

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: Protest of MAXIMUS, Inc.
Under RFP No. HSTS02-04-R-SCR009

Docket No.: Docket No. 04-TSA-009

Appearances:

For the Protester: Daniel S. Koch, Esq., Paley Rothman, Goldstein, Rosenberg, Eig & Cooper, Chartered.

For the Transportation Security Administration: Virginia G. Farrier, Esq., Adeel Ahmed, Esq., Duane Zezula, Esq., Office of Chief Counsel

For the Intervenors: Kevin P. Connelly, Esq., Michael B. Hubbard, Esq., Robert F. Pezzimenti, Esq., Amanda B. Weiner, Esq., Seyfarth Shaw, LLP

I. Introduction

On August 26, 2004, MAXIMUS, Inc. (“MAXIMUS”) filed this Protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges an award by the Transportation Security Administration (“TSA”) of a contract in support of the Transportation Worker Identification Credential (“TWIC”) Program’s Phase III Prototype, pursuant to RFP No. HSTS02-04-R-SCR009 (the “Solicitation” or “SIR”). The contract was awarded to BearingPoint, Inc. (“BearingPoint” or “Awardee-Intervenor”).

The TWIC Program supports TSA’s efforts to improve the security of the national transportation system by providing uniform identification credentials for all

transportation workers who require unescorted access to secure areas at seaports, airports, rail, pipeline, trucking, and mass transit facilities. The TWIC Program is being implemented in four Phases. Agency Response (“AR”) at 1–2. Phase I of the TWIC Program involved planning and was completed in March, 2003; Phase II involved technology evaluation and was completed in October, 2003. The purpose of Phase III is to demonstrate, validate and evaluate the utility of the TWIC integrated solution and detect and resolve weaknesses in the system before proceeding to Phase IV, Implementation.

The MAXIMUS Protest originally alleged that TSA violated law and regulation in six respects, namely: (1) TSA’s award to BearingPoint resulted from an improper organizational conflict of interest, because BearingPoint has supported the TSA TWIC Program Office, under contract, since the inception of the TWIC project; (2) BearingPoint’s team improperly may have benefited from an organizational conflict of interest arising from the contributions of its key subcontractor Unisys; (3) TSA’s award to BearingPoint will create a new improper organizational conflict of interest, *i.e.*, BearingPoint’s TWIC Program support staff cannot manage BearingPoint’s TWIC Phase III implementation team objectively, and the conflict cannot be cured by a mitigation plan; (4) BearingPoint’s proposal lacked price realism, and thus award to BearingPoint would be inconsistent with the evaluation criteria set forth in the solicitation; (5) TSA’s evaluation of technical factors was conducted on an unequal basis, favoring BearingPoint while disadvantaging MAXIMUS; and (6) TSA’s unequal evaluation of technical proposals may have been the product of an evaluation plan crafted to favor a likely BearingPoint solution. Protest at 2.

During the default adjudicative process, the parties extensively briefed several dispositive motions, *i.e.*, motions to dismiss for: failing to state a cause of action; lack of timeliness; and lack of basis in law and fact.

The first BearingPoint motion to dismiss (“First Motion”), in which the TSA joined, sought summary dismissal of the matter as not protestable under (1) the express terms of the Government Wide Acquisition Contract (“GWAC”); and (2) the Federal Acquisition Streamlining Act (“FASA”), Pub. L. No. 103-355. The ODRA issued a decision denying the First Motion. *See* ODRA Decision, dated September 20, 2004. Reconsideration of that decision also was denied. *See* ODRA Decision dated October 8, 2004.

The MAXIMUS Comments, filed on October 1, 2004, and its supplementary comments, dated October 5, 2004, and October 13, 2004, suggested that MAXIMUS intended to pursue only Count 3 of its Protest. In order to clarify the record concerning which of the six counts of the Protest remain at issue, the ODRA convened a telephone status conference with the parties on October 27, 2004. During the conference, counsel for MAXIMUS confirmed that MAXIMUS is pursuing only Count 3, which alleges that BearingPoint has an impaired objectivity organizational conflict of interest that cannot be mitigated. Counsel for MAXIMUS further confirmed that Protest Counts 1, 2, 4, 5, and 6 are withdrawn. *See* ODRA Status Memorandum, dated October 28, 2004.

For the reasons discussed herein, the ODRA concludes that the allegations set forth in Count 3 of the MAXIMUS Protest are timely filed. The ODRA concludes further that the award to BearingPoint, and the implementation of a mitigation plan for OCIs, had a rational basis and was not arbitrary, capricious or an abuse of discretion. The ODRA therefore recommends that the TSA Administrator deny the MAXIMUS Protest.

