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Decision

Matter of: Pragmatics Inc.
File: B-407320.2; B-407320.3
Date: March 26, 2013

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Brandon D. Porter, Esq., Department of Defense, Defense Information Systems Agency, for the agency.
Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the awardee has an unmitigable impaired objectivity organizational conflict of interest is denied where the agency reasonably concluded that the awardee's performance as a subcontractor on a prior software development contract would not affect its ability to render impartial advice to the government.

DECISION

Pragmatics Inc., of Reston, Virginia, protests the issuance of a task order to Booz Allen Hamilton, Inc., of McLean, Virginia, by the Department of Defense, Defense Information Systems Agency (DISA) under request for proposals (RFP) No. E200474.00 for National Ground Intelligence Center (NGIC) programs system engineering and technical assistance (SETA) support work. Pragmatics argues that Booz Allen has an actual or potential impaired objectivity organizational conflict of interest (OCI) that cannot be adequately mitigated, which requires Booz Allen's exclusion from the competition.

We deny the protest.

The RFP, issued on March 29, 2012, to all ENCORE II contract¹ holders, sought task order proposals to provide SETA support for NGIC programs. The RFP anticipated the issuance of a cost plus fixed-fee task order with a 1-year base period and two 1-year options. The RFP advised that the task order would be issued to the best value offeror based upon the evaluation of three factors: (1) technical/management approach, (2) past performance, and (3) cost. For purposes of award, the RFP stated that the technical/management approach factor is more important than past performance, and when combined, the non-cost factors are significantly more important than the cost factor. RFP, Amend. 1, at 2-3.

The solicitation described the SETA support requirement for the NGIC programs as a comprehensive, iterative management process that includes: translating operational requirements into configured systems; integrating the technical inputs of design teams; managing interfaces; characterizing and managing technical risk; transitioning technology from the technology base into program specific efforts; and verifying that designs, analysis, techniques, tactics, and procedures meet operational needs. RFP, Performance Work Statement, at 1-2. The solicitation explained that SETA support is essential in order to provide system engineering and technical consulting support for software programs and integration analysis across the NGIC's mission. Id. at 1. The solicitation's performance work statement listed four SETA support tasks to be completed by the SETA contractor: (1) NGIC programs technical project management, (2) biometric programs technical oversight and system support, (3) counter insurgency programs technical oversight and system support, and (4) enterprise programs technical oversight and system support. Id. at 2.

As relevant here, the biometric programs technical oversight and system support task requires the SETA contractor to provide oversight and support for the production operation of the NGIC biometric applications and IT infrastructure. Id. at 3. This work required the SETA contractor to provide software engineering and systems engineering oversight to support NGIC's biometric identity intelligence resource (BI2R) program.² The SETA software engineering oversight support for the BI2R program will involve monitoring the software development contractor and providing technical information exchange between the Government and the software development contractor to ensure Government objectives are understood and implemented. Id. at 4. The SETA systems engineering oversight support for the BI2R program will include support for the BI2R software development contractor's testing, which involves reviewing and approving the software

¹ ENCORE II is a multiple award indefinite-delivery, indefinite-quantity contract currently awarded to twenty-six firms. Agency Report (AR), at 3.

² The BI2R program was previously named the biometric intelligence resource (BIR) program.

development contractor's test plans, monitoring testing activities, and documenting and assigning priorities to defects. Id. at 5. Also relevant here was the requirement under the enterprise programs technical oversight and system support task for the SETA contractor to provide indirect enterprise support to the NGIC programs, which includes information assurance support. Id. at 8.

In response to the solicitation, the agency received proposals from four offerors, including Pragmatics and Booz Allen. The agency reviewed and evaluated the proposals and selected Booz Allen for award. On September 6, the agency advised Pragmatics of its award decision.

