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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: Ocean Ships, Inc.

File: B-401526.4

Date: April 21, 2010

Ralph C. Thomas III, Esq., Barton Baker Thomas & Tolle, LLP, for the protester. J. Alex Ward, Esq., Daniel E. Chudd, Esq., and Caroline A. Keller, Esq., Jenner & Block LLP, for General Dynamics American Overseas Marine, an intervenor. Kimberly G. Foxx, Esq., Sebastian B. Vaneria, Esq., and Lea E. Delossantos, Esq., Department of the Navy, Military Sealift Command, 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

1. Protest that agency's inadvertent disclosure of protester's price information and discussion questions resulted in unfair competition is denied where record shows information was limited in scope and does not demonstrate competitive harm.
 2. Protest that protester's proposal should have been assigned maximum evaluation rating under socio-economic factor based on protester's status as small business is denied; factor encompassed more than small business status and agency reasonably evaluated protester's proposal based upon protester's failure to specifically identify any other small businesses or minority institutions that would perform the contract.
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DECISION

Ocean Ships, Inc. (OSI), of Houston, Texas, protests the award of a contract to General Dynamics American Overseas Marine (AMSEA), of Quincy, Massachusetts, under request for proposals (RFP) No. N00033-08-R-5302, issued by the Department of the Navy, Military Sealift Command, for the operation and maintenance of large, medium-speed roll-on/roll-off (LMSR) ships in the agency's surge project. OSI challenges the evaluation of its proposal.

We deny the protest.

The surge project, part of the agency's Sealift Program, involves the quick transition of ships from reduced to full operating status to move U.S. forces and military equipment to defend and promote vital U.S. interests anywhere in the world. Lot 1 of

the RFP--the subject of OSI's protest--concerns seven BOB HOPE class LMSRs, one of which was to be used for the Marine Corps as a prepositioning ship. Proposals were to include personnel, operational and technical support (ashore and afloat), equipment tools, and supplies, necessary to operate and maintain the vessels. The RFP contemplated award--on a "best value" basis--of a fixed-price contract with reimbursable elements for a base year, with 4 option years. Proposals were to be evaluated on the basis of four factors, listed in descending order of importance--technical (with subfactors for ship operations and manning, maintenance and repair, contract administration, management of reimbursables and purchasing system, and accounting system), past performance, socioeconomic program utilization, and price. Non-price factors, combined, were more important than price.¹ The RFP warned that award would not be made to an offeror whose proposal received a marginal or unsatisfactory rating in any factor or subfactor.

Seven offerors submitted proposals and, after the initial evaluation, both OSI's and AMSEA's were included in the competitive range. Prior to conducting discussions, the contracting officer sent an e-mail to each competitive range offeror with a list of discussion items. AMSEA's e-mail included a file with business, insurance, price, past performance, and socioeconomic discussion issues for AMSEA and all other offerors covering all three lots. Of primary relevance here, the file included total price figures for OSI's proposal on Lots 2 and 3 and various discussion items common to all offerors concerning Lot 1. Within minutes of receiving the e-mail, AMSEA's vice-president, the sole recipient, notified the contracting officer and explained that "[i]mmediately upon discovering the content of the attachment and the scope of the error," he had closed the attachment. Letter from AMSEA. According to the vice-president, as directed by the contracting officer--and without further accessing the e-mail--the vice-president deleted the e-mail and its attachments, then emptied the trash folder to ensure deletion of the information. Id.

