Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aetna Government Health Plans, Inc.;
Foundation Health Federal Services, Inc.

File: B-254397.15; B-254397.16; B-254397.17;
B-254397.18; B-254397.19

Date: July 27, 1995

Thomas L. Patten, Esq., Roger S. Goldman, Esq., David R. Hazelton, Esq., Penelope A. Kilburn, Esq., Katherine A. Lauer, Esq., and Annalisa Pizzarello, Esq., Latham & Watkins, for Aetna Government Health Plans, Inc.; Thomas P. Humphrey, Esq., Robert M. Halperin, Esq., Kathryn D. Kirmayer, Esq., Stephanie V. Corrao, Esq., and Nabil W. Istafanous, Esq., Crowell & Moring, for Foundation Health Federal Services, Inc., the protesters.
Richard S. Ewing, Esq., Steven G. Reade, Esq., David S. Eggert, Esq., March Coleman, Esq., Rosemary Maxwell, Esq., Lisa B. Horowitz, Esq., Ellen T. Noteware, Esq., and
Stacy J. Pollock, Esq., Arnold & Porter, for QualMed, Inc., an interested party.
Karl E. Hansen, Esq., and Laurel C. Gillespie, Esq., Office of the Civilian Health and Medical Program of the Uniformed Services, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Significant organizational conflict of interest exists where an affiliate of one offeror's major subcontractor evaluates proposals for the procuring agency.

2. Agency acted unreasonably in assessing the significance of an organizational conflict of interest where it failed to make an independent effort to gather relevant facts, and instead relied on a document which was prepared by the two private firms whose affiliation created the conflict of interest and which presented the facts in a manner that understated the significance of the conflict.

3. In the circumstances of the organizational conflict of interest at issue, severance of communication between the two affiliates and the absence of direct financial interest by employees of the affiliate performing the evaluation of proposals did not adequately mitigate the conflict.

DECISION

Aetna Government Health Plans, Inc. and Foundation Health Federal Services, Inc. protest the award of a contract by the Office of the Civilian Health and Medical Program of the Uniformed Services to QualMed, Inc. under request for proposals (RFP) No. MDA906-91-R-0002.[1] Aetna and Foundation contend that the award was improper due to an organizational conflict of interest involving Lewin-VHI, Inc., the consulting firm which assisted OCHAMPUS in many aspects of the procurement, including the evaluation of proposals. The alleged conflict of interest arose because QualMed proposed using an affiliate of Lewin-VHI to perform a significant portion of the services under a subcontract valued at approximately $183 million. According to the protesters, the agency failed to take reasonable steps to avoid, neutralize, or mitigate the resulting organizational conflict of interest.

We sustain the protests.

The RFP sought proposals to provide managed health care and associated administrative services in the states of California and Hawaii for CHAMPUS beneficiaries, who include military service retirees, their dependents, and dependents of active duty members. The RFP covers a base period with five 1-year options. The estimated value of the contract is more than $2.5 billion.

THE 1993 DECISION OF OUR OFFICE

After the agency initially made award to Aetna in July 1993, our Office sustained protests filed by Foundation and QualMed. Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3. We sustained the protests because we found that OCHAMPUS, by failing to meaningfully consider the cost impact of the offerors' proposals to manage health care, had deviated from the evaluation criteria in the solicitation.

As discussed in our prior decision, a team of approximately five employees of the consulting firm of Lewin-VHI, headed by a senior vice president of Lewin-VHI, played a major role in the procurement. In addition to helping draft key parts of the RFP, the Lewin-VHI personnel largely supplanted the business proposal evaluation team (BPET) both in the evaluation of cost proposals and in the conduct of significant portions of the discussions with offerors.[2]

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[1]The program is referred to as CHAMPUS and the agency as OCHAMPUS.

[2]We noted in our decision that the "core of the evaluation of business proposals" was performed by Lewin and that the BPET "for the most part simply adopted Lewin's analysis."

In our decision, we found that the agency evaluators abdicated their responsibilities by adopting Lewin-VHI's judgment without meaningful review. Thus, Lewin-VHI personnel created the methodology for evaluating cost proposals and set forth that methodology in a memorandum sent to agency personnel. Among other things, that memorandum advised the agency that Lewin-VHI proposed to assume that all offerors would incur the same health care costs (at the level calculated by Lewin-VHI as the independent government cost estimate (IGCE)), notwithstanding the offerors' differing technical approaches. OCHAMPUS employees never responded to the memorandum, either to adopt or reject it. Lewin-VHI treated the agency's failure to respond to the memorandum as consent and employed the proposed methodology in the evaluation of cost proposals. Our decision noted that, even at the time of the hearing conducted by our Office, OCHAMPUS personnel, including the source selection authority (SSA), did not appear to realize that Lewin-VHI had substituted its own IGCE figures for the estimates of health care costs proposed by the offerors.

In sustaining the protest, we recommended that OCHAMPUS either revise the solicitation to accurately advise offerors of the way that technical and cost proposals would be evaluated, or reopen discussions with the offerors and request revised proposals before proceeding with the source selection. OCHAMPUS implemented our recommendation by substantially revising the RFP as well as the internal methodology for evaluating proposals.[3] See QualMed, Inc., B-254397.13; B-257184, July 20, 1994, 94-2 CPD ¶ 33.

