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Decision

Matter of: Trailboss Enterprises, Inc.

File: B-415812.2; B-415970; B-415970.2

Date: May 7, 2018

Charles R. Lucy, Esq., Holland & Hart LLP, for the protester.
Colonel C. Taylor Smith, Isabelle Cutting, Esq., and Justin D. Haselden, Esq.,
Department of the Air Force, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of a solicitation is denied where the agency had a reasonable basis to use a lowest-priced, technically-acceptable evaluation scheme, and where the solicitation's terms were not unduly restrictive of competition.
 2. Protest challenging the award of a sole-source contract is denied where the agency reasonably concluded that only the incumbent contractor could provide the required services during the period between the expiration of the incumbent contract and the anticipated award of the new contract.
 3. Protest alleging that the terms of a solicitation and a sole-source award reflect a biased grounds rules organizational conflict of interest is dismissed in part and denied in part where the protester fails to demonstrate hard facts reflecting a conflict and where the protester does not show that the agency's investigation was unreasonable.
 4. Protest alleging bias against the protester is denied where the protester's inferences do not demonstrate a specific intent by agency officials to harm the protester.
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DECISION

Trailboss Enterprises, Inc., of Fort Worth, Texas, challenges the terms of request for proposals (RFP) No. FA4897-17-R-0006, which was issued by the Department of the Air Force for training services in support of the Republic of Singapore Air Force (RSAF). Trailboss also challenges the award of a sole-source contract to PKL Services, Inc., of Poway, California, under solicitation No. FA4897-18-R-0010, for training services during

the time between the expiration of the incumbent contract and the award of the new contract under solicitation No. FA4897-17-R-0006.

We deny in part and dismiss in part the protests.

BACKGROUND

The Air Force provides training support to the RSAF through a Foreign Military Sales (FMS) program known as Peace Carvin. Contracting Officer's Statement (COS) (B-415812.2) at 1. This program provides F-15G fighter aircraft maintenance and flying operations training to RSAF personnel at Mountain Home Air Force Base in Idaho. Agency Report (AR) (B-415812.2), Tab 7a, Performance Work Statement (PWS), at 7. These services are currently being provided by PKL, which was awarded sole-source contracts in 2008 and 2012.

The Air Force issued solicitation No. FA4897-17-R-0006 on November 6, 2017, which anticipates the award of a fixed-price contract with a base period of 6 months and four 1-year options. AR (B-415812.2), Tab 4, RFP at 24, 54. The RFP advises offerors that proposals will be evaluated on the basis of the following three factors: (1) technical, (2) past performance, and (3) price. Id. at 61. The technical factor has four subfactors, all of which will be assessed on an acceptable/unacceptable basis: (1) recruitment/retention, (2) training, (3) quality management, and (4) experience. Id. at 62-63. The past performance factor will also be evaluated on an acceptable/unacceptable basis. Id. at 63-64. Award will be made to the firm whose proposal receives acceptable ratings under the technical and past performance factors and offers the lowest price. Id. at 61-62.

On December 20, prior to the due date for submission of proposals, Trailboss filed a protest with our Office challenging the terms of the solicitation. The protester argued that the solicitation improperly provides for award on a lowest-priced, technically-acceptable (LPTA) basis, the proposal submission requirements are unduly restrictive of competition, the solicitation was tainted by a biased ground rules organizational conflict of interest (OCI), and the agency's actions reflected bad faith. On January 19, the agency advised that it would take the following corrective action in response to the protest:

[T]he Air Force will suspend the solicitation in order to investigate a potential organizational conflict of interest under [Federal Acquisition Regulation (FAR)] Sections 9.504 and 9.505. The Air Force will then determine how to proceed based on the results of that investigation. The Air Force may also take any other corrective action that it deems appropriate.

Agency Notice of Corrective Action, Jan. 19, 2018, at 1. Based on the agency's proposed corrective action, we dismissed the protest as academic on January 25. Trailboss Enters., Inc., B-415812, Jan. 25, 2018, at 1-2 (unpublished decision).

