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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: The Jones/Hill Joint Venture

File: B-286194.4; B-286194.5; B-286194.6

Date: December 5, 2001

William A. Roberts III, Esq., Phillip H. Harrington, Esq., William S. Lieth, Esq., and Janet L. Eichers, Esq., Wiley, Rein & Fielding, for the protester.
Marvin D. Norman, Esq., Vicki E. O'Keefe, Esq., and Robert E. Little, Jr., Esq., Department of the Navy, for the agency.
Louis A. Chiarella, Esq., John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A conflict of interest existed in an Office of Management and Budget Circular A-76 commercial activities study where a Navy employee and a private-sector consultant wrote and edited the performance work statement and then prepared the management plan for in-house performance.

2. The Navy Independent Review Official's certification (pursuant to Office of Management and Budget Circular A-76) that the government is able to perform the requirements set forth in the performance work statement with the resources provided in the in-house management plan, and that all costs in the in-house cost estimate were fully justified, cannot be found reasonable where it is unsupported by either the contemporaneous documentation or the arguments, explanations, or testimony in the record.

3. Agency's in-house management plan submitted under an Office of Management and Budget Circular A-76 commercial activities study was misevaluated, where the in-house management plan was based on the use of personnel that were not part of the "most efficient organization" to accomplish certain requirements in the performance work statement, and the record does not show that the costs of these personnel were included in the in-house cost estimate.

4. Agency's determination, pursuant to Office of Management and Budget Circular A-76, that the management plan for in-house performance offered a comparable level of performance and performance quality to the selected private-sector proposal, was

unreasonable, insofar as it did not account for several strengths identified during the "best value" competition in the selected private-sector proposal.

DECISION

The Jones/Hill Joint Venture protests the Department of the Navy's determination, pursuant to Office of Management and Budget (OMB) Circular A-76, that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore (NASL), California, rather than contract for these services with Jones/Hill under request for proposals (RFP) No. N62474-98-R-2069.

We sustain the protest.

BACKGROUND

The Navy issued the RFP on May 5, 1999, as part of a Circular A-76 commercial activities study, to determine whether it would be more economical to perform base operations support and real property maintenance and operations services for the NASL in-house, using government employees, or under contract with a private-sector firm.[1] The solicitation provided that a "best value" offer would be selected in accordance with the terms of the RFP, and compared to the government's in-house management plan in accordance with the terms of Circular A-76 to determine if contractor or in-house performance of the services was more economical. RFP § A.

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[1] The procedures for determining whether the government should perform an activity in-house or by a contractor are set forth in Circular A-76 and the Revised Supplemental Handbook (RSH) to it, which have been made expressly applicable to the Department of Defense (DOD) and its military departments. See 32 C.F.R. § 169a.15(d) (2001). The process set out in the Circular and the RSH broadly encompasses the following steps in conducting the public/private competition. First, after the performance work statement (PWS) has been drafted, agency officials develop an in-house management plan describing how the government can most efficiently perform the work required by the PWS. The agency's Independent Review Officer (IRO) then ensures that the in-house plan has been prepared based on the PWS, and that the in-house plan reasonably establishes the government's ability to perform the PWS with the resources provided. RSH, part I, ch. 3, ¶¶ E.3., I. Second, there is a competition among private-sector offerors, which is conducted much as any competed federal procurement is conducted. Third, if that competition is done on the basis of a comparative evaluation (that is, a cost/technical tradeoff is contemplated), the government's in-house management plan is compared with the winning private-sector offer to assess whether or not they are based on a comparable level of performance and performance quality--and if not, to make all changes necessary to make the level of the in-house plan comparable to that of the private-sector proposal. Id. ¶¶ H.3.d, e. Finally, once the playing field is leveled, there is a cost comparison between the private-sector offer and the in-house plan. Id. ¶¶ H, J.

The RFP requested fixed-price proposals, and provided for a two-step evaluation of the proposals with past performance, corporate capabilities and past commitment to small business the factors considered in the first step, and management and technical approach and small business commitment the factors considered in the second step. To determine which proposal represented the best value, the combined ratings of the proposals from the two steps were considered approximately equal in importance to price. RFP at M-2.

Each offeror's proposal was to include the firm's statement of requirements (SOR), prepared in accordance with a workbook provided by the agency as part of the solicitation package.[2] The solicitation specified that each offeror's SOR was to include, among other things, "the contract sub-requirements their firm[] shall perform to achieve the required mandatory requirement and the stated outcome" provided in the RFP, as well as the performance metrics "by which successful accomplishment of every mandatory and proposed contract requirement and sub-requirement can be measured to determine that it has been successfully met." Each offeror's SOR was also to include the applicable units of work, quantities and frequencies for performance of the units of work, and quality performance standards that the contractor proposed to meet (such as "[r]espond within 30 minutes"). The RFP noted here that the selected best value proposal's SOR "will be reviewed and used in adjusting the Government's [in-house] Technical Performance Plan to ensure it offers the same level of performance and performance quality which is equivalent to the best value commercial proposal." RFP at L-17-18.

Meanwhile, certain Navy personnel were tasked with the development of the in-house management plan. The agency contracted with E.L. Hamm, Inc. to assist these personnel (hereinafter, the most efficient organization (MEO) team) in the development of the in-house management plan, including the development of the in-house plan's cost estimate and transition plan.

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[2] The RFP's set forth, under its technical requirements section, 13 "outcomes," each of which listed a number of "mandatory contract requirement[s]" and a corresponding "metric" by which contractor performance would be measured. RFP §§ C.5.1-13; Agency Report (AR), Oct. 5, 2000, at 2; Hearing Transcript (Tr.) at 191-92 (the PWS served as section C of the RFP). The agency explains that in an outcome-based solicitation, such as this RFP, the "contractors design the approach to accomplish the desired outcome by developing the performance requirements and the levels to which they propose to perform." The contractor's resultant SOR would become the statement of work upon award of the contract, and provide "the what, when, where, how and how often and to what quality level [the contractor] intend[s] to do those things necessary to accomplish the Government's desired outcomes." AR, Oct. 5, 2000, at 2.

