

REDACTED DECISION

NOTE: Redacted portions of the decision are denoted by the insertion of "[****]".

Board of Contract Appeals

General Services Administration

Washington, D.C. 20405

March 10, 1998

GSBCA 14451-FAA

(FAA ODR Docket Number 97-ODR-00059)

WASHINGTON CONSULTING GROUP, INC.,

Protester,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent,

and

LOCKHEED MARTIN SERVICES, INC.,

Interested Party.

Richard J. Conway, J. Andrew Jackson, Kendrick C. Fong, and Steven A. Alerding of Dickstein Shapiro Morin & Oshinsky, LLP, Washington, DC, counsel for Protester.

Gregory C. Carter and Richard J. McCarthy, Federal Aviation Administration, Washington, DC, counsel for Respondent.

Robert J. Kenney, Jr., David W. Burgett, Thomas L. McGovern III, S. Gregg Kunzi, and Michael F. Mason of Hogan & Hartson LLP, Washington, DC, counsel for Interested Party.

DANIELS, Board Judge (Chairman), acting as Special Master.

On December 12, 1997, Washington Consulting Group, Inc. (WCG), filed with the Federal Aviation Administration's (FAA's) Office of Dispute Resolution for Acquisition (ODR) a protest against the award of a contract by the FAA to Lockheed Martin Services, Inc. (LMSI), in the "NISC-II" procurement. The awardee is to provide professional services to the FAA under the agency's second National Air Space Implementation Support Contract.

The ODR docketed this protest as number 97-ODR-00059. It referred the protest to the General Services Board of Contract Appeals for adjudication by a special master. I am the special master for this case.

As initially filed, and as supplemented on three occasions, the protest was a wide-ranging attack on the agency's award of the contract. The ODR issued a protective order in the case, and subject to that order, the FAA provided some information about the procurement to WCG counsel voluntarily and additional information in response to my direction. After counsel reviewed the material, WCG ultimately briefed a very limited number of protest issues, thereby abandoning all others. WCG now challenges only a few aspects of the FAA's evaluation of the technical/management merit of the two proposals and virtually all of the FAA's assessment of the risks posed to the agency by accepting each of the proposals.

The FAA's Acquisition Management System (AMS) provides that in protests under the agency's Administrative Dispute Resolution Process, such as this one, "[t]he standard of review is whether the decision of the FAA has a rational basis, and is neither arbitrary and capricious nor an abuse of discretion." AMS § 3.9.3.2.3.2. This standard is substantively identical to one contained in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994). In interpreting this provision of statute, courts have consistently held that the review must concern itself with "whether the agency's decision was legally permissible, reasoned, and factually supported." Delbert Wheeler Construction, Inc. v. United States, 39 Fed. Cl. 239, 247 (1997). The reviewer may not substitute his discretion for that of the agency. Id.; see also, e.g., Latecoere International, Inc. v. United States, 19 F.3d 1342, 1356 (11th Cir. 1994); Board of County Commissioners of the County of Adams v. Isaac, 18 F.3d 1492, 1496-97 (10th Cir. 1994). Particularly with regard to the evaluation of proposals, agencies have broad discretion, since evaluation is "inherently a judgmental process which cannot accommodate itself to absolutes." Wheeler Construction, 39 Fed. Cl. at 247.

Under this standard, the protest allegations that WCG continues to pursue are not meritorious. The agency evaluations which WCG contests had a rational basis; they were not arbitrary or capricious. The FAA's determination that LMSI's proposal was superior to WCG's, and worthy of award, was appropriate, given the judgments agency evaluators made in accordance with the evaluation scheme announced in the solicitation to which both firms responded. I therefore recommend that the FAA Administrator deny this protest.

Evaluation scheme

The AMS provides that "[e]ach SIR^[1] shall contain the specific evaluation criteria to be used to evaluate offeror submittals." AMS § 3.2.2.2. "The evaluation will be conducted by the IPT,^[2] in accordance with the stated evaluation criteria and evaluation plan. . . . The IPT is expected to apply sound judgment in determining appropriate variations and adaptations necessary for individual situations, provided that these do not constitute a departure from the basic concepts and intent of the evaluation plan and SIR(s)." Id. § 3.2.2.3.1.2.3. "The IPT must brief the SSO [Source Selection Official] on [its] evaluation findings." Id. § 3.2.2.3.1.3. "All SSO selection or screening decisions shall be based on the evaluation criteria established in each SIR." Id. § 3.2.2.2; see also id. §§ 3.2.2.3.1.2.5, 3.2.2.3.1.3.

