

FAA OFFICE OF DISPUTE RESOLUTION

FOR ACQUISITION

Re: Protest of Washington Consulting Group, Inc,

Against the Award of Contract No.DTFAOI-98-C-00012

Docket: 97-ODR-00059

DECISION

On January 7, 1998 awardee, Lockheed Martin Services, Inc., ("LMSI") filed a motion to dismiss ("Motion") the organizational conflicts of interest ("OCI") portion of the protest of Washington Consulting Group, Inc. ("WCG"). The FAA subsequently joined in the Motion, which was opposed by WCG. LMSI's Motion essentially alleges that the OCI allegations raised in the protest involve matters of contract administration or bidder responsibility that are not properly the subject of a bid protest. As is discussed below, it is the determination and decision of the Office of Dispute of Resolution for Acquisition ("ODRA") that LMSI's Motion has been rendered moot by the FAA's decision on February 5, 1998 to reconvene the risk evaluation team for the procurement.

I. FACTUAL BACKGROUND

WCG's original protest in this case ("Protest") was filed with ODRA on December 12, 1997. Included among several independent, non-OCI, grounds raised in the protest was the allegation that the FAA: ignored LMSI's "obvious and serious OCI problems"; approved LMSI's OCI litigation plan; and awarded LMSI the contract. WCG Protest at 8. WCG contended that the FAA's action was unreasonable, arbitrary and violative of FAA-AMS Section 3.9.3.2.3.2 and 5 U.S.C. §702, et seq.

WCG filed a First Amended Protest on January 6, 1998. The First Amended Protest was not directed at OCI issues and is not pertinent to the pending Motion. WCG filed its Second Amended Protest on January 8, 1998, one day after the filing of LMSI's motion to dismiss the OCI grounds of protest. The Second Amended Protest specifically alleges that: LMSI failed to disclose pertinent facts related to OCI; the FAA risk evaluation was defective in that the OCI risk of LMSI was not taken into account; and the FAA award decision, accordingly, was not based on accurate information. WCG Second Amended Protest at 3.

The Motion and the OCI protest ground were retained in this Office, pending completion of briefings on the Motion. On January 8, 1998, the other independent grounds of protest were referred for fact finding to a Special Master, Judge Stephen A. Daniels of the General Services Board of Contract Appeals, pursuant to an interagency agreement.

Analysis of the Motion and the opposition thereto revealed an issue of fact with respect to the protester's allegation that the FAA evaluated the OCIs of the offerors in this procurement as a factor in the source selection process. Therefore, on January 22, 1998, a limited issue was referred to the Special Master Judge Daniels for fact finding, as follows:

"Whether during the selection process in this procurement the FAA evaluated the Organizational Conflicts of Interest of the individual offerors as source selection factors, rather than treating OCI as a matter of bidder responsibility and contract administration."

Neither the parties nor Judge Daniels objected to or questioned this specific referral for fact finding. Judge Daniels allowed the protester to take the depositions of the contracting Officer and a source selection official, and the parties submitted briefs to Judge Daniels on the issue.

As is more fully discussed below, on February 2, 1998, Judge Daniels provided written findings of fact ("Findings") on the above question, answering the referred question in the negative. In addition, the Special Master independently provided his views and suggestions with respect to the overall merits of the OCI issue. Judge Daniels concluded that the FAA had not adhered to the rules it had established for the procurement, in that it failed to examine OCI issues as part of the source selection risk evaluation. He suggested that inasmuch as the risk evaluation was, in his view, incomplete, "the FAA may wish to propose a suspension of proceedings in the protest, so that it may reconvene the risk evaluation team to finish the job the solicitation promised that it would fulfill, and then brief the source selection official again so that he might make a new source selection decision on the basis of a complete evaluation." Special Master's Findings at 9.

Counsel for the parties were provided with copies of the Findings on February 2, 1998. By letter dated February 5, 1998, the FAA advised as follows:

"The FAA is reassembling the Risk Evaluation Team (RET) for the sole purpose of assessing the offerors' organizational conflicts of interest (OCI), to the extent there are any, and the offerors' OCI plans, as part of Risk Evaluation (RFP Sec. M.XXX). The results of this limited assessment shall be briefed to the Source Selection Official (SSO), who shall decide whether the results of this assessment change his original source selection decision."

This Office stayed all proceedings before the Special Master and in this Office, effective at the close of business on February 5, 1998, pending the completion of the Agency's OCI risk re-evaluation. The stay expired on February 17, 1998.

II. DISCUSSION

As is discussed herein, the LMSI Motion was rendered moot by the Agency's decision to reconvene the risk evaluation team and to re-evaluate OCI related risks as a source selection factor for the instant procurement.

