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of the United States

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Decision

Matter of: PURVIS Systems, Inc.

File: B-293807.3; B-293807.4

Date: August 16, 2004

William L. Walsh, Jr., Esq., J. Scott Hommer, III, Esq., Benjamin A. Winter, Esq., and Julia M. Kiraly, Esq., Venable, for the protester.

Anne B. Perry, Esq., John W. Chierichella, Esq., and Aleksander Lamvol, Esq., Sheppard, Mullin, Richter & Hampton, for Northrop Grumman Mission Systems, Inc., an intervenor.

John McC. Treanor, Esq., Department of the Navy, 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

Protest is sustained where agency failed to reasonably consider or evaluate potential conflicts of interest that will be created by awardee's involvement in evaluating the performance of undersea warfare systems that have been manufactured by the awardee or by the awardee's competitors.

DECISION

PURVIS Systems, Inc. protests the Department of the Navy's award of a contract to Northrop Grumman Defense Mission Systems, Inc. under request for proposals (RFP) No. N00189-03-R-0038 to provide analytical and technical support for two Navy programs--the Ship Anti-submarine Warfare Readiness Effectiveness Measuring (SHAREM) program and the Mine Readiness Effectiveness Measuring (MIREM) program. PURVIS protests that the agency failed to properly evaluate potential organizational conflicts of interest and conducted misleading discussions.¹

We sustain the protest.

¹ PURVIS has raised bases for protest other than those discussed in this decision; we have considered them and conclude they are without merit.

BACKGROUND

The SHAREM and MIREM programs are anti-submarine and anti-mine programs, sponsored by the Chief of Naval Operations (CNO), that assess the readiness and effectiveness of the Navy's surface forces. RFP at 79. The SHAREM and MIREM programs involve at-sea exercises, during which one or more naval battle groups are tested and evaluated with regard to their effective employment of anti-submarine and anti-mine warfare techniques. The RFP states that the at-sea exercises are used "to evaluate the performance of surface, air, and subsurface USW [undersea warfare] systems and techniques to develop new tactics and improve existing fleet and unit USW tactics." Id. at 79-80.

The solicitation at issue here was issued in October 2003, seeking proposals to "provide analytical and technical support services" for the SHAREM and MIREM programs during a base period and four 1-year option periods. Id. at 79. The solicitation's statement of work (SOW) identified "typical tasks or areas of work," including: exercise planning and preparation,² conducting and observing an exercise,³ exercise summary review and message preparation,⁴ exercise

² Under this task area, the SOW provides greater detail regarding the required tasks/deliverables, including: "[o]btaining or performing preexercise modeling and/or system performance prediction," "drafting scenarios to test specific tactics," "participating in exercise planning meetings and conferences," "incorporating testing and tactical evaluation of new systems and procedures in the exercise test plan," and "[p]lanning minefields and recommending settings for mine simulators." Id. 80-81.

³ Under this task area, the SOW provided that the contractor will: "[o]versee activities of participating units' data collection officers," "take notes on all exercise events," "present first-impression reports," "participate in post-exercise hot washup conferences," and "draft post-exercise quick look messages." Id. at 81.

⁴ Under this task area, the SOW provided that "[w]ithin 20 days after the completion of conducting and observing the exercise, the contractor will produce a draft Exercise Summary Message" which must contain, among other things, "highlights of the exercise and a preliminary assessment of results based on observer notes [and additional data gathered during the exercise]." Id. at 81.

reconstruction and analysis,⁵ program analysis,⁶ and program intermediary and long-range planning.⁷ Id. at 80-83.

Section M of the solicitation advised offerors that proposals would be evaluated against the following factors, listed in descending order of importance: technical performance plan,⁸ past performance,⁹ cost, and socioeconomic factors. Offerors were further advised that, in evaluating the non-cost evaluation factors, the agency would apply adjectival ratings of “outstanding,” “highly acceptable,” “acceptable,” “marginal,” and “unacceptable.”¹⁰ Id. at 153-55.

