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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Nortel Government Solutions, Inc.

File: B-299522.5; B-299522.6

Date: December 30, 2008

James J. Regan, Esq., Daniel R. Forman, Esq., John E. McCarthy, Jr., Esq., Puja Satiani, Esq., and Jonathan M. Baker, Esq., Crowell & Moring LLP, for the protester. John S. Pachter, Esq., D. Joe Smith, Esq., Jonathan D. Shaffer, Esq., and Mary Pat Gregory, Esq., Smith Pachter McWhorter PLC, for Systems Research and Applications Corporation, an intervenor.

James E. Hicks, Esq., Drug Enforcement Administration, for the agency.

Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where offeror will be required to review and provide input on designs proposed by itself under separate contract with same agency, agency unreasonably failed to determine the extent of offeror's organizational conflict of interest (OCI) and unreasonably concluded that offeror's mitigation plan was acceptable, where it did not avoid, mitigate, or neutralize the OCI and instead relied on agency's existing process that made government responsible for final decisions.

DECISION

Nortel Government Solutions, Inc. (NGS) of Fairfax, Virginia, protests the award by the Drug Enforcement Administration (DEA), Department of Justice, of a contract to Systems Research and Applications Corporation (SRA) of Fairfax, Virginia, under request for proposals (RFP) No. DEA-06-R-0013, for enterprise management services (EMS) in support of DEA's information technology (IT) infrastructure. NGS asserts that the agency failed to properly consider SRA's potential organizational conflict of interest (OCI) and challenges the evaluation of proposals.

We sustain the protest.

BACKGROUND

The RFP, initially issued on July 10, 2006, sought proposals to provide consolidated IT operations and maintenance (O&M) services for all DEA offices. The requirement covered four core enterprise management functions: customer support, IT security, network operations, and change management. NGS was one of six offerors responding to the initial RFP and it was awarded a contract in January 2007. In response to protests from three other offerors, DEA took corrective action and the protests were withdrawn.

The RFP, as then amended by the agency, included a new statement of work (SOW) detailing the agency's requirements in the same four enterprise management functions. With regard to scope, the RFP explained that the DEA enterprise which the contractor would support was comprised primarily of the Firebird IT System (FITS) but that the contractor also would be responsible for supporting all DEA IT and IT-related systems and components worldwide whether FITS or not. The resulting contract was intended to improve efficiencies, performance, and cost effectiveness by consolidation of various existing contract requirements under a single O&M contractor. Additional functions and services currently performed under separate contracts—including field relocations, cabling and headquarters support, and depot services—were to be added to the EMS contractor's responsibilities as those contracts expired.

The amended RFP contemplated award of a cost-plus-award-fee contract, for a base period with 4 option years, to the offeror whose proposal represented the “best value” based on four evaluation factors (in descending order of importance): technical/management solution (35 points), transformation approach (30 points), initial performance enhancement plan (20 points), past performance (15 points), and cost. Cost was evaluated for realism. Non-cost factors, when combined, were of significantly greater importance than cost.

NGS and SRA were the only offerors to submit proposals under the amended RFP. After conducting written and face-to-face discussions with the offerors, DEA requested final proposal revisions (FPR). Prior to making the award, the agency amended the RFP to require additional customer support administrator positions, and obtained revised proposals. Based upon the evaluation of proposals, the source selection authority (SSA) determined that SRA had submitted the “most advantageous” proposal.

NGS then filed a protest with our Office challenging the evaluation of its proposal and the source selection decision, and asserting the existence of a possible OCI associated with SRA's review of designs prepared by itself as the FITS contractor. After developing the record, including a hearing on the issues, the GAO attorney

responsible for the protest conducted an “outcome prediction” alternative dispute resolution (ADR) telephone conference.¹ Based on the GAO attorney’s assessment of the issues, DEA decided to take corrective action, and our Office dismissed the protest as academic (B-299522.4, May 13, 2008).

The agency then reopened discussions with the offerors and requested revised proposals including submission for the first time of OCI mitigation plans. After review of these proposals, the agency conducted a further round of discussions. The contracting officer, after review of the offerors’ OCI mitigation plans and consultation with the technical evaluation panel (TEP), determined that there were sufficient safeguards in place to mitigate and/or resolve potential OCIs for both offerors.

