



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Meridian Corporation

File: B-246330.4

Date: September 7, 1993

Cheralyn S. Cameron, Esq., and Stuart Young, Esq., DynCorp, and Paul Shnitzer, Esq., Crowell & Moring, for the protester.

James J. McCullough, Esq., Anne B. Perry, Esq., and Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, an interested party.

Ronald E. Cone, and Paul A. Gervas, Esq., Department of Energy, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to evaluate the impact of awardee's organizational conflict of interest avoidance plan on its technical proposal is denied where information obtained during review of such a plan does not clearly contradict representations in the offeror's technical proposal.

2. Protest that agency improperly evaluated the organizational conflict of interest (OCI) presented by awardee's proposed subcontractors is denied where protester has not shown agency unreasonably determined that any potential OCIs can be successfully avoided by the combination of internal agency controls and the awardee's OCI avoidance plan.

DECISION

Meridian Corporation protests the award of a contract to Science Applications International Corporation (SAIC) under request for proposals (RFP) No. DE-RP01-91DP30423, issued by the Department of Energy (DOE) for the provision of technical, analytical, and management support services to DOE's Office of Safeguards and Security (OSS). Meridian argues that the agency improperly failed to evaluate the impact of SAIC's organizational conflict of interest (OCI) avoidance plan on its technical proposal, and improperly evaluated the OCIs presented by some of SAIC's proposed subcontractors.

We deny the protest.

BACKGROUND

The RFP was issued on April 18, 1991, and contemplated award of a level-of-effort, cost-plus-fixed-fee contract for a 3-year base period and one 2-year option period. The work under the contract will be performed in response to specific task assignments issued by OSS, and the services contemplated will assist OSS in carrying out its responsibilities for safeguards and security functions. Award was to be made to the offeror whose proposal was determined to be the most advantageous to the government based on designated technical, business management, and cost factors.

The RFP's section I.011 contained Department of Energy Acquisition Regulation (DEAR) § 952.209-72, "Organizational Conflicts of Interest-Special Clause." The purpose of this clause is to aid in ensuring that a contractor (1) is not biased because of its past, present, or currently planned interests which relate to the work under the contract, and (2) does not obtain any unfair competitive advantage by virtue of its performance of the contract. DEAR § 952.209-72(a). The clause prohibits contractors from participating in any capacity in DOE contracts, subcontracts, or proposals which stem directly from the contractor's performance of work under the contract. DEAR § 952.209-72(b)(1)(i). Section L.036 of the RFP required offerors (including subcontractors proposed by offerors) to disclose all relevant facts bearing on possible OCIs--or to represent that no such facts exist--as well as to submit substantial supporting information. The RFP's cover letter instructed offerors that award of the contract would be subject to the OCI clearance of the selected offeror.

By May 20, 1991, the closing date for receipt of initial proposals, DOE had received three offers from three companies: Meridian, SAIC, and ERC Environmental and Energy Services Co., Inc. (ERCE). Meridian and SAIC submitted revised proposals in response to DOE's written discussion questions,¹ and the SEB conducted oral discussions with both offerors concerning, among other things, OCI issues. Revised best and final offers (BAFO) were submitted by

¹After initial evaluations, the Source Selection Official (SSO) determined that neither Meridian nor ERCE had a reasonable chance of being selected for award and thus eliminated them from the competitive range. In response to ERCE's protest of this determination to our Office, DOE reestablished the competitive range to include all offerors, and ERCE withdrew its protest. ERCE subsequently withdrew from the competition and did not submit a revised proposal.

January 21, 1993, and the SEB evaluated the revised BAFOs as follows:

<u>Offeror</u>	<u>Technical</u>	<u>Business Management</u>	<u>Probable Cost</u>
SAIC	800	Fully Satisfactory	\$45,106,928
Meridian	533	Fully Satisfactory	\$36,658,632

Because the SEB determined that both Meridian and SAIC had potential OCIs,² it evaluated the OCI avoidance plans submitted by both offerors and determined that both plans sufficiently avoided potential OCIs. See DEAR § 909.570-9. Since the SSO found that the strengths of SAIC's technical proposal offset its higher probable cost, it awarded the contract to SAIC on March 4. Meridian subsequently filed an initial protest of the award,³ followed by this supplemental protest. Performance has been suspended pending resolution of this protest.

DISCUSSION

Meridian argues that (1) DOE improperly failed to evaluate the impact of SAIC's OCI avoidance plan on its technical proposal, and (2) improperly evaluated the OCIs presented by three of SAIC's proposed subcontractors.