On December 1, 2003, three offerors, including PURVIS and Northrop Grumman, submitted proposals.¹¹ Each offeror made an oral presentation to the agency, and the proposals were subsequently evaluated by the agency’s technical evaluation board (TEB) with the following results:

⁵ Under this task area, the SOW provided that the contractor will “combine[] technical expertise and contributions from participating activities and conduct[] in-depth analysis of exercise data,” and that such analysis will include “[d]etection capability evaluation,” “[s]ensor effectiveness assessment,” and “[t]actical effectiveness assessment.” Id. at 82.

⁶ Under this task area, the SOW provided that the contractor’s responsibilities will include “[e]valuating and comparing data,” and “selecting and analyzing [measures of effectiveness] MOEs,” and further states that the contractor will “draft[] overall program reports for presentation to program sponsors and at flag level briefings.” Id. at 83.

⁷ Under this task area, the SOW provided that the contractor will “meet[] with activity representatives throughout the year to determine the specific program’s direction for the upcoming year,” and “assist[] the SHAREM and MIREM officers in devising, presenting and implementing their 6-year plans.” Id. at 83.

⁸ As initially issued, the solicitation established two subfactors under the technical performance plan evaluation factor: oral presentation and resumes.

⁹ The solicitation directed the offerors to submit contractor performance data sheets for a maximum of three recent contracts for services similar to those required under this solicitation. Id. at 147-48. Offerors were advised that only “relevant” contracts, as determined by the agency based on consideration of scope, complexity and magnitude, would be considered, and that the number of contracts evaluated as relevant would be reflected in each offeror’s past performance rating. Id. at 157-59.

¹⁰ A “neutral” rating could also be assigned under the past performance factor.

¹¹ The third proposal was subsequently withdrawn and is not discussed in this decision.

	PURVIS	Northrop Grumman
Technical Performance Plan	[deleted]	[deleted]
–Oral Presentation	[deleted]	[deleted]
–Resumes	[deleted]	[deleted]
Past Performance	2 [deleted] ¹²	1 [deleted] ¹³
Cost	[deleted]	[deleted]
Socioeconomic Factors	[deleted]	[deleted]

Agency Report, Tab 11, at 15-18.

On February 26, the agency selected Northrop Grumman for award and notified PURVIS of that selection. Following a debriefing, PURVIS filed a protest with our Office, asserting, among other things, that the agency had failed to give any consideration to potential organizational conflicts of interest that will be created by Northrop Grumman’s involvement, pursuant to the contract requirements, in evaluating various undersea warfare systems, including several systems manufactured by Northrop Grumman.¹⁴

By letter to our Office dated March 16, the agency acknowledged that corrective action was required, and advised our Office that it would terminate Northrop Grumman’s contract, revise the solicitation, conduct discussions, request proposal revisions, and make a new source selection decision. Based on the agency’s stated intent to take corrective action, we dismissed PURVIS’s protest.

By letters to the offerors dated March 17, the agency issued an amendment to the solicitation and opened discussions. Among other things, the amended solicitation required that each offeror submit an organizational conflict of interest (OCI) mitigation plan, and provided that such plans would be evaluated as a subfactor under the technical performance plan factor.¹⁵ Agency Report, Tab 24, RFP amend. 5, at 6. With the solicitation amendment, the agency also sent each offeror

¹² The number “2” in the rating indicates that only two of the three contracts Purvis submitted were considered relevant.

¹³ The number “1” in the rating indicates that only one of the three contracts Northrop Grumman submitted was considered relevant.

¹⁴ Purvis also protested that the agency’s application of a “(+)” to adjectival ratings was not consistent with the solicitation provisions.

¹⁵ The agency also added quality assurance as a subfactor under the technical performance plan evaluation factor, and amended the solicitation to expressly provide for application of a “(+)” or “(-)” to the adjectival ratings.

detailed agency comments regarding the prior evaluation of their respective proposals; the agency's comments identified various evaluated strengths and weaknesses in each proposal.