On January 18, the Air Force posted a synopsis of a proposed sole-source award to PKL on the Federal Business Opportunities (FBO) website. AR (B-415970), Tab 30, FBO Synopsis, Jan. 18, 2018, at 2. The proposed award was intended to ensure continued performance of the Peace Carvin requirements after the upcoming expiration of the incumbent contract on March 31. The notice anticipated the award of a fixed price contract with a 3-month base period and a 2-month option. Id. On January 29, Trailboss filed a protest (B-415970) challenging the proposed award of the sole-source contract to PKL.¹

On February 14, the Air Force advised offerors that it had completed the corrective action in connection with Trailboss' initial protest (B-415812) and found that there were no OCIs. Protest (B-415812.2), Exh. 8, Email from Air Force to Offerors, Feb. 14, 2018, at 1. The agency also advised that the solicitation was reinstated and that proposals were due by February 20. Trailboss filed a protest (B-415812.2) prior to the closing time on February 20, raising the same challenges to the terms of the solicitation set forth in its initial protest (B-415812).

DISCUSSION

Challenge to the Solicitation Terms

Trailboss challenges the terms of solicitation No. FA4897-17-R-0006 based on the following four primary arguments: (1) the solicitation improperly provides for award on an LPTA basis, (2) the solicitation's proposal requirements are unduly restrictive of competition, (3) the solicitation is tainted by a biased ground rules OCI because its terms favor the incumbent contractor, and (4) the agency's actions reflect bad faith. For the reasons discussed below, we find no basis to sustain the protest.

LPTA Award Basis

Trailboss argues that the solicitation improperly provides for award on an LPTA basis, in violation of a policy memorandum issued by the Department of Defense in 2015 and the policy set forth in the National Defense Authorization Act (NDAA) for fiscal year (FY) 2017. We conclude that neither of the authorities cited by the protester is applicable to this procurement, and that the agency's rationale for using an LPTA award basis is otherwise reasonable.

¹ On March 14, the Air Force advised our Office that it had issued an override of the stay of award and performance on the basis of urgent and compelling circumstances. Agency Notice of Override; see 31 U.S.C. § 3553(c)(2), FAR § 33.104(b)(2). Because the award of the contract occurred after the protest of the intended sole-source award (B-415970), and the protester's arguments relate to the propriety of both the proposed and the actual award, we refer to the argument as a challenge to the sole-source award to PKL.

The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. Crewzers Fire Crew Trans., Inc., B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3; G. Koprowski, B-400215, Aug. 12, 2008, 2008 CPD ¶ 159 at 3. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. Chenega Fed. Sys., LLC, B-414478, June 26, 2017, 2017 CPD ¶ 196 at 3.

The FAR provides the following guidance for choosing the source selection method in a best-value procurement:

In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

FAR § 15.101. The FAR further states that “[t]he lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.” Id. § 15.101-2(a); see PDL Toll, B-402970, Aug. 11, 2010, 2010 CPD ¶ 191 at 2 (an agency may use LPTA award criteria in a solicitation where it reasonably concludes a minimum level of technical performance satisfies its requirements).

Here, the Air Force states that the use of LPTA award criteria is appropriate because the RFP is for the third iteration of the agency's requirements for training services in support of the RSAF. COS (B-415812.2) at 6. The agency notes that these requirements were first solicited in 2008 and again in 2012. For this third solicitation, the agency states that it “has been able to develop well defined tasks and workload estimates, which have been included in the PWS's minimum requirements.” Id. As a result, the agency asserts that the requirements are recurrent, mature, and well-defined. AR (B-415812.2), Tab 13, Acquisition Plan, at 4. The agency further explains that the performance risk associated with the requirements is low because the requirements are well documented in guidance set forth in the PWS, Air Force Instructions, and other written procedures. COS (B-415812.2) at 6. Additionally, the agency notes that the RSAF, the FMS customer for the requirements and source of the funding, “has agreed to a competitive buy instead of a sole source award.” AR (B-415812.2), Tab 13, Acquisition Plan, at 3. The agency states that this agreement reflects of the customer's desire for cost savings associated with an LPTA procurement. COS (B-415812.2) at 3, 6.

