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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of the Navy--Reconsideration

File: B-286194.7

Date: May 29, 2002

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DIGEST

1. Prior GAO decision sustaining a protest that challenged an agency's decision to retain in-house performance of certain activities under a Circular A-76 study properly characterized the team tasked with preparing the agency's in-house management plan as "essentially a competitor."

2. The nature and status of an agency team tasked with preparing the in-house management plan in a Circular A-76 study do not justify exempting that team from the conflict of interest limitations generally applied to private-sector competitors.

3. In complying with the conflict of interest requirements of Federal Acquisition Regulation (FAR) subpart 3.1, government officials involved in A-76 procurements should consider the instruction and guidance provided by FAR subpart 9.5.

4. Where a protest establishes facts that constitute a conflict of interest or an apparent conflict of interest, GAO will presume prejudice unless the record affirmatively demonstrates its absence.

5. Recommended corrective action addressing conflict of interest portion of prior decision is modified to provide for only prospective application.

DECISION

The Department of the Navy requests reconsideration of our decision, The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194, in which we sustained Jones/Hill's protest challenging the Navy's determination, pursuant to Office of Management and Budget (OMB) Circular A-76, that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore (NASL) California, than to contract for those services with Jones/Hill. We sustained the protest on the basis of multiple procurement flaws, including the Navy's failure to comply with the conflict of interest requirements of the Federal Acquisition Regulation (FAR), subpart 3.1.[1] Specifically, we concluded that the Navy's use of the same employee and consultants to develop both the PWS and the in-house management plan for performance by the government's "most efficient organization" (MEO) was contrary to the FAR requirement that procuring agencies "avoid strictly any conflict of interest or even the appearance of a conflict of interest." FAR § 3.101-1.

The Navy requests reconsideration of our decision to the extent we concluded that a conflict of interest existed. We affirm our decision, but modify our recommended corrective action so as to apply the conflict of interest portion of the decision only prospectively.

BACKGROUND

In January 1998, the Navy initiated a commercial activities study to determine whether it would be more economical to perform base operations support services for the NASL in-house, using government employees, or under contract with a private-sector firm.[2] Thereafter, various Navy personnel were tasked with

[1] We also sustained the protest on the following bases: the agency's independent review official (IRO) failed to reasonably support his determination that the government would be able to perform the performance work statement (PWS) requirements with the resources reflected in the agency management plan for in-house performance; the in-house management plan failed to include the costs of all resources that would be used by the agency; and the agency failed to reasonably compare the level and quality of performance reflected in the in-house management plan with the level and quality of performance reflected in Jones/Hill's proposal. The Navy's reconsideration request does not challenge any of these bases for our decision.

[2] The process for determining whether activities should be performed in-house or with a contractor is set forth in OMB Circular A-76 and that Circular's Revised Supplemental Handbook. The Department of Defense (DOD) and its military

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developing the PWS to be used in this matter. To assist the Navy personnel in this task, the agency contracted with a private consultant, E.L. Hamm, Inc. As ultimately issued, the PWS was performance-oriented, specifying 13 particular "outcome[s]," each of which listed a number of "mandatory contract requirement[s]," along with corresponding "metric[s]" to be used in measuring performance. RFP §§ C.5.1-13.

Following completion of the PWS, the agency assigned various Navy employees to prepare the agency's in-house management plan and, again, relied on the consulting firm of E.L. Hamm, Inc. to assist in this effort. The record establishes, and the Navy does not dispute, that an agency employee, along with Hamm consultants, were substantially involved in the development and preparation of the PWS and were also primarily responsible for development and preparation of the in-house management plan.[3]

Meanwhile, the Navy issued request for proposals (RFP) No. N62474-98-R-2069, seeking private-sector proposals to perform the PWS activities. Six offerors, including Jones/Hill, submitted proposals by the specified closing date. The agency evaluated each proposal against the PWS requirements, and selected Jones/Hill's as the proposal representing the best value to the government. Thereafter, the agency performed a cost comparison between Jones/Hill's proposal and the in-house management plan, concluding that it would be more economical to retain performance of the PWS activities in-house.

