DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220444 DATE: February 14, 1986

MATTER OF: SysteMetrics, Inc.

DIGEST:

1. An agency reasonably determined that a potential organizational conflict of interest existed where the protester's status as the current contractor for a related effort would tend to impair its objectivity in performing the subsequent contract and the steps taken by the protester to eliminate the conflict were deemed to be inadequate.

2. Where a contracting agency has a reasonable basis to exclude a firm from the competition because of an organizational conflict of interest, this determination properly may be made during the actual evaluation and source selection process when the conflict becomes clear to the agency, even though the solicitation itself did not expressly provide that the firm or other offerors of the same status would be ineligible to receive the award.

3. Where a solicitation provision clearly puts offerors on notice not to rely on the oral representations of agency personnel, an offeror must suffer the consequences of its reliance upon such advice. Therefore, although a firm may have detrimentally relied upon oral advice into submitting a proposal for a contract it was ultimately precluded from receiving because of a potential organizational conflict of interest, the firm is not entitled to recover its proposal preparation costs since it was reasonably excluded from the competition.

SysteMetrics, Inc. (SMI) protests a determination by the Department of Health and Human Services (HHS) to exclude its proposal submitted under request for proposals (RFP)

No. 81-85-HHS-OS from further award consideration because of a potential organizational conflict of interest. The procurement was initiated by HHS' Office of the Inspector General for the performance of a "National Diagnosis Related Group Validation Study." SMI, which is currently performing a contract for HHS' Health Care Financing Administration, complains that the agency improperly determined that a potential organizational conflict existed with regard to its simultaneous performance of that contract. We deny the protest.

Background

Under Medicare's Prospective Payment System, payments for inpatient operating costs are based upon a fixed, predetermined amount for each case according to the particular Diagnosis Related Group (DRG) into which the case has been classified by the health care provider. In order to monitor the performance of hospitals receiving Medicare reimbursement payments, 54 Peer Review Organizations (PROs) have been established nationwide to review hospital admissions and discharges to see if DRG classifications were correct and supported by the entire medical record in each specific case. Under SMI's current contract with HHS' Health Care Financing Administration (hereinafter the "SuperPRO" contract), the firm acts in an oversight capacity by reviewing the performance of each of the 54 PROs. A principal objective of the "SuperPRO" contract is to validate the determinations made by PROs with respect to hospital admission reviews and DRG validations.

The purpose of the "National Diagnosis Related Group Validation Study" at issue in this protest is to assure, through the review of medical records from a select sample of hospitals receiving Medicare reimbursements, that the DRG assignments made by the hospitals are substantiated by the records and that the admissions and services provided were appropriate. Among the principal objectives of the effort (hereinafter the DRG Validation Study) are: (1) to determine the amount of DRG errors in the hospital record sample and project nationwide error rates; (2) to determine the impact of errors on a case mix index; and (3) to compare the findings of PROs in conducting DRG validations with the contractor's own findings.

The RFP excluded PROs from competing for the DRG Validation Study contract by specifically providing that:

> "[PROs] and full or part-time employees of these organizations will not be considered as potential offerors because of conflict of interest inherent in the review of the DRG Validation which they may have previously conducted."

SMI, as the contractor for the Health Care Financing Administration's "SuperPRO" contract, was concerned that its status in that regard would cause HHS to assume that this would present a potential organizational conflict of interest. SMI therefore contacted the contracting office to ascertain whether its "SuperPRO" role would result in its exclusion from the competition, but was orally advised by HHS personnel that this would present no problem.

SMI then submitted a proposal for the DRG Validation Study at a cost-plus-fixed-fee amount of $528,073. The firm's proposal was initially evaluated, but HHS concluded that SMI's role in the "SuperPRO" contract created a potential conflict of interest principally because the firm could be in the position of reviewing the same medical records for the DRG Validation Study that it had reviewed under the "SuperPRO" contract. Accordingly, SMI's proposal was not considered further, and the award was made to another firm.

SMI contends that HHS improperly determined that a potential conflict of interest existed because of its status as the "SuperPRO" contractor. SMI asserts that the scope of work for the DRG Validation Study does not include the review of any work it performs under the "SuperPRO" contract, since, under the DRG Validation Study, it would not be evaluating its own previous evaluation of a particular PRO.