Trailboss argues that the use of LPTA award criteria for this RFP is inconsistent with guidance set forth in a memorandum issued by a former Undersecretary of Defense in 2015. See Appropriate Use of Lowest Priced Technically Acceptable Source Selection Process and Associated Contract Type, Mar. 4, 2015, http://bbp.dau.mil/docs/Appropriate_Use_of_Lowest_Priced_Technically_Acceptable_Source_Select_Process_Assoc_Con_Type.pdf (last visited May 1, 2018). This memorandum sets forth the following principle regarding the use of LPTA award criteria: “LPTA is the appropriate source selection process to apply only when there are well-defined requirements, the risk of unsuccessful contract performance is minimal, price is a significant factor in the source selection, and there is neither value, need, nor willingness to pay for higher performance.” Id. at 1. The memorandum, however, did not establish or revise any mandatory procurement regulations for the Department of Defense. See id. at 1-3.

As our Office has explained, we review alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. An agency’s compliance with internal guidance or policies that are not contained in mandatory procurement regulations is not a matter that our Office will review as part of our bid protest function. LCPP, LLC, B-413513.2, Mar. 10, 2017, 2017 CPD ¶ 90 at 5. We conclude that the memorandum cited by the protester does not establish mandatory regulations for the use of LPTA award criteria, and as such, is not for review under our bid protest function.

Next, the protester argues that the use of LPTA award criteria in the solicitation violates the requirements in section 813 of the NDAA for fiscal year 2017. This section of the NDAA states that “[i]t shall be the policy of the Department of Defense to avoid using lowest price technically acceptable source selection criteria in circumstances that would deny the Department the benefits of cost and technical tradeoffs in the source selection process.” 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2000, § 813 (Dec. 23, 2016). The NDAA directs the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to require that solicitations use LPTA award criteria only in the following situations:

- (1) the Department of Defense is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;
- (2) the Department of Defense would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;
- (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror’s proposal versus a competing proposal;

(4) the source selection authority has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the Department;

(5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file; and

(6) the Department of Defense has determined that the lowest price reflects full life-cycle costs, including for operations and support.

Id. § 813(b).

The NDAA does not expressly prohibit the use of LPTA award criteria. Further, as discussed above, it directs the Secretary of Defense to promulgate regulations in the DFARS that incorporate the guidance in § 813(b) of the NDAA. The Department of Defense, however, has not yet promulgated regulations in the DFARS implementing the policy guidance in section 813(b) of the 2017 NDAA. As of the date the protest was filed, a DFARS case was open regarding this matter without a final date for promulgation. See DFARS Case No. 2018-D010 (formerly 2017-D017), <https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf> (last visited May 1, 2018). Because the Department of Defense has not issued regulations implementing section 813(b) of the 2017 NDAA, we cannot conclude that the solicitation violates that provision of the NDAA. In the absence of a revision to the DFARS, we examine the reasonableness of the agency's rationale for use of the LPTA criteria based on the guidance set forth in FAR part 15. See FAR § 15.101-2(a); PDL Toll, supra.

As discussed above, the Air Force states that the RFP requirements are well-defined and well-documented, based on the prior two iterations of the contract. COS (B-415812.2) at 6-7; see AR (B-415812.2), Tab 13, Acquisition Plan, at 4. The agency further states that it does not anticipate additional value from exceeding the requirements set forth in the RFP. Id.

Trailboss generally argues that the RFP requirements are more complex and pose more performance risks than acknowledged by the agency. The protester also generally contends that the government would realize benefits from a procurement that allowed the agency to make tradeoffs in favor of proposals that exceeded the minimum requirements. Based on our review of the record, we conclude that none of the protester's disagreements with the agency's judgement demonstrate that the use of LPTA award criteria is unreasonable here. See CACI, Inc.-Fed.; Booz Allen Hamilton, Inc., B-413028 et al., Aug. 3, 2016, 2016 CPD ¶ 238 at 12-13 (use of LPTA criteria is reasonable where the requirements were mature and there were no anticipated benefits from using a cost-technical tradeoff). We therefore find no basis to sustain the protest.

Unduly Restrictive Solicitation Terms

Next, Trailboss argues that the solicitation's proposal requirements are unduly restrictive of competition. Specifically, the protester contends that the RFP's requirements to provide information regarding proposed personnel and to demonstrate the offeror's experience are unreasonable. For the reasons discussed below, we find no basis to sustain the protest.