In August 2001, Jones/Hill filed a protest challenging the Navy's determination to retain performance of the PWS activities in-house.[4] That protest led to GAO's

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departments are required to use the Circular and its Handbook in performing commercial activities studies. 32 C.F.R. § 169a.15(d) (2001). The required process includes preparation of a PWS outlining the task and performance requirements, preparation of a management plan for performance of the PWS tasks by the agency's MEO, a competition among private-sector proposals, and a cost comparison between the successful private-sector proposal and the MEO management plan.

[3] E.L. Hamm, Inc. provided at least three employees who worked on both the PWS and MEO management plan. At the GAO protest hearing, one of these employees testified that he "was the editor of the PWS and . . . the [MEO] management plan." Protest Hearing Transcript at 337. A Navy witness described Hamm's role as that of a "co-producer" of the PWS and "full participant" in development of the in-house management plan. Id. at 245-46. Similarly, a Navy employee who chaired the agency's commercial activity team and was instrumental in developing the PWS also served as the leader of the MEO team that developed the in-house management plan.

[4] Prior to the August 2001 protest, there were various other administrative appeals and protests.

decision, issued on December 5, 2001, in which we sustained Jones/Hill's protest based on the various flaws listed above, including the Navy's failure to comply with the conflict of interest requirements of FAR subpart 3.1. The Navy seeks reconsideration of our decision to the extent we concluded that a conflict of interest was created by having the same personnel develop both the PWS and the MEO management plan.

In responding to the Navy's reconsideration request, we conducted a conference with counsel for the Navy and Jones/Hill and, following that conference, requested and received written comments from both parties.[5] As discussed below, we affirm our conclusion that a conflict of interest existed, but modify our recommended corrective action to provide for only prospective application.

DISCUSSION

As an initial matter, the Navy challenges our decision's description of the MEO team that developed the in-house management plan as "essentially a competitor." In this regard, our decision stated:

> [G]iven the use of the competitive system in Circular A-76 studies and the MEO team's status as essentially a competitor in the study, we believe that the provisions of [FAR] subpart 9.5 serve as useful guidance in determining whether the type of conflict of interest prohibited under subpart 3.1 of the FAR exists . . . .

The Jones/Hill Joint Venture, supra, at 11.

The Navy argues that our characterization of the MEO team as "essentially a competitor" fails to recognize that the in-house management plan is not legally an "offer" and that the MEO team is not legally an "offeror." Thus, the Navy maintains, our conflict of interest analysis is based on an invalid premise.

We reject the Navy's assertion that our characterization of the MEO team as "essentially a competitor" was inappropriate for purposes of assessing whether a conflict of interest existed. While we agree that, for purposes of contract formation, the MEO management plan is not technically an "offer," nor the MEO team technically an "offeror," the reality is that, in preparing the in-house plan for performance, the MEO team members functioned, and viewed themselves, as competitors. At the protest hearing conducted by GAO prior to issuing the

[5] We also invited both parties to solicit and submit comments from other organizations having an interest in this matter. The Navy provided comments from the Office of the Under Secretary of Defense, the Department of the Army, and the Defense Logistics Agency. Jones/Hill provided comments from the Professional Services Council.

December 5 decision, the Navy's MEO team leader testified that it was his goal "[t]o successfully compete" for the PWS requirements, elaborating that his aim was "[t]o develop a management plan that fulfilled the performance work statement goals and would compete at a level or better than the commercial sector."[6] Protest Hearing Transcript at 300.

Consistent with the MEO team leader's testimony, the Circular A-76 Handbook recognizes and reenforces the fact that agencies in A-76 studies are competing with the private sector, stating:

> Circular A-76 is not designed to simply contract out. Rather, it is designed to: (1) balance the interests of the parties to a make or buy cost comparison (2) provide a level playing field between public and private offerors to a competition, and (3) encourage competition and choice in the management and performance of commercial activities.

