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# Decision

**Matter of:** Safal Partners, Inc.

**File:** B-416937.3

**Date:** June 26, 2019

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Michael S. Taylor, Esq., Department of Education, for the agency.  
Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

The record does not support the protester's contention that the agency permitted only the successful vendor to revise its quotation; consequently, we deny the protest that the agency improperly held discussions with the awardee but not the protester.

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## DECISION

Safal Partners, Inc., of Houston, Texas, protests the issuance of a task order (TO) to Manhattan Strategy Group, LLC (MSG), of Bethesda, Maryland, under request for quotations (RFQ) No. 91990018Q0023, issued by the Department of Education for support of the Charter Schools Program (CSP). Safal contends that the agency engaged in improper discussions when it permitted MSG to make material changes to its quotation without conducting discussions with other vendors, including Safal.

We deny the protest.

## BACKGROUND

The RFQ, issued as a small business set-aside under Federal Acquisition Regulation (FAR) subpart 8.4, contemplated the issuance of a fixed-price TO under the successful firm's General Services Administration Federal Supply Schedule contract to support the

CSP by providing technical assistance and disseminating best practices. Agency Report (AR), Tab A, RFQ at 19.<sup>1</sup> The TO is referred to as the National Charter School Resource Center (NCSRC) contract, on which Safal is the incumbent contractor. Award was to be made on a best-value tradeoff basis, considering price and the following five technical factors, listed in descending order of importance: technical approach, quality and time commitments of quoted personnel, management plan, organizational capabilities and experience, and vendor past performance. AR, Tab B, RFQ amend. 0001, at 7-9. Price was significantly less important than technical merit and would be evaluated for reasonableness. Id. at 7. Each of the five technical factors would be evaluated as excellent, satisfactory, marginal, or unsatisfactory. Id.

Three vendors, including the protester and the awardee, submitted quotations. The agency evaluated the technical quotations and assigned the following ratings:

Factor	Vendors		
	MSG	Safal	Vendor C
Technical approach	Satisfactory	Marginal	Marginal
Quality and time commitments of quoted personnel	Excellent	Marginal	Marginal
Management plan	Excellent	Satisfactory	Marginal
Organizational capabilities and experience	Excellent	Satisfactory	Marginal
Vendor past performance	Excellent	Excellent	Satisfactory

AR, Tab L, Award Summary, at 7.

The agency subsequently provided each of the vendors with Business Questions related to its pricing. Each vendor was advised that it was required to submit a revised business quotation making specific changes requested by the agency. AR, Tab J, Business Questions. Safal's final price was \$42,061,596, and MSG's was \$25,781,177. AR, Tab L, Award Summary, at 5. MSG increased its final price slightly from its initial price; Safal decreased its final price by less than two percent from its initial price.<sup>2</sup> See id.

The TO was issued to MSG as the firm whose quotation represented the best value to the agency, and Safal protested to our Office. Safal argued that the agency's technical evaluation was unreasonable, that the agency conducted unfair discussions, and that MSG had an unmitigated organizational conflict of interest (OCI).

With respect to the last allegation, Safal argued that the awardee's subcontractor, WestEd, had an impaired objectivity OCI because of WestEd's role in performing the

<sup>1</sup> Citations are to the agency reports in the two prior protests, discussed below, as well as the current protest.

<sup>2</sup> Vendor C's total final price was slightly lower than MSG's. Id.

Charter Schools Monitoring and Data Collection (DCM) contract for the agency. A central requirement of that contract is the implementation of an on-site monitoring process for gathering information and data to ensure project performance by grantees. AR, Tab Q, DCM Contract, attach. A, Performance Work Statement (PWS), at task 9. Monitors conduct an on-site visit and, after that visit, develop a draft monitoring report for agency review, which will eventually become a final report. Id. Based on the results included in all monitoring reports, the DCM contractor develops a comprehensive monitoring and data collection report with recommendations in writing for technical assistance to particular grantees. Id. The requirement at issue calls for the NCSRC contractor to provide individualized technical assistance to grantees addressing the findings identified in the grantee monitoring reports developed under the DCM contract. AR, Tab B, RFQ amend. 0001, NCSRC PWS, at subtask 3.4. In the earlier protest, Safal argued that WestEd could benefit financially by both recommending grantees for technical assistance under the DCM contract and providing that assistance under the NCSRC contract. We sustained the protest on the OCI allegation alone, because we had no basis to conclude that the agency's finding of no OCI was reasonable, and we recommended that the agency conduct and adequately document a new OCI analysis. Safal Partners, Inc., B-416937, B-416937.2, Jan. 15, 2019, 2019 CPD ¶ 20 at 10-11.