SRA’s FPR received an overall consensus evaluation score of [deleted] and NGS’s FPR received a score of [deleted]. Although NGS’s proposed costs [deleted] were lower than SRA’s [deleted], the agency found there was cost risk associated with NGS’s proposal while SRA’s proposed costs were realistic as proposed. However, while DEA, as part of the cost realism analysis, quantified the risk associated with NGS’s proposal (calculating additional costs of [deleted]), in making her source selection, the SSA based her best value decision on her conclusion that SRA’s technical superiority justified the proposed cost premium of its proposal over NGS’s as calculated using the proposed costs of the offerors. Upon learning of the selection of SRA for award, and after a debriefing, NGS filed this protest.

ORGANIZATIONAL CONFLICT OF INTEREST

As before, NGS asserts the existence of a possible OCI associated with SRA’s review of designs prepared by SRA itself as the FITS contractor. In this regard, FITS, the major IT infrastructure system at DEA, provides a desktop environment from which DEA users access applications and network resources. SRA currently holds a contract with DEA to provide engineering support for this system, including deployment, development support, integration and performance support, as well as infrastructure engineering. SRA Mitigation Plan at 1. Further, as the EMS O&M contractor, SRA will be required to participate in integrated project teams (IPT) which are intended to bring together all involved parties (DEA and contractor) to ensure that a delivered IT capability is aligned with DEA’s business and functional requirements. SRA Mitigation Plan at 3. In this regard, the EMS contractor would provide input from the “O&M perspective” on design solutions crafted by the FITS

¹ In “outcome prediction” ADR, the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief.

and other DEA contractors.² Supplemental Agency Report (SAR) at 5; GAO Hearing Transcript (Tr.), Apr. 23, 2008, at 136. In addition to participation in IPTs, the record indicates that the EMS contractor's work will include review of proposed designs outside of IPT meetings.³ Tr. at 274. The FITS contractor does not produce the hardware or software for its proposed design solution or otherwise receive additional work implementing its proposed solution. SAR at 7.

As in its original protest, NGS asserts that SRA, in its dual roles as the EMS contractor and FITS contractor, would have a substantial and inadequately mitigated OCI. Specifically, it asserts that the EMS contractor will be called upon to review and provide input on engineering designs proposed by the FITS contractor and provide configuration reviews of equipment furnished by the FITS contractor. In NGS's view, it would not be in SRA's interests as the EMS contractor to provide negative feedback to the agency based on its review of solutions proposed by SRA as the FITS contractor, since repeated criticism could adversely affect SRA's standing with its customer, affecting past performance evaluations and how SRA fares in future competitions. NGS SAR Comments at 9-10. Under these circumstances, NGS suggests that SRA could "subconsciously pull its punches" when providing the DEA with the EMS perspective on SRA's FITS designs. NGS SAR Comments at 4. NGS also asserts that the agency failed to evaluate the technical and cost consequences of SRA's OCI, including, for example, the potential need to use additional government or other contractor resources to review SRA's designs. NGS Initial Comments at 21-24.

The contracting officer (who was the SSA) determined, and DEA continues to maintain, that "SRA's performance of the FITS contract [does] not create an 'impaired objectivity' OCI" with regard to SRA's performance of the EMS O&M contract. Contracting Officer's Statement at 32. In explaining her position that no OCIs will result from SRA's performance of both contracts, the contracting officer asserts that: (1) SRA will not be in a position to evaluate or assess its own work on the FITS contract, nor will SRA benefit from SRA's input as the EMS contractor since neither the EMS nor FITS systems engineering contractor will furnish any system or software that will be necessary to implement systems engineering solutions proposed by the FITS contractor; (2) all systems engineering work and implementation of systems engineering initiatives are subject to oversight and

² DEA and NGS agree that this input/review work is required of the EMS contractor. NGS Initial Comments at 6-7; Supplemental Agency Report at 5. However, apart from a deliverable concerning "meeting minutes," RFP ¶ F.4; GAO Hearing Transcript at 127-28, the SOW does not identify this task with any specificity.

³ In addition, the protester states, based on its prior experience as the O&M contractor, that it also performs configuration management quality checks on servers provided by the FITS contractor. NGS Declaration, Mar. 24, 2008, ¶ 8.

control by DEA personnel, with government personnel chairing any IPTs involved in the initiatives and all systems engineering work under the FITS contract subject to review and approval of DEA's government-led configuration control board (CCB); (3) the input from the EMS contractor regarding systems engineering solutions proposed by the systems engineering FITS contractor will be essentially limited to participating in meetings involving the implementation of systems engineering initiatives, with such meetings occupying only a relatively small portion of the EMS contractor's overall contract effort; and (4) SRA committed that, in the event of a change in these processes or if the government concluded that additional measures were necessary, it would adopt additional mitigation items including organizational/financial and informational separation of the EMS work from the FITS work (a firewall). Supplemental Contracting Officer's Statement at 2-4; SRA Mitigation Plan at 3-5, 7.

