

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
(BID PROTEST)**

THE QED GROUP LLC)	
d/b/a Q2 IMPACT)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	
THE UNITED STATES,)	
)	
<i>Defendant.</i>)	
)	
)	
)	

Case No. _____



COMPLAINT

Plaintiff The QED Group LLC d/b/a Q2 Impact (“Q2 Impact”) files this bid protest against Defendant, the United States of America, acting through the General Services Administration, Federal Acquisition Service (“GSA”), and shows the Court as follows:

Nature of the Action

1. Q2 Impact challenges the GSA’s conclusion that Q2 Impact is not a Qualifying Offeror under the Agency’s Request for Proposals No. 47QRCA23R0001 (“RFP”) and is therefore ineligible for a contract award. The RFP was issued for GSA’s One Acquisition Solution for Integrated Services Plus (“OASIS+”) program.
2. GSA’s determination was based on Q2 Impact’s representation in its proposal that it uses telecommunications equipment or services covered by Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“FY19 NDAA”).
3. The government may not contract with an entity that uses telecommunications equipment or services implicated by Section 889 as a substantial or essential component of any



system, or as critical technology as part of any system, unless a recognized exception applies or unless the subject equipment or services are covered by a government-issued waiver. Irrationally, the Agency concluded that it cannot contract with Q2 Impact even though a valid waiver, issued by the Director of National Intelligence (“DNI”) to the U.S. Agency for International Development (“USAID”), applies to Q2 Impact’s limited use of covered telecommunications equipment or services.

4. For the reasons outlined in this protest, this decision was arbitrary and capricious and therefore unlawful.

Jurisdiction and Standing

5. This Court has jurisdiction over the subject matter of this bid protest pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-230, §§ 12(a)-(b), 110 Stat. 3870 (Jan. 3, 1996), codified at 28 U.S.C. § 1491(b)(1).

6. Q2 Impact is an interested party under 28 U.S.C. § 1491(b)(1) as an actual offeror whose direct economic interest in the procurement is adversely affected by the Agency’s conclusion that it is not a Qualifying Offeror under the RFP.

Parties

7. Q2 Impact is a Maryland limited liability company with a principal place of business at 2311 Wilson Boulevard, 3rd Floor, Arlington, VA 22201.

8. Defendant, the United States of America, for all purposes relevant hereto, acted by and through the Agency.

Statement of Facts and Relevant Law

I. OASIS+

9. OASIS+ “is a Government-wide, multiple award, Indefinite Delivery, Indefinite Quantity (IDIQ) acquisition program for services.” Ex. A, RFP Amend. 6, at 12. It is “designed to address agencies’ need for a full range of service requirements that integrate multiple service disciplines and ancillary services/products,” considering “flexibility for commercial and non-commercial requirements, all contract types and pricing determined at the task order level to achieve a total solution.” *Id.*

10. The OASIS+ program includes a collection of unrestricted contracts, a collection of contracts set-aside 100% for small businesses of any type, and several collections of contracts set-aside 100% for small business with specified socio-economic designations (e.g., Women-Owned Small Businesses). *Id.*

11. The RFP outlined several distinct performance areas, known as “Domains,” that could be covered by an offeror’s proposal and awarded contract: Management and Advisory, Technical and Engineering, Research and Development, Intelligence Services, Environmental Services, Facilities, and Logistics. *Id.* at 23. The RFP anticipated making multiple contract awards in each of the Domains, and an offeror could qualify to provide services across “one or more Domains.” *Id.* at 140. Each awarded contract would include “shared terms and conditions and specific terms and conditions unique to the Contractor’s socioeconomic status (e.g. 8(a) and Small Business) and Domains.” *Id.*

12. The RFP described the basis of award as “All Qualified Offerors with a Fair and Reasonable Price.” *Id.* at 194. Further, it defined “Qualifying Offeror” as an offeror that: (a) “[i]s determined to be a responsible source in accordance with FAR 9.104 and as detailed in Section

M.8”; (b) “[s]ubmits a proposal that conforms to the requirements of the solicitation”; (c) “[m]eets all technical requirements referenced in Section M.6”; (d) “[s]ubmits fair and reasonable pricing in accordance with Section M.8”; and (e) “[i]s otherwise eligible for an award.” *Id.* at 196.