Agencies must specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs or as otherwise authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. Remote Diagnostic Techs., LLC, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Coulson Aviation (USA), Inc., B-414566, July 12, 2017, 2017 CPD ¶ 242 at 3. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. Protein Scis. Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

The recruitment/retention subfactor of the technical evaluation factor requires offerors to provide a "comprehensive written plan to recruit and retain qualified personnel for all positions described in the PWS." RFP at 62. The RFP emphasizes that the plan must give "due attention to the relative scarcity of qualified F-15 pilot-instructors and [weapon systems officer (WSO)] instructors, as well as to the position qualifications for other instructor personnel described in the PWS." Id. As part of the written plan, offerors are required to provide a number of "qualified contacts" with individuals who could meet the PWS requirements in four labor categories: (1) instructor-pilot, (2) instructor-WSO, (3) simulator/platform instructor, and (4) training instructor/manager. Id. A qualified contact means: "an individual (1) who is at the time of proposal submission fully qualified to perform the duties set forth for each position as described in the PWS, and (2) who has been contacted by the offeror within the past sixty (60) days." Id. To demonstrate the contact, offerors are required to provide documentation regarding the qualifications of the contact: "[O]fferors may provide official training records, teaching certificates or formal training certifications sufficient to prove the individual has the requisite skills and experience to fill the position." AR (B-415812.2), Tab 6a, RFP amend. 2, at 15; RFP at 62.

Trailboss argues that the requirement to submit qualified contacts is unduly restrictive of competition because the RFP specifies the contacts must be qualified to perform the requirements at the time of proposal submission. The protester contends that the agency should allow offerors to identify contacts who could become qualified prior to

beginning the work. Alternatively, the protester argues that the agency should allow offerors to propose to retain incumbent personnel, without identifying specific individuals.

The Air Force contends that the RFP requirements are reasonable because they are intended to demonstrate an offeror's ability to provide personnel for the four positions, which the agency describes as "either difficult to fill based on qualifications for the position, or . . . are so critical to the [Air Force]/RSAF mission that an interruption in service would result in mission degradation." Supp. COS (B-415812.2), Apr. 25, 2018, at 1. In this regard, the agency explains that these positions all require individuals who have received "specialized training on F-15E or F-15SG platforms to meet the PWS requirements." *Id.* at 2. The agency contends that allowing offerors to simply propose to provide individuals who could be qualified in the future is not acceptable because of potential delays associated with training or retraining individuals to meet the RFP requirements. COS (B-415812.2) at 9.

Additionally, the agency notes that offerors are not required to submit letters of commitment for proposed personnel, but are instead required to identify and provide information regarding qualified individuals. The agency contends that this requirement is therefore less restrictive than requiring offerors to obtain letters of commitment from prospective personnel. Sup. COS (B-415812.2), Apr. 25, 2018, at 3-4.

We conclude that the agency has set forth a reasonable basis for its proposal requirements. The agency explains that the positions are hard to fill, and that offerors must therefore demonstrate their ability to identify individuals who meet the PWS requirements. We agree with the agency that the solicitation requirements are more restrictive than allowing offerors to identify prospective personnel after award, but less restrictive than requiring letters of commitment. To the extent the agency has elected to require offerors to provide contacts with prospective personnel as evidence of their ability to meet the PWS requirements, we find no basis to conclude that the solicitation is unduly restrictive of competition.² The protester's disagreement with the agency's exercise of its discretion here does not provide a basis to sustain the protest.

² Trailboss also argues that because the RFP included FAR clause 52.222-17, Nondisplacement of Qualified Workers, which requires the successful awardee to offer a first right of refusal to certain qualified service employees performing the incumbent contract, the RFP's requirement to submit contacts is "pointless and unnecessary." Protester's Comments (B-415812.2), Mar. 19, 2018, at 12. The protester does not specifically address, however, whether this clause applies to the four labor categories identified in the RFP. In any event, the agency notes that covered employees are not required to perform the requirements on a successor contract, and therefore the terms of the FAR clause do not obviate the need for an offeror to demonstrate its ability to contact qualified individuals who could perform the requirements. We agree and find no basis to sustain the protest based on the inclusion of this FAR clause.

With regard to the training instructor/manager position, the protester notes that while the RFP requires offerors to provide contacts with three training instructor/managers, the PWS requires that the contractor provide only one individual for this position. RFP at 62; PWS at 70-71. The protester argues therefore that the RFP's proposal requirement does not reflect the agency's needs and is therefore unduly restrictive of competition.