The in-house management plan was subsequently forwarded to the IRO for certification. To assist the IRO in reviewing and certifying the in-house plan, the Navy contracted with Management Analysis, Inc. (MAI), which performed the analysis on which the IRO based his judgment. The IRO, in this case a member of the Naval Audit Service, certified that the management plan reasonably established the government's ability to perform the PWS with the resources provided.

The agency received proposals from six offerors, including Jones/Hill, by the RFP's closing date. After discussions were conducted with the three offerors included in the competitive range, the agency assigned and supported ratings under each factor and sub-factor, including the 13 outcomes, with explanations identifying each proposal's specific strengths, weaknesses, and deficiencies. AR, Oct. 5, 2000, Tab 4, Value Assessment Team (VAT) Report for Technical Proposals (Apr. 12, 2000), at 16-20. Based on a comparison of Jones/Hill's proposal with the two others, the agency determined that Jones/Hill's proposal, with a final proposed price of $127,676,656, represented the best value to the government. Id.

After the selection of Jones/Hill's proposal, the in-house plan and Jones/Hill's proposal were provided to a quality comparison panel (QCP) to ensure that the management plan and Jones/Hill proposal offered the same level of performance and performance quality. AR, Oct. 5, 2000, at 3-4. After some clarifications and changes to the in-house management plan, the QCP then determined that the adjusted in-house plan and Jones/Hill proposal provided for the same level of performance and performance quality. The QCP's determination was subsequently reviewed and approved by the source selection authority (SSA). AR, Oct. 5, 2000, Tab 5, SSA Decision Document.

The revised in-house management plan was next forwarded to the IRO, who re-certified that the in-house plan satisfied the PWS requirements. AR, Oct. 5, 2000, at 4; Tab 7, Commercial Activity Cost Comparison Review of NASL Base Operating Services. The agency then conducted the cost comparison by first adding the "minimum conversion differential and costs of conversion" to Jones/Hill's proposed price, for an adjusted total cost to contract for services of $149,266,341. Because the revised in-house plan's costs totaled $137,614,706 (a difference of $11,651,635), the agency determined to perform the requirements in-house. AR, Oct. 5, 2000, at 4-5.

Jones/Hill filed an administrative appeal. The agency's administrative appeal authority ratified the determination to perform the requirements in-house, making only a minimal increase in the costs associated with in-house performance to a total of $137,921,286. Id. at 5; Tab 8, Memorandum from the Commander in Chief, U.S. Pacific Fleet to the Chief of Naval Operations, NASL Final Decision Summary Report; Tab 9, Decision of Administrative Appeal Authority on NASL Cost Comparison Decision.

Jones/Hill then filed a protest with our Office on September 1, 2000, challenging the adequacy of the agency's comparison of the performance reflected in the in-house management plan with the performance reflected in Jones/Hill's proposal, and the reasonableness of the agency's determination that the revised management plan and Jones/Hill's proposal offered a comparable level of performance and performance quality. Jones/Hill also contended during the course of the protest that the agency had improperly failed to inform the offerors of certain changes to the agency's requirements, as well as of the existence and terms of an interservice support agreement (ISSA) between the Navy and the General Services Administration (GSA), and a memorandum of agreement (MOA) between NASL and GSA that, according to the protester, adversely affected its competitive position overall and specifically with regard to its provision of transportation services and the related costs.

During the course of that protest, alternative dispute resolution (ADR) procedures were used by our Office on November 16, 2000, in which we advised that the agency faced significant litigation risk with respect to a number of the issues raised. The agency subsequently took partial corrective action, and our Office dismissed the protest on November 22, 2000.

With regard to the partial corrective action, the agency specifically stated that the QCP would examine various strengths in Jones/Hill's proposal that had been identified but not considered, and would have the in-house plan adjusted as necessary to account for those strengths "that predict a higher quality performance (as opposed to 'strengths' such as a well-written proposal)." Agency's Post-ADR Comments at 10. The agency stated that the in-house management plan would be adjusted as necessary, and added that "[i]n any event, the QCP will prepare a detailed written justification on its conclusion." Id. at 11.

In response to the protester's contention that the agency had improperly failed to inform the offerors of certain changes to the agency's requirements during the conduct of the procurement, the agency conceded that "it should have amended the solicitation," but stated that it would not take any corrective action to address this shortcoming because "the protester has not suffered any prejudice thereby." Id. The agency also declined to take any action in response to Jones/Hill's protest of the propriety of the agency's determination to inform only the MEO team, and not the private sector offerors, of the ISSA between the Navy and GSA and the MOA between NASL and GSA, arguing that its actions in this respect were reasonable.[3] Id. at 6-10.

On August 15, 2001, the Navy informed Jones/Hill that it had completed the "tasks" associated with the corrective action it had committed to, and that as a result, "the

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[3] We more fully describe the ADR and the agency's proposed corrective actions in The Jones/Hill Joint Venture—Costs, B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62.

level of effort included in the [in-house plan] was raised by 14.92 [full-time equivalents]," and the in-house plan had been re-certified by the IRO. Protest, Aug. 27, 2001, Tab 3, Agency letter to Jones/Hill (Aug. 15, 2001). The letter concluded by informing Jones/Hill that notwithstanding the revised management plan staffing, "a cost comparison . . . revealed that the cost of in-house performance was lower than the commercial acquisition and, therefore, the services will remain in-house." The cost comparison provided an adjusted total cost for performance by Jones/Hill of $149,567,344, and an adjusted total cost for in-house performance of $140,815,852 (a difference of $8,751,492). Protest, Sept. 6, 2001, Tab 2, Cost Comparison of In-House vs. Contract or ISSA Performance (Aug. 13, 2001). During the course of this protest, the agency has conceded various errors, so that the adjusted costs associated with in-house as opposed to contractor performance differ, for the purposes of this protest, by approximately $6 million.[4] Tr. at 23-26.