According to SMI, a PRO is concerned with determining from medical records whether hospitals are making valid DRG assignments and, therefore, whether these hospitals are being correctly reimbursed by Medicare. In performing the "SuperPRO" contract, SMI asserts that it is not evaluating particular DRG assignments for the purpose of ensuring that Medicare is being correctly charged, as it would be under the DRG Validation Study contract, but rather is determining whether each PRO has adequately performed its task of validating the DRG's assigned by particular hospitals. Since, as SMI urges, the two efforts have dissimilar objectives, the firm believes that there is no potential conflict of

interest even if it should have occasion to review the same medical record, and accordingly, that it is entitled to the award of the DRG Validation Study contract as the low offeror.1/

Alternatively, SMI argues that even if a potential conflict of interest should exist, the firm took positive steps in its proposal to eliminate the conflict. SMI notes that its proposal included a memorandum to all personnel proposed to work on the DRG Validation Study contract should the firm receive the award. This memorandum, primarily devoted to the protection of confidential patient data, provided, in pertinent part:

> "In your review, should you receive a medical record for which any of the following situations would apply, you are required to identify such in advance and exclude yourself from any further involvement in the review of any such medical record:
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> . . . . .
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> " Any role in coding the record for DRG reimbursement or any role in any prior review, adjudication or legal interest in the case. . . ."

Consequently, SMI argues that this proposal memorandum should have addressed HHS' concerns as to the potential for an organizational conflict of interest since the affected personnel would be required to sign a document agreeing to abide by its terms and would be precluded from evaluating any medical record under the DRG Validation Study which they had evaluated under the "SuperPRO" contract. Moreover, SMI asserts that, in any event, personnel involved in the "SuperPRO" contract were not proposed to work under the DRG Validation Study contract.

SMI also contends that HHS acted improperly by deciding well into the procurement process that its status as the "SuperPRO" contractor presented a potential conflict of interest, since, as expressly provided in the RFP, the agency had originally determined that only PROs should be excluded from the competition. SMI urges that it relied upon erroneous advice from the agency into submitting a

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1/ SMI's proposed cost was some 13 percent lower than the awardee's proposed cost, but, in fact, the firm was not the low offeror.

proposal, and, therefore, the firm seeks as an alternative remedy the recovery of its proposal preparation costs.

Analysis

The Federal Acquisition Regulation (FAR) recognizes that an organizational conflict of interest exists when the nature of the work to be performed under a proposed government contract may, without some restriction on future activities, result in an unfair competitive advantage to the contractor, or impair the contractor's objectivity in performing the contract work. FAR, 48 C.F.R. § 9.501 (1984). Applicable here, the FAR also provides that contracts involving consulting services shall not generally be awarded to a contractor that would evaluate its own activities without proper safeguards to ensure objectivity and protect the government's interest. FAR, § 9.505-3(b).

HHS contends that SMI's current performance of the "SuperPRO" contract will impair the firm's objectivity in performing the proposed DRG Validation Study because the two efforts overlap to a certain extent in terms of their objectives. As HHS explains, the "SuperPRO" contract calls for the review of patient records from a sample of some 40,000 cases reviewed by the PROs nationwide, whereas the DRG Validation Study, in part, seeks the review of 2400 randomly selected cases that had previously undergone PRO review. Because of the size of the "SuperPRO" sample, HHS was concerned that the same cases could be included in both efforts, so that SMI potentially could be reviewing a case under the DRG Validation Study that it had, or was currently reviewing, under the "SuperPRO" contract, hence affecting the firm's objectivity. HHS states that it has already identified two cases in the DRG Validation Study sample which SMI has reviewed under the "SuperPRO" effort.

In one case, SMI disagreed with the particular PRO's determination that the hospital had made an incorrect DRG assignment on the patient's medical record. In the other case, SMI rejected the hospital's DRG assignment and the PRO's concurrence in that assignment, and concluded that another DRG coding was appropriate. HHS contends that these examples illustrate that SMI will be unable to provide objective findings to the Office of the Inspector General when the firm has already provided its findings on these cases to the Health Care Financing Administration. HHS states that a biased finding in even one case, given the

presumption that SMI would tend to reach the same result in a subsequent review, will cause large-scale statistical distortion when projecting national error rates, one of the principal objectives of the DRG Validation Study. Accordingly, HHS contends that SMI was properly excluded from any further award consideration because of this potential conflict of interest.

