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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** The Analysis Group, LLC

**File:** B-401726.3

**Date:** April 18, 2011

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Thomas L. McGovern III, Esq., Michael D. McGill, Esq., and Keith D. Burney, Esq., Hogan Lovells US, LLP, for the protester.

James J. McCullough, Esq., and Michael J. Anstett, Esq., Fried, Frank, Harris, Shriver & Jacobson, LLP, for Science Applications International Corporation, an intervenor.

Liana D. Henry, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency failed to give adequate consideration to awardee's potential organizational conflicts of interest (OCI) is denied, where record shows that agency extensively investigated potential OCIs and, after completing its investigation and concluding that there was a remote possibility of an OCI, properly executed a waiver of the residual OCI.
  2. Protest of agency's method of evaluating price is dismissed as untimely where protester knew or should have known from reading the solicitation that agency did not intend to normalize the level of effort for all offerors.
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### DECISION

The Analysis Group, LLC (TAG), of Falls Church, Virginia, protests the issuance of a task order to Science Applications International Corporation (SAIC), of McLean, Virginia, under request for quotations (RFQ) No. GSC-TFMG-09-32148, issued by the General Services Administration (GSA) to acquire--on behalf of the Department of the Air Force's Deputy Chief of Staff for Operations, Plans, and Requirements, Strategic Plans and Policy Division (A5XP)--various support services in connection with A5XP's mission. TAG asserts that the agency did not adequately consider circumstances showing that SAIC may have an "impaired objectivity" organizational conflict of interest (OCI), and then executed an improper waiver of any remaining

OCI that SAIC may have. TAG also challenges the adequacy of the agency's source selection decision.

We deny the protest.

## BACKGROUND

The RFQ contemplated that a task order would be issued under the successful vendor's Federal Supply Schedule (FSS) contract on the basis of price and several non-price considerations, with the non-price considerations being collectively more important than price. RFQ at 12-1. The agency received two quotations, from TAG and SAIC. After hearing oral presentations from both vendors and evaluating their quotations, the agency determined that SAIC's quotation was the best value. In this regard, although SAIC's quotation was higher priced than TAG's, it was rated excellent overall, whereas TAG's was rated only acceptable.

After learning of the resulting award to SAIC, TAG filed a protest at our Office asserting that the agency had misevaluated proposals, improperly engaged in discussions with SAIC but not with TAG, and failed to consider whether SAIC had an impermissible "impaired objectivity" type OCI. We sustained TAG's protest, finding that the agency had engaged in discussions with SAIC but not the protester, and also finding that the agency had not given consideration to whether SAIC had a potential "impaired objectivity" type OCI. The Analysis Group, LLC, B-401726, B-401726.2, Nov. 13, 2009, 2009 CPD ¶ 237. We recommended that the agency reopen the acquisition to engage in discussions with both concerns, and further, that the agency, in consultation with the Air Force, give careful consideration to, and adequately document its consideration of, whether SAIC had an "impaired objectivity" type OCI. Id. at 7.

The agency thereupon reopened the acquisition, provided both firms discussion questions, and obtained and evaluated revised quotations. Supplemental Document Production (SDP), exhs. 2, 3, 4; Supplemental Consensus Technical Evaluation Report. In addition, the agency assembled an OCI analysis team comprised of technical and program experts from GSA and the Air Force to review the question of whether SAIC had a potential OCI. This team reviewed detailed material provided by SAIC in its quotation relating to other contracts that potentially could give rise to an OCI, and also conducted independent research (discussed below) into whether SAIC had an OCI. On the basis of that review, the OCI analysis team concluded that, even with a proposed mitigation plan, SAIC continued to have a potential "impaired objectivity" type OCI. Agency Report (AR), exh. 9.