A-76 Revised Supplemental Handbook (1996), Introduction, at iii (emphasis added).

Elsewhere throughout the A-76 Handbook, that authority similarly describes the A-76 process as a "competition" between the private sector and the government. See, e.g., Handbook at 4 ("Competitions based upon output and cost performance measures must reflect the agency's fully allocated costs of performance").

While we recognize that A-76 studies can legitimately be characterized as tools for management to reach make-or-buy decisions, we believe it important to also recognize the reality, which is that Circular A-76 studies essentially are competitions between the public and private sectors, and they are so viewed by all sides. See, e.g., Commercial Activities Panel, Final Report: Improving the Sourcing Decisions of the Government (Apr. 2002) at 58 (statement of Under Secretary of Defense for Acquisition, Technology, and Logistics) (referring to "A-76 competitions"); at 65 (statement of National President, American Federation of Government Employees) (referring to "A-76 competition process"). Once the reality is recognized that these are, indeed, public/private competitions, the Navy's position becomes that, in these

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[6] The Navy's MEO team leader provided further insight into the realities of the competitive situation, testifying as follows:

> Q. On your MEO team, were any of your members part of the group whose jobs were being reviewed . . . ?
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> A. Almost all of them, yes, were members. That's a pretty strong incentive, just as in the commercial [sector], that if you want to compete very strongly, their job's at risk.

Protest Hearing Transcript at 297.

competitions, there is no public-sector competitor. We reject this assertion as an attempt to elevate form over substance, and we stand by our characterization of the MEO team as "essentially a competitor."

In a similar vein, the Navy argues that our consideration of an MEO team as "essentially a competitor" fails to recognize certain factors that should properly distinguish in-house teams from their private-sector counterparts. Specifically, the Navy notes that, unlike private-sector competitors, MEO teams are charged with "writing the most cost effective means to achieve the required level of output as described in the PWS"; that PWS and MEO teams are supervised, and their work products are reviewed and certified, by other government managers; and that government employees are "presumed to act in good faith." Navy Post-Conference Comments, Feb. 15, 2002, at 2-6. The Navy maintains that the safeguards built into the A-76 process and the unique status and responsibilities of MEO team members, along with their government supervisors and managers, provide an adequate basis to exempt MEO teams from application of the conflict of interest rules generally applicable to private-sector competitors.

The conflict of interest rules serve to separate roles that require neutrality (such as drafting the ground rules of a competition) from those where advocacy is permissible (such as assisting one side in the ensuing competition). In developing a PWS to be used in an A-76 procurement, the personnel tasked with that effort are, in effect, setting the ground rules for the subsequent competition, and they are thus expected to act in a neutral fashion. As a general matter, if those who set such ground rules will later compete under those rules, a conflict of interest arises. See Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13. The primary concerns in such situations are that those personnel responsible for establishing the ground rules may, intentionally or unintentionally, select rules that skew the subsequent competition in their own favor, and/or will obtain unique and otherwise-unavailable information that provides an unfair competitive advantage. Id.

In the protest hearing conducted by GAO prior to issuing our December 5 decision, one of the Navy witnesses expressly acknowledged the relevance of these concerns, testifying that having the same personnel create both the PWS and MEO management plan created the risk of "crafting [the PWS] in a manner which would make it advantageous to the MEO," and further testifying, "I think . . . intimate knowledge of the PWS would allow you to provide a better MEO." Protest Hearing Transcript at 228-29.