The agency advised our Office that it would comply with our recommendation, and the contracting officer began conducting a new OCI investigation. AR, Tab H, Agency Notification of Compliance, Jan. 17, 2019. Pursuant to FAR § 9.504(e), the contracting officer notified MSG of the potential for a conflict of interest, explaining as follows:

Pursuant to the Department's Acquisition Regulations ("EDAR"), WestEd's role as the prime contractor under the DCM contract and its role as subcontractor under the NCSRC Contract, at a minimum, create[s] the appearance of an apparent impaired objectivity OCI. See 48 C.F.R. § 3452.209-71. MSG's Technical Proposal attributes [DELETED] hours of work to "Supporting Partners" for a single occurrence in which optional Subtask 3.4 of the NCSRC contract is exercised. MSG does not identify which subcontractor will perform the [DELETED] of work.<sup>3</sup> Therefore, it is possible that WestEd may be the subcontractor responsible for providing some of the [technical assistance (TA)] to [State Entity/State Educational Agency (SE/SEA)] grantees under optional Subtask 3.4. If this is true, then based on its role as the prime contractor for the DCM contract; WestEd has a reasonably foreseeable financial interest in the Department providing [TA] to SE/SEA grantees under optional Subtask 3.4

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<sup>3</sup> MSG's quotation contained a staffing chart, which included staffing for optional subtask 3.4. AR, Tab I, MSG Quotation at 33, Exh. 11. Under subtask 3.4, MSG indicated that a total of [DELETED] hours would be performed by named MSG personnel, and that [DELETED] hours would be performed by "Supporting Partners." Id. The supporting partners were described as "Outside Experts," and a note in the chart stated that "[h]ours for subs and other third-party experts are included in the supporting partners line above." Id.

of the NCSRC contract. Specifically, because the monitoring reports WestEd drafts under the DCM contract are used to help determine which SE/SEA grantees may receive TA under optional Subtask 3.4 of the NCSRC contract. Therefore, WestEd may have the ability to influence when optional SubTask 3.4 is exercised and may be financially incentivized to do so.

Supp. AR, attach. 1, FAR § 9.504(e) Exchange, at 3-4.

MSG responded that, as a threshold matter, WestEd would not be involved in performing subtask 3.4, as evident from MSG's business quotation. Supp. AR, attach. 2, Letter from MSG to Agency, Feb. 22, 2019 at 2. The awardee noted that MSG's existing budget did not include any hours for WestEd under subtask 3.4, and that all of the hours for that subtask were allocated to subject matter experts and/or outside experts. Id. Moreover, MSG asserted that the amount of compensation WestEd would receive under the NCSRC contract was unrelated to the amount of work the agency ordered under subtask 3.4. As a result, MSG argued, the agency had no reason to question WestEd's objectivity. Id.

MSG further responded that its mitigation plan included a fire wall for all personnel supporting subtask 3.4, prohibiting them from discussing sensitive information with personnel outside the fire wall. Id. In addition, MSG represented that WestEd was implementing a firewall on the DCM contract that would prohibit personnel supporting the DCM contract from discussing sensitive information pertaining to that contract with anyone not supporting that contract.<sup>4</sup>

The contracting officer again considered whether WestEd had an unmitigated OCI. AR, Tab L, Contracting Officer Memorandum at 6. The contracting officer found that WestEd's performance of the DCM contract, along with its possible participation in the NCSRC requirement, did create the possibility of an apparent impaired objectivity OCI. The contracting officer concluded that WestEd did not have an actual impaired objectivity OCI, however. He based his conclusion on MSG's specific statement that WestEd would not perform any portion of subtask 3.4 of the NCSRC contract, or any other tasks under the NCSRC contract that might be impacted by its performance on the DCM contract. Moreover, the contracting officer found that, to the extent an impaired objectivity OCI did exist, "MSG's mitigation plan effectively resolved and/or nullified any potential conflict."<sup>5</sup> Id. at 8. The contracting officer advised the

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<sup>4</sup> MSG also stated additional possible mitigation measures, including eliminating subtask 3.4, converting it to either a fixed quantity of work or a fixed price, or the agency waiving the potential OCI. Id.

<sup>5</sup> After the contracting officer documented his finding that no impaired objectivity OCI existed, he requested a waiver of the OCI from the head of the contracting activity, which was granted. AR, Tab M, Memorandum from Contracting Officer to Head of Contracting Activity & Waiver Approval, Mar. 13 &15, 2019. The waiver is not pertinent  
(continued...)

unsuccessful vendors, including Safal, of the results of his new conflict of interest investigation. Protest, Exh. A, Email from Contracting Officer to Safal, Mar. 18, 2019. This protest followed.

