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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: Overlook Systems Technologies, Inc.--Costs

File: B-298099.3

Date: October 5, 2006

Drew A. Harker, Esq., Matthew H. Solomson, Esq., and Chad E. Miller, Esq., Arnold & Porter LLP, for the protester.

Michael J. O'Farrell, Jr., Esq., Department of the Air Force, for the agency. Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not entitled to reimbursement of the costs of filing and pursuing its protests where the agency decides to take corrective action in response to the protests, and the protests, which concerned alleged organizational conflicts of interest, the agency's evaluation of proposals, and its best value decision, were not clearly meritorious.

DECISION

Overlook Systems Technologies, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the award of a contract to LinQuest Corporation under request for proposals (RFP) No. FA2550-05-R-2000, issued by the Department of the Air Force for services in support of the operation of the Global Positioning System (GPS) Operations Center (GPSOC) located at the 2nd Space Operations Squadron at Schriever Air Force Base, Colorado. We dismissed the protest as academic on June 13, 2006 based on the Air Force's statement that it would evaluate an organizational conflict of interest (OCI) allegation raised by Overlook in its protest.

We deny the request.¹

¹ Prior to our issuance of this decision resolving Overlook's request for costs, the agency implemented its corrective action and the protester filed a new protest challenging the results of the corrective action. In this new protest the protester raises essentially the same bases of protest that were raised in its initial protest. The fact that we have denied the protester's request for costs does not reflect a judgment (continued...)

The RFP, issued on December 22, 2005 as a small business set-aside, contemplated the award of a fixed-price incentive fee contract for a base period of 6 months and four 1-year option periods for services in support of the GPSOC, which has the mission of operating, maintaining, and employing GPS, “the world’s premier satellite-based Position, Velocity, and Timing (PVT) information system,” “in support of military, civil, and allied operations across the full spectrum of conflict.” RFP, Statement of Work, at 3. In support of the GPSOC, the contractor is to provide sufficient personnel to operate the GPSOC on a 24-hour, 7-day-a-week basis “to ensure optimal data, products and services support to GPS users.” Id.

Award was to be made on a best value basis, with proposals evaluated under the following three factors: (1) technical acceptability; (2) past performance; and (3) price. Technical acceptability was to be evaluated solely on a pass/fail basis. Only those offerors whose proposals were found technically acceptable were evaluated under the past performance factor, which was considered significantly more important than cost or price. RFP at 53. Regarding the evaluation of past performance, the RFP explained that the Air Force would consider “recent and relevant” past performance information, including customer past performance questionnaires, contractor assessment surveys, Contract Performance Assessment Reporting System (CPARS) records, and “any other information available.” RFP at 53. The RFP defined “recent” contracts as those completed within the last 3 years and “relevant” contracts as those calling for “performance of efforts involving mission analysis of the GPS constellation or relevant system that are similar or greater in scope, magnitude and complexity than the effort described in this solicitation.” RFP at 54. In addition, the RFP defined three different “degrees of relevance” for the purpose of evaluating past performance—relevant, somewhat relevant, and not relevant—and indicated that the government reserved the right to give greater consideration to information on those contracts deemed “most relevant to the effort described in the RFP.” Id. As it relates to the protests, “relevant” was defined by the RFP as efforts involving “much of the magnitude of effort and complexities this solicitation requires,” and “somewhat relevant” as efforts involving “some of the magnitude of effort and complexities [] this solicitation requires.” Id.

The solicitation provided that, based on its evaluation of an offeror’s past performance information, the Air Force would assign the offeror a performance confidence assessment (PCA) rating of high confidence, significant confidence, satisfactory confidence, unknown confidence, little confidence, or no confidence. Id. With regard to price, which was to be evaluated for reasonableness and realism,

(...continued)

regarding the merits of the new protest filed by Overlook, given that the request for costs and the protest are subject to different standards of review based on different records.

the RFP required offerors to propose “all target costs, target profits, target prices, ceiling prices and sharing ratios for overruns/underruns (i.e. example format 80/20 refers to, contractor’s share of 80%/government’s share of 20%).” RFP at 51.

By the RFP’s amended closing date, the Air Force had received proposals from several offerors, including Overlook (the incumbent contractor) and LinQuest. As relevant to the protest issues raised by Overlook, LinQuest proposed to perform the GPSOC contract using as a team member General Dynamics Advanced Information Systems (GDAIS), a business unit of General Dynamics Corporation. In its evaluation, the Air Force rated both Overlook’s and LinQuest’s proposals as technically acceptable. Under the past performance factor, with regard to Overlook, the Air Force considered four past performance questionnaires completed by Overlook customers and three contractor assessment surveys, and concluded that Overlook’s past performance information was “relevant” and that the questionnaires and surveys reflected a majority of ratings in the exceptional category, with no ratings in the unsatisfactory or marginal category. As a consequence, the agency assigned Overlook the highest PCA rating of “high confidence.”