We do not dispute the Navy's general observations regarding the responsibilities of MEO team members, along with their supervisors and managers, and the presumed good faith of government employees. We reject, however, the proposition that these factors effectively eliminate the conflict of interest concerns that exist in the competitive environment of an A-76 process. Indeed, our Office's prior decisions involving conflicts of interest in A-76 studies have similarly considered the realities

of this competitive environment. For example, in DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19, we found that a conflict of interest was created when 14 of the 16 evaluators who were responsible for evaluating private-sector proposals in an A-76 study also held positions that were subject to the study. In concluding that an impermissible conflict of interest existed in DZS/Baker, we were aware of the various unique aspects of A-76 studies--including the responsibilities with which the government evaluators were charged, the supervision to which they were subject, and the presumed good faith of government employees. Nonetheless, our conclusion that a conflict of interest existed, and that corrective action was necessary, was based on the reality--as here--that, despite these responsibilities and attributes of government employees, when such personnel are competing for selection in an A-76 study the conflict of interest considerations applicable to private-sector competitors should also be applied to government competitors.

In its reconsideration request, the Navy expresses agreement with our decision in DZS/Baker, noting that there are certain "common-sense principles regarding conflicts of interest that should be observed." Navy Reconsideration Request at 3. Specifically with regard to the situation in that case, the Navy states that corrective action was "obviously the right thing to do." Id. In our view, the Navy's argument that MEO teams should be exempt from conflict of interest rules due to their unique status and responsibilities, or because of the involvement of government supervisors, is inconsistent with the agency's express acknowledgment that our decision in DZS/Baker reflects "common-sense principles regarding conflicts of interest that should be observed." Consistent with our decision in DZS/Baker, we reject the Navy's assertion that the unique attributes of MEO teams eliminate otherwise relevant conflict of interest concerns.

More generally, the Navy criticizes our Jones/Hill decision for its references to the conflict of interest provisions of FAR subpart 9.5, since that portion of the FAR refers to "contractors" and "companies" rather than to "agencies." The Navy asserts that because "FAR subpart 9.5 does not apply to the [A-76] process," GAO's consideration of those FAR provisions renders the decision invalid. Id. We disagree.

As we stated in our decision, we sustained the Jones/Hill protest on the basis that the agency failed to comply with the conflict of interest requirements contained in FAR subpart 3.1, which establishes the standard of conduct applicable to government procurement officials. Specifically, that portion of the FAR states:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general

> rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

FAR § 3.101-1 (emphasis added).

In considering whether the agency met its obligation under FAR § 3.101-1, we did, indeed, consider the instruction and guidance provided by FAR subpart 9.5.[7] Our consideration of FAR subpart 9.5 reflects the fact that this portion of the FAR contains detailed guidance and specific examples of conflict of interest situations which apply to private-sector competitors. For example, FAR subpart 9.5 generally precludes a private-sector offeror from competing for a contract where the offeror prepares the statement of work (FAR § 9.505-2), evaluates other offerors' proposals (FAR § 9.505-3), or obtains information that provides an unfair competitive advantage (FAR § 9.505-4). In contrast to FAR subpart 9.5's detailed guidance and specific examples, FAR § 3.101-1, while establishing the requirement to "avoid strictly any conflict of interest or even the appearance of a conflict of interest," does not provide further guidance on implementing that directive. While FAR § 3.101-1 is thus less detailed than FAR subpart 9.5, it is at least as strict in its prohibition of conflicts of interest, and we view it as reasonable to look to subpart 9.5 for guidance. Based, in part, on the fact that a private-sector competitor, such as Jones/Hill, would have been precluded from both developing the PWS at issue here and submitting a proposal responding to that PWS, see FAR § 9.505-2, our decision concluded that, by permitting a Navy employee and consultant to develop and prepare both the PWS and the MEO management plan, the Navy failed to reasonably comply with the conflict of interest requirements of FAR § 3.101-1.