II. Findings of Fact

A. Background of the TWIC Program

1. The TWIC Program was developed in response to threats and vulnerabilities identified in the transportation system, and in accordance with the spirit and requirements of the USA PATRIOT Act of 2001, Pub. L. 107-56, Section 1012 (requiring federal background checks before states can issue licenses to transport hazardous materials by motor vehicle); the Aviation and Transportation Security Act of 2001 (“ATSA”), Pub. L. 107-71, Sections 106 and 114(f)(12) (requiring the strengthening of access control points in secured areas and background checks for screening and security-related personnel in all modes of transportation); and the Maritime Transportation Security Act of 2002 (“MTSA”), Pub. L. 107-295, Section 70105 (requiring the issuance of biometric security cards and background checks for entering secure areas of a vessel or facility). Declaration of Iola W. Kull, dated August 31, 2004 at ¶5.
2. The TSA’s TWIC Program is intended to improve security by establishing an integrated, credential-based, identity management program for all transportation workers requiring unescorted access to secure areas of the nation’s transportation system. When fully implemented, the program will ensure that the identity of each TWIC holder has been verified; that a satisfactory background check has been completed on that identity; and, that each credential issued is positively linked to the rightful holder through the use of biometric technology. Agency Response (“AR”) Tab 135, page 848.
3. The TWIC Program works closely with the TSA Credentialing Program Office (“CPO”). Both entities report directly to the TSA Chief of Staff. The CPO is responsible for the background check component of TWIC. The TWIC Program staff focuses on identity management and credentialing threats, while the CPO

staff focuses on identifying individuals to be excluded from secure areas of the transportation system. AR Tab 135, p. 848.

4. When TSA began examining issues related to credentialing transportation workers, it was supported by government employees detailed from numerous agencies and employees of various vendors, including MAXIMUS and KPMG Consulting, now BearingPoint, Inc. AR Attachment B, Declaration of James Zok, dated September 21, 2004 (“Zok Declaration”) at ¶¶2 and 3. Some of these individuals became involved in the Credentialing Direct Action Group (CDAG)¹, which was chartered by the Department of Transportation to investigate the feasibility of developing a program that ultimately became the “National Transportation Worker’s Identification Card” program. AR at 5-7; Attachment B, Zok Declaration at ¶ 5.

5. The technology supporting the TWIC Program is based on a common, open architecture developed by government and industry over several years. Development of this technology occurred as a result of a cooperative effort by government and industry leaders to establish interoperability standards for access cards and address concerns relating to the security and safety of government personnel, buildings, systems, and other facilities; the need for the Federal government to provide the necessary tools and safeguards to support the growth in electronic commerce; and the development of a level of interoperability across organizational boundaries while maintaining a competitive environment. AR at 33, Attachment B, Zok Declaration at ¶6.

¹ CDAG consisted of senior government officials, as well as government, industry and vendor representatives. Participants also included many DOT representatives, *i.e.*, from Office of General Counsel, U.S. Coast Guard, Office of Intermodalism, Policy, MARAD, Federal Motor Carrier Safety Administration, Federal Transit Administration, Federal Highway Administration and the Office of the Secretary. AR Attachment B, Zok Declaration at ¶5; AR Tab 1.

6. These efforts resulted in the May 2000 award of a Smart Access Common ID Contract to five companies, including KPMG Consulting, now BearingPoint, and MAXIMUS. Solutions acquired under the GSA Smart Card Contract, including the one supporting the TWIC Program, are required to meet a common interoperability standard, Interoperability Specification (GSC-IS), so as to be interoperable with all other GSA supplied solutions. AR Attachment B, Zok Declaration at ¶ 9; AR Tab 2, pages 17-19.

7. TSA is meeting the objectives of the TWIC Program, in part, by competing task and delivery orders among awardees of the GSA Smart Access Common ID Card Contract (the “GSA Smart Card Contract”)² AR Tab 135. The solicitation for Phase III of the TWIC Program, while incorporating the terms of the GSA Smart Card Contract, also specified its own terms and conditions, including clauses from the TSA Acquisition Management System (“AMS”). *Id.*

B. BearingPoint’s Credentialing Program Management Support Services Contract

8. Prior to the TWIC Phase III acquisition, BearingPoint performed credentialing program management support services for the TWIC Program office. AR Tabs 99, 100, and 102. Initially, TSA procured such support services through individual task and delivery orders issued under the GSA schedule contract for Management, Organizational and Business Improvement Services (“MOBIS”), Contract No. GS-23F-9796H. The most recent MOBIS acquisition of support services was TSA Contract No. HSTS02-04-F-SCR007 (the “Support Services Contract”), which was awarded on June 14, 2004 to BearingPoint, pursuant to a competition. AR Tabs 101 and 102. The Support Services Contract involves the provision of management, research, analytic and technical support to achieve

² BearingPoint and MAXIMUS both are vendors under the GSA Smart Card Contract. MAXIMUS was TSA’s Phase II Technology Evaluation contractor. AR Tab 103.