## DISCUSSION

The protester asserts that while the agency found a potential ambiguity in MSG's quotation regarding WestEd's role in performing subtask 3.4, "in reality MSG's quote was unambiguous that WestEd was proposed to have a role in performance of Subtask 3.4." Protest at 6. For the contracting officer to have found otherwise, Safal argues, the agency must have permitted MSG to revise its quotation, which would constitute unequal discussions. Id. at 5.

There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors. FAR § 8.404(a); see USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in determining whether exchanges with vendors in a FAR subpart 8.4 procurement were fair and equitable. Id. Before withholding award due to an OCI, the FAR requires the contracting officer to notify the contractor, provide the reasons for the possible withholding of the contract, and provide the firm a reasonable opportunity to respond. FAR § 9.504(e). Where an agency conducts exchanges with a vendor regarding the vendor's plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions. See International Bus. Machs. Corp., B-410639, B-410639.2, Jan. 15, 2015, 2015 CPD ¶ 41 at 10, citing CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 15; Cahaba Safeguard Adm'rs, LLC, B-401842.2, Jan. 25, 2010, 2010 CPD ¶ 39 at 10; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 21.

In support of its contention that MSG's quotation unambiguously reflected that WestEd would perform a portion of the subtask 3.4 requirement, Safal notes that a WestEd employee wrote the subtask 3.4 portion of MSG's quotation,<sup>6</sup> and that MSG's quotation states the "Team" will perform subtask 3.4 and defined WestEd as part of that Team. Comments on AR at 3-7. In its initial protest, the protester also pointed to the labor chart in MSG's quotation indicating that [DELETED] hours of labor for subtask 3.4 would be performed by "Supporting Partners," and the note in the labor chart providing that

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(...continued)

to the issue before us, which is whether the agency engaged in unfair discussions by permitting MSG--but not Safal--to revise its quotation.

<sup>6</sup> This fact is not in dispute; the table of contents of MSG's quotation identified a WestEd employee as the author of the task 3 portion of the quotation. See AR, Tab I, MSG Technical Quotation at Table of Contents.

“[h]ours for subs and other third-party experts are included in the supporting partners line above.” Protest at 8 n.35, quoting AR, Tab I, MSG Quotation at 33, Exh. 11. The protester asserted that “[w]hile the ‘Supporting Partners’ line item for Subtask 3.4 could, in theory, include hours from other subcontractors in addition to WestEd, here no reasonable person [could] reach that conclusion [] because WestEd was the only subcontractor proposed by MSG.” Id. at 9.

First, as argued by the intervenor, it is irrelevant who drafted a particular portion of the quotation. See Intervenor’s Comments at 3. As MSG notes, the person identified as the primary drafter for tasks 1, 2, 16, 17, and 19 had all of her hours allocated to performance of tasks [DELETED]. Id., citing AR, Tab I, MSG Quotation, at 308, 342. The record provides no evidence of a direct correlation between the individual who drafted a quotation section and the individual who will be performing that portion of the requirement.

Likewise, we agree with the intervenor that the protester’s speculation about the composition of the awardee’s team is flawed. The awardee identifies specific sections of its quotation where the “MSG Team” will perform the contract requirements, and where “MSG Team” does not include WestEd. See Intervenor’s Comments at 2-4. For example, with regard to the performance of [DELETED], MSG’s quotation uses the term “MSG Team,” followed several times by “we.” AR, Tab I, MSG Technical Quotation at 22-23. Yet, the intervenor contends, WestEd was not allotted any performance hours under [DELETED]. See id. at 33, Exh. 11 (noting that no WestEd personnel were included in the performance of [DELETED]). In sum, we are not persuaded that, because MSG’s quotation defines the “Team” as including WestEd and provides for performance of subtask 3.4 by the “Team,” it is clear that MSG was proposing performance by WestEd on subtask 3.4.

We are also not persuaded that MSG’s chart unambiguously provided that WestEd was to have a role in the performance of subtask 3.4. As noted by the agency, MSG’s labor chart states that “hours for subs **and other third-party experts** are included in the supporting partners above,” and the protester’s argument “completely disregards MSG’s reference to other third-party experts.” Memorandum of Law at 9, quoting AR, Tab I, MSG Technical Quotation at 33, Exh. 11 (emphasis added by agency). The agency also points out that WestEd was not the only subcontractor proposed by MSG. Id. at 10.

In conclusion, the record does not support the protester’s contention that MSG’s quotation unambiguously provided for performance of a portion of subtask 3.4 work by WestEd. As a result, we find to be without merit the protester’s argument that MSG must have been permitted to revise its quotation.

The protest is denied.

Thomas H. Armstrong  
General Counsel