Pragmatics received a debriefing on September 10. Two days later, Pragmatics filed its initial protest with our Office, alleging that Booz Allen had an actual or potential impaired objectivity OCI that could not be adequately mitigated to prevent Booz Allen's conflicting roles from biasing its judgment in performing the SETA work contemplated by the solicitation. Specifically, Pragmatics argued that Booz Allen's role as SETA support contractor will require the awardee to review work it performed under a subcontract to Northrop Grumman, where it provided systems analysis, requirements analysis, and software development assistance on NGIC's BIR development program. On October 3, in response to the protest, the agency advised our Office that it intended to take corrective action by reviewing the OCI allegations concerning Booz Allen. On October 4, we dismissed Pragmatics' initial protest as academic, due to the agency's corrective action.

On December 17, the agency informed Pragmatics of the results of its corrective action and issued a new award decision, again awarding the task order to Booz Allen. In its notice to Pragmatics, the agency explained that the contracting officer (CO) had concluded--based upon her review of the OCI allegations--that no significant potential OCI exists than cannot be adequately mitigated or avoided. On December 21, Pragmatics filed the current protest with our Office.

DISCUSSION

Pragmatics contends that Booz Allen has an actual or potential impaired objectivity OCI that cannot be adequately mitigated to prevent Booz Allen's conflicting roles from biasing its judgment in performing the SETA work contemplated by the solicitation. Pragmatics asserts that DISA's OCI investigation and analysis unreasonably concluded that Booz Allen--in its role as SETA contractor--would not be in a position to evaluate the software and systems development work it completed as a subcontractor on the BIR program.³

³ Pragmatics initially argued that the award to Booz Allen gave rise to an actual or potential OCI with regard to other NGIC programs it alleged were part of the SETA solicitation--automated identity management system (AIMS), digital production

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DISA contends that its investigation and analysis meaningfully considered Pragmatics' allegations, and reasonably concluded that no significant actual or potential OCI exists as a result of Booz Allen's previous subcontract performance on the BIR program. Additionally, DISA contends that its analysis reasonably determined that to the extent that Booz Allen will provide oversight of the BI2R program, these activities do not pose an OCI because oversight of the BI2R program will commence with software release version 3.12 for which Booz Allen was not a developer. Finally, the agency states that the awardee proposed additional assurance regarding any potential concerns because Booz Allen's SETA support staff will not be selected from its previous BIR development team. For the reasons discussed below, we find no basis to sustain the protest.

The Federal Acquisition Regulation (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-254397.15 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 decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 5. As relevant here, an impaired objectivity OCI 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; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra at 13. The concern in impaired objectivity situations, including evaluation of products or services, is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service

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program (DPP), and biometrics intelligence program support (BIPS). As the agency explained, however, these programs are not part of the review required by the SETA contractor, and, as a result, are not part of our review. Pragmatics also raised, but subsequently withdrew, a supplemental protest allegation that the agency failed to issue an amendment based upon the removal of the AIMS, DPP, and BIPS programs from the solicitation, or in the alternative, that the solicitation contained a latent ambiguity with regard to these programs. Supplemental Comments (Feb. 13, 2013), at 1 n. 1 ("Pragmatics concedes that the Supplemental Agency Report renders its Supplemental Protest filed on January 28, 2013 moot.")

being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7.

A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., *supra*, at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). An agency's evaluation of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion by the agency. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). We review an agency's OCI investigation for reasonableness, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., *supra*, at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 *et al.*, Aug. 4, 2011, 2011 CPD ¶ 156 at 17.

Pragmatics asserts that Booz Allen has an actual or potential impaired objectivity OCI in relation to two of the SETA performance work statement tasks: (1) task 2, biometric programs technical oversight and system support, and (2) task 4, enterprise programs technical oversight and system support. As relevant here, these tasks involve SETA software engineering oversight support for the BI2R program, which requires monitoring of the BI2R software development contractor and providing technical information exchange between the Government and software development contractor; SETA systems engineering oversight support for the BI2R program, which includes support for the software development contractor's testing; and information assurance support to the BI2R program.

On December 17, the CO concluded her investigation into these claims and memorialized her analysis of the actual or potential impaired objectivity OCI. The CO's assessment concluded that "no significant potential OCI exists . . . that cannot be adequately mitigated or avoided." AR, Tab 8, CO's OCI Analysis (Dec. 17, 2012), at 1-9.