BACKGROUND OF THE CONFLICT OF INTEREST ALLEGATIONS

The agency's handling of the alleged organizational conflict of interest at issue in this protest was significantly affected by the resolution in 1992 of another organizational conflict of interest. For that reason, we set out in some detail the specifics of the 1992 issue, before turning to the conflict of interest directly relevant here.

The 1992 Conflict of Interest and Its Resolution

In late October 1992, the Lewin senior vice president wrote to Mr. Richard Hogue, who played a role in administering Lewin's contract with OCHAMPUS and is the contracting officer for the California/Hawaii procurement, that Lewin (then known as Lewin-ICF) was probably going to be acquired by Value Health, Inc. (VHI). The letter noted that, in its proposal for the California/Hawaii procurement, Foundation

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[3]Our recommendation did not address the agency's dependence on Lewin-VHI, and OCHAMPUS did not reduce its reliance on the consulting firm as a result of our decision. Lewin-VHI, in fact, played a key role in the revisions to the RFP and to internal procedures adopted to implement the recommendation in our decision.

was proposing another subsidiary of VHI, Value Health Sciences, Inc. (VHS), as a supplier of proprietary software and related services. The letter explained that VHS and Lewin-VHI would remain separate corporations with independent management, and Lewin-VHI proposed to implement procedures to ensure that no sensitive information would be disclosed to VHI or VHS. The letter emphasized that VHS' portion of Foundation's proposal was "very small" and estimated that it represented six hundredths of 1 percent of Foundation's total price.[4]

At a meeting held on November 10, 1992, the agency concluded that the situation created an organizational conflict of interest. On that day, agency counsel and the contracting officer had a conversation with the Lewin senior vice president in which the agency personnel indicated that there was no action that Lewin could take (other than preventing the acquisition by VHI) which the agency would consider adequate to resolve the conflict of interest. Accordingly, in a November 12 letter, the agency formally advised Lewin that it could not continue its work as a consultant to the agency in this procurement. The agency's letter stated that the contracting officer and legal counsel had reviewed the provisions of Federal Acquisition Regulation (FAR) subpart 9.5 regarding organizational conflict of interest. The letter concluded that:

> "After careful review of the information you provided and the pertinent laws and regulations, it is our position that Lewin-ICF would be unable to render impartial assistance or advice to the agency because they may be providing assistance or advice that could be detrimental to Value Health, Inc., Value Health Sciences, Inc., and Lewin-ICF. Because of the new business relationship, Lewin-ICF may be inclined to provide assistance or advice to the agency that may not be in the best interests of the Government but would be beneficial to themselves. . . . [T]he plan devised by Lewin-ICF to isolate the parent company and the other subsidiary does not negate the conflict. It does not overcome the appearance of unfair competitive advantage."

On November 30, representatives of the firms concerned and Value Health's outside counsel met with OCHAMPUS officials to discuss the organizational conflict of interest.[5] The agency officials indicated that their primary concern was the

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[4]On that basis, the estimated revenue to VHS would have been less than three million dollars over approximately 5 years.

[5]We use the term "Value Health" to refer collectively to the affiliated companies. The law firm representing Value Health in the resolution of the 1992 and 1994 conflict of interest issues has not participated in the instant protests. Due to the affiliated companies' central role in the matters at issue, our Office permitted Value Health to participate in the protest proceedings, notwithstanding the fact that none

possibility of bias arising from a financial interest (through profit sharing, compensation schemes, or bonus plans) on the part of individuals employed by the VHI affiliates. The agency agreed to allow Value Health's counsel to submit a proposed plan on December 7 to address those concerns.

That plan (entitled "Organizational Conflict of Interest Identification, Avoidance and Mitigation Plan" and referred to here as the 1992 plan), annotated with citations and notes concerning decisions of our Office, was presented as an agreement between VHS and Lewin-VHI, to be reviewed and approved by OCHAMPUS. The 7-page document contained representations regarding past and present facts, together with assertions that those facts demonstrated that no significant conflict of interest existed, and commitments to take certain steps to mitigate such a conflict, if it did exist.[6]

The agency's counsel determined that the plan adequately resolved the organizational conflict of interest issue, and the contracting officer so notified Lewin-VHI and Foundation in separate letters, both dated December 16. The agency's need for Lewin-VHI to continue to provide assistance in the procurement appears to have been a significant factor in the agency's decision to approve the plan.

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of the Value Health entities is an interested party under our Regulations. See 4 C.F.R. §§ 21.0(b), 21.3(l) (1995). Accordingly, attorneys from the firm representing Value Health in these protests were admitted to the protective order issued in the protests, participated in the hearing, and filed pre-hearing and post-hearing submissions.

[6]Among the representations, the document stated that Lewin and VHS had not been affiliated prior to the sale of Lewin to VHI and had not shared directors, officers, or employees. The document further represented that the revenues which VHS expected to have through the Foundation contract would constitute less than specified percentages of VHI's and VHS' projected 1994 revenue. The plan committed the subsidiaries to establishing an "ethical barrier" barring contact and communication between VHS employees and the Lewin-VHI employees serving as procurement officials.

Lewin-VHI agreed in the plan to cooperate with OCHAMPUS in adopting additional measures to "ensure that neither actual bias nor the appearance of bias enter into any of the work that it does for OCHAMPUS." Among the techniques that the plan stated Lewin-VHI was willing to adopt, if practicable and if requested by the agency, were (1) performing services on a "blind" basis (that is, without Lewin-VHI knowing the identify of the offeror), (2) having OCHAMPUS employees subject Lewin-VHI's work to close scrutiny, and (3) having another contractor review Lewin-VHI's work.

