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Decision

Matter of: A Squared Joint Venture

File: B-413139; B-413139.2

Date: August 23, 2016

Joseph P. Dirik, Esq., Norton Rose Fulbright US LLP, for the protester.
D. Evelyn Lyon, Esq., and Jerry L. Seemann, Esq., National Aeronautics and Space Administration, for the agency.
Louis A. Chiarella, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly excluded offeror's proposal from the competition because of an organizational conflict of interest (OCI) is dismissed as untimely where the agency informed the offeror that it had an unequal access to information OCI, and the conditions under which the offeror would be eligible to compete, and the offeror failed to challenge the agency's determination prior to the closing time for receipt of proposals.

DECISION

A Squared Joint Venture (A2JV),¹ of Houston, Texas, protests the exclusion of its proposal from the competition under request for proposals (RFP) No. NNM16534124R, issued by the National Aeronautics and Space Administration (NASA) for acquisition and business support services (ABSS) for the George C. Marshall Space Flight Center (MSFC), in Huntsville, Alabama. A2JV argues that the agency's determination that the offeror had an impermissible organizational conflict of interest (OCI), and the resulting decision to exclude A2JV from the competition, were unreasonable.

We dismiss the protest.

¹ A2JV is a joint venture comprised of [DELETED], and Al-Razaq Computing Services.

BACKGROUND

This protest involves both the incumbent contract as well as the current solicitation. On May 1, 2011, NASA awarded the prior ABSS contract to Al-Razaq.² AR, Tab 3, ABSS1 Contract, May 1, 2011, at 13.³ ABSS1 was an indefinite-delivery, indefinite-quantity contract, with fixed-price task orders, for a base year with four 1-year options and one 4-month option. In general terms, the ABSS1 performance work statement (PWS) required the contractor to provide acquisition support services (*i.e.*, administrative services, acquisition policy services, acquisition management services), business support services (*i.e.*, accounting and resource management operations, budget integration and analysis, business systems, business best practices), and related program management in support of MSFC and ancillary facilities. *Id.* at 73-79.

The contracting officer described the scope of the ABSS1 contract as follows:

From an organizational perspective, the MSFC procurement office consists of approximately 83 NASA employees and 27 Al-Razaq employees. These employees are located throughout MSFC in various buildings and offices. Throughout the procurement office, Al-Razaq employees literally sit side-by-side with NASA employees at the various locations. Every location has contract files associated with the specific program/project or functional area being supported. Generally, a contract file includes the complete history of the contract beginning with the proposal that served as the basis for award. Access to these files is the same for both NASA employees and Al-Razaq employees.

From an operational perspective, with the exception of inherently governmental functions and matters related to the ABSS1 contract, the responsibilities/functions are not divided between NASA employees and Al-Razaq employees such that NASA employees perform one set of procurement-related responsibilities/functions and Al-Razaq employees perform a different set of procurement-related responsibilities/functions. Thus, both NASA employees and Al-Razaq employees perform similar responsibilities and functions.

² The parties in their filings refer to the Al-Razaq contract as ABSS1 (although there was an earlier ABSS contract) and the solicitation here as ABSS2. For ease of reference, we adopt the same terminology in our decision.

³ The agency assigned the record sequential Bates numbers which we use in our decision.

AR, Tab 9, Contracting Officer's Declaration, June 13, 2016, at 573.

In addition to the PWS, the ABSS1 contract included position descriptions (e.g., Procurement Analyst I, Contracts Administrator III, Cost/Price Analyst IV) detailing personnel duties and responsibilities. AR, Tab 3, ABSS1 Contract, May 1, 2011, at 182-191. Relevant to the protest here, the Acquisition Team Lead position description was as follows:

The Acquisition Team Lead serves as the primary acquisition interface with the customer. Responsible for meeting contract requirements and customer objectives. Exercises independent judgment and solves administrative and managerial problems. Responsible for planning and coordinating staff, as well as managing cost, schedule and quality. Guides teams, analyzes problems and implements solutions. . . . Has expert knowledge of NASA acquisition concepts, practices and procedures. Relies on extensive experience in Federal acquisition policies, guidelines, regulations, processes, procedures, and judgment to plan and accomplish goals. Performs a variety of tasks. Leads and directs the work of others. Reports to the Program Manager. Has a broad mandate for independent actions and decisions.