With regard to Pragmatics' allegations that Booz Allen's work on the BI2R program will require it to evaluate its prior work on the BIR program, the CO concluded that Booz Allen will not be in a position to make decisions favoring its former work on the BIR program while performing the SETA support. *Id.* at 7. In reaching this conclusion, the CO reviewed Booz Allen's work as a subcontractor to Northrop Grumman on the BIR program in which it assisted in the software development life cycle, analysis design, code, test, and deployment, throughout the duration of the task order--including work on BIR version 2 and BIR version 3. *Id.* at 5. The CO found that at the time of its proposal submission, Booz Allen was performing as a subcontractor on the BIR program and had seven staff deployed to this effort.

Id. at 5; AR, Tab 4, Booz Allen OCI Plan, at D-7. The CO confirmed with the BIR CO representative that Booz Allen's performance under the BIR program contract ceased on September 10, 2012, upon the completion and delivery of BIR version 3.11. AR, Tab 8, CO's OCI Analysis (Dec. 17, 2012), at 6-7; AR, Tab 4, Booz Allen OCI Plan, at D-7. The CO noted that a follow-on contract had been awarded to Northrop for the continuation of the BI2R software development beginning with version 3.12, for which Booz Allen will not be a subcontractor.⁴ AR, Tab 8, CO's OCI Analysis (Dec. 17, 2012), at 5.

The CO also reviewed the requirements of the SETA solicitation and concluded that there is no requirement for the SETA contractor to provide direct oversight of BIR software prior to version 3.12, as there is no requirement for review or rework of previously existing software code. AR, Tab 8, CO's OCI Analysis (Dec. 17, 2012), at 6. As explained in the CO's analysis:

SETA support does not entail software development but rather involves oversight and/or assistance to help software development contractors get their software into production, working it through the NGIC software development lifecycle and change management process. As the process works, the first line identifier of software defects is user and prime contractor/developer. When a problem is identified, the developer is responsible for evaluation and resolution: they map it back to technical issue and consult users as necessary to refine and devise a solution. Once complete, the SETA contractor then does technical review of the resolution (new software release) before requesting final approval from the Government; all contract reporting system performance evaluation receives Government inspection, acceptance and final approval.

Id. at 7.

In addition, the CO reviewed Booz Allen's OCI management plan, which provided that the awardee "will take extra precautions to ensure that Booz Allen staff who supported the development of the current releases of the BIR system (up through

⁴ As detailed in the CO Representative's OCI statement, Northrop's follow-on contract for BIR work began with version 3.12 because DISA, with SETA support from the prior SETA support contractor Pragmatics, had already accepted version 3.11. AR, Tab 9, CO Representative OCI Statement, at 8. In this regard, after September 9, when Northrop released version 3.11 to the Government, any new requests for modifications or changes that require additional software development are considered an entirely new software release--which, as relevant here, will be version 3.12. Id. at 3. This is because once version 3.11 goes into production the code is "locked" and no vendor can access or modify the source code. Id.

version 3.11) will not be assigned to any SETA activities related to the BIR version 3.11 system.” AR, Tab 8, CO’s OCI Analysis (Dec. 17, 2012), at 6; AR, Tab 4, Booz Allen OCI Plan, at D-2-3. The CO also noted that Booz Allen’s plan further explained that “no current Booz Allen employees supporting the BIR program will participate in an oversight capacity relative to releases to which they were contributing developers.” AR, Tab 8, CO’s OCI Analysis (Dec. 17, 2012), at 6; AR, Tab 4, Booz Allen OCI Plan, at D-7. Booz Allen’s plan also required all SETA team members to execute a non-disclosure agreement, complete OCI training, and certify in writing that they are presently unaware of any OCIs regarding the SETA support work for the NGIC programs. AR, Tab 8, CO’s OCI Analysis (Dec. 17, 2012), at 6; AR, Tab 4, Booz Allen OCI Plan, at D-8.