In the December 16 letter to Lewin-VHI, the agency stated that all of Lewin-VHI's services involving the procurement:

> "will, when feasible, be on a `blind' basis; that the Office of CHAMPUS and/or [the Office of the Assistant Secretary of Defense for] Health Affairs employees will subject Lewin-VHI's work to close scrutiny in a manner determined by the agency;
> . . . will review all work product prepared by Lewin-VHI; . . . will perform final review and clearance of all work product prior to its use; and . . . will review the data against Lewin-VHI's interpretation to ensure that it is sound."

It appears, however, that no part of the evaluation of Foundation's proposal was actually conducted on a "blind" basis, and there is no evidence that OCHAMPUS (or Health Affairs) subjected Lewin-VHI's work to close scrutiny. The 1992 plan effectively expired in July 1993, when OCHAMPUS awarded the initial contract to Aetna, since Foundation did not propose use of VHS' software in the reprocurement.

The 1994 Conflict of Interest and Its Resolution

After amending the RFP as part of its implementation of our December 1993 decision, OCHAMPUS requested revised proposals, which were due on April 4, 1994. Less than 4 weeks before the closing date, QualMed initiated negotiations with Value Behavioral Health, Inc. (VBH), a provider of managed mental health care, concerning the possibility of VBH serving as a subcontractor managing mental health services, including services related to substance abuse. Like Lewin-VHI, VBH is a wholly owned subsidiary of VHI, a fact of which QualMed was aware. Both QualMed and VBH were also aware that VBH's proposed role as a subcontractor to QualMed raised an organizational conflict of interest issue.

When the outside counsel who had prepared Value Health's 1992 plan learned of the proposed subcontracting arrangement, he suggested that the 1992 plan could serve as a model for resolving this situation. Accordingly, in the course of March, he sent a revision of the 1992 plan to the Lewin-VHI senior vice president, individuals at VBH and VHI, and agency counsel responsible for the California/Hawaii procurement (who had also played the key role in approval of the 1992 plan).

On March 10, the Lewin-VHI senior vice president discussed VBH's potential participation as the mental health care subcontractor for QualMed with a senior OCHAMPUS official who was not directly involved in this procurement. Because of that official's familiarity with the CHAMPUS program, he recognized that, unlike the de minimis role of VHS' software in Foundation's proposal in 1992, VBH's proposed responsibility for managing mental health care in this procurement represented a significant share of the contract. He offered a suggestion that Lewin-VHI might be able to mitigate the conflict of interest by refraining from evaluating mental health

care utilization management (apparently because he viewed that portion of the mental health care proposals as the most subjective part). That informal suggestion was included in Value Health's 1994 plan as an additional technique that could be adopted to avoid "actual bias" and "the appearance of bias." Other than the reference to this measure in Value Health's 1994 plan, there is no contemporaneous (that is, pre-protest) document indicating any guidance or instruction from OCHAMPUS restricting Lewin-VHI's role in the evaluation of proposals.

Because agency counsel had been away from the office, he did not speak with Value Health's counsel or review the plan until March 29. The next day, he left Value Health's counsel a message stating that QualMed could team with VBH and that someone other than Lewin-VHI would be found to evaluate mental health care. For purposes of QualMed and Value Health–that is, for all practical purposes–that message effectively constituted approval of Value Health's 1994 plan.[7]

Agency counsel states (through a declaration submitted during the protest proceedings) that his primary concerns before approving Value Health's 1994 plan were the prevention of procurement information passing between Lewin-VHI and VBH and the preclusion of any financial incentive that could cause bias on the part of the Lewin-VHI employees who were assisting the agency with the evaluation. Because he concluded that Value Health's plan adequately addressed those concerns and because he trusted the Value Health affiliates and their outside counsel, he found the plan satisfactory without taking any steps to confirm the accuracy or completeness of the representations made in the plan. He made no suggestions for revisions to the plan,[8] and apparently did not discuss the plan with anyone else at OCHAMPUS before approving it.

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[7]Agency counsel states that he further reviewed the plan during April, and confirmed to Value Health's outside counsel by telephone on April 26 that he (agency counsel) had no comments or revisions to suggest and that Lewin-VHI and VBH should proceed to execute the plan.

Agency counsel's approval of Value Health's plan in March and April indicates that the contracting officer was not involved in the review and approval of the plan. Indeed, the contracting officer apparently did not learn of the existence of the Lewin-VBH conflict of interest issue until April 1994 and did not see the 1994 plan until some time after May.

[8]The one exception was that he suggested that the plan apply to the managed care procurement covering Washington and Oregon as well; for reasons not relevant here, this revision was not adopted. Other than this non-substantive suggestion, which was in any event rejected, there appears to be no support in the record for the statement in the agency report that "OCHAMPUS reviewed and revised the proposed [1994] plan." (Emphasis added.)

During discussions in May, QualMed asked the agency for guidance about resolution of the potential organizational conflict of interest. QualMed indicated that it could submit a proposal without VBH's participation, if the Lewin-VHI affiliate's involvement posed a problem for OCHAMPUS. Agency counsel and the contracting officer responded that the agency had experience in this area, and that, so long as QualMed submitted an acceptable plan for mitigation of the conflict, the agency would approve it and VBH could serve as QualMed's subcontractor.

