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Decision

Matter of: Science Applications International Corporation

File: B-293601.5

Date: September 21, 2004

James J. McCullough, Esq., Deneen J. Melander, Esq., Steven A. Alerding, Esq., and Abram J. Pafford, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. Thomas L. McGovern, III, Esq., Michael J. Vernick, Esq., and Todd R. Overman, Esq., Hogan & Hartson, for Lockheed Martin Services, Inc., an intervenor. Jonathan S. Baker, Esq., Environmental Protection 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

Where agency previously failed to give any consideration to potential conflicts of interest between awardee's performance of contract requirements and awardee's involvement in environmentally-regulated activities, agency's corrective actions adequately remedy prior procurement flaws where agency has reviewed additional information regarding the ongoing, environmentally-regulated activities of the awardee, has considered that information in the context of the scope of work reasonably contemplated under this contract, and has procedures in place for the agency's independent assessment of potential conflicts between each task order's requirements and the awardee's ongoing activities.

DECISION

Science Applications International Corporation (SAIC) protests the corrective action taken by the U.S. Environmental Protection Agency (EPA) in response to this Office's decision in Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96, wherein we sustained SAIC's earlier protest challenging the award of a contract to Lockheed Martin Services, Inc. pursuant to request for proposals (RFP) No. PR-HQ-02-11750. SAIC protests that the agency's corrective actions are insufficient to address the procurement flaws identified in our earlier decision.

We deny the protest.

BACKGROUND

The solicitation at issue here was released in May 2003 and sought proposals to provide various systems engineering services to be performed in identified “task areas.”¹ The solicitation identified various cost and non-cost evaluation factors, and provided that award would be based on the proposal offering the best value to the government. As part of the non-cost evaluation factors, offerors were required to submit a “corporate conflict of interest plan” to be evaluated on a pass/fail basis, but were advised that such plans need not be “contract or program specific.” RFP at M-4.

Proposals were submitted by five offerors, including Lockheed Martin and SAIC. Based on the agency’s evaluation of cost and non-cost factors, Lockheed Martin’s proposal was selected for award in January 2004. Thereafter, SAIC filed a protest with our Office.² Among other things, SAIC’s protest challenged the award decision on the basis that the agency failed to properly consider potential organizational conflicts of interests created by the involvement of Lockheed Martin affiliates in performing various activities, nationwide, that are subject to environmental regulations.³

In defending against SAIC’s earlier protest, the agency maintained that it had no obligation to—and that it did not—consider the impact that the environmentally-regulated activities of Lockheed Martin or its affiliates could have on Lockheed Martin’s performance of this contract. The agency maintained that it gave no consideration to such activities because “this procurement is for computer support/systems engineering services, not enforcement or regulatory advice.” Agency Post-Hearing Brief at 2. However, during the hearing conducted by this Office in connection with SAIC’s earlier protest, SAIC established that, in at least a few instances, performance of the prior contract had required SAIC to perform tasks that could create conflicts of interest for a contractor involved in activities subject to

¹ The following task areas were listed in the solicitation: systems development, maintenance, and operation; application security support; information technology architectural support; data management support; training; statistical services; geographic information systems support; high performance computing and visualization support; and scientific application and computational science support.

² SAIC was the incumbent contractor.

³ There is no dispute that Lockheed Martin or its affiliates have interests in multiple activities and facilities that are subject to state and federal environmental regulations. See, e.g., Lockheed Martin Corporation 2003 Annual Report.

environmental regulations.⁴ Although the agency questioned the quantity and relative significance of such work under the prior contract, there was no dispute that at least a portion of the task orders issued under the prior contract involved work that could create conflicts of interest for Lockheed Martin.⁵

Since the record was clear that the agency had given no consideration to the ongoing environmentally-regulated activities of Lockheed Martin or its affiliates and, similarly, that the agency had given no consideration to the impact such activities could have on Lockheed Martin's judgment and objectivity in performing certain tasks that had been required under the predecessor contract and appeared to be within the scope of the current contract, we sustained the earlier protest and recommended that the agency perform a thorough assessment of Lockheed Martin's environmentally-regulated activities in the context of the entire scope of work to be performed under this contract.

In response to our decision, the agency requested, received and considered additional information regarding Lockheed Martin's past and ongoing environmentally-regulated activities. Thereafter, the agency performed and documented an analysis regarding whether such activities would reasonably affect the objectivity with which Lockheed Martin will perform the work contemplated by this contract. In a memorandum dated June 9, 2004, the agency summarized the additional information it had considered and concluded: "[I]t has been determined that no actual or potential conflicts of interest exist due to Lockheed Martin's environmentally-regulated activities in the context of the entire scope of work to be performed under [this contract]." Agency Report, Tab 9, Conflict of Interest Analysis Memorandum, at 2. Despite the agency's assertion that "no . . . potential conflicts of interest exist," the agency's analysis, nonetheless, provides that, prior to issuing any task order under this contract, the agency's project officer will "ascertain that no

⁴ For example, under the task area "statistical surveys," SAIC had been tasked with developing a series of questionnaires to elicit information concerning the testing and sampling practices used by certain public drinking water systems. Similarly, in addressing this task area of the solicitation, Lockheed Martin's proposal referenced Lockheed Martin's experience with the design and implementation of surveys stating: "We [Lockheed Martin] [have] evaluated information collected from anglers along a potentially contaminated river to determine long-term contaminant ingestion and corresponding health effects." Lockheed Martin Proposal, at III.2-32. At the hearing conducted by GAO in connection with the prior protest, agency personnel acknowledged that it would be inappropriate for Lockheed Martin to be tasked with conducting this type of survey under the contract at issue if there were a Lockheed Martin production facility in the area being surveyed.