Although the amended solicitation precluded any revisions to proposed costs, and stated “[n]ew oral presentations will not be conducted,” it also provided that “[e]ach offeror will be permitted to submit revised material (e.g., PowerPoint slides) in response to the Government’s comments, plus one page of explanatory text . . . for each revised/resubmitted PowerPoint Slide.” Id. at 4. The amended solicitation further stated that an offeror could submit “an entire set of materials” provided there was “clear and specific identification of those material[s] that are revised, changed, new, or otherwise different from those originally presented to the Government.” Id.

On March 29, PURVIS submitted written questions to the agency regarding what offerors were permitted to submit. Specifically, PURVIS referenced the solicitation provision permitting submission of “revised, changed, new, or otherwise different” material, and asked:

Does this mean that additional (new) PowerPoint Slides or material, not merely revisions to what was originally submitted, may be provided to clarify identified weaknesses and deficiencies in an offeror’s proposal?

Agency Report, Tab 27, at 2.

In a response provided only to PURVIS, the agency responded:

No. “Additional” slides are not permitted. “New” and “revised” PowerPoint slides are substitutes for (and corrections/improvements of) existing PowerPoint slides. The purpose of reopening the solicitation for discussions is to permit offerors an opportunity to address and correct weaknesses, not to submit an entirely new proposal. The amended solicitation clearly demonstrates that the Government does not intend to evaluate entirely new proposals. This is evidenced by the fact that oral presentations will not be reopened, and that offerors must identify PowerPoint materials that have been changed or substituted.

Agency Report, Tab 28, at 7.

In a subsequent RFP amendment, the agency added the following provision: “The word ‘new’ does not mean additional PowerPoint slides or material. The number of slides originally submitted shall not increase.” Agency Report, Tab 31, RFP amend. 6, at 3.

Thereafter, both offerors submitted final revised proposals. Each proposal contained an OCI plan. Northrop Grumman also submitted new past performance data sheets for additional contracts that had not previously been identified for evaluation purposes. The final proposals were reviewed and evaluated with the following results:

	PURVIS	Northrop Grumman
Technical Performance Plan	[deleted]	[deleted]
--Oral Presentation	[deleted]	[deleted]
--Resumes	[deleted]	[deleted]
--Quality Assurance	[deleted]	[deleted]
--OCI Mitigation Plan	[deleted]	[deleted]
Past Performance	2 [deleted]	3 [deleted] ¹⁶
Cost	[deleted]	\$17,764,362
Socioeconomic Factors	[deleted]	[deleted]

Agency Report, Tab 39, at 4-5.

Based on this evaluation, Northrop Grumman's proposal was again selected for award. In making the source selection determination, the contracting officer expressly concluded that the two proposals were equal with regard to the technical performance plan factor; that Northrop Grumman's proposal was superior with regard to past performance; that the proposed costs were essentially equal;¹⁷ and that PURVIS' proposal was superior with regard to socioeconomic factors. Agency Report, Tab 39, at 7. Because the past performance factor, under which Northrop Grumman's proposal was considered superior, was more important than the socioeconomic factor, under which PURVIS's proposal was considered superior, the contracting officer concluded that Northrop Grumman's proposal offered the best overall value. This protest followed.

DISCUSSION

PURVIS protests that the agency failed to properly evaluate Northrop Grumman's proposal with regard to potential conflicts of interest. More specifically, PURVIS maintains that both Northrop Grumman's OCI plan and the agency's evaluation of that plan, failed to reasonably recognize or evaluate various situations creating

¹⁶ The "3" in the rating indicates that, based on Northrop Grumman's submission of new contracts for consideration, all three contracts were considered relevant.

¹⁷ The contracting officer noted that Northrop Grumman's cost was approximately [deleted] percent lower than PURVIS's but concluded that, due to "transition cost risk," they were considered "absolutely equal" for cost evaluation purposes. Agency Report, Tab 39, at 7.

potential conflicts of interest for Northrop Grumman, including the conflict created by Northrop Grumman's significant involvement in evaluating the performance of undersea warfare systems that Northrop Grumman has manufactured.