PROTEST

Jones/Hill protests that the way in which the agency used a private-sector consultant and a Navy employee in certain aspects of the Circular A-76 study at NASL resulted in a conflict of interest. The protester also contends that the agency unreasonably determined that the government could perform the work required with the number of personnel proposed in the in-house plan. The protester further contends that the in-house management plan provided for the performance of certain tasks by individuals who were not part of the MEO. Jones/Hill also argues that the agency's determination that the in-house management plan and Jones/Hill's proposal offered the same level of performance and performance quality was unreasonable. Jones/Hill finally argues that the agency improperly failed to inform the offerors of the existence and terms of the ISSA between the Navy and GSA, and the MOA between NASL and GSA, that, according to the protester, adversely affected its competitive position overall and specifically with regard to the provision of transportation services and related costs.[5]

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[4] The Navy conceded the merits of Jones/Hill's arguments that the agency had failed to inform the offerors of certain changes to the agency's requirements, and that the agency improperly calculated Jones/Hill's price by improperly accounting for non-appropriated fund revenues.

[5] Jones/Hill withdrew a number of protest contentions during the course of these protests, such as its contentions that the agency improperly calculated the costs of contract administration associated with an award to Jones/Hill and that the in-house management plan did not reasonably account for materials and supplies.

ANALYSIS

Conflict of Interest

Jones/Hill argues that this procurement is fatally flawed by conflicts of interest. As discussed below, we find that because a Navy employee and a Hamm consultant wrote the PWS and then wrote the management plan, a conflict of interest was created. To best explain this issue, some relevant background follows.

As one of the first steps in the process, the Navy organized a commercial activities (CA) team to plan for the conduct of the study. Tr. at 156. The CA team was comprised of Navy personnel, who were assisted by Hamm consultants. Tr. at 204, 260, 335-36. Certain members of the CA team subsequently became members of the PWS team, which had responsibility for the development of the PWS. Tr. at 203, 261-62. After the development of the PWS, an MEO team was formed, which had responsibility for the development of the in-house management plan. Tr. at 158, 174, 246, 264, 269. The record reflects that the PWS team was comprised in part of individuals who had served on the CA team, and that the MEO team was comprised primarily of individuals who had served on the CA Team.[6]

The MEO team leader and second CA team leader testified that a "firewall" was maintained between the Navy personnel serving on the PWS team and the Navy personnel serving on the MEO team. Tr. at 205, 210, 213, 268. They explained that the firewall was necessary in order to avoid a conflict of interest that, in the view of the second CA team leader, could "compromis[e] the study." Tr. at 213, 281. The second CA team leader explained in this regard that "intimate knowledge of the PWS would allow you to provide a better MEO." Tr. at 229. The MEO team leader added that such a firewall was necessary in order to avoid the "appearance that the PWS

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[6] The agency's explanations about the composition of the CA, PWS, and MEO teams were somewhat inconsistent. At the hearing our Office conducted in this matter, while an individual who served as the first CA team leader, who later became the MEO team leader, testified that the PWS team was comprised of members of the CA team, Tr. at 261, the individual who replaced him and served as the second CA team leader testified that the PWS team did not contain any members of the CA team. Tr. at 206. After the hearing, our Office requested that the Navy provide a list of the individuals that served on each of the teams, and to add to the confusion, that list provides that only one individual--the chairperson of the PWS team--also served on the CA team. As another example of the inconsistencies in the record as to the composition of the teams, the contracting officer testified that no one on the MEO team held a position that was under study, Tr. at 167-68, while the MEO team leader testified that "almost all" of the MEO team members held positions that were under study. Tr. at 297.

was written in such a way to favor the government management, management strategy." Tr. at 271.

Nevertheless, the Navy admits that the first CA team leader, while not listed as a member of the PWS team, participated substantially in the drafting and development of the PWS, and then became the MEO team leader. AR, Nov. 20, 2001, at 12; Tr. at 224, 259, 270-71, 276, 278, 296-97, 305, 311; List of NASL A-76 Teams. With regard to the extent of the MEO team leader's role in the development of the PWS, the MEO team leader testified that he "wrote th[e] PWS" (at other times, the MEO team leader testified that he participated in the development of the PWS until it was 80 to 90 percent drafted). Tr. at 276, 278, 311.

As mentioned previously, the Navy also contracted with Hamm to assist it during a number of the steps in the process, considering Hamm an "active partner" in the process. Tr. at 202. Specifically, Hamm provided "technical support" for the planning of the Circular A-76 study, the development of the PWS and the management plan (including the in-house cost estimate and transition plan), the MEO team's responses to the IRO during the certification process, and the responses to the evaluation board during the board's analysis of whether the in-house management plan and Jones/Hill's proposal offered the same level of performance and performance quality. Contract/Purchase Order No. N00140-98-D-1474, Delivery Order No. 5000; Tr. at 174, 177, 201-02, 225-26, 246-48.

A representative of Hamm testified, for example, that he "was the editor of the PWS and . . . the management plan."[7] Tr. at 337. The second CA team leader characterized Hamm's role as that of a "co-producer" and "active coparticipant in the preparation of the PWS," and as a "full participant" in the development of the in-house management plan. Tr. at 245-46. Thus, it is clear from the record that the Hamm consultant substantially participated in the preparation of the PWS (which was a deliverable under its contract), and then the in-house plan, without any firewall.[8] AR, Nov. 20, 2001, at 2.

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[7] The record reflects that Hamm provided a number of employees to assist the Navy in its CA study at NASL, and that three of these employees worked on both the PWS and the management plan. Tr. at 340. However, for the sake of simplicity, we use the term "consultant" in the singular in this decision to refer specifically to the senior employee of the firm that testified at the hearing held at our Office.

[8] During the same timeframe that the Hamm consultant was developing the PWS as a contract deliverable, he was helping develop a work sampling plan to obtain information to identify efficiencies and changes to the existing work performance, which was used to prepare the in-house management plan. Tr. at 202, 223-24, 260, 291-92, 335.

