



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: KPMG Peat Marwick
File: B-255224
Date: February 15, 1994

Diane L. Dudley for the protester,
Joel R. Feidelman, Esq., and Lawrence E. Ruggiero, Esq.,
Fried, Frank, Harris, Shriver & Jacobson, for Arthur
Andersen & Company, an interested party.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Agency reasonably determined that the protester was not eligible for award because of an organizational conflict of interest where, if awarded the contract for audit services, the protester would be reviewing its own audits performed for the agency's predecessor entity.

DECISION

KPMG Peat Marwick protests the decision of the United States Enrichment Corporation (USEC) not to evaluate its proposal submitted in response to request for proposals (RFP) No. USECHQ-93-R-0011, issued by the USEC for the performance of financial and compliance audit services. Peat Marwick contends that the USEC improperly determined that it was ineligible for award based on an organizational conflict of interest.

We deny the protest.

The USEC is a wholly owned government corporation established pursuant to an amendment to the Atomic Energy Act of 1954, codified at 42 U.S.C. §§ 2297 et seq. (1988), to initiate the privatization of the United States' uranium enrichment enterprise. To accomplish this goal, on July 1, 1993, the Department of Energy (DOE) transferred to the USEC uranium enrichment assets held by DOE prior to the transition date. The USEC is directed "[t]o operate as a business enterprise on a profitable and efficient basis" and "[t]o maximize the long-term value of the [USEC] to the Treasury of the United States." 42 U.S.C. § 2297a. The financial statements of the USEC are required to "be audited annually by an independent certified public accountant,"

42 U.S.C. § 2297b-5, and the USEC is required to "prepare and submit an annual report of its activities to the President and the Congress." 42 U.S.C. § 2297b-6. After a period of operation, if deemed acceptable, ownership of the USEC will be transferred from the government to private investors. 42 U.S.C. § 2297d.

The RFP, issued on August 20, 1993, contemplated the award of a time-and-materials, task order type contract for a 2-year base period and a 1-year option period. The offeror awarded this contract will be required, among other things, to inventory the uranium enrichment assets transferred by DOE to the USEC, to review DOE's fiscal year (FY) 1993 audit in determining the valuation basis of the assets transferred to the USEC, and to determine the USEC's initial account balances as of the transition date between DOE and the USEC. The RFP stated that an award would be made to the offeror whose proposal, conforming to the RFP, was deemed most advantageous to the government, cost and technical evaluation factors considered.

The RFP required each offeror to identify any actual or potential conflicts of interest by completing a disclosure statement which requested, among other things, that an offeror provide information regarding any business or other relationships with DOE. The RFP defined an organizational conflict of interest as follows:

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

The RFP specifically stated that only those offerors without a conflict of interest would be considered for award.

Four firms, including Peat Marwick and Arthur Andersen & Company, submitted proposals by the time set for receipt of proposals on September 3. In its proposal, Peat Marwick explained that it was uniquely qualified to serve as the independent auditor for the USEC because of its past and current experiences with DOE's Uranium Enrichment Activity (UEA), the predecessor entity to the USEC. Peat Marwick stated that from 1985 to the current time, it has provided financial and compliance audit services for the UEA, but nevertheless believed that its work for this program would not compromise its independence and objectivity if awarded the contract by the USEC. In this regard, in its conflict

of interest disclosure, Peat Marwick included the following statement:

"With respect to our service to [DOE] as auditors for the [UEA], we do not see a conflict between auditing the UEA and auditing the USEC. If we receive the USEC audit contract, we would, in essence, continue to audit the same entity, albeit with different management."

In its proposal Peat Marwick acknowledged that a major challenge for the successful offeror will be ensuring that the transferred uranium enrichment assets are not materially misstated and that the USEC's initial account balances are fairly stated, since these balances will not correspond to DOE's ending balances.

To perform the required audit services for the USEC, Peat Marwick proposed key personnel who participated in financial and compliance audits of the UEA. With respect to its subcontractors, Peat Marwick proposed a former firm partner who has been involved in auditing the UEA's inventories since 1985. Peat Marwick also proposed a former DOE employee and consultant who performed and supervised the preparation of the UEA's financial statements from 1981 to 1990. In its proposal, Peat Marwick stated that "personnel who are currently completing [the UEA's] audit for the period ending June 30, 1993, will be scheduled to perform the USEC audits, ensuring continuity and cost efficiency."

