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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Science Applications International Corporation

File: B-293601; B-293601.2; B-293601.3

Date: May 3, 2004

James J. McCullough, Esq., Deneen J. Melander, Esq., Steven A. Alerding, Esq., and Abram J. Pafford, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. Thomas L. McGovern, III, Esq., Michael J. Vernick, Esq., and Todd R. Overman, Esq., Hogan & Hartson, for Lockheed Martin Services, Inc., an intervenor. Jonathan S. Baker, Esq., Environmental Protection Agency, for the agency. Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency acknowledges that awardee's substantial involvement in activities that are subject to environmental regulations could create a conflict of interest in performing certain tasks contemplated by the solicitation's scope of work, and agency gave no consideration to the impact of such potential conflicts in selecting awardee's proposal for contract award, agency failed to comply with Federal Acquisition Regulation requirement that it "identify and evaluate potential organizational conflicts of interest."

DECISION

Science Applications International Corporation (SAIC) protests the U.S. Environmental Protection Agency's (EPA) award of a contract to Lockheed Martin Services, Inc. under request for proposals (RFP) No. PR-HQ-02-11750 to perform various tasks, including those related to systems development, data management, training, statistical services, and scientific applications. SAIC protests that the agency failed to properly consider Lockheed Martin's potential organizational conflicts of interest.

We sustain the protest.

BACKGROUND

The solicitation at issue here was published on May 21, 2003 and contemplated award of an indefinite-delivery/indefinite-quantity contract, under which cost-reimbursement and fixed-price task orders will be issued.¹ The solicitation stated that task orders will be issued for “a wide variety” of systems engineering services, to be performed at various locations, “to assist [EPA] in meeting its strategic objectives and responsibilities under Federal legislation and executive orders.” RFP at C-2, C-3. More specifically, section C of the RFP listed various “task areas,” including “systems development, maintenance, and operation,” “application security support,” “IT architectural support,” “data management support,” “training,” “statistical services,” “geographic information systems (GIS) support,” “high performance computing (HPC) and visualization support,” and “scientific application and computational science support.” RFP at C-7 through C-10.

For each task area identified, the solicitation provided a more expansive description of the particular activities contemplated. For example, with regard to “statistical services,” the solicitation stated that the contractor will: “Develop surveys, samples, and questionnaires and related documentation.” RFP at C-9. Similarly, with regard to the task area entitled “scientific application, visualization and computational science support,” the RFP provided that the contractor will: “Provide environmental modeling and application development; molecular modeling and computational modeling; numerical algorithms and verification; code optimizing, porting, tuning, and vectorizing; trouble shooting; parallel computing; cluster porting; statistical analysis; data mining and large scale statistical analysis; information engineering; and other scientific application support.” RFP at C-10.

Section C of the RFP identified the agency’s overall objectives related to performance of this contract. Among other things, this portion of the solicitation stated that the agency intends to “[d]evelop a full partnership relationship with the Offeror,” which will, among other things, result in “significant business growth.” RFP at C-3. Consistent with the objective to achieve “significant business growth,” the solicitation stated that the agency intends for this contract to become the “vehicle of choice” for the agency’s “clients” and “partners,” which include “other Federal and state agencies,” as well as “local governments, contractors, and researchers.” RFP at C-2, C-4.

The solicitation provided that the agency would select the proposal that is “most advantageous” to the government, based on consideration of cost and various non-cost factors, advising offerors that the non-cost factors combined were “significantly more important” than cost. RFP at M-1. The solicitation established the following

¹ Offerors were told to assume that approximately 90 percent of the task orders would be issued on a cost-reimbursable basis. RFP at L-19.

non-cost factors that would be subjectively point-scored: management approach, key personnel, oral presentations, task performance, software development center facilities and organization, corporate experience and past performance, transition approach, and small business utilization. RFP at M-2 through M-3. The solicitation also provided that the agency would evaluate, on a “pass/fail” basis, each offeror’s compliance with the solicitation’s statement of objectives and the offeror’s conflict of interest (COI) plan.² RFP at M-3.