The Department of Defense (DOD) apparently agrees with our view of the relevance of FAR subpart 9.5 to A-76 studies, since it issued conflict of interest guidance more than 2 years ago which directs DOD agencies conducting A-76 studies to avoid conflicts of interest "in accordance with FAR Part 9." DOD Interim Guidance (Feb. 29, 2000).[8] Specifically, that DOD Guidance states: "[W]here private sector consultants are assisting DOD Components in preparing both a PWS and [MEO] Management Plan for a specific A-76 cost comparison, sufficient measures shall be

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[7] Specifically, our decision stated: "[A]lthough FAR subpart 9.5, by its terms, does not apply to government agencies or employees, it is instructive in determining whether an agency has reasonably met its obligation to avoid conflicts under FAR § 3.101-1." The Jones/Hill Joint Venture, supra, at 9. We took the same approach in DZS/Baker (at 3-6).

[8] The DOD Guidance augments DOD Instruction 4100.33, Commercial Activities Program Procedures, Sept. 9, 1985.

taken to avoid potential conflicts of interest in accordance with FAR Part 9."[9] Id. While it is true that the DOD Guidance, by its terms, applies only to consultants assisting in A-76 studies, it reflects a recognition of the relevance of FAR subpart 9.5 even to A-76 studies, which the Navy vigorously argues are not competitions at all, and it would appear to recognize that FAR subpart 9.5 prohibits the conflict of interest (that of Hamm) that was one of the bases for our sustaining the protest here.

Accordingly, we reject the Navy's assertion that our decision regarding an existing conflict of interest is invalid because "FAR subpart 9.5 does not apply to the [A-76] process." The Navy does not dispute its obligation, pursuant to FAR § 3.101-1, to strictly avoid conflicts of interest as well as the appearance of conflicts of interest, and DOD has instructed agencies to avoid conflicts "in accordance with FAR Part 9." We believe that, in determining how to implement the mandate of FAR § 3.101-1 in the context of conducting A-76 studies, it is not reasonable for an agency to ignore the instruction and guidance provided by FAR subpart 9.5 on the basis that, by its terms, that portion of the FAR technically applies only to private-sector competitors.

The Navy next takes exception to our consideration of the specific portion of FAR subpart 9.5 that limits competitors' involvement in the preparation of work statements. See FAR § 9.505-2.[10] The Navy complains that the prior decisions of this Office have not specifically dealt with the type of situation discussed in FAR § 9.505-2, and that the issue regarding development of both a PWS and MEO management plan is substantively distinguishable from other conflict of interest situations addressed elsewhere in FAR subpart 9.5.[11] Navy Reconsideration Request at 3. Noting that the PWS here is "outcome-based," the Navy argues it would be "very difficult, if not impossible to slant [such a PWS] in favor of a MEO." Id. Based

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[9] The Navy maintains that this DOD Guidance was inapplicable to the A-76 study in the Jones/Hill matter because that study was initiated before the Guidance was published.

[10] This section of the FAR states, among other things:

> When contractor assistance is necessary [to prepare work statements], the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless [otherwise excepted].

FAR § 9.505-2(b)(2).

[11] For example, in DZS/Baker, we considered the guidance provided by FAR § 9.505-3, which precludes private-sector offerors from evaluating competing proposals.

on the nature of this PWS, along with the fact that our Office has not previously discussed the specific relevance of FAR § 9.505-2 to MEO teams, the Navy asserts it had no reason to know that its use of common personnel to prepare both the PWS and MEO management plan would be considered a conflict of interest.

As discussed above, the underlying rationale for viewing the examples contained in FAR subpart 9.5 as relevant to MEO teams is the reality that MEO teams are, in fact, competing to perform the PWS. Our Office has repeatedly advised that, when conducting A-76 studies or other procurements in which a government entity is participating as a competitor, procuring agencies should consider the instruction and guidance provided by FAR subpart 9.5 in connection with their obligations to avoid conflicts of interest under FAR § 3.101-1. See, e.g., Battelle Mem'l Inst., B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107 at 6-7; DZS/Baker, supra, at 4; IT Facility Servs.--Joint Venture, B-285841, Oct. 17, 2000, 2000 CPD ¶ 177 at 14. Our recommendations regarding the relevance of FAR subpart 9.5's detailed guidance have not been limited to any particular segments of that authority, since the underlying rationale regarding the competitive environment in A-76 studies is generally applicable to all of the analogous FAR subpart 9.5 examples. Indeed, in responding to questions raised by the Office of Government Ethics following our decision in DZS/Baker, we noted that, because of the competitive environment in A-76 studies, an actual or apparent conflict of interest "would taint more than the individual source selection; it would undermine the integrity of the A-76 process and the procurement system overall." GAO Letter to the Office of Government Ethics Regarding Conflicts of Interest in A-76 Cost Comparisons, B-281224.8, Nov. 19, 1999, 99-2 CPD ¶ 103 at 2.