Contracting officers are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. Federal Acquisition Regulation (FAR) § 9.504. Situations that create potential conflicts of interest include situations in which a firm's work under a government contract entails evaluating itself or its own products. FAR §§ 9.505, 9.508; Engineered Air Sys., Inc., B-230878, July 25, 1988, 88-2 CPD ¶ 77 at 2-3. The concern in such situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated; accordingly such situations are frequently referred to as "impaired objectivity" conflicts of interest. See Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13.

As a threshold matter, the agency asserts that the contract requirements at issue here do not involve subjective input or judgments on the part of the contractor—that is, only objective data measurement will be involved; accordingly, because only objective data measurement activities are required, there are no "impaired objectivity" OCI issues. Specifically, at the GAO hearing conducted in connection with this protest,¹⁸ the TEB Chair repeatedly testified that the contract requirements involve only objective data measurements, not subjective input or assessments. Hearing Transcript (Tr.) at 23-24, 47-49, 58, 61-62, 70-71, 77, 84, 89, 126-28, 166-72. For example, the TEB Chair testified:

The whole purpose of the program is measurements. Everything is backed up by measurements. We don't say we think or we like or we dislike. We say this system performed this way and here is the measurement. So, when I bend it like that, I can't see where there's subjective activity there.

Tr. at 128.

Similarly, the TEB Chair testified as follows:

TEB Chair: [I]n terms of the contract, I don't foresee that there is an OCI issue.

¹⁸ In resolving this protest, GAO conducted a hearing on the record, during which testimony was provided by various government, PURVIS and Northrop Grumman witnesses, including: the two contracting officers involved in this procurement, the TEB Chair, PURVIS' proposed project manager, Northrop Grumman's proposed project manager, and another PURVIS employee.

GAO: Why is that ?

TEB Chair: Because they're measuring the system. The Government is with them as they're measuring the system. I think numbers are objective inherently.

GAO: Don't let me mischaracterize your testimony. I'm understanding your testimony to be that the basis for the conclusion . . . that there is not a conflict of interest is -- rests on your conclusion that there is no evaluation [or] subjective assessment that Northrop Grumman would perform with regard to, for example, the AQS-20 system; is that correct?

TEB Chair: Yes, sir. It's measured.

GAO: That it is just completely measurement, objectively measuring data . . . ?

TEB Chair: That's the whole purpose of the execution contract, yes, sir.

Tr. at 166-67.

In short, the agency maintains that there is no potential for Northrop Grumman to experience "impaired objectivity" when it performs the contract requirements involving evaluation of any undersea warfare systems because there is no subjective input or assessments involved in contract performance.¹⁹ In our view, the record is to the contrary.

As noted above, the solicitation's SOW lists numerous activities that either expressly or inherently involve analysis, evaluation, and judgment on the part of the contractor. For example, under the task area "exercise planning and preparation," the SOW establishes that the contractor is responsible for "*drafting scenarios to test specific tactics*" and "*recommending settings for mine simulators.*" Agency Report, Tab 3, RFP at 80-81 (italics added). With regard to the task area "conducting and observing an exercise," the contractor is required to "*present first-impression reports.*" *Id.* at 81 (italics added). Under the task area "exercise reconstruction and analysis," the contractor is required to "*conduct in-depth analysis of exercise data*" to include "detection capability *evaluation*," "sensor *effectiveness assessment*," and "tactical *effectiveness assessment.*" *Id.* at 81 (italics added). Under the task area

¹⁹ At the GAO hearing, the contracting officer who awarded this contract testified that she relied on the evaluation of the TEB with regard to the OCI issues. Tr. at 384-86.

“program analysis,” the contractor’s responsibilities include “*evaluating and comparing data*” and “*selecting and analyzing MOEs [measures of effectiveness]*.” Id. at 81 (italics added). Finally, under the task area “program intermediary and long-range planning, the contractor is responsible for “assisting the SHAREM and MIREM officers in *devising*, presenting and implementing their 6-year plans.” Id. at 82 (italics added). We view all of the above activities as requiring varying amounts of subjective analysis and judgment on the part of the contractor that go beyond “objectively measuring data.”