Subpart 9.5 of the DEAR prescribes general rules and procedures for identifying, evaluating and resolving OCIs.⁴ It is DOE's policy to identify and avoid OCIs before entering into contracts. DEAR § 909.570-2. An OCI exists where an offeror has past, present, or currently planned interests that either directly or indirectly, through a client relationship, relate to the work to be performed under a DOE contract and which may (1) diminish its capacity to give impartial, technically sound, objective assistance and advice, or (2) result in the offeror being given an unfair competitive advantage. DEAR § 909.570-3. Offerors (and their proposed subcontractors) submitting proposals for

²Both SAIC and Meridian had contracts with DOE field organizations or other federal agencies which could place them in a position of reviewing their own work or supporting organizations overseeing this work.

³Meridian argued that DOE had misapplied the evaluation criteria in the RFP. We denied the protest. Meridian Corp., B-246330.3, July 19, 1993, 93-2 CPD ¶ ____.

⁴DOE acquisitions are processed in accordance with these regulations rather than as provided at Federal Acquisition Regulation subpart 9.5 with respect to OCIs. DEAR § 909.500.

technical consulting and management support services are required to disclose relevant information bearing on the possible existence of any OCIs. DEAR §§ 909.570-5(a); 909.570-12.

Where, as here, formal SEB procedures apply, the SSO is to evaluate submitted information concerning the possible existence of OCIs, and make a finding whether possible OCIs exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist. DEAR § 909.570-9(a). The ultimate determination as to whether OCIs exist is to be made in the light of common sense and good business judgment based upon the relevant facts and the work to be performed. DEAR § 909.570-4(a). If the finding indicates that such conflicts exist, the SSO has three options:

1. Disqualify the offeror from award;
2. Avoid OCIs by including appropriate conditions in the resulting contract; or
3. Waive OCIs if award of the contract is in the best interest of the United States, provided a written finding and determination is published in the Federal Register and an appropriate clause included in the contract to mitigate the conflict, to the extent feasible, prior to award.

DEAR § 909.570-9.

As discussed above, while the SEB found that both Meridian and SAIC had potential OCIs, it determined that the OCI avoidance plans submitted by both offerors sufficiently avoided potential OCIs when incorporated as appropriate conditions in the resulting contract. See DEAR § 909.570-9.

Technical Evaluation of OCI Avoidance Plans

Meridian first argues that DOE improperly failed to evaluate the impact of SAIC's OCI avoidance plan on its technical proposal. Meridian contends that SAIC's OCI avoidance plan "boils down" to "large-scale" recusals by SAIC and its subcontractors from the performance of a number of tasks under the statement of work (SOW) wherein a possible OCI exists. Meridian argues that, to the extent that SAIC and its subcontractors are precluded from performing tasks due to OCI considerations, the impact should be evaluated as an important consideration under technical factor one, subfactor B, "technical approach," which states:

"The offeror's technical approach will be evaluated as to how the offeror intends to perform each of the tasks of the Statement of Work in relation to the technical requirements set forth therein. Evaluation of the approach will include: (1) task fulfillment, i.e., work definition, task assignment planning, budgeting and execution . . ."

The agency responds that it was not required to consider the impact of the OCI avoidance plans in its evaluation of the technical proposals because OCI considerations are not included under the stated technical evaluation factors. DOE also contends that Meridian erroneously assumes that SAIC's OCI avoidance plan requires the complete preclusion of SAIC and its subcontractors from the performance of various tasks and, thus, that SAIC's technical proposal should have been downgraded. The agency states that recusal is but one of several OCI avoidance mechanisms included in SAIC's OCI avoidance plan.

While the RFP's technical evaluation scheme does not specifically state that OCI avoidance mechanisms will be evaluated to determine their effect upon the technical proposals,⁵ an agency should consider the effect of an offeror's OCI avoidance plan on its technical proposal where the information obtained during the review of such a plan clearly contradicts representations in the offeror's technical proposal, calling into question the evaluators' conclusions concerning its merits. See Continental Maritime of San Diego, Inc., B-249858.2; B-249858.3, Feb. 11, 1993, 93-1 CPD ¶ 230; AAA Eng'g & Drafting, Inc., B-250323, Jan. 26, 1993, 93-1 CPD ¶ 287.

Here, however, the record shows that the agency's review of SAIC's OCI avoidance plan did not call into question its conclusions concerning the merits of SAIC's technical proposal. The assumption on which Meridian's argument is based--that SAIC and its subcontractors will be completely precluded from performing tasks due to OCI considerations--is incorrect. While SAIC's OCI avoidance plan allows for the recusal by a firm with OCI problems, the plan also includes such avoidance mechanisms as the issuance of task order subcontracts so subcontractors can proceed; the restructuring of a given work effort to avoid a conflict; the semi-autonomous operation of groups to avoid conflicts; the use of a database to identify potential conflicts and to direct that work to a subcontractor who would report directly to DOE; and the review of each task assignment for

⁵Some RFPs do make OCI considerations part of the technical evaluation. See e.g., American Sys. Corp., B-239190, Aug. 6, 1990, 90-2 CPD ¶ 109.

possible OCI issues. Moreover, performance under this contract is on a task order basis, and whether a task with a potential OCI problem will be both ordered and present an unavoidable OCI, despite the OCI avoidance plan, is purely speculative.

