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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Leader Communications Inc.

File: B-298734; B-298734.2

Date: December 7, 2006

Inslee T. Bennett for the protester.

Maj. Kevin J. Wilkinson, and Douglas J. Thiesen, Esq., Department of the Air Force, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that the award of a contract for business support services to a firm currently performing a contract for acquisition support services did not create an organizational conflict of interest.
 2. Agency's evaluation of the protester's proposal submitted in response to a solicitation for business support services was reasonable where the agency's evaluated criticisms of the protester's proposal were consistent with terms of the solicitation and the record.
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DECISION

Leader Communications Inc. (LCI) protests the award of a contract to CC&G Company¹ under request for proposals (RFP) No. FA9451-06-R-0002, issued by the Department of the Air Force, for business resources and support services (BRASS) for the Air Force Research Laboratory (AFRL), Kirtland Air Force Base (AFB), New Mexico.

We deny the protest.

The RFP, issued as a competitive set-aside under section 8(a) of the Small Business Act, provided for the award of a 5-year indefinite-delivery/indefinite-quantity

¹ CC&G is an 8(a) joint venture of Corporate Allocation Services, Inc. (CAS); Compa Industries, Inc.; and Galactic Network Integrators, Inc.

contract that provides for the issuance of cost-plus-fixed-fee task orders. RFP §§ B039, B051. The contractor will be required to provide all personnel, services, and other items necessary to perform business reporting, analyses, and management administration support functions in support of the Directed Energy and Space Vehicle Directorates at AFRL.²

The RFP listed the following evaluation factors to determine the best-value proposal: past performance, mission capability, price/cost, and proposal risk. The past performance and mission capability factors were said to be equal in importance and significantly more important than the price/cost and the proposal risk factors. The mission capability factor was comprised of two equally weighted subfactors: personnel qualifications/corporate experience and management. RFP § M002.

By the RFP's closing date, the agency received nine proposals, including those of LCI (the incumbent contractor on the predecessor contract to the BRASS contract, which was called the Business and Staff Support (BASS) contract) and CC&G. Agency Report (AR), Tab 23, Source Selection Decision Document, at 1. The proposals were evaluated, with CC&G's proposal receiving ratings of "high confidence" under the past performance factor, with "blue" with "low" proposal risk ratings under both subfactors comprising the mission capability factor, at a proposed price of \$17.2 million and an evaluated cost/price of \$17.3 million.³ LCI's proposal received ratings of "high confidence" under the past performance factor, "green" with "low" proposal risk under the personnel qualifications/corporate experience subfactor of the mission capability factor, and "green" with "moderate" proposal risk under "management" subfactor, at a proposed price of \$17.4 million.⁴ AR, Tab 22, Evaluation Matrix; Tab 23, Source Selection Decision, at 17. The agency selected CC&G's highest rated, lowest cost/price proposal for award.

² The Directed Energy Directorate develops "directed energy technologies," such as high-energy lasers and high-power microwaves, and the "mission of the Space Vehicles Directorate is to develop and transition high pay-off space technologies supporting the war fighter while leveraging commercial, civil and other Government capabilities to ensure America's advantage." RFP, Performance Work Statement, at 4.

³ Proposals could be evaluated under the past performance factor as "high confidence," "significant confidence," "confidence," "little confidence," or "no confidence," and under the mission capability factor as "blue/exceptional," "green/acceptable," "yellow/marginal" and "red/unacceptable," and as having "high," "moderate," or "low" proposal risk. AR, Tab 9, Source Selection Briefing, at 18.

⁴ The agency found that it could not evaluate LCI's proposal for cost realism because of a number of evaluated inadequacies in the cost proposal.

LCI protests that CC&G should be precluded from receiving award under this solicitation because one of its joint venture partners, CAS, has an organizational conflict of interest (OCI). LCI, which asserts that its incumbent BASS contract included an OCI clause that “barred [it] from competition on any other AFRL contract,” contends that because CAS is currently performing an acquisition closeout support services (ACSS) contract for AFRL at Kirtland AFB, “fundamental fairness” requires that CC&G “be barred from participating on the BRASS Contract” because the BASS contract “was of a similar nature to CAS[’s] ACSS” contract. Protester’s Comments at 3; Protester’s Supp. Comments at 4. In this regard, the protester contends that “[a]ccess to contract sensitive information and developing requirements is an implicit part” of the ACSS contract. Protester’s Supp. Comments at 3.

The Federal Acquisition Regulation (FAR) generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.504, 9.505; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. FAR § 2.101 provides that an organizational conflict of interest exists when “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.” The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.