The Air Force acknowledges that the RFP requests that the offeror provide contacts from more individuals than will be needed to perform the PWS requirements. Supp. COS (B-415812.2), Apr. 25, 2018, at 3. The agency explains, however, that the incumbent contract does not have an individual in this position, and that it will be filled for the first time on the new contract. Id. The agency further states that the new requirement for this position, combined with the need for immediate availability for this position, justifies the requirement for offerors to demonstrate their contacts with a number of individuals qualified to fill the position--in this case, more individuals than will be needed for performance. Id.

For the same reasons discussed above, we conclude that the agency has reasonably exercised its discretion in setting the solicitation requirements. In this regard, the agency has elected to evaluate an offeror's ability to identify and provide contacts who could perform the requirements, as opposed to allowing offerors to identify them after award or requiring firm commitments in the proposal. Although the protester disagrees with the agency's chosen means of assessing offerors' ability to perform the PWS requirements, we find no basis to sustain the protest.

Finally, Trailboss argues that the experience subfactor of the technical evaluation factor is unduly restrictive of competition because it requires offerors to demonstrate "involvement as a party³ to at least one contract with the United States Government, or any agency or Department thereof, at any time in the last five (5) years in which maintenance support and operations support for 4th-generation fighter aircraft⁴ were critical objectives." RFP at 63. The protester contends that this provision effectively means that "the company submitting a proposal must have performed identical work in the past," and further contends that "such contracts do not exist." Protest (B-415812.2) at 8. For this reason, the protester argues, the solicitation is limited only to the incumbent contractor.

The Air Force states that the RFP's experience requirements do not limit the competition to the incumbent contractor. In this regard, the agency notes that although the RSAF preferred that the competition be limited to offerors with F-15 experience, the

³ The RFP stated that experience could be demonstrated as a prime contractor, subcontractor, teaming arrangement participant, or joint venture participant. RFP at 63.

⁴ Fourth-generation U.S. aircraft include F-14, F-15, F-16, F-18, and A-10 aircraft, as well as variants of these aircraft. COS (B-415812.2) at 11.

agency broadened the requirement in the RFP to any 4th-generation aircraft. COS (B-415812.2) at 11 (citing AR (B-415812.2), Tab 10, RSAF Letter of Request, at 11). The agency further states that other contracts meet the solicitation's experience requirements, including FMS contracts with partners from "Saudi Arabia, Oman, and others." COS (B-415812.2) at 11.

Trailboss' comments on the agency report do not meaningfully dispute the agency's position that the RFP does not require that an offeror have performed "identical work," or its explanation that other contracts exist. Instead, the protester merely reiterates its unsupported position that "such contracts do not exist." Protester's Comments (B-415812.2), Mar 19, 2018, at 15. On this record, we find no basis to conclude that the solicitation is unduly restrictive of competition and no basis to sustain the protest.

Organizational Conflicts of Interest

Next, Trailboss argues that the solicitation is tainted by a biased ground rules OCI. The protester contends that the terms of the solicitation favor PKL, the incumbent contractor, which in turn demonstrates that the firm must have been involved in the development of the solicitation. For the reasons discussed below, we dismiss in part and deny in part this argument.

The FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, a biased ground rules OCI arises where 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 and could therefore skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2; Energy Sys. Grp., B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 4.

In reviewing protests that challenge an agency's conflict of interest determinations, our Office reviews the reasonableness of the agency's investigation and, where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. DV United, LLC, B-411620, B-411620.2, Sept. 16, 2015, 2015 CPD ¶ 300 at 6. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Health Innovation & Tech. Venture, B-411608.2, Sept. 14, 2015, 2015 CPD ¶ 298 at 5. A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. ViON Corp.; EMC Corp., B-409985.4 et al., Apr. 3, 2015, 2015 CPD ¶ 141 at 10. Here, the record does not support the protester's challenges and provides no basis to question the reasonableness of the agency's investigation.

Trailboss argues that certain solicitation provisions favor the incumbent, and that the agency refused to disclose information requested by the protester about the composition of the incumbent contractor's workforce. Protest (B-415812.2) at 9. The protester contends that these concerns "indicate[] clearly that PKL had a hand in its structure, and therefore has a disqualifying OCI." Id. The Air Force unequivocally states, however, that PKL did not have any role in drafting the solicitation: "[A]t no time was the incumbent involved in the writing of the PWS or in the development of the source selection factors." COS (B-415812.2) at 12.

