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Comptroller General
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Decision

Matter of: American Management Systems, Inc.

File: B-285645

Date: September 8, 2000

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Phillipa L. Anderson, Esq., Dennis Foley, Esq., and Phillip S. Kauffman, Esq., Department of Veterans Affairs, for the agency.

Henry J. Gorczycki, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Organizational conflict of interest does not exist in procurement for financial management software where, while agency's integration contractor that provides advice and assistance to the agency concerning available software has an agreement with the selected software vendor to seek out opportunities to join together in a prime contractor/subcontractor relationship, that agreement does not apply to the protested procurement and the integration contractor has no other relationship with the selected vendor that creates a significant conflict of interest.

DECISION

American Management Systems, Inc. (AMS) protests a procurement by the Department of Veterans Affairs (VA) under General Services Administration (GSA) Federal Supply Schedule (FSS) contract No. GS-35F-4997H, for Joint Financial Management Improvement Program (JFMIP) certified software. AMS protests that assistance on this procurement given to VA by the agency's system integration contractor, KPMG Peat Marwick, creates an impermissible organizational conflict of interest.

We deny the protest.

Since 1992, VA has been using financial management software from AMS. Agency Report at 2. In 1998, VA began planning improvements to the agency's financial and

logistical management systems, which the agency refers to as the core Financial and Logistics System (coreFLS) project. Id. at 1-2. The project was organized into four phases: Phase I--planning, Phase II--business process reengineering, Phase III--acquisition of commercial-off-the-shelf (COTS) financial software package, and Phase IV--implementation of the software package. Agency Report, Tab 79, Acquisition Methodology, at 1. VA intended to select an integration services contractor for Phase II and, if the contractor performed successfully on that task, that contractor would continue as the agency's integration partner during Phases III and IV. Id.

On November 30, 1999, VA issued a White Paper on its website stating the agency's intent to conduct separate procurements for integration services and software. Agency Report at 2; Tab 64, White Paper Integrator IFMS, at 1. VA's plan, which has since been implemented, was to acquire integration services and JFMIP certified software from two separate vendors on GSA FSS non-mandatory Schedule 70. Agency Report at 2; Contracting Officer's Statement at 10. On December 22, after evaluating quotations from four integration services vendors, the agency selected KPMG as its integration services partner and issued a task order for integration support and professional services under KPMG's FSS contract.¹ Agency Report, Tab 94, Best Value Determination, at 7.

VA then identified four vendors on FSS Schedule 70 with COTS software packages capable of meeting the agency's requirements. Agency Report at 1. These vendors are AMS, PeopleSoft, Inc., Oracle Corporation and SAP America, Inc. Id. On March 30, 2000, VA issued another White Paper stating its intent to acquire a COTS software package, identifying the agency's requirements, and stating the selection criteria for awarding a blanket purchase agreement pursuant to one of these vendors' FSS contract. Agency Report, Tab 144, White Paper coreFLS. On April 7, VA issued pricing and software solution surveys requesting that these vendors propose JFMIP certified software solutions to the agency's requirements and to propose price adjustments to their FSS contracts. Agency Report, Tabs 146-49, Pricing Surveys; Tab 150, Third Party Software Solution Surveys.

¹ The task order for the integration services contemplated KPMG providing source selection services for the JFMIP certified software procurement. Agency Report at 6. The agency states that, although KPMG drafted an acquisition plan for the software procurement, that plan was not used and KPMG has not performed source selection services. Id. at 5-6; Contracting Officer's Statement at 5. The extent and effect of KPMG's participation in this protested COTS software procurement is disputed. At a minimum, VA states that KPMG's services relating to this protested procurement include providing VA with technical guidance and insight as to industry standards and best practices with respect to COTS software. Agency Report at 6.

AMS filed an agency-level protest on April 17, alleging that the services provided by KPMG create a conflict of interest, given that KPMG assertedly has significant business relationships with PeopleSoft, Oracle and SAP. Agency Report, Tab 138, AMS's Agency-Level Protest, at 2-3. On June 2, VA dismissed the protest as untimely, but nonetheless reviewed the facts and determined that the relationships between KPMG and PeopleSoft, Oracle and SAP did not create a conflict of interest. Agency Report, Tab 143. AMS filed the present protest in our Office on June 12, prior to a selection decision by VA. VA subsequently notified our Office of its determination that urgent and compelling circumstances exist that significantly affect the interest of VA and will not permit suspension of an award pending resolution of the protest. On August 3, VA selected Oracle for award.

AMS essentially alleges that KPMG provided technical assistance, advice and/or acquisition support services to VA that either influenced, or had the potential to influence, the procurement process to favor one of the FSS software vendors with which KPMG had significant business relationships. Protest at 7-10; Protester's Comments at 3-14. AMS asserts that KPMG's alliances with those vendors create either actual or potential organizational conflicts of interest that cannot be avoided, neutralized or mitigated unless either VA eliminates from the competition the three software vendors that have alliances with KPMG (which would leave only AMS), or the agency begins the acquisition process anew with an integration partner other than KPMG. Protest at 10; Protester's Comments at 13-15.

Federal Acquisition Regulation (FAR) Subpart 9.5 sets forth the regulatory guidance governing organizational conflicts of interest, and defines the term as follows:

Organizational conflict of interest means that 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 other impaired, or a person has an unfair competitive advantage.

FAR § 9.501. Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505.

The responsibility for determining whether an actual or apparent conflict of interest will arise rests with the contracting agency. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. We will not overturn

the agency's determination except where it is shown to be unreasonable. D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419 at 5.