Id. at 187.

Al-Razaq's ABSS1 contract also included a limitation on future contracting as follows:

Performance of this contract involves (1) participation in all phases of the acquisition process (i.e., from acquisition planning through closeout of the contract) at MSFC, (2) access to and use of highly sensitive information belonging to both the Government and third parties and (3) analysis and document preparation in support of the Government's decision-making processes. Thus, to avoid any conflict of interest related to unequal access to information, biased ground rules, and/or impaired objectivity with respect to future contracting opportunities,⁴ the Contractor and any subcontractor (including any

⁴ The situations in which OCIs arise, as described in Federal Acquisition Regulation (FAR) subpart 9.5 and decisions of our Office, can be broadly categorized into three groups: unequal access to information, biased ground rules, and impaired objectivity. See McConnell Jones Lanier & Murphy, LLP, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 13. As relevant here, an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide
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affiliate as defined in FAR 2.101) under this contract shall not perform nor assist with the performance of any other contract/agreement under the cognizance of MSFC during the performance of this contract.

AR, Tab 3, ABSS1 Contract, May 1, 2011, at 41.

The limitation-on-future-contracting-clause, however, did not expressly address Al-Razaq's eligibility to perform MSFC contracts after the completion of its ABSS1 contract, including eligibility to compete for any follow-on ABSS contract.

The ABSS1 contract also required Al-Razaq to prepare and submit an OCI mitigation plan, which the contractor did. Among other things, Al-Razaq's OCI plan stated that:

- Al-Razaq conducts an OCI screening process (i.e., unequal access to information, impaired objectivity, biased ground rules, other) prior to accepting new work for the Government, and prior to submitting any proposal.
- If an actual or potential OCI situation is discovered as a result of the screening process, it will be reported to an Al-Razaq corporation officer and the nature of the OCI will be "immediately disclosed" to the client (i.e., contracting officer, contracting officer's representative) along with recommendations to avoid, neutralize, or mitigate the actual or potential OCI situation.
- Al-Razaq would not proceed with future work until resolving the OCI in a manner acceptable to the contracting officer.

Id. at 192-199.

Al-Razaq's OCI mitigation plan also set forth the procedures the contractor would use to avoid, mitigate, or neutralize OCI situations (e.g., if current work conflicts with contemplated or future work, avoid the OCI by turning down either the contemplated or future work). Id. at 196.

On February 16, 2016, NASA issued the ABSS2 RFP. As with the prior contract, the ABSS2 PWS required the contractor to provide a variety of acquisition support services (i.e., procurement administrative services, acquisition policy services, procurement operations support, procurement source selection office support),

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the firm a competitive advantage in a later competition for a government contract. FAR § 9.505-4; Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6; CapRock Gov't Solutions, Inc., et al., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 25.

business support services (i.e., accounting and resource management operations, budget integration and analysis, business best practices), and related program management to MSFC.⁵ AR, Tab 5, ABSS2 RFP, at 338-346.

The RFP included a “limitation of future contracting” clause--identical to that in the ABSS1 contract--which would preclude the awardee from performing any other MSFC contract during performance of the ABSS2 contract. Id. at 319. The RFP also instructed offerors to submit an OCI mitigation plan as part of their proposals, addressing any actual or potential OCIs not avoided by the RFP’s limitation on future contracting clause. Id. at 500-501.

On February 24, the Al-Razaq Acquisition Team Lead requested a meeting with the contracting officer.⁶ AR, Tab 9, Contracting Officer’s Declaration, June 13, 2016, at 572. The Acquisition Team Lead wanted to know whether Al-Razaq personnel performing the ABSS1 contract could assist in any manner with the preparation of the offeror’s proposal for ABSS2. Id. As part of her inquiry, the Al-Razaq employee provided to the contracting officer a copy of the letter which the agency had furnished Al-Razaq’s predecessor, Digital Fusion Solutions, Inc., regarding a similar inquiry.⁷ Id. Specifically, the NASA letter stated:

The purpose of this letter is to inform Digital Fusion . . . that in accordance with the current contract . . . , Digital Fusion . . . is prohibited from proposing, either as a contractor or subcontractor, on any activity during the performance of this contract. Thus, as currently written, the contract does not allow Digital Fusion to participate in any proposal activity related to the successive contract. However, the Government is willing to modify the existing contract . . . to allow Digital Fusion to participate . . . in the successive contract if a firewall is used to separate both the information and personnel associated with the current contract from the proposal team associated with the successive contract.

