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Decision

Matter of: McConnell Jones Lanier & Murphy, LLP

File: B-409681.3; B-409681.4

Date: October 21, 2015

G. Lindsay Simmons, Esq., J. Eric Whytsell, Esq., Hopewell H. Darneille, Esq., and Lara Nochomovitz, Esq., Jackson Kelly PLLC, for the protester.

Patricia H. Wittie, Esq., Wittie Law, PLLC, for Alternate Perspectives, Inc., an intervenor.

David R. Koeppel, Esq., Dennis A. Adelson, Esq., and Savannah L. Wilson, Esq., Department of Labor, 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

1. Protest that the agency engaged in misleading discussions that led the protester to increase its cost is denied where the protester's contention is not supported by the record, and where the protester made its own independent business judgment to adjust its proposed cost.
 2. Protest challenging the agency's technical evaluation is denied where the evaluation was reasonable and consistent with the stated evaluation criteria.
 3. Protest challenging the agency's evaluation of past performance is denied where the evaluation was reasonable and consistent with the solicitation's stated evaluation criteria, and the protester failed to demonstrate that it was prejudiced by any alleged error.
 4. Protest that agency failed to give adequate consideration to awardee's potential organizational conflicts of interest (OCI) is denied, where the protester's assertions fail to present hard facts indicating the existence of a conflict.
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DECISION

McConnell Jones Lanier & Murphy, LLP (MJLM), of Houston, Texas, protests the award of a contract to Alternate Perspectives, Inc. (API), of Leesburg, Virginia, under request for proposals (RFP) No. DOL12QA20003, issued by the U.S.

Department of Labor (DOL), Employment and Training Administration (ETA), for the operation of the Shriver Job Corps Center (JCC) in Ayer, Massachusetts. MJLM argues that the agency's evaluation of offerors' proposals and the resulting award decision were improper.

We deny the protest.

BACKGROUND

The RFP, issued on December 14, 2012, as a small business set-aside,¹ contemplated the award of a cost-plus-incentive-fee contract for a 2-year base period with three 1-year options.² In general terms, the statement of work (SOW) required the contractor to provide all material and personnel necessary to operate the Shriver JCC, including the provision of academic, career technical, social skills, career development training, and related support services.³ RFP § C.1. The RFP established that contract award would be made on a best-value basis, based on four evaluation factors in descending order of importance: technical approach, staff resources, past performance, and cost.⁴ *Id.* §§ M.2, M.5. The noncost factors, when combined, were significantly more important than cost. *Id.* § M.2.

¹ Adams and Associates, Inc., the incumbent Shriver JCC contractor, unsuccessfully challenged the agency's small business set-aside decision in a series of legal actions. See *Adams & Assocs., Inc. v. U.S.*, 109 Fed. Cl. 340 (2013), *aff'd*, 741 F.3d 102 (Fed. Cir., 2014); *Adams & Assocs., Inc.*, B-409680, B-409681, Apr. 22, 2014, 2014 CPD ¶ 131; *Adams & Assocs., Inc.--Recon.*, B-409680.2, B-409681.2, Nov. 12, 2014 (unpublished), 2014 U.S. Comp. Gen. LEXIS 409.

² The RFP was subsequently amended four times. Unless stated otherwise, all references are to the final version of the solicitation.

³ Offerors were informed that the Shriver JCC would operate at an estimated, "on-board strength" of 300 students--272 residential students and 28 nonresidential students. RFP § C.1. The RFP also incorporated by reference the Job Corps Policy and Requirements Handbook (PRH), which set forth mandatory program operation requirements. *Id.*

⁴ The technical approach factor consisted of six subfactors, in descending order of importance: career development period, career transition period, career preparation period, admissions, outreach, and administrative & management support services. The staff resources factor also consisted of six subfactors, in descending order of importance: adequacy of staffing, corporate oversight and support, key personnel, staff development and incentives, center director, and transition/phase out. *Id.* § M.2.