On June 1, Value Health's counsel formally transmitted to agency counsel a copy of the 1994 plan, signed by the Lewin-VHI senior vice president and a representative of VBH.[9] The OCHAMPUS attorney prepared a legal opinion which, although not introduced into the record due to attorney/client privilege, evidently found the plan acceptable. Ultimately, the plan was signed by an acting contracting officer in early July; that individual had no substantive involvement in reviewing or approving the plan, and the agency has advised that she was performing a ministerial function in signing it.

The record includes no contemporaneous analysis by the contracting officer or any other official at OCHAMPUS of the conflict of interest or of a recommended course of action for avoiding, neutralizing, or mitigating it. Unlike the case with the 1992 plan, the record contains no letter from the contracting officer (or anyone else at the agency) advising QualMed or any Value Health affiliate that the 1994 plan had been approved. There is also nothing in the record comparable to the December 16, 1992, letter to Lewin-VHI instructing that firm about procedures which would be undertaken to ensure the conflict was adequately mitigated, nor is there any record of agency consideration of any such procedures.

THE EVALUATION OF PROPOSALS AND SELECTION OF QUALMED

Proposals were submitted at the beginning of April 1994 and evaluated during the ensuing 4 weeks. In its proposal, QualMed wrote about its subcontractor's affiliate in the following terms:

> "Lewin-VHI . . . is assisting VHI and its subsidiaries in maintaining an active role in the health care reforms anticipated under the Clinton administration. A key health policy consultant and an effective voice in Washington, . . . Lewin-VHI staff members have substantial experience performing analysis of DoD health policies and programs."

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[9]Although the record does not include a copy of the draft reviewed by agency counsel in March, none of the parties has indicated that the June 1 signed plan differed in any way from that draft.

During the evaluation of the mental health portion of proposals, Lewin-VHI personnel did not score the proposals' mental health care utilization management trend factors; that scoring was left to a second consulting firm assisting OCHAMPUS in the cost evaluation. Lewin-VHI personnel did score the proposals, including VBH's, for other mental health trend factors. Lewin-VHI personnel also participated in meetings (held in Lewin-VHI's offices) to discuss all aspects of mental health care proposals, including the scores for the utilization management trend factor. At those meetings, Lewin-VHI personnel acted as "devil's advocates," challenging the rationale for the scores that the other consultant had assigned (including the scores for VBH's proposal). Those meetings resulted in changes to the proposals' scores.

Written and oral discussions were conducted between mid-May and early July. Lewin-VHI played a prominent role in the portion of the discussions involving cost proposals, including the discussion of mental health care proposals. Best and final offers (BAFO) were due on August 8. Discussions were held with the offerors during September and early October, and a second round of BAFOs was due on October 24. In the evaluation of the second round of BAFOs, Lewin-VHI's role remained unchanged, except that Lewin-VHI personnel refrained from performing the initial scoring of one additional mental health care trend factor (provider discounts). The record indicates that the other consultant met with Lewin-VHI personnel during September to discuss QualMed/VBH's proposal.

In late November, a decision was made (for reasons not relevant here) to change one aspect of the requirements, which necessitated an amendment to the RFP. In response to the RFP amendment, discussions were held with offerors during December and January, and a third round of BAFOs was due on February 13, 1995. In the evaluation of those final BAFOs, Lewin-VHI personnel continued to participate in the evaluation of mental health care proposals, including VBH's.

The technical evaluators assigned the highest technical score to Aetna's proposal; Foundation's score was second; and QualMed's was third. The BPET (based largely on Lewin-VHI's analysis) concluded that Aetna's proposal would probably cost the government substantially more than Foundation's or QualMed's. The latter two proposals were found to represent similar probable costs to the government (both well over $2.5 billion), with QualMed's approximately $50 million lower. Using its formula for the cost/technical tradeoff (referred to as a "best buy" analysis), the source selection advisory council (SSAC) found that Foundation and QualMed were significantly ahead of the other offerors, with Foundation slightly ahead of QualMed (by less than two tenths of 1 percent).[10]

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[10]The RFP assigned the technical proposal 50 percent more weight than cost (that is, the weighting was 60/40).

The SSAC and the SSA viewed this situation as essentially a tie between Foundation and QualMed. Based on several factors which the SSA and the SSAC viewed as indications that QualMed's proposal represented a better value than Foundation's, the SSAC recommended, and the SSA selected, QualMed for award, which was made on March 31. Selection of QualMed's proposal to a significant degree reflected Lewin-VHI's judgment, which was that Foundation's proposal was essentially less persuasive than QualMed's with regard to proposed trend factors and probable cost.

In a press release issued on April 3, VHI announced that its subsidiary, VBH, had won a $200 million subcontract to provide mental health and substance abuse services. The press release stated that the subcontract was expected to produce $38 million in revenue to VBH in the first program year.

PROTEST ALLEGATIONS

Aetna and Foundation allege that the agency failed to take reasonable steps to avoid or mitigate the organizational conflict of interest involving Lewin-VHI and VBH. The protesters also assert that the actions of QualMed and VBH warrant termination of the contract to QualMed.