At the outset, it should be noted that issues of organizational conflicts of interest may well give rise to an actionable bid protest. For example, the General Accounting Office has sustained a number of protests challenging the eligibility of bidders who participated in formulating a statement of work or technical specifications for Federal projects, *GIC Agricultural Group*, 72 Comp. Gen. 14 (1992), 92-2 CPD T263; *Basile, Baumann, Prost & Associates, Inc.*, Comp. Gen. Dec. B-274870 (January 10, 1997), 97-1 CPD T15. In each of those cases, the entity's prior position created an unacceptable OCI which gave it an unfair competitive advantage over others and which, under established Federal procurement principles, precluded it from being eligible to receive a contract award. On the other hand, the GAO has observed, "the mere existence of a prior contract or current contractual relationship between a contracting agency and a firm does not create an organizational conflict of interest for that firm." *Mortara Instrument, Inc.*, Comp. Gen. Dec. B-272461 (October 15, 1996), 96-2 CPD T212, *citing Etek, Inc.*, 68 Comp. Gen. 537 (1989)@ 89-2 CPD T29; *see also Optimum Technology, Inc.*, Comp. Gen. Dec. B-266339 (April 16, 1996), 96-1 CPD TI 88.

The FAA's Acquisition Management System ("AMS") makes plain the Agency's policy to avoid awarding contracts where "unacceptable" OCIs arise:

"The policy of the FAA is to avoid awarding contracts to contractors who have ***unacceptable organizational conflicts of interest***. An organizational conflict of interest means that, because of activities or relationships with other persons, a persons is unable or potentially unable to render impartial assistance to the agency, or the person's objectivity in performing the contract work is or might be impaired or the person has an ***unfair competitive advantage***."

AMS §3.1.7 (emphasis supplied). By the same token, the AMS allows the Agency's contracting officials broad discretion in determining how to deal with OCIs and does not mandate exclusion of contractors from procurements in every instance:

"The FAA will resolve organizational conflict of interest issues ***on a case-by-case basis***. When necessary to further the interests of the agency, an actual or potential conflict may be waived or mitigated at the FAA's discretion."

Id. (emphasis supplied).

The discretion provided by AMS §3.1.7 logically would encompass an Agency decision in an appropriate case to assess and resolve potential OCIs for a particular procurement as either a pre-award responsibility determination or during post-award contract administration. Given that the Agency would have the authority and discretion to waive

OCIs altogether (something hardly unique to the FAA - *see, e.g.*, FAR 9.503), a decision to defer dealing with potential OCIs until after a contract award would be permissible, assuming that such a decision has a rational basis.

Here, the Request for Offers/Screening Information Request ("RFO/SIR") called for offerors to submit OCI mitigation plans for Agency review. Both WCG and LMSI submitted such plans. The language of the RFO/SIR did not specify Agency evaluation of OCI mitigation plans and assessment of potential OCI-related risks as part of the source selection risk evaluation process. Rather, the risk evaluation process as described in RFO/SIR Section M.4.2 spoke of reviewing and assessing risks that the Agency would be able to identify from its analysis of each offeror's "oral presentations, written responses, unit element analysis, and cost analysis." None of these items reflected OCI related risks. [1]

Moreover, the FAA was already well aware that the instant procurement could pose OCI risks and, at least initially, chose to deal with OCI issues separately from the source selection process, that is, through the submission and separate evaluation of OCI mitigation plans. RFO/SIR Section H.8, "Organizational Conflict of Interest Matrix & Policy Guidance," recognized that actual and potential OCIs were to be handled in this manner and allowed the FAA Contracting Officer ("CO") very broad discretion to address and resolve OCI "situations" both "before contract award and during contract administration." The import of this provision is that FAA COs are fully authorized to deal with OCI issues as matters of bidder responsibility (pre-award) and/or as matters of contract administration (post-award). The provision does *not* contemplate that COs factor in OCI-related risks as part of the rating system that is established to assess contract performance risks addressed through source selection risk analysis and evaluation.

In this case, however, the WCG protest, when challenging the propriety of the Agency's handling of OCI prior to its award of a contract, raised a question as to whether, in fact, OCI had been treated as a source selection risk evaluation factor. Accordingly, as noted above, that question was referred to the Special Master, who unequivocally responded in the negative:

"I find no indication in this record that the FAA evaluated OCI matters as source selection factors. The contracting Officer testified, and I agree, that these matters were not a consideration at all with respect to source selection or evaluation factors for award."

Special Master's Findings (February 2, 1998) at 5. As to whether OCI was treated as a matter of responsibility and contract administration, Judge Daniels made the following observation and finding:

"The record does not contain any statements by any FAA official during the procurement that the Contracting Officer or anyone else considered the acceptability of these plans to be a matter of responsibility. . . . Taking the

record as a whole, however, I find that the essential purpose of the review was to determine responsibility of offerors."

Id., at 7.

In the context of the instant procurement, the Agency's decision not to evaluate OCI related issues as part of the source selection process -- and to treat such issues, instead, as matters of responsibility and post-award contract administration -- was completely reasonable. Here, as noted above, the FAA was dealing with a very long term contract. The contract was not for a discrete amount or type of work, but rather was an IDIQ contract having a very broad scope and requiring the contractor to respond-to task orders that have yet to be defined, that may or may not be issued, and that may or may not involve the potential for OCIs. We are also dealing with a procurement involving teams of large federal contractors, firms that may or may not choose to undergo mergers, consolidations and other radical changes over the next ten years which could produce hosts of unanticipated OCI issues. In sum, then, the Agency's decision to require the submission of OCI mitigation plans and its initial approach of treating OCI-related risks for this procurement as matters of responsibility and contract administration were both fully justified and did not constitute an abuse of the wide discretion which the AMS provides. [2]

Nevertheless, as noted above, the FAA subsequently chose to reconvene the risk evaluation team and to treat the evaluation of OCI related risks as a source selection factor. This Agency action - albeit taken by the FAA while maintaining that its earlier actions were proper - effectively reopened the source selection decision-making process. The Agency's decision essentially mooted the OCI protest allegations regarding the risk evaluation (as set forth in the original Protest and Second Amended Protest) as well as the pending Motion, which attacks those allegations. [3]

III. CONCLUSION AND DIRECTION

LMSI's Motion to Dismiss has been rendered moot by the reconvening of the risk evaluation team. However, the matter of evaluation of OCI related risks was not wrested from the ODRA's jurisdiction by the Agency's decision. The propriety of utilizing the original risk evaluation team is the subject of an objection filed by WCG by its letter of February 12, 1998. [4] In effect, the posture of this case is the same as if the Special Master had determined that the Agency had previously treated OCI as a source selection factor. Now that the Agency has undertaken to deal with OCI as a source selection factor, and its methodology of doing so has been objected to in the context of a pending protest, the ODRA is required to determine whether the FAA has acted reasonably in evaluating the OCI risks.

In order that a full resolution of the merits may be obtained, the Special Master is requested to determine whether the evaluation of OCI had a rational basis and was not arbitrary, capricious or an abuse of the discretion afforded under the AMS. In this connection, and in light of the objection filed by WCG, the Special Master should

determine whether any actual bias among the original evaluation team members impacted on the objectivity of their findings after the team was reconvened. The Special Master is asked to address these matters along with the other grounds of protest previously referred to him for findings and recommendations, as an integral part of the overall fact finding process.

/s/

Anthony N. Palladino, Director

Dated: 2/18/98

[1] This Office respectfully disagrees with the Special Master's conclusion concerning the FAA's obligations related to OCI and source selection risk assessment. The Special Master read Section H.8 of the RFO/SIR as implying that OCI related risks were to be evaluated as part of the source selection risk evaluation. In our view, Section H.8 does not support such interpretation. Neither does Section M.4.2 regarding assessment of potential risks relating to "any aspect of the offeror's proposal". When Section M.4.2 is read as a whole, the words "any aspect of the offeror's proposal" must be read as relating to those "aspects" of the proposal that were already enumerated earlier in that Section *i.e.*, the offeror's "oral presentations, written responses, unit element analysis, and cost analysis." To read this Section otherwise would impose on FAA contracting officials the obligation to identify, assess and rate, as part of the formal source selection risk evaluation process, any conceivable risk that could potentially emerge from an offeror's performance on a contract. This certainly was never the intent of this standard AMS provision, particularly in the context of this 10 year IDIQ contract that incorporates a broad statement of work and allows for a wide variety of yet undefined task orders, each having potential for generating OCI risks. The current environment of mergers and consolidations of federal contractors only reinforces the need, in contracts such as this, to resolve OCI questions for particular work orders during contract administration.

[2] This Office simply does not address matters of post-award contract administration in the context of bid protests, and, as a general rule, affirmative responsibility determinations are a proper subject of a bid protest, only under relatively rare circumstances. For example, in *Gold Coast Engineering, Inc.*, Comp. Gen. Dec. B-216325 (September 24, 1984), the GAO observed that it would not review a Contracting Officer's ("CO's") affirmative determination of responsibility, absent a showing that the CO acted fraudulently or in bad faith or that definitive responsibility criteria in the solicitation have not been met. Moreover, the AMS affords FAA Contracting Officer "great discretion" in their determination of responsibility/non-responsibility (see AMS §3.2.2.2).

[3] On the afternoon of February 17, 1998, the FAA filed the results of its OCI risk-evaluation. Those results have no bearing on this decision.

[4] It is well established that the protester must bear the burden of proof of any alleged bias on the part of the agency proposal evaluators and that prejudicial motives will not be attributed on the basis of either inference or supposition. *Pioneer Contract Services, Inc.*, Comp. Gen Dec. B197245 (February 19, 1981), 81-1 CPD ¶107. Where the written record fails to demonstrate bias, the protester's allegation are properly to be regarded as "mere speculation." *Id. citing Sperry Rand Corporation*, 56 Comp. Gen. 312,219 (1977).