Six offerors, including API and MJLM, submitted proposals by the March 5, 2013, closing date. A DOL technical evaluation panel (TEP) evaluated offerors' proposals using an adjectival rating scheme that was set forth in the RFP: exceptional, very good, satisfactory, marginal, and unsatisfactory. Id. § M.3. With respect to past performance, the RFP also contemplated a rating of neutral for offerors without a record of relevant past performance. Id., § M.4.

On October 29, 2014, following the evaluation of offerors' initial proposals, DOL established a competitive range that included the API and MJLM proposals. The agency held several rounds of discussions with offerors, and received offerors' final proposal revisions (FPR) by June 16, 2015. The final evaluation ratings and costs of the API and MJLM proposals were as follows:

	API	MJLM
Technical Approach		
Career Development Period	Very Good	Very Good
Career Transition Period	Very Good	Satisfactory
Career Preparation Period	Exceptional	Satisfactory
Admissions	Very Good	Satisfactory
Outreach	Very Good	Very Good
Admin. & Mgmt. Support Services	Very Good	Very Good
Overall	Very Good	Very Good
Staff Resources		
Adequacy of Staffing	Marginal	Satisfactory
Corporate Oversight & Support	Very Good	Satisfactory
Key Personnel	Very Good	Very Good
Staff Development & Incentives	Very Good	Satisfactory
Center Director	Very Good	Very Good
Transition/Phase out	Satisfactory	Satisfactory
Overall	Very Good	Satisfactory
Past Performance	Neutral	Satisfactory
Total Proposed Cost	\$49,016,599	\$49,819,618
Total Evaluated Cost	\$49,016,599	\$49,819,618

Agency Report (AR), Tab 21, TEP Report (MJLM), at 1-25; Tab 24, Source Selection Decision, at 5-6, 10-11.

The agency evaluators also identified various strengths and weaknesses in each offerors' proposals, in support of the adjectival ratings assigned. Id., Tab 21, TEP Report (MJLM), at 1-25.

The contracting officer, as source selection authority (SSA), reviewed the ratings and findings of the agency evaluators. Id., Tab 24, Source Selection Decision, at 1-12. The SSA found that API's proposal was superior to MJLM's under both the technical approach and staff resources factors (past performance was not considered to be a significant discriminator). Id. at 6-10. The SSA concluded that because API was both technically superior to and lower cost than MJLM, API's proposal represented the best value to the government. Id. at 12. The DOL then made contract award to API on June 30.

On July 14, after the agency provided MJLM with notice of contract award and a debriefing, MJLM filed its protest with our Office.

DISCUSSION

MJLM's protest raises numerous issues regarding the agency's evaluation and resulting award decision. The protester alleges that the agency's discussions with it were misleading, that DOL's evaluation of technical proposals was improper, that the agency's past performance evaluation was improper, that the agency failed to identify and mitigate API's organizational conflict of interest, and that the selection decision was tainted by bias and a desire to retaliate against MJLM. We have considered all the issues and arguments raised by MJLM and, although we do not address them all, find they provide no basis on which to sustain the protest.

Misleading Discussions

MJLM first alleges that the agency posed misleading discussion questions which forced MJLM to adjust upward its final proposed cost. The protester also alleges that it was competitively prejudiced by the agency's misleading discussions.

After completing its initial evaluation, the agency conducted discussions with MJLM regarding various weaknesses identified in its proposal, and requested clarification of the proposed general and administrative (G&A) rate. AR, Tab 13, DOL Discussions with MJLM, Oct. 29, 2014, at 3-19. In response thereto, MJLM stated that it planned to perform the Shriver JCC contract using Adams as its major subcontractor for the student services portion of the work, and that its proposed G&A rate was actually a "blended" rate--based on applying MJLM's G&A rate only to MJLM's direct costs, and Adams' G&A rate to Adams' direct costs. Id., Tab 16, MJLM Revised Proposal, Nov. 19, 2014, Part III, Cost Proposal, at 11-12. The agency thereafter sent another discussion question to MJLM as follows:

After evaluating your [business management proposal] (FPR) there are a couple aspects of your cost proposal which require[] additional information. Still remains unclear. Please respond to each issue[] identified below along with your revised cost proposal.