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible. Federal Acquisition Regulation (FAR) §§ 9.505, 9.508. Situations that create potential conflicts of interest include situations in which a firm's work under a government contract entails evaluating itself. The concern in such "impaired objectivity" situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. 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; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 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. Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8.

The record indicates that the agency did not give meaningful consideration to the potential impaired objectivity OCI involving SRA's dual roles. Contrary to the agency's assertion that SRA will not be in a position to evaluate or assess its own work on the FITS contract, the record shows that SRA, as the EMS contractor, is expected to review and offer input from the O&M perspective regarding systems engineering solutions proposed by itself as the FITS contractor. SAR at 5. Moreover, that input will involve SRA's subjective judgment. In this regard, we note that when asked if DEA sought the O&M (EMS) contractor's "subjective opinions of the design," the TEP chair testified that "[t]hey can be subjective . . . depending on the level of detail of the design." Tr. at 49. In our view, this provides an opportunity for biased advice. See PURVIS Sys., Inc., *supra*, 2004 CPD ¶ 177 at 9 (agency improperly failed to consider impaired objectivity OCI where same contractor was expected to provide subjective input on its own products and services). Further, we find persuasive the protester's position that, while the advice may not result in implementation work for SRA under either contract, input from and review by SRA as the EMS contractor regarding systems engineering solutions proposed by SRA as

the FITS contractor could have a potential impact on SRA's relationship with the government including past performance evaluations and future competitions. In these circumstances, we believe that it is clear from the record that the performance by SRA of both the EMS and FITS contracts presents a potential impaired objectivity OCI.

Our conclusion that a potential impaired objectivity OCI exists is not altered by DEA's assertion that it does not rely on the EMS contractor alone for advice, nor by its reliance on the fact that the government retains the ultimate decisionmaking authority. The record indicates that obtaining input from a contractor with the O&M perspective was considered important. According to the testimony of the TEP chair, it would be "negligent" not to have the EMS contractor's perspective on FITS designs and so the agency would still seek the input of SRA even when it fulfills both roles. Tr. at 166-68. In this regard, the EMS contractor will replace multiple former O&M contractors with a single O&M contractor (Tr. at 166), arguably giving it a more important role. Thus, the possibility of obtaining O&M perspective from other DEA contractors may necessarily be somewhat limited. Further, the agency broadly asserts that under its process "[a]ny contractor input" in an IPT is "vetted by the DEA personnel" and that the CCB reviews and approves all IT changes making the government the "final decision authority." AR at 20. However, it is not clear from the record that this review will address the impaired objectivity concern arising from SRA's dual roles where, as here, the contractor is expected to have a potentially significant role in providing input with regard to SRA's system design. For example, neither SRA in its OCI mitigation plan, nor the agency, provides any specifics on how the agency will accomplish its vetting of SRA's input before making its final decisions.⁴ As we explained in Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 11-12, an approach based upon ad hoc mitigation activity such as discounting the weight given to the firm's recommendations, even if feasible, is not a substitute for the preaward deliberation contemplated under FAR § 9.504.

Moreover, although DEA asserts that the review work constitutes only a small portion of the EMS contractor's effort, the agency's position is not supported by the record. In this regard, in response to NGS's protest, the agency now asserts that only 2 percent of the contractor's time is spent in IPT meetings and those meetings are not solely for design reviews. AR at 21 n.8; Supplemental Contracting Officer's Statement at 4. However, not only did a representative of NGS offer persuasive testimony to the effect that 5 of 60 NGS engineers spent at least 25 percent of their time working on reviews and IPT meetings, but in addition, the TEP chair testified that the EMS contractor was spending 10 to 15 percent of its time on reviews.

⁴ Moreover, even though the CCB includes and is chaired by DEA personnel (who make the final decisions), membership on the CCB would include SRA in both its EMS and FITS contractor roles. SRA Mitigation Plan at 3. This dual presence could enhance its influence and the related OCI, rather than mitigate it.