TWIC Program goals and objectives. AR Tab 101, page 457. The SOW for the Support Services Contract expressly recognizes “[b]ecause of the extremely sensitive nature of the work involved and the need to provide support related to the award of primary project contracts, all contractor personnel assigned to the award of primary project contracts, all contractor personnel assigned to support TWIC must work within the constraints and requirements of an approved organizational conflict of interest mitigation plan.” *Id.* Specifically, the Support Services Contract provides, among other things, timely professional advice to the project manager regarding all aspects of credentialing program issues, including technical, acquisition, management, organizational, and industry matters; management oversight to determine if the project is on schedule, within budget, proceeding in conformance with approved plans and specifications, and is being implemented efficiently and effectively; and support in the development and execution of a plan to coordinate the work of vendors and subcontractors. AR Tab 102, pages 517-523. Additionally, the contract contains the clause, “Organizational Conflict of Interest for Contractor Participation in Evaluation Services and Activities, and Consulting and Management Support,” which provides:

(a) It is recognized by the parties that the effort to be performed by the contractor under this contract includes technical consulting and management support services that involve work or effort, having as its principal purpose, providing internal assistance to a government program office or other organizational component, in the formulation or administration of its programs, projects, or policies. These consulting and management support services typically include assistance in the preparing of program plans; evaluation, monitoring, or review of contractors’ activities or proposals submitted by prospective contractors; and preparation of preliminary designs, specifications, statements of work or specific approaches or methodologies that are to be employed in or incorporated into future procurement activity or involve access to specifications, statements of work, or plans. The contract may also involve providing evaluation services or activities in which work or effort, has as its principal purpose, the independent study of a technology, process, product, or policy and entails the assessment, appraisal, or survey of such technology, process, product, or policy for purposes of comparison.

(c) Consequently, work under this contract may create a future organizational conflict of interest (OCI) that could prohibit the Contractor from competing for, or being awarded future Government contracts. The following examples illustrate situations in which questions concerning organizational conflicts of interest may arise:

(3) Impaired objectivity. A contractor in the course of performance of a TSA contract is placed in a situation of providing assessment and evaluation findings over itself, or another business division, or subsidiary of the same corporation, or other entity with which it has a significant financial relationship. The concern in this case is that the contractor's ability to render impartial advice to the TSA could appear to be undermined by the contractor's financial or other business or other business relationship to the entity whose work product is being assessed or evaluated. In these situations, a "walling off" of lines of communication may well be insufficient to remove the perception that the objectivity of the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a significant financial relationship, the affected contractor should provide a mitigation plan that includes recusal by the vendor from the affected contract work. Such recusal might include divestiture of the work to a third party vendor.

(d) In order to prevent a future OCI resulting from potential ... impaired objectivity, the Contractor shall be subject to the following restrictions:

(3) The Contractor shall be excluded from competition for or award of any government contract, which calls for the evaluation of system requirements, system definitions, or other products developed, by the Contractor under this contract.

(g) The agency may in its sole discretion, waive any provisions of this clause if deemed in the best interest of the Government

AR Tab 101, pages 483- 486 (emphasis added). BearingPoint's Support Services Contract also contains TSA Acquisition Management System ("AMS") clause

TSAAMS – 3.1.7-3, Organizational Conflict of Interest (February 2003), which is set forth, in part, in Finding of Fact (“FF”) 13 below.

9. On October 20, 2003, TSA’s Support Services contracting officials notified the TWIC Project Manager about their concerns regarding potential OCI issues relative to the BearingPoint activities supporting the CPO and future TWIC Program office activities. Specifically, they advised the Project Manager that, although BearingPoint had submitted a risk mitigation plan to address potential conflicts of interest earlier that year with respect to Support Services, its plan needed to be reviewed in the context of Phase III of the TWIC Program and updated in order for BearingPoint to participate in the Prototype Phase of the TWIC procurement. AR Tab 58, page 153.

10. TSA then required BearingPoint to submit a new OCI Mitigation Plan for its credentialing program Support Services Contract. AR at 11; Attachment F, Declaration of Richard K. Gunderson, dated September 22, 2004, at ¶3. Based on an initial OCI Mitigation Plan submitted in March of 2003, the TSA requested additional information from BearingPoint regarding its OCI mitigation efforts. BearingPoint submitted a new OCI Mitigation Plan to TSA on December 10, 2003, which included a detailed table identifying documents that BearingPoint prepared or participated in preparing, along with their status, description, and mitigation measures to be taken relative to the Phase III procurement. AR Tab 68, page 203-214. These proposed mitigation measures were the subject of further negotiations and agreements between TSA and BearingPoint with respect to the manner and extent of their implementation. AR Tab 78.

11. In pertinent part, the BearingPoint Support Services Contract Mitigation Plan provides that it is company policy [Deleted]. AR Tab 68, page 207. The Plan provides for the [Deleted]. AR 208. This OCI [Deleted] has an ongoing

responsibility throughout the course of contract performance to [Deleted] potential conflicts of interest that arise from the performance of tasks under the contract. The Plan specifies a [Deleted]. In addition, the Plan sets forth [Deleted] for BearingPoint personnel with respect to [Deleted] and provides for a [Deleted]. The Plan provides for [Deleted]. The Plan further indicates that it will be [Deleted]. AR Tab 68. [Deleted] and is included as part of BearingPoint's successful proposal for the Support Services Contract, which was awarded June 14, 2004. See FF 8. AR Tab 102, page 539.