Center Operation section- Line 17 Indirect Admin costs, the offeror proposed the subcontract G&A [DELETED]% which is inappropriate for this cost Line. In accordance with PRH chp 5 Appendix 502, subcontractor G&A cost should be captured in Line [16]. Please clarify.

Line 16 Other Admin costs, . . . The offeror did not propose subcontractor G&A in this line as appropriate. Subcontractor G&A costs would further increase costs associated with this Line. The offeror's response was not adequate to address this concern statement. Please clarify.

AR, Tab 18, DOL Discussions with MJLM, June 11, 2015, at 3.

Relevant to the protest here, ETA Report 2110 is a JCC financial report that records a contractor's expenses by category, and PRH Appendix 502 (Financial Management of Center Contracts), which provides instruction on completing the 2110 Report, states that "subcontractor's overhead and G&A expense shall be reported on Line 16 – Other Administrative Expense. Do NOT report these costs on Line 17 – which is used exclusively to report the prime contractor's Overhead/G&A expense." AR, Tab 37, PRH, at 819-20, Appendix 502 at 9 (emphasis in original).

In response to the agency's June 2015 discussion question, MJLM not only re-allocated Adams' G&A from Line 17 to Line 16, but it also applied MJLM's G&A rate to all proposed direct costs (including subcontractor Adams' direct and indirect expenses). AR, Tab 20, MJLM FPR, Cost Proposal, at 83-85.

MJLM argues that DOL's mechanical application of PRH Appendix 502 led the agency to pose misleading discussion questions regarding the validity and/or accuracy of the offeror's cost proposal, which forced MJLM to adjust upward its proposed cost by approximately \$1.4 million. The agency argues that the evaluators neither accepted nor rejected MJLM's separation of prime and subcontractor G&A rates, and never instructed the offeror to raise its costs; rather, the agency contends, its questions were ones regarding the proper placement of figures and not the composition of the offeror's proposed costs.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, the discussions must be sufficiently detailed and identify the deficiencies and significant weaknesses found in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. Federal Acquisition Regulation (FAR) § 15.306(d)(3); InfoPro, Inc., B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 6; PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. Further, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the

agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. Refinery Assocs. of Texas, Inc., B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6; Per Aarsleff A/S, et al., B-410782 et al., Feb. 18, 2015, 2015 CPD ¶ 86 at 15.

MJLM's assertion that the agency conducted misleading discussions has no merit. As noted above, MJLM's proposal indicated that it planned on using a blended G&A rate consisting of prime contractor and subcontractor G&A costs, which the offeror listed together on Line 17 of ETA Report 2110. The agency had concerns with how MJLM had reported on ETA Report 2110 its subcontractor G&A costs, which were specifically brought to MJLM's attention during discussions. Quite simply, contrary to the protester's assertions, the agency did not state that MJLM's G&A rate had to be applied to all direct costs (including all subcontractor direct and indirect costs); rather the question stated only that it was inappropriate for MJLM to capture Adams' G&A costs on Line 17 instead of Line 16.

Additionally, the record reflects that MJLM was not coerced, but rather, made an independent business judgment about how to respond to the agency's discussions. While an agency may not, in conducting discussions, coerce an offeror into raising its prices or altering any other aspect of its proposal, Serco Inc., B-407797.3, B-407797.4, Nov. 8, 2013, 2013 CPD ¶ 264 at 5, we will not find coercion in discussions where, as here, an agency provides information to an offeror which accurately reflects the agency's concerns, and leaves it to the offeror regarding how to respond. EMR, Inc., B-406625, July 17, 2012, 2012 CPD ¶ 209 at 4-5; Academy Facilities Mgmt.--Advisory Opinion, B-401094.3, May 21, 2009, 2009 CPD ¶ 139 at 6. Here, MJLM made an independent business judgment to not only reallocate Adam's G&A costs from Line 17 to Line 16, but to also apply its own G&A rate to all direct costs--an action that the agency's discussion question did not instruct, force, or direct. An agency's discussions are not coercive merely because an offeror makes an independent business judgement that it later regrets.