13. Further, proposals submitted in response to the RFP would be awarded credits in accordance with a unique “Qualification Matrix” for each Domain:

To receive a Domain award, the offer must meet or exceed the Domain-specific qualification threshold at Section M.7 through the submission requirements in Section L. Excluding the minimum mandatory submission requirements detailed in Sections L.5.1, L.5.7, and L.5.8, the Offeror has the discretion to use any combination of qualifications detailed in each Domain’s Qualifications Matrix to achieve the applicable qualifying threshold. Offerors that fail to demonstrate a particular qualification will simply not receive credit for that criterion.

Id. at 194.

14. In Section M.7, the RFP stated that offerors, regardless of Domain, would have to establish “36 out of the available 50 credits” to be eligible for a contract award. *Id.* at 192.

15. Q2 Impact submitted a proposal for a small business contract within the Management and Advisory Domain. It claimed 38 of the 50 available credits, which was above the minimum threshold of 36 credits required for a contract award.

II. Section 889

16. Section 889 is a national security provision of the FY19 NDAA that, *inter alia*, prohibits executive agencies from procuring “any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.” John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889(a)(1)(A), 132 Stat. 1636, 1917 (2018).

17. Section 889 defines “covered telecommunications equipment or services” to include telecommunications equipment and surveillance equipment produced by certain entities

headquartered in the People’s Republic of China, such as Huawei Technologies Company; telecommunications or video surveillance services provided by these companies or using their equipment; and “[t]elecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense . . . reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of” certain foreign countries. *Id.* § 889(f)(3).

18. The statute also prohibits executive agencies from entering into, extending, or renewing a contract “with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.” *Id.* § 889(a)(1)(B).

19. Pursuant to subsection 889(c), the prohibition described in subsection 889(a)(1)(A) went into effect on August 13, 2019, while the prohibition described in subsection 889(a)(1)(B) went into effect on August 13, 2020. *Id.* § 889(c).

20. However, despite the seemingly blanket nature of the bans, Section 889 also gives certain government officials the authority to grant waivers. For example, the head of an executive agency could, “on a one-time basis, waive the requirements under subsection (a) . . . for a period of not more than two years after the effective dates described in subsection (c)” when the relevant contracting office provided “a compelling justification for the additional time to implement the requirements under such subsection.” *Id.* § 889(d)(1).

21. Congress also granted waiver authority to the DNI, who, since the subsection 889(a) prohibitions have gone into effect, has been permitted to issue waivers if they determine the waivers are in “the national security interests of the United States.” *Id.* § 889(d)(2). Importantly,

unlike the temporary waiver authority that was provided to heads of executive agencies, the DNI's waiver authority is not time-limited. *See id.* § 889(d)(1)-(2).

22. The FAR Council incorporated Section 889's requirements into the FAR, and the provisions it added to the regulation mirrored the language of Section 889.

23. The waiver provisions outlined in subsection 889(d) were added to the FAR as subpart 4.2104. *See, e.g.*, FAR 4.2104(b) ("The Director of National Intelligence may provide a waiver if the Director determines the waiver is in the national security interests of the United States.").

24. Additionally, subpart 4.2105 directs the contracting officer to insert several standard clauses—52.204-24, 52.204-25, and 52.204-26—into all solicitations and/or contracts. FAR 4.2105.

