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**Comptroller General
of the United States**

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

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Decision

Matter of: Alion Science & Technology Corporation

File: B-297022.3

Date: January 9, 2006

L. James D'Agostino, Esq., Richard L. Moorhouse, Esq., David T. Hickey, Esq., John G. Stafford, Esq., and Andrew Belofsky, Esq., Greenberg Traurig, LLP; J. Scott Hommer III, Esq., and Kier X. Bancroft, Esq., Venable LLP, for the protester. Thomas C. Papson, Esq., Jason N. Workmaster, Esq., and Kara M. Klaas, Esq., McKenna Long & Aldridge LLP, for Advanced Engineering & Sciences, a division of ITT Industries, Inc., an intervenor.

Flayo O. Kirk, Esq., Defense Information Systems Agency, for the agency. Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where record does not support the agency's assessment regarding the "maximum potential" for organizational conflicts of interest to occur during awardee's contract performance where awardee, a manufacturer of spectrum-dependent products, will perform various activities requiring subjective judgments that may affect the sales or use of spectrum-dependent products of the awardee, the awardee's competitors, and the awardee's customers.

DECISION

Alion Science & Technology Corporation protests the Defense Information Systems Agency's (DISA) award of a contract to Advanced Engineering & Sciences, a division of ITT Industries, Inc. (ITT), under request for proposals (RFP) No. HC1047-05-R-4009 to provide electromagnetic spectrum engineering services for DISA's Joint Spectrum Center (JSC). Alion protests that, in light of ITT's significant interests in the manufacture and marketing of spectrum-dependent products, the agency failed to reasonably consider the extent of organizational conflicts of interest

(OCI) that are likely to impair ITT's objectivity in performing the contract requirements.¹

We sustain the protest.

BACKGROUND

On February 23, 2005, DISA issued RFP No. HC1047-05-R-4009, seeking proposals to “provide the JSC with Electromagnetic Spectrum Engineering (ESE) services to facilitate improved mission effectiveness.”² RFP at 4. The solicitation elaborated that “[t]he JSC vision is to be recognized as the DOD technical center of excellence and provider of choice for electromagnetic spectrum management and E3 expertise.” Id. With regard to contract requirements, the solicitation laid out the following task areas, and specific activities, the contractor will be expected to perform:

1. Operational Spectrum Support – deploying qualified spectrum managers in support of Combatant Command (COCOM) or Joint Task Force (JTF) contingencies; deploying technical experts to take field measurements and analyze incidents of electromagnetic interference (EMI), determine causes, and recommend methods of resolution; and developing, operating, and maintaining DOD's standard spectrum management systems.
2. E3 and Spectrum Engineering – coordinating electromagnetic compatibility (EMC) standards; analyzing equipment and systems for potential E3 [electromagnetic environmental effects] problems and recommending solutions; performing RF [radio frequency] measurements; developing and conducting E3 training; assisting the acquisition community by assessing E3; determining operational frequency bands; and providing assistance in acquiring host nation approval for equipment operation.

¹ Alion also protests various other aspects of the agency's source selection process. We have reviewed all of Alion's bases for protest and, other than those related to the assessment of OCIs as discussed below, find no bases for sustaining Alion's protest.

² With regard to JSC's mission, the solicitation stated: “The Joint Spectrum Center (JSC) is a technically oriented center for all electromagnetic (EM) spectrum matters supporting the Department of Defense. The JSC mission is to enable effective and efficient use of the electromagnetic spectrum and control of electromagnetic environmental effects (E3) supporting national security and military objectives. Additionally, JSC supports the EM/E3 analytical needs of Defense components and other organizations on a reimbursable basis.” RFP at 4.

3. Modeling and Simulation -- developing and maintaining spectrum management automated tools and analytical models to perform EMC analyses.

4. Information Management -- collecting and maintaining extensive data on spectrum dependent equipment and spectrum usage to support tactical, training, or sustaining-base operations, operational assessments, and research and development efforts; and providing and maintaining a capability to store and retrieve documents such as technical reports, project notebooks, and other related technical documents.

