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Decision

Matter of: Business Consulting Associates, LLC

File: B-299758.2

Date: August 1, 2007

J. Scott Hommer, III, Esq., Peter A. Riesen, Esq., Keir X. Bancroft, Esq., and Patrick R. Quigley, Esq., Venable LLP, for the protester.
Philip M. Musolino, Esq., Musolino & Dessel, for MacArthur & Baker International, Inc., d/b/a MBI Consulting, an intervenor.
Jud E. McNatt, Esq., Department of Housing & Urban Development, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably concluded that the protester's and awardee's proposals were "technically equivalent," such that price became the discriminator in the award selection.
 2. Protest that agency unreasonably accepted the awardee's mitigation plan for a potential "impaired objectivity" organizational conflict of interest (OCI) is denied, where only one of the team members (a subcontractor) had a potential OCI, only a small portion of the work was affected, and the agency reasonably determined that awardee's plan to transfer the affected work to the other team member (the prime contractor awardee), which was fully capable of performing the work independently of the team member with an OCI, was acceptable.
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DECISION

Business Consulting Associates, LLC (BCA), protests the award of a contract issued by the Department of Housing & Urban Development (HUD) to MacArthur & Baker International, Inc. d/b/a/ MBI Consulting (MBI) under request for proposals (RFP) No. R-ATL-01867, which was set aside for firms qualified under the Small Business Administration's (SBA) section 8(a) program, for post-closing portfolio management support services. BCA contends that the agency misevaluated proposals, including the awardee's apparent organizational conflict of interest (OCI).

We deny the protest.

The RFP sought support for HUD's project managers in analyzing certain unique loans that have been (and will be) created and held by HUD under its "Mark-to-Market" (M2M) Program or its pilot program, the "Portfolio Re-Engineering Demonstration Program." These typically below-market-interest-rate loans are generally in second lien position and are payable from a percentage of the operating cash flow on these recently underwritten transactions. The purpose of this procurement is to ensure that HUD's field office project managers are provided sufficient information to compare actual property performance to the anticipated performance outlined in the "M2M Restructuring Plan," which is the contract for debt restructuring that is negotiated between the property owner and HUD. The contractor awarded this contract will, among other things, assist the HUD project managers in drawing accurate conclusions regarding the financial performance of a property and help establish payment amounts due to HUD on the loans. RFP at 11.

The RFP contemplated the award of a "Hybrid Contract with Firm-Fixed-Price, Indefinite Quantity/Fixed Unit Rate, Labor Hour and Cost Reimbursement (No Fee) for Travel." *Id.* at 4, 85. With the exception of the travel "contract line item numbers" (CLIN), all other CLINs were priced on a fixed-unit-price or fixed-hourly-rate basis, based on estimated quantities set forth in the solicitation. *Id.* at 5-9. The non-travel CLINs were for asset management and reporting services that included the following activities: post-closing portfolio management services (which included evaluating the financial performance of properties), portfolio database maintenance reporting and development (which included maintaining the government-owned portfolio database), and "intensive servicing" asset management services (which included investigating specific operating contracts and expenses; negotiating with owners, management agents, and tenants; and conducting property site visits). RFP at 15-25.

The RFP provided for award on a "best value" basis, considering technical capability and experience, staffing and resources, past performance, and price. The technical factors were considered "significantly more important than the cost or price," although offerors were advised that cost or price "shall be considered a significant criterion in the overall evaluation." *Id.* at 96. Of the technical factors, technical capability and experience, and staffing and resources were "more importan[t]" than past performance. *Id.* In addition, although not specifically identified as an evaluation factor, each offeror in its proposal was to identify and discuss potential OCIs and provide a mitigation plan if necessary. *Id.* at 62.

BCA and MBI submitted proposals in response to the RFP. BCA, an 8(a) concern, teamed with RER Solutions, Inc. (RER), the incumbent contractor for this work, under the SBA's mentor-protégé program. Agency Report (AR), Tab 7(D), BCA's Final Proposal Revisions, at 11. MBI, which had previously managed the M2M Loan Portfolio Re-Engineering Demonstration Program in the 1990's, teamed with Reznick Group, P.C., which also had financial analysis and asset management experience as

well as a “long-standing” relationship with the firm that served as the HUD loan servicer.¹ AR, Tab 8(D), MBI’s Final Proposal Revisions, at 2.

