



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: L-3 Services, Inc.

File: B-400134.11; B-400134.12

Date: September 3, 2009

Mark D. Colley, Esq., Craig A. Holman, Esq., Stuart W. Turner, Esq., and Avi M. Baldinger, Esq., Arnold & Porter LLP, for the protester.

Scott M. McCaleb, Esq., William A. Roberts, III, Esq., Nicole Owren-Wiest, Esq., Jon W. Burd, Esq., and Stephen J. Obermeier, Esq., Wiley Rein LLP, for General Dynamics Information Technology, Inc., the intervenor.

W. Michael Rose, Esq., LTC John D. Douglas, MAJ Jonathan P. Widmann, and B. Eric Beckstrom, Esq., Department of the Air Force, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably determined that the awardee did not have a “biased ground rules” organizational conflict of interest is sustained where the record shows that the awardee’s subcontractor provided procurement development services that put it in a position to affect the subsequent competition in its favor.
 2. Protest that agency unreasonably determined that awardee did not have an “unequal access to information” organizational conflict of interest is sustained where the record shows that the awardee’s subcontractor had access to competitively useful, non-public information, and the drafts of the mitigation plans intended to prevent the disclosure of that information were not furnished to the agency until after the conclusion of the performance of the work covered by those plans.
 3. Protest that agency unreasonably determined that the awardee did not have an “impaired objectivity” organizational conflict of interest is denied where the relationships between the awardee’s subcontractor and the firm that was its prime contractor on a prior task order are too attenuated to support such an allegation.
-

DECISION

L-3 Services, Inc., Enterprise IT Solutions (L-3), of Reston, Virginia, protests the award of a contract to General Dynamics Information Technology, Inc. (GDIT), of Fairfax, Virginia, by the Department of the Air Force, Air Force Space Command (AFSPC),

under request for proposals (RFP) No. FA2550-06-R-8000, to provide enterprise operations, maintenance, and management of data, voice, land mobile radio, and video conferencing facilities. L-3 argues that the agency unreasonably concluded that GDIT either did not have or properly mitigated organizational conflicts of interest, and that the agency improperly evaluated L-3's proposal under the Mission Capability/Proposed Enterprise End State (PEES) subfactor and the Past Performance factor.¹

We sustain the protest in part and deny it in part.

BACKGROUND

This acquisition, referred to as Uni-Comm, seeks to consolidate AFSPC's operations and maintenance requirements for government-owned networks at seven main operating bases. Core communication and information technology services are currently performed under 24 contracts. In the early stages of procurement planning, the Air Force determined that it needed assistance from an outside contractor. In response, consistent with Department of Defense rules governing use of interagency indefinite-delivery/indefinite-quantity contracts, the Army initiated a competition to provide Uni-Comm procurement development services to the Air Force under a procurement referred to as Task Order 5017. Phase I of the task order, the portion at issue in this protest, was divided into phases Ia and Ib, with the following five categories of services identified for phase Ia: program management services, communication and information technology (IT) requirements identification and analysis services, transition strategy services, risk mitigation services, and technical advice and program support services. Agency Report (AR), Tab 249A, Task Order at 7.

The task order contained the following provision with respect to organizational conflicts of interest: "The scope of this [task order statement of work] is to develop a solid requirement and way ahead for the Uni-Comm Program. . . . Therefore, potential contractors shall sign appropriate [organizational conflict of interest] documents excluding them from competing for the Uni-Comm contract." *Id.* At the time, the Uni-Comm technical manager and the Army contracting officer agreed that, even if phase Ib, which required writing the statement of work, was not funded, the prospective contractor would still face an organizational conflict of interest.

¹ By our decision in an earlier protest of this same procurement, we sustained Northrop Grumman Information Technology, Inc.'s (NGIT) challenge to the agency's evaluation of proposals under the Mission Capability/Small Business Subcontracting subfactor, and we recommended that, consistent with other corrective action that the agency may take, the Air Force reevaluate proposals under this subfactor. Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ __. For the reasons set out in that prior decision, we sustain L-3's protest on this ground as well.

Femme Comp, Inc. (FCI) teamed with SI for the task order, and SI identified one individual who would perform the work.² On January 27, 2005, the Army issued the task order to FCI, stating that, “Based on the revised [task order plan] submission as discussed earlier, performance on this task order omits FCI or its Subcontractor from competing on the Uni-Comm future effort based upon [an] organizational conflict of interest.” AR, Tab 172 at 71, Letter from Army Contracting Officer to FCI, Jan. 27, 2005. The record shows that SI participated in the full scope of the Uni-Comm procurement development work assigned under Task Order 5017 phase Ia; the extent of its effort will be discussed in detail below.