Five proposals, including those of Lockheed Martin and SAIC,³ were submitted by the June 23 closing date; thereafter, each offeror made an oral presentation to the agency. The agency subsequently conducted discussions with all five offerors and, thereafter, requested, received and evaluated the offerors’ final revised proposals.⁴ Lockheed Martin’s and SAIC’s proposal both received ratings of “pass” with regard to their conflict of interest plans and compliance with the solicitation’s stated objectives. With regard to the point-scored non-cost factors, SAIC’s proposal received a score of [deleted]; Lockheed Martin’s proposal received a score of [deleted]. SAIC’s proposal had an evaluated cost of approximately [deleted] million; Lockheed Martin’s proposal had an evaluated cost of approximately \$706 million.⁵ Agency Report, Tab 11, Source Selection Document, at 1. On the basis of this evaluation, the agency determined that Lockheed Martin’s proposal represented the

² The solicitation required offerors to submit a “corporate COI plan,” that would describe the procedures a company uses to identify and report future conflicts; however, the solicitation specifically provided that such plans need not be “contract or program specific.” RFP at M-4. Separate and apart from the requirement to submit a corporate plan describing the procedures for identifying and reporting future conflicts, the solicitation required each offeror to certify that it was “not aware of any information bearing on the existence of any potential organizational conflict of interest.” RFP at K-11, L-7.

³ SAIC is the incumbent contractor under the predecessor contract for these requirements.

⁴ The proposals submitted by the three offerors other than Lockheed Martin and SAIC are not relevant to resolution of this protest; accordingly, they are not further discussed.

⁵ In evaluating Lockheed Martin’s proposal, the agency noted Lockheed Martin had stated its intent to “[g]row the annual revenue under the contract by [deleted] *a year*” and to “[a]dd [deleted].” Agency Report, Tab 4, Lockheed Martin Proposal at III.2-1 (italics in original). The agency commented favorably on these portions of Lockheed Martin’s proposal, characterizing the proposal as reflecting “an extremely clear commitment to growth” and “an excellent analysis of business opportunities in other agencies.” Agency Report, Tab 11, Source Selection Decision, at 3.

best value to the government; a contract was awarded on January 8. This protest followed.

DISCUSSION

SAIC first protests that Lockheed Martin failed to properly disclose, and the agency failed to properly consider, Lockheed Martin's potential organizational conflicts of interest (OCI) associated with its performance of the particular requirements of this contract. More specifically, SAIC protests that Lockheed Martin may suffer impaired objectivity in performing some of the tasks contemplated under this solicitation, due to Lockheed Martin's multiple ongoing activities that are subject to, and potentially in violation of, EPA regulations.⁶

Contracting officers are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. FAR § 9.504. Situations that create potential conflicts of interest are identified and discussed in FAR subpart 9.5, and they include situations in which a contractor's performance of contract requirements may affect the contractor's other activities and interests. See FAR §§ 9.505, 9.508. That is, a contractor's judgment and objectivity in performing the contract requirements may be impaired if the substance of its performance has the potential to affect other activities and interests of the contractor. Id.

SAIC maintains that, in light of Lockheed Martin's significant involvement in activities that are subject to environmental regulations, including its ownership and/or operation of various manufacturing and production facilities dealing with hazardous materials,⁷ Lockheed Martin failed to properly disclose its ongoing

⁶ The record contains a document printed from EPA's website, titled "Enforcement & Compliance History Online," which identifies numerous Lockheed Martin facilities across the country that are subject to EPA inspection and, potentially, enforcement actions. Protester's Post-Hearing Comments, attach. B, exh. 1.

⁷ Neither Lockheed Martin nor the agency disputes the fact that Lockheed Martin has substantial interests in multiple activities and facilities that are subject to EPA regulations. For example, in its post-hearing comments, the agency refers to "Lockheed's status as a potentially responsible party (PRP) at Superfund sites," as well as "the fact that it [Lockheed Martin] still performs manufacturing activities which are subject to EPA regulations." Agency's Post-Hearing Comments at 2. In this regard, the 2003 annual report filed by Lockheed Martin Corporation with the Securities and Exchange Commission, states:

[W]e have property that is subject to environmental matters. . . . We are responding to three administrative orders issued by the California Regional Water Quality Control Board in connection with our former facilities in Redlands, California. We are also

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involvement in such activities,⁸ and the agency failed to reasonably consider the extent to which such involvement might impair Lockheed Martin’s judgment and objectivity in performing certain tasks contemplated by the solicitation’s statement of work.