The first group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505-4. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining an unfair competitive advantage; there is no issue of possible bias. 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 second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13.

The third group comprises cases where a firm's work under one government contract could entail its evaluating itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. In these "impaired objectivity" cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by the relationship with the entity whose work product is being evaluated. Id.; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13.

Contracting officers are to exercise "common sense, good judgment, and sound discretion" in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; Science Applications Int'l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Science Applications Int'l Corp., supra. In this regard, substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. Snell Enters., Inc., supra, at 4.

As an initial matter, we find no merit to the protester's assertion that CC&G should have been precluded from receiving award of the BRASS contract based upon the protester's assertion that the ACSS contract awarded to CAS in January 2006 should have included, as a matter of "fundamental fairness," an OCI clause that would have barred CAS (and thus CC&G) from competing. The matter of whether a contract should include an OCI clause or a contractor should be precluded from a competition based upon an agency's determination that an OCI exists that cannot be avoided, neutralized, or mitigated, is dependent upon a reasoned application of regulation and case law, rather than a competing contractor's view of "fundamental fairness."⁵

⁵ The protester's contention that "fundamental fairness" requires that CC&G be barred from receiving the contract is based largely upon the protester's view that because its BASS contract included an OCI clause that "barred [LCI] from competing on any other AFRL contract," CAS's ACSS contract did or should have included a similar OCI clause. Protest at 2. In response, the agency notes that the BASS and ACSS contracts are dissimilar in both nature and scope, such that the inclusion of different OCI clauses in the respective contracts was warranted, and that in any event, and as evidenced by the record here, the section of the OCI clause that LCI asserts acted as a bar to its competing for other AFRL contracts was in fact deleted by the agency from LCI's BASS contract after 1 year, with LCI continuing to perform the contract for 4 more years. Agency Supp. Report at 3; Tab 6, Modification 0005 of LCI's BASS Contract (June 6, 2002), at 3-5. The agency further explains that it

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As noted by the agency, the protester does not argue that CAS has had access to any other firm's proprietary data or had any "unequal access" to any other information during its performance of the ACSS contract that would have provided CC&G with an unfair competitive advantage on this RFP. Although the protester argues that CAS may gain access to a firm's proprietary information at some point during its performance of the ACSS contract, such speculation as to the possible occurrence of such an incident in the future does not render unreasonable the agency's determination that CC&G was eligible for the award of the BRASS contract.

The protester asserts that "developing requirements is an implicit part" of the ACSS contract, apparently suggesting that CAS may have had some input into the solicitation under which the BRASS contract was awarded to CC&G, thus creating a "biased ground rules" conflict of interest. See Protester's Supp. Comments at 3. However, the agency points out that because "the acquisition support services of ACSS were (and currently are) not 'on contract' or funded. . . . CAS had no opportunity to participate in the acquisition planning, drafting of specifications, work statements or any other facet of the BRASS acquisition." Agency Supp. Report at 2. Under the circumstances and given the protester's failure to provide any evidence in support of its apparent "biased ground rules" allegation, we find this aspect of LCI's protest to be without merit.

With regard to the potential for an "impaired objectivity" OCI, the agency states that "[t]he BRASS contract does not create situations in which CAS or CC&G would provide advice or judgments related to assessment of its own performance." The agency adds, however, that it is aware that CAS, in performing its ACSS contract, may effectively "be closing out its own orders," in that it may perform closeout services for the agency with regard to tasks performed by CC&G under the BRASS contract. The agency explains that it has considered this possibility, and has determined that because "the ACSS closeout services are primarily administrative and do not involve advice, judgment, evaluation or assessment of the performance of the contractor whose contract is to be closed out," the cognizant contracting officer determined that there is no impaired objectivity "conflict between the ACSS and BRASS contracts." Agency Supp. Report at 3-4. Based upon this record, and given the protester's failure to substantively respond to the agency's explanation as set forth above, we find the agency's determination that there was no prohibited "impaired objectivity" conflict here to be reasonable. That is, since the work of CAS under the ACSS contract regarding the close out of contracts is, as explained by the

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considered the specific types of OCIs that may occur through a contractor's performance of the ACSS contract, and determined that the ACSS contract was to include a tailored OCI clause that governs the ACSS contractor's access and use of proprietary information pertaining to other contractors and which does not bar it from competing for this RFP.

agency, largely administrative and does not require subjective judgments or evaluations, there is no basis for finding that CC&G should be precluded from receiving the award of the BRASS contract here. See Computers Universal, Inc., B-292794, Nov. 18, 2003, 2003 CPD ¶ 201 at 2-3.