BCA’s and MBI’s proposals, along with four others, were found to be in the competitive range.² After holding discussions and receiving revised proposals, a technical evaluation panel (TEP) evaluated the revised technical proposals against the evaluation criteria, considered the adequacy of mitigation plans for potential OCIs, and performed a comparative analysis of proposals under the technical factors.

The TEP rated both BCA’s and MBI’s proposals “outstanding” under each of the technical factors and, after considering the features of the two proposals, found them to be technically “equivalent.” AR, Tab 12(B), Final TEP Report, at 142-45. The TEP also reviewed each proposal for potential OCIs and determined that each offeror had identified a potential OCI, but that both offerors provided adequate mitigation plans that were “very similar” and were acceptable to the agency. Id. at 20, 68-69.

A cost evaluation panel (CEP) performed a price reasonableness analysis for the fixed-price line items by comparing each offeror’s proposed price to that of the other offerors and to the government estimate.³ For the “cost type” line items, the CEP performed a cost realism analysis. As reported by the CEP, MBI’s final proposal was evaluated at \$16,287,688, and BCA’s final proposal was evaluated at \$20,918,267. Id. at 140.

After considering the TEP and CEP reports, the solicitation, the source selection plan, and the proposals submitted, the source selection official (SSO) performed a comparative analysis of proposals, and agreed with the TEP that the two proposals were “outstanding and technically equivalent.” AR, Tab 13, Source Selection Decision, at 2; attach. 1 at 2. The SSO concluded that BCA’s “significantly” higher price was not worth the additional price premium, stating that:

Given that MBI’s offer provides at least the same level of technical sophistication, resource capacity and performance history coupled

¹ Both RER and Reznick were identified as “subcontractor[s]” in BCA’s and MBI’s respective proposals. AR, Tab 7(D), BCA’s Final Proposal Revisions, at 11; Tab 8(D), MBI’s Final Proposal Revisions, at 2.

² The evaluation of the other proposals is not relevant to this decision.

³ The government estimate was \$21,422,501. AR, Tab 12(B), Final TEP Report, at 140.

with a significantly better price, MBI's offer represents the best value to the government.

AR, Tab 13, Source Selection Decision, at 2. The SSO thus selected MBI for award and this protest followed.

BCA contends that the agency misevaluated proposals under each of the evaluation factors. It complains that the agency's "scoring methodology" was flawed because the evaluation "did not reasonably account for the vast differences between what BCA and the awardee offered." Protester's Comments at 16.

In reviewing protests of an agency's evaluation, our Office does not reevaluate proposals, but instead examines the record to determine whether the agency's judgment was reasonable and in accord with the RFP criteria. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. In performing our review, we are mindful that evaluation ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. Where the evaluators and the source selection decision reasonably consider the underlying bases for the ratings, including advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and equitable and consistent with the terms of the solicitation, the protesters' disagreement over the actual adjectival or color ratings is essentially inconsequential in that it does not affect the reasonableness of the judgments made in the source selection decision. See id.; National Steel and Shipbuilding Co., B-281142, B-281142.2, Jan. 4, 1999, 99-2 CPD ¶ 95 at 15-16.

Here, the agency has provided a detailed record documenting its evaluation and source selection decision. This extensive analysis shows that the agency evaluated the relative merits of the offerors' proposals, including essentially all of the areas cited by the protester, and assessed ratings in a fair and equitable manner, consistent with the RFP. The record demonstrates that the SSO considered all of the information available and, based on his rational assessment of the relative advantages and disadvantages associated with the specific content of proposals, the SSO reasonably concluded that BCA's and MBI's proposals were "technically equivalent" and that the key discriminator between the proposals was price. We find that BCA's disagreements with the actual adjectival ratings assessed under this "scoring methodology" to be inconsequential, given that the ratings do not affect the reasonableness of the judgments made in the source selection decision. See Citywide Managing Servs. of Port Washington, Inc., supra, at 11.

For example, BCA contends that its proposal should have received a higher rating than MBI's proposal under the technical capability and experience factor because of RER's incumbent experience. BCA contends that its proposal offers all of the advantages of MBI's proposal, and, in addition, the BCA team "*is uniquely qualified*

to comprehend the subtlety of the restructuring process.” Protester’s Comments at 3. BCA contends that MBI’s proposal should have been assessed weaknesses because of “[p]ossible inflexibility regarding the proprietary nature of the data and reporting,” and because the MBI team does not have a mentor-protégé arrangement like the BCA team. Id. at 4, 6.

