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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: AT&T Government Solutions, Inc.

File: B-400216

Date: August 28, 2008

David Z. Bodenheimer, Esq., James J. Regan, Esq., and James Peyster, Esq., Crowell & Moring LLP, for the protester.

Davis Young, Esq., Department of the Navy, Fleet and Industrial Supply Center, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of firm's elimination from competition due to perceived organizational conflict of interest (OCI) is sustained where agency failed to evaluate protester's proposed mitigation plan, failed to consider whether protester would actually be in a position to evaluate its own products, and did not give protester notice of and an opportunity to respond to OCI findings prior to firm's disqualification.

DECISION

AT&T Government Solutions, Inc. protests its disqualification, due to a perceived organizational conflict of interest (OCI), under request for proposals (RFP) No. N00189-08-R-0003, issued by the Department of the Navy for information operations (IO) support services, including analysis of computer network security systems. AT&T contends that the agency improperly failed to consider the OCI mitigation plan included in its proposal; unreasonably concluded that the firm would evaluate its own products, given that the agency does not subscribe to the firm's network's products and services; and improperly failed to give the firm notice of and an opportunity to respond to the agency's OCI concerns before being disqualified.

We sustain the protest.

The RFP, issued on January 2, 2008, sought proposals for the award of an indefinite-delivery/indefinite-quantity contract for a 1-year base period and 4 option periods for IO support services related to the following 11 performance tasks: fleet training; computer network operations; strategic, operational and tactical planning; operational support; functional data management; IO requirements; experimentation,

tactics evaluation and doctrine development; systems assessment; information technology management and administration; engineering and technical services; and IO management and professional support services. RFP at 14-17. Award is to be made to the firm that submits the proposal deemed to represent the best value to the agency considering technical factors and price. Id. at 83-84.

The RFP advised that the contracting officer would evaluate all proposals to determine whether a prime contractor or subcontractor had an actual or apparent OCI in performing the RFP's tasks. Id. at 38. To help offerors determine if they had an OCI, the RFP listed various computer-related products and equipment used for the operations to be supported under the RFP; while not intended as an exhaustive listing of all possible areas of conflict, the list nevertheless did not identify any AT&T products or equipment. Id. at attach. 4. The RFP stated that, in accordance with the agency's interpretation of the rules set out in Federal Acquisition Regulation (FAR) § 3.101 (providing for OCIs to be strictly avoided), § 1.602-2 (providing for the nation's interests to be safeguarded in its contractual relationships), and FAR subpart 9.5 (regarding the use of limits on a contractor's activities if appropriate to avoid, neutralize, or mitigate OCIs in order to prevent bias and unfair advantage), firms with even an appearance of an OCI "will be disqualified and eliminated." Id. at 38. The RFP, under a heading entitled "contracting restrictions," referenced several FAR subpart 9.5 provisions that permit participation in a procurement and the award of a contract where appropriate actions are taken, and safeguards are put in place, that resolve perceived conflicts of interest. Id. at 39-41. The RFP specifically provided, for instance, that "[t]o the extent work to be performed . . . requires evaluation of offers for products or services, a contract will not be awarded to a contractor that will evaluate its own offers for products or services, without proper safeguards to ensure objectivity . . ." Id. at 40 (citing FAR § 9.505-3). Similarly, the RFP stated that "[t]o the extent work to be performed under this contract requires access to proprietary data of other companies, the contractor must enter into agreements with such other companies . . . to protect such data . . .," id. (citing FAR § 9.505-4(b)), and that "[i]f the contractor provides [advisory and assistance services] . . . it shall be ineligible thereafter to participate in any . . . contractual efforts [other than follow-on contracts for advisory and assistance services]. . . which stem directly from the work, . . . [and] unless so directed . . . the contractor shall not perform any such work under this contract on any of its products or services." Id.

AT&T, among other firms, submitted its proposal by the scheduled closing date. The agency reports that, without evaluating the firm's proposal (including its OCI mitigation plan), the contracting officer conducted an OCI assessment for the firm and determined that, since one of the firm's business operations and affiliates provides IO products and services similar to the types of products in use by the Navy and to be evaluated under the RFP, AT&T would be "in a position to favor its own products and capabilities . . . (and disfavor its competitor's products)." OCI Assessment at 31. The contracting officer concluded that the firm had an "impaired

objectivity” OCI¹ and informed AT&T that the terms of the solicitation required its disqualification from the procurement. This protest followed.

AT&T challenges its elimination from the competition. The protester contends that, contrary to the RFP’s terms, the agency failed to consider the firm’s proposal—which included an OCI mitigation plan—and improperly failed to give the firm notice of any OCI concerns or an opportunity to respond to such concerns prior to the agency’s decision to exclude AT&T from the competition. AT&T contends that the agency unreasonably determined that the firm would be evaluating its own products under the contract without confirming whether AT&T’s products are even available to the agency, which is not a subscriber to its network services, and failed to recognize that, even if the firm would be required to evaluate its own or others’ products in providing advice and assistance services under the terms of the RFP, the RFP itself set out contracting limitations that could have resolved the perceived OCI without requiring its disqualification from the competition.