C. The TWIC Program Phase III Prototype Procurement

12. The TSA issued the Prototype Phase III SIR on May 12, 2004. AR Tab 135.

13. The Phase III SIR contains TSA clause, TSAAMS – 3.1.7-3, Organizational Conflict of Interest (February 2003), which provides in pertinent part:

The policy of the TSA is to avoid contracting with contractors who have unacceptable organizational conflicts of interest. An organizational conflict of interest means that because of existing or planned activities, an Offeror or contractor is unable or potentially unable to render impartial assistance to the agency ... or the Offeror or contractor's objectivity is, or might be impaired.

(a) It is not the intention of the TSA to foreclose a vendor from a competitive acquisition due to a perceived OCI. TSA Contracting Officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances. The final determination of such action may be negotiated between the impaired vendor and the Contracting Officer. The Contracting Officer's business judgment and sound discretion in identifying, negotiating, and eliminating OCI scenarios should not adversely affect the TSA's policy for competition. The TSA is committed to working with potential vendors to

eliminate or mitigate actual and perceived OCI situations, without detriment to the integrity of the competitive process, the mission of the TSA, or the legitimate business interests of the vendor community.

(b)Mitigation plans. The successful contractor will be required to permit a Government audit of internal OCI mitigation procedures for verification purposes. The TSA reserves the right to reject a mitigation plan, if in the opinion of the Contracting Officer, such a plan is not in the best interest of the TSA. Additionally, after award the TSA will review and audit OCI mitigation plans as needed, in the event of changes in the vendor community due to mergers, consolidations, or any unanticipated circumstances that may create an unacceptable organizational conflict of interest.

(c)Examples of conflict situations. The following examples illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all-inclusive, but are intended to help the Contracting Officer apply general guidance to individual contract situations:

(3) Impaired objectivity. A contractor in the course of performance of a TSA contract is placed in a situation of providing assessment and evaluation findings over itself, or another business division, or subsidiary of the same corporation, or other entity with which it has a significant financial relationship. The concern in this case is that the contractor's ability to render impartial advice to the TSA could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated. In these situations, a "walling off" of lines of communication may well be insufficient to remove the perception that the objectivity of the contractor has been tainted. If the requirements of the TSA procurement indicate that the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a significant financial relationship, the affected contractor should provide a mitigation plan that includes recusal by the vendor from the affected contract work. Such recusal

might include divestiture of the work to a third party vendor.

AR Tab 136, page 1073

14. The Phase III SIR states that the OCI Mitigation Plan is not an evaluation factor, but if an OCI is found, the OCI mitigation plan will be evaluated on a case-by-case basis by the Contracting Officer to determine whether the proposed plan will mitigate the conflict situation. The SIR expressly provides that no award will be made to any offeror with an OCI that cannot be mitigated. AR Tab 136, page 1097; AR Attachment G, Declaration of Holly Hamilton Bolger (“Bolger Declaration”), dated September 22, 2004 at ¶4.
15. The Phase III SIR also advises offerors that the TWIC Program has established Integrated Project Teams (“IPTs”) to coordinate activities within each region and the selected offeror will be an integral part of these IPTs. The SIR states “[c]ontractors are expected to actively participate as members of their respective IPT and take direction from the Government IPT leads” and “contractor communication will be required with the TSA Credentialing Program Office (CPO) for purposes of discussing background checks, threat assessments, and hazardous material endorsements on Commercial Drivers Licenses.” IPTs will be composed of the following groups, among others: TSA Credentialing Program Office, TWIC Program Office, TSA IT Managed Services Contractor, the TSA Chief Technology Officer (*i.e.*, TSA Technology Center, Operational Integration, and IV&V Contractor), Prototype Contractor, TSA Contracting Officer, and Contracting Officer’s Representative. AR Tab 135, page 819.
16. BearingPoint submitted its proposal on June 29, 2004. AR Tab 139.
17. BearingPoint’s proposal for the TWIC Phase III contract included an OCI Mitigation Plan, which essentially describes the same policies and procedures as

those set forth in its Support Services Contract OCI Mitigation Plan. The Phase III Plan focuses on avoiding and mitigating any potential OCIs that could arise between BearingPoint personnel assigned to the tasks under the CPO and any potential unfair advantage OCI issues related to non-public information obtained by the CPO support team in the context of BearingPoint's proposal activities with respect to the Phase III solicitation. The Plan sets forth detailed policies and procedures for avoiding and mitigating any potential unfair advantage OCI. These policies and procedures [Deleted]. AR Tab 139, pages 1854-1861.

18. BearingPoint's Phase III OCI Mitigation Plan also addresses the potential of impaired objectivity OCIs during contract performance as follows:

[Deleted]

[Deleted]

AR 138, page 1854 (emphasis added).

19. The BearingPoint Phase III Mitigation Plan further explains that every BearingPoint contract has [Deleted] with ongoing responsibility throughout the course of performance of the contract to [Deleted]. AR 138. Specifically, the Mitigation Plan provides that when a potential OCI is identified, the [Deleted]³ for the coordination of avoidance and mitigation measures with [Deleted]:

[Deleted]

AR Tab 138, page 1855 (emphasis added).