The RFP for the technical capability and experience factor required that offerors demonstrate a number of capabilities and experience relating to asset management and loan servicing, but did not place a premium on incumbency, any particular data reporting system, or a mentor-protégé relationship. RFP at 96. The record shows that the agency performed a comprehensive evaluation of the proposals consistent with the evaluation criteria, and the documentation supports the agency’s findings that both proposals warranted an outstanding rating under this factor.

Under this factor, the agency noted that the BCA team was “uniquely qualified” due to RER’s incumbent experience and, therefore, assessed the team strengths for having experience with the M2M program and multifamily asset management and property management, and for understanding the contract requirements. AR, Tab 12(B), Final TEP Report, at 9. Although the agency initially had concerns that the BCA/RER team was new, which might have posed a risk to contract performance, the evaluators accepted BCA’s explanation that the relationship was strengthened through the mentor-protégé program and that RER had committed to [REDACTED], so the agency did not assess the proposal a weakness for this in the final evaluation. Id. at 7-8, 10.

With regard to MBI’s proposal, the agency found several strengths in the team’s experience, including that the team provided a “[s]trong multifamily underwriting and financial analysis background,” demonstrated a “thorough understanding of the complexity and subtlety of the M2M program,” and provided “experienced leadership for this program.” Id. at 53-54. Although this was also a new team, the agency did not consider this to be a weakness in the final evaluation because both team members had successfully worked on projects involving teaming arrangements, and the proposal indicated that the team would implement a management process that incorporated “clear[] lines of authority, well defined responsibilities and communications protocol.” Id. at 51-52. While BCA complains that MBI’s proposal was “inflexib[le]” because MBI’s data tracking system is proprietary,⁴ Protester’s Comments at 4, the agency addressed this in its final evaluation, after discussions were conducted on this point, and found that MBI’s data tracking system, in fact, warranted a strength; in this regard, the record shows that MBI’s proprietary data tracking system was something that the team intended to use in addition to the other available database systems, as a way to make sure that work did not “slip through

⁴ This was a concern of the evaluators in the initial evaluation. AR, Tab 12(A), Initial TEB Report, at 17.

the cracks,” not as a tool to perform the work as the agency had first thought. AR, Tab 12(B), Final TEP Report, at 53.

Thus, the record shows that the agency considered all of the areas complained of by BCA and reasonably concluded that both offerors’ proposals were deserving of the highest possible rating (outstanding) under the technical capability and experience factor and were “technically equivalent,” after giving due weight to RER’s incumbency.

BCA also complains that the agency did not recognize its proposal’s superiority under the staffing and resources factor, again asserting that RER’s incumbent experience should have set it apart from the MBI team. While both offerors’ proposals were credited with strengths because the teams provided “[b]road industry knowledge,” id. at 13, 61, the agency recognized a “distinct advantage” in BCA’s proposal because the “[e]xisting [incumbent] staff” had “significant direct experience with [post-closing portfolio management] policies” and would “lose no time training new contractors and preparing to perform work.” However, the agency found that this advantage was “offset by the backlog [of RER’s work] under the existing contract.” Id. at 13. Thus, the record shows that the agency favorably considered the advantages of RER’s incumbency, but reasonably balanced those advantages against weaknesses and risks to contract performance.⁵

With regard to MBI’s proposal, the agency assessed strengths because the staff possessed “significant current and directly related experience at an expert level in multifamily underwriting and financial management,” as well as “substantial, current experience with preparing and auditing” M2M financial statements. The agency noted that the MBI proposal “includes an excellent offering of staff skills, training/education and experience[,] and adequate staff commitments for this contract,” and found that the MBI team’s “combination of accounting and asset management experience and integration of related staff enhances the proposal.” Id. at 61-62. Thus, the record shows that the agency reasonably found that MBI’s proposal also warranted an outstanding rating, such that the agency could reasonably conclude that the proposals were “equivalent” under this factor.