We also find that the protester's arguments are based upon a misunderstanding of our holding in CFS-KBR Marianas Support Servs., LLC; Fluor Fed. Solutions LLC, B-401486 et al., Jan 2, 2015, 2015 CPD ¶ 22 (Fluor). In Fluor, we did not find the discussions to be misleading because the agency precisely identified the perceived shortcoming in the offeror's proposal and requested that it be addressed; rather, we found the agency's discussions to be misleading because they were based upon inaccurate information, which misinformed the offeror concerning a problem with its proposal. Here, the agency accurately conveyed its specific concern to MJLM, and the protester has no basis for its assertion that the discussions "could only be understood as a directive" to apply both subcontractor and prime contractor G&A to Adams' direct costs. MJLM Comments, Aug. 28, 2015, at 25.

Technical Evaluation of Proposals

MJLM protests the agency's evaluation of technical proposals. Specifically, the protester alleges that the agency failed to properly consider the relevant experience possessed by each offeror. MJLM also alleges that its proven strategies should not be rated lower than API's untested ones, and that consideration of offerors' innovative ideas was an unstated evaluation criterion. The protester also contends that it was prejudiced by the agency's technical evaluation errors.⁵

In reviewing a protest challenging the agency's evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency's discretion. Del-Jen Educ. & Training Group/Fluor Fed. Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency's evaluation was reasonable; consistent with the stated evaluation criteria, applicable procurement statutes, and regulations; and adequately documented. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An offeror's disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. We find the protester's assertions do not provide a basis on which to sustain the protest.

For example, MJLM alleges that the agency improperly evaluated API's lack of experience, as well as the protester's depth of experience. The protester, however, fails to demonstrate that the evaluation was not in accord with the solicitation. While MJLM argues that DOL failed to properly consider offerors' experience under the staff resources factor, the protester fails to show that any specific subfactor required considering corporate experience. MJLM Comments, Aug. 28, 2015, at 17, 21-22. Our review of the RFP indicates that the staff resources factor was to assess what an offeror was proposing for this particular procurement, not its capability. RFP §§ L.7, M.4. Further, the only mention of experience in the staff resources factor concerns the personal experience of the proposed center director, and not an offeror's corporate experience. *Id.* § M.4. We therefore find this aspect of MJLM's protest to be factually and legally insufficient. See 4 C.F.R. § 21.5(f).

⁵ MJLM also alleges the technical evaluation was unreasonable with regard to three staff resources subfactors where it received satisfactory ratings (*i.e.*, adequacy of staffing, corporate oversight and support, and staff development and incentives), as well as the weakness assigned to its technical approach for the use of JCC students to replace paid maintenance support. We consider these arguments abandoned, since DOL provided a detailed response to the protester's assertions in its report (AR, Aug. 17, 2015, at 11-14), and MJLM did not reply to the agency's response in its comments (MJLM Comments, Aug. 28, 2015, *passim*). See Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

The protester also alleges that the agency failed to give sufficient weight to its proven strategies, in favor of API's more innovative approaches and programs. The protester essentially argues that the agency's consideration of proposed innovative measures, by either offeror, was an unstated evaluation criteria, because the words "innovative," "innovate," and "innovation" do not appear in the solicitation.⁶ We disagree.

Although contracting agencies are required to identify in a solicitation all major evaluation factors, they are not required to identify all areas of each factor which might be taken into account in an evaluation, provided that the unidentified areas are reasonably related to or encompassed by the stated factors. Portage, Inc., B-410702, B-410702.4, Jan. 26, 2015, 2015 CPD ¶ 66 at 5; AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 18. We find the agency's consideration of the innovations proposed by API (and MJLM) as part of the evaluation of offerors' technical approaches was consistent with the stated evaluation criteria.