GSA then consulted with the Air Force concerning its views about the relative risk arising as a consequence of SAIC's potential OCI. In response, the Air Force advised GSA that it viewed the risk as low; that the corporate expertise and involvement of SAIC with many technologies and subject domains related to A5XP's

mission that created the potential for an OCI also were the same skills that A5XP viewed as contributing to SAIC's expected effective performance of the requirement; and that the agency was prepared to accept that risk in order to have SAIC perform the solicited requirement. Air Force Letter to GSA's contracting officer, Sept. 21, 2010. After being advised of the Air Force's position, GSA executed a determination and finding (D&F) waiving any remaining OCI that SAIC may have. Agency Motion for Summary Denial, exh. 1. Following execution of the D&F, the agency again issued a task order to SAIC, finding that its quote offered the best value to the government. SDP, exh. 5. After being advised of the agency's decision, TAG filed this protest.

## OCI

As noted in our earlier decision, the RFQ requires the successful firm to provide expertise to the Air Force in a number of subject areas. Under task three, the successful contractor will be required to provide a broad range of objective advisory and assistance services, technical analysis, and support in the area of counter-proliferation of weapons of mass destruction, including combating chemical, biological, radiological and nuclear weapons (C-CBRN). RFQ, Statement of Work (SOW), at 2-31 to 2-41. In both its initial protest, and the current protest, TAG maintains that the requirements under task three pose an impaired objectivity OCI for SAIC because the firm also sells C-CBRN-related detection and prevention products and services. In short, the protester maintains that SAIC will be unable to provide objective advice in this area because any advice given could affect sales of its products.

In its current protest, TAG asserts that the agency failed to adequately consider and investigate whether SAIC has an "impaired objectivity" OCI. In this connection, TAG principally asserts that the agency's OCI review improperly was limited primarily to information provided by SAIC; according to the protester, since SAIC in effect selected the information reviewed by the agency in analyzing the OCI question, the agency's conclusion is inherently unreasonable. TAG further asserts that since the agency's analysis of the OCI question was faulty, its execution of the D&F waiving any remaining OCI also was faulty inasmuch as the waiving authority was unable to appreciate the actual potential risk of an OCI. Finally, in connection with the D&F, TAG also asserts that it improperly included a blanket waiver of potential OCIs that may arise in the future.

The responsibility for determining whether a conflict exists rests with the procuring agency. CIGNA Gov't Servs., LLC, B-401068.4, B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶129 at 12. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of

counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. Federal Acquisition Regulation (FAR) §§ 9.504, 9.505. In reviewing bid protests that challenge an agency's conflicts determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act (APA). See Axiom Res. Mgmt, Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of OCIs, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." Id. The standard of review employed by this Office in reviewing a contracting officer's OCI determination mirrors the standard required by Axiom. In this regard, where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See, e.g., MASAI Tech. Corp., B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8; Business Consulting Assocs., LLC, B-299758.2, Aug. 1, 2007, 2007 CPD ¶ 134 at 9-10; Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 10-18; Alion Sci. & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 5-8.

We have no basis to object to the adequacy of the agency's inquiry into whether SAIC has an OCI. The protester is correct that the starting point for the agency's effort was to obtain information from SAIC that was to be submitted in response to the discussions conducted during the agency's corrective action; both SAIC and TAG were requested to provide detailed information relating to any potential OCI, and the firm's strategy to mitigate any potential OCI. AR, exhs. 2, 3. In response to this request for information, SAIC provided detailed information, including a matrix<sup>1</sup> listing some [deleted] contracts that SAIC had identified as potentially presenting an OCI, along with an OCI mitigation plan intended to address any OCI concerns. SAIC Revised Cost Proposal, Tab F.

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<sup>1</sup> The matrix presented by SAIC divided the firm's other contracts into three tiers. Tier one included contracts that SAIC viewed as presenting an "apparent OCI" because performance of those contracts, along with the current requirement, has the possibility of creating an OCI in limited circumstances if not mitigated. SAIC Revised Cost Proposal, Tab F, at 1. Tier two included contracts that SAIC viewed as presenting a "potential OCI" based on the firm's conclusion that performance of those contracts and the current requirement, under remote circumstances, presented the possibility that potential OCIs might evolve into an apparent OCI in the future. Id. at 3. Tier three included contracts that SAIC viewed as presenting no actual, apparent or potential OCI. Id. at 13.