⁵ BCA contends that the agency’s consideration of the backlog under the prior contract constitutes the evaluation of an unstated evaluation criterion. However, we find that consideration of this issue was reasonably encompassed within the RFP, which required, under the staffing and resources factor, the evaluation of experience “especially as it relates to programs of this nature and the capacity of those individuals to effectively and efficiently perform the required work.” RFP at 97. Given that BCA heavily relied on RER’s experience under the incumbent contract throughout its technical proposal, BCA cannot complain that the agency considered work backlogs in evaluating BCA’s capability to provide sufficient staff and resources to perform this work.

Next, BCA complains that the agency misevaluated past performance by not recognizing as a strength the relevance of RER's incumbent contract. However, the record shows that the agency credited BCA's proposal with strengths based on RER's incumbent contract performance and gave significant weight to this contract in the evaluation. Id. at 17. The agency also credited MBI's proposal with strengths for performance under contracts that were "relevant to this proposal in terms of tasks, size and scope." Id. at 65. While BCA contends that the agency should have more favorably considered its proposal under this factor relative to MBI's, we note that BCA's past performance was based entirely on RER's (and not BCA's) performance history, while MBI's past performance was based on the favorable record of both team members. Although the agency did not assess BCA's proposal a weakness for this, it also did not agree with BCA that the proposal warranted a higher rating than MBI's. Based on the record before us, we cannot find unreasonable the agency's judgment that the offerors were "equivalent" under this factor.⁶

In sum, the agency reasonably determined that BCA's and MBI's proposals were "equivalent" under each of the technical evaluation factors and "technically equivalent" overall, and properly used price as the award discriminator.

BCA next challenges the price evaluation, contending that the agency failed to consider the costs of developing a web-based interface and transition costs in its realism analysis. The RFP here required only that the agency evaluate price for "reasonableness," RFP at 97, which the Federal Acquisition Regulation (FAR) provides may be established by adequate price competition, as is the case here. FAR § 15.404-1(b)(2)(i). Further, this contract is essentially a fixed-price contract (the only cost-reimbursable line items are for travel); thus, a cost realism analysis of the fixed priced items was not required. See Systems, Studies, and Simulation, Inc., B-295579, Mar. 28, 2005, 2005 CPD ¶ 78 at 6. Likewise, in the absence of an evaluation criterion to the contrary, price realism is not ordinarily a consideration in the evaluation for award of a fixed-price contract, since the risk of performing the contract at the proposed price is borne by the contractor. SOS Interpreting, Ltd.,

⁶ BCA also asserts that the agency should have considered, as a significant discriminator under the past performance factor, that RER developed a web-based interface under the incumbent contract. However, the consideration of a web-based interface, which is not the focus of the solicited effort, was not required to be considered in the past performance evaluation. Moreover, given that MBI's proposal does not take exception to meeting the RFP's web-based interface requirements and the proposal instructions do not specifically require that proposals address this capability, we find no basis to find that MBI's proposal should have been downgraded for not having the capability of immediately satisfying these requirements.

B-293026.4, B-293026.5, Aug. 25, 2004, 2005 CPD ¶ 25 at 8. Accordingly, we find no basis to sustain the protest on this ground.

Finally, BCA contends that the agency did not adequately consider the offerors' proposed mitigation plans for potential OCIs. As noted above, the RFP required that each offeror identify potential OCIs and propose mitigation plans to neutralize these conflicts. BCA identified as a potential OCI that approximately [REDACTED] of the M2M portfolio involved loans that were previously underwritten by RER. As a mitigation plan, BCA proposed to subcontract to another firm the M2M loan restructuring work that is to be performed under the RFP for any property where RER underwrote the loan, and to establish a firewall between this contractor and the BCA/RER team. This was the same mitigation plan that RER followed under its incumbent contract. The agency found this plan acceptable. AR, Tab 12(B), Final TEP Report, at 18-20.

The agency identified that [REDACTED] of M2M portfolio included property where Reznick provided financial services (accounting and underwriting services),⁷ and determined that this, too, presented an OCI.⁸ For a mitigation plan, the MBI team proposed that Reznick would not perform any work on any of the M2M properties where Reznick previously provided financial services, and the affected properties would be transferred to, and independently handled by, MBI. Further, a firewall would be established between Reznick and MBI for these properties. The agency found this mitigation plan acceptable, concluding that it was "very similar" to that proposed by the BCA team. *Id.* at 67-69.