Shortly after the issuance of the task order, on April 4, 2005, the Air Force contracting officer made his first organizational conflict of interest assessment of SI International’s involvement in the Uni-Comm procurement. Consistent with the prior determination of the Army contracting officer and the written direction to FCI, he concluded: “[D]ue to the organizational conflict of interest issues resulting from SI’s involvement in preparing the Uni-Comm business case, it is likely that no proposal (prime or subcontract) from SI can be accepted by the government as SI’s conflict of interest cannot be mitigated.” AR, Tab 172 at 76, Organizational Conflict of Interest Analysis of April 4, 2005. The Air Force contracting officer reversed his initial determination over a year later, on June 1, 2006, when his reassessment found “a lack of a definite organizational conflict of interest being created through SI International’s subcontract to FCI as well as due to SI International’s organizational conflict of interest Mitigation Plan being reasonable for mitigating any organizational conflict of interest, or the perception of an organizational conflict of interest, resulting from the same FCI-prime task order.” AR, Tab 172 at 17, Organizational Conflict of Interest Analysis of June 1, 2006.

On October 29, 2007, the Air Force issued the RFP, which called for a fixed-price incentive (firm target) contract, with certain cost-reimbursement items, for a 9-month base period and five 1-year option periods. The RFP contained the following four equally weighted evaluation factors: Mission Capability, Proposal Risk, Past Performance, and Cost/Price. The five Mission Capability subfactors, in descending order of importance, were Proposed Enterprise End State, Core Communications and IT Services Management, Transition Plan, Enterprise Program Management, and Small Business Subcontracting. The Mission Capability factor was to be assessed at the subfactor level only, using the color codes “blue,” “green,” “yellow,” and “red.” Each Mission Capability subfactor was also to be evaluated for Performance Risk; the available Performance Risk ratings were “high,” “moderate,” and “low.” The RFP

² The local SI International organization consisted of two separate divisions, SI International Network & Telecom (SI Telecom) and SI International Engineering (SI Engineering). SI Engineering became FCI’s subcontractor on the Army task order, and GDIT proposed SI Telecom as its subcontractor on the Uni-Comm procurement. References to “SI” indicate SI Engineering.

stated that the total cost/price would be evaluated for reasonableness, realism, and affordability.

Nine offerors submitted proposals. GDIT's proposal estimated that SI Telecom would perform [deleted] percent of the total Uni-Comm effort. AR, Tab 25 at 86, Uni-Comm Proposal at III-81. Four proposals--from the protester, the awardee, NGIT, and Lockheed Martin Information Services, Inc. (LMIS)--were included in the competitive range. Ultimately, the agency selected GDIT's proposal for award.

After contract award, the other three offerors whose proposals were in the competitive range filed protests with our Office. The agency decided to take corrective action, indicating that it would reevaluate the existing proposals and issue a new source selection decision. We then dismissed the protests as academic. See L-3 Servs., Inc. et al., B-400134.5 et al., Dec. 11, 2008.

In the reevaluation, the agency rated NGIT's proposal somewhat higher than the other proposals. Proposed prices were \$244 million (L-3), \$271 million (GDIT), \$279 million (LMIS) and \$333 million (NGIT). The agency again selected GDIT for contract award, based on a decision that the higher technical rating of NGIT's proposal was not worth the cost/price premium. The agency determined that GDIT's proposal was worth the premium over L-3's proposal because GDIT received a higher past performance rating. After receiving a debriefing, L-3 filed this protest with our Office.

ANALYSIS

L-3 alleges that GDIT or its affiliate SI has each of the three types of organizational conflicts of interest, described below, none of which has been properly mitigated.

Organizational Conflicts of Interest

Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. Federal Acquisition Regulation (FAR) § 9.504(a), 9.505.

The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B--254397.15 et al., July 27, 1995, 95-2 CPD ¶129 at 12. Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. FAR § 9.505. We will not overturn the agency's determination except

where it is shown to be unreasonable. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra.

The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups. The first group consists of situations in which a firm³ has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. FAR § 9.505-4. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.

The second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra at 13.

Finally, the third group comprises cases where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. Id.; see also FAR § 9.501 (definition of organizational conflict of interest).