25. The clause codified at 52.204-25 includes the prohibitions from Section 889(a). Subsection (b)(1) of this clause includes a provision prohibiting executive agencies from procuring covered telecommunications equipment or services. FAR 52.204-25(b)(1). With respect to the ban on contracting with entities that use covered telecommunications equipment or services, the clause states in relevant part:

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system, *unless* an exception to paragraph (c) of this clause applies or *the covered telecommunication equipment or services are covered by a waiver described by FAR 4.2104.*

FAR 52.204-25(b)(2) (emphasis added).¹

26. The clause codified at 52.204-24 requires an offeror to represent, “[a]fter conducting a reasonable inquiry,” whether it does, or does not, “use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.” FAR 52.204-24(d)(2); *see also* FAR 52.204-26, Covered Telecommunications Equipment or Services-Representation (requiring a similar representation). If the offeror represents that it does use such covered telecommunications equipment or services, the clause then instructs offerors to provide the government with certain information, such as a description of the equipment or service and its proposed use. FAR 52.204-24(e)(2).

III. The USAID Section 889 Waiver

27. On November 30, 2020, USAID informed its industry partners that the DNI, utilizing their authority under Section 889(d) of the FY19 NDAA, had issued USAID “a limited waiver” of Section 889(a)’s prohibitions. *See* Ex. B. The waiver covered acquisitions that “advance [USAID’s] foreign-assistance mission overseas,” and was valid through September 30, 2022. *See id.*

28. On December 16, 2021, USAID informed its industry partners that it had received “a Modified Foreign Assistance (FA) Waiver of the prohibitions under Section 889” of the FY19 NDAA. *See* Ex. C. The modified waiver, which is valid through September 30, 2028, “can only

¹ The “exception” mentioned in this clause, which is different from a waiver, refers to the provision of Section 889 which states that the law does not “prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements” or “cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” Pub. L. No. 115-232, § 889(a)(2); *see also* FAR 52.204-25(c) (incorporating this statutory language into the FAR).

be applied in situations where [USAID] contractors and recipients aren't able to avoid using covered technology because there are no Section 889 compliant telecommunications service providers in the countries where they are working." *Id.* USAID contracting officers "make a determination as to whether to apply a waiver to a particular award." *Id.*

29. The foreign assistance waiver issued by the DNI to USAID is relevant to this protest because Q2 Impact, currently and at the time of its OASIS+ proposal submission, performs a foreign assistance contract in [REDACTED] for USAID supporting that agency's [REDACTED]. The USAID contract, number 72026322C00001, was awarded on August 31, 2022.

30. The USAID [REDACTED] provides monitoring, evaluation, and learning ("MEL") support services and builds the capacity of USAID [REDACTED] and implementing partner staff. The activity works to improve the use of Collaborating, Learning, and Adapting; supports implementation of the MEL aspects of USAID [REDACTED] [REDACTED]; and enhances USAID's organizational effectiveness.

31. There are no telecommunications service providers operating in [REDACTED] that are compliant with Section 889 of the FY19 NDAA, so it is impossible for entities operating in [REDACTED] to avoid using covered telecommunications or services. Thus, the USAID contracting officer managing Q2 Impact's contract applied the DNI's Section 889 foreign assistance waiver to the contract award.

IV. Q2 Impact's OASIS+ Proposal and the Agency's Evaluation

32. Section K.5 of the RFP incorporates FAR 52.204-24, requiring offerors to complete the representations included in paragraph (d) of that clause in their OASIS+ proposals. In its proposal, for subparagraph (d)(1), Q2 Impact represented that it "will not provide covered

telecommunications equipment or services to the Government in performance of any contract, subcontract or other contractual instrument resulting from the [RFP].” Ex. D at 13.

33. However, due to its performance of the foreign assistance contract for USAID in [REDACTED] where using telecommunications equipment or services covered by Section 889 is unavoidable, Q2 Impact represented in response to subparagraph (d)(2) that it “*does* use covered telecommunications equipment or services, or use any equipment, system or service that uses telecommunications equipment or services.” *Id.* (emphasis added).

34. This representation was consistent with prior representations that Q2 Impact submitted to government customers. For example, Q2 Impact included the same statement in its annual representations and certifications that are included in the System for Award Management (“SAM”).