By letter dated September 27, the USEC notified Peat Marwick that its proposal would not be evaluated for award since the firm did not satisfy the qualification criteria in the RFP regarding organizational conflicts of interest. Specifically, the USEC anticipates that it will be involved in a dispute with DOE over the valuation basis of the uranium enrichment assets transferred to the USEC and the USEC's initial account balances. Peat Marwick is responsible for auditing this program for FY 1993, for the period ending on June 30, 1993, at which time DOE transferred the assets to the USEC. The USEC's independent auditor, to be awarded a contract under this RFP, will be required to use Peat Marwick's FY 1993 audit for the UEA in determining the valuation basis of the assets transferred to the USEC and the USEC's initial account balances. The USEC was concerned that if Peat Marwick were awarded the contract under this RFP, the firm would be reviewing its FY 1993 audit for the UEA, thus impairing Peat Marwick's independence and objectivity in performing the FY 1993 audit for the USEC. The USEC believed that this situation would

result in an organizational conflict of interest for Peat Marwick which could not be avoided or mitigated.¹

Peat Marwick maintains that the USEC improperly determined that it was ineligible for award based on an organizational conflict of interest arising from its work for the UEA.

A conflict of interest exists when the contractor's objectivity may be impaired due to the nature of the work to be performed. ICF Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124. The agency is responsible for identifying and resolving conflicts with regard to a particular procurement and in doing so, is required to exercise common sense, good judgment, and sound discretion. Id. An agency should withhold the award of a contract when an actual or potential conflict cannot be avoided or mitigated. Id. We will not disturb a contracting officer's determination regarding a conflict of interest unless it is shown to be unreasonable. Systemetrics, Inc., B-220444, Feb. 11, 1986, 86-1 CPD ¶ 163; R. W. Beck & Assocs., B-218457, July 19, 1985, 85-2 CPD ¶ 60; Acumenics Research and Tech., Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94.

Here, the USEC reasonably determined that there would be a potential, if not actual, conflict of interest if Peat Marwick were awarded a contract to be the USEC's independent auditor in light of the firm's work as the independent auditor for the UEA, the predecessor entity to the USEC. In this regard, since 1985, Peat Marwick has been the independent auditor for the UEA and is currently responsible for the UEA's FY 1993 audit, including the period when DOE transferred the uranium enrichment assets to the USEC. If Peat Marwick were awarded the contract by the USEC, it would be in the position of auditing for the USEC the same assets which it audited for the UEA.

While Peat Marwick states that its work for the UEA did not include actually valuing the uranium enrichment assets, but instead required the firm to ensure that the UEA's valuation

¹Peat Marwick furnished with its proposal a general conflict of interest plan which defined an organizational conflict of interest as existing when the type of work to be performed may "result in an unfair competitive advantage" to Peat Marwick or would "impair Peat Marwick's objectivity in performing the contract work." The plan describes Peat Marwick's general procedures for identifying and resolving conflict of interest situations in order to remain independent. However, Peat Marwick does not dispute the USEC's position that it did not propose specific actions to avoid or to mitigate the organizational conflict of interest under the circumstances here.

methodologies were in accordance with various accounting principles and policies, the fact remains that Peat Marwick did review the UEA's valuation determinations as part of the audit.

The USEC is required to maximize the value of the transferred assets for the purpose of ultimately transferring these assets to private investors and it must have accurate initial account balances. Since Peat Marwick's FY 1993 audit for the UEA will serve as the starting point for the USEC's FY 1993 audit, we think the USEC has reasonable concerns regarding Peat Marwick's ability to independently and objectively review its own work and to properly respond on behalf of the USEC if the valuation of the assets transferred to the USEC and the USEC's initial account balances are questioned.

Peat Marwick's own proposal supports the USEC's concerns. Peat Marwick's proposal reflects the view that the UEA and the USEC effectively are the same entity, and the firm intends to use the same key personnel and subcontractors who participated in the audits of the UEA. In addition, Peat Marwick acknowledges that a major challenge for the successful offeror will be valuing the transferred uranium enrichment assets and determining the USEC's initial account balances. We think the risk of conflict of interest is increased by Peat Marwick's proposal to use the same personnel who participated in auditing the UEA.

Therefore, on this record, we have no basis to question the reasonableness of the USEC's determination to disqualify Peat Marwick in light of an organizational conflict of interest.²

Finally, Peat Marwick alleges that the USEC "preselected" Arthur Andersen for award. However, since Peat Marwick is not eligible for award, and two other firms would be in line for award if the award to Arthur Andersen were set aside,

²Contrary to Peat Marwick's assertion that no conflict of interest exists because it performed the audits of the UEA on behalf of DOE's Office of the Inspector General, we think that the subject matter of the audit, not the entity to whom the independent auditor reports, is the relevant focus. Also, we note that an internal DOE order provides that the Inspector General is responsible for all audits of the programs and operations of DOE.

Peat Marwick is not an interested party to challenge the USEC's award decision. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1993); ICF Inc., supra.

The protest is denied.

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for Robert P. Murphy
Acting General Counsel