The situations in which organizational conflicts of interest arise, as addressed in both FAR subpart 9.5 and the decisions of our Office, can be broadly categorized in three groups: unequal access to information cases, biased ground rules cases, and impaired objectivity cases. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12-13.

Unequal access to information cases arise in situations where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. Id. at 12; FAR § 9.505-4. The concern in such situations is generally limited to the risk of the firm gaining an unfair competitive advantage in the later competition; there generally is no issue of the firm's objectivity or ability to render impartial assistance or advice to the government during performance of the incumbent contract. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 12.

Biased ground rules cases arise in situations where a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications for that other contract. Id. at 13. The primary concern in such situations is one of unfair competitive advantage in that the firm could skew the competition for the other contract, intentionally or not, in its own favor. Id.; PricewaterhouseCoopers LLP, B-284470, Apr. 24, 2000, 2000 CPD ¶ __ at 7; FAR §§ 9.505-1, 9.505-2.

Impaired objectivity cases arise in situations where a firm's work under one government contract could entail the firm evaluating itself through either assessment of its own performance under another contract, or evaluation of its own and/or competitors' proposals in a procurement process. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13; FAR § 9.505-3. The concern here is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13; FAR § 9.505-3.

We view AMS's allegations as raising concern about both biased ground rules and impaired objectivity in that the protester contends that, as a result of business relationships that KPMG has with PeopleSoft, Oracle and SAP, KPMG will, or has the potential to, influence the agency's selection of a software package to favor one of these three vendors over AMS. In this regard, the overriding interest of AMS here is presumably to ensure that its competitors in this software procurement do not have

an unfair competitive advantage. As discussed below, based on our review, we find that no significant organizational conflict of interest exists here.

Given that VA has now selected Oracle's proposal for a COTS software package, the relevant relationship for determining whether an actual or potential organizational conflict of interest existed is that between KPMG and Oracle.² During the agency-level protest, KPMG gave VA a copy of an agreement between KPMG and Oracle entitled "Marketing Alliance Agreement for the Federal, Higher Education and State & Local Marketplaces" to show its business relationship with Oracle. This document stated the following purpose for this agreement:

WHEREAS, It is the intention of both parties to work closely together and coordinate their efforts to pursue the public services marketplace for financial systems believing that their core competencies enable them to accomplish more together than individually,

NOW THEREFORE, [Oracle] and KPMG enter this Agreement to define common objectives, market goals and procedures for engagement that will ensure a commitment to their alliance and desire to work together in the public services marketplace.

Agency Report, Tab 141, KPMG's Response to Allegations of Conflict of Interest, Agreement with Oracle, at 1. Essentially, the agreement sets forth a structure for submitting proposals under a prime contractor/subcontractor relationship where the parties agree to do so, and provides a formula for splitting revenues under contracts resulting from such proposals. Id. at 2-4.

VA reviewed this relationship and determined that a financial relationship does not exist, nor does the relationship between the firms otherwise create a significant conflict of interest here. Agency Report, Tab 143, VA Response to Agency-level Protest, at 1. We think this determination is reasonable. In this regard, VA's approach of procuring integration services and software separately effectively prevented submission of proposals with a prime contractor/subcontractor relationship between KPMG and Oracle; indeed, no such relationship was proposed during either procurement by either firm. Moreover, the agreement expressly states that the parties remain independent contractors and that no partnership, joint venture or agency relationship is created between them. Agency Report, Tab 141, KPMG's Response to Allegations of Conflict of Interest, Agreement with Oracle, at 6. There is no relationship arising from this agreement that is applicable to either

² Given VA's selection of Oracle, we need not discuss the alleged organizational conflicts of interest arising from KPMG's relationships with PeopleSoft and SAP, since they have been rendered academic by the selection.

KPMG or Oracle with regard to the integration services procurement, the software procurement, or either firm's resulting contract performance for VA.

AMS alleges that the relationship arising from this agreement is a "more elusive" financial interest than the express terms of the agreement indicate. Protester's Comments at 11. The protester essentially contends that KPMG will benefit in the long run from Oracle software being used in the federal marketplace, and from Oracle establishing a past performance record and customer relationships in the federal marketplace, because it will create a greater demand for Oracle software in the federal market resulting in more opportunities in the future for KPMG to benefit from its marketing alliance agreement with Oracle. Id. at 11-12.

We find the potential benefit to KPMG here is speculative and too remote from the present procurement to establish a significant organizational conflict of interest that the contracting agency must avoid, neutralize or mitigate pursuant to FAR Subpart 9.5. Compare Professional Gunsmithing Inc., B-279048.2, Aug. 24, 1998, 98-2 CPD ¶ 49 at 3-4 (entitlement of consultant employed by the agency to help evaluate proposals to trademark royalties from awardee on products other than those to be provided under the contract is an interest that is speculative and too remote to create a significant conflict of interest) and International Management and Communications Corp., B-272456, Oct. 23, 1996, 96-2 CPD ¶ 156 at 4 (awardee's interest in receiving repayment of debt owed to its affiliate organization by a potential recipient of advice and assistance under the awarded support services contract is not a significant conflict of interest because the relationship between the awardee/contract and the repayment of the debt is indirect) with Aetna Gov't Health Plans, Inc.; Foundation Health Fed'l Servs., Inc., supra, at 13-17 (significant organizational conflict of interest exists where a corporate affiliate of a major subcontractor under one proposal evaluates proposals for the procuring agency).

The protest is denied.

Anthony H. Gamboa
Acting General Counsel