The SIR, or solicitation, at issue here said that evaluation would involve three aspects of each proposal -- technical/ management, risk, and cost -- with a separate team conducting each evaluation and all three presenting their findings to the SSO. The SSO would then select the offer providing the greatest overall value to the FAA, considering technical/management competence as the most important criterion, followed by risk and cost. "Technical/management competence is significantly more important than risk. Risk is significantly more important than price." SIR §§ M.2, M.3.

Technical/management evaluation

The technical/management portion of the evaluation process involved a review of proposals in accordance with five factors. The factors are listed here in order of importance, along with the evaluations FAA personnel made of the two proposals as to each of the factors.

Factor	Weight	WCG rating	LMSI rating
Oral presentation	45%	Exceptional	[****]
Written response	25%	Good	[****]
Relevant experience	15%	Good	[****]
Past performance	10%	Exceptional	[****]
Key personnel	5%	Exceptional	[****]

SIR § M.4.1; WCG Exhibit 13 at I-1-11, -12. As this table shows, the technical/management evaluation team rated LMSI as exceptional in ninety percent of this area and good in ten percent, and rated WCG as exceptional in sixty percent and good in forty percent. Based on these findings, the team determined that LMSI presented the superior technical/management proposal. WCG Exhibit 13 at II-1-11.

WCG takes issue with the FAA's technical/management evaluation only as to a single factor, written responses. Under this factor, as for others, the evaluation team ascribed strengths and weaknesses to the two proposals. WCG maintains that the FAA had no rational basis for assigning five particular weaknesses to WCG. These weaknesses all fell within the topic "Understanding of NISC-II Work Efforts at the FAA Headquarters or Macro Level." WCG contends that the assignments were improperly based on its having failed to address items which the SIR did not call for discussing.

In evaluating written responses, the technical/management evaluation team ascribed 102 strengths and 91 weaknesses to WCG's proposal (as opposed to [****] in LMSI's proposal). WCG Exhibit 13 at II-3-5, -19, -32, -49, -67. Even if WCG is correct in asserting that five weaknesses were inappropriately assigned, it strains credulity to believe that this would have affected the rating of "good" the offeror received for its written responses. One hundred two strengths and 86 weaknesses is not materially different from 102 strengths and 91 weaknesses, and WCG has not alleged that any of the five weaknesses in question was especially important, such that its elimination from the list would have changed the rating. Thus, no purpose would be served by reviewing the five contested items in detail. I do find, however, that the general approach the FAA took in assigning the weaknesses was rationally based. The SIR states that "[w]ritten responses will permit an assessment of each Offeror's understanding of NISC-II work efforts." SIR § M.4.1. The technical/management team chairperson reasonably explained:

[W]e had several categories where we asked offerors to provide their understanding of the work efforts that FAA would undertake. In part, this was considered to be like a test, where we relied on the offeror to provide us an answer so we could gauge and use our judgment as to each offeror's understanding of the work effort. . . . The [SIR] is [not] structured . . . to provide a road map to each of the offerors as to specific details that we are looking for as the answer from the offerors. To give the answer to the offerors would be to level the playing field and make it difficult, if not impossible, to make a technical judgment of which offeror had a better technical knowledge of what the FAA was requiring.

WCG Exhibit 5 at 127-28, 131. This approach is consistent with this Board's conclusion that where an agency elicits responses to test an offeror's understanding of a problem, telling an offeror how to respond would defeat the purpose of that portion of the solicitation. OAQ Corp., GSBICA 10186-P, 90-1 BCA ¶ 22,332, at 112,235, 1989 BPD ¶ 296, at 10 (1989).

Cost/price evaluation

The cost evaluation team determined that the most probable cost to the Government from accepting the WCG proposal was \$1,061,400,000, and from accepting the LMSI proposal was [****]. Cost Evaluation Report at IV-3. This team found "no significant lack of cost reasonableness or 'realism' in either proposal." Id. at IV-12. Although WCG initially objected to some aspects of the cost/price evaluation, it has abandoned these portions of its protest.