³ BearingPoint's Federal government practice group is composed of eight sectors, [Deleted]. AR Tab 138, page 1858.

20. The Contracting Officer reviewed BearingPoint's Mitigation Plan submitted in response to the Solicitation and accepted the plan as drafted. AR Attachment G, Bolger Declaration at ¶10.
21. The Source Selection Decision Memorandum provides the basis for the TSA's decision to award the TWIC Phase III contract to BearingPoint. The Memorandum discusses the OCI issue as follows:

Given that BearingPoint was projected to bid on the prototype RFP and that BearingPoint provides support to the TWIC Program Management Office, aggressive steps were taken to ensure that no Organizational Conflict of Interest (OCI) concerns existed with regards to source selection for the prototype. OCI concerns have been managed by both TSA's Office of Chief Counsel and Office of Acquisitions, and any concerns that may have existed have been adequately mitigated.

In November 2003, TSA officials met with the four prime contractors (BearingPoint, EDS, Maximus, Northrop Grumman) on the GSA Smart Access – Common ID Contract. Attendees at the meeting also included representatives from GSA, TSA's Office of Acquisition and the TWIC Program staff. The TWIC Phase II Technology Evaluation Report was provided to all prime contractors, which ensured that all potential bidders for Prototype received this information well ahead of release of the Prototype RFP.

On January 8, 2004, the draft TWIC Phase III Requirements Document was provided by GSA to all four prime contractors. Three of the four prime contractors sent questions to TSA regarding the Requirements Document. The TWIC Program Office, TSA's Office of acquisition and TSA's Office Chief Counsel reviewed these questions and, as appropriate, incorporated changes into the final version of the Requirements Document. By allowing industry comment, any potential concerns about organizational conflict of interest were mitigated.

In addition to the above, BearingPoint submitted an OCI mitigation plan with their proposal as required by the RFP; this plan was reviewed and deemed acceptable by TSA's Office of Acquisition

and Office of Chief Counsel. The mitigation plan identified an [Deleted].

TSA will continue to monitor the possibility of any organizational conflict of interest *throughout the term of the contract* and will include appropriate safeguards to avoid any potential conflict of interest in TWIC Phase IV.

AR Tab 142 (emphasis added).

D. TSA Award of the Independent Verification and Validation Services Contract

22. On August 3, 2004, *i.e.*, prior to the award at issue here, TSA issued Solicitation No. HTS02-04-R-SCR012 to Access Systems, Inc., a small, woman-owned business, for Independent Verification and Validation (“IV&V”) services to support the TWIC Phase III prototype, including the review of the TWIC Phase III Prototype Contractor’s deliverables and processes. AR Attachment G, Bolger Declaration at ¶11. The TSA Credentialing Program Office awarded the IV&V contract on September 23, 2004. The statement of work for the contract provides: (1) that the support will include an independent verification of the TWIC Program’s budget and a cost/benefit analysis; and (2) that the results of the IV&V will be instrumental in determining the efficacy and efficiency of the TWIC Prototype Phase and the program’s readiness to proceed to Phase IV, Implementation. TSA Supplement to the Agency Record, Tab B, page 1. The contract further provides that the IV&V contractor will interact with both TSA government employees and the TWIC Program support contractor in the TWIC Program Office, as well as the TWIC Phase III Prototype contractor. *Id.*, page 2.

23. The technical requirements for the IV&V Statement of Work consist of eight categories of tasks specifying the independent review, analysis, and validation of deliverables developed by the BearingPoint Management Support Services Team and by its Phase III Prototype Team, as follows:

8.1 Task 1. Review internal Program Office products

- 8.2 Task 2. Review and Validate Prototype Contractor System Design and Deliverables
- 8.3 Task 3. Test Support
- 8.4 Task 4 – Prototype Implementation Support. :
- 8.5 Task 5 – Analysis of Prototype Help Desk and/or Call Center supporting TWIC Prototype Phase.
- 8.6 Task 6 – Analysis and Assessment of the TWIC card Management System.
- 8.7 Task 7 – Review and Analysis of Prototype Contractor’s Final Prototype Report.
- 8.8 Task 8 – Final IV&V Report for TWIC Prototype Phase.

Agency Record Supplement, Tab B, Appendix A.

D. MAXIMUS Protest Proceedings

- 24. The MAXIMUS Protest was filed on August 26, 2004 and the TSA filed the Agency Response on September 22, 2004. On September 28, 2004, the ODRA directed TSA to provide certain documents to MAXIMUS by September 30, 2004, and provided MAXIMUS and BearingPoint with the opportunity to file supplementary Comments with respect to those documents.
- 25. On October 1, 2004, BearingPoint and MAXIMUS filed their Comments to the TSA Agency Response. On October 5, 2004, MAXIMUS and BearingPoint filed Supplemental Comments on the documents produced by TSA on September 30, 2004.
- 26. On October 7, 2004, TSA filed a Supplemental Brief, along with a request to the ODRA for permission to do so. The ODRA granted the request and allowed the other parties to file supplemental comments with respect to the TSA Supplemental Brief. On October 13, 2004, BearingPoint and MAXIMUS filed

their supplemental comments, and, thereafter, the record was closed.