In addition, both Foundation and Aetna assert that various aspects of the technical and cost evaluations were unreasonable or inconsistent with the solicitation. Foundation further protests as unreasonable the agency's decision to award the contract to QualMed notwithstanding the "best buy" analysis, under which Foundation's proposal was in line for award. Foundation also contends that the agency improperly permitted a former OCHAMPUS employee to play a major role in the preparation of QualMed's proposal, despite the agency's knowledge that the individual had been an on-site representative for the Department of Defense at Foundation's site when Foundation was performing under a predecessor contract. Aetna also contends that the agency misled the firm during discussions and failed to investigate an anonymous informant's report that information proprietary to Aetna had been improperly released.

Because we view the organizational conflict of interest as dispositive, we devote this decision primarily to that issue and address the other protest grounds only briefly.

DISCUSSION

Overview of the Rules Governing Organizational Conflicts of Interest

FAR subpart 9.5 sets forth the regulatory guidance governing organizational conflicts of interest. Such a conflict of interest arises where:

> "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

FAR § 9.501. Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505.

The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. SRS Technologies, B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. We will not overturn the agency's determination except where it is shown to be unreasonable. D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419.

The Three Types of Organizational Conflict of Interest Addressed in FAR Subpart 9.5

The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups. The first group consists of situations in which 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 § 9.505-4. In these "unequal access to information" cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.

The second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these "biased ground rules" cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. The Pragma Corp., B-255236 et al., Feb. 18, 1994, 94-1 CPD ¶ 124.

Finally, the third group comprises cases where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. In these "impaired objectivity" cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. Id.; see also FAR § 9.501 (definition of organizational conflict of interest).

While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. See ICF Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124.

In the instant protests, there has been no allegation (and no evidence, direct or circumstantial) that VBH had access to relevant nonpublic information obtained through Lewin-VHI's contract with OCHAMPUS, and the "unequal access to information" type of organizational conflict of interest therefore is not at issue. Similarly, there is no indication in the record that Lewin-VHI's role in writing key parts of the solicitation in any way could have skewed the competition in favor of VBH, since the writing of the solicitation was essentially completed prior to Lewin-VHI's learning of VBH's teaming with QualMed. Accordingly, the "biased ground rules" type of conflict of interest does not arise. The protests here reflect the third type of organizational conflict of interest, involving potentially impaired objectivity, in that they concern the propriety of Lewin-VHI's evaluating proposals where that evaluation could determine whether its affiliate would receive a $183 million subcontract.

The Factual Representations in the 1994 Plan and The Agency's Response

The protesters contend that Value Health's 1994 plan presented the facts in such a way as to fail to alert OCHAMPUS to the significance of the organizational conflict of interest. We agree. The 1994 plan was incomplete and inaccurate in describing the facts relevant to the organizational conflict of interest. For example, the plan failed to mention that VBH's subcontract would be on the order of $183 million of managed health care services, more than 50 times larger, in dollar terms, and far more central to the procurement than the de minimis amount of software and services that was to be purchased from VHS under the 1992 plan.

The plan also substantially reduced the apparent significance of the subcontract, and therefore the conflict of interest, by disclosing only the percentage of VBH's and VHI's total earnings that the subcontract would represent (rather than the percentage of total revenue, as in Value Health's 1992 plan). Value Health contends that earnings are a more meaningful criterion than revenue for VBH's subcontract

because much of the revenue consists of "passthrough" payments to medical service providers (that is, VBH merely forwards those payments to the doctors or other providers, and does not retain any portion of the funds transmitted). While Value Health views the revenue figures (both in dollar and percentage terms) as overstating the true value of the subcontract to VBH, Value Health's own press release announcing the award disclosed only the amount of revenue involved, without reference to earnings. The effect of not disclosing the dollar figures or the impact on revenue, as was done in 1992, was plainly to minimize the significance of the conflict. While objective reasons may be presented for citing the earnings figure, the failure to provide information comparable to that disclosed in 1992 was at least potentially misleading.

With respect to the corporate affiliation between VBH and Lewin-VHI, the 1994 plan added a representation not made in the 1992 version: it stated affirmatively that "Lewin and VBH . . . do not share officers or employees"; in fact, the two corporations have the same corporate secretary. On the other hand, the 1994 plan deleted the reference in the 1992 plan to the absence of common directors in the two corporations. Three of the four members of the boards of directors of Lewin-VHI and VBH are the same.[11]

In sum, Value Health provided OCHAMPUS with a document that purported to describe a factual situation, and, in light of Lewin-VHI's historical role at OCHAMPUS, Value Health could reasonably anticipate that OCHAMPUS would rely on the document as a presentation of the relevant facts of that situation. Based on our review of the entire record, we conclude that the 1994 plan presented the facts in such a way as to fail to alert OCHAMPUS to the scope and significance of the organizational conflict of interest.