The record shows that SAIC's matrix was not simply accepted by the agency without critical analysis. Rather, the record shows that the agency's OCI analysis team carefully reviewed the contracts listed in SAIC's matrix; while the team agreed with SAIC's characterization of the contracts (and the potential for mitigating possible OCIs) in some instances, it disagreed in other instances. For example, the record shows that, in reviewing SAIC's contracts, the OCI analysis team reached the following conclusion relating to the tier one and two contracts:

The single most significant potential impaired objectivity OCI that SAIC noted revolves around the Joint Capabilities Integration and Development System (JCIDS). SAIC mentions JCIDS in its discussion of all [deleted] of the Tier 1 and Tier 2 contracts.<sup>2</sup> A5XP's analysis of SAIC and JCIDS was as follows:

"The potential for an OCI in A5XP is very low. A5XP is the Strategic Plans and Policy Division, which does not determine requirements, capabilities, or specifications, nor has any influence on future military acquisition of products or services. Our role is to ensure AF policies are in line with that of higher authorities."

"The only risk for an OCI stems from our contractor's access to military requirements documents as they are vetted through the Joint Capabilities Integration and Detection System (JCIDS)."

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"When coupled with the staffing process within A5XP, which acts as an additional OCI mitigation layer, the mitigation strategies outlined by SAIC [excluding itself from participation in any JCIDS reviews or inputs related to this program] are effective and acceptable."

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The OCI Analysis Team accepted and concurred with A5XP's analysis of JCIDS. SAIC's JCIDS strategies, which include tasking one of their teaming partners with all JCIDS reviews, when coupled with Air Force oversight of those reviews and the limited scope of those reviews (policy and directives compliance), taken together constitute an effective mitigation for this potential impaired objectivity OCI.

AR, exh. 9, at 10-11. On the other hand, the record also shows that the agency criticized SAIC's characterization of certain of its contracts, as well as its proposed

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<sup>2</sup> Earlier in their discussion of this consideration, the OCI analysis team noted that, in order to mitigate any potential OCI in connection with JCIDS activity, SAIC proposed to exclude itself from participation in any reviews or inputs related to this program.

mitigation efforts. See e.g., AR, exh. 9, at 11-17. After a lengthy discussion of the agency's reservations in this connection, the agency concluded as follows:

Although these [mitigation] strategies and concepts are useful, none of them can ensure that zero residual potential OCI remains. As the attached Air Force Findings attest, A5XP understands and is willing to accept this unmitigated potential OCI risk.

AR, exh. 9, at 19.

In addition to this critical analysis of the materials presented by SAIC, the record shows that the agency also independently contacted references from the contracts listed by SAIC, both to verify the accuracy of information presented by SAIC in its matrix, and to inquire whether, in light of the requirements being solicited, the points of contact thought that an OCI might potentially exist in light of the SAIC contract for which they were responsible. AR, exhs., 4, 7, 8.

Additionally, the agency performed independent research relating to the products and services offered by SAIC. That review included an examination of SAIC's own website<sup>3</sup> (which provides detailed information relating to the firm's products and services), AR, exh. 5, as well as an examination of other, independent, sources of information about the company, many of which were critical of the firm and its products and services. AR, exh. 6.

Finally, and most significantly, the agency, in the wake of its review, determined that it could not rule out the remote possibility that there was some residual potential for an OCI because of SAIC's other contracts. Consequently, the agency executed a D&F acknowledging and accepting this residual risk and waiving it, consistent with the requirements of the FAR. In this respect, the FAR establishes that, as an alternative to avoidance, neutralization, or mitigation, an agency head or designee may execute a waiver. Specifically, the FAR provides:

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<sup>3</sup> In its comments responding to the agency report, the protester asserted for the first time that the agency's efforts failed to uncover information relating to three SAIC contracts identified by TAG. An examination of the agency's materials, however, shows that all of the products and services being sold under the contracts identified by TAG (CBRN products and support services, including engineering, research and technology, and integration support services, as well as VACIS scanning and inspection systems) were identified by the agency's research into SAIC's products and services. AR, exh. 5, 6. TAG has not alleged or demonstrated that the agency's research failed to identify a product or service that is materially different than the products and services identified and considered by the agency, or otherwise included on the list of contracts provided by SAIC.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee.

FAR § 9.503.