The contracting officer notified all offerors of the e-mail release, provided copies of the released information pertinent to each, and evaluated the impact of the disclosure. Based on her initial review, the contracting officer concluded that release of the information would not alter the course of discussions, and she proceeded to conduct discussions with AMSEA and the other offerors in the competitive range. Contracting Officer's Memorandum on Inadvertent Disclosure, at 3. After OSI objected and asserted that the recipient of its Lots 2 and 3 pricing could "back into" OSI's Lot 1 price, the contracting officer continued her review, specifically considering OSI's objections. Based on her additional review, the contracting officer again concluded that the released information would not result in

¹ Adjectival ratings used in the evaluation for the technical factor were exceptional, very good, satisfactory, marginal, and unsatisfactory; for the past performance factor, very good, satisfactory, unsatisfactory, and neutral; and for the socioeconomic utilization factor, exceptional, satisfactory, and unsatisfactory.

an unfair competitive advantage to AMSEA and proceeded to obtain final proposal revisions (FPR). Contracting Officer's Analysis of Procurement Impact of Disclosure, at 2. She specifically required AMSEA to submit a narrative with its FPR explaining any price changes from its initial proposal. Id. Based on her review, the contracting officer concluded that there was no indication in AMSEA's FPR that it had used the information in the e-mail to its competitive advantage. FPR Analysis of Procurement Impact of Disclosure, at 7. While AMSEA lowered various prices, its overall FPR price remained significantly lower than OSI's initial and FPR prices.

In the consensus evaluation, OSI's proposal was rated marginal under the technical factor (marginal rating under the contract administration subfactor, very good under the management of reimbursables subfactor, and exceptional under the remaining subfactors), very good under the past performance factor, and satisfactory under the socioeconomic factor. AMSEA's proposal was rated overall exceptional under the technical factor (very good for management of reimbursables and exceptional for the remaining subfactors), very good under the past performance factor, and satisfactory under the socioeconomic factor. AMSEA's price of \$238 million was approximately 8.5% lower than OSI's. Because OSI's proposal was rated marginal under the technical factor, it was not considered for award. Based on the evaluations, the source selection authority determined that AMSEA's proposal was the best value, and made award to AMSEA for Lot 1.

DISCUSSION

OSI challenges both the agency's decision to allow AMSEA to remain in the competition after the information disclosure and its evaluation of OSI's proposal under the technical and socioeconomic factors. As discussed below, we find OSI's arguments do not warrant questioning the award.

Disclosure of OSI's Information

OSI asserts that the agency's release of its pricing and all offerors' discussion information to AMSEA was improper and tainted—or gave the appearance of tainting—the competition. In OSI's view, AMSEA's changed FPR prices evidenced possible use of this information and the agency relied on insufficient evidence in concluding that AMSEA had not used this information to its competitive advantage. OSI concludes that the agency's decision to proceed with the competition was unreasonable and asserts that the agency should terminate AMSEA's contract, cancel the RFP, and re-compete its requirements.

The disclosure of source selection information, including an offeror's price, during the course of a procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the procurement process. Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 4-5. Where an agency

decides that no remedial steps are necessary, we will sustain a protest based on the improper disclosure only where the protester demonstrates that it was in some way competitively prejudiced by the disclosure. Kemron Env'tl. Servs., Inc., B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2.

While OSI makes numerous assertions in support of its claims, the record reflects that the protester was not competitively prejudiced by the release of information.² For example, OSI notes that AMSEA lowered its prices in six categories that were the subject of discussion questions asked of all offerors--insurance, support of government personnel on the Marine Corps ship, and four transition rate categories. Each question was asked in terms of the offeror's failure to meet a requirement or confirmation of its understanding of the pricing categories. OSI asserts that these questions would reasonably lead AMSEA to believe that the offerors' initial prices indicated a lack of understanding, and thus lead it to reduce its own prices. OSI Comments at 8. However, as found by the contracting officer, there is nothing in the record to indicate that AMSEA used any of the released information as the basis for changing its pricing, and AMSEA provided a reasonable, detailed explanation for each change. In this regard, based on its decision to absorb more risk, AMSEA [deleted], allowing it to reduce various [deleted] rates. FPR Analysis of Procurement Impact of Disclosure, at 3. AMSEA explained that its [deleted] on the Marine Corps ship was based on RFP amendment 0014, which designated the subsistence for these personnel as a reimbursable expense instead of being included in its fixed-price per diem. Id. at 4. AMSEA explained that its reduction in [deleted] rates was based on its reliance on historical data from previous experience. Id. at 4-6. In accepting AMSEA's explanations for its FPR changes, the contracting officer considered the fact that--with limited exceptions--there was no disclosure of offerors' specific prices