Jones/Hill argues that the MEO team leader's roles as the CA team leader, writer of the PWS, and MEO team leader, and the Hamm consultant's role as the writer/editor of both the PWS and in-house management plan, constituted a conflict of interest which violated the applicable standards of conduct. In this regard, Jones/Hill contends that the MEO team possessed an unfair competitive advantage because of its special knowledge of NASL's requirements for base operations and support services, which arose from the consultant's and MEO team leader's participation in the writing and editing of the PWS.

In setting out the standards of conduct that apply to government business, Federal Acquisition Regulation (FAR) § 3.101-1 states:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR subpart 3.1 does not provide specific guidance regarding situations in which government employees, because of their job positions or relationships with particular government organizations, may have a conflict of interest. However, as we have noted in prior decisions, FAR subpart 9.5 addresses analogous situations involving contractor organizations. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19 at 4; Battelle Memorial Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 6-7. Accordingly, although FAR subpart 9.5, by its terms, does not apply to government agencies or employees, it is instructive in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR § 3.101-1, in that FAR subpart 9.5 establishes whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation in Circular A-76 studies. DZS/Baker LLC; Morrison Knudsen Corp., supra (agency's use of employees, whose positions were the subject of a Circular A-76 study and thus subject to being contracted out, to evaluate the private-sector proposals created a conflict of interest).

FAR § 9.501(d) provides that a conflict of interest exists when, "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." The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.

The first group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505-4. In these "unequal access to information" cases, the concern is limited to the risk of the firm gaining an unfair competitive advantage; there is no issue of possible bias. 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.

The second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or the specifications. In these "biased ground rules" cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 13.

The third group comprises cases where a firm's work under one government contract could entail its evaluating itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. In these "impaired objectivity" cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by the relationship with the entity whose work product is being evaluated. Id.; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 13.

The facts here are clear. There is no dispute that the Hamm consultant and MEO team leader wrote and edited the PWS, and then wrote and edited the in-house management plan. AR, Nov. 20, 2001, at 12; Tr. at 276, 278, 337. Accordingly, the record is consistent with the circumstances attendant to both "unequal access to information" and "biased ground rules" conflicts of interest.[9] See FAR § 9.505-2

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[9] The responsibility for determining whether an actual or apparent conflict of interest will arise rests with the contracting agency, and our Office will not object to an agency's determination except where it is shown to be unreasonable. American Mgmt. Sys., Inc., B-285645, Sep. 8, 2000, 2000 CPD ¶ 163 at 3-4. Here, the contracting officer, who was responsible for issuing the delivery order to Hamm to assist the agency in planning for the study, and to develop the PWS and in-house management plan, states that she did not perceive a conflict of interest that had to be mitigated. She explains that this was so because under the delivery order Hamm would not "participate in the technical evaluation," and there was, at the time, no guidance prohibiting private-sector consultants from assisting in both the development of the
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(generally prohibiting a contractor from competing on a solicitation on which it prepared the statement of work).

The agency asserts that none of the conflict of interest rules set forth in subpart 9.5 of the FAR should be applied to Circular A-76 studies. AR, Nov. 20, 2001, at 4-6, 10-13. However, as noted above, given the use of the competitive system in Circular A-76 studies and the MEO team's status as essentially a competitor in the study, we believe that the provisions of subpart 9.5 serve as useful guidance in determining whether the type of conflict of interest prohibited under subpart 3.1 of the FAR exists, and we have specifically found the "impaired objectivity" type conflict of interest set forth at FAR § 9.505-3 applicable to Circular A-76 studies. DZS/Baker LLC; Morrison Knudsen Corp., supra. We see no reason why the provisions of subpart 9.5 of the FAR regarding "unequal access to information" and "biased ground rules" conflicts of interest (e.g., FAR § 9.505-2) should not also serve as guidance in determining whether an agency has reasonably met its obligation to avoid conflicts of interest under FAR § 3.101-1. In this regard, the plain language of FAR § 3.101-1 makes it clear that procurement officials are required to act "in a manner above reproach" and consistent with "an impeccable standard of conduct," so as "to avoid strictly any conflict of interest or even the appearance of a conflict of interest." B-281224.8, Nov. 18, 1999 (Letter to Director of Office of Government Ethics), at 2. An actual or apparent conflict of interest on the part of an agency official or a contractor employee, who drafted the PWS and then drafted the agency response to the PWS, would taint more than the individual source selection; it could undermine the integrity of the Circular A-76 process. See id.

(...continued)
PWS and the in-house management plan. AR, Nov. 20, 2001, encl. 1, Memorandum of Contracting Officer (Nov. 15, 2001).

There is no indication in the record that there was any contemporaneous consideration of whether the MEO team leader's role in writing both the PWS and in-house management plan could result in a conflict of interest, with the exception of the MEO team leader's own testimony at the hearing held at our Office. In this regard, the MEO team leader testified that the agency was careful to maintain firewalls between the PWS and MEO teams, with the exception of himself and the Hamm employees, and that he "knew the appearance would be not the best" with regard to his serving as the MEO team leader after having written the PWS. Tr. at 271, 273, 280. The MEO team leader added that he voiced this concern to the Commanding Officer of NASL, who decided that the first CA team leader could be the MEO team leader given the MEO team leader's assurance that he had written the PWS as "an unbiased document." Tr. at 280. The MEO team leader also testified that he was initially unaware that he would serve as the MEO team leader, and that he had "developed the PWS strategy well prior to even knowing that [he] was going to develop the [in-house] management plan." Tr. at 271.

Our conclusion that subpart 9.5 of the FAR should be referenced in determining whether an agency reasonably met its obligation to avoid "unequal access to information" and "biased ground rules" conflicts of interest in the context of a Circular A-76 study is consistent with the RSH, which states that Circular A-76 is designed in part to "provide a level playing field between public and private offerors to a competition." We fail to see how there can be "a level playing field between public and private offerors" where one competitor--here, the MEO team--receives a competitive advantage by having written and edited the PWS, thus providing it with greater access to competitively useful information and creating the possibility of a competition with biased ground rules. See FAR § 9.505-2; RSH, Introduction. We note that Hamm's role in writing and editing the PWS meant that it was prohibited by FAR subpart 9.5 from submitting a private-sector proposal as part of the competition at issue here, FAR § 9.505-2(b)(1), and we believe that protecting the integrity of the process mandates similarly preventing individuals, whether contractor or government employees, who wrote the PWS from writing the "proposal" (that is, the management plan and cost estimate) of the in-house team.