Trailboss' comments on the agency report do not specifically rebut or respond to the Air Force's conclusion that PKL did not have a role in drafting the solicitation or its requirements. Aside from asserting an inferred or implied influence by PKL on the terms of the solicitation, the protester does not allege any specific facts demonstrating that the firm actually had a role in drafting the solicitation. Based on Trailboss' failure to identify hard facts demonstrating the existence an OCI, we dismiss this aspect of the argument for failing to state a valid basis of protest. 4 C.F.R. § 21.5(f); see DGC Int'l, B-410364.3, Apr. 22, 2015, 2015 CPD ¶ 136 at 7.

Additionally, the Air Force has addressed the protester's initial OCI complaint. Specifically, the Air Force's corrective action in response to Trailboss' initial protest (B-415812) consisted of a review of an incident that took place in July 2017, prior to the issuance of the solicitation. The contracting officer explains that he was advised in July 2017 that a PKL employee was in the vicinity during a conversation between agency personnel regarding the upcoming solicitation. COS (B-415812.2) at 13. The contracting officer reviewed the matter and concluded that "the conversation was general in nature, did not reveal any source selection sensitive information, and would not have provided PKL an unfair competitive advantage in responding to Solicitation No. FA4897-17-R-0006." Id. The agency explains that although the contracting officer found that there was no basis to conclude that an unequal access to information OCI existed, "the Air Force did not document its contemporaneous investigation when the potential OCI occurred in July 2017." Id. The agency therefore took corrective action in response to Trailboss' initial protest (B-415812) to further review the incident and fully document the contracting officer's conclusions. Id. at 13-14.

The Air Force's OCI review during corrective action involved interviews with witnesses to the 2017 conversation, including the PKL employee. AR (B-415812.2), Tab 15, OCI Investigation Report, at 1-2. The contracting officer states that the interviews confirmed that "the discussion was general in nature and that the conversation terminated before further details were disclosed in front of a PKL employee." COS (B-415812.2) at 14. The contracting officer further found that "[i]n reviewing the [witness] statements above, no source selection sensitive information was revealed to" the PKL employee. AR (B-415812.2), Tab 15, OCI Investigation Report, at 2. For these reasons, the contracting officer concluded that no OCIs arose from the incident. Id.

Trailboss does not specifically address the conclusions of the agency's OCI investigation during the corrective action, and instead argues that the agency's investigation merely reflects "a culture where such conversations about contract requirements were allowed to occur in front of contractor personnel." Protester's Comments (B-415812.2), Mar. 19, 2018, at 18. On this record, we conclude that the protester does not provide any basis to conclude that the agency's review of potential OCIs involving PKL was unreasonable. We therefore deny this aspect of the protester's OCI argument.

Bad Faith

Next, Trailboss argues that the Air Force's actions in connection with the issuance of the solicitation and response to its initial protest reflect bad faith. In essence, the protester contends that the solicitation provides advantages to the incumbent contractor, and that these alleged advantages are evidence of bad faith on the part of the agency. See Protest (B-415812.2) at 9-10. We find no merit to this argument.

To establish bad faith, a protester must present convincing evidence that agency officials had a specific and malicious intent to harm the firm. United Enter. & Assocs., B-295742, Apr. 4, 2005, 2005 CPD ¶ 67 at 5. The burden of establishing bad faith is a heavy one. Id. Government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 at 29. Our Office will not conclude that an agency's actions are motivated by bad faith merely because they are adverse to the protester's interests. See United Med. Sys.-DE, Inc., B-298438, Sept. 27, 2006, 2006 CPD ¶ 148 at 4; Prospect Assocs., Ltd.--Recon., B-218602.2, Aug. 23, 1985, 85-2 CPD ¶ 218 at 2.

Here, we find that none of the protester's substantive challenges to the solicitation discussed above have merit; thus, we find no basis to conclude that the solicitation reflects any improper actions by the agency. Moreover, the protester does not cite any evidence of a specific and malicious intent to injure the protester. See United Enter. & Assocs., supra. On this record, we find no basis to sustain the protest.

Challenge to the Sole-Source Contract

Trailboss challenges the award of the sole-source contract to PKL based on the following primary arguments: (1) the sole-source justification and approval was not reasonable, (2) the biased ground rules OCIs raised by the protester which affected solicitation No. FA4897-17-R-0006 also tainted the award of the sole-source contract, and (3) the agency's actions reflect bad faith. For the reasons set forth below, we find no basis to sustain the protest.