With regard to LinQuest’s past performance, and that of its subcontractors and team members, the Air Force considered a total of 15 past performance customer questionnaires, 12 contractor assessment surveys, and two CPARS records, and concluded that its past performance was “somewhat relevant,” since LinQuest’s team did not have any experience performing some of the particular types of tasks required under the contract. As with Overlook, however, the questionnaires, surveys, and CPARS records reflected a majority of scores in the exceptional category, with no unsatisfactory or marginal ratings. Based on this information, the Air Force assigned LinQuest the second highest PCA rating of “significant confidence.”

The Air Force determined that the prices proposed by both Overlook and LinQuest were reasonable and realistic. Overlook proposed a target price of \$14,046,552, a ceiling price of \$14,546,000, and an equal 50/50 share between the contractor and the government for both cost underruns and overruns. LinQuest submitted a target price of \$12,860,409, a ceiling price of \$14,500,000, and, from the government’s perspective, a more advantageous contractor/government cost overrun share ratio of 70/30, and a cost underrun share ratio of 30/70 contractor/government.

Based on a tradeoff between past performance and price, the Air Force concluded that LinQuest’s proposal represented the best value to the government. After learning of this decision and receiving a debriefing, Overlook filed a protest with our Office on March 16, 2006 raising several issues.

In its initial protest, Overlook argued that LinQuest was precluded from performing the GPSOC contract due to an OCI stemming from LinQuest’s inclusion of GDAIS as a member of its team. Overlook alleged that the objectivity of GDAIS would be

compromised in those instances where it was called upon to evaluate problems and the performance of GPS in systems manufactured by General Dynamics or those of its competitors. As described by Overlook, General Dynamics “manufactures GPS equipment . . . as well as commercial aircraft . . . and many multi-million dollar weapon systems and munitions that depend upon GPS for their proper operation.” Protest at 6. In addition, Overlook argued that the agency improperly evaluated LinQuest’s past performance since LinQuest did not have any relevant experience, and that the Air Force’s best value decision was arbitrary.²

On April 14, the Air Force filed its report addressing the issues raised by Overlook. With regard to the OCI issue, the Air Force maintained that because performance of the GPSOC contract does not require the LinQuest team to analyze the performance of its own weapons systems or those of its competitors, the alleged OCI issue was unfounded. According to the Air Force, the GPSOC contractor is responsible solely for analyzing and evaluating problems with the GPS signal as caused by satellite issues, signal strength, signal gaps, or environmental issues, such as interference and space weather, or “some outside cause such as the receiver failure, operator error, etc.” Agency Report (AR), Legal Memorandum, at 7. Regarding the reasonableness of its past performance evaluation of LinQuest, the Air Force set forth its basis for assigning LinQuest a PCA score of “significant confidence.” In this regard, the Air Force provided our Office with the record of its evaluation of LinQuest’s past performance, which reflected the Air Force’s consideration of the degree of relevance of LinQuest’s past performance information. In its report, the Air Force explained that while LinQuest’s record of contract performance was largely exemplary, its team’s experience was considered only “somewhat relevant” based on the fact that it lacked experience in “a very small number of the areas related to performance of the GPSOC contract.” AR, Memorandum of Law, at 12. The agency also disputed Overlook’s allegation that its best value determination was unreasonable.

In its comments on the agency report, Overlook challenged the agency’s assertion that the GPSOC contract does not require the awardee to analyze or evaluate the performance of General Dynamics’ GPS-dependent systems or those of its competitors. According to Overlook, the OCI inherent in LinQuest’s reliance on GDAIS in performing the GPSOC contract results from the fact that the contractor will be required to determine the cause of GPS signal failures, which are ultimately attributed to failure of either the GPS signal or the GPS-dependent system itself. Overlook argued that, by having GDAIS make this fault determination, its objective assessment of the problem would be compromised in those situations where it would be evaluating GPS performance in connection with one of General Dynamics’

² Overlook also challenged the Air Force’s determination that LinQuest’s proposal was technically acceptable. After receipt of the agency report, however, Overlook expressly withdrew this basis of protest.

systems or the system of one of its competitors since it would have a vested interest in the outcome of the determination. In support of its contention, Overlook submitted a declaration by its chief engineer, who served as the program manager and chief engineer for the GPSOC on Overlook's incumbent contract. Overlook's chief engineer indicated that to evaluate problems with GPS signal failure, the contractor utilizes a specific checklist to evaluate issues such as status of the satellites, space weather conditions, atmospheric conditions, terrain, etc. After all the items on the checklist have been excluded, the weapon system itself becomes the subject of further investigation. Protester's Comments, Tab 1, Declaration of Chief Engineer for Overlook, Apr. 27, 2006, at 3.