In sum, the agency reasonably found no OCI concerns regarding CAS that would bar award to CC&G.

The protester next argues that the evaluation of its proposal under the personnel qualifications/corporate experience and management subfactors to the mission capability factor was unreasonable and inconsistent with the terms of the solicitation. The evaluation of technical proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. An offeror's mere disagreement with the agency does not render the evaluation unreasonable. Westinghouse Gov't and Env'tl Servs. Co., Inc., B-280928 et al., Dec. 4, 1998, 99-1 CPD ¶ 3 at 5.

The RFP included detailed proposal preparation instructions, and required that the section of the offeror's proposal addressing the personnel qualifications/corporate experience subfactor to the mission capability factor include, among other things, a "[d]escription of the experience, expertise and qualifications of your key personnel," including "but not limited to program/project manager and deputy." RFP § L036. The RFP provided under the mission capability factor for the evaluation of "the experience, expertise, and qualifications of the proposed key personnel relevant to the proposed efforts." RFP § M002.

The agency found in evaluating LCI's proposal under the personnel qualifications/corporate experience subfactor to the mission capability factor that LCI's proposed contract manager "is qualified and has extensive relevant experience." AR, Tab 23, Source Selection Decision Document, at 8. The agency noted with regard to the protester's proposed deputy contract managers that while the protester's proposal provided the names of the proposed personnel, their years of experience, and positions held, the proposal failed to "provide specific details of [the] type or level of supervision and or management experience each person had." Id.

In challenging this criticism of its proposal, the protester does not dispute the accuracy of this assessment, but argues that it did not provide such details in its proposal because they were not expressly requested by the RFP. However, as referenced above, the RFP specified that "the experience, expertise, and qualifications of the proposed key personnel relevant to the proposed effort" would be evaluated. RFP § M002. Thus, it is obvious that a description of information regarding the supervisory or management experience of the key personnel proposed

for supervisory and management positions, such as the deputy contract managers identified in LCI's proposal, should have been provided with the proposal, and that LCI's failure to provide sufficient details in this regard could reasonably be negatively evaluated by the agency and did not constitute an "unstated evaluation factor." See Network Eng'g, Inc., B-292996, Jan. 7, 2004, 2004 CPD ¶ 23 at 3.

The protester makes a somewhat similar complaint with regard to the evaluation of its proposal under the management subfactor of the mission capability factor. Here, the RFP included detailed proposal preparation instructions, and informed offerors that "[m]anagement would be evaluated to determine the degree to which the offeror demonstrates the capability to effectively and efficiently manage the same or similar contract requirements," including providing staffing. RFP §§ L036, M002.

The agency criticized LCI's proposal of two deputy contract managers, with one having responsibility for the Directed Energy Directorate and the other having responsibility for the Space Vehicle Directorate, and each having additional duties in support of the Directorates, because this arrangement assertedly "provides the potential for inconsistencies and lack of continuity of policies, decisions and communication." AR, Tab 23, Source Selection Decision Document, at 13. The protester argues that the agency's criticism was unreasonable because LCI's proposed approach of having two deputy contract managers has "been successfully and effective[ly] used by LCI during the last six months of the [predecessor] BASS contract." Protester's Supp. Comments at 7. The protester represents that this approach was thus "field tested," and asserts that the agency evaluators "[k]new of the success of this approach." Id. at 8.

An agency's evaluation is dependent upon information furnished in a proposal, and it is the offeror's burden to submit an adequately written proposal for the agency to evaluate. Chant Eng'g Co., Inc., B-279049; B-279049.2, Apr. 30, 1998, 98-2 CPD ¶ 65 at 7. The agency points out in this regard that "LCI did not incorporate any information in their proposal indicating that [its] approach had been subject to a field test or that the results had been successful." Contracting Officer's Supp. Statement at 4. The agency adds that the chairperson of the agency evaluation team "had no knowledge of the dual [deputy contract manager] concept implemented by LCI on the BASS contract," and that the evaluators considered "LCI's proposal as submitted and did not use data from the field test which was not referenced, much less included in the proposal." Id. at 4-5. Although the protester appears to contend that the success of its proposed dual deputy contract manager approach could have been verified through AFRL personnel, it was LCI's responsibility to provide, within the four corners of its proposal, the information it felt necessary for the agency to properly evaluate LCI's proposed approach. See Chant Eng'g Co., Inc., supra.