Risk evaluation

Most of WCG's fire is trained on this portion of the evaluation. The SIR explains how the FAA was supposed to perform this task:

The Risk evaluation will consist of a Government analysis of each Offeror's oral presentations, written responses, unit element analysis, and cost analysis to identify, review, and assess identified and potential risks to the FAA regardless of the source of the risk. The Risk evaluation will serve to capture and assess any threats to successful performance of NISC-II requirements by any Offeror.

Risks identified within any aspect of the Offeror's proposal will be evaluated as to potential impact on cost, schedule, and work performance. Additionally, risks due to inconsistencies and discrepancies between various aspects (volumes) of each Offeror's proposal will also be evaluated as to potential impact on cost, schedule, and work performance.

. . . The risk evaluation will also examine any unsubstantiated representations made by Offerors in any aspect of proposals

Risk evaluation elements identified and assessed may not be assigned equal importance. Therefore, a single risk element may pose such a threat to successful performance of NISC-II requirements as to render the entire proposal as "high" risk.

SIR § M.4.2.

The risk evaluation team reviewed the two proposals using the following definition of risk:

An element found within an Offeror's proposal which, when assessed, presents a degree of uncertainty as to the ability of the Offeror to deliver all aspects of the NISC-II effort without adversely impacting contract performance, quality of work, schedule, or actual costs incurred by the Government during the performance period.

The team assigned WCG's proposal six risks -- two high, two moderate, and two low. [****]. Overall, the team gave WCG's proposal a rating of moderate risk and LMSI's a rating of [****]. The team concluded, "[****], there was a clear differentiation in the overall level of risk between the offers." WCG Exhibit 13 at III-2 to -4.

WCG protests that the risk team evaluated proposals inconsistently and arbitrarily. It challenges five of the six risk assignments made for the WCG proposal, and by implication, one of the two assignments made for the LMSI proposal. I conclude that the FAA had a rational basis for every one of these ratings.

In WCG risk issue 1, "Technical Experience & Expertise," the risk team rated the WCG proposal as having a high risk. The team explained, "In its proposal, [WCG] demonstrated only a fair understanding of NISC-II work efforts. This raises a serious concern regarding [WCG's] ability to effectively focus the technical personnel resources on the appropriate transition, integration, and implementation support functions that are required on NISC-II." The team believed that this was a "key risk" which could affect the quality, timeliness, and cost of work under the contract. The team further concluded that this risk is likely to occur. WCG Exhibit 13 at III-9 to -13.

WCG objects that assigning a high risk rating was irrational, since the FAA gave WCG an exceptional rating for technical experience. Whether the agency's name for this risk issue is appropriate or not, however, the appraisal is rationally premised. The technical/management team found that in "Understanding of NISC-II Work Efforts," WCG had 88 weaknesses and only 67 strengths (as opposed to LMSI's 31 weaknesses and 164 strengths). That team identified 17 of WCG's weaknesses and only 2 of its strengths as "discriminators." WCG Exhibit 13 at II-3-5, -19, -32, -49. WCG has not even challenged 83 of those weaknesses or 16 of the "discriminator" weaknesses. The weaknesses of WCG's proposal in demonstrating an understanding of NISC-II work efforts were a reasonable basis for a rating of high risk as to WCG's ability to bring to contract performance the expertise it promised.

In WCG risk issue 2, "The Uncertainty Surrounding NAIS," the risk team rated the WCG proposal as having a high risk. "NAIS" is WCG's proposed "NISC-II Automated Information System." The team was concerned that this management information system, which it described as "the linchpin to the offeror's plan to manage and operate NISC-II," had not yet been developed. The team found that WCG had not provided an adequate design for the system or its implementation, or any plan at all for computer security. The team also thought that the training and number of computers WCG planned to supply were insufficient, and that WCG had not made clear its intentions as to use of software applications.

[****]. The difference in the ratings was readily explained by a member of the team, however:

NAIS [WCG's system] is an undeveloped, untested, unknown, uncoded system which is critical to the performance of WCG.[****].

[****], development of a new management information system clearly poses far greater risks for the agency than improvement of an existing, well-regarded system. There is a rational basis for the distinction in ratings in this area.