The agency record regarding the evaluation of Northrop Grumman’s proposal further supports the conclusion that contract performance will require—and that the agency values—subjective contractor input and judgment. For example, in evaluating Northrop Grumman’s technical performance plan with regard to the task area, [deleted], the agency rated Northrop Grumman’s proposal [deleted], specifically noting that, in their proposal, [deleted]. Agency Report, Tab 36, at 6. Similarly, in evaluating Northrop Grumman’s technical performance plan with regard to the task area [deleted], the agency concluded that Northrop Grumman “specifically proposed [deleted],” and further noted that Northrop Grumman’s proposed performance approach includes [deleted]. Id. at 9. We view the agency’s evaluation assessments identified above as reflecting the agency’s expectation—and desire—that the contractor will provide subjective input and judgment in performing the contract.

Finally, as part of our Office’s review, and after notifying all of the parties of our intent, we independently accessed the SIPRNET²⁰ where the classified reports produced under prior contract performance are electronically retained. Because of the classified nature of these reports, our decision today does not discuss their substance. Nonetheless, our review of the classified reports did not alter our views, discussed above, regarding the requirements of this contract.

In sum, the agency’s determination that Northrop Grumman’s performance of the contract requirements create no “impaired objectivity” OCIs because those requirements involve only objective data measurements lacks a reasonable basis. Thus, the agency failed to properly consider the potential that Northrop Grumman will experience impaired objectivity in performing this contract and failed in its obligation under the FAR to identify and evaluate potential conflicts of interest. Science Applications Int’l. Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ ____ at 4.

PURVIS argues that Northrop Grumman’s OCI plan also fails to demonstrate a reasonable understanding of situations that create “impaired objectivity” concerns and, similarly, that the agency’s [deleted] rating of Northrop Grumman’s OCI plan lacks a reasonable basis. We agree.

²⁰ Secret Internet Protocol Router Network.

As amended, the solicitation advised offerors that OCI plans would be evaluated as follows:

The Government will evaluate the Offeror's Organizational Conflict of Interest (OCI) Plan for an understanding of the problems relating to OCI and potential OCI in the program; identification of current OCI issues related to the programs: a method(s) of identifying OCI and potential OCI issues in the future; and specific methods of avoiding or mitigating OCI issues that might currently exist, or occur in the future.

Agency Report, Tab 24, RFP amend. 5, at 20.

Northrop Grumman's OCI plan lists 59 undersea warfare systems that are currently in the Navy inventory and subject to testing and evaluation under the SHAREM/MIREM programs. Agency Report, Tab 34, Northrop Grumman OCI Mitigation Plan, at attach. 4. The Northrop Grumman OCI plan further acknowledges that 12 of these 59 systems were manufactured by Northrop Grumman,²¹ and that at least 30 of the remaining systems were manufactured by four contractors—Lockheed Martin, Raytheon, Allied Signal, and Hughes Aircraft.²² Id. Finally, the OCI plan identified [deleted] systems that Northrop Grumman is currently in the process of researching, developing, or testing.²³ Id. at attach. 6.

Despite recognizing that Northrop Grumman is the manufacturer of a significant portion of the systems to be tested and that the vast majority of the remaining systems are manufactured by companies with whom Northrop Grumman competes, Northrop Grumman's OCI plan concludes: "we have determined that an actual OCI . . . does not currently exist for the envisioned work to be performed under the Contract," adding that "[m]ature, fielded USW systems in use in the fleet do not pose an OCI issue." Agency Report, Tab 24, Northrop Grumman OCI Plan, at 8. Northrop

²¹ Specifically, the following systems are manufactured by Northrop Grumman: AN/AQS-14 Dipping Sonar; AN/SLQ-25B TAS Towed Array Sensor; AN/SLX-1 MSTRAP Multi-Sensor Torpedo Recognition and Alertment Processor; AN/SQQ-28 Sonobuoy Signal Processor; AN/SQR-19 TACTAS Surface Ship Towed Array Sonar; LWWAA Lightweight Wide Aperture Array; RAMICS Rapid Airborne Mine Clearance System; ALMDS Airborne Laser Mine Detection System; COBRA Coastal Battlefield Reconnaissance and Analysis; AN/AQS-14 Side looking Sonar; LLSS Laser Line Scan System. Id.