Allegations Arising from the SI Divisions’ Roles in Both the Procurement Planning Work and the Subsequent Procurement

All those involved took the view initially that a company that performed procurement planning services under the task order could not compete for the subsequent procurement. There was a consensus among the Army and Air Force that SI could not participate in the Uni-Comm procurement because of its work under the planning effort task order, a preclusion agreed to by SI under the terms of the task order. That

³ While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. Id. at 13.

view is consistent with FAR subpart 9.5 and reflects concern that SI International (and its affiliate, SI Telecom) would have an unfair competitive advantage in the Uni-Comm procurement. Specifically, without the prohibition on competing for the Uni-Comm contract, SI Engineering's advice to the government in the planning effort under the task order could be tainted by its corporate interest in the subsequent procurement and the firm could obtain nonpublic, competitively useful information. This reflects the fact that the work under the task order entailed being part of the government's procurement planning process and advising the government on the "business case" for the subsequent procurement, as well as other acquisition planning work. In terms of FAR subpart 9.5, the reasons for barring a firm (or its affiliate) that participated in the task order work from competing for the subsequent procurement reflect two types of OCIs: unequal access to information--concern that the firm could obtain (or share with an affiliate) through the task order work nonpublic information that would be competitively useful in the subsequent procurement, and biased ground rules--concern that the firm could shape the Uni-Comm procurement in a way that favors itself or its affiliate.

Here, the Air Force eventually reversed its original decision that SI Telecom was barred from participating in the Uni-Comm procurement due to its affiliate's role in the procurement planning work under the task order. The gravamen of this protest is whether the Air Force had a reasonable basis for that reversal. We examine first the biased ground rules concerns, and then those related to SI's access to nonpublic, competitively useful information.

L-3 alleges that SI has a biased ground rules organizational conflict of interest, given the way in which the effort to produce the Uni-Comm business or mission case and other procurement planning was intertwined with the writing of the statement of work. That interconnectedness can be seen clearly in the language of the Army task order, which described six subtasks that would be performed under phase I; five of those six subtasks were to be performed under phase Ia, and all six would be performed under phase Ib. See AR, Tab 249A, Task Order at 7. Performance of both portions of phase I would include, among others, subtask 1, Program Management, Administrative, and Quality Assurance Services, subtask 2, Communication and IT Requirements Identification and Analysis Services, and subtask 6, Technical Advice and Program Support Services. The one subtask reserved for performance under phase Ib was subtask 5, Evaluation Criteria Services.

The ability of the task order contractor under phase Ia to exert influence on both the "go/no-go" decision and the resulting statement of work was reflected in the consensus opinion of the cognizant Army and Air Force officials--announced during the task order planning, included in Task Order 5017, and reiterated after issuance of the task order--that the contractor performing phase Ia would be excluded from participation in the Uni-Comm procurement. On January 7, 2005, prior to the issuance of the task order, the Air Force Uni-Comm technical manager concurred with the Army contracting officer that a firm that performed only in phase Ia would face

organizational conflicts of interest. See AR, Tab 249C, Response to Offeror Questions at 32 (“Q: Will there still be an [organizational conflict of interest] if phase Ib is not turned on or funded? A: Yes.”); AR, Tab 249C, E-mail from AF Technical Manager to Army Contracting Officer, Jan. 7, 2005, at 30 (“Concur with [statement of work] and Q&As.”). Consistent with this position, the task order itself included a clause precluding SI from participation in the Uni-Comm procurement based on the conclusion that performance of the Uni-Comm contract would create an unmitigable organizational conflict of interest. In sum, as agreed by the Air Force technical manager and the Army contracting officer, and as confirmed in the language of the task order: performance of phase Ia of the task order would necessarily preclude a contractor from participating in the Uni-Comm competition.⁴

Over a year after his original organizational conflict of interest analysis in April 2005, the Air Force contracting officer conducted a second analysis reversing the position that he had shared with the Army contracting officer and the Air Force technical manager, namely, that performance of phase Ia of the Army task order would preclude a firm from participation in the Uni-Comm procurement. The record shows, however, that the Air Force contracting officer’s June 2006 biased ground rules organizational conflict of interest analysis failed to appreciate the way in which performance of phase Ia shaped the statement of work, thus making it inappropriate for the phase Ia contractor to participate in the Uni-Comm procurement. The Air Force contracting officer testified that in making his organizational conflict of interest determination he relied on the “clean break” between phases Ia and Ib.⁵ The record shows that the “clean break” was illusory. As noted above, the task order contained several critical subtasks that would be performed in both portions of phase I. Moreover, phase Ia was funded for a particular time period, and not for completion of particular tasks, and thus the assumption that none of the tasks assigned to phase Ib could be performed under phase Ia is incorrect. In this regard, the May Monthly Status Report stated that “[b]y direction of the [Air Force technical director], begin [in June] the development of the Uni-Comm [statement of work] and strategy to conduct a series of Industry Days. In accordance with the 5017 Task Order Plan, this activity was not scheduled to begin

⁴ Indeed, even the transmittal letter accompanying the mitigation plan that SI provided to the Air Force in July 2005 confirms the integral role that SI performed under the task order. That letter states that SI participated in developing a description of the inherent risks involved in the Uni-Comm procurement, and assisted in the development of the Risk Management Plan, the Business Case and Mission Case Proposals, and the Funding, Manning, and Contracting Strategies. AR, Tab 249C at 179, Letter from SI to Air Force Contracting Officer, July 20, 2005.