III. Discussion

A. The Motions to Dismiss Protest Count 3

As noted above, the matter currently before the ODRA is limited to what originally was Count 3 of the MAXIMUS Protest. Count 3 alleges that the TSA's decision to award the Phase III contract to BearingPoint lacks a rational basis because BearingPoint has an impaired objectivity OCI that cannot be mitigated. TSA and BearingPoint filed motions to dismiss Count 3 of the MAXIMUS Protest on the grounds that Count 3 is untimely, frivolous and without a basis in law and fact. More specifically, the motions assert that (1) to the extent that this Count alleges that mitigation of BearingPoint's potential OCI is impossible, it is untimely, since MAXIMUS was aware of BearingPoint's participation in the competition prior to the due date for initial proposals; and (2) to the extent that this Count alleges that award to BearingPoint will create a future OCI, it is a matter of contract administration and therefore not a valid basis for protest. *See* TSA Reply to Opposition to Motion to Dismiss at 2; BearingPoint Second Motion for Summary Dismissal at 6.

As a general rule, the Government Accountability Office ("GAO") has stated that a protester is not required to protest that another firm has an impermissible OCI until that firm has been selected for award. *CDR Enterprises, Inc.*, March 26, 2004, B-293,557, 2004 CPD ¶ 46.⁴ The ODRA believes that this general rule is appropriate for application in this case.⁵

⁴ *See Kimmins Thermal Corporation*, B-238,646, September 12, 1990, 90-2 CPD ¶ 198 (agency's acceptance of a proposal for evaluation does not itself amount to a determination that the offeror is eligible for award of the contract); *see also John J. McMullen Assocs., Inc.*, B-188703, Oct. 5, 1977, 77-2 CPD ¶ 270 (protester not charged with knowledge that another firm was considered eligible for award simply because the protester knew that the other firm had submitted an offer).

⁵ The ODRA previously has ruled that decisions of the GAO are considered to be persuasive authority, provided such decisions are consistent with the AMS and applicable laws and regulations and ODRA

TSA and BearingPoint also contend that Count 3 is frivolous and without basis in law and fact. The ODRA finds this aspect of the Motions to be meritless. It is well established that where a protest alleges facts which, if proven, would constitute improper conduct on the part of procurement officials or a violation of the AMS by the Agency, the Protest is not dismissed, but rather decided on its merits. *See Protest by Bel-Air Electric Construction, Inc.* 98-ODRA-00084; *Protest of Universal Systems & Technology, Inc.* 01-ODRA-00179.

B. TSA’S DETERMINATION TO AWARD BEARINGPOINT THE PHASE III CONTRACT WAS RATIONAL

It is well-established that, where the ODRA finds that a Product Team’s decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the decision be overturned. 14 C.F.R. Part 17; *Protest of Ridge Contracting, Inc.*, ODRA Docket No. 04-ODRA-00312; *see also Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, ODRA Docket No. 03-ODRA-00250, *et al.*, *citing Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 203 F.3d 52 (D.C. Cir. 1999). The Protester bears the burden of proof under this standard. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232; *Protest of Glock, Inc.*, 03-TSA-003.

Protest Count 3 alleges that TSA’s award violated TSA policy and the SIR language, because the award of the Phase III contract to BearingPoint gives rise to an unmitigatable impaired objectivity OCI. MAXIMUS Comments at 5. In support of this allegation, the MAXIMUS Protest states that “[d]uring TWIC Phase II, BearingPoint TWIC Program support staff closely managed the activities and performance of MAXIMUS,” and that, “in substance, BearingPoint contractors to TSA were surrogate supervisors, at times displacing TSA managers.” Protest at 10. MAXIMUS asserts that, as a result of the Phase III award, BearingPoint will continue in its role as supervisor of TWIC contractors,

caselaw. *See Protest of International Services, Inc.*, 02-ODSA-00224; *Protest of Transgroup Express*, 00ODRA-00157.

and “[r]egardless of any OCI mitigation plan in place, BearingPoint TWIC support staff cannot objectively assess performance of their own colleagues and team members as contractors.” Protest at 10-11. MAXIMUS further contends that an OCI mitigation plan is unlikely to control an impaired objectivity violation effectively and that the only remedy would be to remove BearingPoint from one of its two roles, *i.e.*, exclude it from Phase III award. Protest at 11. MAXIMUS complains that BearingPoint’s plan focused only on the prevention of an unfair advantage in competing for the award and did not satisfactorily mitigate the impaired objectivity OCI that would arise during performance. *See* MAXIMUS Comments at 8-9. MAXIMUS asserts that the *only* successful mitigations plan would require BearingPoint to recuse itself from managing Phase III implementation. MAXIMUS Comments at 8 and 9.