As discussed above, where one competitor has established the ground rules applicable to all competitors by developing and drafting the PWS, there is significant risk of at least the perception that the ground rules were written in a manner that skews the competition or that, by virtue of the unique access to information required to develop the PWS, provides the competitor with an unfair advantage. Consistent with these common-sense bases for concern, the DOD Guidance discussed above specifically precludes precisely the situation that existed in the Jones/Hill matter. That guidance states:

> [W]here private sector consultants are assisting DOD Components in preparing both a PWS and [MEO] Management Plan for a specific A-76 cost comparison, sufficient measures shall be taken to avoid potential conflicts of interest in accordance with FAR Part 9 or the appearance of such conflicts. These measures shall include, at a minimum, sufficient "firewalls" within the private sector consultant to prevent the same individuals from both developing the PWS and assisting in preparation of the MEO.

DOD Interim Guidance (Feb. 29, 2000) (emphasis added).

Thus, the Navy's assertion that the conflict of interest situation addressed in FAR § 9.505-2 is substantially different from the situations addressed in other portions of FAR subpart 9.5, and that the prohibition therein is uniquely inapplicable to government competitors, directly conflicts with DOD's own Guidance--which prohibits precisely the situation that existed in the Jones/Hill matter.

As noted above, we recognize that the DOD Guidance, by its terms, applies only to individuals within a private-sector consultant firm, and not to government employees. Nonetheless, we fail to see how a reasonable argument can be made that preparation of both a PWS and MEO plan by consultant employees creates greater conflict of interest concerns than such actions by government employees. We therefore conclude that, just as FAR subpart 9.5 supports the prohibition set out in the DOD Guidance, FAR § 3.101-1 requires that this prohibition be applied to government employees. In summary, consistent with the DOD Guidance, we believe that the practice of generally precluding one competitor from establishing the ground rules applicable to all competitors reflects, to use the Navy's phrase, "[a] common sense principle[]" that should be observed by both government and private-sector competitors in A-76 procurements.[12]

The Navy next argues that, even if the situation here created the appearance of a conflict of interest, it was improper to sustain Jones/Hill's protest because Jones/Hill did not demonstrate, nor did our decision describe, the specific portion of the PWS that favored the MEO management plan or the particular information obtained by the MEO team that constituted an unfair advantage. In short, the Navy maintains that our decision is flawed because Jones/Hill did not demonstrate prejudice.

Prejudice is an essential element of every viable protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Nonetheless, the provisions of FAR § 3.101-1 direct agencies to "avoid strictly any conflict of interest or even the appearance of a conflict of interest." (Emphasis added.) We believe that the strict limitation on both actual and apparent conflicts reflects the reality that the potential harm flowing from such situations is, by its nature, frequently not susceptible to demonstrable proof. For example, here, the PWS contained multiple "outcomes," "mandatory contract

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[12] Application of this common-sense principle does not preclude obviously necessary interaction among the PWS team, the MEO team, and other personnel who are currently performing the tasks under study. Rather, the principle enunciated in our prior decision, and affirmed here today, precludes common personnel from playing a substantial/leadership role in developing both the PWS and MEO management plan. We recognize that distinguishing between activities that constitute "obviously necessary interaction" and those that constitute "playing a substantial/leadership role" will require ongoing, subjective judgments by responsible agency officials based on the individual facts and circumstances of individual A-76 studies.

