2018 supplemental protest and comments on the agency report, ActioNet raised for the first time the protest ground that the agency's conclusion that ActioNet had an OCI was unsupported and irrational.⁵ Specifically, ActioNet claimed that "[t]here is nothing in the record that supports the existence of a potential conflict of interest." Protester's Comments and Supp. Protest at 4. The protester also asserted that the agency considered this potential OCI to be a weakness for ActioNet, but not for the awardee, and that this amounted to disparate treatment.⁶

In the agency's August 31 supplemental agency report responding to ActioNet's supplemental protest, the contracting officer stated that an OCI was "inherent to the work since this contract is a consolidation of different tasks." Supp. COS at 4. The contracting officer further explained that "[u]nder this contract, the [s]ustainability team

³ The TEC made this finding as part of its evaluation of offerors' quality control plans. See AR, Tab 10, Consensus Technical Evaluation at 12-13.

⁴ Because the awarded value of the task order exceeded \$10 million, the protest was within our jurisdiction. See 41 U.S.C. § 4106(f)(1)(B).

⁵ ActioNet was not aware that the agency had determined that ActioNet had an OCI until it received the agency report and TEC evaluation that revealed the agency's OCI findings.

⁶ ActioNet's disparate treatment claim is based on two points: first, the TEC characterized the awardee's failure to address the OCI as only a "minor negative" while not similarly downplaying the same failure by ActioNet; and second, the contracting officer's award summary did not mention this failure when summarizing the awardee's technical evaluation but stated that it was a "concern" in the summary of ActioNet's evaluation. In its response to ActioNet's supplemental protest, the agency claimed these inconsistencies in the evaluation record were "oversight[s]." See Supp. Contracting Officer's Statement (COS) at 4-5.

creates code changes for [three DMIX] systems and then turns it over to the [s]ystems [i]ntegration team, which, under this contract, would be employees from the same company, to evaluate the software code quality and installation instructions.” Id. As a result, “[i]nherent in this contract is the evaluation of the contractor’s own work.” Id. The contracting officer concluded that “all Quoters will have a potential conflict of interest and the Government expected all Quoters to recognize and address the potential conflict.” Id. This explanation differed from the OCI provision in the RFQ, which stated that the conflict could arise because the awardee may evaluate DMIX product software code that had been developed and delivered under other contracts, not this same subject task order.⁷

The contracting officer then stated that because none of the offerors acknowledged or mitigated the conflict, the agency concluded that the potential OCI was simply a risk that was “equal across all Quoters.” Id. at 4. The agency alternatively surmised that it was possible that none of the offerors addressed potential conflicts because no conflicts existed. Supp. Memorandum of Law at 5 n.2. In this regard, the agency contended that the potential conflict arising from a situation where the contractor performing this effort would evaluate its own products used in performance of this same effort could be “considered internal quality control instead of potential impaired objectivity.” Id.

On October 3, GAO held a conference call with the parties and indicated that our Office would likely sustain the protest based on the agency’s failure to meaningfully evaluate OCIs as required by section 9.504 of the Federal Acquisition Regulation (FAR). In this regard, the GAO attorney noted that there was no documentation in the contemporaneous evaluation record to support the agency’s argument raised in its supplemental agency report that the vendors’ potential OCIs presented risks that were equal for all offerors or, alternatively, that this was a quality control issue and not an OCI. Rather, the record reflected (1) the contracting officer’s determination as stated in the RFQ that “this acquisition may give rise to a potential organizational conflict of interest”; (2) none of the offerors addressed OCIs in their proposals; and (3) the agency determined that the contract work presented an implied impaired objectivity OCI that all five offerors failed to acknowledge or mitigate, but still moved forward with award. The GAO attorney explained that based on this record, the agency failed to properly evaluate or analyze the OCI and therefore GAO would likely sustain the protest on this ground.⁸

On October 5, the agency requested the opportunity to file a supplemental brief in response to the conference call. The agency filed its brief on October 10 and argued that the OCI issue discussed on the conference call was not raised by the protester, that

⁷ As noted above, the contract here is a consolidation of two previous task orders.

⁸ The GAO attorney also noted concern with the inconsistencies in the record regarding the OCIs, including the fact that the record appeared to minimize the OCI for the awardee while citing it as a “concern” for the protester.

GAO had raised the OCI issue sua sponte, and that GAO did not have authority to decide cases based on issues raised sua sponte. The agency also argued that the OCI issue was a matter of contract administration that GAO should not consider, and that there was no prejudice to ActioNet even if the agency had failed to meaningfully review the potential OCIs.⁹ As explained below, GAO disagreed with the agency's complaint that the issued was raised sua sponte because our Office found that the protester had sufficiently raised this issue in challenging the agency's finding that ActioNet had an OCI. Thus, in response to the agency's filing, GAO indicated that it intended to move forward with its decision as discussed on the October 3 conference call.

On October 12, the agency advised our Office that it intended to take corrective action.¹⁰ Specifically, the agency stated that it would review its treatment of the potential OCIs to ensure that all OCIs are avoided, mitigated, or neutralized.¹¹ The agency also stated that it would review ActioNet's other protest allegations and take any action deemed necessary. GAO dismissed the protest as academic. On October 30, ActioNet filed this request.

DISCUSSION

ActioNet requests that our Office recommend that the agency reimburse ActioNet's costs of filing and pursuing its protest challenging the award to AFDNT. The agency counters that ActioNet is not entitled to costs because ActioNet cannot establish that its protest was clearly meritorious or that the agency unduly delayed taking corrective action.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the record, we

⁹ In this regard, the agency quoted the TEC's finding that the contract work "presents an implied impaired objectivity of the contractor evaluating its own work" but argued that "when looking closely at this statement, it is evident that the technical evaluators' concern was not actually an implied impaired objectivity OCI," and that the TEC simply had used a "poor choice of words" when describing the OCI. Supp. Memo. of Law, Oct. 10, 2018, at 3. We rejected this argument on its face. Given the TEC's express finding that there was an impaired objectivity OCI, and the contracting officer's subsequent statement that the OCI was "inherent" to the contract, the agency's attempt to dismiss its contemporaneous evaluation as "a poor choice of words" was unconvincing.

¹⁰ The agency's implementation of this corrective action is subject to a protest (B-416557.4) currently pending before GAO.

¹¹ In the notice of corrective action, the agency again alleged that GAO raised the OCI issue sua sponte, complaining that GAO's stated intention to sustain the protest "exceeds its authority" and was "unreasonable and irrational." Agency Notice of Corrective Action, Oct. 12, 2018, at 2.

determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest; we generally do not consider it to be prompt where it is taken after that date. Alsalam Aircraft Co.--Costs, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3. We will recommend reimbursement only where the underlying protest is clearly meritorious, *i.e.*, not a close question. InfraMap Corp.--Costs, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2; CSRA LLC--Costs, B-415171.3, Aug. 27, 2018, 2018 CPD ¶ 307 at 3-4. For the reasons discussed below, we find that the protest ground challenging the agency's OCI evaluation was clearly meritorious. In addition, because the agency took corrective action after it filed a supplemental agency report, we also conclude that the corrective action was not prompt.

As an initial matter, our willingness to inform the parties that a protest is likely to be sustained, as we did here as a result of the deficient OCI analysis, is generally an indication that the protest is viewed as clearly meritorious, and satisfies the "clearly meritorious" requirement for purposes of recommending reimbursement of protest costs. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 7. Moreover, a review of the record shows that the agency's OCI analysis did not meet the requirements of the FAR, and therefore ActioNet's protest ground was clearly meritorious.

It is a fundamental principle of government procurement that procuring agencies must evaluate proposals on the basis of the solicitation's stated evaluation factors, and document the bases for their evaluation conclusions. Risk Analysis and Mitigation Partners, B-409687, B-409687.2, July 15, 2014, 2014 CPD ¶ 214 at 6. More specifically, the FAR requires that contracting officers identify and evaluate potential OCIs, and directs them to avoid, neutralize, or mitigate potential significant OCIs before contract award 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. In considering whether there is an actual or potential OCI, the FAR advises contracting officers to examine the particular facts of the contracting situation and the nature of the proposed contract, and to exercise common sense, good judgment, and sound discretion in deciding whether a significant OCI exists, and in determining the appropriate means for resolving any significant OCI that has been identified. FAR § 9.505. We review agencies' OCI investigations for reasonableness and whether an agency has given meaningful consideration to whether a significant conflict of interest exists. See LOGZONE, Inc., B-416029, B-416029.2, May 21, 2018, 2018 CPD ¶ 190 at 4 (citing TISTA Sci. & Tech. Corp., Inc., B-408175.4, Dec. 30, 2013, 2014 CPD ¶ 17

at 6; TeleCommunication Sys., Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4).

As explained above, the agency's evaluation found that all offerors had an OCI that each offeror failed to address. In response to ActioNet's allegation that this finding was irrational, the agency stated that all offerors had an "inherent" OCI, but argued that the OCIs were a risk equal across all offerors, or alternatively that no OCIs existed, and that therefore it could make award regardless of the OCI. In the absence of any contemporaneous evidence in the record supporting these arguments, there was no basis for GAO to conclude that the agency gave any meaningful consideration to potential OCIs in its evaluation. Based on the agency's response to ActioNet's supplemental protest, the agency apparently concluded that the awardee--indeed any awardee--had an impaired objectivity OCI, but decided to move forward with award without meaningfully considering the extent of any such OCI. Further, the record did not reflect any consideration by the agency of whether there was a way to avoid, neutralize, or mitigate the OCIs. Without any meaningful analysis of OCIs, the agency's conclusion that ActioNet--or any offeror--had a potential OCI was irrational.¹²

The agency argues that ActioNet cannot establish that any of its protest grounds were clearly meritorious because ActioNet did not raise the protest ground on which GAO stated it would sustain the protest; rather, GAO raised it sua sponte. We disagree. The protester alleged that the agency improperly concluded that ActioNet had an OCI, and then highlighted the OCI as a concern for ActioNet while downplaying the significance of the awardee's own OCI. In other words, the protester argued that the agency had failed to meaningfully evaluate OCIs because there was no support in the record for the agency's conclusion that ActioNet had an OCI. Thus, the protester raised all of the elements that led us to inform the agency that we would likely sustain the protest on the basis that the agency failed to meaningfully review and consider potential OCIs.

Furthermore, any reasonable agency inquiry into ActioNet's OCI allegations at the time they were raised would have revealed facts showing the absence of a defensible legal position. As explained above, to counter ActioNet's OCI allegations, the agency asserted conclusions about the alleged OCIs that were nowhere to be found in the contemporaneous evaluation record. In fact, these conclusions differed from the OCI analysis in the contemporaneous evaluation record. Thus, the agency's reliance on post-hoc rationalizations that were contrary to the contemporaneous record to downplay the significance of its original OCI findings should have made clear the absence of a defensible legal position.

¹² It also was unreasonable for the agency to minimize the significance of potential OCIs for the awardee while highlighting that issue as a concern for the protester. Because there was no indication in the contemporaneous record that the agency evaluated the individual quotations in this regard--or had any information that would permit such an analysis--there was no basis in the record for the agency to differentiate between vendors in this manner.

We also conclude that the agency's corrective action, occurring only after the agency filed a supplemental agency report--and after GAO informed the parties that it was likely to sustain the protest--to have been unduly delayed. Relying again on the argument that GAO raised this issue sua sponte, the agency asserts that we should measure the promptness of the agency's corrective action from the date GAO held the conference call with the parties and informed the agency that it would likely sustain the protest on the basis of the agency's failure to meaningfully evaluate OCIs. Under this approach, the agency argues that the corrective action came only seven business days after the conference call.¹³ We disagree. The evaluation record at the time the agency responded to ActioNet's supplemental protest made apparent to the agency the lack of a defensible legal position. To be sure, the agency should have realized this when it was unable to point to any of the contemporaneous evaluation documentation to support the arguments it raised in its supplemental agency report. As a result, it should have realized that corrective action was appropriate at the time it responded to ActioNet's supplemental protest. In these circumstances, we do not consider the corrective action to be prompt.

As noted above, ActioNet raised other protest grounds alleging that the agency's evaluation of its and the awardee's proposals was irrational and unreasonable, and that the agency imposed unstated evaluation criteria. In the October 3 conference call, GAO did not take a position on any of ActioNet's other protest grounds, and ActioNet has not shown that these other grounds are clearly meritorious. In that regard, while ActioNet generally requested reimbursement of the costs for filing its protest, its filings in this case focused primarily on the challenge to the agency's OCI evaluation and did not discuss its other protest grounds except to note that ActioNet "believe[d] that GAO would have sustained the protest on at least one other ground." This is not sufficient to show that ActioNet's other protest grounds are clearly meritorious, i.e., not a close question. See InfraMap Corp.--Costs, 2012 CPD ¶ 123 at 3.

In addition, we find that these other protest grounds are severable from the OCI challenge. A protester generally should be reimbursed its costs with respect to all issues pursued and not merely those on which it prevails. Social Sols. Int'l, Inc.-Costs, B-411994.4, May 8, 2017, 2017 CPD ¶ 138 at 5. However, in appropriate cases, we will

¹³ The agency claims that Southeast Tech. Servs., B-272374.2, Mar. 11, 1997, 97-1 CPD ¶ 107--in which we determined that the promptness of corrective action had to be measured from the date GAO identified the issue--supports its position that it took prompt corrective action. We disagree. In that case, the basis for the agency's corrective action was GAO's questioning why the agency did not use simplified acquisition procedures, of which the protester had made only a "passing remark" in its protest. Southeast Tech. Servs., supra., at 3. Here, ActioNet expressly challenged the agency's consideration of OCIs, raising this issue in a supplemental protest and addressing it again in its comments on the supplemental agency report. This was far more than a "passing remark."

limit our reimbursement recommendation to costs associated with issues on which the protest was sustained where the unsuccessful issues are clearly severable so as to essentially constitute a separate protest. Sodexo Mgmt., Inc.-Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶136 at 29. Issues are severable where they do not share a common core of facts and are not based on related legal theories. Id.; see also Red River Waste Sols., LP--Costs, B-411760.4, Aug. 21, 2017, 2017 CPD ¶ 263 at 3.

Here, ActioNet's other protest grounds did not involve the same set of core facts as did ActioNet's clearly meritorious challenge to the OCI evaluation. They also were not based on related legal theories. Accordingly, we recommend that ActioNet be reimbursed only the costs related to its challenge to the agency's OCI evaluation.

RECOMMENDATION

For the reasons discussed above, we conclude that ActioNet's argument that the agency incorrectly found that it had an OCI was clearly meritorious and that the agency failed to take timely corrective action in response to this argument. We recommend that the agency reimburse ActioNet's costs for filing and pursuing its protest only as related to its challenge of the agency's OCI evaluation. ActioNet should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Thomas H. Armstrong
General Counsel