We note that our conclusion here, with regard to the Hamm consultant, is consistent with Department of Defense (DOD) Interim Guidance issued Feb. 29, 2000, which augments DOD Instruction 4100.33, Commercial Activities Program Procedures, Sept. 9, 1985 (Paragraphs E.3.b. and E.3.f.), and provides that

> where private sector consultants are assisting DOD Components in preparing both a PWS and Management Plan for a specific A-76 cost comparison, sufficient measures shall be taken to avoid potential conflicts of interest in accordance with FAR Part 9 or the appearance of such conflicts. These measures shall include, at a minimum, sufficient 'firewalls' within the private sector consultant to prevent the same individuals from both developing the PWS and assisting in the preparation of the MEO.

The agency specifically asserts that no conflict of interest exists with regard to Hamm's role because, in the agency's view, Hamm lacks incentive, being an independent contractor, to bias the PWS or to obtain a competitive advantage in drafting the in-house management plan.[10] We disagree.

As confirmed by the second CA team leader, we would think that Hamm had the incentive to be successful in its work by positioning itself to draft the most competitive management plan possible, and then by drafting such an in-house plan. Tr. at 229. While it is true that Hamm would not be paid more if the in-house team

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[10] The agency's argument here appears in the context of its explanation that the DOD Interim Guidance cited above "goes, and easily could have gone, without saying, since it merely regurgitates A-76." AR, Nov. 20, 2001, at 7.

prevails in this Circular A-76 study, its potential for future work assisting in-house teams would presumably be enhanced if it could help its "client" prevail.[11] As the second CA team leader explained, with regard to Hamm's participation in drafting both the PWS and in-house management plan, "there could be construed a conflict of interest between the production of the PWS and possibly crafting it in a manner which would make it advantageous to the MEO so that the MEO could construct a more favorable bid."[12] Tr. at 228.

In sum, we find that because the MEO team leader and the Hamm consultant wrote and edited the PWS, and then wrote and edited the in-house management plan, a conflict of interest arose which called for the agency to take appropriate action.[13] See Basile, Bauman, Prost & Assoc., Inc., supra; GIC Agricultural Group, supra.

The agency next contends that even if the roles of the MEO team leader and Hamm consultant created an apparent conflict of interest, the protest is nevertheless without merit because the conflicts of interest clearly had no impact. For example, the agency argues that "potential bias [in a solicitation] . . . is tested in the crucible of competition [and] . . . [o]fferors can determine in a trice whether the PWS is unduly slanted toward a particular solution," and that "[a]dmitting that one's actions might

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[11] It would similarly have been improper for Hamm to have offered its services to a private-sector offeror (such as Jones/Hill), as help in preparing its proposal for this study.

[12] While it could be argued that "biased ground rules" conflict may not be applicable to the MEO team leader, because the record reflects that at the time he was writing the PWS he did not know he would also be writing the in-house management plan, an "unequal access to information" conflict still exists. Moreover, both types of conflict remain applicable to the Hamm consultant, who knew he would be developing the in-house management plan at the time he was developing the PWS.

[13] We recognize that an agency may conclude that it has no choice, due to the limited number of people with the requisite knowledge or skills, but to use the same individuals to prepare both a PWS and an in-house plan. In that case, we believe that a written determination to proceed notwithstanding the conflict may be appropriate. Cf. FAR § 9.503 (allowing for a waiver of conflict restrictions). Here, however, there would not have been a reasonable basis for such a determination with regard to Hamm, because a firewall could have been established within that firm, with some individuals working on the PWS and others on the in-house plan. See IT Facility Servs.--Joint Venture, B-285841, Oct. 17, 2000, 2000 CPD ¶ 177 at 14. As to the MEO team leader's involvement, the record shows that another qualified individual had been recommended and was scheduled to serve as the MEO team leader, Tr. at 263, 267-68, so that the intended firewall could have been maintained with regard to the agency personnel as well.

lead to a perception of a 'conflict of interest' does not mean anything immoral, unethical, irregular or illegal actually--or even could have--happened." AR, Nov. 20, 2001, at 9, 13. The agency also argues, in a more specific vein, that the Hamm consultant's and the MEO team leader's participation in the drafting of the PWS and the in-house management plan was unobjectionable because the RFP and the PWS were "outcome based," and thus could not (either intentionally or unintentionally) be "tailored to any specific approach." AR, Nov. 20, 2001, at 2.

These contentions evidence a misunderstanding of the conflict of interest rules. A key purpose of the applicable conflict of interest provisions and those to which we turn for guidance is to avoid even the appearance of impropriety in government procurements. FAR § 3.101-1; see FAR subpart 9.5; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 18. Where, as here, the facts establishing the existence of a conflict are present, and a conflict thus exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur. See Basile, Bauman, Prost & Assoc., Inc., supra, at 4; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra; GIC Agric. Group, supra, at 8-9, n.4; see Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 7, aff'd, Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (where former agency employee who had access to source selection information left the agency and went to work for a contractor and prepared the contractor's proposal, the likelihood of an unfair competitive advantage warrants corrective action to protect the integrity of the process, despite the good faith behavior of all parties). That is, a protester is not required in these circumstances to establish bias in the PWS or point to the results of a specific unfair competitive advantage in order to establish a conflict of interest. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 18-19. Moreover, where the integrity of the procurement system is at issue because a conflict of interest has been established, the honesty and good faith of the individual actors cannot render behavior permissible where it would otherwise be improper. Id. at 19.

In our view, the appearance of impropriety resulting from the conflicts of interest here has tainted the integrity of the process, and we therefore sustain Jones/Hill's challenge to this aspect of the agency's determination that it would be more economical to perform the base operations and support services at NASL in-house, rather than contract for the services.