requirement[s]," and corresponding "metrics" to measure performance. RFP §§ C.5.1-13. The process of preparing the PWS included multiple modifications, revisions, and amendments. As in the preparation of a statement of work in a private/private competition, it appears indisputable that, in developing the PWS, the authors made countless determinations related to what should constitute a "mandatory requirement," and what type of "metric" should be used in measuring performance.[13] The end product reflects the authors' ultimate conclusions regarding these issues; what is not readily apparent are the multiple alternatives that may have been considered and rejected, and the bases for rejecting such alternatives.

We believe that, if the prohibition on common personnel preparing both the PWS and MEO management plan were to be enforced only when a protester could specifically identify and prove that a particular "road not taken" would, likely, have led to selection of the protester's proposal over the MEO management plan, the prohibition would be largely meaningless.[14] Accordingly, where a protest establishes facts that constitute a conflict or apparent conflict, we will presume prejudice unless the record affirmatively demonstrates its absence.[15] See Basile, Baumann, Prost & Assocs., Inc., B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15 at 4. Based on the record here,

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[13] For example the record contains a memorandum written by a Hamm consultant to the Navy employee acting as coordinator of the Navy's commercial activities team which summarized various specific outcomes the Hamm consultants had rewritten. The memo requested that the Navy team "complete [and/or] correct" a certain portion of the outcomes, and described other outcomes that had been revised from an earlier draft as having been "simplified," restricted", "replace[d]," "rolled into one [another]," and "written to a much broader level." The memorandum concluded by stating: "We look forward to your constructive critique of these outcomes soon. How we organize workload, what specific regulatory requirements are included, and the organization of the MEO requirements all hinge on the outcomes." Memorandum from Hamm Consultant to Navy Commercial Activities Coordinator (Sept. 9, 1998).

[14] We note in this regard that FAR § 9.505-2(b) establishes a general prohibition on a firm receiving a contract where the firm wrote, or assisted in the writing of, the statement of work. Nothing suggests that this prohibition should be enforced only if there is proof that the statement of work was actually biased in the firm's favor, and, indeed, the regulation explains that the prohibition is in place "[t]o overcome the possibility of bias." FAR § 9.505-2(b)(2) (emphasis added).

[15] The Navy asserts that our decision means that the presumption of prejudice is "irrebuttable" for purposes of a protest before our Office. The Navy is mistaken. Our Office has demonstrated that, even when a conflict of interest situation exists, a protest will not be sustained where the record affirmatively demonstrates that, even if the conflict had been eliminated, the protester would not have had a substantial chance of receiving award. See TDF Corp., B-288392, B-288392.2, Oct. 23, 2001, 2001 CPD ¶178 at 9-10; IT Facility Servs.–Joint Venture, supra, at 12-13.

we reject the Navy's assertion that our decision was flawed because Jones/Hill failed to demonstrate prejudice.

Finally, the Navy, along with the Office of the Under Secretary of Defense, the Army and the Defense Logistics Agency, assert that our decision will have a serious negative impact on multiple ongoing A-76 studies, and may require the cancellation of a significant portion of those studies.[16] Accordingly, the agencies request that we modify our decision and recommended corrective action to apply the conflict of interest portion only prospectively.

As discussed above, we believe that the integrity of the decision-making process in A-76 cost studies should be above reproach. Nonetheless, just as our decision reflected the reality that A-76 studies are essentially public/private competitions, we believe it important to recognize the practical realities supporting the agencies' request for prospective application of the conflict of interest portion of our decision. The fact is that disruption or cancellation of large numbers of studies will not serve the private-sector firms who would presumably be disadvantaged by the conflicts, nor the agencies endeavoring to conduct the studies, nor the viability of the A-76 process overall. In addition to the large number of ongoing studies that could be affected, the corrective action contemplated by our initial decision--rewriting the PWS--would entail a significant period of delay for each affected study that would lengthen what is, often, already a lengthy process.