In addition, based on new information gleaned from the agency's report, Overlook elaborated on its initial general protest arguments regarding the Air Force's evaluation of LinQuest's past performance and the agency's best value determination, and filed a supplemental basis of protest raising a new OCI issue. As to the Air Force's evaluation of LinQuest's past performance and its best value determination, Overlook argued with greater specificity why, in its view, the record did not substantiate LinQuest's PCA rating of "significant confidence," why LinQuest's experience was not relevant to the tasks required under the GPSOC contract, and that the Air Force failed to conduct a proper trade-off analysis since it failed to consider significant weaknesses in LinQuest's past performance information and failed to adequately document its trade-off analysis.

Overlook's supplemental OCI protest issue concerned the reasonableness of the Air Force's analysis of potential OCI issues resulting from GDAIS's and General Dynamics' involvement in five other GPS-related procurements. In this regard, the record reflected that LinQuest had submitted a letter to the Air Force to provide information regarding potential OCI issues. In this letter, LinQuest represented that GDAIS "does not believe it has any OCI issues, but has disclosed involvement in GPS related procurements," which were identified and discussed in the letter. AR, Tab 29, Letter, Subject: LinQuest Team Potential OCI Issues, Jan. 3, 2006. The record further reflected that the contracting officer considered LinQuest's letter and determined that, based on the information provided by LinQuest, no further action by LinQuest was necessary regarding OCI issues.

The Air Force then filed a supplemental report which further addressed Overlook's initial OCI protest allegation regarding GDAIS's impaired objectivity, the supplemental OCI allegation raised by Overlook, and the specific concerns raised by Overlook regarding the evaluation of LinQuest's past performance and the trade-off analysis. Regarding the impaired objectivity OCI issue, the Air Force reiterated that in its view no impaired objectivity OCI exists with respect to GDAIS's performance under the contract because the GPSOC contract does not require GDAIS to analyze or evaluate the performance of any equipment or technology of General Dynamics or its competitors. Rather, according to the Air Force, it is the GPS signal that is being analyzed under the GPSOC contract, not the system using the signal. In support of

its position, the Air Force submitted statements from the contracting officer and the Commander of the 2nd Operations Squadron.

After reviewing the record, our Office held a hearing with the parties on June 5-6, in order to more fully understand the contractor's responsibilities under the GPSOC contract and address the specific question of whether the awardee would be placed in the position of assessing whether a GPS receiver, which General Dynamics has incorporated in equipment it has provided to the government, is or is not the cause of a GPS failure. After the hearing, but before post-hearing comments were due to our Office, the Air Force notified our Office and the parties that it was taking corrective action by further evaluating the impaired objectivity OCI issue raised by Overlook to determine "whether the Air Force should take appropriate steps to avoid, neutralize or mitigate any significant potential conflicts of interest before contract award . . ." Air Force Letter to GAO, June 9, 2006. Based on this proposed corrective action, our Office dismissed Overlook's protest as academic on June 13.

Overlook requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. Overlook asserts that all of its protest grounds were clearly meritorious and the Air Force unduly delayed taking corrective action, as evidenced by its failure to do so until after filing an initial agency report and a supplemental report, and after a hearing was held in the case.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that, where the contracting agency decides to take corrective action in response to the protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2006). That does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, we will recommend reimbursement only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham- Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is "clearly meritorious" where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. Spar Applied Sys.--Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5.

We conclude that reimbursement is not appropriate in this case since Overlook's protest allegations were not clearly meritorious. Regarding the OCI issue raised in Overlook's initial protest—the alleged impaired objectivity of GDAIS—this basis of protest was premised on Overlook's understanding of the solicitation as requiring the GPSOC contractor, in the context of evaluating GPS signal failures, to analyze and evaluate the performance of GPS equipment and the operation of equipment that utilizes GPS technology. The Air Force, however, maintained that the contract does not require this type of analysis and instead argued that the contract merely requires the GPSOC contractor to evaluate and analyze problems relating to the GPS signal itself. Because our Office could not determine which party's position was correct from the record, we held a hearing to more fully develop the matter. Since the ultimate resolution of this matter required substantial further analysis as indicated, in part, by our Office's scheduling of a hearing to more fully develop the protest record regarding this issue, the protest, in our view, presented a close question, and therefore was not clearly meritorious. See Honeywell Tech. Solutions, Inc.—Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 4 n.3.