The parties do not dispute that the issue presented here is one of an "impaired objectivity" OCI, where the contractor's judgment and objectivity in performing the contract requirements may be impaired due to the fact that the performance has a potential to affect other interests of the contractor. *Alion Sci. & Tech. Corp.*, B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 at 5-6. BCA essentially argues that the awardee's OCI arises from the fact that the awardee would be giving loan restructuring advice to HUD on properties for which Reznick provided financial services, such that its objectivity in providing advice to HUD could be impaired, and that the awardee could not "exercise[] reasonable judgment" involving any of these properties because Reznick would have "proprietary knowledge of the exact 'tolerances' acceptable to the Government" for those loans. Protester's Comments at 25. The agency determined that the conflict was not limited to the awardee. Rather, both Reznick and RER currently perform financial services for [REDACTED] of the M2M properties and, because of the nature of that work, these firms' interests

⁷ BCA does not dispute that the percentage potentially affected loans with regard to Reznick's activities is [REDACTED].

⁸ MBI did not previously perform work that could result in an OCI.

could be affected by the loan restructuring work under this M2M program; thus, their objectivity could be impaired. See AR, Tab 12(B), Final TEP Report, at 18-20, 67-69; Contracting Officer's Statement at 20-22, 24.

The issue here is whether the agency reasonably considered the awardee's proposed mitigation plan. BCA contends that MBI's plan to move the affected work from one team member to the other, and imposing a firewall, does not adequately mitigate the potential OCI. It contends that MBI's mitigation plan should have required MBI to subcontract the work to a firm that was not a team member of the offeror, like BCA's mitigation plan did.

In cases such as this, 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. Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 16. In this regard, contracting officer's are allowed to exercise "common sense, good judgment, and sound discretion" in assessing whether a potential conflict exists and in developing appropriate ways to address it. FAR § 9.505; Epoch Eng'g, Inc., B-276634, July 7, 1997, 97-2 CPD ¶ 72 at 5.

Here, the agency conducted extensive discussions with each offeror about the potential OCIs and the details of each offeror's proposed mitigation plan. As a result of these discussions, the agency reasonably determined the plans to be "similar." In this regard, under BCA's proposal, RER will subcontract the affected work to a separate entity and establish safeguards to ensure that RER employees will not work on the affected transactions. Similarly, under MBI's proposal, Reznick will transfer the affected work to a separate entity (MBI) and establish safeguards to ensure that Reznick's employees will not work on these transactions.⁹

In evaluating the adequacy of the plans, the agency considered that both offerors put into place procedures to identify the affected properties and to ensure that the conflicted company would not be performing the work on these properties. AR, Tab 12(B), Final TEP Report, at 19, 68. The agency also considered whether the

⁹ Although BCA disputes that the plans are similar, arguing that its team is subcontracting the affected work to a third entity, whereas the MBI team is merely moving the work from one team member to another, we find this to be a distinction without a difference under this set of facts. Both MBI and Reznick are separate legal entities and the affected interest of Reznick is not attributable to MBI merely because they have teamed together as a prime/subcontractor under this contract. Here, the agency determined that the firewall could neutralize the potential OCI, and we find no basis to find this decision unreasonable. See Epoch Eng'g, Inc., *supra*, at 5-6 (finding reasonable mitigation plan that proposed to assign work from subcontractor to prime contractor or other team members).

affected work could be performed independently from the conflicted entity in order to determine whether the safeguards were sufficient. Contracting Officer's Statement at 20-21. The agency concluded that MBI possessed "significant experience and skill" so as to complete the work independently of Reznick, and that the BCA team subcontractor was able to perform the work independently of RER. Id. The agency identified that only a small percentage of loans (approximately [REDACTED]) could potentially be affected, such that the proposed mitigation plans could adequately neutralize the conflict. Id.

We have found, in other "impaired objectivity" OCI situations, that subcontracting or transferring work to a separate entity, and establishing a firewall around the impaired entity, can reasonably mitigate these types of OCIs. Deutsche Bank, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 at 4; see also Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 10; Epoch Eng'g, Inc., supra, at 6. Given that the agency thoroughly considered the parties' potential OCIs and proposed mitigation plans, we find unobjectionable the agency's determination that MBI's mitigation plan adequately mitigated the potential OCI.

The protest is denied.

Gary L. Kepplinger
General Counsel