We are authorized under the Competition in Contracting Act of 1984 (CICA), where we sustain a protest, to make recommendations that we determine "to be necessary in order to promote compliance with procurement statutes and regulations." 31 U.S.C. § 3554(b) (2000). Exercising that authority, and taking into consideration the widespread concern that numerous ongoing A-76 studies will have to be canceled or largely re-done, we are modifying our recommended corrective action to apply the conflict of interest portion of the decision only prospectively.[17]

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[16] The Navy states there are 160 ongoing A-76 studies within the Department of the Navy that could be affected by the Jones/Hill decision. Navy Reconsideration Request at 5. The Office of the Under Secretary of Defense expresses concern that "widespread cancellation [of ongoing A-76 studies] will undermine DOD's competitive sourcing programs." Letter from Director, Competitive Sourcing & Privatization, Office of the Deputy Under Secretary of Defense, to GAO, Mar. 5, 2002, at 2.

[17] Specifically, our decision today supersedes our prior recommendation that in the NASL study the Navy should issue a new PWS/RFP, prepare a new MEO management plan, and resolicit private-sector proposals. In light of the other bases for sustaining the protest, however, we recommend that the agency take action correcting the other specific concerns identified in our decision. Specifically, we recommend that the Navy review the RFP to be certain that it adequately reflects the

(continued...)

With regard to an A-76 study in which, prior to the public release of our initial decision,[18] an agency had already completed the PWS and invested substantial time and/or resources (a determination that we leave to the agency's reasonable exercise of discretion) in preparing the MEO in-house plan, we will not consider a protest ground alleging a conflict of interest based on the Jones/Hill decision. If the PWS had been completed but the agency had not yet invested substantial time and/or resources in preparing the in-house plan, we do not expect the agency to rewrite the PWS, but we would consider a protest alleging that the agency had failed to take steps to avoid or mitigate a conflict in the writing of the in-house plan (for example, ensuring that no individual substantially involved in writing the PWS also plays a substantial role in drafting the in-house plan). Our decision today also does not preclude consideration of a protest alleging that an agency failed to comply with DOD's February 2000 Guidance regarding consultants, where that guidance was applicable, or consideration of an otherwise timely protest of a specific aspect of a performance work statement (for example, challenging it as unduly restrictive of competition).[19] Moreover, even where the prospective application of our decision

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agency's requirements. Assuming that it does, the agency should then ensure that all appropriate costs are included in the in-house cost estimate; specifically review the existing MEO plan with regard to the staffing concerns identified in our decision, either adjusting the staffing levels of the MEO plan, along with the addition of appropriate costs, or documenting the basis for concluding that the proposed staffing will satisfy the PWS requirements and offer a level and quality of performance comparable to those in Jones/Hill's proposal, taking into account the specific evaluated strengths in that proposal; and, finally, perform a new cost comparison.

[18] The decision was issued under protective order on December 5, 2001; the redacted version was released to the public on December 10, 2001.

[19] In its reconsideration request, the Navy also sought guidance regarding the permissibility of executing conflict of interest waivers. In this regard, the FAR states:

> The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

FAR § 9.503.

(continued...)

would shield an agency from having a protest ground considered, we would encourage the agency to take steps to address any appearance of a conflict, where the agency deems that practicable.

The decision is affirmed, but the recommended corrective action is modified to reflect only prospective application of the conflict of interest portion of the decision.

Anthony H. Gamboa
General Counsel

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Consistent with our view that MEO teams are essentially competitors in the A-76 process and should be treated as such for conflict of interest purposes, we see no reason why agencies may not, consistent with the provisions of FAR § 9.503 quoted above, execute conflict of interest waivers with regard to MEO teams or consultants assisting them. As with any such determination applicable to private-sector competitors, we would expect waivers to be consistent with, and reasonably supported by, the record.