LCI also protests that the agency's evaluation of its proposal under the past performance and cost/price factors was unreasonable. With regard to the evaluation of its proposal under the past performance factor, the protester argues that the agency failed to consider information regarding its performance of the BASS

contract that should have been available to the agency through the contractor performance assessment reporting system. Protest at 4. The protester also complains with regard to its cost/price proposal that the agency erroneously concluded that it could not determine the realism of LCI's proposed costs because the concerns that were noted by the cognizant agency cost/price analyst were assertedly unreasonable. Protest at 3-4.

Although the agency has responded in detail to LCI's protest here, we need not consider these aspects of LCI's protest on the merits. Competitive prejudice is an essential element of every viable protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest, even if deficiencies, such as an unreasonable or unequal evaluation of proposals, are found. CAE USA, Inc., B-293002; B-293002.2, Jan. 12, 2004, 2004 CPD ¶ 25 at 16. As evidenced by the record, LCI's proposal received the highest rating possible under the past performance factor, so its past performance rating could not be improved, and in considering the relative merits of LCI's proposal vis-a-vis CC&G's proposal in performing its source selection, the agency used LCI's proposed cost/price. Accordingly, there is nothing in the record to suggest that LCI was prejudiced by any alleged improper evaluation of its proposal under either the past performance or cost/price factors.

LCI next protests that the agency improperly used "subjective evaluations to apply objective ratings." Protest at 4. The protester asserts in this regard that the RFP's evaluation "criteria were not specific and the ratings could only have been based upon subjective opinion." Id. The protester complains that as a result it was not given credit during the evaluation process for certain aspects of its proposal that had been favorably evaluated "in other solicitation evaluations," such as "LCI[s] dynamic corporate capacity to manage multidimensional projects." Protester's Supp. Comments at 11.

The protester's complaint that the RFP's evaluation "criteria were not specific and the ratings could only have been based upon subjective opinion" is a protest of an apparent alleged solicitation impropriety, which should have been protested prior to the closing time for receipt of proposals, and is therefore untimely and not for our consideration. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2006). In any event, we note that our Office has long recognized that subjective evaluations are not improper. Sunbelt Properties, Inc., B-249969 et al., Nov. 17, 1992, 92-2 CPD ¶ 353 at 6. With regard to LCI's apparent complaint that certain alleged aspects of its proposal were more favorably evaluated in procurements with other agencies, we note that each federal procurement stands on its own, so that evaluation ratings under another solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the present RFP. Parmatic Filter Corp., B-285288, B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185 at 7. Given this, as well as LCI's failure to provide any sort of specific explanation as to how the evaluation of its proposal was

improper in this regard, we have no reason to object to this aspect of the agency's evaluation.

The protester finally points out that the initial solicitation issued by the agency for BRASS was cancelled on February 24, 2006. The protester argues that the BRASS solicitation here, which differs from the prior solicitation in that the current solicitation includes certain additional work and provides for the issuance of task orders on a cost-plus-fixed-fee basis rather than a fixed-price basis, was issued and the prior solicitation cancelled "to facilitate and accommodate joint venture bidders," such as CC&G. Protest at 3.

Although the agency has responded in detail to this aspect of the LCI's protest, we need not address it on the merits. To the extent that the protester is challenging the cancellation of the prior solicitation based upon the subsequent issuance of an RFP which it believes is not materially different, this protest ground concerns a matter other than an alleged solicitation impropriety, and therefore falls under the 10-day rule set forth in our Bid Protest Regulations. 4 C.F. R. § 21.2(a)(2); S & C Constr. Co., B-252545, Apr. 7, 1993, 93-1 CPD ¶ 301 at 3. That is, LCI knew or should have known its basis of protest--that the agency did not have a reasonable basis for canceling the prior RFP given the terms of the RFP here, or that the agency had misrepresented the reasons for canceling the prior RFP--when it received the RFP here, which was issued on March 27, 2006. Given that LCI did not file its protest challenging the agency's cancellation of the prior RFP and issuance of the RFP here until August 25, 2006, its protest here is untimely. S & C Constr. Co., *supra*. To the extent that the protester is arguing that the agency's cancellation of the prior RFP was motivated by bias in favor of the CC&G joint venture, we note that LCI has failed to provide any explanation or point to anything in the record in support of this argument. Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. McDonnell Douglas Corp., B-259694.2; B-295694.3, June 16, 1995, 95-2 CPD ¶ 51 at 28.

The protest is denied.

Gary L. Kepplinger
General Counsel