G A O
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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Computer Technology Associates, Inc.

File: B-288622

Date: November 7, 2001

David R. Hazelton, Esq., Thomas Patten, Esq., and C. Thomas Powell, Esq., Latham & Watkins, for the protester.
Susan D. Falkson, Esq., and William A. Wotherspoon, Esq., for Unisys Corporation, and James J. McCullough, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corp., intervenors.
Kacie A. Haberly, Esq., General Services Administration, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's employees, including two management personnel, improperly obtained and reviewed other vendors' proposal material during course of procurement, agency reasonably determined to disqualify protester from further participation in the competition.

DECISION

Computer Technology Associates, Inc. (CTA) protests its disqualification from further participation under a request for quotation (RFQ) issued by the General Services Administration (GSA), Federal Supply Service (FSS), for information technology (IT) services. CTA asserts that there is no evidence to support the disqualification.

We deny the protest.

The RFQ provided for the award of a blanket purchase agreement (BPA) for IT applications maintenance, enhancement, technical support, program management, and transition services to maintain and enhance existing FSS IT applications. The RFQ also provided for the award of five task orders, each for a base period, with nine 1-year options. Future task orders were to be awarded as FSS needs dictated. Proposals were to be evaluated on the basis of technical quality factors and price, with technical quality considered significantly more important than price. Multiple BPAs were to be awarded based on the technical acceptability of proposals on all

five task orders. Each task order was to be awarded to the vendor whose task order proposal offered the most advantageous solution to the government from a price and technical standpoint.

Three vendors, CTA (the incumbent contractor for the FSS requirement), Unisys Corp., and Science Applications International Corp. (SAIC), submitted quotations. In addition to written technical and price proposals, each vendor made a 90 minute oral technical presentation. These oral presentations were held with each vendor individually, with only agency and vendor personnel present, and were transcribed by a court reporter. Upon receipt of the transcripts on August 2, the contracting officer sent copies by e-mail to her assistant and to a technical evaluation team member. She also e-mailed each vendor a copy of its own transcript.

On Thursday, August 2, CTA's help desk operator obtained Unisys's and SAIC's transcripts from GSA's e-mail system. Agency Report (AR) at 2-3. This employee then gave the transcripts to CTA's project manager (PM), who was then with the deputy PM (DPM). PM Declaration (Decl.) ¶¶ 1, 4. The PM then notified and sought guidance from CTA's chief executive officer (CEO). PM Decl. ¶ 2. The CEO was unable "to have a serious conversation with him at that time," and directed the PM to contact his supervisor, the president of CTA's Internet services unit, the unit responsible for submitting CTA's proposal. CEO Supplemental (Suppl.) Decl. ¶ 2; PM Decl. ¶ 2. When the PM indicated that he had copies of the oral presentations of CTA's competitors, CTA's unit president arranged to meet him the next day (August 3). Unit President's Decl. ¶ 2. The PM then "reviewed the SAIC transcript and skimmed the Unisys transcript" and highlighted portions of both. PM Decl. ¶ 2; Suppl. AR, Cover Letter.

On Friday, August 3, the unit president was out sick, so the PM gave the transcripts to the DPM and asked him to review them over the weekend. Unit President's Decl. ¶ 2; DPM Decl. ¶ 2. While the DPM, who was involved in preparing CTA's proposal, did not believe there would be anything of use or advantage to CTA in the transcripts, he subsequently read and marked portions of SAIC's, but not Unisys's, transcript.[1] DPM Decl. ¶¶ 3-4.; Suppl. AR, Cover Letter.

On Monday, August 6, CTA's unit president returned to his office and found a printout of the transcripts apparently transmitted by the PM. Unit President's Decl. ¶ 3. He did not review them and directed his secretary to seal them and store them in a secure place. Id. He also directed the PM to have any additional copies sealed and sent to his office. That same day, the CEO arrived in Washington, D.C. from his home in California to meet with the contracting officer. CEO Decl. ¶ 8.

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[1] For example, the SAIC transcript contains marked passages on more than 30 of its 148 pages.

On August 7, the contracting officer issued final technical questions and requests for clarifications to all three vendors, with an August 9 deadline for proposal revisions. The agency identified 23 questions for CTA, 20 of which concerned cost issues. On August 8, CTA personnel, including the PM and DPM, participated in a telephone conference to discuss CTA's responses. Both the PM and DPM deny discussing any substantive, technical issues, and both deny using or revealing any information from the transcripts during the conference. PM Decl. ¶ 3; DPM Decl. ¶ 5. The PM and DPM further deny discussing the contents of the transcripts with anyone apart from each other. PM Decl. ¶ 4; DPM Decl. ¶ 6. CTA management directed the employee responsible for CTA's response to exclude any input received from the PM or DPM. Director of Contracts Decl. ¶ 9.

At approximately 3:30 p.m. on August 8, CTA's CEO contacted the contracting officer, informed her that he had "received some information about the other bidders," and requested a meeting. Contracting Officer's Statement (COS) at 2. At his meeting with the contracting officer, the CEO gave her a sealed envelope containing marked copies of the transcripts. Id.; CEO Decl. ¶ 9. The contracting officer directed them to proceed with CTA's response to the agency's August 7 questions. CEO Decl. ¶ 10. CTA submitted its response by the August 9 deadline. CTA subsequently discharged the help desk operator and placed the PM and DPM on administrative leave. CEO Decl. ¶ 11. Neither individual is currently employed by CTA. CTA Cover Letter, Sept. 10, 2001.

The contracting officer outlined the above circumstances to legal counsel at GSA's Inspector General's (IG) office, and to the head of the contracting activity (HCA), who concurred in the IG's involvement. COS at 2; AR at 4-5. After a preliminary investigation, on August 14, the contracting officer determined that CTA's actions, through its employees, represented a violation or possible violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (Supp. IV. 1998) (those provisions are referred to in the record as the Procurement Integrity Act, or the Act); that CTA had gained an "obvious unfair competitive advantage on parts of [the] procurement"; and that the integrity of the procurement process had been clearly breached. AR, Exh. D, at 1. The contracting officer thus recommended to the HCA that CTA be disqualified from the procurement in issue (and also from a related BPA procurement where it had been proposed as a subcontractor). Id. The HCA concurred and, finding that there was adequate competition for the requirement, directed the contracting officer to disqualify CTA. Id. After disqualifying CTA, the agency conducted further negotiations with SAIC and Unisys.

After receiving notice of its disqualification, CTA first requested reconsideration from the agency, and then filed this protest. GSA subsequently notified our Office that it was overriding the stay of contract award. Both SAIC and Unisys were awarded BPAs and Unisys was awarded all five of the initial task orders.

CTA asserts that GSA lacked a reasonable basis to disqualify it from the competition because, according to CTA, the "uncontroverted record . . . establish[es] that the conduct underlying GSA's disqualification decision had 'no impact' on the contract award or source selection process." Protester's Supplemental Comments at 3. CTA's assertion is based on its view that it "promptly" returned the transcripts and took steps to eliminate any possible use of them in its proposal revisions, and thus could not have gained any improper advantage in this procurement.

The Procurement Integrity Act, as implemented by the Federal Acquisition Regulation (FAR), prohibits anyone from "knowingly obtain[ing] contractor bid or proposal information or source selection information before the award" of a "contract to which the information relates." 41 U.S.C. § 423(b); FAR § 3.104-4(b). Where there is a violation or possible violation of the Act, the contracting officer must determine whether the violation or possible violation has any impact on the pending award or source selection and, if an impact is found, must refer the matter to the head of the contracting activity (HCA) or designee. FAR § 3.104-10(a). If the HCA concludes that the Act has been violated, the HCA may, among other alternatives, direct the contracting officer to disqualify an offeror. FAR § 3.104-10(d)(1)(ii).

Before turning to the specific findings relevant to the Act, we note that our Office has recognized that, in meeting their responsibility to safeguard the interests of the government in its contractual relationships, contracting officers are granted wide latitude to exercise business judgment, FAR § 1.602-2, and may impose a variety of restrictions, not explicitly provided for in the regulations, where the needs of the agency or the nature of the procurement dictates the use of those restrictions. Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126 at 5, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435. For example, a contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc., B-220007, Dec. 9, 1985, 85-2 CPD ¶ 638 at 5; NKF Eng'g v. United States, 805 F.2d 372, 376-77 (Fed. Cir. 1986); Compliance Corp., supra; Compliance Corp. v. United States, 22 Cl. Ct. 193, 199-204 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992). It is our view that, wherever an offeror has improperly obtained proprietary proposal information during the course of a procurement, the integrity of the procurement is at risk, and an agency's decision to disqualify the firm is generally reasonable, absent unusual circumstances. See Compliance Corp., supra (disqualification of offeror reasonable where based on its improperly obtaining or attempting to obtain competitor's proprietary information); NKF Eng'g, Inc., supra, at 6 (disqualification not unreasonable where there was "mere possibility" that offeror did not obtain an advantage from source selection information). This is certainly the case under the facts here, and we find the agency's action reasonable even without reference to the Act.

With regard to the specific findings under the Act, there is no question that the transcripts of SAIC's and Unisys's oral presentations of their technical proposals constituted contractor proposal information, defined to include proprietary information about operations or techniques. FAR § 3.104-3. In this regard, SAIC's oral presentation encompassed details of its team composition and structure; management approach; personnel and transition plans; and its approach to each of the task orders. AR, Exh. H. Similarly, Unisys's presentation provided the highlights of its proposal, including its management and technical approach for BPA tasks and the processes it used for all tasks. AR, Exh. I; Unisys Comments, Oct. 5, 2001, at 2. The transcripts also constituted source selection information, defined to include any information prepared for the purpose of evaluating a proposal which has not previously been made publicly available. FAR § 3.104-3. The oral presentations and their transcripts were an integral part of the evaluation. To this end, they contained questions from the evaluation team and each offeror's responses, and they were subsequently used by the agency in its evaluation for award of the BPAs and task orders.

Regarding whether the actions constituted a violation of the Act, again, the Act is violated where a person "knowingly obtain[s] contractor bid or proposal information" prior to award. 41 U.S.C. § 423(b); FAR § 3.104-4(b). While GSA's IG Office has not yet completed its investigation, in the HCA's direction to disqualify CTA "in accordance with [her] authority under FAR [§] 3.104-10," she implicitly determined that there was a violation of the Act. AR, Tab D. On the facts of this case, we believe that she had a reasonable basis for such a determination. The record showed that, prior to the award of the BPAs and task orders, the help desk operator obtained the transcripts from the e-mail system, produced copies, and then disseminated them to the PM, who in turn provided them to the DPM.[2] In our view, there is no doubt that this record establishes a violation of the Act; perhaps for that reason, the parties focus their arguments on the impact of the violation.

As for the question of impact, in our view, CTA too narrowly focuses on actual use as the test to be applied. The record contains ample, undisputed information to

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[2] The protester asserts that the record contains no evidence regarding how the help desk operator came into possession of the transcripts and suggests several innocent scenarios. Protester's Supplemental Comments at 9. While there is no definitive evidence on the point, we note that the help desk operator has not furnished a statement explaining his actions, and CTA has not provided any other evidence to establish that the transcripts were obtained innocently. At the same time, CTA's PM told agency investigators that it was a CTA employee "who knew how porous the e-mail system was" (AR at 2) who entered the e-mail system to access the transcripts (AR at 3), and the uncontroverted facts show that the help desk operator downloaded, copied and distributed the transcripts, and that other company employees obtained and reviewed the transcripts.

support the contracting officer's finding of an impact on the procurement and the HCA's determination to disqualify CTA. CTA's employees, including its PM and DPM, who was directly involved in the preparation of CTA's proposal, obtained its competitors' proposal information, reviewed the information and marked those aspects of interest to them. Discussions were ongoing at the time the information was obtained, and the transcripts provided both the competitors' proposal strategies and, based on the agency's questions, GSA's concerns with those strategies. This clearly is information that could affect an offeror's judgments about its own proposal, and that potentially could enhance its standing in the evaluation.[3] Further, at the time the information was obtained, CTA could have used it in the BPA and task order negotiations which followed the submission of proposal revisions, as well as in future task order competitions among all BPA holders. In our view, even without proof of actual use of the information, the actions of CTA's employees had a significant, negative impact on the integrity of the procurement system, and we find reasonable the judgment of the agency that the competition has been tainted by those actions.

Moreover, since CTA is the company whose employees' actions are in question, CTA's assertions regarding its use or nonuse of the information, without some independent corroborating evidence, should not, in our view, be accorded controlling weight in determining whether the information had some effect on CTA's judgments regarding its proposal. Rather, under the circumstances, CTA's obtaining and possessing the information, and the fact that CTA alone was in control of whether it was used, calls into question the integrity of the immediate and future source selections.[4]

Finally, we address CTA's concern that it was deprived of due process, since the agency made its decision without affording the protester an opportunity to present its side of the matter. We find nothing improper in the agency's handling of this matter. First, in meeting with CTA officials, interviewing those involved with the matter, and otherwise gathering information from CTA in the conduct of its preliminary investigation, the agency provided CTA with the opportunity to present

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[3] In this regard, CTA's employees highlighted information concerning SAIC's proposal to use, and the availability of, CTA's incumbent employees, an area of apparent concern to the agency, and an area that CTA, as incumbent contractor, could affect.

[4] Likewise, CTA's actions in returning the transcripts did little to alleviate the impact or to provide confidence in CTA's handling of the matter. In this regard, CTA employees had unlimited control of the transcripts for 4 days before they were secured. CTA then waited 2 days before notifying GSA and returning some of the copies. Remaining copies were not returned until August 20, nearly 2 weeks later, and after CTA had been disqualified and had filed this protest.

its version of the facts. As a result, the agency was well aware of the protester's position, and considered various options prior to disqualifying CTA. AR at 3-4; Supplemental Report at 1-2. We note that CTA does not dispute the facts on which the agency's determination was made. Moreover, through its protest to our Office, CTA has been provided with ample due process. See NKF Eng'g v. United States, supra, at 377 (referring to lower court's assessment of our Office's review, "there surely was no want of due process at the administrative level").[5]

In sum, we see no basis to question the propriety of the agency's decision that CTA should be excluded from further participation in the competition.

The protest is denied.

Anthony H. Gamboa
General Counsel

[5] CTA asserts that the NKF decision is distinguishable from the facts here, because the court relied on the provision of an automatic stay to find our administrative review adequate due process; here, GSA overrode the stay and awarded the BPAs and task orders. We fail to see the relevance of this distinction. The absence of a stay had no effect on CTA's having an opportunity to fully present and argue its case.