² In a related argument, OSI asserts that the agency had reason to doubt AMSEA's position that it had not reviewed and destroyed the improperly released information. In this regard, OSI notes that the AMSEA vice-president's certification letter was not notarized or made under oath; there was no evidence that AMSEA had taken additional steps to ensure that the information was professionally removed from the firm's hard drive; and in a prior procurement, AMSEA had allegedly misrepresented the availability of some key personnel. OSI Comments at 3-5. The agency's actions here were unobjectionable. The record shows--and OSI provides no evidence to the contrary--that, after quickly reporting his receipt of the information, AMSEA's vice-president followed the agency's directions to delete the e-mail from his inbox and trash files. His later certification to these actions did not have to be made under oath to make the agency's acceptance of it reasonable. As to AMSEA's alleged misrepresentation under a prior procurement, what may have happened there does not mandate the agency's actions here. Sabreliner Corp., B-275163 et al., Dec. 31, 1996, 96-2 CPD ¶ 244 at 2, n.2 (each federal procurement stands on its own).

in any of the challenged areas, and AMSEA's price position (fourth lowest price) did not change from its initial proposal to its FPR.³ *Id.* at 3-6.

Apart from its assertion that AMSEA would more likely have used its historical data to arrive at its initial—rather than final—pricing, OSI provides no basis for questioning AMSEA's explanations. Meanwhile, we think it is significant that AMSEA's FPR price advantage (post-disclosure) over OSI (8.5% lower) was only slightly less than its price advantage in the initial evaluation (8.8% lower); OSI does not explain, and it is not clear to us, why knowledge of a competitor's significantly higher price would lead an offeror to lower its price further. See *Health Net Fed. Servs., LLC*, B-401652, Oct. 13, 2009, 2009 CPD ¶ 213 at 6; *Kemron Env'tl. Servs., Inc.*, *supra*, at 4. We conclude that the agency reasonably determined that AMSEA's price changes were based on its business judgment, changes to the RFP, and its reliance on its own historical data, rather than on the disclosed information. Accordingly, we find that the agency reasonably concluded that disclosure of the information did not result in competitive prejudice to OSI.

OSI asserts that cancellation of the RFP and elimination of AMSEA are required because of the “*appearance* that the integrity of the procurement process was compromised and unreliable.” OSI Comments at 10. However, as indicated, we will sustain a protest based on an inadvertent disclosure of information only where it is shown to have harmed the protester. It is undisputed that the disclosure of OSI's information was inadvertent, and that the agency and AMSEA proceeded appropriately once the disclosure was discovered. Since, as discussed above, we find that OSI was not competitively prejudiced by the disclosure, there is no basis for us to sustain the protest and recommend the suggested corrective action.

Evaluation of OSI's Proposal—Socioeconomic Factor

OSI asserts that the agency's evaluation of its proposal as satisfactory, instead of exceptional, under the socioeconomic utilization program factor was unreasonable. Noting that the factor's underlying objective is to ensure participation of small businesses, OSI asserts that, since it is a small business and will perform a

³ The only specific prices released concerned OSI's bottom-line prices for Lots 2 and 3 and certain line item prices of \$0 proposed by some other offerors. With regard to the Lot 2 and 3 pricing, the agency's analysis found—and OSI does not rebut—that there was no reasonable possibility that these figures allowed AMSEA to “back into” OSI's Lot 1 pricing. With regard to the other offerors' prices, with one exception, AMSEA's pricing did not change in any of the areas. In the single exception, AMSEA reduced its price by some 27% and remained significantly above the \$0 proposed by the other offeror. This single reduction provides no basis to conclude that AMSEA used the pricing information to its competitive advantage.

substantial amount of the work, its proposal should have received the maximum rating. OSI Comments at 11.

In considering a protest of an agency's evaluation of proposals, our review is confined to determining whether it was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. See United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11.

The evaluation here was unobjectionable. Contrary to OSI's assertions, nothing in the RFP provided that small business proposals automatically would receive the maximum score under the socioeconomic factor. In this regard, the factor not only addressed small business participation, but also included evaluation of the extent of participation of historically black colleges or universities and minority institutions in performance of the contract, including joint ventures, teaming arrangements, subcontractors, or self-performance. RFP at 106. Offerors were instructed to describe, in narrative form, the extent of participation by these entities and, if possible, to identify specific small businesses and historically black colleges or universities and minority institutions. RFP at 102. OSI's proposal identified OSI as a small business and stated that it would perform a majority of the work. Socioeconomic Proposal at 1. It also identified the percentages of past subcontracts OSI had awarded to various small, women-owned, and disadvantaged businesses; its past activities in reaching out to small businesses; and its practice of giving special consideration to veterans and other socio-economic groups responding to its advertised job vacancies. Id. at 2. Based on this information, the evaluators found that OSI had made a reasonable effort to involve small and minority firms in performing the requirement, but further determined that, because it had not identified any specific small businesses or minority institutions that would be used during contract performance, a rating higher than satisfactory was not warranted. Socioeconomic Evaluation Report at 3. Since the evaluation factor encompassed more than an offeror's status or performance as a small business, and OSI did not specifically propose to subcontract with any particular small or minority institutions, we find no basis for objecting to this rating.⁴

⁴ OSI also maintains that it was entitled to the maximum rating because—under procurements resulting in federal supply schedule contracts, government-wide acquisition contracts, or multi-agency contracts—small businesses automatically receive the maximum possible score or credit for small business subcontracting. 13 C.F.R. § 125.3(g). This regulation provides no basis for sustaining OSI's protest since, as OSI itself recognizes (Protest at 12), the procurement here did not involve any of these types of contracts. Similarly unavailing is OSI's reliance on the agency acquisition plan's provision for small businesses performing a majority of the work to receive the highest rating. OSI Comments at 11. Alleged deviations from an agency's acquisition plan do not themselves provide a basis for questioning the validity of the evaluation; such plans are internal agency instructions and as such do
(continued...)

Contract Administration Subfactor

OSI asserts that the agency unreasonably evaluated its proposal as marginal under both the contract administration subfactor and technical factor based on its failure to include one résumé. OSI maintains that the marginal rating was “unfair” because the missing résumé was for a “sub-key official” and OSI’s proposal was strong under every other subfactor. Protest at 12. The agency defends the marginal rating, explaining that the missing résumé was for the property administrator, identified by the RFP as one of several key shoreside personnel; the absence of the résumé prevented the agency from determining the qualifications and experience of the proposed employee and resulted in an unacceptable risk of unsuccessful performance. Technical Consensus at 13.

We need not resolve this issue because the record shows that OSI was not competitively prejudiced by any alleged evaluation error. In this regard, even if OSI prevailed on this protest ground and its rating under this subfactor and the technical factor were increased to exceptional, its ratings under every subfactor and factor would be identical to AMSEA’s; thus, price would necessarily become the deciding factor. Since OSI’s price was more than \$22 million higher than AMSEA’s, there is no reasonable possibility that OSI’s proposal would be selected for award. See American Cybernetic Corp., B-310551.2, Feb. 1, 2008, 2008 CPD ¶ 40 at 3. Prejudice is an essential element of every viable protest; where, as here, the agency’s allegedly improper actions did not affect the protester’s chances of receiving the award, the allegation provides no basis for sustaining the protest. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

(...continued)

not give outside parties any rights. Hubbell Elec. Heater Co., B-289098, Dec. 27, 2001, 2002 CPD ¶ 15 at 5 n.4.