²² We view it as a matter of public record that Northrop Grumman has competed with some or all of these four firms, or their successors in interest, with some frequency.

²³ Under the heading "USW Projects under Development by Northrop Grumman Corporation," the OCI plan listed the following developmental systems: [deleted].

Grumman's conclusion that no OCI issues are created by Northrop Grumman's evaluation of its own "mature, fielded" systems--or similar systems manufactured by potential competitors--appears to be based on the premise that the work performed under this contract is not "part of the procurement process."²⁴

Even if Northrop Grumman's assertion, that the work performed and reports produced under this contract are not "part of the procurement process," was factually accurate--which it is not²⁵--we reject Northrop Grumman's apparent assumption that impaired objectivity OCIs can arise only within the procurement process. To the contrary, we view a situation where, as here, a company is responsible for assessing the performance of systems it has manufactured as a classic example of an "impaired objectivity" OCI--without regard to whether the evaluation occurs as "part of the procurement process." See, e.g., Engineered Air Sys., Inc., supra, at 3 (contract to test and evaluate products that awardee manufactured was improper). In such situations, the firm risks having its objectivity impaired by a bias in favor of its own systems' performance. Similarly, a company manufacturing systems that are, as a practical matter, competing with similar systems produced by other manufacturers, risks having a negative bias regarding the performance of the competing systems. This is particularly true where, as here, the contract requirements clearly anticipate comparisons between the performance of similar systems manufactured by competing firms.

Finally, Northrop Grumman's OCI plan acknowledges that--in contrast to the broad assertion that no OCIs are created by Northrop Grumman's evaluation of "mature, fielded" systems--evaluation of systems that are "under development" by Northrop Grumman "could cause the perception of a potential OCI issue." Id. at 19-20.

²⁴ Specifically, Northrop Grumman states that it "does not believe there is any real 'impaired objectivity' conflict because the [SHAREM/MIREM] exercises do not evaluate the performance of [undersea warfare] systems as part of the procurement process." Id. at 4.

²⁵ The record here establishes that the SHARE/MIREM reports are "a data point" in the procurement process and that "the acquisition community" is a "customer" of the SHAREM/MIREM programs. Tr. at 192. Further, at the hearing conducted by GAO in connection with this protest, the TEB chair testified that the SHAREM/MIREM reports "have value [to] and should be considered by the procurement community." Tr. at 338. Finally, Northrop Grumman's OCI plan assumes that "mature, fielded" systems are, by definition, outside of the procurement process. The record here reflects the reality that even "mature, fielded" systems may be subject to the procurement process. In this regard, the TEB Chair acknowledged during the GAO hearing that such systems may be subject to "improvements." Tr. at 97.

Accordingly, the OCI plan provides that, in situations where a “developmental” Northrop Grumman system is being evaluated, Northrop Grumman will [deleted].²⁶
Id.

We find Northrop Grumman’s proposal to mitigate conflicts of interest in such limited circumstances to be materially inadequate. In addition to ignoring potential conflicts regarding “mature, fielded” systems, Northrop Grumman’s mitigation plan fails to address necessary mitigation actions with regard to the evaluation of systems that Northrop Grumman’s “developmental” systems may replace or otherwise affect. Similar to the principles discussed above, where a company is in the process of developing new systems, the production of which may, as a practical matter, affect the continued use of existing systems, the manufacturer of the developmental systems risks having a positive bias regarding the performance of its own developmental system and a negative bias regarding the existing system that its developmental system may replace or otherwise affect.

In summary, we find Northrop Grumman’s OCI plan to be fundamentally flawed. Specifically, Northrop Grumman’s OCI plan fails to recognize or otherwise address the multiple situations, discussed above, that create potential “impaired objectivity” OCI concerns.

