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Decision

Matter of: VRC, Inc.

File: B-310100

Date: November 2, 2007

Bryant S. Banes, Esq., and Sean D. Forbes, Esq., Neel, Hooper & Banes, PC, for the protester.

Capt. Marlin D. Paschal, Department of the Army, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency should not have disqualified the protester because of an organizational conflict of interest (OCI) is denied where the agency reasonably found that an OCI existed based on the fact that an individual employed by a company with ownership ties to the protester was assigned to work in the agency's contracting office in connection with the procurement at issue.

DECISION

VRC, Inc. protests the rejection of its proposal under request for proposals (RFP) No. W9133L-07-R-0031, issued by the National Guard Bureau (NGB) for personnel services in support of the Joint Combined State Strategic Plan. VRC alleges that the agency improperly disqualified it based on an organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

VRC is the incumbent contractor providing the services called for under the RFP. Military Personnel Services Corporation (MPSC) is a subcontractor to VRC on the incumbent contract and would continue in that role if VRC retained the contract. The sole owner of Taylor Consultants, Inc. (TCI) owns [DELETED] percent of the total issued and outstanding stock of MPSC. Protest at 2 n.1. TCI is a company currently under contract with NGB to provide personnel-related services and placed one of its employees in NGB's contracting division. That TCI employee was assigned to assist the contracting officer with this procurement and had direct access to

source selection information unique to the procurement, including the source selection plan. Agency Report (AR), Memorandum of Law at 2. She also was expected to assist evaluators with evaluating competing offers.¹

On May 8, 2007, NGB issued the RFP, followed by two amendments, with a June 12 proposal due date. The RFP included the following language:

Offerors are advised that employees of the firm identified below may serve as advisors to Source Selection Evaluation Board members in the source selection process. These individuals will be authorized access to only those portions of the proposal data and discussions that are necessary to enable them to perform their respective duties. Such firms are expressly prohibited from competing on the subject acquisition and from rating proposals or recommending a selection.

Firm: Taylor Consultants, Inc.

Contact Name: [TCI employee]

RFP § L. ¶ 1.4. According to the protester, companies interested in competing under this solicitation began contacting TCI, requesting that TCI execute non-disclosure agreements with those companies because a TCI employee would be working on this procurement. The protester asserts that TCI then attempted, unsuccessfully, to contact the contracting officer.²

On June 4, the contracting officer's supervisor, the Chief of the Operational Contracting Division, recused himself from all matters that might affect MPSC or its related companies. Prior to his recusal, the Chief spoke with the owner of TCI and expressed his "opinion that [the relationship between TCI, MPSC, and VCR] should not lead to an OCI." AR, Tab E, Decl. of Chief of Operational Contracting Division at 1. The protester asserts that the Chief "approved TCI's measures designed to

¹ The protester asserts that the "only contact" between TCI and the TCI employee in NGB's contracting division has been that the employee receives her paycheck from TCI. Protest at 3. In addition to paying the employee, the protester states that if there were performance issues with this employee, TCI would counsel her. *Id.* at 2.

² Besides this assertion, the record lacks any evidence that the protester or TCI attempted to contact the contracting officer. Indeed, the agency challenges that assertion, noting that, although the contracting officer and TCI's owner had communicated numerous times by e-mail, the protester has produced no e-mail messages suggesting that TCI attempted to contact the contracting officer by e-mail concerning the conflict of interest issue. The record shows that TCI's owner, in communications with the contracting officer, used an e-mail address of the subcontractor, MPSC.

mitigate any perceived conflict.” Protest at 3. The Chief states, however, that he does not recall seeing a written mitigation plan and that the agency has no record of a mitigation plan having been submitted, let alone reviewed and approved, AR, Tab E, Decl. of Chief of Operational Contracting Division at 2; the protester has offered no record of any such plan.

Five proposals, including the protester’s, were received on the due date. The agency’s intent was to make a single award to the offeror whose proposal represented the best value to the government.

Two days after receipt of proposals, on June 14, the contracting officer learned of the relationship between TCI, MPSC, and VRC and removed the TCI employee from further work on this procurement. By letter dated June 19, the contracting officer provided notice to VRC that the contracting officer was considering rejecting VRC’s proposal due to a conflict of interest and invited VRC’s response. The protester responded by letter dated June 21; the contracting officer considered the response inadequate and rejected the protester’s proposal on July 21.