Tr. 158-61. Given this testimony, and the fact the 2 percent figure is not supported by any meaningful contemporary assessment, we find unpersuasive the agency's attempt to portray the review work giving rise to an impaired objectivity OCI as insignificant in terms of the EMS contractor's overall level of effort. More significantly, even if the review work took little of the EMS contractor's time, there is no showing in the record that this review process is not important to the agency's mission, and it would not obviate the fact that a potential impaired objectivity OCI existed which needed to be avoided or mitigated.

Finally, SRA's proposal to separate its EMS and FITS personnel through use of a firewall appears to be of little, if any, help in resolving the OCI here. In this regard, the proposed firewall provides for SRA to manage the two contracts using "separate organizations with separate interests" and "distinct business objectives." SRA Mitigation Plan at 5. It also prohibits SRA and subcontractor personnel working on one contract from providing support under the other contract, without written approval from the contracting officer. SRA Mitigation Plan at 7. However, while a firewall arrangement may resolve an "unfair access to information" OCI, it is virtually irrelevant to an OCI involving potentially impaired objectivity. See Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 16. This is because the conflict at issue pertains to the organization, and not the individual employees. Id. Thus, while the firewall proposed by SRA may create the appearance of separation to mitigate the OCI, the fact remains that personnel under both contracts will be working for the same organization with an incentive to benefit SRA overall. Accordingly, the firewall does not avoid, mitigate or neutralize the impaired objectivity OCI resulting from SRA's performance of dual roles reviewing and providing input on its own designs.

We sustain the protest on the basis that the record does not support DEA's conclusion that there was no potential OCI involving SRA's dual roles, but instead indicates that the agency did not give meaningful consideration to this potential impaired objectivity OCI.⁵ Since the agency needs to address the extent of the OCI and what mitigation is appropriate, and because the impact that mitigation may have on SRA's technical and cost proposals is unknown, we believe that the agency will need to reopen discussions in order to address these matters.⁶

⁵ We note that the FAR anticipates situations in which application of the OCI provisions contained in FAR subpart 9.5 may not be in the government's best interest, and authorizes the waiver of such provisions by an authority at a level not lower than head of the contracting activity. FAR § 9.503. Here, no waiver was requested or approved.

⁶ Likewise, the agency should discuss NGS's OCI plan as well. While NGS recognized and planned for the mitigation of a potential OCI stemming from the possibility that it would have to test, evaluate, or provide procurement recommendations on products manufactured by Nortel (its parent company), and Nortel's competitors, its
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EVALUATION OF NGS PROPOSAL

NGS challenges numerous aspects of the agency's evaluation of its proposal.⁷ In considering a protest of an agency's proposal evaluation, our review is confined to determining whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. Here, we have reviewed each of NGS's challenges to the evaluations and find that none has merit. We discuss several of NGS's assertions below.

Meeting SLAs

NGS challenges the agency's evaluation of offerors' integrated performance enhancement plans (IPEP), including their proposals for meeting the various service level agreements (SLA) DEA's Office of Information Systems has with other DEA activities.⁸ In its revised proposal, NGS included a list of 21 assumptions "as necessary to successfully meet the proposed SLAs." First Revised NGS Proposal at D-13. The proposal warned that "[p]otential impacts such as schedule delay may occur if these assumptions are not met." Id. The TEP determined that 19 of the assumptions related to items that in the TEP's experience, an IT support contractor would normally take responsibility for under this contract. For example, in order to meet SLA Nos. 8 (antivirus update file deployment time) and 9 (software patch deployment time), NGS assumed that all servers and workstations would be

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plan did not address a potential OCI identified by the agency—the possibility that NGS would have to review the proposal of hardware from NGS's team member Hewlett Packard (HP). See OCI Analysis at 3. We note that NGS disputes the propriety of the agency's solution to this latter OCI, that is, that no HP solutions be included in an engineering design. NGS Initial Comments at 18. We believe that NGS should have the opportunity to revise its plan to address this potential OCI.

⁷ NGS also asserts that the agency did not provide it with meaningful discussions because it failed to raise concerns in at least three areas of its proposal—the level of dispatch authority proposed for NGS's customer service administrators, concerns regarding customization of its proposed Courion password reset software and related help desk coverage, and risk associated with its reduced award fee. Based on our recommendation that the agency reopen discussions to address the offerors' respective OCI issues, the agency should use that opportunity to resolve continuing concerns with both offerors' technical and cost proposals.

