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Decision

Matter of: NTT DATA Services Federal Government, LLC

File: B-422235.5; B-422235.6

Date: November 18, 2024

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DIGEST

Protest that agency's waiver of organizational conflicts of interest is invalid and unreasonable is denied when the waiver is consistent with the requirements of the Federal Acquisition Regulation.

DECISION

NTT DATA Services Federal Government, LLC (NTT), of Herndon, Virginia, protests the agency's decision to allow Salient CRGT, Inc. (Salient), of Fairfax, Virginia, to compete for the award of a contract under request for quotations (RFQ) No. 72MC1023Q00002, issued by the United States Agency for International Development (USAID), for operations and maintenance services in support of the USAID's information technology (IT) infrastructure and systems.¹ The protester argues that Salient has unmitigable organizational conflicts of interest (OCIs), the agency unreasonably decided not to exclude Salient from the competition, and the agency failed to properly execute a waiver of Salient's OCIs.

¹ GovCIO (formally named as Government CIO LLC) acquired Salient, Inc. on August 19, 2021, and Salient continues to operate and do business as a subsidiary of GovCIO. Protest at 3 n.1. The agency's documentation refers to Salient as GovCIO LLC/Salient CRGT; however, we refer to the entity as Salient throughout the decision.

We deny the protest.

BACKGROUND

As relevant here, on February 27, 2023, USAID issued the RFQ to vendors holding General Services Administration multiple-award schedule contracts for special item number 54151S (IT professional services) pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. Contracting Officer's Statement (COS) at 1-2; Agency Report (AR), Tab 2, Conformed RFQ at 2, 173.² The solicitation anticipates the award of a task order to provide operations and management (O&M) services for USAID's IT infrastructure and systems (referred to as the O&M contract). COS at 1; Conformed RFQ at 21. USAID will issue the task order to the vendor whose quotation represents the best value to the government considering technical and price evaluation factors where technical factors are significantly more important than price. Conformed RFQ at 173. The agency received quotations from vendors, including NTT and Salient, and notified NTT that Salient had been selected for award on May 14, 2024. COS at 2.

NTT, the incumbent contractor for the O&M contract, filed a protest with our Office on May 24. Among other things, the protester alleged that Salient has OCIs that would preclude the agency from issuing the task order to Salient. COS at 2; AR, Tab 9, NTT Protest, May 24, 2024 at 14-19. In response to the protest, the contracting officer investigated the OCI allegations and determined that no actual or potential OCI existed, but that it was in the best interest of the government to execute a waiver of "any actual or potential conflict of interest." AR, Tab 19b, OCI Waiver at 1-2; AR, Tab 19h, OCI Determination & Findings at 1-2, 6-7. USAID then notified our Office it was taking corrective action that would include review of the entire procurement beginning with quotations received; review and revision, as appropriate, of the source selection decision; and any other actions necessary to ensure the integrity of the procurement. We subsequently dismissed the protest as academic. *NTT DATA Servs. Fed. Gov't, LLC*, B-422235.3, B-422235.4, July 11, 2024 (unpublished decision) at 1. In implementing the corrective action, the agency conducted discussions with Salient and NTT where the agency provided both parties with the final technical ratings and total evaluated price for each vendor. Protest Exhibits, exh. 3, Corrective Action Discussion Letter, July 15, 2024 at 9, 35.

On August 9, 2024, before the deadline for receipt of revised quotations, NTT protested the agency's decision to keep Salient in the competition. USAID responded by requesting dismissal of the protest on the basis that the agency had executed an OCI waiver pursuant to FAR section 9.503. Req. for Dismissal at 1-5. NTT then filed a supplemental protest challenging the validity and reasonableness of the agency's waiver.

² Citations to the record use the Adobe PDF or Microsoft Word pagination of documents produced in the agency report. GAO requested an agency report in response to the supplemental protest (B-422235.6) and suspended the agency report for the initial protest (B-422235.6).

DISCUSSION

In its various protest submissions, NTT contends USAID failed to reasonably consider Salient's alleged OCIs, and, as a result, improperly waived them. As discussed below, we find no basis to sustain any of NTT's protest allegations.