⁵ Trans. at 192. To address certain protest issues, this Office conducted a hearing during which the Uni-Comm contracting officer and the chair of the source selection evaluation team testified. “Trans.” cites refer to that hearing testimony.

until Phase 1b.”⁶ AR, Tab 171, Monthly Task Order Reports at 14. Similarly, the June report states, “[b]y direction of the [Air Force technical director], began the development of the Uni-Comm [statement of work] and strategy to conduct a series of Industry Days. In accordance with the 5017 Task Order Plan, this activity was not scheduled to begin until Phase 1b.” *Id.* at 15. These reports reflect the nearly seamless way in which the effort under phase Ia blended into the drafting of the statement of work under phase Ib, which likewise was reflected in the timing of the deliverables; the draft statement of work was due only 60 days after the last site visit, with the final statement of work due only 30 days later, unless as otherwise directed by the Air Force. Agency Report (AR), Tab 249A, Task Order at 13. The Air Force contracting officer testified that he did not consider these Monthly Reports when conducting his organizational conflict of interest analysis.

Even though his analysis reversed the earlier consensus determination that the contractor under phase Ia would be precluded from participation in the Uni-Comm procurement, the Air Force contracting officer’s June 1, 2006 memorandum analyzing SI’s potential conflicts of interest recognized the interrelationship between the work performed under phases Ia and Ib on which that preclusion had been based. He stated that “some of the information researched by the Uni-Comm team, which included the SI International employee, was later part of the source information used to develop the requirement.” AR, Tab 172 at 17, Organizational Conflict of Interest Analysis of June 1, 2006. He discounted that finding because “SI International’s employee was not in a position, during the business/mission case development, to draft specifications for Uni-Comm that would favor the employee’s corporation.” *Id.*

As an initial matter, we note that the relevant concern is not simply whether a firm drafted specifications that were adopted into the solicitation, but, rather, whether a firm was in a position to affect the competition, intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶115 at 3. While the Air Force contracting officer here relied on our decision in American Artisan Prods., Inc., B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176, as support for the proposition that SI’s participation in the business/mission case development did not give rise to a biased ground rules organizational conflict of interest, the facts of the two cases differ in a critical respect. We reached our conclusion in American Artisan Prods., Inc. because the firm alleged to have the biased ground rules organizational conflict of interest did not “perform the type of work solicited,” American Artisan Prods., Inc., *supra* at 9, and thus was incapable of shaping the requirement in a way that would have been beneficial to it, as envisioned in Snell Enters. Inc.. That is not the case here, because SI Telecom, as part of the GDIT team, will perform [deleted] percent of the contract effort.

⁶ Monthly Status Reports described the work that was done each month under the task order and the work planned for the next month.

In sum, the Air Force contracting officer's determination that there was no biased ground rules organizational conflict of interest was based on a misconception of the work performed under the task order and a misreading of American Artisan Prods., Inc. Based on the record here, we think that the agency lacked a reasonable basis for its conclusion that SI's performance under phase Ia of the task order did not place it in a position to skew the competition, intentionally or not, in favor of itself, and we therefore sustain the allegation that SI had a biased ground rules organizational conflict of interest.

L-3 also alleges that SI's performance on Task Order 5017 gave it access to competitively useful, non-public information and thus created an unequal access to information organizational conflict of interest for GDIT. The awardee and the agency assert the following: that the information was not competitively useful; that if it was competitively useful, the information was fully disclosed to the other offerors; that if it was not fully disclosed to the other offerors, the mitigation plans effectively prevented the information's disclosure; and that, based on our decision in Mechanical Equip. Co., Inc. et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192, this Office should nevertheless dismiss the organizational conflict of interest protests. As explained below, in our view there is no reasonable basis on which to conclude that all competitively useful information obtained by SI was disclosed to the other offerors, as the agency and the intervenor argue. Nor can we conclude that the mitigation plans and non-disclosure agreement effectively prevented an organizational conflict of interest. The agency has yet to adequately investigate and reasonably determine the extent and type of information to which SI had access or the efficacy of the non-disclosure agreement and mitigation plans, and absent the results of those inquiries, the record contains inadequate support for a finding that SI did not have an unequal access to information organizational conflict of interest.

The Air Force contracting officer's own organizational conflict of interest analysis in June 2006 stated that SI handled competitively useful information in the form of unredacted copies of contracts, core communications requirements, the 38 EIG information,⁷ and proprietary information of other companies that was subject to non-

⁷ "38 EIG" referred to the 38th engineering and installation group, an Air Force activity that analyzes and prepares requirements for upgrading communications and IT infrastructure. Trans. at 207. The Air Force contracting officer testified that the 38 EIG information was never released to other potential offerors because he later determined it to be of no competitive value. Trans. at 34-36. Nevertheless, the record reflects that on more than one occasion, cognizant agency officials noted the importance of this information and the need to release it to the other offerors. See, e.g., AR, Tab 172 at 11, 14, Contracting Officer's Organizational Conflict of Interest Analysis of June 1, 2006. The Air Force contracting officer also testified that there is no documentation of his later determination that there was no need to make the information available. Trans. at 210. While we consider the entire record, including
(continued...)

disclosure agreements.⁸ On the basis of this memorandum alone, it would be unreasonable to conclude that SI did not access competitively useful information in the performance of the Army task order.⁹ Moreover, while performing the task order, SI's employee was considered a member of the Program Management Office with access to the Department of Defense NIPRNET¹⁰ and wrote site visit reports summarizing the Program Management Office's trips to Air Force bases. Although the Air Force contracting officer testified that he was unaware whether the SI employee was ever unaccompanied on the site visits conducted under the task order, Trans. at 189-90, he never conducted any interviews with the individuals with whom the SI employee met to determine the kinds of information to which he had access. Id. at 186-91. Because the Air Force contracting officer was unaware of the full extent and nature of the SI employee's work under the task order, he could not reasonably conclude, with any certainty, the kinds of information that the SI employee accessed.

(...continued)

the parties' later explanations and arguments, we accord greater weight to contemporaneous material than to arguments and documentation prepared in response to protest contentions. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Given the importance of this information and the widely shared belief that it should be disclosed to the other potential offerors, we find unpersuasive the Air Force contracting officer's undocumented finding that the information became of no competitive value.

⁸ It is unclear whether all of the nondisclosure agreements, required under the FAR, were executed. See FAR § 9.505-4(b) ("A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.") (emphasis added). As discussed below, only one non-disclosure agreement was produced into the record. Trans. at 203-04.

⁹ The contracting officer's earlier organizational conflict of interest analysis also undercuts his subsequent position. It stated that the issue of a possible organizational conflict of interest first came to the fore when the Air Force learned that the Uni-Comm team including SI "was researching [Air Force] communications contracts and requesting access to information (such as contract line item pricing and contractor staffing) that is generally exempt from release under [the Freedom of Information Act]." AR, Tab 172, Organizational Conflict of Interest Analysis of April 4, 2005 at 3.

¹⁰ Trans. at 178-79. The NIPRNET is the Department of Defense's unclassified administrative data network.

Although extensive hearing testimony appeared to show that much (and potentially most) of the known competitively useful information was made available to the other offerors, see Trans. at 51-104, the record shows that SI nevertheless likely had access to other competitively useful information not known to the Air Force. As noted above, the plain language of the task order precluded the firm performing the task order phase Ia work from competing under the Uni-Comm solicitation; the Army and Air Force officials who drafted and issued the Army task order concurred with this exclusion. With that exclusion in effect, neither the Army, nor the Air Force, nor the task order prime contractor or SI themselves, had any reason to track the information being accessed by SI. In this regard, the Air Force contracting officer stated that “[s]ince I wasn’t supporting Uni-Comm from Jan 2005 to Apr or May 2005, I didn’t know what the SI employee had worked on or had access to during the time (Jan 2005 to about 17 Jun 05) under the subcontract to prime FCI on the [Army] Task Order.” AR, Tab 172 at 143, Contracting Officer Memorandum for Record, Dec. 19, 2005. The Air Force contracting officer also testified that he was unaware of any record of the information that SI reviewed. Trans. at 179. The earliest attempts to identify what the SI employee could have learned were made some time after the completion of phase Ia of the task order. In sum, the record contains no contemporaneous account of what information SI had access to, nor is there any accurate description in the record, memorialized after-the-fact, containing that information. Given the various ways in which SI could have accessed information and the lack of a record showing what it did access, we think that it follows that there was no support for the Air Force’s belief that all competitively useful information was made public.

The agency and GDIT argue that, even if SI obtained competitively useful, non-public information, the mitigation plans of SI Telecom and SI Engineering, operating alone or in tandem, prevented disclosure of that information.

The record contains two mitigation plans, one each from SI Engineering and SI Telecom, that were submitted to the agency unsigned and undated in July and August 2005, respectively. The SI Engineering mitigation plan included a signed non-disclosure agreement for the SI employee dated January, 28, 2005. Even assuming that the non-disclosure agreement was created in January 2005,¹¹ that agreement was binding only as to the SI employee and not as to SI Telecom or SI Engineering; neither

¹¹ The record also contains a non-disclosure agreement dated “5/12/05” and signed on behalf of the SI employee by the SI contracts manager. The Uni-Comm contracting officer received this document from his predecessor in response to a request for all non-disclosure agreements in the files. There is no explanation in the record as to why SI would submit to the agency a non-disclosure agreement with a later date and a signature on behalf of the SI employee if SI had in its possession an agreement bearing the employee’s signature and dated at the start of performance on the task order.

the SI Telecom nor the SI Engineering plan was submitted to the Air Force until after SI's performance under the task order had ended. Further, because the Air Force contracting officer had a number of significant questions concerning the adequacy of SI Telecom's plan, the final mitigation plan was not approved for over a year, in August 2006, and it was not until then that the agency had before it a signed plan.¹² The issues the Air Force contracting officer raised as requiring clarification went to the heart of the adequacy of the plan's efficacy in addressing the potential organizational conflicts of interest stemming from SI's access to competitively useful information, including: who would decide what qualified as source selection sensitive information, and the other kinds of information that might require protection; how SI's internal computer systems would function to isolate the competitively useful information; how the government would verify that the contractor followed the mitigation plan; how the government would enforce compliance with the mitigation plan; and given that the two divisions of SI were no longer physically separate, how the workspace separation of the employees would be accomplished. AR, Tab 174 at 241-43, Memo from Contracting Officer to SI, July 6, 2006.

Where a prospective contractor faces a potential unequal access to information organizational conflict of interest, the conflict may be mitigated through the implementation of an effective mitigation plan. Axiom Res. Mgmt., Inc., B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶ 117. An agency's reliance on a contractor's self-assessment of whether an organizational conflict of interest exists or a contractor's unilateral efforts to implement a mitigation plan, however, is inconsistent with the FAR. Johnson Controls World Servs., Inc., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 8. Here, in our view, it was unreasonable for the agency to rely on a mitigation plan that was undisclosed to, unevaluated by, and unmonitored by the Air Force—in a word, self-executing.¹³ Without credible evidence that an effective mitigation plan was in effect at the start of performance, there is no basis to assume that, even if the SI employee himself did not disclose competitively useful information, the information

¹² In January 2006, the SI contracts manager advised the Uni-Comm contracting officer that the only mitigation plan that should be considered was SI Telecom's, the one without the signed non-disclosure agreement. AR, Tab 172 at 7, Organizational Conflict of Interest Analysis of June 1, 2006.

¹³ We need not resolve the issue here, but there is some doubt, on the existing record, that the mitigation plan was drafted prior to the start of performance of phase Ia of the task order. For example, the Army task order contracting officer stated in late February 2005 that FCI/SI saw no reason to develop a mitigation plan, AR, Tab 172 at 131, E-mail from Task Order Contracting Officer to Uni-Comm Contracting Officer, Feb. 28, 2005, and in early May the SI contracts manager stated that he had "developed" plans that he submitted months later. This and other circumstantial evidence in the record, amply briefed by the protester, calls into question the time of creation of the SI plans.

was not otherwise made available to SI Telecom employees working on the subcontract to GDIT.

Finally, citing Mechanical Equip. Co., Inc. et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192, the intervenor argues that the Air Force contracting officer's reassessment and later finding that there were no organizational conflicts of interest were based on extensive consultations with cognizant Air Force officials, such that he could reasonably rely on their knowledge of whether there were organizational conflicts of interest. The record simply does not support the intervenor's position. The agency in the Mechanical Equip. Co., Inc. protest offered testimony or statements from five agency officials involved in the procurement, including the chair and deputy chair of the source selection evaluation board, who had made an independent, contemporaneous determination, based on extensive first-hand knowledge of the firm's involvement in the subject procurement, that the firm did not have an organizational conflict of interest. Here, the record contains no contemporaneous finding by knowledgeable Air Force Uni-Comm program officials that SI did not have an organizational conflict of interest. Nor on this record would it be reasonable for the Air Force contracting officer to assume that Air Force officials possessed sufficient familiarity with SI's participation in the procurement to make such a determination.¹⁴ Simply put, the showing that the agency made in Mechanical Equip. Co., Inc. was that agency officials with a breadth and depth of first-hand knowledge reasonably and contemporaneously concluded that the firm had no organizational conflict of interest. The Air Force has made no such showing here.

This record lacks a thorough agency inquiry into the extent of access to information that the SI employee had and what competitively useful information his access yielded. The record similarly lacks any reasonable assessment of whether the non-disclosure agreement and the mitigation plan were effective against the disclosure of information to SI Telecom (or others). We therefore conclude that, given the inadequacies of this record, it was unreasonable for the agency to determine that SI did not have an unequal access to information organizational conflict of interest.

Allegations Arising from the Relationship Between SI and FCI

The protester argues that we should find that GDIT, through its subcontractor SI, had an impaired objectivity organizational conflict of interest, because the prime contractor under Army Task Order 5017, FCI, supplied employees who acted as Mission Capability subfactor evaluation team advisors to the Air Force. As noted

¹⁴ The chair of the Uni-Comm source selection evaluation team attended the hearing but testified only concerning the evaluation issues. Only the contracting officer and the source selection evaluation team chair testified, and no other Air Force officials offered statements.

above, an impaired objectivity organizational conflict of interest exists where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of a proposal submitted to obtain another contract. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra at 13.

In support of its allegation, L-3 cited FAR § 9.505-3¹⁵, while also noting the FAR's general admonishment "to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." FAR § 3.101-1. The "hard facts" that L-3 offered in support of such a finding were that SI was FCI's subcontractor on the Uni-Comm procurement, the two firms sought to work together on another task order advising the Uni-Comm procurement, and during the Uni-Comm evaluation, the GDIT proposal, with SI as a subcontractor, was evaluated by FCI. L-3's Post Hearing Comments, Aug. 5, 2009 at 76. Thus, L-3 argues, FCI and SI sought to influence the solicitation, participate as a subcontractor in GDIT's proposal, and assist with the evaluation of the proposals, and the agency improperly failed to conduct and document an analysis of whether these relationships created an impaired objectivity organizational conflict of interest. GDIT asserts that all of these relationships were timely reported to the Air Force and the relationships and roles do not violate the FAR.

We will sustain an allegation that a firm has an impaired objectivity organizational conflict of interest when the facts of the case meet the standard in FAR § 9.505-3. Nortel Gov't Solutions, Inc., B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 (sustaining impaired objectivity organizational conflict of interest allegation where the record showed that contractor would review its own work on another contract); Alion Sci. & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (sustaining impaired objectivity organizational conflict of interest where awardee would be required to perform analysis and make recommendations regarding products that might be manufactured by it or by its competitors); Ktech Corp., B-285330, B-285330.2, Aug. 17, 2000, 2002 CPD ¶ 77 (sustaining impaired objectivity organizational conflict of interest where a firm would be responsible for helping to determine the stringency of testing requirements and for monitoring the performance of the tests, while at the same time, as a subcontractor, the firm was responsible for conducting the tests).

The relationships between firms, or the actions of individual firms, described in the cases where we have sustained an allegation of an impaired objectivity organizational conflict of interest are different in kind from the relationship between FCI and SI.

¹⁵ "Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests." FAR § 9.505-3.

There is no evidence in the record of a corporate relationship between the firms, such that one firm is evaluating itself or an affiliate, or evaluating products made by itself or a competitor, or is making judgments that would otherwise directly influence its own well-being, as there was in the cases cited above. The protester urges us to consider that an organizational conflict of interest exists because the two firms contemplated additional work together on the Uni-Comm procurement, but we decline to do so; at least in this circumstance, what the two firms considered doing has no bearing on our analysis of whether their actual relationship met the standard for an organizational conflict of interest. Moreover, we look for some indication that there is a direct financial benefit to the firm alleged to have the organizational conflict of interest, American Mgmt. Sys., Inc., B-285645, Sept. 8, 2000, 2000 CPD ¶ 163 at 5, and there is none in this instance. While SI performed as FCI's subcontractor on the Army task order, the suggestion that FCI would benefit financially from favorably evaluating GDIT's proposal is too remote a financial relationship on which to base an impaired objectivity organizational conflict of interest. See id. at 6. The relationship between SI and FCI is simply too attenuated and too dissimilar to the above cases for us to conclude that the agency unreasonably determined that GDIT did not have an impaired objectivity organizational conflict of interest.

In addition to the organizational conflict of interest issues, L-3 challenged the agency's evaluation of proposals on various grounds. As discussed below, we deny all of those grounds, with the exception of the one raised in the earlier protest of this procurement. See supra, note 1.

Agency's Evaluation of Protester's Proposal Under Mission Capability/Proposed Enterprise End State Subfactor

The protester's proposal was evaluated as having [deleted] strengths that were of benefit to the government under the Mission Capability/Proposed Enterprise End State subfactor.¹⁶ As a consequence, L-3 argues, it was unreasonable for the agency not to rate the protester's proposal "blue" under the PEES subfactor where the definition of that rating was as follows: "Exceeds specified minimum performance or capability requirements in a way beneficial to the government; proposal must have one or more strengths and no deficiencies to receive a blue." We disagree. While the RFP stated that a proposal rated "blue" must have one or more strengths, it also stated that a proposal rated "green" under a Mission Capability subfactor may have one or more

¹⁶ The RFP defined "strength" as "a significant, outstanding or exceptional aspect of an offeror's proposal that has merit and exceeds specified performance or capability requirements in a way that is advantageous to the Government, and either will be included in the contract or is inherent in the offeror's process." RFP § M.3.3.

strengths.¹⁷ Where, as here, a solicitation provides that proposals receiving one or more strengths might be rated as either “Blue/Exceptional” or “Green/Acceptable,” either rating may properly be assigned. Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 9-10.

Agency’s Evaluation of L-3’s Proposal Under Past Performance Factor

L-3 challenges as unfair the agency’s past performance relevance ratings for L-3’s subcontractors, arguing that the Air Force should have analyzed whether a subcontractor’s past performance in connection with a given subfactor was comparable in scope to the subcontractor’s proposed performance under the Uni-Comm contract, rather than the scope of the entire Uni-Comm requirement for that particular type of work. In other words, L-3 argues that if a subcontractor was proposed to perform one half of a task accounting for \$10 million under the contract, then the relevance of the subcontractor’s past performance references should have been assessed on the degree to which they demonstrated an ability to perform a \$5 million contract for the designated line of work, not \$10 million. The agency asserts that the RFP definition of “relevant” past performance, “[p]ast effort involved much of the magnitude of effort and complexities this solicitation requires as related to the Factor/Subfactors being evaluated,” RFP at § M.6.2, did not require such an analysis. We conclude that the agency’s interpretation of the RFP language is not unreasonable.¹⁸

¹⁷ “[P]roposal rated green must have no deficiencies but may have one or more strengths.” RFP § M.4.3.

¹⁸ L-3 raised a number of other objections to the Air Forces’ evaluation methodology under the Past Performance factor, including that the agency improperly determined that fixed-price contracts may only be “somewhat relevant,” unreasonably focused on factors such as the number of systems users, routers, switches, and controlled locations in assessing magnitude, and improperly determined that transitions to a single site share less of the magnitude or complexity than those same efforts involving multiple sites. We have reviewed these allegations and find them without merit. L-3 raised a number of other allegations, including that the agency underrated L-3 in all of the Mission Capability subfactors with the exception of the Small Business Subcontracting subfactor, for which it was rated “blue,” gave excessive weight to the Past Performance factor, and failed to properly evaluate L-3’s [deleted] under the Enterprise Program Management subfactor. Having reviewed these and other challenges and finding them without merit, we deny the protest on the remaining grounds.

CONCLUSION AND RECOMMENDATION

In Northrop Grumman Info. Tech., Inc., *supra*, we recommended that the Air Force reevaluate the proposals under the Mission Capability Proposed Enterprise End State and Small Business Subcontracting subfactors. We recommended that, after the reevaluation, the Air Force make a new selection decision; if that decision resulted in the selection of an offeror other than GDIT, we recommended that the Air Force terminate the contract with GDIT.

In this protest we sustain the allegations that GDIT had a biased ground rules and an unequal access to information organizational conflict of interest.¹⁹ With respect to the biased ground rules organizational conflict of interest, the ordinary remedy where the conflict has not been mitigated is the elimination of that competitor from the competition. The Jones/Hill Joint Venture, B-286194.4 *et al.*, Dec. 5, 2001, 2001 CPD ¶ 194 at 22 n.26. We recommend that, at a minimum, SI International be excluded from the competition. With respect to both organizational conflicts of interest, we recommend that the Air Force contracting officer thoroughly investigate the nature and timing of the subcontracting relationship between GDIT and SI to determine the degree to which GDIT is implicated in SI's organizational conflicts of interest and whether, consistent with FAR § 9.504, GDIT, too, should be excluded from the competition. If the Air Force decides to allow GDIT to remain in the competition and replace SI as a proposed subcontractor, the agency would need to reopen the competition and allow the submission of revised proposals from all offerors.²⁰

¹⁹ There is a presumption of prejudice to competing offerors where an organizational conflict of interest (other than a de minimis matter) is not resolved. Organizational conflicts of interest call into question the integrity of the competitive procurement process, and, as with other such circumstances, no specific prejudice need be shown to warrant corrective action. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., *supra* at 19. For example, an unfair competitive advantage is presumed to arise where an offeror possesses competitively useful nonpublic information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was, actually, of assistance to the offeror. *Id.* at 18-19 n.16. Here, the organizational conflict of interest allegations are more than de minimis, and we assume prejudice.

²⁰ For any organizational conflict of interest, the FAR allows the agency to waive the requirement that a firm be excluded from competition. FAR § 9.503 ("Waiver. 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.").

We also recommend that L-3 be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees, limited to the costs relating to the grounds on which we sustain the protest. 4 C.F.R. § 21.8(d)(1). L-3 should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. Id. at § 21.8(f)(1).

The protest is sustained in part and denied in part.

Daniel I. Gordon
Acting General Counsel