Our review of the RFP indicates that the technical approach subfactors generally consisted of two elements: (1) the extent to which an offeror's proposal demonstrated understanding of the work; and (2) the effectiveness of the programs proposed to ensure achievement of the Job Corps' specified outcomes. See, e.g., RFP § M.4 (career preparation period subfactor). It is self-evident, we think, that the innovative approaches proposed by an offeror to accomplish a specified task logically relates to the effectiveness of the offeror's technical approach. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 10; see Millennium Space Sys., Inc., B-406771, Aug. 17, 2012, 2012 CPD ¶ 237 at 7.

Moreover, where a solicitation indicates the relative weights of evaluation factors, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish their relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency's needs. ViroMed Labs., Inc., B-310747.4, Jan. 22, 2009, 2009 CPD ¶ 32 at 4. With specific regard to the consideration of innovations and/or creative approaches to distinguish the relative quality of proposals, an agency can properly consider both the extent to which proposals exceed the RFP requirements and the extent to which offerors used innovative measures to respond to those requirements. Id.; IAP World Servs, Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199. Accordingly, we conclude that DOL's consideration of the innovations in the

⁶ MJLM does not dispute that it also proposed, and received evaluation credit for, various innovative approaches and programs--just not as many as API.

offerors' technical proposals was reasonably contemplated by the stated evaluation criteria, and not based on unstated evaluation criteria, as the protester alleges.⁷

Past Performance Evaluation

MJLM alleges that the agency's past performance evaluation of offerors was improper. The protester also contends that it was prejudiced by the various evaluation errors; had DOL performed a proper evaluation, MJLM argues, the agency would have recognized that MJLM's past performance is superior to that of API.⁸

Our Office will examine an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit or relative relevance of an offeror's past performance is primarily a matter within the agency's discretion. Richen Mgmt., LLC, B-409697, July 11, 2014, 2014 CPD ¶ 211 at 4. A protester's disagreement with the agency's judgment does not establish that an evaluation was improper. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 19. Our review of the record leads us to conclude that the agency's past performance evaluation provides no basis on which to sustain the protest, as detailed below.

The RFP stated that the agency would evaluate past performance with regard to both the quality and relevance (i.e., sufficiently similar in size, scope, and complexity to the SOW requirements) of the prior work performed. RFP §§ L.7, M.4. The solicitation also provided:

The Government will consider Past Performance information for the offeror or entity and/or its principals proposed as the prime contractor. Only that offeror's performance as a prime contractor . . . will be

⁷ Moreover, contrary to the protester's assertions, MJLM was not downgraded for proposing proven strategies, as evidenced by the ratings assigned to its technical approach proposal. Rather, the record indicates the agency found--consistent with the RFP's best-value basis for award--that API proposed a greater number of innovative approaches which were of value to the government.

⁸ MJLM also alleges the agency's past performance evaluation was improper because the satisfactory rating it received here was lower than the very good rating that MJLM received in a parallel procurement for the Gadsden JCC. We consider this argument abandoned, since DOL provided a detailed response to the protester's assertion in its report (AR, Aug. 17, 2015, at 8), and MJLM did not reply to the agency's response in its comments (MJLM Comments, Aug. 28, 2015, passim). See Citrus College; KEI Pearson, Inc., supra.

considered. Past performance of proposed subcontractors will not be evaluated.

Id. § M.4 (emphasis omitted).