Based upon the CO’s analysis of the solicitation, Booz Allen’s prior work on the BIR program, and Booz Allen’s OCI proposed staffing approach to avoid any potential conflict, the CO concluded that no significant OCI exists as a result of Booz Allen’s previous BIR program work that can not be adequately mitigated or avoided. Id. at 9.

Pragmatics argues that the agency’s OCI analysis was unreasonable because, as the incumbent SETA contractor performing under similar performance requirements, Pragmatics was required to review past software releases to recommend future requirements/changes.⁵ Pragmatics contends that its evaluation of BIR software releases identified defects in earlier releases that resulted in Pragmatics making recommendations and offering constructive criticisms of the prior system design/architecture. This retrospective criticism, Pragmatics argues, could hinder the previously released software/system developer’s reputation and its ability to secure future software/system development work with the Government or as a subcontractor. Thus, Pragmatics alleges that Booz Allen could not provide objective advice to the government in its oversight role as the SETA contractor since it may implicate its performance of prior software and system development.

Here, we think that DISA reasonably found that there is no significant OCI as a result of Booz Allen’s previous work that can not be adequately mitigated or avoided. As the CO’s analysis explained, Booz Allen’s work on the BIR program ceased with version 3.11. AR, Tab 8, CO’s OCI Analysis (Dec. 17, 2012), at 5. This software is now integrated into the overall BI2R system. Id. at 5-6. SETA oversight of each software release is a distinct and independent effort (*i.e.*, BIR version 3.9 was assessed by the SETA team independently of BIR version 3.10). Id. at 5. In preparation for release of a new BIR version, the Government, with SETA support, approves the software changes to add new requirements and resolve defects. Id. For each new release, new code is written for additions and

⁵ While we do not address all of Pragmatics’ arguments with regard to the agency’s OCI analysis, we have considered each of them and find them without merit.

defects, and there is never a requirement for review or rework of previously existing software code. Id. SETA oversight of each new release assesses the software updates and/or changes made to determine if these additions met the new requirements and resolved the defects. Id. Significantly, with regard to Pragmatic's arguments, the SETA contractor is not required to identify when a defect was introduced or which contractor is responsible for the defect. Id. at 6.

Furthermore, DISA explains that while the SETA contractor may look at the system in its entirety when identifying defects in new software releases, such a review does not require the contractor to reanalyze the code of a completed version of the software that has been accepted by the government. AR, Tab 15, CO Representative Supp. Decl. (Feb. 8, 2013), at 1. In the agency's view, the discovery of a defect in a new software version has no impact whatsoever on the acceptability of code released in a previously accepted software version. Id.

In any event, even assuming Booz Allen may be required to review its own work as alleged by Pragmatics, the CO determined that the awardee had provided an additional "safety measure" to avoid any potential OCI because Booz Allen's SETA support staff will not be selected from the staff who performed development work under the firm's BIR subcontract. AR, Tab 8, CO's OCI Analysis (Dec. 17, 2012), at 6. The CO's analysis specifically referenced Booz Allen's statement that "current [Booz Allen] staff members who have participated as BIR developers will not review artifacts for releases up to and including release of Version 3.11." Id. The CO concluded that although such additional measures were unnecessary in light of the absence of an OCI, the awardee's OCI plan provided additional assurance that the award to Booz Allen's would not give rise to an impaired objectivity OCI. See id.

In sum, the record shows that the CO conducted a thorough investigation of Pragmatics' OCI allegations. As discussed above, CO reviewed Booz Allen's performance on the BIR program, which included questions to the NGIC and BIR CO representatives regarding this work. The CO also reviewed the SETA requirements and reviewed Booz Allen's OCI plan submitted with its proposal. After reviewing all of the information, the CO concluded that no significant potential OCI exists that cannot be adequately mitigated or avoided. While Pragmatics challenges the manner and extent of investigation, we find nothing unreasonable about DISA investigation or conclusions.

The protest is denied.

Susan A. Poling
General Counsel