Specifically, SAIC identifies various tasks contemplated by the solicitation, including tasks associated with statistical services and environmental modeling, maintaining that the agency failed to properly consider the impact that the existence of Lockheed Martin’s other environmentally-regulated activities—that is, Lockheed Martin’s ownership or operation of various production or manufacturing facilities that produce or handle various hazardous materials subject to federal, state and local environmental regulations—may have on Lockheed Martin’s judgment and objectivity in performing these tasks.

The agency responds that it had no obligation to—and that it did not—consider the impact that Lockheed Martin’s past and ongoing environmentally-regulated activities may have on Lockheed Martin’s performance of this contract because “this procurement is for computer support/systems engineering services, not enforcement or regulatory advice.”⁹ Agency’s Post-Hearing Brief at 2. At the hearing conducted by GAO in connection with this protest,¹⁰ the technical evaluator offered by the agency to speak on behalf of the technical evaluation panel (TEP), testified that the panel did not consider conflict of interest issues. Specifically, this evaluator testified as follows:

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coordinating with the U.S. Air Force, which is working with the aerospace and defense industry to conduct preliminary studies of the potential health effects of perchlorate exposure associated with several sites across the country, including the Redlands site.

Protester’s First Amended Protest, attach. A, at 69.

⁸ There is no dispute that Lockheed Martin submitted a certification with its proposal, as required by sections K and L of the RFP, representing that it was “not aware of any information bearing on the existence of any potential organizational conflict of interest.”

⁹ The agency maintains that approximately 70-75 percent of the work to be performed under this contract will deal with “administrative” systems, such as payroll, personnel, and grants management. Agency’s Post-Hearing Brief at 3.

¹⁰ In resolving this protest, GAO conducted a hearing on the record, during which testimony was provided by various government and SAIC witnesses, including: the agency’s contracting officer, a technical evaluator, contract transition manager, and internal cost auditor; and two SAIC managers under the predecessor contract.

Q. [C]an [you] provide us [with] what your understanding was with regard to OCI and what the TEP did prior to source selection with regard to OCI.

A. Sure. My focus was on the--on evaluating the capability of the bidders. And so[,] so far as the OCI itself, that was something that was addressed by the contracting officer, and it wasn't something that we weighed in on or needed to weigh in on. It was something that was outside our particular focus.

Q. So prior to the source selection decision, the issue--was the issue of conflict of interest discussed by the TEP at all?

A. No, it was not.

Hearing Transcript (Tr.) at 87-88.

Similarly, the contracting officer testified that, other than the corporate OCI plan submitted by Lockheed Martin--which discussed the general procedures Lockheed Martin will employ to identify future conflicts, but did not address either its ongoing environmentally-regulated activities or the particular requirements of this contract--the agency gave no consideration to any potential conflicts of interest created by Lockheed Martin's prior or current activities.¹¹ Tr. at 10, 15-18.

For the reasons discussed below, we are unpersuaded that the agency could reasonably conclude that it need not give any consideration to the potential that Lockheed Martin may suffer impaired objectivity in performing a portion of the contract requirements contemplated by this solicitation due to its considerable involvement with activities and facilities that are subject to environmental regulations.