⁵ The contracting officer stated that the work under the current contract is expected to be similar to that performed under SAIC's prior contract.

[conflicts of interest] exist within the assigned tasks, or that adequate mitigation strategies are in place and have been discussed with the contracting officer.” Id. at 8.

By letter to our Office dated June 10, with a copy to SAIC’s counsel, the agency stated that, as a result of its analysis and conclusions, it was proceeding with contract performance by Lockheed Martin. This protest followed.

DISCUSSION

SAIC’s protest first challenges the agency’s determination that “no actual or potential conflicts of interest exist due to Lockheed Martin’s environmentally-regulated activities.” SAIC notes that Lockheed Martin affiliates are involved in various environmentally-regulated activities across the country and, in light of the undisputed record established during the prior protest that at least a limited amount of work performed under the prior contract could create conflicts of interest for a contractor involved in widespread environmentally-regulated activities, the agency’s assertion that “no . . . potential conflicts of interest exist” is unreasonable.

Although it is clear that Lockheed Martin affiliates are involved in widespread environmentally-regulated activities, it is also clear that a significant majority of the tasks reasonably contemplated under this contract have no potential to create conflicts of interest. As noted in our prior decision, the significant majority of work reasonably contemplated under this contract relates to “administrative” systems engineering services related to payroll, personnel, and grants management. In our prior decision we sustained SAIC’s protest since it was clear the agency gave no consideration to potential conflicts of interest—despite the fact that some of the work performed under the prior contract presented potential conflict of interest concerns.

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize or mitigate such conflicts to prevent the existence of conflicting roles that might impair a contractor’s objectivity. Contracting officers are to exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. Federal Acquisition Regulation (FAR) § 9.505; RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4; Epoch Eng’g, Inc., B-276634, July 7, 1997, 97-2 CPD ¶ 72 at 5. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9.

Here, notwithstanding the agency’s broad assertion that “no . . . potential conflicts of interest exist,” the record clearly demonstrates that the agency recognizes the

potential that conflicts may arise during contract performance, and has in place procedures to safeguard against such occurrences. As noted above, the agency states that, prior to issuing each task order under this contract, the agency project officer will independently consider whether that task order's requirements create a conflict of interest for Lockheed Martin. Specifically, the project officer will "[either] ascertain that no [conflicts of interest] exist within the assigned tasks, or that adequate mitigation strategies are in place and have been discussed with the contracting officer."⁶ Agency's Conflict of Interest Analysis, June 9, 2004, at 8.

In summary, the record establishes that the agency has requested and received information regarding Lockheed Martin's environmentally-regulated activities, has reasonably considered that information in the context of the solicitation's anticipated requirements, and has accepted responsibility for performing an independent and ongoing assessment of potential conflicts of interest each time a task order is issued. On this record, we deny SAIC's protest that the agency's corrective actions regarding potential conflicts of interest were inadequate.⁷

Anthony H. Gamboa
General Counsel

⁶ In the context of the record as a whole, we understand that, rather than categorically asserting that there is no potential for a conflict of interest to arise, the agency's position is that, based on its consideration of Lockheed Martin's ongoing environmentally-regulated activities, it is unlikely that a conflict will arise and that the agency's independent review process will identify such a conflict if and when it is created by specific task order requirements.

⁷ In our prior decision we also noted various concerns regarding the agency's evaluation of Lockheed Martin's proposed indirect rates, including the fact that, although the contracting officer believed that the Defense Contract Audit Agency (DCAA) had verified all of Lockheed Martin's proposed rates, this was not the case. In light of our recommendation that the agency perform additional assessments regarding potential conflicts of interest, we suggested that the agency also review its earlier assessment of Lockheed Martin's proposed indirect costs. In response, the contracting officer personally contacted the cognizant DCAA auditor, discussed each of Lockheed Martin's indirect rates with that auditor—including the specific cost elements that DCAA had not previously reviewed—and concluded that Lockheed Martin's proposed rates were reasonable and realistic. Although SAIC protests that the contracting officer's independent review was insufficient, we disagree. Based on the entire evaluation record, including the prior evaluation along with the actions taken by the contracting officer in response to our decision, we find no basis to question the agency's conclusion that Lockheed Martin's proposed indirect rates are reasonable and realistic.