As to OCHAMPUS, the agency failed to take reasonable steps to learn the relevant facts about the organizational conflict of interest. FAR § 9.505 directs the contracting agency, and in particular the contracting officer, to examine each individual potential organizational conflict of interest situation "on the basis of its particular facts," and that direction cannot be fulfilled if the agency has not ensured that it is aware of the relevant facts. Here, OCHAMPUS made no inquiry beyond

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[11]Value Health devoted considerable time during the protests arguing that the corporate secretary's role at Lewin-VHI was inconsequential and that the boards of directors of Lewin-VHI and VBH rarely, if ever, meet. In our view, such arguments miss the point, which is that Value Health failed to present clearly relevant facts in a document that purported to identify the organizational conflict of interest.

the four corners of Value Health's own partisan presentation of the facts in its 1994 plan.[12]

Essentially, OCHAMPUS left the gathering of relevant facts and, indeed, the resolution of the conflict of interest here to Lewin-VHI and VBH, just as the evaluation of cost proposals had been left, by default, to Lewin-VHI. Although there is no evidence of intent to misrepresent the facts, Value Health presented OCHAMPUS with a plan which was incomplete and inaccurate, thereby understating the significance of the conflict of interest. In our view, allowing the private firm whose conflict of interest is at issue to decide how to describe and resolve that conflict is unreasonable on its face, regardless of the capabilities and integrity of that firm and its employees.

The Adequacy of the Safeguards in the 1994 Plan

The agency views the provisions of the 1994 plan as adequately resolving Lewin-VHI's conflict of interest, and argues that a more complete presentation of the facts would not have mattered. For OCHAMPUS, essentially the only significant fact was the isolation of the Lewin-VHI employees working for OCHAMPUS in terms of both communication and personal remuneration.[13] This view reflects a misunderstanding of the nature of the conflict. While a "Chinese wall" arrangement may resolve an "unfair access to information" conflict of interest, it is virtually irrelevant to an organizational conflict of interest involving potentially impaired objectivity. See ICF Inc., supra, at 3.

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[12]Based on the testimony of the agency witnesses at the hearing held in this protest, we find it unlikely that anyone at OCHAMPUS was aware of the differences noted above between the 1992 and 1994 plans prior to the filing of these protests. It would have been difficult, without performing a side-by-side comparison, to detect the deleted reference to the absence of common directors or the shift from percentage of revenue to percentage of earnings to describe the importance of the Value Health affiliate's involvement. It appears that no one, including agency counsel, performed such a comparison.

[13]QualMed contends that, given that isolation, it would have been appropriate, under FAR subpart 9.5, to permit Lewin-VHI to evaluate VBH's proposal. OCHAMPUS appears to agree with that position: the declaration that its counsel prepared during the course of these protests describes the use of someone other than Lewin-VHI to evaluate VBH's portion of QualMed's proposal as essentially a superfluous afterthought, merely a "sensible additional precaution" added after the plan had already been found acceptable due to the isolation of the Lewin-VHI employees.

The walling off of Lewin-VHI's employees may have effectively ensured that they did not release nonpublic information to VBH or QualMed and that no pressure was placed on them to favor VBH or QualMed. Similarly, the absence of any explicit link between VBH's winning the subcontract and those employees' compensation may have precluded their having a direct financial interest in the outcome of the competition. Organizational conflicts of interest, however, arise "because of other activities or relationships with other persons," and they pertain to the organization (including, as discussed earlier, its affiliates), quite apart from the financial interests of individuals. FAR § 9.501. At issue, after all, is an organizational, not an individual, conflict of interest. Accordingly, the agency had no reasonable basis to conclude that, due to the absence of financial or other pressure on the individual Lewin-VHI evaluators, the 1994 plan mitigated Lewin-VHI's organizational conflict of interest.[14]

Value Health argues that the protesters' position calls for an improper per se proscription against awarding contracts to companies with potential organizational conflicts of interest. We agree that a per se approach would be inconsistent with FAR subpart 9.5, which directs the contracting officer to develop a course of action to avoid or mitigate organizational conflicts of interest, where that is possible. FAR § 9.504(e). The FAR recognizes, however, that some organizational conflicts of interest cannot be mitigated. See, e.g., FAR §§ 9.508(e), (f) (prohibition on firm competing for contract in certain circumstances).

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[14]Value Health also suggests that the Lewin-VHI employees working for OCHAMPUS on this procurement were concerned only with Lewin-VHI (and then only with their subgroup within Lewin-VHI), and there were thus no dual loyalties and no possibility of impaired objectivity. Value Health points to Lewin-VHI's tradition of autonomy, the allegedly tenuous affiliation between Lewin-VHI and VBH, and the 1994 plan's prohibitions on communications between the two affiliates. We find this argument unpersuasive both legally and factually.

As a matter of law, as explained above, we see no basis to distinguish between one affiliate and another in conflict of interest situations, such as this one, involving the risk of competing loyalties. As to the facts regarding the affiliation here, in addition to their shared corporate officer and directors, these are not large corporations: when the 1994 plan was drafted, VHI and Lewin-VHI each had fewer than 150 employees, and VBH (the largest of the three in terms of the number of employees) had fewer than 2,000. Moreover, all the Value Health entities, including Lewin-VHI, cooperate in developing business. Lewin-VHI's monthly operations reports highlight that affiliate's initiatives with other VHI companies, and a recent operations report stated, "We look forward to continuing to grow this `account' in 1995." More relevant to these protests is the fact that Lewin-VHI set its senior vice president a "marketing goal" of having his practice group work with another VHI company to market a product.

The organizational conflict of interest presented here could not be mitigated. Our conclusion in this regard is based, not on a per se approach, but on consideration of the very substantial dollar value of the VBH subcontract, Lewin-VHI's historical role, and the largely subjective nature of the evaluation of probable health care costs in this procurement, where probable cost calculations turn on whether the Lewin-VHI evaluators have been persuaded that an offeror will succeed in managing health care as proposed. In these circumstances, the agency could not mitigate or neutralize the organizational conflict of interest created by QualMed's submitting a proposal under which VBH would receive a $183 million subcontract.