Here, the record shows that the contracting officer prepared and submitted a written waiver request that described the agency's investigative efforts to determine if SAIC had an OCI that could not be mitigated and the extent of any residual OCI, and that provided a detailed discussion of the bases for his conclusions that the conflict was not significant and that waiver would be in the best interests of the government. Contracting Officer's Statement, Jan. 21, 2011, exh. 1. The requested waiver was duly executed by the head of the contracting activity, as authorized by FAR § 9.503. Id.

TAG challenges the adequacy of the waiver on the basis that the agency relied solely on information provided by SAIC to reach its conclusions regarding the possible existence of an OCI. As discussed, however, the record shows that the agency's efforts went well beyond mere acceptance of the information presented by SAIC--the agency critically examined the information presented by SAIC, contacted the cognizant personnel for the other contracts to inquire about potential OCIs, and conducted its own independent research into the products and services offered by SAIC. In these circumstances, we have no basis to question the adequacy of the agency's investigative efforts. CIGNA Gov't Servs., LLC, supra.

As a final matter, TAG takes issue with the terms of the waiver itself insofar as it purports to waive future, currently unknown, OCIs that may arise. In this respect the waiver provides that it is being executed, in part, to waive "[t]he risk of unknown current or future SAIC contracts that may impact the planned A5XP task order." Contracting Officer's Statement, exh. 1, at 7. According to TAG, the agency cannot waive unknown future OCIs.

As an initial matter, irrespective of whether or not an agency properly can waive future, unknown OCIs,<sup>4</sup> GSA's alleged attempt to do so here does not serve to invalidate the agency's waiver of the known potential OCIs on the part of SAIC, a waiver that, as discussed, we find proper. In any case, while we agree with the

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<sup>4</sup> As we have previously noted, typically, the most appropriate time to address future or unknown OCIs is if, and when, they arise in connection with subsequent awards; such future or unknown OCIs can and should properly be analyzed at the time of those subsequent award decisions. Axiom Resource Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117 at 6-7

protester that an agency may not properly waive unknown or future OCIs, the record shows that this was understood by the agency and that the contracting officer did not intend to waive unknown future OCIs. The contracting officer states:

As the contracting officer, in my ongoing coordination with A5XP, I plan to remain aware of any changes that impact potential OCIs. I will assure that the A5XP personnel are to report any new or unknown existing contract vehicles where additional potential risks have been identified. My intention is to address any new OCI issues and handle them in accordance with my duties under the FAR. It was not my intention that the waiver would cover unanticipated conflicts that were not considered in the waiver request. Any new risks would go through the same scrutiny as identified in the Waiver D&F for adequacy of mitigation. If any risks are found to be real OCI and complete mitigation is not provided then meetings would ensue between the Government and the contractor to establish acceptable mitigation procedures or complete avoidance. The approved waiver represents the risks currently identified and is not intended to be a catch all for potential risks identified in the future.

Contracting Officer's Supplemental Statement, Feb. 15, 2011, at 2-3. We have no basis to question the contracting officer's representations in this regard. Valdez Int'l Corp., B-402256.3, Dec. 29, 2010, 2010 CPD ¶ 13 at 6 (GAO looks to the entire record, including the contracting officer's statement to our Office, in reviewing a contracting officer's judgment concerning a contractor's possible OCI.) In light of the foregoing, we deny TAG's protest of the OCI review.

## PRICE EVALUATION

TAG asserts that the agency's price evaluation was unreasonable. Specifically, TAG asserts that the record shows that there was a difference between the number of hours it proposed to perform the requirement and the number of hours proposed by SAIC, but that the agency's evaluation failed to "normalize" the number of hours between the firms in order for there to be what TAG describes as an "apples-to-apples" comparison of the two proposals.

This aspect of TAG's protest is untimely. The RFQ specifically required offerors to provide the agency with information relating to the labor categories (from the firm's FSS contract) to be used to staff the requirement, along with number of labor hours by category that would be used. RFQ § 11.6 (c). The RFQ also contemplated oral presentations from the firms, during which the firms were required to discuss their project staffing approach and strategy, as well as their rationale for their proposed labor mix:

Explain the rationale for projected staffing and approach to how each task and subtask is staffed to include estimated hours and labor mix of the key and non-key personnel, their expected work location, clearance level, and functional knowledge.