MJLM submitted a total of 13 past performance references, including its prior work at 5 JCCs. AR, Tab 15, MJLM Proposal, Part 2, Past Performance Proposal, at 5. Only MJLM's prior work at the Sacramento JCC was as a prime contractor; its work at the Shriver, Woodland, Woodstock and North Texas JCCs was as a subcontractor.⁹ Id. The agency evaluators found certain MJLM references to be somewhat relevant, while others involved work that MJLM had performed as a subcontractor. AR, Tab 23, MJLM Past Performance Evaluation, at 1-2. Further, the agency considered MJLM's performance of the Sacramento JCC contract to be highly relevant and of high quality based on the Job Corps' outcome measurement system (OMS) ranking; however, no contractor performance assessment report (CPAR) was available.¹⁰ Id. at 2. The agency also considered the fact that MJLM was found to be jointly liable for unfair labor practices committed at the Sacramento JCC, and concluded that MJLM's past performance was satisfactory overall. Id. at 2-3.

MJLM alleges that the agency's evaluation of its past performance was, in various ways, improper. For example, MJLM argues that its prior performance at the Shriver and other JCCs (all of which were performed by MJLM as a subcontractor) was well known to the agency and should have been considered. This argument is unavailing. We have recognized that in certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider outside information bearing on the offeror's past performance when it is "too close at hand" to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. See, e.g., Firestorm Wildland Fire Suppression, Inc., B-310136, Nov. 26, 2007, 2007 CPD ¶ 218 at 4; International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. This principle, however, does not override a solicitation's stated evaluation criteria. As set forth above, the RFP expressly stated that "[o]nly [the] offeror's performance as a prime contractor . . . will be considered." RFP § M.4. MJLM does not dispute that its performance at JCCs other than Sacramento was as subcontractor. Quite simply, regardless of whether

⁹ MJLM performed as a subcontractor to Adams on the incumbent Shriver JCC contract. Id. at 5, 8. MJLM now proposes Adams as its subcontractor here. AR, Tab 14, MJLM Proposal, Part 1, Technical Proposal, at 2.

¹⁰ The agency evaluators also noted MJLM's work as a major subcontractor at the Shriver JCC had been contributing to that Center's high OMS ranking. Id. at 2.

MJLM's performance as a subcontractor at various JCCs was well-known to the agency, as the protester asserts, it could not properly be considered here.¹¹

MJLM also argues that the agency failed to consider (and appears to have lost) the past performance questionnaire responses for its performance at the North Texas JCC and the Dallas County Community College District (DCCCD).¹² We find that MJLM has failed to show that it was prejudiced by any error. First, as stated above, MJLM's work at the North Texas JCC was as a subcontractor; thus, the quality of MJLM's performance could not be considered in accordance with the solicitation. Further, the work at the DCCCD was performed by McConnell & Jones LLP, an affiliate of MJLM. MJLM Comments, Aug. 28, 2015, exh. 12, DCCCD Past Performance Questionnaire, at 1. By contrast, the RFP limited the agency's evaluation of past performance to prior work performed by the offeror. Quite simply, MJLM fails to demonstrate that it was prejudiced in any way from the past performance questionnaires the agency did not consider. Where a protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. See, e.g., HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7.

MJLM also protests the evaluation of API's past performance. Specifically, the protester contends that API should have received a marginal rather than a neutral rating. When assessing API's past performance, the agency evaluators found that: (1) the offeror provided some relevant past performance information from other than JCC contracts; and (2) the offeror's Job Corps' experience, while valuable, was limited to professional development, staff training and consulting, academic/vocational, and other program development. AR, Tab 12, API Past Performance Evaluation, at 1-2. The evaluators also found there was no information available (e.g., CPARs, past performance questionnaires) regarding API's prior work. Id. Although the evaluators concluded that API's past performance should be assessed as marginal because of a lack of relevant past performance experience, the contracting officer subsequently decided that API's past performance should be rated as neutral. Id., AR, Tab 24, Source Selection Decision, at 10. Specifically, the contracting officer found that while API had certain limited and specialized Job

¹¹ To the extent MJLM contends that the agency should have also considered its prior work performed as a subcontractor, its protest is an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1).

¹² The DCCCD contract involved financial and internal control audit services at a value of \$465,600 (MJLM's proposal does not further describe the relevance of the reference). AR, Tab 15, MJLM Proposal, Part 2, Past Performance Proposal, at 5.