IRO's Certification of the Government's Ability to Perform the PWS

Jones/Hill argues that the government cannot satisfy the minimum requirements of the PWS with the resources set forth in the in-house management plan.[14] Specifically, the protester contends that the MEO is understaffed with regard to the ground electronics, fire fighting school, and water plant functions.

The RSH sets forth the role and responsibility of the IRO. In this regard, the IRO first reviews the management plan and supporting documentation in order to reasonably ensure the government's ability to perform the PWS within the staffing and material resources provided in the in-house plan. RSH, part I, ch. 3, ¶ I.3.a. Thereafter, the IRO reviews the in-house cost estimate to ensure it completely and accurately reflects the costs of the in-house management plan and fully complies with the procedures and requirements set forth in the RSH. Id. ¶ I.3.b. Here, the IRO certified and re-certified that the in-house management plan satisfied the PWS requirements; there is no evidence that any other agency reviewing official performed any similar evaluation.

In performing his review of the management plan, the IRO relied upon the work of MAI--a private sector contractor--to support its efforts.[15] In those instances where MAI identified deficiencies or discrepancies in the in-house plan, it recorded and communicated these discrepancies to the MEO team by means of action item tracking forms.[16] Tr. at 419. Although MAI recorded those instances where it found deficiencies in the in-house management plan, it failed to document its examination of the in-house plan in any other regards, including those instances where it believed

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[14] The Navy suggests that Jones/Hill's failure to challenge the adequacy of the in-house management plan as part of the Circular A-76 appeals process now precludes our subsequent consideration of this issue. Agency Post-Hearing Comments, Nov. 7, 2001, at 9-12; see Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 at 3 (GAO generally will not consider issues that could have, but were not, raised by the protester in its administrative appeal). Contrary to the agency's representation, Jones/Hill did in fact challenge the adequacy of the record supporting the management plan's proposed staffing as part of its administrative appeal. Administrative Appeal (July 13, 2000) at 27-36.

[15] The IRO primarily provided oversight for the work being performed by MAI. Tr. at 354, 357. The IRO did not personally review the adequacy of the management plan's staffing for the ground electronics, fire fighting school, or water plant functions. Tr. at 403.

[16] The one-page action item tracking form documents only where MAI found that the management plan might not satisfy a PWS requirement and the MEO team's response to these items.

that the in-house plan could satisfy the PWS requirements. Tr. at 420-21, 433. More specifically, MAI did not retain (and may not have created) any documents regarding its review of the in-house management plan's staffing of the ground electronics, fire fighting school, or water plant functions. Tr. at 426, 495, 510. As illustrated below, this lack of documentation, even when considered with the protest record as a whole, precludes our conclusion that the agency had a reasonable basis for its determination that the government could in fact satisfy the requirements of the PWS with the resources set forth in the in-house management plan.

First, Jones/Hill challenges the adequacy of the management plan's proposed staffing to accomplish the ground electronics work required, given that under the management plan "the staffing of the Ground Electronics Division decreased from 27 military personnel and 7 civilians (or 34 personnel in all) to . . . 6.36 FTEs." Protest, Sept. 6, 2001, at 7. At the hearing held at our Office, the MAI representative who reviewed the in-house management plan stated that he examined the proposed staffing for the ground electronics function. However, while the MAI representative was able to generally explain why the management plan's deletion of certain military positions from the ground electronics function was reasonable,[17] he could not recall or offer any explanation as to how he determined that the in-house plan's proposed 6.36 FTEs would satisfy the minimum requirements of the PWS.[18] Tr. at 426, 429-31, 437-38.

With regard to the fire fighting school, while the MAI representative was aware of the decrease in the in-house management plan's staffing from the historic seven FTE level to a single FTE (who will have duties in addition to those at the fire fighting school), the MAI representative again could not recall how he had calculated the number of hours required nor how the in-house management plan was staffed to

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[17] The MAI representative testified that Navy sailors were placed in the ground electronics division as part of their ship-to-shore duty rotation in order to stay proficient in their military specialty, and that this rotation may have resulted in the ground electronics division being overstaffed with an unspecified number of military personnel. Tr. at 424-25.

[18] Although the agency argues that certain tasks associated with the Ground Electronics Division were excluded from the study, and offers this as an explanation as to why the management plan proposed less staffing for the ground electronics work than had historically been provided, the agency has not provided an explanation as to why the management plan's dramatically reduced staffing and its approach would satisfy the minimum requirements of the PWS. Agency Post-Hearing Comments at 10. As indicated, there is no other documentation or explanation in the record that explains why the IRO or agency reviewing officials believe the management plan can satisfy this requirement with the lower level of staffing proposed.

perform the PWS requirements in this area.[19] Tr. at 458-60, 482, 484. There is no other documentation or explanation of how the agency determined that the in-house plan can satisfy the PWS requirements for the fire fighting school function with the one FTE proposed.

Lastly, while the MAI representative recalled reviewing the management plan's proposed staffing of the water plant and his ultimate conclusion that the staffing was reasonable, he could not recall determining whether, as argued by Jones/Hill, the in-house management plan was deficient in that it required that the Water Plant Work Leader both to perform the required supervisory responsibilities and to stand watch alongside other utility operators.[20] Tr. at 506, 509.

In reviewing an agency's evaluation of whether the in-house management plan establishes the ability to perform the PWS within the resources provided by the plan, we will not reevaluate the in-house management plan, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with applicable procedures. See Rice Servs., Ltd., B-284997, June 29, 2000, 2000 CPD ¶ 113 at 8. An

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[19] The agency argues that the MAI representative's testimony demonstrates the reasonableness of the IRO's determination that the management plan was sufficiently staffed to perform the PWS requirements regarding the fire fighting school. Agency's Post-Hearing Comments at 10-11. The fire fighting school instruction consists of both classroom and live fire training. RFP attach. C.5.7-4. The PWS provided four Government-furnished hose team leaders for live fire training, and required private sector offerors and the government "to staff the following positions: Field Safety Chief (one Instructor), F-2000 Control Console Operator (one instructor), and On Scene Leader (one Instructor)." Id. The MAI representative testified that, in his view, the PWS did not preclude offerors from proposing one FTE to perform all instructor positions, and that based upon his previous experience one individual could perform all three instructor positions simultaneously. Tr. at 455-56, 478-80. Nevertheless, the MAI representative conceded that he had no specific recollection as to how the management plan actually proposed to perform the fire fighting school requirements. Tr. at 482, 484. Indeed, the MAI representative's testimony that one individual could perform all three instructor positions is inconsistent with the agency's earlier explanation that while the management plan proposed one FTE for the fire fighting school, the instructor requirements would not be performed by one individual simultaneously, but rather by three individuals within the management plan's staffing. AR, Oct. 9, 2001, at 8.