RFQ § 11.8.5.2 (b). In addition, the RFQ expressly provided that, among other things, the agency would evaluate the firms' estimated hours and labor mix. RFQ § 12.3.2.

From these solicitation provisions, it is clear that the agency contemplated that firms would offer differing labor categories and differing numbers of hours to staff the requirement, and that the firms' differing proposed staffing approaches would be evaluated by the agency. Thus, to the extent that TAG believed the agency should have used the same staffing level and labor mix for both firms, that is, normalize the staffing, it was required to protest the terms of the solicitation prior to the deadline for submitting quotations. 4 C.F.R. § 21.2 (a)(1) (2010). Since TAG did not raise this aspect of its protest until after award of the contract, we dismiss it as untimely. Ball Aerospace & Tech Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 4-5.<sup>5</sup>

#### BEST VALUE SELECTION DECISION

TAG asserts that the agency's cost/technical tradeoff was unreasonable. According to the protester, the agency's source selection document fails adequately to describe either the specific strengths in the SAIC proposal or the weaknesses in TAG's proposal that the agency relied on in deciding to make award to SAIC at a price premium.

We find no merit to this aspect of TAG's protest. Where, as here, a solicitation contemplates award on a best value basis and provides that the non-price considerations are significantly more important than price, agencies have discretion to make award to a concern that has submitted a higher-priced, technically superior

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<sup>5</sup> In its comments relating to this issue, TAG also suggests for the first time that SAIC had insider knowledge from performing the requirement that somehow enabled it to more precisely tailor its staffing to the agency's requirements. To the extent this constitutes an independent basis for protest, it also is untimely. This contention was advanced in TAG's supplemental comments filed on March 25, 2011. However, TAG was provided a copy of SAIC's proposal (as well as the agency's price evaluation materials showing its evaluation of SAIC's proposed staffing) on February 25. Since a review of these materials revealed SAIC's proposed staffing approach, to be timely, TAG was required to file within 10 days of receiving those materials. 4 C.F.R. § 21.2 (a)(2). Since TAG first advanced this concern more than 10 days after it knew or should have known of the basis for its contention, we dismiss this aspect of its protest as untimely.

quote; the agency's decision is governed only by the test of rationality and consistency with the solicitation's stated evaluation scheme. Tessada and Assocs., Inc., B-293942, July 15, 2004, 2004 CPD ¶ 170 at 8.

As an initial matter, we point out that the price difference between the two quotes was small. TAG's overall price was \$88,206,553, while SAIC's overall price was \$89,628,027, or only approximately 1.6 percent higher than TAG's quote. Price Negotiation Memorandum (PNM) at 8. The record further shows that the SAIC quote was rated superior to the TAG quote under each of the non-price considerations, as well as overall, receiving an overall rating of excellent, compared to the overall rating of good assigned to the TAG quote. Id. at 4. TAG has not protested the assignment of these ratings or challenged the underlying agency evaluation and narrative materials prepared in support of the agency's evaluation conclusions.

Rather, this aspect of TAG's protest focuses on the sufficiency of the narrative included in the PNM to support the agency's cost/technical tradeoff; in effect, TAG asserts that the PNM does not identify the specific strengths in the SAIC quote or the weaknesses in the TAG quote that were relied on by the agency to support its selection decision. We disagree. The PNM specifically articulates the reasons for the agency's source selection decision. For example, the PNM specifically takes note of the fact that TAG's proposal repeatedly does little more than parrot back the terms of the solicitation, without including any real, in-depth, explanation of how the firm intends to fulfill the requirements of the RFQ. PNM at 15. In addition, the PNM specifically incorporates and relies on the findings memorialized in the agency's technical evaluation board (TEB) report. Simply stated, we find that the agency's PNM, as well as the underlying TEB consensus report that was effectively incorporated into the PNM, adequately articulates the agency's rationale for making award to SAIC at a modest price premium on the basis of SAIC's evaluated technical superiority under each of the RFQ's evaluation factors.

The protest is denied.

Lynn H. Gibson  
General Counsel