



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: RMG Systems, Ltd.

File: B-281006

Date: December 18, 1998

Daniel B. Abrahams, Esq., and Raymond Fioravanti, Esq., Epstein, Becker & Green, for the protester.

William H. Butterfield, Esq., Kilcullen, Wilson and Kilcullen, for Consolidated Safety Services, Inc., an intervenor.

Lt. Col. David S. Franke, Department of the Army, for the agency.

Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that awardee of contract for safety inspections and covert in-transit surveillance of carriers approved to do business with Department of Defense (DOD) did not have an inherent conflict of interest based on business relationships with carriers.

DECISION

RMG Systems, Ltd. protests the award of a contract by the Military Traffic Management Command (MTMC), Department of the Army, to Consolidated Safety Services, Inc. (CSS) under request for proposals (RFP) No. DAMT01-98-R-2014. The contract primarily calls for (1) safety inspections of passenger motor carriers that have been approved by MTMC to do business with the Department of Defense (DOD) or that are applicants for MTMC/DOD approval, and (2) covert in-transit surveillance of DOD hazardous cargo and munitions shipments transported by motor carriers and railroads, in order to evaluate compliance with safety and security regulations.¹ RMG alleges that the award was improper due to organizational conflicts of interest.

We deny the protest.

The RFP contemplated award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a 1-year base period with 4 option years. It provided for award on a

¹The solicitation is a follow-on procurement to two separate contracts for these services. CSS was the incumbent for the safety inspections and Stanley Associates for in-transit surveillance.

best-value basis with an evaluation based on price, technical, and past performance factors. Of six offers received, two--CSS's and RMG's--were rated technically acceptable. Both were rated excellent under the technical and past performance factors and were rated low risk. The agency thus made award to CSS based on its low price (\$9,591,507 versus \$13,943,006 for RMG).

The RFP contained the following conflict of interest provision:

Ethics: Government business shall be conducted in a manner above reproach, with complete impartiality and without preferential treatment. The performance of these services requires a high degree of public trust and an impeccable standard of conduct. Contractor personnel must avoid strictly any conflict of interest or even the appearance of a conflict of interest while performing their duties. Contractor employees shall not solicit or accept, directly or indirectly, any gratuity, gift, entertainment, loan, or anything of value from anyone receiving inspections and/or under surveillance through this contract. The offer or acceptance of a bribe is prohibited by 18 U.S.C. 201, 10 U.S.C. 2207, 5 U.S.C. 7353, and 5 CFR Part 2635.

RFP, Performance Work Statement § 1.2.6 at 3.

In the past performance section of its offer, CSS noted that it had performed "annual safety fitness evaluations . . . to determine compliance levels with federal, state and local requirements" for Landstar Systems, Inc., which is a holding company for several DOD-approved munitions carriers that would be subject to the safety inspections and surveillance under the current contract. CSS "recognize[d] that maintaining Landstar Systems, Inc. as a client could be a potential conflict of interest," and stated that it was "willing to discontinue [its] services with Landstar, upon award of this proposed contract." CSS Offer, Past Performance Information (unpaginated). The agency concluded that CSS's proposed plan would eliminate the cited potential conflict of interest.² The proposal contained no other information bearing on potential conflicts.

²RMG questions whether the conflict has been mitigated, since there is no evidence in the record that the letter of agreement between CSS and Landstar, executed in February 1997, has been terminated. However, CSS states that it has no contract with Landstar for 1998, and that its last payment from Landstar was received in November 1997 for work completed pursuant to the February 1997 agreement. There is no indication that the work covered by the agreement has not been completed, or that there has been some further agreement between the firms to continue their relationship in contravention of CSS's pledge. Under these circumstances, the agency reasonably could conclude that the pledge was sufficient to mitigate the potential conflict.