The record shows that the SEB reviewed the impact of OCI avoidance procedures on each offeror's ability to perform the contract as part of the OCI review called for by the RFP. It considered the relevant contracts requiring OCI avoidance, the proposed OCI avoidance mechanisms, and the availability of proposed subcontractors to perform efforts that would otherwise contain potential OCIs. In its risk assessment, unchallenged by Meridian, the SEB identified risks inherent in awarding the contract to SAIC, including the risk that the OCI avoidance plan might be overly burdensome. However, the SSO concluded that incorporation of SAIC's OCI avoidance plan into the resulting contract made the possibility that SAIC would be unable to perform the work insignificant, and ensured the availability of other OCI avoidance alternatives. Meridian has not shown that this determination was unreasonable.⁶

Evaluation of Potential OCIs Presented by Subcontractors

Meridian also argues that three of SAIC's proposed subcontractors, those who perform work for DOE's Office of Security Evaluations (OSE),⁷ have actual OCIs which prohibit their performance of similar work for OSS. Meridian alleges that in their work for OSE, these subcontractors will be asked to evaluate the work of SAIC under the OSS contract, and that the work detailed in the OSS solicitation presents a clear OCI with respect to the work these subcontractors are now performing for OSS. Meridian argues that DOE has not properly considered the ramifications of the OSE work performed by these three subcontractors.

DOE contracting officials are required to avoid or mitigate OCIs on the part of prospective contractors so as to prevent

⁶The record also shows that Meridian's OCI avoidance plan presented the same problems as did SAIC's OCI avoidance plan; Meridian does not dispute the agency's determinations in this regard.

⁷OSE conducts independent inspections, evaluations and performance testing of DOE safeguards and security policy and program implementation, while OSS develops and implements DOE safeguard and security programs.

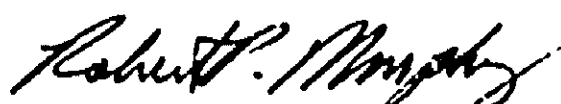
the existence of conflicting roles that might impair a contractor's capacity to give objective assistance and advice, or to prevent an unfair competitive advantage. DEAR §§ 909.570-2; 909.570-3; 909.570-9(a); see D.K. Shifflet and Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419. The responsibility for determining whether possible OCIs exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist, and to what extent the firm should be excluded from the competition, rests with the contracting officer or selection official. DEAR § 909.570-9(a). Our Office will not overturn the agency's determination in this regard except where it is shown to be unreasonable. See D.K. Shifflet & Assocs., Ltd., supra. Here, we conclude that DOE reasonably determined that the potential OCIs which existed with regard to these three subcontractors were avoidable.

The record shows that the SEB did evaluate, assess and consider the possible OCI implications of the participation of these three subcontractors and concluded that any potential OCIs that existed were avoidable. As for two of the subcontractors, the agency recognized that a conflict could be created under the OSE contract if either firm were called upon to evaluate work they had performed under the OSS contract with SAIC. The Deputy Assistant Secretary for Security Evaluations assured the SEB chairman that administrative controls were in place over OSE contractors to avoid any potential conflict with the OSS contract. These controls include agency review of contractor deliverables, internal review of task assignments for OCI before issuance, formalized monthly reviews of work performed and projected, physical separation of records and personnel, and organizational barriers. The SEB concluded that these OSE measures, in addition to the measures provided in SAIC's OCI avoidance plan, were sufficient to avoid the potential OCIs presented by the participation of these two subcontractors. As for the third subcontractor, the SEB determined that the primary potential OCI problem existed in reference to one site and that other subcontractors could perform tasks related to that site.

Meridian essentially speculates that both OSE's internal controls over potential OCIs and SAIC's OCI avoidance plan will not succeed in avoiding the potential OCIs that may be presented by the participation of these three subcontractors; Meridian does not address the specifics of these avoidance mechanisms and why they will not be successful. Meridian's mere disagreement with the evaluators' judgments regarding the evaluation of potential OCIs presented by these subcontractor is not a basis for sustaining the protest. See American Sys. Corp., B-239190, Aug. 6, 1990, 90-2 CPD ¶ 109. Moreover, even assuming that there are potential OCIs with these three subcontractors that cannot

be successfully avoided, SAIC has proposed five other subcontractors to perform tasks under the contract; Meridian has not challenged the OCI findings concerning these subcontractors.

The protest is denied.


for James F. Hinchman
General Counsel