[20] Although the MAI representative testified generally that it is not uncommon for supervisors to perform non-supervisory functions, he does not explain why the arrangement in question here satisfies the PWS requirements for the water plant function. Tr. at 506.

agency's evaluation of proposals, as well as the in-house management plan submitted as part of an Circular A-76 cost comparison, should be documented in sufficient detail to allow for the meaningful review of the merits of a protest, as is dictated by the fundamental principle of government accountability. Id. at 8 n.14; Aberdeen Technical Servs., B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46 at 4 n.1; NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 5 n.3. An agency that fails to adequately document an evaluation, including the evaluation of whether the government can perform the PWS with the resources provided in the management plan, bears the risk that its determinations will be considered unsupported. Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 5; Matrix Int'l Logistics, Inc., B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89 at 5.

Here, as discussed above, the agency has not documented, or otherwise provided, an adequate explanation for the determination that the management plan could satisfy the PWS for these three functions with the staffing proposed.[21] Accordingly, we find that there is no reasonable basis for the conclusion that the government could reasonably "perform the PWS within the resources provided by the MEO" as required by the RSH. RSH, part I, ch. 3, ¶¶ E, I.

In-House Management Plan's Use of Non-MEO Personnel

Jones/Hill also contends that, with regard to both the public works and the maintenance and repair service functions, the management plan did not include the costs of non-MEO personnel performing some of the work required by the PWS.

The RSH requires that the management plan include all labor and costs associated with the performance of the tasks required, and the agency is required to ensure, during its review of the management plan, that those costs are completely and properly accounted for. RSH, part I, ch. 3, ¶ I; part II, ch. 2; The Jones/Hill Joint Venture--Costs, supra, at 13. Failure to capture accurately and completely the cost of support from outside the MEO obfuscates the true cost of in-house performance and renders the resulting cost comparison inaccurate and unfair. See The Jones/Hill Joint Venture--Costs, supra, at 13.

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[21] The inability of the MAI analyst to recall and explain how he determined that the management plan could satisfy the PWS requirements in various functional areas is understandable; this review occurred almost 2 years ago, and MAI has performed seven or eight additional reviews in the interim. Tr. at 430, 439. It is precisely for such reasons that it is important to maintain a well-documented, contemporaneous evaluation record. Rice Servs., Ltd., supra; Aberdeen Tech. Servs., supra; NWT, Inc.; PharmChem Labs., Inc., supra.

Here, as acknowledged by the agency, the in-house management plan, as part of its plan to accomplish the public works function, proposed to use the NASL Public Works Duty Officer (who was not part of the MEO) to take emergency calls from 4 p.m. to 7 a.m.[22] The agency concedes that the in-house cost estimate did not include a cost for this service, but asserts that the cost to provide it is nominal.[23] AR, Oct. 9, 2001, at 10.

The in-house management plan also provided for the use of non-MEO personnel to perform required maintenance and repair services. See RFP § C.5.10. The agency acknowledges that reliance, but claims that the costs for the non-MEO personnel were included in the cost comparison. AR, Oct. 9, 2001, at 10-11. The VAT, which as part of the agency's corrective action compared the in-house management plan to Jones/Hill's proposal, noted the in-house plan's planned use of non-management plan personnel to accomplish the maintenance and repair services, but stated that "the VAT believe[d] that these services are separately costed in the Government's [in-house cost estimate]." NASL Corrective Action Report (July 10, 2001) at 22. However, at the hearing held by our Office, the VAT Team Leader testified that the VAT made no effort to determine if the management plan's proposed use of non-MEO personnel to accomplish maintenance and repair services was, in fact, separately costed in the in-house cost estimate, and added that he was unaware of any agency efforts in this regard.[24] Tr. at 533. Although the agency continues to assert that the in-house cost estimate includes the costs of these non-MEO personnel, it has not pointed to any documentation or testimony that supports this assertion.

Leveling the Strengths that the Agency Identified in Jones/Hill's Proposal

Jones/Hill also contends that the in-house management plan does not provide a level of performance that is comparable to that offered by Jones/Hill's proposal, even after the corrective action taken in response to its prior protest. Specifically, the protester alleges that not all of the strengths found in its proposal were properly accounted for in the management plan. Our review indicates that the agency reasonably leveled all strengths found in Jones/Hill's proposal, except for the ones discussed below in the customer interface and the family service center areas.

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[22] Taking calls after regular duty hours was necessary in order to meet the PWS requirement that emergency or critical situations be responded to in no more than an hour after receiving notice.

[23] The agency asserts that the cost to provide this service over the next 5 years totals $6,480, rather than the $442,910.76 estimated by Jones/Hill.

[24] The VAT Team Leader testified that he was restricted from seeing the in-house cost estimate because his job was limited to reviewing the relative performance of the management plan and the Jones/Hill proposal. Tr. at 533-34.

The RSH provides that where, as here, a best value approach is taken in evaluating private-sector proposals, the agency must compare the in-house management plan to the successful private-sector proposal to determine "whether or not the same level of performance and performance quality will be achieved," and, if not, to make "all changes necessary to meet the performance standards accepted" in the private sector proposal. RSH, part 1, ch. 3, ¶¶ H.3.d, e. This "leveling of the playing field" is necessary because a best value solicitation invites the submission of proposals that exceed the RFP requirements, together with the higher prices that often accompany a technically superior approach. Failure to ensure that the in-house management plan offers the same level of performance as the "best value" private-sector proposal selected to be compared with the in-house plan can lead to an unfair situation where the very technical superiority that led to the private-sector proposal's selection would cause it to lose the public/private cost comparison. The Jones/Hill Joint Venture--Costs, supra, at 10.