First, as SAIC points out, there are various portions of the statement of work that directly conflict with the agency's assertion that the contract is unrelated to the agency's environmental regulatory responsibilities. For example, with regard to the tasks to be performed in the area of "statistical surveys," the solicitation states that the contractor will: "Develop surveys, samples, and questionnaires and related

¹¹ The contracting officer noted that, because a significant portion of this contract calls for information technology (IT) support, there were three other contracts involving IT support--a "software development contract," an "architectural support contract," and an "advisory and assistance" contract--that the agency reviewed for purposes of identifying potential conflicts caused by offeror involvement in those contracts. Tr. at 8-9.

documentation.” RFP at C-9. At the GAO hearing, one of SAIC’s contract managers testified that, under the predecessor contract,¹² SAIC had been tasked with developing a series of questionnaires designed to elicit information concerning the testing and sampling practices used by certain public drinking water systems. Tr. at 178-79. The surveys had been designed to assess how often water was being sampled for various bacteria or other pathogens and what kind of water treatment was being applied.¹³ Tr. at 179.

Further, Lockheed Martin’s own proposal provides additional support for SAIC’s assertions that the scope of work under this contract encompasses various activities associated with EPA’s assessment of environmental conditions. Specifically, in responding to the “statistical surveys” portion of the solicitation, Lockheed Martin’s proposal states:

We have designed and implemented questionnaires and surveys to meet EPA requirements that are clear and concise. For example, we evaluated information collected from [deleted] along a potentially contaminated river to determine long-term contaminant ingestion and corresponding health effects.

Agency Report, Tab 4, Lockheed Martin Proposal, at III.2-32.

At the GAO hearing, agency personnel acknowledged that the scope of work of this contract could reasonably include designing and implementing surveys similar to the type described in Lockheed Martin’s proposal, specifically testifying as follows:

Q. Is it your position that under the [protested] contract, Lockheed can be tasked with designing and implementing surveys to gather

¹² In responding to SAIC’s initial protest, the contracting officer specifically referenced the manner in which work had been performed under the predecessor contract as indicative of the manner in which this contract will be performed. Contracting Officer’s Statement, Feb. 19, 2004, at 4. Accordingly, we view prior task orders issued under the predecessor as relevant to the type of task orders that may be issued under this follow-on contract.

¹³ The portion of the GAO hearing during which testimony was elicited regarding the type of work performed under the preceding contract, was conducted in a somewhat unusual manner. In essence, GAO moderated a “panel discussion” consisting of two SAIC participants and three agency participants, all of whom had been involved with performance of the preceding contract. Each of the participants was given an opportunity to hear and react to other participants’ testimony. Although the agency participants questioned the significance of the above-referenced survey, there was no dispute that SAIC was, in fact, tasked to perform the work described.

information on things such as contaminant ingestions and health effects?

A. I don't see a reason why they couldn't.

Tr. at 169.

Upon further questioning, this government witness then testified that it would be inappropriate for Lockheed Martin to be tasked with conducting this type of survey if there were a Lockheed Martin production facility located in the area being surveyed, concluding "this [the presence of a Lockheed Martin facility] would clearly be a conflict of interest." Tr. at 171-72.

In defending against this protest, the agency argues that it intends to engage in ongoing monitoring and supervision of Lockheed Martin's contract performance in a manner that will effectively neutralize potential conflicts. However, such post-award assertions do not negate the agency's pre-award obligation to "identify and evaluate potential organizational conflicts of interest." See FAR § 9.504. As discussed above, the record unambiguously establishes that the agency gave no consideration to Lockheed's past and ongoing performance of environmentally-regulated activities and, similarly, gave no consideration to the impact those activities could have on Lockheed Martin's judgment and objectivity in performing certain tasks that are reasonably within the scope of the contract. Our concern with the agency's failure to consider the potential conflicts of interest is heightened by the fact that both the agency and Lockheed Martin are intent on experiencing substantial "growth" in the contract--increasing both the volume of tasks to be performed and the customer base that relies on this contract, specifically expressing the intent to expand the base to EPA's "clients" and "partners," including "other Federal and state agencies" and "local governments, contractors, and researchers." RFP at C-2, C-4; Agency Report, Tab 4, Lockheed Martin Proposal, at III.2-1.

On this record, we conclude that the agency could not reasonably determine that it need not give any consideration to the potential conflicts of interest created by Lockheed Martin's substantial involvement in environmentally-regulated activities while simultaneously performing certain tasks under this contract, which the agency now concedes, at least in certain circumstances, would clearly be a conflict of interest.¹⁴ Tr. at 171-72.