5. Research and Evaluate Emerging Technologies -- determining electromagnetic spectrum implications and opportunities for exploitation by DOD.

6. Technical Advice -- analyzing national and international electromagnetic spectrum issues and advising executive decision-makers on the technical viability of policy and implementation options.

Id.

The solicitation advised offerors that the agency's source selection would reflect a "best overall value" determination, and that proposals would be evaluated with regard to three factors: technical,³ past performance,⁴ and cost/price. RFP at 62.

On or before the April 25, 2005 closing date, proposals were submitted by three offerors, including Alion and ITT. Thereafter, the proposals were evaluated, discussions were conducted with Alion and ITT,⁵ and revised proposals were

³ With regard to the technical factor, the solicitation established four subfactors: technical approach, management plan, transition plan, and organizational strategic quality assurance plan. Under the subfactor for technical approach, the solicitation established evaluation "elements" that corresponded to each of the task areas of contract performance. Under the subfactor for management plan, the solicitation established several evaluation "elements"--one of which was "organizational conflict of interest plan." RFP at 64-66.

⁴ The solicitation stated that the technical and past performance factors were "comparatively equal," and that technical and past performance combined were "significantly more important" than cost/price. RFP at 62.

⁵ The third offeror's proposal was eliminated from further consideration based on the agency' evaluation of initial proposals, and that offeror has not protested any aspect
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requested, submitted, and evaluated.⁶ With regard to the technical factor, Alion's proposal was rated "Green" with [deleted] risk; ITT's proposal was rated "Green" with "medium" risk. With regard to the past performance factor, Alion's proposal was rated [deleted]; ITT's proposal was rated "Blue" with "low" risk. Agency Report, Tab 8, at 17. Alion's evaluated cost/price was [deleted]; ITT's evaluated cost/price was \$500,915,000. Id. at 18.

On July 22, ITT's proposal was selected for award; a contract was awarded on August 5. On August 12, Alion filed a protest challenging that award on various bases, including that the agency failed to reasonably consider ITT's organizational conflicts of interest. Thereafter, the agency advised this Office that it was taking corrective action in response to Alion's protest; the agency's corrective action included a request that offerors submit revised OCI plans and an amendment of the RFP to eliminate consideration of OCIs as an evaluation "element," instead advising offerors that OCI issues would be considered under the provisions of Federal Acquisition Regulation (FAR) subpart 9.5 on a "go/no go" basis. Agency Report,

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of this procurement; accordingly, our decision does not further address the third offeror's proposal.

⁶ With regard to evaluation under the technical and past performance factors, the agency applied a color rating/narrative assessment evaluation system. With regard to the technical factor, the following color ratings and associated narrative assessments were applied: "Blue" ("proposal exceeds requirements and clearly demonstrates the offeror's capability to deliver exceptional performance"); "Green" (proposal is satisfactory; the offeror is capable of meeting performance requirements"); "Yellow" ("proposal is minimally adequate; the offeror is most likely able to meet performance requirements"); "Red" ("proposal is inadequate; the offeror cannot meet performance requirements"). With regard to past performance, the following color ratings and associated narrative assessments were applied: "Blue" ("Highly relevant and very recent past performance in all identified past performance efforts; excellent performance ratings"); "Green" ("Relevant and somewhat recent past performance in all identified past performance efforts; acceptable performance ratings"); "Yellow" ("Somewhat relevant but not very recent past performance; mostly acceptable performance ratings"); "Red" ("Little relevant past performance identified; almost all unacceptable performance ratings"); "White" ("Completely lacks relevant performance history or past performance is unavailable, not due [to] offeror's failure to provide information."). Under the technical and past performance factors, the agency also performed a risk assessment assigning ratings of "low," "medium," or "high." Agency Report, Tab 8, at 15-17.