AR, Tab 2, NASA Letter to Digital Fusion, Nov. 5, 2009, at 12.

⁵ The primary difference was the addition of a requirement for legal support services (i.e., paralegals) to the ABSS2 PWS.

⁶ NASA legal counsel was also present at the February 24 meeting. Agency Dismissal Request, Aug. 10, 2016, at 2 n.2.

⁷ Digital Fusion provided ABSS services to MSFC from September 2005 to March 2011. Contracting Officer’s Statement, June 15, 2016, at 4 n.3. The record is unclear regarding how the Al-Razaq Acquisition Team Lead accessed the Digital Fusion letter.

The contracting officer then advised the Al-Razaq Acquisition Team Lead that guidance similar to that provided to Digital Fusion would be given in response to any official request by the contractor, that is, that Al-Razaq would be required to implement a firewall and separate both the information and personnel associated with performing the current ABSS1 contract from the team of Al-Razaq employees preparing the offeror's ABSS2 proposal.⁸ Id.

Twenty offerors, including A2JV, submitted proposals by the March 18 closing date.⁹ The A2JV proposal was hand-delivered to the MSFC contracting activity by the current and former Al-Razaq program managers for the ABSS1 contract. AR, Tab 6, NASA Memorandum for Record, Mar. 21, 2016, at 568. Moreover, the Al-Razaq program manager informed agency officials that he had been involved in the preparation of the A2JV proposal, and had spent 10-12 hours a day for the last two weeks working on the offeror's proposal. Id.; Tab 9, Contracting Officer's Declaration, June 13, 2016, at 572-73; see also A2JV Comments, June 28, 2016, exh. A, Declaration of Al-Razaq Program Manager, June 28, 2016, at 5-6.

On May 9, the NASA contracting officer notified A2JV that its proposal was eliminated from the competition because of an unequal access to information OCI. AR, Tab 8, NASA Letter to A2JV, May 9, 2016, at 570. The contracting officer also detailed the rationale for her decision as follows:

The current ABSS contract involves support to both the acquisition community and business community at the [MSFC]. This support requires access to the full breadth of sensitive contractual and financial information necessary for the administration of MSFC contracts. Government employees and ABSS support contractor employees essentially have the same access to this nonpublic information. The current ABSS contract obligates Al-Razaq to screen new business opportunities for organizational conflicts of interest and have proposed resolutions for identified OCIs approved by the contracting officer. MSFC expected Al-Razaq to adhere to its obligation in the contract to report the follow-on ABSS contract as a new business opportunity. Current employees on the ABSS contract

⁸ The record indicates the contracting officer intended that any such Al-Razaq request, and establishment of a firewall between Al-Razaq employees, would be made and formalized pursuant to the contractor's existing OCI Mitigation Plan. Contracting Officer's Statement, June 15, 2016 at 4-7.

⁹ A2JV's proposal included a generic OCI mitigation plan stating how the offeror would handle actual or potential OCIs if they occurred. AR, Tab 15, A2JV Proposal, Mar. 17, 2016, at 948-959. A2JV's mitigation plan, however, did not identify any actual or potential OCIs, including Al-Razaq's performance of the ABSS1 contract. Id.

were aware that MSFC would have restricted individuals working on the ABSS contract from directly or indirectly assisting with the preparation of the A2JV proposal.

Consistent with past practice, if Al-Razaq had notified MSFC of its desire to use resources from Al-Razaq Computing Services for preparation of the A2JV proposal, MSFC would have required a firewall to be established around all ABSS support contractor employees (including the program manager). The firewall/restriction on certain individuals would have ensured Al-Razaq used other resources in its preparation of the A2JV proposal. Al-Razaq's use of the existing ABSS program manager gave Al-Razaq an unacceptable OCI based upon unequal access to information described in section 9.505-4 of the Federal Acquisition Regulation (FAR).

Id.

A2JV subsequently filed its protest with our Office on May 17.