RMG asserts that CSS will have a conflict of interest under the contract based on CSS's affiliation with the International Motor Carrier Audit Commission (IMCAC) (two of CSS's five principals own IMCAC), a private organization that performs the same type of safety inspections as under the awarded contract for private sector clients that would be subject to inspection under the awarded contract.³ More specifically, according to RMG, because IMCAC is in the business of providing safety ratings and inspection services to carriers, and accepts payment from carriers (including MTMC/DOD carriers) in return for these ratings and services, CSS, by virtue of common ownership with IMCAC, will not be able to maintain its objectivity in performing DOD safety inspections and in-transit surveillance of the same carriers under this contract. In this regard, RMG maintains that if IMCAC-rated carriers pass their inspections under CSS's contract, it will appear that they received special or more lenient treatment. Conversely, RMG contends, where carriers receive an unsatisfactory DOD inspection from CSS after opting not to seek and pay for an IMCAC rating, it will appear that they received a more rigorous inspection as retribution. According to the protester, the agency failed to take reasonable steps to avoid, neutralize, or mitigate these alleged conflicts.

After reviewing RMG's protest, the contracting officer requested CSS to provide a written response to the organizational conflict of interest issues and, if conflicts existed, a plan for eliminating or substantially ameliorating the conflicts or appearance of such conflicts, and for complying with the RFP's Ethics provision at paragraph 1.2.6. In its response to the agency, CSS acknowledged common control of CSS and IMCAC, but generally maintained that, because the business activities of CSS and IMCAC do not significantly overlap, there would be no significant potential for conflicts of interest. However, CSS did propose a mitigation plan to eliminate certain possible conflicts.⁴ The agency agreed with CSS that there are no material conflicts and concluded that, to the extent conflicts might otherwise arise, CSS's mitigation plan eliminated that possibility. RMG maintains that conflicts of interest remain.

³While FAR subpart 9.5 does not explicitly address the role of affiliates in organizational conflicts of interest, there is no basis to distinguish between a firm and its affiliates, at least where impaired objectivity is at issue. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD 129 at 13. Here, there is no dispute among the parties that IMCAC and CSS are affiliates for purposes of addressing any conflict of interest.

⁴Under the mitigation plan, IMCAC's president "pledge[d that IMCAC will] . . . take no money from and do no business with any carrier that is, or later may become, DOD approved" while CSS holds the current contract. This pledge included both ratings and inspection services. Affidavits of W. Dennis Lauchner, Sept. 28 and Oct. 19, 1998. In light of our view that the IMCAC ratings and inspections do not present a conflict of interest, the mitigation plan is not critical to our decision.

Federal Acquisition Regulation (FAR) subpart 9.5, which sets forth guidance governing organizational conflicts of interest, provides that a conflict 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 bias a contractor's judgment (*i.e.*, impair a contractor's objectivity). FAR §§ 9.504(a)(2), 9.505. Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or potential conflict is not sufficient. Chemonics Int'l, B-222793, Aug. 6, 1986, 86-2 CPD ¶ 161 at 7. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent a firm should be excluded from the competition, rests with the contracting agency. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9. 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 at 5.

We find that the agency reasonably determined that alleged conflicts do not exist. CSS explained in its response to the agency that IMCAC was established in August 1996 for the purpose of providing an independent source of motor carrier safety ratings based on safety performance data.⁵ The IMCAC safety rating--a numerical rating from 1 (the highest) to 5--consists of the accident rate and vehicle-out-of-service rate, which are calculated from publicly available information

⁵CSS explained that the IMCAC rating system was envisioned to provide relief to the Department of Transportation, Federal Highway Administration (FHWA) rating system, which has been unable to meet the demand for such ratings. CSS characterized the IMCAC rating system as a voluntary system designed to provide carrier safety information in the same manner that credit and financial information is provided by companies such as Dun & Bradstreet, with payment to IMCAC coming primarily from consumers who would use the ratings. IMCAC is governed by a board of governors, which includes two FHWA advisory members.

maintained by the FHWA in a database known as the Motor Carrier Management Information System (MCMIS), and cannot be manipulated by IMCAC.⁶ Carriers previously inspected and approved by MTMC/DOD or FHWA pay IMCAC \$300 for the initial rating (to cover administrative costs), and thereafter the rating is updated semi-annually based on updated MCMIS information, for no additional cost. For carriers not inspected by any federal authority within the last 3 years, IMCAC performs on-site safety inspections of carrier facilities and vehicles for a fee which would range from \$1,500 to more than \$4,800, depending on the size of the carrier's fleet. After the inspection, the carrier thereafter is rated as described above.