Similarly, the other issues raised in Overlook's protest were not clearly meritorious. In challenging the Air Force's evaluation of LinQuest's past performance, Overlook principally argued that LinQuest's PCA rating of "significant confidence" was unreasonable given LinQuest's lack of experience with GPS. The agency, however, defended its evaluation, noting that the solicitation did not require GPS experience per se, but rather defined relevant past performance information to include performance of efforts "that are similar or greater in scope, magnitude and complexity than the effort described in this solicitation." RFP at 54. Moreover, the record reflected that the Air Force rated LinQuest's past performance as only "somewhat relevant" since its past performance information reflected only "some of the magnitude of effort and complexities" required under the RFP. Given its largely exceptional performance, however, the Air Force concluded that LinQuest deserved a PCA rating of "significant confidence." Based on this record, we think that the agency's response constituted a colorable defense to the issues in the protest, and we thus cannot conclude that Overlook's challenge in this regard was "clearly meritorious."

With regard to the Air Force's award decision, Overlook asserted that the agency improperly converted the source selection decision from a best value determination to one based on technical acceptability and low price in contravention of the terms of the RFP as reflected by the Air Force's failure to consider significant weaknesses in LinQuest's past performance information, and the lack of any substantive analysis in the trade-off between past performance and price. The Air Force argued that it followed the selection criteria set forth in the RFP and adequately documented its best value decision in favor of LinQuest's lower-priced proposal as reflected in its source selection decision, and further supported its position through a declaration from the SSA. Thus, the record reflected that, in making the award decision, the SSA

considered, at a minimum, the offerors' proposals and the past performance evaluations, including LinQuest's rating of "significant confidence," the determination that its information was "somewhat relevant," and the fact that its performance reflected an overall exceptional level of customer satisfaction, as well as Overlook's status as the incumbent, its relevant past performance information, and its past performance evaluation rating of "high confidence." Since the agency advanced a colorable argument in defense of its best value decision, which was not inconsistent with the record, we have no basis on the record here to conclude that Overlook's challenge to the best value decision was clearly meritorious.

As a final matter, regarding Overlook's supplemental protest allegation that the Air Force failed to adequately analyze potential OCIs resulting from the involvement of GDAIS and General Dynamics in several other GPS-related procurements which were disclosed by LinQuest in its proposal, we find that this issue also was not clearly meritorious. The record reflects that LinQuest informed the Air Force of contracts which either GDAIS or General Dynamics C4 Systems (GD-C4S), a separate business unit of GD, were performing [deleted]. LinQuest further indicated that GDAIS had been supporting the GPS Joint Program Office for 9 years and had been operating under an approved OCI plan for several years, that it was in the process of updating that plan, and that an OCI mitigation plan would be in place for the GPS Joint Program Office support as well as the GPSOC effort. AR, Tab 29, supra. Moreover, LinQuest explained that the GDAIS business unit involved with the GPS Joint Program Office was separate from the unit proposed for the GPSOC contract. During the hearing held by our Office, the contracting officer testified that he had discussed LinQuest's disclosures regarding GDAIS's involvement in the GPS Joint Program Office contracts with a technical expert in the GPSOC who further discussed the issue with other technical experts in the GPSOC, and advised the contracting officer that the 2nd Space Operations Squadron did not perceive the possibility of an OCI. Ultimately, the contracting officer concluded, in part, that given GDAIS's history of successfully supporting the GPS Joint Program Office under approved OCI plans, there was no reason to conclude that the disclosed GPS Joint Program Office contracts gave rise to impermissible conflicts.

The record, albeit limited and in some instances incomplete, was not inconsistent with the Air Force's contention that the contracting officer had considered GDAIS's involvement under the GPS Joint Program Office contracts as they related to the GPSOC contracts, and determined that such involvement did not present an impermissible conflict. Further, the record did not clearly establish that GDAIS's involvement under the GPS Joint Program Office contracts presented an impermissible conflict (i.e., a conflict resulting from impaired objectivity, unequal access to information, or biased ground rules, the three circumstances, broadly speaking, which create the potential for OCI concerns, see Government Scrap Sales, B-295585, Mar. 11, 2005, 2005 CPD ¶ 60 at 3). As a result, we cannot conclude that

Overlook's challenge in this regard was clearly meritorious.

The request that we recommend reimbursement of costs is denied.

Gary L. Kepplinger
General Counsel