DISCUSSION

A2JV protests the agency's determination that the offeror had an unequal access to information OCI, and the decision to exclude the offeror. The protester argues, among other things, that it was unnecessary for Al-Razaq to firewall all employees performing the ABSS1 contract from those preparing the offeror's ABSS2 proposal, because of internal firewalls that Al-Razaq had in place while performing the ABSS1 contract. A2JV also contends that it was unnecessary to preclude the involvement of the current and former Al-Razaq program managers from assisting with the offeror's ABSS2 proposal because these individuals did not have the same level of access to competitively useful information while performing the ABSS1 contract (A2JV does not dispute that the current and former Al-Razaq program managers assisted with the preparation of the offeror's ABSS2 proposal). Thus, A2JV argues, the agency failed to conduct a reasonable OCI investigation and lacked requisite hard facts when excluding the offeror from the ABSS2 competition.

The agency argues that its OCI investigation was reasonable, and its decision to exclude A2JV from the competition was proper. NASA contends that Al-Razaq routinely had access to nonpublic, competitively useful information (including information involving concerns competing for the ABSS2 procurement) as part of its performance of the ABSS1 contract. The agency also argues that at no time--prior to this protest--did Al-Razaq ever disclose its "secret" internal firewalls that allegedly limited information access of certain ABSS1 contract employees: such procedures, if they allegedly existed at all, were not part of the contractor's OCI mitigation plan or otherwise disclosed. The agency contends that A2JV's decision not to firewall all ABSS1 employees from its ABSS2 proposal preparation thereby resulted in an

unequal access to information OCI which the offeror failed to adequately mitigate, and which necessitated removing A2JV from the competition.

The agency also argues that A2JV's protest here is untimely, insofar as the offeror essentially challenges the ground rules for the procurement. Specifically, NASA contends that the protester knew, prior to RFP closing, that: (1) the agency believed that Al-Razaq had an unequal access to information OCI as a result of performing the ABSS1 contract; (2) the agency had determined that Al-Razaq's ability to mitigate this OCI, and therefore eligibility to compete here, required the contractor to firewall all employees performing the ABSS1 contract from those preparing the offeror's ABSS2 proposal; and (3) that Al-Razaq believed that such a firewall of all ABSS1 employees was in fact unnecessary. The agency argues that because Al-Razaq challenges the conditions under which it was told it would be eligible to compete, it was required to bring such a ground rules challenge prior to RFP closing. As detailed below, we agree.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial quotations must be filed prior to that time; similarly, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of quotations following the incorporation. 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Armorworks Enters. LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 6; Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4. More specifically, underlying our timeliness rules regarding solicitation improprieties is the principle that challenges which go to the heart of the fundamental ground rules by which a competition is conducted should be resolved as early as practicable during the solicitation process.¹⁰ See, e.g., Armorworks Enters. LLC, supra (post-award protest challenging agency's testing methodology is dismissed as untimely where the protester was aware of the alleged problems and failed to raise its concerns regarding the ground rules of the procurement prior to the time set for receipt of proposals); Caddell Constr. Co., Inc., B-401281, June 23,

¹⁰ Such a rule promotes fundamental fairness in the competitive process by preventing an offeror from taking advantage of the government as well as other offerors, by waiting silently only to spring forward with an alleged defect in an effort to restart the procurement process, potentially armed with increased knowledge of its competitors' position or information. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313-14 (Fed. Cir. 2007). It also promotes efficiency by ensuring that concerns regarding a solicitation are raised before contractor and government resources are expended in pursuing and awarding the contract, thus avoiding costly and unproductive litigation after the fact. Id.

2009, 2009 CPD ¶ 130 at 3 (post-closing challenge to a competitor's eligibility to compete for award is untimely where the protester was aware prior to closing of the operative facts as well as the agency's eligibility determination); Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7 (post-closing argument that agency should have held discussions with protester is untimely where agency unequivocally indicated prior to closing that agency did not contemplate holding discussions); see also Del-Jen Education & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 6.

We have also previously applied our general rule regarding challenges which go to the ground rules by which a competition is conducted to the area of OCIs. As a general rule, a protester is not required to protest an agency's OCI determination until after contract award. See, e.g., REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. However, we have applied a different rule where the protester is aware of the operative facts regarding the existence of an actual or potential OCI regarding a prospective offeror, and the protester has been advised by the agency of the agency's position on the offeror's eligibility to compete. See Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2; International Sci. & Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16 at 3-4. In such cases, we have found that the protester cannot wait until an award has been made to file its protest of an agency's OCI determination, but instead must protest before the closing time for receipt of proposals. See Abt Assocs., Inc., supra.