⁸ SLAs are the agency's attempt to define the level of service and support to be provided to DEA's field activities and other users. Contracting Officer's Statement ¶ 88.

responsibilities associated with service levels, NGS stated that it understood that it was “solely responsible” for achieving DEA’s required service levels. NGS Final Revised Proposal at 8. However, since NGS also stated that it knew there were events beyond its control that would influence implementation of the SLAs, and its proposal continued to include the 21 “assumptions,” all but two of which concerned matters for which the agency reasonably believed an IT support contractor would normally address in contract performance, the TEP found that NGS’s response did not mitigate its concerns with regard to NGS’s commitment to meeting the SLAs. Final NGS Technical Evaluation at 9. In our view, the agency could reasonably conclude that the continued presence in NGS’s proposal of the 21 assumptions called into question NGS’s general acknowledgment of its responsibility for meeting the SLAs and thus represented a risk to achieving the SLAs and a weakness in the proposal. Cf. Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., B-309752 et al., Oct. 5, 2007, 2008 CPD ¶ 83 at 11 (agency’s technical evaluation must take into account any assumptions underlying an offeror’s proposed approach); recon. den., Kellogg, Brown & Root Servs., Inc.–Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84.

Escalation Rate

NGS asserts that the agency unreasonably assessed risk as a result of NGS’s proposal of a labor escalation rate of only [deleted] percent in the option years, a reduction from its previously proposed [deleted] percent escalation rate. In this regard, when the agency asked NGS during discussions to address the adequacy of the rate, NGS Discussions, Question 2, NGS responded that while it expected its personnel raises to continue in accordance with the industry average of 3.7 percent, it also assumed that attrition and personnel career growth (employees moving to more senior positions) would result in the replacement of more experienced personnel with highly skilled, but less costly personnel. NGS Final Revised Proposal at 2. The agency found this plan likely would result in a lack of continuity in the EMS project resulting in risk to performance. We find the agency’s concern to be reasonable. Although NGS asserts that the agency misread its proposal, noting that its discussion response referred to “career growth within the program,” id., the response also referred to its corporate policy for “employees to grow and move forward within the company,” thus suggesting the possible loss to the program of experienced personnel moving elsewhere in the company. Id. Further, NGS’s asserted plan for experienced personnel to move upward within the program would necessarily be dependent upon sufficient higher level positions to open up in the program. NGS’s proposal, however, did not explain the basis for the assumption that such higher level positions would open up and, in any case, if there were significant turnover at higher levels of the program, this would appear likely to result in the very lack of continuity about which the agency was concerned.⁹

⁹ NGS also challenged various aspects of the cost evaluation, including the agency’s upward adjustment of NGS’s award fee percentage. In this regard, it is improper for
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RECOMMENDATION

We recommend that the agency reconsider its determination that SRA's performance of both the FITS and EMS contracts would not present a significant impaired objectivity OCI, taking into consideration the actual scope of any review/input tasks for which the EMS contractor would be responsible. The agency's review should include an evaluation of the reasonable impact on SRA's technical approach in the event that its OCI mitigation plan relies on having the review performed or augmented by government personnel and/or other contractors. See Meridian Corp., B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129 at 5 (an agency should consider the effect of an offeror's OCI avoidance plan on its technical proposal). We further recommend that the agency reopen discussions with the offerors to obtain revised OCI mitigation plans and to address any remaining technical or cost concerns. The agency should then request revised proposals, sufficiently document its evaluation including any cost adjustments, and then make a new, properly documented source selection. Finally, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel

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an agency to adjust a fixed cost such as the award fee percentage here. See Barents Group, L.L.C., B-276082, May 9, 1997, 97-1 CPD ¶ 164 at 11 (improper upward adjustment of capped cost). Here, NGS was not prejudiced by this adjustment since the SSA did not consider it in her source selection, basing her best value tradeoff on the difference in the offerors' proposed costs. Source Selection Decision at 31-32. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed Cir. 1996). While NGS was not prejudiced by the SSA's best value determination in this instance, in performing the next source selection, the agency must consider the offerors' probable costs. A cost realism evaluation is unreasonable where the contracting officer fails to take into account cost adjustments made in the cost realism evaluation and relies on the offerors' proposed costs instead. Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 14; FAR § 15.404-1(d)(2) (probable cost shall be used in best value evaluation).