WCG complains that the moderate risk rating as to WCG risk issues 3 and 4 should have been assigned once, not twice, since both issues involve control over subcontractors. In my view, the issues are sufficiently different that assigning two ratings to them was reasonable. Issue 3, "Responsiveness of the MIS [management information system] Managerial Organization," is based on a concern that because WCG's MIS would be managed by a subcontractor employee in offices separated from WCG's NISC operations, WCG would have limited ability to protect the FAA's investment in the system. WCG Exhibit 13 at III-20 to -22. Issue 4, "Managerial Control," involves prospective problems stemming from WCG's confusing managerial organization; the FAA is not clear as to whether the WCG operations would be managed by WCG or a consortium of WCG and its subcontractors. If a consortium were in charge, the evaluators believed, WCG might have reduced leverage over its subcontractors and less ability to direct operations, so quality of work, scheduling, and costs could all be affected. Id. at III-22 to -23. One issue addresses a risk implicit in a specific, known aspect of operations; the other addresses a risk implicit in a vague aspect of the WCG proposal. While both concerns involve with contractor-subcontractor relations, they are distinct issues.

WCG maintains that WCG risk issue 5, "Conflicting Reporting Responsibilities of Key Personnel," is an unfair assessment since [****]. The risk team's concern here was that two of WCG's proposed key NISC-II personnel would be reporting to a NISC-II program manager, who would in turn report to those same individuals in their capacities as corporate officials. WCG Exhibit 13 at III-24 to -26. WCG has not made clear why it believes that [****]. There is no basis for a finding that the agency's assignment of a risk to WCG's proposal as to this matter was arbitrary or capricious.

WCG also protests that the FAA failed to evaluate properly risks associated with offerors' organizational conflicts of interest (OCIs). An "organizational conflict of interest," according to the AMS, "means that, because of activities or relationships with other persons, a person 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. "The policy of the FAA is to avoid awarding contracts to contractors who have unacceptable organizational conflicts of interest." Id. Section H.8 of the SIR required each offeror to submit an OCI mitigation plan addressing "the three prime examples of conflict situations" "in which questions regarding OCIs may arise" -- "Unequal Access to Information," "Biased Ground Rules," and "Impaired Objectivity."

The genesis of the issue of the FAA's evaluation of risks posed by OCI matters, including OCI mitigation plans, is complex. In a previous opinion, I concluded that such an evaluation was required by the solicitation. The SIR states that the agency's risk analysis will assess identified and potential risks to which "any aspect of [an] offeror's proposal" may expose the FAA, "regardless of the source of the risk." The offerors' OCI mitigation plans were parts of their proposals, and they were also, according to a thoughtful memorandum from agency counsel to the contracting officer (who was chairperson of the risk evaluation team), a source of potential risk to the FAA. Thus, under the terms of the solicitation, the risk analysis should have considered these plans.

The FAA and LMSI (and the ODR) disagreed with this conclusion. They read the words "any aspect of [an] offeror's proposal" to refer only to aspects of the proposal contained in certain of its volumes, not including the volume which included the OCI mitigation plan. They also believe that the solicitation's command that offerors' written responses be reviewed in the risk evaluation should be read to refer only to certain written responses, not including the written responses involving OCI mitigation plans. I continue to believe that "any" means exactly what the dictionary says it means -- in this context, "all -- used as a function word to indicate the maximum or whole of a number or quantity." Webster's Third New International Dictionary 97 (1986 ed.).

The solicitation cannot reasonably be read to limit the scope of the review; the contrary reading renders surplus some of the SIR's section M.4.2 (in particular, the second paragraph of that section). Further, my understanding of the solicitation not only gives its terms their commonly recognized meaning, but also is consistent with good sense in contracting. I cannot imagine what benefit the FAA could possibly derive from not considering, as part of its evaluation of the risks posed by accepting either of the proposals, any concerns that agency evaluators might have as a result of reading any aspect of a proposal or of having independent knowledge about the companies involved. The FAA, of course, could have limited its risk analysis (such as by excluding consideration of OCI matters) by stating in the SIR that it would do so. It did not.

All this is water over the dam, however. Notwithstanding the FAA's position that it was not obligated to consider OCI matters in its risk evaluation, the agency did agree, after receiving my earlier opinion, to "reassembl[e] 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." Notwithstanding the ODR's agreement with the FAA's position, the ODR has asked me to review the agency's actions in this regard to determine whether they have a rational basis.

The FAA now insists that what the risk evaluation team did was not a full evaluation, but rather, a "limited assessment." Whatever the difference in labels may mean to someone else, it is of no importance in the context of this protest. Similarly, WCG points out that the team did not follow the same procedures it employed in performing its other work, see WCG Brief at 10-12, but this is not important, either. The agency has made two public commitments as to how the procurement will be conducted, the AMS and the SIR. WCG has not demonstrated that anything in the AMS or the SIR precluded the team from acting as it did.^[3] What is critical about what the risk team did regarding OCI is not what that action is called or that it was performed differently from the rest of the risk evaluation, but rather, whether the conclusions reached by the team have a rational basis.