Corps' experience, it had no past performance directly comparable to the Shriver JCC requirement, and thus should be rated as neutral. Id. at 11.

We find that the agency reasonably evaluated API's past performance. The RFP indicated that the purpose of the past performance evaluation was to determine the degree to which the past performance record demonstrated the offeror's ability to successfully perform the SOW tasks. See RFP § M.4. Here, the agency found that API had no past performance directly comparable to the Shriver JCC requirement, and the agency was unable to locate any information (e.g., CPARs, past performance questionnaires) for references that were deemed to be of even limited relevance. Moreover, the record reflects that the contracting officer properly changed API's rating to neutral, because the agency evaluators had based the assigned marginal rating on a lack of relevant past performance. In our view, API's neutral rating is consistent with the requirement to not assign positive or negative ratings to an offeror "without a record of relevant past performance or for whom information on past performance is not available." See FAR § 15.305(a)(2)(iv); WKG & Assocs., LLC, B-409835, Aug. 26, 2014, 2014 CPD ¶ 250 at 9. On this record, we find that the agency reasonably evaluated API's past performance.¹³

MJLM also argues that it was improper for the SSA to equate MJLM's satisfactory past performance rating with API's neutral rating. In support thereof, the protester cites to our decision in Wolf Creek Fed. Servs., Inc., B-409187 et al., Feb. 6, 2014, 2014 CPD ¶ 61. In Wolf Creek, the SSA concluded that the awardee's moderate performance confidence assessment should be viewed more favorably than the protester's neutral confidence rating; we subsequently found that the SSA was reasonably permitted to make such a determination. Id. at 9 n.13. The protester's reliance on this decision, however, is misplaced: there is no requirement that an agency consider a satisfactory past performance record more favorable than a neutral assessment. Here, the SSA reasonably found that MJLM's satisfactory past performance did not reflect a significant advantage over API's neutral rating, as he was permitted to do. Thus, we find no basis on which to sustain this protest.

OCI Evaluation of API

MJLM protests that the agency's evaluation of API's organizational conflict of interest (OCI) was improper. Specifically, the protester alleges that an API principal, W.M., who previously performed contract work at the DOL Job Corps' headquarters offices, was intimately familiar with a wide range of information that

¹³ We also find no incongruity in the contracting officer's determination that although API had no record of relevant past performance, the awardee and its principals had the necessary experience to perform successfully, AR, Tab 24, Source Selection Decision, at 11; see FAR § 9.104-1(e); these are two different inquiries.

was highly relevant to the Shriver JCC procurement.¹⁴ MJLM argues that this unequal access to information provided API with an unfair competitive advantage that the agency failed to identify and mitigate.¹⁵

The situations in which OCIs arise, as described in FAR subpart 9.5 and decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. See Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 5. 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 the firm a competitive advantage in a later competition for a government contract. FAR § 9.505(b); 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.

We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. Alliant Techsystems, Inc., B-410036, Oct. 14, 2014, 2014 CPD ¶ 324 at 4. In this regard, the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion. Guident Techs., Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 7; see Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009). 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. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

¹⁴ MJLM does not allege that W.M. had access to source selection information for this procurement.

¹⁵ The agency argues that MJLM's protest here is untimely, insofar as MJLM knew that API was a competitor in the procurement based on the attendance of the API principal here at a preproposal conference, citing to our decision in Women's Energy, Inc., et al., B-258785 et al., Feb. 15, 1995, 95-1 CPD ¶ 86. We disagree. MJLM had no reason to conclude with any certainty that API was an actual competitor based on the awardee's attendance at a preproposal conference, nor did it have any evidence about whether the agency considered the potential offeror eligible for award. See Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6-7; Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2.

As set forth below, MJLM has failed to satisfy the standard required to demonstrate the existence of the alleged OCI. Thus, we have no basis to question the contracting officer's conclusion that API's participation in this procurement does not raise potential OCI concerns.