Tab 19; Hearing Transcript (Tr.) at 12-13.⁷ We dismissed Alion’s August 12 protest pending completion of the agency’s corrective actions.⁸

Thereafter, ITT and Alion each submitted revised OCI plans. Agency Report, Tab 21. ITT’s plan identified various potential OCIs it could encounter under several of the performance areas and stated that, where impaired-objectivity OCIs are anticipated to occur, it will segregate those conflicted contract requirements for performance by “one of ITT’s team members” that are separated from ITT by a “firewall.” Agency Report, Tab 21, ITT OCI Plan, at 14. Thereafter, the agency performed an assessment of the activities contemplated for performance with the stated objective of determining the extent of ITT’s conflicts. Based on this assessment, the agency concluded that “the maximum potential for impaired objectivity OCI occurrences is 15% of the total ESE contract projects.”⁹ Agency Report, Tab 25, Addendum to Source Selection Authority Decision, at 3. Based on the agency’s assessment regarding the “maximum potential” for OCIs, and ITT’s stated intent to rely on “firewalled” team members to perform conflicted portions of the contract, the agency concluded that ITT’s OCI plan was acceptable.

On September 22, the agency “reconfirmed” its prior award to ITT. Agency Report, Tab 25, at 3. This protest followed.

DISCUSSION

Alion protests that the agency failed to recognize the extent of OCIs that will impair ITT’s objectivity in performing the contract requirements. Further, Alion maintains that, because the agency failed to recognize the extent of ITT’s impaired-objectivity OCIs, its evaluation of ITT’s proposal failed to reasonably consider the effect that ITT’s necessary reliance on “firewalled” team members will have on the quality of ITT’s overall contract performance. We agree.

Contracting officers are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. FAR § 9.504. The FAR

⁷ In resolving this protest, GAO conducted a hearing, during which testimony was provided by various witnesses, including the agency’s source selection evaluation board chair, the contracting officer, and the source selection authority.

⁸ Alion also filed a protest challenging the changes effected by the RFP amendment. We have considered Alion’s assertions in that regard and conclude that they provide no basis for sustaining the protest.

⁹ The source selection authority elaborated on this projection, stating: “The Government considers this [15%] estimate to be high and that the actual number of specific tasks posing potential OCI will be significantly lower.” Id.

provides that an OCI exists when, because of activities or relationships with other persons or organizations, a person or organization is unable or potentially unable to render impartial assistance or advice to the government. See FAR § 2.101. Situations that create potential conflicts are further discussed in FAR subpart 9.5 and the decisions of this Office; specifically, an “impaired objectivity” OCI is created when a contractor’s judgment and objectivity in performing a contract’s requirements may be impaired due to the fact that the substance of the contractor’s performance has the potential to affect other interests of the contractor. FAR §§ 9.505, 9.508; PURVIS Sys., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177; Science Applications Int’l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96; Aetna Govt. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13.

In reviewing this protest, we considered the description of contract requirements reflected in the solicitation, as well as the basis for the agency’s conclusion that “the maximum potential for impaired objectivity OCI occurrences is 15%” of the total contract requirements. We also considered the information provided by ITT with its OCI plan, which included its 2004 annual report, along with other publicly available information, including information contained on ITT’s Internet website. The publicly available information we reviewed leaves no doubt that ITT has multiple financial interests with regard to manufacturing and marketing of spectrum-dependent products to the U.S. government, to foreign governments, and to commercial customers worldwide.¹⁰ Further, ITT’s public statements make clear that its financial interests and the success of its company are affected by a variety of factors, including both domestic and foreign government regulations, ITT’s ability to continue to win contracts, and ITT’s development and marketing of new products.¹¹

¹⁰ By way of example, ITT has stated that it provides single channel ground and airborne radios (SINCGAR), spectrum management systems, and several types of radar systems to DOD. Additionally, ITT states that: “ITT Industries is a global engineering and industrial manufacturing company with leading positions in the markets that it serves. The company is a major supplier of sophisticated military defense systems, and provides advanced technical and operational services to a broad range of government agencies.” www.itt.com/downloads/defense12pg.pdf. ITT elaborates that it has provided, or is providing, “Night vision equipment for Australian Defence Forces,” “Imagers for Japanese weather satellites,” “Airborne Self-Protection Jammers (ASPJ) for Republic of Korea,” “Tactical communications systems for U.K. armed forces,” and “Air traffic control radar systems for Brazilian Air Force.” Id. ITT also states that it markets various spectrum-dependent products to commercial customers. Id.