Inadequate Basis for Sole-Source Award

As discussed above, the Air Force issued a synopsis of an intended sole-source award to PKL, and subsequently awarded a contract to ensure continued performance during the period between the expiration of the incumbent contract and the award of the new contract anticipated by solicitation No. FA4897-17-R-0006. The protester argues that the sole-source award was improper because it was based on a lack of advanced planning and that the agency failed to solicit offers from as many sources as practicable. We find no basis to sustain the protest based on these arguments.

The Competition in Contracting Act (CICA) requires agencies to obtain full and open competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). However, CICA permits an exception to the use of competitive procedures where the supplies or services required by an agency are available from only one responsible source, and no other type of supplies or services will satisfy agency requirements. *Id.* § 2304(c)(1); FAR § 6.302-1(a)(2). As relevant here, for purposes of applying this exception, CICA and the FAR provide that services may be deemed to be available only from the original source in the case of follow-on contracts for the continued provision of highly specialized services when it is likely that award to any other source would result in: (1) substantial duplication of costs to the United States which is not expected to be recovered through competition; or (2) unacceptable delays in fulfilling the agency's needs. 10 U.S.C. § 2304(d)(1)(B); FAR § 6.302-1(a)(2)(iii).

When using noncompetitive procedures pursuant to 10 U.S.C. § 2304(c)(1), such as here, agencies must execute a written justification and approval (J&A) with sufficient facts and rationale to support the use of the cited authority. 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.303-1, 6.303-2, 6.304. Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A; where a J&A sets forth a reasonable basis for the agency's actions, we will not object to the award. Chapman Law Firm Co., LPA, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3.

As discussed above, the incumbent contract was due to expire on March 31, 2018. The agency issued the competitive solicitation for these services on November 6, 2017. Trailboss' initial protest of the terms of the solicitation (B-415812) was filed on December 20, 2017. On January 18, 2018, the Air Force posted a synopsis of the sole-source award on the FBO website. Our Office dismissed the pending protest (B-415812) on January 25, 2018, based on the agency's notice of corrective action. On January 29, Trailboss filed its protest (B-415970) challenging the synopsis of the sole-source contract to PKL.

The Air Force's J&A states that the agency required continued services for the Peace Carvin program in support of the RSAF following the expiration of the incumbent contract. AR (B-415970), Tab 25, Sole-Source J&A, at 1. The J&A states that the agency had contacted three potential offerors other than the incumbent, including

Trailboss, to inquire as to whether they would be able to meet the requirement for a sole-source contract covering the period between the expiration of the incumbent contract and the award of the new contract. Id. at 2-3. The J&A states that responses from the three firms showed that transition could take 30-45 days, with an additional 14 days for employee clearance and badging requirements. Id. The J&A also states that there would be “additional cost associated with changing out contractors to include logistics, transportation, and security requirements for the phase-in of new contractor personnel.” Id. at 2. Based on the transition requirements, additional costs, and the time needed to conduct a competitive procurement, the agency concluded that only PKL was capable of meeting the agency’s requirements for continued services: “Due to the highly specialized services required under this contract, discontinued use would result in substantial duplication of cost to the government that is not expected to be recovered through competition and will result in unacceptable delays in fulfilling the agency’s requirements.” Id.

Trailboss argues that the sole-source award was improper because it reflects a lack of advance planning by the agency. In this regard, the FAR states that an award based on other than full and open competition shall not be justified on the basis of “[a] lack of advance planning by the requiring activity.” FAR § 6.301(c)(1). The protester contends that the agency has known of its requirements since 2008, the date of the award of the first of two sole-source contracts for these requirements, and therefore any short-term need arising from the expiration of the incumbent contract must reflect a lack of advance planning.

As our Office has explained, however, an agency’s procurement planning need not be error-free or successful, and the fact that an agency encounters delays or exigencies does not demonstrate that the agency failed to meet its obligation for advance planning. eAlliant, LLC, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 5. Specifically, an immediate need for services that arises as a result of an agency’s implementation of corrective action in response to a protest does not constitute a lack of advance planning. Systems Integration & Mgmt., Inc., B-402785.2, Aug. 10, 2010, 2010 CPD ¶ 207 at 3; Chapman Law Firm Co., LPA, supra.