Subsequent to the filing of the protest, the agency provided to our Office copies of the DOL contracts on which API and W.M. had previously performed work for the National Office of Job Corps (NOJC), and API provided a declaration from W.M., which can be summarized as follows:

- Coffey Consulting performed a student training support services contract for NOJC from 2005 - 2010, and W.M. served as its project director. Coffey provided support to NOJC's development and implementation of a standards-based education and training system.
- Coffey and W.M. did not monitor performance of the JCCs, nor did they collect, analyze, or maintain any nonpublic data regarding performance of the Job Corps student training programs.
- Coffey and W.M. did not perform any procurement-related functions for NOJC, such as prepare or view specifications or statements of work for JCC operations; evaluate competitive proposals or assist evaluation panels; review or evaluate the performance of other contractors performing work for DOL, including JCC operators.
- Coffey and W.M. did not have access to any proprietary, source selection, or nonpublic information.
- The contracts that API and W.M. performed after 2010 also involved providing support to NOJC to assess and improve curriculum and systems for the education and training of JCC students and the development of JCC staff.
- The access that API and W.M. had to Job Corps academic program information and curriculum used by all JCCs was publically available information.¹⁶

AR, Tab 27, API Subcontract with Coffey, Dec. 20, 2005; Tab 28, API Subcontract with Coffey – Modifications (various dates); Tab 29, Ashlin Contract with DOL, Nov. 4, 2008; Tab 30, API Subcontract with Ashlin, Nov. 2008; Tab 31, API Subcontract with Ashlin, July 2010; Tab 32, API Subcontract with University of Kansas Center for Research, July 2011; Tab 33, W.M. Employment Agreement with Coffey, June 2, 2014; API Comments, Aug. 28, 2015, encl. 1, Declaration of W.M., Aug. 27, 2015, at 1-8.

¹⁶ API (to include its principals) was not the only entity to previously perform a Job Corps support contract: MJLM performed as the NOJC national career technical training contractor and developed up-to-date training achievement records that resulted in standards-based career technical training programs for all JCCs. AR, Tab 15, MJLM Proposal, Part 3, Past Performance Proposal, at 9.

The contracting officer, before finalizing his award decision here, reviewed the aforementioned contracts that API and its personnel had performed for NOJC, discussed the matter with the contracting officer with knowledge of the prior work performed by API for NOJC, and concluded that there was no potential of a significant OCI arising from the work that W. M or API had performed for NOJC. AR, Tab 1, Contracting Officer's Declaration, Aug. 18, 2015, at 1-3.

Based on the record before us, we find the agency's evaluation of API's potential for OCI to be wholly reasonable. Moreover, MJLM has failed to identify hard facts that indicate the existence or potential existence of an OCI. Although the protester alleges that API and its principal have spent years working closely with the Job Corps to develop and implement key policies and guidance that govern the operation of JCCs, MJLM has failed to demonstrate that API had access to any nonpublic and competitively useful information. At best, the protester surmises that API's prior contracts resulted in the awardee gaining "unique insight into the Job Corps' unspoken needs and opinions regarding how operators may best address the formal requirements against which proposed for Center operations contracts are assessed," MJLM Comments, Aug. 28, 2015, at 6; this, however, is a far cry from the identification of any hard facts, and amounts to mere inference and suspicion.¹⁷

The protest is denied.

Susan A. Poling
General Counsel

¹⁷ Lastly, MJLM contends that the agency's award decision was motivated by bias and a desire to retaliate against MJLM. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Sygnetics, Inc., B-405138 et al., Aug. 22, 2011, 2011 CPD ¶ 163 at 6. Where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but must also show that this bias translated into action that unfairly affected the protester's competitive position. Global Integrated Sec. (USA) Inc., B-408916.3 et al., Dec. 18, 2014, 2014 CPD ¶ 375 at 14. MJLM has not provided any credible evidence of bias nor does the record otherwise show that the agency's award decision was motivated by bias.