35. Indeed, in May 2023, a GSA contract specialist assisting with the modification of Q2 Impact’s GSA Multiple Award Schedule contract, number 47QRAA22D003Q, requested “clarification as to the firm’s certification [in SAM] that it **does** use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.” Ex. E at 3 (emphasis in original). On May 24, 2023, Q2 Impact provided the GSA contract specialist with the following response:

Q2 Impact is currently implementing the USAID [REDACTED] [REDACTED] Due to the inability to access telecommunications and internet infrastructure in [REDACTED] that does not use covered equipment as a major component of the equipment used in providing the services, Q2 Impact uses covered services as a part of project codes D304 (IT AND TELECOM – TELECOMMUNICATIONS AND TRANSMISSION) and D322 (IT AND TELECOM – INTERNET) as a part of its services. Through the Modified Foreign Assistance (FA) Waiver of the prohibitions under Section 889 of the John S. McCain National Defense Authorization Act (NDAA) for FY 2019 extended through September 30, 2028, USAID contracts that aren’t able to avoid using covered technology because there

are no Section 889 compliant telecommunications service providers in [REDACTED].

Id. at 2. Q2 Impact also provided the GSA contract specialist with additional information on USAID’s implementation of the foreign assistance waiver. *Id.* at 1.

36. Q2 Impact continues to perform its GSA Multiple Award Schedule contract to this day.

37. On November 30, 2023, GSA sent Q2 Impact a request for clarification regarding its FAR 52.204-24(d)(2) representation in connection with the OASIS+ procurement, seeking confirmation that Q2 Impact’s affirmative representation was accurate. The following day, Q2 Impact responded with the same message it had sent to GSA on May 24, 2024—in short, that Q2 Impact’s limited use of telecommunications equipment or services implicated by Section 889 was covered by the foreign assistance waiver granted by the DNI to USAID.

38. Following that exchange, Q2 Impact received no further communications from GSA regarding its affirmation representation in FAR 52.204-24(d)(2). Then, on July 30, 2024, it received a “combined unsuccessful Offeror notification and written pre-award debriefing” where GSA stated that Q2 Impact was ineligible for an OASIS+ contract award. *See* Ex. F.

39. The notice asserted that Q2 Impact did not satisfy all of the RFP’s requirements “to be considered a ‘Qualifying Offeror.’” *Id.* at 2. This conclusion was based solely on the GSA’s determination that it is unable to enter “into a contract with any entity that represents that it ‘DOES’ use covered telecommunications equipment or services per Section K.5” (that is, per FAR 52.204-24(d)(2)). *Id.*

40. As a result, Q2 Impact’s proposal was removed from consideration during the Acceptability Review phase of the evaluation process, and it “was not evaluated for claimed credits.” *Id.* at 3.

COUNT I

The Agency's Disqualification of Q2 Impact From the OASIS+ Procurement Was Arbitrary & Capricious

41. Q2 Impact incorporates paragraphs 1 to 39 as if fully stated herein.

42. GSA's conclusion that Q2 Impact was not a "Qualifying Offeror" under the RFP, and therefore was not eligible for a contract award, was arbitrary and capricious because it was based on a blatant misreading of Section 889.

43. As demonstrated by the unsuccessful offeror notice it sent to Q2 Impact, the Agency's sole reason for removing Q2 Impact's proposal from consideration is its apparent position that GSA is completely prohibited, under any circumstances, from contracting with an entity that uses telecommunications equipment or services covered by Section 889(a). *See* Ex. F at 2 ("GSA is unable to enter into a contact with any entity that represents that it 'DOES' use covered telecommunications equipment or services per Section K.5.").

44. GSA's interpretation of Section 889 and the statute's implementing provisions in the FAR is legally erroneous. Specifically, the Agency appears to have completely ignored the fact that Q2 Impact's limited use of non-compliant telecommunications equipment or services is covered by a valid waiver, meaning that GSA *may* contract with Q2 Impact even if Q2 Impact's use of certain telecommunications equipment or services would otherwise fall within the prohibition found at Section 889(a)(1)(B).