The team considered all the concerns raised by its counsel in the memorandum which I have noted. See WCG Exhibit 9. It determined that some of the concerns had been remedied by offerors' responses to questions posed during the procurement, other concerns involved little if any risk, others involved risks with minimal impact, and still others involved risks with some impact on schedule and cost. The team also reviewed teaming arrangements of both offerors and concluded that those arrangements were "nothing out of the ordinary." The team concluded that "both plans present a reasonable and logical process for mitigating each of the three OCI scenarios [set out in the SIR]" and "present minimal risk to the FAA." The team consequently advised the

source selection official that its earlier ratings of the risks posed by acceptance of the proposals remained unchanged after consideration of OCI risks. WCG Exhibit 8.

WCG makes several criticisms of the substance of the risk team's assessment of OCI risks. The first of these criticisms involves the conclusion that [****]. WCG Exhibit 8 at 6. This judgment was made on the advice of a risk team member who had participated in establishing and reviewing plans for major [****]for the FAA and another Government agency. This individual reached his conclusions based on his experience and knowledge. WCG Exhibit 5 at 29-37. WCG is correct in observing that the risk team performed no detailed analyses to support the conclusions. [****]. Nonetheless, WCG has not demonstrated that the [****]in question would be likely to have such impacts, so as to cast doubt on the reasonableness of the risk team's assessment.

[****]. This does not invalidate the team's advice that OCI matters related to acceptance of the LMSI proposal pose no significant risk to the FAA, however. The LMSI OCI mitigation plans envisions a graduated response to potential OCI situations. [****], there is no reason to believe that the present value of those costs, when considered against the likelihood of the costs occurring, poses a significant risk to the agency.

Summary

The FAA determined that LMSI's proposal was superior to WCG's in terms of technical/management competence. The agency also determined that acceptance of the LMSI proposal would pose a smaller risk to the agency, and would probably cost less, than the WCG proposal. Faced with these evaluations, which showed the LMSI proposal to be better than its competition in all three regards, the source selection official chose the LMSI proposal for award. WCG has not demonstrated that any of the evaluations it challenges was arbitrary or capricious, or, consequently, that the source selection decision did not have a rational basis.

Recommended Decision

I recommend that the FAA Administrator deny this protest.

_____/s/_____

STEPHEN M.
DANIELS
Board Judge

[1] An SIR, or Screening Information Request, "is a request by the FAA for documentation, information, presentations, proposals, or binding offers." AMS § 3.2.2.3.1.2.1. There are three categories of SIRs. The one involved in this case is an RFO, or Request for Offer. An RFO "is a request for an offeror to formally commit to provide the products or services required by the acquisition under stated terms and conditions. The response to the request for offer is a binding offer." Id.

^[2] An IPT, or Integrated Product Team, "is a cross-functional, empowered team that is given a budget and other resources to accomplish lifecycle acquisition and management for specific products or services." AMS § 1.11.

^[3] Another red herring regarding the risk evaluation of OCI matters is the assertion by the FAA and LMSI that any protest allegation that the solicitation requires inclusion of these matters in the risk evaluation is untimely, since the contracting officer, early in the procurement, told WCG's president that the agency would review OCI mitigation plans solely apart from risk. A contracting officer's commitment to a single company, in a private conversation, to act contrary to the terms of a solicitation is an arbitrary action, antithetical to fair competition under the structure publicly announced by the agency. Thus, even if this private conversation occurred, it should not serve as a limitation on WCG's right to seek review through a protest. Further, even if such a conversation could limit the ability of WCG to protest, the contracting officer's notes of the conversation are not as the FAA and LMSI characterize them. The notes state, "There are no plans to put OCI into Risk right now, but any area an evaluator wishes to highlight as a risk will be considered." FAA Exhibit 1 at 4-7. This statement is consistent with the recollections of WCG's president and chief financial officer about discussions they had with the contracting officer. WCG Reply Brief, Exhibits A, B. Since agency counsel, in evaluating the OCI mitigation plans, highlighted various concerns as risks, the contracting officer's statement promised that the plans would be considered as part of the risk assessment.