CSS maintained in its response to the agency that, since the IMCAC rating is calculated objectively from publicly available information, its providing such ratings to carriers which CSS may be called upon to inspect under the contract does not give rise to a conflict of interest. We agree. It is not apparent how CSS's objectivity in performing inspections and surveillance tasks under the contract would be impaired by IMCAC's safety rating business. Not only are the IMCAC ratings objective rather than subjective, but carriers that have been inspected pay only a one-time, up-front fee for the rating, and thus do not have an ongoing business relationship with IMCAC such that it could be in CSS's financial interest to favor carriers with an IMCAC rating. More specifically, since a rated carrier would make no further payments to IMCAC for future updated ratings, CSS would have no reason to improperly approve or disapprove the carrier in hopes of influencing the carrier to purchase additional IMCAC rating services.⁷

Similarly, we see no conflict involving IMCAC's providing safety inspections. If a carrier pays for and receives an IMCAC inspection and rating, and subsequently seeks a MTMC/DOD inspection from CSS, it is not apparent how CSS would benefit

⁶The MCMIS database contains a list of all reportable accidents involving the carrier. From this information and information supplied by the carrier in its IMCAC application, the number of accidents per million miles traveled is calculated. The MCMIS data also contains a list of all vehicle inspections conducted by state law enforcement authorities, with the results of each inspection. From this information, IMCAC calculates the carrier's out-of-service rate, which reflects the number of vehicles placed out of service in relation to the number inspected in a 12-month period.

⁷This also is not a situation where there would be potential for IMCAC to obtain commercial work directly as a result of the judgments made by CSS in performing the current contract. See Radiation Safety Servs., Inc., B-237138, Jan. 16, 1990, 90-1 CPD ¶ 56 (under contract to survey general Nuclear Regulatory Commission licensees who use equipment containing radioactive material, protester was determined to have a conflict of interest based on its providing consulting services to those licensees and performing service work on the equipment in question).

from providing an improper approval or disapproval of the carrier. Since the carrier already would have purchased IMCAC's services, CSS could not use the approval process to influence the carrier to do further business with IMCAC. Where a carrier first seeks MTMC/DOD approval through CSS, there could, at least theoretically, appear to be an opportunity for CSS to use the threat of disapproval to influence the carrier to seek an IMCAC rating. However, the only financial incentive to IMCAC in this situation would be the one-time \$300 administrative fee, and this simply does not appear to be an inducement of a magnitude that warrants assuming that CSS would be influenced to proceed improperly under its contract.⁸

We reject the protester's view, essentially, that CSS's conflict is inherent and unremediable because, whether or not correctly, carriers may assume that DOD is endorsing IMCAC, or that they must do business with IMCAC in order to obtain favorable treatment from CSS under its contract here. As discussed, CSS in fact will have no financial interest in failing to provide honest inspections (and the CRB represents a check on CSS's discretion to deny approval in any case). Further, although CSS will be performing inspections similar to the IMCAC inspections, the two inspections are distinct and CSS will not be reviewing IMCAC's work; thus, there is no reason to assume that CSS would be inclined to tailor its inspection results to match the results of an IMCAC inspection. See Parameter, Inc., B-241652, Feb. 28, 1991, 91-1 CPD 229 ¶ at 4.

Under these circumstances, we conclude that there is no more than a remote, theoretical possibility of risk of CSS performing with impaired objectivity. Accordingly, RMG has not shown any impropriety in the award to CSS.

The protest is denied.

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⁸Further, as a practical matter, it seems unlikely that a conflict situation would arise under CSS's contract. CSS asserts that because the current number of MTMC/DOD-approved motor carriers is a small percentage of the total carriers in the United States--only 440 out of 450,000--it is only remotely possible that it could be requested to inspect a carrier under the awarded contract that had previously been inspected by IMCAC. CSS states further that to date there has been no conflict of interest (under its incumbent contract), noting that, out of 37 requests for IMCAC ratings, only 5 have been for MTMC/DOD-approved carriers, and it has conducted no vehicle inspections of any carriers.