The Support Services Contract and Phase III Prototype SIR set forth the TSA’s policy and procedures with respect to OCI issues, expressly stating that TSA contracting officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances. FF 8 and 13. Both documents explain that contracting officers have great discretion in dealing with a potential OCI in the context of such considerations as business judgment, the preference for competition, and integrity of the competitive process, and that OCI mitigation can be negotiated. *Id.* Moreover, they expressly state that the TSA will contract with companies that have actual or perceived organizational conflicts of interests that can be mitigated, and thus are considered acceptable. Towards this end, the contracting officers are empowered to audit a successful contractor’s internal OCI mitigation plan and reject it if it is not in the best interest of the TSA. *Id.*

The record shows that TSA was well aware of the potential for OCI issues in the context of the TWIC Program and took action to address them. FF 9. The TSA required BearingPoint to update its OCI Mitigation Plan for its Support Services Contract to take into account potential OCIs that could arise in connection with the upcoming Phase III Prototype procurement. FF 10 and 11. Also, BearingPoint’s submission of a new OCI Mitigation Plan was the subject of additional negotiations and agreements with respect to Phase III OCI mitigation efforts. FF 10. TSA’s actions in this regard are consistent with

the express terms of the Support Services Contract and the Phase III SIR, which contemplate OCI mitigation to be an on-going effort throughout the period of contract performance, and potential OCI scenarios will be addressed on a case-by-case basis with respect to *affected contract work*. FF 8, 13 and 14.

Moreover, the SIR clearly delineated the roles of TWIC Program participants in the SIR, stating that, although the Phase III contractor will be an integral part of the TWIC Integrated Project Teams and will be required to coordinate its activities with other contractors, it will “take direction” from the Government team leads. FF 15. Thus, the express language of the Phase III SIR contradicts the MAXIMUS allegation that BearingPoint’s Support Services Contract team will displace TSA managers. In addition, the MAXIMUS suggestion that BearingPoint’s Mitigation Plans should have prohibited all communications between its Support Services and Phase III Implementation Teams is contrary to the terms of both the Support Services Contract and the Phase III Prototype SIR, which contemplate a high degree of contractor interaction and cooperation. FF 8 and 15.

The Support Services Contract and the Phase III SIR also address scenarios that give rise to an impaired objectivity OCI, cautioning offerors that “walling off” of lines of communications may not be sufficient to mitigate a perception of impaired objectivity, and recommending that such situations be addressed by recusal of the contractor *from the affected contract work*. FF 8 and 13. These documents do not contemplate requiring a contractor to divest itself of the entire contract just because certain work that it performs may be affected by a possible impaired objectivity OCI. Rather, their terms treat OCI mitigation as a matter of contract administration, *i.e.*, subject to on-going review during contract performance by the TSA, so as to prevent any OCI from becoming “unacceptable” due to changes in circumstances. FF 8, 13 and 14.

The record shows that BearingPoint’s Mitigation Plans were consistent with the requirements of the Support Services Contract and Phase III SIR. The Mitigation Plans address in detail how BearingPoint is to identify, report and resolve potential conflicts of

interest that arise during the course of contract performance. FF 11, 17, 18 and 19. The Mitigation Plans also provide more precautionary measures than just “walling off” lines of communication. [Deleted] *Id.* Moreover, the BearingPoint Mitigation Plans expressly provide for BearingPoint’s [Deleted] and for BearingPoint to [Deleted]. FF 11 and 18.

In addition, BearingPoint’s Phase III OCI Mitigation Plan explicitly references the [Deleted] based on direction from the Government, among other things. FF 18. Moreover, the BearingPoint Mitigation Plan expressly distinguishes between (1) [Deleted]. *Id.*

The record shows further that TSA gave appropriate consideration to BearingPoint’s OCI issues in accordance with the SIR and the AMS Policy. Such consideration occurred in the context of both the Support Services Contract and the BearingPoint proposal for the Phase III SIR, before, during and after the Phase III procurement. FF 9-11, 20-21. With respect to the TSA’s award decision, the Source Selection Decision Memorandum reflects TSA’s determination that BearingPoint had no OCI that could not be mitigated. Moreover, the Decision specifically addresses the impaired objectivity OCI issue by noting BearingPoint’s ongoing responsibility throughout the course of the contract to [Deleted] and underscoring its own responsibility to “continue to monitor the possibility of any organizational conflict of interest throughout the term of the contract.” FF 21.

MAXIMUS asserts that TSA’s alleged undocumented and unexplained retention of an IV&V contractor compels the conclusion that the IV&V contractor was conceived as an emergency attempt to cure the selection of BearingPoint with an inadequate OCI plan in place.⁶ MAXIMUS Comments at 13 – 14. MAXIMUS also alleges that the RFP

⁶MAXIMUS argues further that the ODRA should draw adverse inferences from TSA’s failure to produce all documents responsive to its original request for documents that eventually became the subject of a discovery dispute. Supplemental Comments, dated October 5, 2004, at 2. In pertinent part, the MAXIMUS document request had requested “full particulars concerning the retention of the IV&V contractor, including but not limited to copies of the solicitation and award, and memoranda supporting the rationale for retaining the contractor.” 14 C.F.R. §17.37(f) authorizes the exchange of documents as part of limited, focused discovery. In this regard, MAXIMUS filed a Motion and Addendum requesting that the ODRA require TSA to supplement the administrative record. After the filing of TSA’s Opposition thereto

contemplated that offerors themselves would retain IV&V contractors to cure OCI's and that TSA's unilateral action in doing so on behalf of BearingPoint impermissibly departed from the RFP. MAXIMUS Comments at 14.