DISCUSSION

The protester alleges that there was no OCI here and that the agency improperly rejected its proposal.

The Federal Acquisition Regulation (FAR) states that an “organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract.” FAR § 9.502(c). Contracting officers are 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. Contracting officers must exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists. FAR § 9.505. 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., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 at 4.

The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: “unequal access to information” cases; “biased ground rules” cases; and “impaired objectivity” cases. See Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13. This protest concerns the first type, unequal access to information.

The record shows that an employee of TCI had access to source selection information, including the independent government estimate, the source selection

plan, and other offerors' proposals. The owner of TCI, as noted, owns [DELETED] percent of the stock of MPSC, Protest at 2 n.1, a subcontractor of VRC under the current contract and a proposed subcontractor under the current solicitation. In our view, these relationships, considered together, indicate that VRC was in a position to benefit competitively as a result of the TCI employee's position in NGB's contracting office, which gave her access to source selection information regarding this procurement. Contracting agencies are admonished to avoid any conflict of interest, even the appearance of a conflict of interest, in government procurements, FAR § 3.101-1; see Lancaster & Co., B-254418, Dec. 14, 1993, 93-2 CPD ¶ 319; on the record here, we find reasonable the agency's conclusion that VRC had a conflict of interest.

The protester asserts that, regardless of the business relationships among the three companies, the Chief of the Operational Contracting Division (the contracting officer's supervisor) had the authority to decide whether the relationships in question constituted an OCI, and the agency was bound by the Chief's opinion that they posed no conflict of interest. We disagree. With regard to conflicts of interest, the FAR assigns certain duties and responsibilities specifically to the contracting officer, some of which are noted above. The FAR, without exception, places responsibility for determining the existence of an OCI on the contracting officer and makes no provision for the contracting officer to delegate her authority. Here, the contracting officer simply exercised her authority under the FAR, notwithstanding the Chief's apparent view of the matter.³

The protester also asserts that there was no conflict of interest because the agency has not shown "hard facts," that is, that VRC was in possession of source selection information as a result of the TCI's employee's work for the agency. We disagree. It is true that a determination to exclude an offeror must be based on facts, rather than mere suspicion. Clement Int'l Corp., B-255304.2, Apr. 5, 1994, 94-1 CPD ¶ 228 at 4; see also CACI, Inc.-Fed. v. United States, 719 F.2d 1567 (Fed.Cir. 1983). The facts that are required, however, are those which establish the existence of the OCI, not the specific impact of the conflict. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., *supra*, at 18. Once the facts establishing the existence of an OCI are present, reasonable steps to avoid, mitigate, or neutralize the conflict are required without further need for "hard facts" to prove the conflict's impact on the competition. Where, as here, the facts demonstrate that an OCI exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur. Id.

³ In any event, it is well-settled that the government is not bound beyond the actual authority conferred upon its agents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); DBA Sys., Inc.--Recon., B-212101, B-212101.2, Aug. 23, 1983, 83-2 CPD ¶ 244 at 1.

The protester asserts that it had measures in place, in the form of “firewall arrangements” between the TCI employee and TCI and between TCI and MPSC/VRC, that the contracting officer should have found sufficient to mitigate any OCI. Protest at 6-7. The contracting officer states that, had TCI made her aware of the ownership relationships earlier in the procurement process, mitigation of the potential conflict of interest might have been possible. AR, Contracting Officer’s Statement of Facts at 4. Because the relationships were not brought to her attention until 2 days after proposals had been received, the contracting officer saw no way to successfully mitigate the actual OCI and instead chose to avoid the OCI altogether by rejecting VRC’s proposal. Again, we see no basis in the record to question the reasonableness of the contracting officer’s decision.

In sum, even the appearance of an unfair competitive advantage may compromise the integrity of the procurement process, thus justifying a contracting officer’s decision to err, if at all, on the side of avoiding the appearance of a tainted competition. Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 10. Here, the fact that an individual employed by TCI, a company with ownership ties to the protester, was assigned to work in the agency’s contracting office, together with the fact that the agency was not notified of those ownership relationships until after receipt of proposals, created a conflict of interest that the contracting officer reasonably determined could only be avoided by rejecting the protester’s proposal.⁴

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ On August 14, the agency awarded a contract under the RFP to Engineering Systems Consultants, Inc. In its protest, VRC challenged the award without offering any elaboration. This unsupported challenge fails to state a valid basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2007).