¹¹ In a publication dated March 5, 2005, under the heading “Forward-Looking Statements,” an ITT representative stated that ITT’s future performance will be affected by various factors, including “government regulations and compliance therewith,” “local regulations in the countries in which the Company conducts its

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As noted above, the solicitation identified six task areas, along with specifically described activities, that the contractor will be expected to perform. In reaching its conclusion that “the maximum potential for impaired objectivity OCI occurrences is 15%” of the total contract requirements, the agency made assessments regarding potential OCIs under each task area.

Task Area 1

With regard to task area 1, “Operational Spectrum Support,” the solicitation stated that the contractor will “analyze incidents of electromagnetic interference (EMI), determine causes, and recommend methods of resolution.” RFP at 4. More specifically, the activities anticipated under this task area include “providing communications-electronics equipment coverage analysis, providing recommendations for operational frequency assignments, assisting in the development of electromagnetic environments (EMEs) for use in engineering studies, providing electronic warfare (EW) deconfliction, analyzing microwave/troposcatter links for link availability and providing training in analysis techniques and spectrum management tool operation.” Agency Report, Tab 24, at 2. Finally, the agency’s source selection plan indicates that ITT’s activities under this task area will involve “deployed DOD systems, possible coalition forces systems/equipments and [the] surrounding private sector environment.” Agency Report, Tab 1, Source Selection Plan, at 48.

In responding to the agency’s request to submit an OCI plan, ITT acknowledged that performance of the tasks anticipated under task area 1 could create impaired-objectivity OCIs. For example, ITT’s OCI plan expressly recognizes that an OCI will arise if, in analyzing an electromagnetic interference incident, ITT is required to analyze one of its own products. Agency Report, Tab 23, ITT OCI Mitigation Plan, at 2. Nonetheless, in assessing ITT’s “maximum potential” for OCIs, the agency concluded:

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businesses,” “changes in technology,” and “changes in . . . the identity of significant customers.” Presentation of Hank Driesse, President, ITT Defense (Mar. 3, 2005), www.itt.com/ir/downloads/fbr_conference_05.pdf. More specifically, ITT stated: “Our Defense Electronics & Services business will be affected by factors including the level of defense funding by domestic and foreign governments; our ability to receive contract awards; and our ability to develop and market products and services for customers outside of traditional markets.” *Id.*

This task area neither places the contractor in a situation where objectivity may be impaired nor does it provide an unfair competitive advantage for award of any Federal contract. No activity associated with this task area is related to award of any Federal contract. Therefore, no known potential for conflict of interest exists within this task area.

Agency Report, Tab 24, at 2.

The agency's conclusion that "no known potential for conflict of interest exists" is inconsistent with ITT's own acknowledgment that an impaired-objectivity OCI will be created if it is required to analyze its own products in the context of an electromagnetic interference incident (in which it will be required to "determine causes, and recommend methods of resolution"). The agency's conclusion is not reasonable. In addition to the OCI created by ITT's assessment of its own products, it is clear that a similar OCI will arise with regard to assessment of products manufactured by an ITT competitor, as well as assessment of products deployed by ITT customers—which, as noted above, include various foreign governments that may compete for spectrum access. Here, the agency's procurement record is devoid of any meaningful agency analysis regarding the scope of spectrum-dependent products manufactured by ITT, the scope of such products manufactured by ITT's competitors, or any consideration of the spectrum-related interests of ITT's customer base. Further, the agency's contemporaneous record suggests that, in assessing potential conflicts, the agency considered only activities "related to award of [a] Federal contract." *Id.* As discussed above, potential impaired-objectivity OCIs are not limited to acquisition-related activities; rather, impaired-objectivity OCIs are created any time the performance of a contract requirement involves the contractor's exercise of judgment that could affect other contractor-related interests. See PURVIS Sys., Inc., supra; Science Applications Int'l Corp., supra.