We view the protester's challenge to USAID's OCI waiver to be the threshold issue in this protest, and we address it first. In this regard, the FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest 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. As an alternative to avoiding, neutralizing, or mitigating an OCI, an agency head or designee, not below the level of the head of the contracting activity (HCA), "may waive any general rule or procedure of [FAR subpart 9.5] by determining that its application in a particular situation would not be in the Government's interest." FAR 9.503. While our Office will review an agency's execution of an OCI waiver, our review is limited to consideration of whether the waiver complies with the requirements of FAR section 9.503; that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency. *Perspecta Enter. Sols., LLC*, B-418533.2, B-418533.3, June 17, 2020, 2020 CPD ¶ 213 at 10; *see also Accenture Fed. Servs., LLC*, B-421134.2 *et al.*, Apr. 12, 2023, 2023 CPD ¶ 90 at 10; *Dell Servs. Fed. Gov't, Inc.*, B-414461.6, Oct. 12, 2018, 2018 CPD ¶ 374 at 6; *CACI, Inc.-Fed.; General Dynamics One Source, LLC*, B-413860.4 *et al.*, Jan. 5, 2018, 2018 CPD ¶ 17 at 7; *AT&T Gov't Sols., Inc.*, B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45 at 3-4. We will dismiss a protest alleging an OCI where the HCA has waived the alleged conflict. *AT&T Gov't Sols., Inc.*, *supra* at 4.

NTT argues that USAID's waiver is invalid because the agency's OCI investigation was unreasonable, failed to assess "the full extent" of Salient's unmitigable OCIs, and is inconsistent with the terms of the task order Salient is currently performing for USAID, the terms of this solicitation, and the record here.³ Resp. to Req. for Dismissal & Supp. Protest at 10-19. For example, NTT argues Salient has an impaired objectivity OCI because Salient currently performs work for USAID under a different contract--the strategic programs task order--where Salient is closely involved in reviewing and approving the IT solutions that will be developed by the O&M contractor for this requirement. *Id.* at 10-13.

NTT contends that as the strategic programs task order contractor, Salient will be in the position of making recommendations and planning work that Salient will be performing under the O&M contract, if Salient is awarded the O&M contract. *Id.* at 13. As relevant here, an impaired objectivity OCI arises where a firm's ability to render impartial advice

³ The protester also alleged that USAID was required to consult with its competition advocate before executing the waiver and failed to do so. After receiving the supplemental agency report, however, the protester withdrew this protest ground. Comments at 7 n.3.

to the government in connection with an evaluation of its own products or services, or those of a competitor, is impaired because of the firm's competing interests; typically such situations arise where, because of the nature of a firm's actual or potential work under one contract, it may be unable to provide objective judgments to the government under another contract.⁴ FAR 9.505-3; see also FAR 9.505(a); *Inquiries, Inc.*, B-418486 *et al.*, May 27, 2020, 2020 CPD ¶ 182 at 11.

NTT argues that even if Salient is not evaluating other firms or proposals under the strategic programs task order, Salient is making "judgments or recommendations that would have the effect of directly influencing its own well-being" under the O&M contract. Resp. to Req. for Dismissal & Supp. Protest at 10-11. In NTT's view, the USAID's OCI investigation unreasonably focused on whether Salient would be evaluating other proposals or firms and failed to consider whether Salient recommendations would influence its own well-being as the O&M contractor. *Id.* NTT maintains that the waiver thus fails to adequately consider the full extent of the conflicts and is invalid. *Id.*

As noted above, the contracting officer conducted an OCI investigation in response to NTT's first protest in May 2024, which included OCI protest grounds nearly identical to the challenges of the current protest, before requesting a waiver. Req. for Dismissal at 2; COS at 13-15; Memorandum of Law at 10-13. In addition to the impaired objectivity and biased ground rules OCIs that NTT raised, the contracting officer also investigated whether Salient had an unequal access to information OCI. COS at 13-15; AR, Tab 19h, OCI Determination & Findings at 5-6.