Appearances, "Hard Facts," and Prejudice

The integrity and commitment to objectivity of the Lewin-VHI employees working for OCHAMPUS serve as the basis for three closely related arguments advocated by the parties defending the award. First, Value Health, in particular, contends that FAR subpart 9.5 does not apply to "apparent" conflicts of interest, and that a standard based on the appearance of impropriety "has no place in determining whether agencies have met their responsibilities under FAR Subpart 9.5." In our view, the organizational conflict of interest at issue in these protests was not merely an apparent conflict. Lewin-VHI's dual roles placed it in an actual organizational conflict of interest because of the prospect that it would be unable to render impartial advice to OCHAMPUS. FAR § 9.501. Furthermore, we view it as axiomatic that a key purpose of FAR subpart 9.5 is to avoid the appearance of impropriety in government procurements.

Second, the parties defending the award contend that our case law requires "hard facts" before an offeror is excluded from a competition due to an organizational conflict of interest, and that no such facts exist here. It is true that a determination to exclude an offeror must be based on hard facts, rather than mere suspicion. Clement Int'l Corp., B-255304.2, Apr. 5, 1994, 94-1 CPD ¶ 228; see also CACI, Inc.–Fed. v. United States, 719 F.2d 1567 (Fed. Cir. 1983). The facts that are required, however, are those which establish the existence of the organizational conflict of interest, not the specific impact of that conflict.[15] Once the facts establishing the existence of an organizational conflict of interest are present, reasonable steps to avoid, mitigate, or neutralize the conflict are required without further need for "hard facts" to prove the conflict's impact on the competition. Where, as here, the facts demonstrate that an organizational conflict of interest

[15]Thus, in Clement Int'l, supra, we denied the protest because, other than the protester's unsupported allegations, nothing in the record suggested that the awardee had access to relevant, nonpublic information, or that the awardee had played any role in preparing the solicitation or specifications.

exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur.[16]

The third argument concerns our Office's requirement that at least a reasonable possibility of prejudice be shown before a protest is sustained. Because the Lewin-VHI evaluators did not leak information, did not skew the ground rules, and were not biased in their evaluation, the parties defending the award contend that the protesters were not prejudiced by the way the conflict of interest issue was resolved.

This contention fails for the same reason as the "hard facts" argument. There is a presumption of prejudice to competing offerors where an organizational conflict of interest (other than a de minimis matter) is not resolved. Organizational conflicts of interest call into question the integrity of the competitive procurement process, and, as with other such circumstances, no specific prejudice need be shown to warrant corrective action. See, e.g., NKF Eng'g, Inc. v. United States, 805 F.2d 372, 376 (Fed. Cir. 1986); Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992). For that reason, we have sustained a protest where the awardee obtained its competitor's information improperly, even though that information may not have given the awardee a competitive advantage. Litton Sys., Inc., 68 Comp. Gen. 422 (1989), 89-1 CPD ¶ 450.

Moreover, where the integrity of the system is at issue, the honesty and good faith of the individual actors cannot render behavior permissible where it would otherwise be improper.[17] For this reason, an agency's confidence in a individual contractor's probity cannot eliminate or mitigate what would otherwise be an organizational conflict of interest. Accordingly, we conclude that, notwithstanding the integrity of the Lewin-VHI evaluators and the absence of evidence of actual bias on their part, the appearance of impropriety resulting from the significant organizational conflict of interest present here rendered the award to QualMed and VBH improper.[18]

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[16]For example, an unfair competitive advantage is presumed to arise where an offeror possesses relevant nonpublic information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was, actually, of assistance to the offeror. See FAR § 9.505(b)(2); see also GIC Agricultural Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263.

[17]Thus, it is generally improper for a government employee to accept a gratuity from a firm seeking to obtain a contract from the employee's agency, regardless of the honesty of the employee or the absence of a quid pro quo. See FAR § 3.101-2.

[18]The agency, QualMed, and Value Health suggest that, if our Office finds that Lewin-VHI's conflicting roles constitute a significant conflict of interest not mitigated by the 1994 plan, OCHAMPUS should be given the opportunity to obtain a

REMAINING PROTEST GROUNDS

We find no factual basis for Aetna's allegation that OCHAMPUS misled it during discussions regarding the application of revised reimbursement provisions (set forth in an amendment to the RFP) to capitated arrangements. According to Aetna, it advised the agency during discussions on May 23, 1994, that the revision created an inconsistency in the RFP about the way capitated arrangements would be viewed, and OCHAMPUS agreed to review the matter and respond to Aetna. The agency never gave Aetna further guidance in this area, however, and Aetna did not raise it again during subsequent discussions. Aetna now states that it was left with "the clear understanding" that the revised RFP in effect precluded capitated arrangements, which placed Aetna at a competitive disadvantage in the face of other offerors who proposed such arrangements. We have reviewed the transcript of the May 1994 discussions and see no basis to conclude that OCHAMPUS misled Aetna into believing that capitated arrangements were effectively barred, or otherwise gave Aetna misleading guidance.[19]

With respect to Aetna's allegation that the agency failed to adequately investigate an informant's statement that Aetna's proprietary information had been improperly released, nothing in the record relevant to this matter would warrant sustaining this protest ground. The agency received an anonymous message that Aetna's proprietary information had been leaked or stolen, with neither details about which procurement might be involved nor corroborating evidence. Even if we assume, arguendo, that Aetna is correct in arguing that the agency was required to pursue its investigation further, neither Aetna's efforts nor the protest proceedings have uncovered any indication of an impropriety that could call into question the award to QualMed or the recommendation set out below.