This Office has consistently held that the responsibility for determining whether a firm has a conflict of interest if a firm is awarded a particular contract and to what extent a firm should be excluded from the competition rests with the procuring agency, and we will not overturn such a determination except when it is shown to be unreasonable. Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94. Since HHS has already identified actual patient cases to be included in the DRG Validation Study sample which have already been reviewed by SMI under the "SuperPRO" contract, we see nothing unreasonable in the agency's determination that a potential conflict of interest would be inherent in making an award to SMI. The very fact that SMI recognized in its proposal that HHS would be concerned that its "SuperPRO" role created a potential conflict discredits its present argument that the two efforts are unrelated.

Furthermore, contrary to SMI's assertion, we do not believe that HHS acted improperly by deciding well into the procurement process that the firm's "SuperPRO" status required its exclusion from further award consideration, even though the RFP had expressly provided that only PRO's would be excluded. Although we agree with SMI that a contracting agency has the responsibility to identify and evaluate potential organizational conflicts of interest as early in the procurement process as possible, FAR, § 9.504(a)(1), we do not believe that there was a failure of that duty here. In our view, the record fairly suggests that the potential conflict of interest only became clear to HHS upon its initial evaluation of SMI's proposal. In any event, we have held that a contracting agency may properly disqualify a firm because of an organizational conflict of interest even though no prior notice was given the firm. See LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531; Acumenics Research and Technology, Inc., B-211575, supra. We note that our conclusion in those cases specifically related to a situation where there was no notice given in a prior contract that the firm would be excluded from the follow-on contract, but we think our view is equally applicable where, as here, the agency later has a proper

basis to exclude a firm for conflict of interest reasons even though the solicitation itself did not expressly provide that the firm, or other offerors of the same status, would be ineligible to receive the award.

With regard to SMI's assertion that it took positive steps in its proposal to eliminate the conflict, we must assume that HHS regarded these measures as inadequate. Although the proposal memorandum, in fact, recognized that a potential conflict could exist, SMI acknowledges that the memorandum was broadly drawn, with the primary emphasis on protecting the confidentiality of patient data, and that there was no mention of the "SuperPRO" effort. Therefore, despite language in the memorandum that proposed personnel were to exclude themselves from the review of any medical record where they had "any role in any prior review," it is apparent HHS concluded that this was not an adequate safeguard to ensure the firm's objectivity in performing the DRG Validation Study and to protect the government's interest. FAR, § 9.505-3(b), supra. Since SMI's proposal received a full initial technical evaluation, the fact that the evaluation narratives repeatedly state that SMI failed to describe in its proposal approaches to avoid the potential conflict reasonably indicates that the memorandum was fairly considered and found to be insufficient.

To the extent SMI complains that contracting personnel advised the firm that its status as the "SuperPRO" contractor would not disqualify it from the competition, it is well settled that where a solicitation provision clearly puts offerors on notice not to rely on the oral representations of agency personnel, an offeror must suffer the consequences of its reliance upon such advice. Jensen Corp., 60 Comp. Gen. 543 (1981), 81-1 CPD ¶ 524. Here, the RFP incorporated the standard clause set forth at FAR, § 52.215-14 (FAC 84-5, Apr. 1, 1985), which provides that any oral explanations or instructions given before the contract award will not be binding. Thus, despite the allegation that statements from agency personnel may have led SMI into submitting a proposal for a contract it was ultimately precluded from receiving, that advice neither binds the government to consider SMI's proposal now nor requires the procurement to be recompeted. See Tri-State Laundry Services, Inc. d/b/a Holzberg's Launderers and Cleaners, B-218042, Feb. 1, 1985, 85-1 CPD ¶ 127. We think it clear that SMI's attempt to have its employees disqualify themselves if necessary shows that SMI knew at the time it submitted its proposal that a potential conflict of interest existed because of its activity in the "SuperPRO" contract notwithstanding the alleged oral assurances to the contrary.

We therefore find SMI's exclusion to be a reasonable exercise of discretion under the circumstances.

Concomitantly, there is no legal basis to allow SMI's recovery of its costs of preparing the proposal. Our Bid Protest Regulations, 4 C.F.R. § 21.6(d) and (e) (1985), provide that such costs are only recoverable where the agency has unreasonably excluded the protester from the procurement. Since HHS reasonably determined that SMI's "SuperPRO" status created a potential organizational conflict of interest so as to require the firm's exclusion from further award consideration, the firm is not entitled to recover its proposal preparation costs even though it may have incurred those costs as the result of reliance upon oral advice from agency personnel. See Ernaco, Inc., B-218106, May 23, 1985, 85-1 CPD ¶ 592.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel