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**Comptroller General
of the United States**

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

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Decision

Matter of: Axiom Resource Management, Inc.

File: B-298870.3; B-298870.4

Date: July 12, 2007

James S. DelSordo, Esq., Argus Legal, LLC, for the protester.
LTC Frank A. March, Department of the Army, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency reasonably determined that the issuance of a task order to a vendor to provide program management support services to the TRICARE Acquisitions Directorate did not create an impermissible organizational conflict of interest (OCI) where the agency reviewed both existing and future support requirements, and concluded that no OCI exists for current support contracts, that any potential future OCIs can be mitigated and that the awardee here will be barred from competing as a prime contractor or subcontractor on future support contracts to provide healthcare benefits directly to TRICARE benefit recipients.

DECISION

Axiom Resource Management, Inc. protests the issuance of a task order to Lockheed Martin Federal Healthcare, Inc. under request for quotations (RFQ) No. 154160, issued by the United States Army Medical Research Acquisition Activity (USAMRAA), for program management support services for the TRICARE Acquisitions Directorate, including support for the TRICARE Office of General Counsel and TRICARE transition and integration contracts. The protester argues that the agency failed to recognize, or properly mitigate, an alleged organizational conflict of interest (OCI) created by award¹ to Lockheed, erred in deciding not to hold discussions, and conducted an unreasonable evaluation.

¹ We recognize that this protest involves an RFQ; however, the agency throughout its procurement record uses award language to refer to its issuance of a task order. For consistency with the underlying record, we will refer to the issuance of this task order as an award.

We deny the protests.

BACKGROUND

TRICARE is a managed health care program implemented by the Department of Defense (DoD) for active duty and retired members of the uniformed services, their families and survivors. See generally 32 C.F.R. § 199.17 (2006). TRICARE is a blend of the military's direct care system of hospitals and clinics (known as Military Treatment Facilities) and the Civilian Health and Medical Program of the Uniformed Services. The TRICARE Management Activity (TMA) is the DoD office that directs the TRICARE program.

The RFQ, issued July 30, 2006, anticipated the issuance of a fixed-price task order under the vendors' Federal Supply Schedule contracts; the task order would be for a base year with four 1-year option periods. The RFQ advised that the selection decision would be made on a best value basis considering the following five evaluation factors (in descending order of importance): technical approach, experience, quality control approach, past performance and price/cost. With respect to the past performance evaluation factor, vendors were required to provide a list of at least three, but no more than five references, for past and present contracts. The RFQ further provided that the agency did not anticipate holding discussions before selecting a vendor.

The RFQ provided extensive guidelines regarding potential OCIs. Specifically the solicitation stated that for purposes of identifying, avoiding or mitigating against OCIs, the TMA had categorized its non-purchased care requirements² into the following three broad categories:

Category 1: TMA Internal Support: Services which, by their very nature, give the Contractor access to extensive data about the contracts of all other TMA contractors.

² Throughout the record here, including the solicitation and the OCI analyses, the agency draws a distinction between what it terms "purchased care" and "non-purchased care" support requirements. In the agency's nomenclature, non-purchased care requirements are support services needed to help the agency fulfill its mission (such as requirements analysis, identified in category 2 above); purchased care requirements refer to medical care and services (such as dental services, or prescription mail benefits) that are provided directly to recipients of TRICARE benefits. See Contracting Officer's Statement of Facts, Apr. 27, 2007, at 6, 8-9; Agency Memorandum of Law, May 3, 2007, at 17. While we recognize that these terms are somewhat unusual, we adopt them for purposes of this review of the agency's analysis.

Category 2: Program Management Support: Services which assist TMA in planning and managing its activities and programs. This includes, for example: requirements analysis, acquisition support, budget planning and management, business process reengineering, program planning and execution support, and independent technical management support.

Category 3: Product Support: Services or end items required to meet the mission requirements of TMA's non-purchased care activities and programs. This includes, for example: concept exploration and development; system design; system development and integration; COTS procurement and integration; internal development testing; deployment; installation; operations; and maintenance.

RFQ § 1.4.

Moreover, the RFQ identified this procurement as a category 2 requirement and advised that a contractor's participation in more than one of these support categories could give rise to an unfair competitive advantage OCI resulting from access to advance acquisition planning, source selection sensitive, or proprietary information. Accordingly, the RFQ required that any offeror/contractor which currently provides, or has previously provided, support in a different category must provide a comparative analysis of the potential new work under category 2 and all current and previous work performed in support of TMA under the other two categories, as well as an OCI avoidance or mitigation plan. In addition, the RFQ advised that a similar analysis would be required if the successful contractor, in the future, competed for work in a different support category. RFQ App. A.

Quotations were received from Lockheed and Axiom. With respect to the past performance evaluation of Axiom, the agency contacted three of Axiom's references, two of which provided positive comments, which led to an overall rating of good. The third reference, the contracting officer's (CO) representative for the current procurement and the incumbent contract, recused himself from submitting a past performance evaluation, because of a personal conflict of interest. Thus, the agency's evaluation of Axiom's past performance included information from only two of its references, but included no information about its performance as the incumbent providing these services.

At the conclusion of the evaluation, the agency assessed these two quotations as follows:

Evaluation Factor	Axiom	Lockheed
Technical Approach	Acceptable	Exceptional
Experience	Exceptional	Exceptional
Quality Control Approach	Exceptional	Exceptional
Past Performance	Good	Acceptable
OVERALL RATING	GOOD	EXCEPTIONAL

COs Statement of Facts, Apr. 27, 2007, at 1.

Lockheed's initial quotation was priced at \$20.2 million and Axiom's at [DELETED]. By amendment dated September 11, 2006, the agency reduced the maximum period of performance from 5 years to 3 years, and requested revised quotations from both vendors. Lockheed submitted a revised quotation of \$11.9 million and Axiom's revised quotation was [DELETED]. Since Lockheed received the highest technical rating and submitted the lowest-priced quotation, the task order was issued to Lockheed on September 19.

On September 19, Axiom, the incumbent contractor, filed a protest with our Office arguing that the evaluation was improper and that the agency failed to properly mitigate an OCI caused by award to Lockheed. On October 31, we dismissed the protest after the agency advised our Office that it intended to conduct further analysis of the potential OCI issues, and issue a new source selection decision.

During the agency's review of potential OCI issues, including its review of Lockheed's prior and existing contracts, as well as the company's OCI representations here, the CO noted that this award could provide Lockheed with unequal access to information, including procurement sensitive information and certain proprietary information belonging to current TMA contractors and future offerors. The CO concluded that an OCI would arise if Lockheed decided to participate in any future acquisitions for purchased care services managed by the TMA. Agency Report (AR), Tab 27, OCI Analysis, Dec. 6, 2006, at 2. In this regard, the CO decided that although there is a potential future OCI, Lockheed's mitigation plan provided sufficient protection to the government to allow award to Lockheed. Id. On December 6, the CO issued a new source selection decision again selecting Lockheed's highest-rated, lowest-priced quotation. AR, Tab 36, Award Memorandum.

On December 7, Axiom again protested the award, arguing that its quotation was misevaluated, and raising more detailed challenges regarding the OCI issue. In response, the agency advised our Office that, as a result of Axiom's additional concerns with respect to the OCI issue, the agency would again revisit its OCI review. We therefore dismissed this protest a second time on January 16, 2007.

In its most recent OCI review, the agency conducted an examination of Lockheed's involvement in providing both purchased care, and non-purchased care, support services. With respect to non-purchased care support services, the agency reviewed all non-purchased care category 1, 2, and 3 support contracts (as defined in the solicitation provision quoted earlier) held by Lockheed. The CO noted that Lockheed does not currently hold any category 1 non-purchased care support contracts, and the company has represented that it will not seek such contracts in the future. AR, Tab 35, CO's OCI Determination, Apr. 2, 2007, at 5. With respect to non-purchased care category 2 and 3 support work, the CO determined that Lockheed's current work does not provide access to extensive data concerning TMA's other non-purchased care contractors. Id. The CO explained that the agency had reviewed all the approved mitigation plans Lockheed submitted to mitigate any OCI for non-purchased care contracts, including a thorough OCI analysis of the Theater Medical Information Program (TMIP) contract held by a different Lockheed subsidiary. Id. Based on this analysis, the CO decided that no OCI arises by awarding Lockheed this contract for category 2 non-purchased care support services. Id.

With respect to purchased care services, the agency concluded that a potential "unequal access to information" OCI could arise as a result of awarding this contract to Lockheed. The CO states that the agency has mitigated the potential OCI by advising Lockheed that it will not be eligible to compete on any new requirements for purchase care contracts. Id. at 3. As a result of this analysis, on April 2, the award to Lockheed was reinstated. Axiom subsequently filed this protest with our Office on April 3.

As in its previous protests, Axiom alleges that the agency failed to properly mitigate certain conflicts caused by award to Lockheed, erred in deciding not to hold discussions, and conducted an unreasonable evaluation of its quotation.

DISCUSSION

OCI Issues

Axiom contends that the solicitation stipulates that an OCI will arise where a TMA vendor currently provides either category 1 or 3 services, and seeks to perform category 2 services, like those required here. Axiom maintains that Lockheed, by virtue of its involvement in performing these category 2 services, will gain access to program information, such as, architectural design and operational systems, long before projects are listed by the government for category 3 services. Axiom also contends that Lockheed will gain unequal access to nonpublic information, such as, planning documents for future health care systems and privileged access to existing acquisition program efforts. Axiom argues that this access would allow Lockheed to have a competitive advantage on new initiatives and future work. It is also Axiom's

belief that, given Lockheed's substantive contributions to the TMIP, including product development, any OCI cannot be resolved through mitigation plans.

COs are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an 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; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The situations in which OCIs 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 firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or the specifications. FAR § 9.505-2; 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 second group, which Axiom alleges is relevant here, consists of "unequal access to information" situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505-4; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., *supra*, at 12. The third group, which reflects concerns about a firm's "impaired objectivity," consists of cases where a firm's work under one government contract could entail its evaluating itself or a related entity, thus undermining the firm's ability to render impartial advice to the government. FAR § 9.505-3; Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., *supra*, at 13.

The responsibility for determining whether an actual or apparent conflict will arise, and to what extent a firm should be excluded from the competition, rests with the contracting agency. RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. COs are to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR § 9.505; Epoch Eng'g, Inc., B-276634, July 7, 1997, 97-2 CPD ¶ 72 at 5. We will not sustain a protest of a contracting officer's determinations in this area except where they are shown to be unreasonable. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9.

Before turning to the specifics of Axiom's challenges, we note two areas where this protest appears to be based on incorrect assumptions. First, Axiom seems to argue that if a conflict can be shown to exist, the agency cannot properly make award to that entity. As set forth above, the FAR specifically anticipates that there will be instances when a CO can properly neutralize or mitigate conflicts, *see* FAR § 9.504(a); there is no basis to assume that Lockheed must be automatically disqualified as a result of the conflicts raised here. Second, we note that many of the conflicts identified by Axiom in its pleadings involve conflicts that arise not with this

award, but with subsequent awards. In our view, conflicts that might arise from subsequent awards can properly be analyzed as part of those subsequent award decisions, and need not be addressed at this juncture. See Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 18.

With respect to Axiom's specific arguments, the protester contends that the agency's analysis of the OCI issue here is inadequate because it is based on Lockheed's "self-serving and totally unauditible mitigation plan," which the protester contends will not resolve the OCI issue. Protester's Comments at 15. The protester also generally disagrees with the CO's determination about whether actual or potential OCIs exist. For the reasons set forth below, we think the agency did an extensive analysis of Lockheed's comparative analysis and mitigation plan, and reasonably reviewed other relevant documentation, such as Lockheed's current contracts and the requirements of the solicitation.³

As previously stated, at the start of this procurement TMA categorized all its non-purchased care requirements into three broad categories for purposes of identifying, avoiding or mitigating against OCIs. The earlier award decision document concluded that Lockheed's involvement in providing both purchased care and non-purchased care support services would give the company unequal access to data concerning TMA's other non-purchased care contractors. AR, Tab 26, Award Memorandum, Dec. 6, 2007, at 7. The CO further concluded that a subsequent OCI would arise if Lockheed were to compete on any acquisitions for purchased care services, such as managed care, dental care, retail pharmacy or mail order pharmacy services. However, the CO decided that, despite the possibility of a future OCI, Lockheed had provided a mitigation plan that provided sufficient protection of the government interests to allow the current award to Lockheed. Id.

As a result of Axiom's second protest, the agency revisited and revised its earlier views, and performed a more detailed evaluation of the OCI issue—including a review of a comparative analysis prepared by Lockheed which set forth the procedures the

³ Among other things, Axiom argues that the agency improperly allowed Lockheed to include a firewall as one element of its OCI mitigation plan; in this regard, Axiom contends that any decision accepting the use of this firewall will violate our prior decision in Aetna Gov't Health Plans, Inc.: Found. Health Fed. Servs., Inc., supra. The protester misinterprets our prior decision. In Aetna, we expressed concerns about the use of a firewall to address an impaired objectivity-type OCI; at the same time, we explained that a mitigation plan that includes a firewall may be sufficient to address an "unequal access to information"-type OCI, which is the type of OCI at issue here. See Aetna Gov't Health Plans, Inc.: Found. Health Fed. Servs., Inc., supra, at 16. Moreover, we think the agency has reasonably concluded that the mitigation plan prepared by Lockheed will be adequate to address the unequal access to information OCI alleged here.

firm would use to avoid or mitigate any real or perceived OCIs associated with this work.

With respect to the contracts the agency terms “non-purchased care” support contracts, the agency noted that Lockheed currently holds no category 1 contracts, and the company states that it will not seek category 1 work in the future. Additionally, the agency reviewed all prior and existing TMA contracts with Lockheed. Specifically, the agency noted that Lockheed employees would be placed in several TMA offices (such as the Office of General Counsel and the acquisitions office), and it analyzed both the type of data to which the company would have access, and the effect this access might have on other TMA contracts. AR, Tab 35, CO OCI Determination. The agency also reviewed the procurement request and the OCI certification completed by Lockheed, the revised statement of work, relevant portions of Lockheed’s quotation describing pertinent work and experience as well as the resumes of the firm’s key personnel. This review also encompassed other relevant disclosure and representation statements, and other OCI-related documentation, such as Lockheed’s risk mitigation plan. Based upon this detailed analysis, the agency concluded that Lockheed would not have access to extensive data concerning other non-purchased care TMA contractors, and that an OCI does not arise for non-purchased care services under this contract. Further, the agency specifically concluded that should a future procurement raise the possibility of an OCI, the matter can be addressed at that time.

With respect to “purchased care” contracts, the agency reached a different conclusion. In this area, the agency concluded that there was a potential for future OCIs involving contracts for purchased care services because contractor employees performing the work here would likely have access to extensive data pertaining to purchased care contractors. This access includes agency source selection information, contract administration information, contract performance information and contract litigation information for purchased care procurements. The agency reports that it will avoid these potential conflicts by barring Lockheed from competing for any purchased care contracts. AR, Tab 36, Award Memorandum.

In our view, once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Alion Science & Tech. Corp., B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 at 8; SRS Techs., *supra*. In this regard, COs are expected to exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to address it. FAR § 9.505. While the protester disagrees with the agency’s determinations here, we have reviewed the extensive analysis and comprehensive approach used to addressing any conflicts that may

arise, and we find no basis to conclude that the contracting officer's determination was unreasonable.⁴

Award Without Discussions

Axiom next argues that the agency erred in not opening discussions here, and specifically, in not advising the company that the evaluators viewed its price as overstated. We disagree. First, the solicitation here expressly provided for award without discussions; in such cases, an agency need not open discussion unless they are determined to be necessary. See Sierra Military Health Servs., Inc.; Aetna Gov't Health Plans, B-292780 et al., Dec. 5, 2003, 2004 CPD ¶ 55 at 6-7 n.5; Facilities Mgmt. Co., Inc., B-259731.2, May 23, 1995, 95-1 CPD ¶ 274 at 8. In addition, Axiom's quotation received an overall rating of good, including a rating of acceptable for its technical approach, and a rating of good for past performance; there were no weaknesses or deficiencies identified by the agency. On this record, we think the agency reasonably concluded it did not require further information to determine which quotation represented the best value to the government.

Evaluation Issues

Finally, Axiom argues that the agency's evaluation of its proposal under the technical factor, and the agency's assessment of its past performance, were unreasonable. As mentioned above, Axiom's quotation received an overall rating of good, including a rating of acceptable for its technical approach, and a rating of good for past performance. Axiom contends that since, according to the CO, its quotation had no weaknesses, other than that its costs were allegedly overstated, it should have received the highest available technical rating, rather than a rating of acceptable.

⁴ The protester also argued in a supplemental filing that the agency's response to a document request during the course of this protest established that the agency's OCI review was inadequate. Specifically, when the protester sought additional documentation, such as other Lockheed contracts, the agency advised (even as it provided the documents) that these documents were not in the CO's possession when the agency submitted its report. Axiom contends that if the CO did not possess these documents, he could not have reviewed them. In answer, the agency advises that one of the contracts provided was expired, and the agency's review relied upon the follow-on contract. In another case, the contract provided in response to the supplemental document request was a follow-on contract, and the review was based on a description of the services provided under that contract. Based on our review, we think the record here shows that the agency performed an extensive review of the OCI issue, including a detailed analysis of the relevant documents, and we have seen no basis to conclude that this review was, in any way, unreasonable.

While the agency agrees that Axiom submitted a good quotation with no weaknesses, and agrees the technical quotation satisfactorily addressed how Axiom proposed to perform the statement of work, it counters that there was nothing about Axiom's quotation that warranted a rating higher than acceptable. Based on our review of the record, we have no basis to conclude that the agency's evaluation of Axiom's quotation under the technical factor was unreasonable.

Axiom also protests its past performance rating of good. It notes that as the incumbent providing these services, it has never received any negative feedback concerning its performance. Through the course of this protest, Axiom learned that its reference for the current contract elected to recuse himself because of an apparent conflict of interest. Axiom contends that it should have been notified of the recusal and been given the opportunity to provide another reference or have another TRICARE manager provide a reference.

While we have concerns about how the agency handled this evaluation of past performance,⁵ we think the record shows that Axiom cannot establish that it was prejudiced by the agency's actions. Even if Axiom's past performance rating were adjusted upward to a rating of exceptional, its quotation would, at best, be viewed as essentially equal to Lockheed's.⁶ In this regard, we note that the evaluation factors were listed in descending order of importance, and past performance was listed last among the rated factors (price was not rated). In the situation where quotations are reasonably regarded as being essentially equal technically, price becomes the determining factor in making an award, notwithstanding that the evaluation criteria assigned price less importance than technical factors. See Language Serv. Assocs., Inc., B-293041, Dec. 22, 2003, 2004 CPD ¶ 6 at 5. Given Lockheed's lower price, we have no reason to conclude that Axiom's, at best, equally-rated, but higher-priced

⁵ For the record, we are troubled by the agency's decision to forego evaluating Axiom's prior performance as the incumbent providing these services. While the CO's representative may have appropriately recused himself from the evaluation, someone at TRICARE could have provided an assessment of Axiom's performance providing this work. Axiom contends that it has performed well, and has never received any negative performance feedback; the agency does not contest this representation. In our view, this information was simply too close at hand for TRICARE to reasonably ignore it in conducting this evaluation. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5; see also Johnson Controls Sec. Sys., LLC, B-296490.3 et al., Mar. 23, 2007, 2007 CPD ¶ 100 at 3-5.

⁶ In fact, even after raising Axiom's past performance, and overall, ratings to exceptional, Lockheed's quotation could yet be seen as the stronger of the two quotations given its ratings of exceptional under the three more-heavily weighted evaluation factors—technical, experience, quality control approach.

quotation would have received the award here.⁷ This is especially true, given that Axiom does not specifically challenge the evaluation of Lockheed's quotation.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁷ Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.