The agency responds only generally to the protester’s allegations, stating that disqualification of a firm constitutes “strict avoidance” of a possible OCI within the meaning of the FAR, and it intended the RFP to require such disqualification without consideration of the firm’s response or any potential mitigation plan. The agency’s legal support for its position is limited to general contentions that it reviewed previous decisions of our Office discussing OCIs (without detailing what aspect of the cases it relied on as support for its determination that disqualification of the protester was required here); another agency’s OCI assessment of a different firm in an unrelated protest where, unlike here, mitigation of an apparent OCI was pursued, accepted, and considered unobjectionable by our Office (without discussing the applicability, if any, of that assessment to the facts of the current case); a law review

¹ OCIs, 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, 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. FAR § 9.505-2; Aetna Gov’t Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The second group consists of “unequal access to information” 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; Aetna Gov’t Health Plans, Inc.; Found. Health Fed. Servs., Inc., at 12. The third group, which the agency refers to here, reflects concerns about a firm’s “impaired objectivity” and comprises cases where a firm’s work under one government contract could entail its evaluating itself or a related entity, thus undermining the firm’s ability to render impartial advice to the government. FAR § 9.505-3; Aetna Gov’t Health Plans, Inc.; Found. Health Fed. Servs., Inc., at 13.

article discussing different types of OCIs (without stating which portions of the article the agency found instructive on the facts here); and the guidance provided in FAR subpart 9.5 for resolution of OCIs (without citing the specific regulatory provisions it believes support its actions). See Agency Report at 3. As discussed further below, under the circumstances here, we conclude that it was unreasonable for the agency to disqualify AT&T without allowing the firm to respond to the agency's concerns or propose a plan to mitigate any perceived OCI.

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize, or mitigate such conflicts to prevent the existence of conflicting roles that might impair a contractor's objectivity, such as where contract performance entails evaluating itself or its own products, since the firm's ability to render impartial advice may be undermined. See FAR §§ 9.505, 9.508; PURVIS Sys., Inc., B-293807.3, B-290807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. In assessing potential OCIs, the FAR directs the contracting officer to examine each contracting situation individually on the basis of its particular facts and the nature of the proposed contract; using sound judgment, the contracting officer is to determine not only whether a conflict exists, but, if so, the appropriate means for resolving it, consistent with the terms of the solicitation and applicable procurement rules. See Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8; Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 10. Our review of the record here supports the protester's contention that the agency's OCI assessment of AT&T, as well as the agency's disqualification of the firm without considering its ability to avoid, neutralize, or mitigate the alleged conflict, or otherwise allowing the firm to respond to the reasons cited for its adverse OCI assessment, were unreasonable.

First, although the RFP required the contracting officer to evaluate all proposals to determine whether an apparent OCI exists, the agency here concedes that AT&T's proposal, which included a proposed OCI mitigation plan, was not evaluated prior to the firm's disqualification; the OCI assessment, therefore, clearly was not conducted in accordance with the terms of the RFP, which called for such an evaluation. Second, as the protester points out, and as stated above, the solicitation here included provisions (referencing the general rules of FAR § 9.505) for limitations on contracting as a means of avoiding, neutralizing, or mitigating perceived OCIs, but there is no indication in the record that the agency considered their application to AT&T prior to deciding to disqualify the firm. While the agency suggests that, since the RFP did not specifically request a mitigation plan from the offerors and advised that firms with an actual or apparent OCI would be disqualified, offerors should have known that plans to avoid, neutralize, or mitigate an OCI would not be considered by the agency, our review of the solicitation does not support the agency's position. Rather, our review shows that the RFP contemplated that the agency would attempt to avoid, neutralize, or mitigate perceived OCIs, at least to the extent of applying the "contracting restrictions" provisions of the RFP. These provisions, as stated above, allow participation in the procurement with some performance limitations or where

other safeguards are in place to ensure objectivity; we therefore agree with the protester that a reasonable interpretation of the RFP is that disqualification was a determination to be made after consideration of whether or not a perceived OCI could be resolved short of eliminating the firm from the competition. See RFP at 39-41. The agency, however, failed to conduct the required review of whether or not the perceived OCI attributed to AT&T could be resolved, i.e., avoided, neutralized or mitigated, without the need to disqualify the firm.

Third, the agency provides no support for its conclusion that AT&T would be evaluating its own IO security products in performance of the tasks identified in the RFP, such as the required analysis of the agency's current IO systems. According to AT&T, its IO security products are not part of the Navy's IO systems to be supported here; rather, AT&T's IO products are only available to its network subscribers and the Navy does not subscribe to that network. The OCI determination, therefore, appears to be based more on unsupported inference than fact.² See NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291 at 6. We think it was unreasonable for the agency to have assessed an OCI in this regard without first resolving the implications of the subscription-only limitation associated with the use of the firm's products and services before concluding that those products and services would be evaluated by the firm during its performance of the RFP's tasks.³ Under these circumstances, we think that the agency's failure to communicate its OCI concerns to AT&T and provide an opportunity for a response from the protester for consideration in the OCI assessment of the firm, was unreasonable. See FAR § 9.504(e) (providing that before determining to withhold an award based on conflict of interest considerations, the contracting officer is to notify the contractor of the reasons supporting proposed exclusion of the firm and allow the contractor a reasonable opportunity to respond); § 9.506(d)(2) (requiring the contracting officer to consider additional information provided by prospective contractors in response to the solicitation or during negotiations in review of perceived OCIs); Lucent Techs. World Servs. Inc., supra, at 11.

In light of the lack of support for the agency's OCI assessment of AT&T, and the failure to give AT&T an opportunity to respond to the agency's perceived OCI, we recommend that the agency give the firm notice of the reasons for its OCI concerns and an opportunity to respond. The agency's new OCI assessment for the firm should also include, consistent with the solicitation, consideration of the firm's proposal (including its proposed OCI mitigation plan). To the extent a perceived

² The OCI assessment itself states only that "[deleted]." OCI Assessment at 31.

³ Whether or not AT&T would be evaluating its own products would affect not only the agency's conclusion that AT&T might favor its own products, but also its determination that, in favoring its own products, the firm would be biased against other firms' products.

OCI is found, the agency should then consider the applicability of the “contracting restrictions” provided in the solicitation to resolve any OCI concerns, if appropriate (i.e., prior to a disqualification determination, if any). We also recommend that AT&T be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2008). AT&T should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel