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Decision

Matter of: Engineering Support Personnel, Inc.

File: B-410448

Date: December 24, 2014

Kenneth B. Weckstein, Esq., Brown Rudnick LLP, for the protester.
Duncan Butts, Esq., Naval Air Systems Command, for the agency.
Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest based on an alleged violation of the Procurement Integrity Act is denied where the protester has not demonstrated that the agency's actions violated any law or regulation, and has not shown any competitive prejudice stemming from the agency's disclosure of information.

DECISION

Engineering Support Personnel, Inc. (ESP), of Orlando, Florida, protests the terms of task order request for proposals (RFP) No. N61340-14-R-0027, issued by the Department of the Navy, for contractor operation and maintenance services (COMS) for fire-fighter and damage-control trainers at numerous locations throughout the United States.¹ RFP, Addendum A, Statement of Work (SOW), at 1. ESP, which is performing COMS support at some of the locations, alleges that the agency violated the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107 (2011), commonly known as the Procurement Integrity Act (PIA), by disclosing certain information that allegedly is proprietary to ESP.² Protest at 8-15.

¹ The RFP lists the following locations: (1) Mayport, Florida; (2) Norfolk, Virginia; (3) Pearl Harbor, Hawaii; (4) San Diego, California; (5) Newport, Rhode Island, and (6) two separate locations at the Great Lakes, Illinois. RFP, SOW, at 1.

² The agency argues that our Office does not have jurisdiction to consider a protest alleging a PIA violation in the terms of a solicitation. Agency Reply to Protester's Response to Motion to Dismiss at 10; AR at 12. According to the agency, the PIA
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We deny the protest.

BACKGROUND

The RFP, issued on September 8, 2014, contemplates the issuance of a fixed-price task order under one of the agency's multiple award contracts for fielded training systems support. RFP at 154. The RFP provides for a 1-year base period, with four 1-year option periods. Id. at 129. The RFP requires the contractor to provide all labor and resources necessary to operate and maintain various fire-fighter trainer devices and equipment in seven locations; damage-control trainer devices and equipment in six locations; and trainer support gear maintenance at two of these locations. RFP, SOW, at 1.

The RFP identifies eight classes of service employees that are expected to be employed under the task order.³ RFP at 140-41. The RFP also provides notice of an existing collective bargaining agreement (CBA), and states that the next contractor for these classes of service employees will be required to pay wages and fringe benefits that are at least equal to those agreed upon in the CBAs. Id. at 131. The independent government cost estimate (IGCE) values the RFP task order at \$14,506,808.⁴ AR, Tab 11, IGCE, at 1.

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allows only the protest of an award or proposed award. Id., quoting 41 U.S.C. § 2106 (2011). We disagree. The jurisdiction of our Office is governed by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (2009), which provides that we may consider protests of solicitations, cancellations of solicitations, and awards and proposed awards under those solicitations. Neither the PIA, nor the section of our Bid Protest Regulations related to PIA protests, limits the scope of our jurisdiction in this manner. Rather, these provisions provide, as a prerequisite to the exercise of our CICA protest jurisdiction in PIA cases, that a protester report an alleged PIA violation to the agency within 14 days of becoming aware of the information or facts, to allow the agency to investigate, and, in appropriate circumstances, to take remedial action. 41 U.S.C. § 2106; 4 C.F.R. § 21.5(d) (2014).

³ Following are the eight classes of service employees identified in the RFP: (1) Electronics Technician, Maintenance (ETM) I, WG [Wage Grade]-8; (2) ETM II, WG-9; (3) ETM III, WG-10; (4) General Maintenance Worker, WG-8; (5) Machinery Maintenance Mechanic, WG-10; (6) Heating, Refrigeration, and Air Conditioning Mechanic, WG-10; (7) Machinist Maintenance, WG-10; (8) Maintenance Trades Helper, WG-5. RFP at 141.

⁴ The estimated value of the task order at issue is in excess of \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the
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ESP was issued a COMS task order in 2010 (2010 ESP Task Order), for a base period of 6 months, with four 1-year option periods, followed by a 5-month transition option period. AR, Tab 15, 2010 ESP Task Order, at 56. The total value (including option years) of the initial task order was \$8,979,033, for efforts supporting fire-fighter and damage-control trainers in five locations throughout the United States. Contracting Officer's (CO) Statement (COS) at 2. The ESP Task Order, issued under the latest option (2014 ESP Task Order), is valued at \$16,929,094.39. Id. at 10; AR, Tab 25. The 2010 ESP Task Order and the 2014 ESP Task Order differ in various respects from each other and from the RFP at issue here. For example, the value of the 2010 ESP Task Order is approximately half the value of the 2014 ESP Task Order, and both are different from the value of the IGCE.⁵ COS at 10. Moreover, there are certain COMS services included in both of the ESP Task Orders that are not included in this RFP for four of the locations, while the RFP provides for certain other services that are not part of either of the ESP Task Orders. COS at 8-9.

The first draft of the RFP was posted to the Navy's local business opportunities webpage in June 2014. COS at 3. In July, ESP requested that the agency inform ESP of any historical data the agency intended to release to potential vendors so that ESP could redact data it did not wish released.⁶ AR, Tab 29, ESP E-Mail, dated July 11, 2014, at 2. The agency responded that it intended to release the fiscal year 2013 monthly status reports, and invited ESP to "sanitize said reports to ensure that your proprietary data is protected." Id., Agency E-Mail, dated July 11, 2014. For each location, ESP redacted all supply support allowance amounts,⁷

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issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1)(B).

⁵ The value of the 2010 ESP Task Order is 38% lower than the IGCE value, while the 2014 ESP Task Order is 15% higher. COS at 10.

⁶ The CO asserts that it is customary to provide 12 months of historical data to the industry during a COMS competition. COS at 3. This custom is corroborated by a question submitted by a potential offeror at a pre-solicitation conference on July 14. AR, Tab 16.

⁷ ESP acknowledges that the supply support allowance "is not a cost or price," yet asserts without elaboration that it is "part of [ESP's] proposal pricing strategy and build-up" and "is an element of the 'unit price' and 'total price' for line items." ESP Response to Agency Reply to ESP's Response to the Agency Request for Dismissal, Oct. 6, 2014, at 7. The agency explains, and ESP does not disagree, that this allowance is simply the amount of the unit price that is removed prior to any deductions, which the agency may take in the event the contractor fails to keep

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labor categories, the numbers of employees in each category, and the total number of employees. Protest, exh. F. The agency posted the redacted monthly reports on its local business opportunities webpage. COS at 3.

Thereafter, on August 28, 2014, the agency states that it inadvertently posted the IGCE as part of the RFP documents. COS at 3. The IGCE provided an estimated labor category mix for each location⁸ and the supply support allowance estimates for all seven locations. Id. at 1-10. The IGCE stated that its labor mix for each location was based on current contracts,⁹ and noted that this was because the basic requirements have not changed. Id.

Through a series of events, the agency was made aware that the IGCE was posted on the Navy's business opportunities webpage, and removed it. Id. After removing the IGCE, the CO determined that it did not contain the proprietary or confidential information of any offeror. COS at 4. The CO then informed all potential offerors under the multiple-award contract by email that the government was reposting the IGCE on the Navy's business opportunities webpage, which it did on September 4. Id.; AR, Tab 24, Agency E-Mail, dated Sept. 6, 2014. The agency then also posted the final RFP on September 8. COS at 5. The final RFP package did not include the IGCE, which remained separately posted.

On September 9, ESP notified the agency that it considered the release of the IGCE to be a potential PIA violation, asserting that it included information that was confidential and proprietary to ESP. AR, Tab 4. On September 15, the Navy removed from its business opportunities webpage all draft postings it had made prior to September 8, including the IGCE, and replaced them with the final RFP package that had been posted on September 8, which did not contain the IGCE.

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trainers operational. COS at 14; ESP Response, Oct. 6, 2014, at 7; see also AR, Tab 15, 2010 ESP Task Order, attach. 1, Statement of Work, § 6.5.9, at 49-51.

⁸ The number and mix of employees differs by location. For example, the Mayport location listed five full-time employees, two in one category and one in three other categories, whereas, the Newport location listed one employee in four different categories. AR, Tab 11, IGCE at 3, 6. Similarly, the supply support allowances also differ, depending on location. For example, the annual supply support allowance for one basic aircraft fire-fighting training system for Mayport is \$3,996; whereas it is \$3,672 for Norfolk. AR, Tab 11, IGCE, at 2.

⁹ The 2014 ESP Task Order only covers COMS services for five of the seven locations. The services for the other locations are the subject of a separate COMS task order. COS at 8-9.

COS at 5. Before the agency responded to ESP's notification of a potential PIA violation, ESP filed this protest with our Office on September 22.¹⁰

DISCUSSION

ESP raises numerous challenges concerning the agency's release of information in the IGCE, and the agency has responded to each contention. Although we address only the most significant of ESP's arguments in this decision, we have fully considered all of them and find that they provide no basis to sustain the protest.

ESP first argues that the agency violated the PIA by re-posting the IGCE on September 4, contending that it disclosed ESP's proprietary and confidential information.¹¹ Protest at 8-13. Specifically, ESP argues that the IGCE contained the labor categories and the number of full-time and part-time workers listed in ESP's monthly reports, and included supply support allowances that were derived from ESP's fiscal year 2014 price breakout worksheet, which were not publicly available. Comments at 2, 3. ESP asserts that the agency should cancel the RFP, extend the 2014 ESP Task Order, and not reissue the RFP until it determines how to eliminate the competitive advantage its disclosure of this information has conferred on other offerors. Protest at 15-16.

¹⁰ The agency argues that the protest should be dismissed as untimely or premature. The agency contends that it was untimely because it was filed more than 10 days after ESP knew or should have known of the potential PIA violation. However, since we have determined that the protest is a valid challenge to the propriety of the terms of the RFP, it is timely because it was filed before proposals were due. 4 C.F.R. § 21.2 (a)(1). Similarly, we do not find the protest to be premature. The agency argues that the protest is premature because ESP filed the protest with our Office before the agency could complete its investigation and respond to ESP's notification to the agency of a potential PIA violation. Supp. AR at 4-5. This issue, however, appears to be moot, because in the contracting officer's supplemental statement, with an attached declaration of the agency's chief of contracting office, the agency states that it had determined, both before and after ESP's notification, that no PIA violation had occurred and that there was no impact on the procurement. Supp. COS at 5-8, attach.

¹¹ ESP also complains that although it notified the agency of this potential PIA violation, the agency did not follow procedures mandated by FAR § 3.104-7. Protest at 13-15; Comments at 12. Although the record indicates that the agency had not completed its review in accordance with the FAR requirements when this protest was filed, we view the record to be complete at this time and ESP has not shown, nor does the record indicate, that the results would have been different had the review been completed earlier.

The procurement integrity provisions of the PIA provide that “[e]xcept as provided by law, a [Federal Government official, acting on behalf of a Federal Agency procurement] shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(b).

As an initial matter, we do not believe that ESP has shown that the release of information on which its protest is based is encompassed by either PIA or FAR provisions. First, as described by the protester, the information at issue here--cost figures in the IGCE that “were derived from FY14 costs on the current [Price Breakout Worksheets]” from incumbent contracts or task orders, including one being performed by the protester—is not “contractor bid or proposal information”; rather, it is information that was generated during the performance of a contract or task order. See Protest at 4. We see a distinction between the protester’s monthly reports and, for example, the labor mix or technical approach in a competitor’s proposal. Moreover, the release of information was not made in connection with “the award of a Federal agency procurement contract to which the information relates”—rather, the information was released in connection with a subsequent procurement that differs from preceding contracts.

Similarly, we fail to see how disclosure of the supply support allowance estimates based upon historical figures falls within the PIA’s provisions as contractor “bid or proposal information.” The record shows that these allowances were made part of the awarded 2010 ESP Task Order, and have remained unchanged each year for the past 5 years. AR, Tab 15, 2010 ESP Task Order, attach. 26; AR, Tab 17, Sept. 29, 2009 Price Breakout Worksheets.

ESP also characterizes the information that was released as “source selection information.” AR, Tab 4, Protester’s Notice to Agency, at 4. However, the protester provides no basis for this assertion, nor do we find the information encompassed within the FAR definition of source selection information.¹² See FAR § 2.101.

Notwithstanding ESP’s insistence that the labor categories and labor hours ESP used at one time or another to perform its prior work, and its supply support

¹² The FAR defines source selection information by listing types of information “that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public”; the list includes such things as source selection plans, cost or price evaluations of proposals, and competitive range determinations, among others. FAR § 2.101.

allowance estimates from other task orders, are “proprietary and confidential to ESP,” it has not shown how the release of the IGCE violated law or regulation.¹³

Furthermore, as discussed below, there are significant differences between the RFP requirements here and the work associated with ESP’s monthly reports. In this regard, ESP has failed to show that it is competitively disadvantaged by the disclosure--other than by having to participate in a competitive procurement.

An unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 31. Even where a protester shows an actual or potential PIA violation, our inquiry does not end there. Rather, the question becomes whether the alleged PIA violation created an unfair competitive advantage. See, e.g., Unisys Corp., B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 10 (protest that awardee’s use of former government employee in preparation of its proposal provided the firm with unfair competitive advantage due to employee’s access to protester’s proprietary information denied where record reflects that the information at issue was not competitively useful).

The record here shows that even the most recent (2014) ESP Task Order includes only some of the work required by the RFP. For example, the RFP includes requirements at two new locations that were not covered by the 2014 ESP Task Order, and includes new trainer support gear maintenance work at two of the current locations. COS at 8. Furthermore, the RFP does not include some requirements at four of the current locations in the 2014 ESP Task Order. Id. at 8-9. The RFP does not address how these different requirements have affected the labor mix numbers cited in the IGCE, even though, as discussed below, most of them differ from those found in ESP’s monthly reports.

Based upon our reading of the record, the IGCE’s estimated labor mixes and total number of employees matched only one of the five locations currently serviced by ESP.¹⁴ ESP itself estimates that its current task order is smaller, reflecting work

¹³ While ESP makes much of the fact that the agency invited ESP to redact information from its monthly reports, and that the agency characterized the initial release of the IGCE as inadvertent, we do not find these facts legally relevant.

¹⁴ For example, as regards labor mix, in Norfolk, ESP’s Aug. 2014 Monthly Report (MR) shows [deleted] full-time General Maintenance Workers, but [deleted] HVAC Mechanic, whereas the IGCE lists three full-time General Maintenance Workers, and one full-time HVAC Mechanic. AR, Tab 11, IGCE, at 11; Tab 22, Aug. 2014 MR, at 5. As an example of different total numbers of employees, in Mayport, the Aug. 2014 MR lists a total of [deleted] full-time workers, but the IGCE shows only five. AR, Tab 11, IGCE, at 3; Tab 22, Aug. 2014 MR, at 3.

that is only a portion of the work contemplated by the RFP. Comments at 16. Even if we were to accept ESP's estimate, the fact remains that a significant portion of the work is not covered by the 2014 ESP Task Order. See Rothe Dev., Inc., B-279839, 98-2 CPD ¶ 31 at 3 (protester was not competitively disadvantaged by disclosure of information from prior contract where 20 percent of the work was not covered by the predecessor RFP).

Finally, we are not persuaded that release of the IGCE estimates of labor mix, or even the total number of employees, unfairly disadvantages ESP.¹⁵ As discussed above, these estimates are pertinent to only part of the requirements at issue. Further, even with respect to the efforts and locations that were covered by the 2014 ESP Task Order, the disclosure did not reveal how ESP calculated its profit, overhead, administrative and maintenance costs--all significant elements of the overall management and support price. See Ursery Cos. Inc., B-258247, Dec. 29, 1994, 94-2 CPD ¶ 264 at 3. On this record, we find no basis to sustain the protest.¹⁶

The protest is denied.

Susan A. Poling
General Counsel

¹⁵ ESP also fails to explain how it suffers competitive prejudice from the release of 5-year old historical supply support allowance figures. ESP's argument that other offerors could derive its pricing strategy by simply using reverse math on these allowances is unpersuasive. Comments at 21. While these allowance amounts have not changed in 5 years, the total price for the ESP Task Order has nearly doubled during the same period. AR at 31.

¹⁶ ESP also argues that the IGCE creates an organizational conflict of interest (OCI) for all of the other offerors under FAR § 9.505(b)(1), contending that it provided them an unfair competitive advantage by giving unequal access to ESP's information. Protest at 13-14; Comments at 24. We disagree. ESP is not complaining that other offerors had access to information that ESP did not; rather, ESP is asserting that it lost an informational advantage to which it believes it was entitled. This situation does not establish the elements of an unequal access OCI. ITT Corporation-Electronic Systems, B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 5. Accordingly, we deny this ground of protest.