¹⁴ SAIC has identified various additional areas in the solicitation's statement of work that may similarly create conflicts of interest, including, for example, tasks associated with environmental modeling, and systems development, maintenance, and operation. Further, as noted above the volume of work and customer base are likely to expand substantially. Accordingly, our concerns regarding potential conflicts of interest are not limited to those specifically discussed above. Consistent
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The protest is sustained.¹⁵

RECOMMENDATION

We recommend that the agency perform a thorough assessment of Lockheed Martin's environmentally-regulated activities in the context of the entire scope of work to be performed under this contract, and perform a reasonable, documented assessment that identifies and evaluates the potential conflicts that may arise due to Lockheed Martin's environmentally-regulated activities and interests.¹⁶ With regard

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with our recommendation below, we expect the agency to perform a thorough, documented, review regarding all potential conflicts, not limited to those discussed here.

¹⁵ In its initial protest and first supplemental protest (filed on January 23 and 30, 2004, respectively) SAIC argued that the procurement was flawed for various additional reasons, including that the agency improperly evaluated SAIC's oral presentation, failed to conduct meaningful discussions, and failed to properly evaluate Lockheed Martin's proposed direct labor rates. SAIC subsequently expressly withdrew some of these allegations. To the extent the allegations were not withdrawn, we have considered them and conclude that they do not provide additional bases for sustaining the protest. In contrast, on March 4, SAIC submitted a second supplemental protest, challenging the agency's evaluation of Lockheed Martin's proposal with regard to certain proposed indirect rates which were [deleted]. Based on the record provided, including the testimony of the EPA's cost evaluator, we have concerns regarding the agency's evaluation of Lockheed Martin's proposed indirect rates. For example, although the solicitation expressly provided that [deleted] information must be provided, Lockheed Martin's proposal did not include that information for some of its proposed rates. Further, although the record indicates that the contracting officer believed that the Defense Contract Audit Agency had verified all of Lockheed Martin's proposed rates, this was not the case. Tr. at 48-49; 288-89, 313-14, 320-21. Finally, the agency's cost auditor repeatedly testified that, rather than focusing on whether there was a basis to accept Lockheed Martin's proposed rates, she focused on whether there was a basis to "question" the rates. Tr. at 289, 295, 296-99, 301, 303, 305, 310-12. In light of our recommendation, below, regarding the potential conflict of interest, we suggest that the agency revisit the basis for determining that Lockheed Martin's proposed indirect rates--that will be applied to performance of this contract, valued in excess of \$700 million, where the agency projects that 90% of the tasks orders will be issued on a cost-reimbursable basis--were reasonable and realistic.

¹⁶ It is not clear whether the agency will need to request additional information from Lockheed Martin in making this assessment. As SAIC has demonstrated in pursuing
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to areas of contract performance creating significant conflicts, the agency should establish and document a course of action that will effectively avoid, neutralize or mitigate the conflict. See FAR §§ 9.504, 9.506. In the event the agency determines that a potential conflict exists which cannot be avoided, neutralized or mitigated, it should either terminate the contract with Lockheed Martin and award a contract to the offeror whose proposal represents the best value to the government, consistent with the terms of the solicitation and applicable law and regulation or, alternatively, amend the solicitation and seek revised proposals from all offerors. We further recommend that the agency reimburse SAIC for the costs of filing and pursuing its protest, including reasonable attorney's fees. SAIC's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2004).¹⁷

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General Counsel

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this protest, there appears to be a substantial amount of publicly available information regarding the scope of Lockheed Martin's activities. Nonetheless, we leave this matter to the agency's reasonable discretion.

¹⁷ We note that the agency determined to proceed with contract performance, notwithstanding the protest, on the basis that performance is in the best interests of the government, citing to FAR § 33.104(c)(2)(i). Letter from EPA to GAO (Jan. 29, 2004). We also note that, pursuant to the Competition in Contracting Act of 1984, when our Office sustains a protest following an agency's determination to proceed with contract performance on the basis of the "best interests of the United States," we are statutorily required to make our recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. § 3554(b)(2) (2000).