In light of our recommendation, we do not reach the protest grounds which relate solely to the evaluation or selection of QualMed's proposal. Of the remaining

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waiver. See FAR § 9.503. While the propriety of a waiver is not before us, on the current record there appears to be no overriding governmental interest weighing in favor of setting the conflict of interest rules aside in a procurement of this magnitude and importance. See Lawlor Corp.--Recon., 70 Comp. Gen. 374 (1991), 91-1 CPD ¶ 335.

[19]At most, the record suggests that the agency failed to provide the specific guidance that Aetna requested. To the extent that Aetna believed that the RFP amendment at issue, combined with the agency's failure to resolve the inconsistency that Aetna perceived, created a deficiency in the solicitation, it was required to raise that issue in a protest filed prior to the next closing date for the receipt of revised proposals. 4 C.F.R. § 21.2(a)(1).

protest grounds asserted by Aetna, we find no merit to any which could affect our recommendation. In particular, there is no merit to Aetna's argument that Lewin-VHI's conflict suggests bias in the drafting of the solicitation, since the conflict did not arise until after the solicitation had been drafted. We similarly see no logical or factual basis for Aetna's contention that Lewin-VHI's conflict might have led it to favor Foundation over Aetna.

CONCLUSION AND RECOMMENDATION

Because the agency failed to recognize the significance of the organizational conflict of interest and failed to take reasonable steps to avoid or mitigate it, we sustain the protests. With respect to the appropriate recommendation, the agency urges us not to recommend termination of the award to QualMed, even if we sustain the protest. OCHAMPUS and QualMed argue in this regard that there is no basis to disqualify QualMed, even if the agency's actions were improper.[20] QualMed, in particular, contends that its actions were reasonable and cannot fairly be criticized.

The agency and awardee also point to the criteria which our Bid Protest Regulations state are to be considered in determining the appropriate recommendation. 4 C.F.R. § 21.6(b). Those criteria include the seriousness of the procurement deficiency, the degree of prejudice to the interested party and to the integrity of the competitive procurement system, the good faith of the parties, cost to the government, urgency of the procurement, and the impact of the recommendation on the contracting activity's mission. Id.

We do not find that either QualMed's or Value Health's conduct was such that the award should be left undisturbed. Neither QualMed nor any of the Value Health entities took reasonable steps to ensure that the plan that purported to identify the conflict disclosed the relevant facts fully and correctly. QualMed left the resolution of the conflict of interest matter to VBH and Lewin-VHI; those entities left it to Value Health's outside counsel; outside counsel appears to have believed that he was leaving it to the agency; and the agency relied on Value Health. While there is no evidence that the parties acted in bad faith, we find that they failed to adequately discharge their responsibilities. See GIC Agricultural Group, supra. There is no overriding reason to allow for providing a second opportunity for the entities to act more responsibly and in compliance with the governing regulation.

The handling of Lewin-VHI's organizational conflict of interest on the part of all the parties involved constituted a serious deficiency in this procurement and one that, absent unequivocal corrective action, casts doubt on the integrity of the competitive procurement process. We are sensitive to the agency's concern about further

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[20]QualMed specifically wants "an opportunity to submit an offer `untainted' by the alleged conflict."

delays in a procurement which has already been subject to significant delays, and where, due to the size of the procurement, delays lead to substantial additional costs. Taking those concerns into account, we recommend that OCHAMPUS terminate QualMed's contract for the convenience of the government and make award to Foundation, if otherwise appropriate. We note in this regard that the agency had selected Foundation's proposal as the "best buy" in any event. Its technical ratings were higher than QualMed's, under a solicitation which stated that technical factors were given substantially more weight than cost, while the two proposals' projected probable cost figures were relatively close. In light of the stay which remains in place and Aetna's continuing performance under the prior award, our recommendation should not entail any delay.

QualMed must bear responsibility for the deficiencies in the representations made to OCHAMPUS by its proposed subcontractor regarding this procurement. Cf. TeleLink Research, Inc.--Recon., B-247052.2, Sept. 28, 1992, 92-2 CPD ¶ 208 (subcontractor's alleged misrepresentation attributed to offeror). QualMed was aware of Lewin-VHI's conflict of interest at the time it proposed to team with VBH. Indeed, QualMed's proposal noted VBH's affiliation with Lewin-VHI and the latter's involvement with the Department of Defense. While QualMed could have made other arrangements for mental health care (as it confirmed to OCHAMPUS as late as May 1994), it was plainly willing to benefit from VBH's affiliation with Lewin-VHI, if it could do so. QualMed's actions do not justify delaying this procurement further in order to allow QualMed another opportunity to submit a proposal untainted by conflict of interest.

In addition, Foundation and Aetna are entitled to the costs of filing and pursuing the protest grounds which have been sustained, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protesters should submit their certified claims for those costs directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protests are sustained.

James F. Hinchman
for Comptroller General of the United States