45. This is evident from the plain language of Section 889 and the FAR. Section 889(d)(2) states simply that the DNI "may provide a waiver . . . if [they] determine the waiver is in the national security interests of the United States." *See also* FAR 4.2104 (implementing Section 889's waiver provision). The DNI issued such a waiver to USAID for its foreign assistance acquisitions that is valid until September 30, 2028, *see* Ex. C, and the USAID contracting officer

overseeing Q2 Impact's [REDACTED] contract applied the waiver to that specific acquisition.

46. Additionally, FAR clause 52.204-25 explains that the prohibition at Section 889(a)(1)(B) applies “unless an exception at paragraph (c) of this clause applies *or the covered telecommunication equipment or services are covered by a waiver.*” FAR 52.204-25(b)(2) (emphasis added).

47. The United States may assert that GSA cannot contract with Q2 Impact because GSA was not the agency that issued the relevant Section 889 waiver that applies to Q2 Impact's use of covered telecommunications equipment or services. But nothing in Section 889 or the related FAR provisions supports the interpretation that a waiver issued by the DNI only has effect with respect to the executive agency that requested the waiver. *See* Pub. L. No. 115-232, § 889(d)(2); FAR 4.2104(b). The relevant law is crystal clear that the prohibition at Section 889(a)(1)(B) does not apply in circumstances where “the covered telecommunication or equipment services”—in this case, those used by USAID contractors in [REDACTED]—“*are covered by a waiver described in FAR 4.2104.*” FAR 52.204-25(b)(2) (emphasis added).

48. Further, adopting an interpretation that GSA must issue a waiver as to Section 889(a)(1)(B) for it to be effective in situations where an offeror simply uses, but will not supply, covered telecommunications equipment or services to the government, would lead to absurd results that Congress did not intend. For one thing, the government's executive agencies no longer have waiver authority under the statute. Pub. L. No. 115-232, § 889(d)(1) (providing that heads of executive agencies could only issue waivers on a “one-time basis . . . for a period of not more than two years after the effective dates” of the prohibitions). It would also mean that executive agencies could effectively second-guess the DNI's decisions with respect to national security.

49. Further, allowing GSA to ignore the DNI's waiver here would create a situation where entities that support USAID's foreign assistance work in countries where covered telecommunications equipment or services are ubiquitous effectively cut themselves off from all future contract opportunities let *by any other executive agency*, at least until their work for USAID is complete.

50. Also, here, the relevant waiver was issued by the DNI pursuant to Section 889(d)(2), so any argument advanced by the United States that is based on the limited authority of executive agencies to issue waivers pursuant to Section 889(d)(1) must fail.

51. In sum, a valid waiver issued by the DNI covers Q2 Impact's limited use of the telecommunications equipment or services, so based on the plain meaning of the relevant law, GSA *is not* prohibited from contracting with Q2 Impact. GSA's contrary conclusion, which it stated in the unsuccessful offeror notice it provided to Q2 Impact, is erroneous and legally unsupported, and therefore, its decision to remove Q2 Impact's proposal from award consideration is arbitrary and capricious.

Prayer for Relief

Wherefore, Q2 Impact respectfully requests that this Court:

- a. Declare that the Agency's actions are arbitrary, irrational, and contrary to law;
- b. Require the Agency to reevaluate Q2 Impact's proposal for an OASIS+ contract award by graduating it from the Acceptability Review phase of the evaluation process and completing the remaining steps of the evaluation process, such as assessing Q2 Impact's claimed credits under the RFP; and
- c. Award Q2 Impact such other and further relief as this Court may deem just and proper, including, without limitation, bid and proposal costs and reasonable attorneys' fees.

Dated: November 26, 2024

Respectfully submitted,



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