On the record here, where ITT will clearly be required to perform analysis and make recommendations regarding spectrum-dependent products that may be manufactured by ITT or by ITT's competitors, or that are deployed by ITT customers, we find no reasonable basis for the agency's conclusion that the activities under this task area create "no known potential" for impaired-objectivity OCIs during ITT's contract performance.

Task Area 2

With regard to task area 2, "E3 and Spectrum Engineering," the solicitation stated that the anticipated activities include: "coordinating electromagnetic compatibility (EMC) standards; analyzing equipment and systems for potential E3 problems and recommending solutions; performing RF [radio frequency] measurements; developing and conducting E3 training; assisting the acquisition community by

assessing E3; determining operational frequency bands; and providing assistance in acquiring host nation approval for equipment operation.” RFP at 4.

In evaluating this task area, the agency concluded there was some potential for ITT to experience impaired-objectivity OCIs in performing the activities contemplated. Agency Report, Tab 24, at 2-4. Indeed, 12 of the “maximum” 15 percent of contract activities that could create OCIs occur in connection with activities under this task area. *Id.* at 4. However, in making its calculations with regard to this task area, it appears the agency considered only acquisition-related activities as creating impaired-objectivity OCIs. Specifically, JSC’s Chief, Plans and Resources Division, who was responsible for directing the agency’s assessment effort, described the agency’s review efforts, stating that agency managers were directed to review past contract activities “[t]o determine the percentage of work associated with source selection activities . . . prior to the source selection/acquisition decision.” Agency Report, Tab 24, Sykes Memorandum for the Record (Sept. 21, 2005).¹² Again, as discussed above, potential impaired-objectivity OCIs are created any time the performance of a contract requirement requires the contractor’s exercise of judgment that could affect other contractor-related interests—and are not limited to activities related to acquisitions. See PURVIS Sys., Inc., supra; Science Applications Int’l Corp., supra.

In any event, as noted above, the agency’s procurement record contains no agency documentation regarding the scope of ITT-manufactured products that could be involved in the activities under this task area, the scope of such products manufactured by ITT’s competitors, or the scope of such products deployed by ITT’s customers. In light of the type of activities being performed here—including analyses, measurements, assessments, and determinations relative to various types of spectrum-dependent products, as well as ITT’s involvement in “acquiring host nation approval for equipment operation,”—the record does not adequately support the agency’s conclusion that ITT will incur impaired-objectivity OCIs under this task area on only a limited basis.

Task Area 6

With regard to task area 6, “Technical Advice,” the solicitation states that performance in this area will involve “analyzing national and international electromagnetic spectrum issues and advising executive decision-makers on the technical viability of policy and implementation options.” More specifically, the agency record states that activities to be performed under this task area will include:

¹² Further, the column headings over the particular values and levels of effort associated with all of the conflicted activities on which the agency relies for its calculations under this task area describe the activities as “Acq[uisition] related.” *Id.* at 2.

providing senior technical staff to evaluate proposed and existing spectrum policy at both the national and international levels. Implications of World Radiocommunication Conference (WRC) agenda items and decisions will be evaluated as to their implication to DOD access to the spectrum. This task area includes attending meetings; preparing and presenting technical papers and briefings; and performing technical analyses to determine the implication of new and existing policy to DOD spectrum access.

Agency Report, Tab 24, at 7.

There is no dispute that, in recent years, the use of spectrum in wireless applications has expanded dramatically and that, with the increased demand, the spectrum has become crowded, leading to sometimes contentious disputes between government and commercial users over access to spectrum.¹³ In responding to the agency's request for an OCI plan, ITT expressly acknowledged that activities under this task create potential impaired-objectivity OCIs, stating:

A potential conflict could relate to ITT's development of new DOD products or technology that can operate only in specific portions of the spectrum other than that which DOD is advocating. A potential OCI could also include advocating defense of current DOD spectrum allocations from encroachment by other spectrum users or access to additional spectrum to satisfy future DOD requirements.

Agency Report, Tab 23, at 5.