Here, the record reflects that prior to the closing time for receipt of proposals, A2JV was aware of the operative facts regarding the existence of an actual or potential OCI involving itself, as well as the agency's position on the offeror's eligibility to compete in the ABSS2 procurement. First, A2JV was intimately knowledgeable of the scope of work, and terms, of the ABSS1 contract, and the requirements of its own OCI mitigation plan. Further, the contracting officer expressly informed Al-Razaq of the agency's position that the firm had an unequal access to information OCI resulting from its performance of the ABSS1 contract. The contracting officer also informed Al-Razaq of the agency's position that--as it had done on a prior occasion--Al-Razaq was precluded from competing in the ABSS2 procurement unless it established a firewall between all ABSS1 employees and those individuals who would be preparing the offeror's ABSS2 proposal. Thus, Al-Razaq (and A2JV) was fully aware prior to closing of the fundamental ground rules by which the ABSS2 competition was being conducted.¹¹ If A2JV was of the

¹¹ In fact, A2JV now essentially challenges the fundamental ground rules for the procurement at hand, i.e., that it was unreasonable for NASA to require all ABSS1 employees to be firewalled from ABSS2 proposal preparation, because various

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opinion that a firewall of all ABSS1 employees from proposal preparation was unnecessary--notwithstanding the known agency position on the matter--it was required to protest the ground rules of the procurement prior to the RFP's closing date. See L&N/MKB, Joint Venture, B-403032.3, Dec. 16, 2010, 2010 CPD ¶ 298 at 4; Honeywell Tech. Solutions, Inc., *supra*, at 6-7.

A2JV does not dispute the agency informed Al-Razaq's Acquisition Team Lead that the offeror was eligible to compete here only if it firewalled its ABSS1 employees from those preparing the ABSS2 proposal. Rather, the protester argues that such notice was not provided by the contracting officer directly to Al-Razaq's program manager, or to any other A2JV individual authorized to act on behalf of the offeror. Because the Acquisition Team Lead lacked suitable authority to act on behalf of Al-Razaq, the protester argues, any knowledge she had of the contracting officer's determination (or the Digital Fusion letter) did not apply to A2JV. A2JV Comments, Aug. 10, 2016, at 6-7. We disagree.

As a preliminary matter, the protester does not contend that the Al-Razaq Project Manager was unaware of the meeting that occurred between the contracting officer and the contractor's Acquisition Team Lead--only that the contracting officer didn't convey her determination regarding Al-Razaq's eligibility to compete directly to the Project Manager. It is well settled that an agent of a government contractor may bind the contractor if the agent has either actual or apparent authority. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-84 (1947); Peter Bauwens Bauunternehmung GmbH & Co. KG, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,497. Here, the Al-Razaq Acquisition Team Lead was not, as the protester contends, a "low level employee," A2JV Comments, Aug. 10, 2016, at 5, but rather, a supervisor and manager who possessed a "broad mandate for independent actions and decisions." AR, Tab 3, ABSS1 Contract, May 1, 2011, at 187. Further, the contracting officer provided the information to the Al-Razaq manager who requested the meeting on behalf of the contractor regarding the firm's eligibility to compete.¹² In sum, we find that prior to the closing time for receipt of proposals, A2JV was aware of the operative facts regarding its own actual or potential OCI, and had sufficient notice regarding the contracting officer's position on the offeror's eligibility to compete in the ABSS2 procurement. As A2JV failed to challenge the

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Al-Razaq employees allegedly did not have access to sensitive information while performing the ABSS1 contract.

¹² Moreover, the record indicates that the Al-Razaq program manager was actually out of the office, preparing A2JV's proposal, at the time of this meeting.

ground rules for the procurement regarding its eligibility to compete under after closing, we find the protest here to be untimely.¹³

The protest is dismissed.

Susan A. Poling
General Counsel

¹³ In any event, we find no basis on which to sustain the protest: the contracting officer reasonably found that A2JV had an unequal access to information OCI as a result of performing the ABSS1 contract, which the offeror failed to show had been adequately mitigated so as to avoid an unfair competitive advantage in the ABSS2 procurement.