After completing the investigation, the contracting officer determined that Salient had no actual or potential OCIs of any kind. AR, Tab 19h, OCI Determination & Findings at 6. Regarding the example above, the contracting officer's investigation found that the function of the strategic programs task order contractor was to coordinate services, and therefore Salient was performing a support function where it collected and analyzed data for the O&M contractor rather than evaluative services or contract performance management services. *Id.* at 3-5. The contracting officer also found that the strategic programs task order provides an analysis of how an IT "program aligns with the office's processes operations, and goals" and provides support for the IT project as it moves forward through the planning process to implementation. *Id.* at 5. The contracting officer concluded, "[t]here is no opportunity for the contractor to make subjective judgments or recommendations and Government resources are directly involved to ensure safeguards are in place." *Id.* The contracting officer concluded further that no actual or potential impaired objectivity OCI existed related to Salient's performance of the strategic programs task order that would prevent Salient from competing the O&M contract here. *Id.* at 7.

⁴ The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. FAR 9.505; *Inquiries, Inc.*, *supra* at 11.

Nevertheless, the contracting officer determined it was in the best interest of the government to execute an OCI waiver “given the appearance of conflict and out of an abundance of caution.” *Id.* On June 17, the designated HCA approved the written waiver request. AR, Tab 19b, OCI Waiver at 1.

As noted above, agencies properly may waive an OCI, provided that the waiver is executed in accordance with FAR section 9.503, which states as follows:

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

FAR 9.503.

Here, there is no issue regarding whether the waiver is in writing and was approved by the appropriate agency official. The only question, therefore, is whether the waiver sets forth the extent of any possible OCI on the part of Salient. The protester argues that USAID’s waiver does not “set forth the extent of the conflict” being waived and is invalid because USAID’s OCI investigation unreasonably determined that Salient did not have an impaired objectivity or a biased ground rules OCI. The protester argues in effect, that because the OCI waiver states that the agency found no disqualifying OCIs, the waiver can only be reasonable if the agency’s review of the merits of the underlying OCI concerns was also reasonable. We disagree and we conclude the waiver is valid and reasonable.

The waiver request states that, even though the agency’s investigation of the OCI allegations found “no actual conflict exists,” the agency nevertheless concluded that

given the appearance of conflict and out of an abundance of caution, the Contracting Officer determined that it is in the best interest of the United States Government to proceed with a waiver pursuant to FAR 9.503 to affirm the award of the O&M contract to GovCIO/Salient CRGT, Inc. (72MC1024M00006) notwithstanding the existence of any actual or potential conflict of interest.^{5]}

AR, Tab 19b, OCI Waiver at 2.

The record shows that USAID did not waive alleged OCIs based solely on its conclusion that Salient had no disqualifying OCIs. Instead, as set forth above, the waiver states

⁵ Note, as discussed above, the agency conducted the OCI investigation and executed the waiver following NTT’s protest of the award to Salient, which is why the waiver references affirming the award to Salient.

that, regardless of the agency's assessment of the merits of the OCI allegations, it was in the best interest of the government to waive the application of the FAR OCI provisions. On this record, we conclude that the agency's waiver of the OCIs does not depend on the conclusions set forth in the agency's OCI investigation, and the waiver complies with the requirements of FAR section 9.503, including the requirement to set forth the extent of the potential conflicts. *CACI, Inc.-Fed.; General Dynamics One Source, LLC, supra* at 13-14. Accordingly, we deny this protest allegation.

In light of the HCA's execution of a valid OCI waiver, we dismiss NTT's protest about the alleged OCIs. As noted above, NTT's protest argues that the agency should have eliminated Salient based on its OCIs under FAR subpart 9.5. Protest at 6-10. The FAR, however, permits waiver of any general rule or procedure within FAR subpart 9.5. FAR 9.503. The issues in dispute in NTT's protest arise from the rules and procedures in FAR subpart 9.5, and, as of June 17, USAID has waived the application of these rules and procedures to Salient under this procurement, which renders the protest academic.

The protest is denied.

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General Counsel