Here, the record shows that the agency anticipated award of the competitive contract prior to the time for the expiration of the incumbent sole-source contract, and that the protest filed by Trailboss (B-415812) and the agency’s corrective action in response to that protest created the need for a sole-source contract. Under these circumstances, we do not conclude that the agency’s sole-source award to PKL reflects a lack of advance planning.

Next, Trailboss argues that the sole-source award was improper because the Air Force failed to solicit offers from firms other than the incumbent contractor. In this regard, the FAR states that “[w]hen not providing for full and open competition, the contracting

officer shall solicit offers from as many potential sources as is practicable under the circumstances.” FAR § 6.301(d).⁵

The Air Force responds that the nature of the requirement and short time until the expiration of the incumbent contract made it impracticable to solicit more than the awardee: “Given the inefficiencies of selecting a new contractor for a three or five month effort, there is only one practical, potential source under the contract: the incumbent, PKL.” Memorandum of Law (B-415970) at 9. Additionally, as noted above, the agency contacted the protester and other firms to assess whether it would be possible to conduct a procurement and transition to a new contractor during the time between the expiration of the incumbent contract and the anticipated award of the competitive contract. The agency concluded that conducting a competition and awarding to a firm other than PKL would result in unacceptable delays. Under the circumstances here, we conclude that the agency has met its obligation to solicit offers from as many sources as practicable, that is to say, only one source. On this record, we find no basis to sustain the protest.⁶

Organizational Conflicts of Interest

Next, Trailboss argues that the sole-source contract was tainted by the same biased ground rules OCI that affected the terms of the solicitation. As discussed above, however, the protester’s arguments concerning the solicitation fail to set forth hard facts concerning a biased ground rules OCI. To the extent Trailboss argues that the same or a similar OCI affected the award of the sole-source contract, the protester does not explain how the awardee could have affected the terms of that contract to give it a competitive advantage. In this regard, the agency states, and the protester does not

⁵ We note that 10 U.S.C. § 2304(e) requires agencies using other than full and open competition to “request offers from as many potential sources as is practicable under the circumstances” when using the exceptions for unusual and compelling urgency or national security; this provision does not apply to the exception for only one responsible source. The FAR, however, expresses a general policy in FAR § 6.301 that “[w]hen not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances.” FAR § 6.031(d). The FAR also requires J&As to describe “efforts made to ensure that offers are solicited from as many potential sources as is practicable. . . .” FAR § 6.303-2(b)(6). To the extent the FAR has imposed broader requirements on contracting agencies than those set forth in Title 10 of the U.S. Code, we apply the regulations set forth in the FAR.

⁶ Trailboss also argues that the agency’s notice did not provide adequate information describing the sole-source award. As discussed herein, we conclude that the agency reasonably found that only one responsible source was available to perform the agency’s requirements. Trailboss does not explain how it could have demonstrated its ability to perform the work, even if the agency had provided additional information.

dispute, that the requirements of the sole-source short term contract are the same as those under the incumbent contract.

In sum, Trailboss relies on an unsupported assertion that an improper relationship between the agency and PKL must have skewed the terms of the sole-source contract in a manner that created an unfair competitive advantage for the awardee. In light of our conclusion above regarding the reasonableness of the sole-source award, and in the absence of any hard facts concerning the alleged OCIs, we find no basis to sustain the protest.

Bad Faith

Finally, Trailboss argues that the agency's award of the sole-source contract reflects bad faith on the part of the agency. We find no merit to any of the protester's substantive challenges to the sole-source contract and no basis to conclude that the agency acted improperly with regard to this award. Moreover, as with the protester's bad faith allegations in connection with its challenges to the terms of the solicitation, the protester does not identify any specific evidence, and instead argues that the negative consequences of the agency's actions are evidence of the agency's bad faith and bias against the protester. On this record, we find no basis to sustain the protest. See United Enter. & Assocs., supra.

The protests are denied in part and dismissed in part.⁷

Thomas H. Armstrong
General Counsel

⁷ Trailboss also raises other collateral arguments regarding its challenges to the terms of the solicitation and the award of the sole-source contract. Although we do not address every issue, we have considered them all and find no basis to sustain the protest.