The starting point for this analysis is the agency's own evaluation, during the private-sector competition, of the proposal that is ultimately selected for comparison with the in-house plan. If an agency identifies strengths in that proposal, or if it identifies areas in which that proposal exceeds the RFP requirements, the agency should consider those strengths in comparing that proposal with the in-house management plan. RSH, part I, ch. 3, ¶¶ H.3.d, e; BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 at 27. An agency's determination during the leveling process that certain previously identified strengths are not important or of no value must have a reasonable basis. BAE Sys., supra, at 27.

Under the customer interface outcome, offerors were encouraged to provide effective methods to receive inquiries, questions, or complaints in support of the requirements and desires of NASL customers. RFP § C.5.5. During the evaluation of proposals, the VAT identified as a strength Jones/Hill's proposed [DELETED] in connection with service trouble calls. AR, Oct. 9, 2001, Tab 10, Final Value Assessment Report (Apr. 12, 2000), at 17. The VAT, when comparing this strength to the in-house management plan, determined that no leveling was required because "[t]he fact that [DELETED] does not add value or improve the service once the phone is answered." NASL Corrective Action Report (July 10, 2001) at 10. However, at the hearing, the VAT evaluator conceded that Jones/Hill's service call intake feature was indeed a strength (what she termed a "little" one) that had not been leveled. Tr. at 557-59.

The family service center function required offerors to provide various on-base programs and services in support of NASL service members and their families. RFP § C.5.6. The VAT identified the [DELETED] as a strength in Jones/Hill's proposal. AR, Oct. 9, 2001, Final Value Assessment Report (Apr. 12, 2000), at 18. The VAT, when comparing this strength to the in-house management plan, determined that the "[family service center's] hours of operation are traditional office hours [and] therefore a [DELETED] is a 'nice to have' but not an enhancement of the actual program." NASL Corrective Action Report (July 10, 2001) at 12. However, when

asked to explain this comment at the hearing held at our Office, the pertinent VAT evaluator conceded that while [DELETED] was not a requirement, it was in fact a strength. Tr. at 594-97.

Accordingly, the agency's actions with regard to these two outcomes were inconsistent with the requirement that the agency ensure that the in-house management plan reflects "all changes necessary to meet the performance standards accepted" in the private sector proposal. RSH, part 1, ch. 3, ¶¶ H.3.d, e.

RECOMMENDATION

In light of the conflict of interest that arose because the MEO team leader and the Hamm consultant wrote and edited the PWS and then wrote and edited the in-house management plan, we recommend that the agency issue a new PWS/RFP, drafted by individuals who will not subsequently be tasked with drafting the in-house management plan.[25] After issuing the new PWS/RFP, a new management plan should be prepared and certified with supporting documentation. Based on the new PWS, new proposals should be solicited from private-sector offerors, one private-sector proposal selected, and a new leveling process (if needed) and cost comparison

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[25] With regard to Jones/Hill's protest that the agency's failure to inform the offerors of the existence and terms of the ISSA between the Navy and GSA, and the MOA between NASL and GSA, adversely affected its competitive position overall, the parties' positions and arguments reflect a misunderstanding of the requirements governing the use of GSA-leased vehicles. For example, the RFP and questions and answers provided to the offerors informed offerors that they should "negotiate with GSA" directly, and represented the resultant offeror/GSA relationship as that of a prime contractor/subcontractor. RFP § C.5.8.4.2; Question and Answers (Nov. 15, 1999). However, as explained by GSA, offerors cannot negotiate with GSA directly, but rather, must contact the contracting officer of the relevant contracting agency (here, the Navy) in order to determine if the offeror may obtain GSA vehicles for use in performing a contract. GSA Memorandum (Oct. 17, 2001) at 3. GSA adds here that contrary to the Navy's representations to offerors, "GSA does not serve as a subcontractor to private contractors." Id. Additionally, Jones/Hill assumes that the terms of the MOA would apply to a private sector offeror such as itself, and that the MOA establishes that GSA must obtain and pay for repair or maintenance services from NASL or, alternatively, a private sector contractor. As explained by GSA, the protester's assumptions in this regard are incorrect. GSA Memorandum (Nov. 15, 2001) at 3. Given the misunderstandings of both the Navy and the protester of the requirements governing the availability and use of GSA-leased vehicles by private sector contractors in the performance of fixed-price contracts, and the errors in the RFP pointed out above, the Navy should review this matter to ensure that the new RFP clearly sets forth the requirements and applicable procedures in this regard.

conducted.[26] We recommend that the agency implement these measures as expeditiously as possible, so that a new cost comparison could be conducted within 1 year or as soon as practicable thereafter. In the meantime, in view of the substantial attendant savings, the in-house management plan should be implemented to the extent practicable.[27] Because we recommend that a new PWS be drafted, we also recommend that the Navy reimburse Jones/Hill for its proposal preparation costs. See COBRO Corp., B-287578.2, Oct. 15, 2001, 2001 CPD ¶ ___ at 9. Finally, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

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[26] In private competitions where a "biased ground rules" conflict of interest resulting from a competitor drafting the statement of work or specifications is found, the ordinary remedy, where the conflict cannot be mitigated, is the elimination of that competitor from the competition. FAR § 9.505-2; see, e.g., Basile, Bauman, Prost & Assoc., Inc., supra, at 4-5. Where an Circular A-76 study is being conducted, however, the in-house management plan cannot be eliminated from the cost comparison. See BAE Sys., supra, at 23 (government's in-house plan cannot be rejected as unacceptable, even where it does not satisfy the PWS requirements).

[27] There is evidence in the record that indicates that the agency has already commenced implementing at least some aspects of the management plan. See Tr. at 319-21.