Similarly, we find no reasonable basis for the agency’s [deleted] rating of Northrop Grumman’s OCI plan in that the agency’s rating fails to reflect consideration of the multiple conflict of interest situations the OCI plan does not address. Specifically, the TEP chair testified that he did not compare the particular systems produced by Northrop Grumman to each of the other particular systems in the Navy’s inventory to determine which systems are, in any sense, competing. Tr. at 161-63. Similarly, the TEB chair testified that he did not consider the functions that Northrop Grumman’s developmental systems would perform, nor make any determination regarding the impact production of such systems would have on any existing systems that Northrop Grumman could be evaluating under this contract. Tr. at 88-94, 163. Finally, the TEB chair acknowledged that the agency gave no consideration to the frequency with which OCI issues requiring mitigation, neutralization or other action are likely to arise during Northrop Grumman’s contract performance, nor the impact that such required neutralization or mitigation measures will have on the quality of Northrop Grumman’s performance. Tr. at 116. For all of these reasons, we find no

²⁶ Northrop Grumman’s acknowledgement regarding potential OCI’s created by evaluation of its “developmental” systems provides further support for our conclusion, discussed above, that the contract requirements involve significantly more than objective data measurements. If the agency’s assertion in this regard were valid, no OCI concerns would be created even when Northrop Grumman’s “developmental” systems are being evaluated.

reasonable basis for the agency's assessment that Northrop Grumman's OCI plan was [deleted].

The protest is sustained.²⁷

RECOMMENDATION

In developing the protest record in this matter, the agency has provided information suggesting that PURVIS's OCI plan may contain flaws, similar to those discussed above, because it fails to identify potential OCI issues regarding a PURVIS subcontractor. In light of the substantial flaws in Northrop Grumman's OCI plan, the agency's flawed evaluation of that plan, and the agency's concerns with PURVIS's OCI plan, we recommend that the agency reopen discussions with both offerors and seek revised proposals, including revised OCI plans identifying all potential OCIs for which mitigation, neutralization, or other action will be required, thereby providing a basis for the agency to assess potential OCI issues with respect to both Northrop Grumman's and PURVIS's performance of this contract. We recommend that the agency meaningfully consider, evaluate, and document the frequency with which

²⁷ PURVIS also protests that the agency conducted misleading discussions by advising PURVIS that it could not submit new material with its final revised proposal. Based on this advice, PURVIS maintains that it did not submit information regarding additional contracts not previously identified for evaluation under the past performance factor, and was prejudiced by the fact that the agency permitted Northrop Grumman to submit additional contracts for evaluation. We agree that the discussions were misleading and prejudicial. As discussed above, PURVIS specifically asked the agency during discussions whether it could submit "additional (new) PowerPoint Slides *or material*, not merely revisions to what was originally submitted." Agency Report, Tab 27, at 2 (italics added). In a response provided only to PURVIS, the agency replied "No." Agency Report, Tab 28, at 7. Although the agency's response also discussed, in detail, the agency's concern with regard to additional PowerPoint slides, its negative response to PURVIS's question was not limited to submission of those slides. Further, in its subsequent solicitation amendment addressing this precise matter, the agency specifically stated: "The word 'new' does not mean additional Power Point slides *or material*." Agency Report, Tab 31, RFP amend. 6, at 3 (italics added). On this record, PURVIS reasonably concluded that it was prohibited from submitting additional contracts for the agency's relevance determination. As discussed above, the record establishes that the additional contracts submitted by Northrop Grumman ultimately formed the basis for selection of Northrop Grumman's proposal for award. In light of our recommendation that the agency reopen discussions with the offerors and seek revised proposals regarding OCI issues, we recommend that the agency also clearly advise the offerors that additional past performance contracts may be submitted for evaluation.

OCI issues will likely occur for each offeror, the actions necessary to address such issues, and the impact such actions will have on the quality of the offeror's performance. As noted above, we also recommend that the agency permit the offerors to submit additional past performance contracts for the agency's relevance assessment and evaluation. Based on the offerors' revised submissions, and the agency's evaluation of those submissions, we recommend that the agency make a new source selection decision. We further recommend that the agency reimburse PURVIS for the costs of filing and pursuing its protest, including reasonable attorneys' fees. PURVIS's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1)(2004).

Anthony H. Gamboa
General Counsel