Nonetheless, in performing its assessment of potential impaired-objectivity OCIs, and reaching its conclusion that the "maximum potential for impaired objectivity OCI occurrences is 15%" of the total contract requirements, the agency concluded that none of the activities to be performed under this task area created potential impaired-objectivity OCIs, stating: "Participating in the analysis of spectrum issues and providing advice on policy . . . is not viewed as a risk for any contractor bias." Agency Report, Tab 24, at 7. We disagree.

ITT manufactures and markets multiple spectrum-dependent products to the U.S. government, foreign government, and commercial customers worldwide. Further,

¹³ See generally *Interdepartment Radio Advisory Committee – IRAC Representative Effectively Coordinate Federal Spectrum but Lack Seniority to Advise on Contentious Policy Issues*, GAO-04-1028, September 2004; *Spectrum Management – Better Knowledge Needed to Take Advantage of Technologies that May Improve Spectrum Efficiency*, GAO-04-666, May 2004.

where DOD is competing for spectrum access with other users, including industry and foreign governments, DOD policies, strategies, regulations and procedures regarding contentious spectrum-related issues are likely to affect the sales or use of spectrum dependent products manufactured by ITT or ITT's competitors, as well as such products deployed by ITT customers. As discussed above, under this contract, ITT will "provid[e] senior technical staff to evaluate proposed and existing spectrum policy at both the national and international levels," and ITT's activities will include "presenting technical papers and briefings" and "performing technical analyses to determine the implication of new and existing policy to DOD spectrum access." Agency Report, Tab 24, at 7. All of these activities involve ITT's exercise of subjective judgment, and the results of such judgments may have a positive or negative effect on the sale or use of spectrum-dependent products manufactured by ITT, those manufactured by ITT's competitors, and those deployed by ITT customers. On this record, we find no reasonable basis for the agency's conclusion that performance of such activities creates no potential for impaired-objectivity OCIs for ITT. Further, because of the interrelated nature of the activities involved, they do not appear, on this record, to reasonably lend themselves to segregation for performance by ITT's "firewalled" team members.

Overall, our review of the record leads us to conclude that the agency's assessment of potential impaired-objectivity OCIs created by ITT's performance of the anticipated contract activities is not adequately supported by the record.¹⁴ Specifically, in light of the significant spectrum-related interests of ITT, ITT's competitors, and ITT's customers, that may well be affected by ITT's contract performance, the agency's failure to meaningfully consider the scope and extent of such spectrum-related interests requires the conclusion that the agency's assessment of the "maximum potential" for impaired-objectivity OCIs is not, on the record here, reasonably supported.

In short, the record shows that the agency failed to reasonably identify and evaluate potential OCIs associated with ITT's performance of this contract and, accordingly, failed to reasonably evaluate the effect that such OCIs will have on ITT's contract performance.¹⁵

¹⁴ We do not view our discussion with regard to task areas 1, 2, and 6, above, as a comprehensive OCI analysis of all contract activities. In particular, our decision does not address the reasonableness of the agency's assessment of potential OCIs in connection with the task areas for "Modeling and Simulation," "Information Management," and "Research and Evaluat[ion of] Emerging Technologies."

¹⁵ We note that the FAR anticipates situations in which application of the OCI provisions contained in FAR subpart 9.5 may not be in the government's interest, and authorizes the waiver of such provisions by an authority at a level not lower than head of the contracting activity. FAR § 9.503. Here, no waiver was requested or approved.

The protest is sustained.

RECOMMENDATION

We recommend that the agency reconsider the extent of ITT's impaired-objectivity OCIs, taking into consideration the spectrum-related interests of ITT, ITT's competitors, and ITT's customers, and document its conclusions in that regard. We further recommend that the agency evaluate the reasonable impact on the quality of performance that will be caused by ITT's reliance on "firewalled" subcontractors to perform conflicted contract requirements. Following such reconsideration and evaluation, we recommend that the agency make a new source selection decision. We further recommend that the agency reimburse Alion for the costs of filing and pursuing its protest, including reasonable attorneys' fees. Alion'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) (2005).

Anthony H. Gamboa
General Counsel