These assertions are not supported by the record. Award of the IV&V contract was contemplated by TSA well before the award of the Phase III contract to BearingPoint. FF 22. The SIR also clearly contemplates that an IV&V Contractor will participate as a member of an Integrated Project Team. FF 15. The IV&V contract's statement of work identifies eight tasks, which require the independent review and validation of deliverables under both BearingPont's management support contract and Phase III Contract. FF 23. Thus, the record does not support MAXIMUS's allegation that the addition of the IV&V contractor was a last ditch attempt at OCI mitigation.

MAXIMUS also argues that given the date of award for the IV&V contract, it will have little impact on any OCI mitigation because important irreversible decisions already will have been made during the first two months of the Phase III implementation, and that "While [TSA] might have cured or waived the OCI violation by acting in a more timely fashion, it neglected to do so." MAXIMUS Comments at 15. The presumption that the IV&V Contract is the only method available to TSA for mitigating any potential impaired objectivity OCI is belied by the record, which shows other methods of OCI mitigation proposed by BearingPoint and approved by TSA.

MAXIMUS complains further that BearingPoint's Support Services Contract was not modified to delete work involving evaluation of its Phase III implementation that was specified in the IV&V contract. Declaration of Benjamin L. Miller ¶¶ 4-5. MAXIMUS also asserts that the IV&V contractor, Access Systems, Inc., does not appear to possess the necessary expertise "to serve as a replacement for BearingPoint within the relevant time frame" and that the schedule for the IV&V contract deliverables is unrealistic. *Id.* at

and MAXIMUS's Reply, the ODRA directed TSA to identify the IV&V Contractor and to provide a copy of the Scope of Work Section of the IV&V Contract to MAXIMUS. *See* ODRA letter, dated September 28, 2004. The fact that TSA did not produce documents that the ODRA did not require it to produce does not provide a basis for drawing an adverse inference.

¶¶ 7-9 and 11. Such issues are matters of contract administration, which the ODRA will not consider in the context of a bid protest. *See Protest of Informatica of America, Inc.*, 99-ODRA-00144.

AMS §3.1.7 sets forth the policy with respect to issues of organizational conflicts of interest and provides contracting officials with broad authority to resolve OCI issues on a case-by-case basis, as well as discretion to waive, or mitigate, an actual or potential conflicts when such action is necessary to further the interests of the agency. Thus, under AMS §3.1.7, any decision to defer dealing with potential OCIs until after contract award is clearly permissible and any unilateral Agency actions that serve to augment OCI mitigation efforts and promote the integrity of the competitive process would not be precluded. *See Protest of Washington Consulting Group, Inc.* 97-ODRA-00059, ODRA Decision dated February 18, 1998.

The MAXIMUS Protest also suggests, but provides no proof, that the TWIC Technical Manager, formerly a BearingPoint employee and member of the TWIC management support team, further compromises TSA's ability objectively to assess contractors and vendors for this project. Protest at 12. It is a well-established principle of procurement law that a presumption of regularity and good faith attaches to the actions of government officials, and that a party alleging bad faith on the part of the Government must ordinarily come forward with "well nigh irrefragable" proof in order to overcome the presumption. *Protest of Royalea'L Aviation Consultants*, 04-ODRA-00304.

In sum, the record does not support the allegation that the potential impaired objectivity OCI of the BearingPoint TWIC Phase III group cannot be mitigated effectively. Rather the record reflects that the mitigation plans for the efforts of both BearingPoint TWIC Phase III team and TWIC Support Services team addressed the potential for impaired objectivity OCIs, and set forth mitigation measures that would reduce the risk of such conflicts significantly, and are not inconsistent with each other. Moreover, the record shows that the TSA's approval of the terms of the Mitigation Plan for the Phase III

solicitation is consistent with the terms of the SIR and AMS policy. The award to the IV&V contractor only serves to augment TSA's ability to mitigate potential impaired objectivity OCIs that may arise. Contrary to the allegations of MAXIMUS, there is no evidence in the record to indicate the existence of an impaired objectivity OCI that cannot be mitigated. The ODRA finds that the OCI alleged in Count 3 is mitigatable and that TSA's treatment of the OCI issue and its award to BearingPoint had a rational basis, were supported by substantial evidence and were neither arbitrary, capricious, nor an abuse of discretion.

III. CONCLUSION

For the reasons set forth above, the ODRA recommends that the TSA Administrator deny the Protest.

/s/
Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

/s/
Anthony N. Palladino
Director
FAA Office of Dispute Resolution for Acquisition

November 10, 2004