



Comptroller General
of the United States
Washington, D.C. 20548

14343

Decision

Matter of: KPMG Peat Marwick

File: B-251902.3

Date: November 8, 1993

William A. Roberts, III, Esq., Brian A. Darst, Esq., and Alice Crook, Esq., Howrey & Simon, for the protester. Mark W. Foster, Esq., and Gregory H. Gust, Esq., Zuckerman, Spaeder, Goldstein, Taylor & Kolker, and William A. Shook, Esq., Preston, Gates, Ellis & Rouvelas Meeds, for Development Alternatives, Inc.; and William R. Thomas, III, for International Science and Technology Institute, Inc., interested parties.

Jonathan Silverstone, Esq., Agency for International Development, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's decision to exclude protester from reopened competition because it possesses evaluation and competition sensitive materials provided in response to a Freedom of Information Act request filed after the initial award is sustained where the protester did not act improperly in requesting the information, and where the information at issue--while usually not released to offerors--could be provided to the other offerors to ameliorate any competitive advantage to the protester as a result of the release.

DECISION

KPMG Peat Marwick protests its exclusion from a reopened competition under request for proposals (RFP) No. OP/B/AEP-92-003, issued by the Agency for International Development (AID) for technical assistance for macro and international economic analysis. Peat Marwick argues that the agency's decision to exclude it from the competition due to Peat Marwick's possession of information related to the previous evaluation--provided to it by the agency--is unreasonable.

We sustain the protest.

OVERVIEW

This protest, the third review by our Office of issues related to this procurement, was filed after AID advised Peat Marwick that it would not be allowed to submit a revised best and final offer (BAFO) as part of a reopened competition for these services. The competition here was reopened as corrective action in response to a protest filed by Peat Marwick against the agency's first selection decision. The contracting officer excluded Peat Marwick from further consideration because the company gained access to "source selection information" via the agency's response to a Freedom of Information Act (FOIA) request. In its FOIA response, the agency provided information that it now believes gives Peat Marwick an unfair competitive advantage.

We conclude that the contracting officer's decision to exclude Peat Marwick from the reopened competition unreasonably imposes an undue hardship on Peat Marwick which, like all offerors on government procurements, is entitled to fair and equitable treatment. Our conclusion that the contracting officer's action is unreasonable is based on the recognition that the perceived competitive advantage is not the result of any improper action by Peat Marwick, and that the agency could level the competitive playing field through the less extreme approach of distributing the information provided to Peat Marwick to all the offerors.

BACKGROUND

On June 8, 1992, AID issued this solicitation seeking short-term technical and advisory services related to macroeconomic policy. The RFP anticipated award of indefinite quantity contracts to two offerors, with both contracts having a 39-month period of performance. Seven firms responded to the RFP, including Peat Marwick, and on September 29, awards on the basis of initial proposals were made to Nathan Associates and Developmental Alternatives Incorporated (DAI).

After Peat Marwick learned that its proposal had not been selected for award, a representative of the company filed a FOIA request for information to help the company assess its "performance on this particular proposal and to determine the feasibility for competing for future work in this area." Specifically, Peat Marwick requested the following information:

1. the technical proposals submitted by the two awardees, Nathan and DAI;
2. the combined technical and cost scores for Peat Marwick, Nathan and DAI;
3. the scores under each of the four technical evaluation factors in the RFP for Peat Marwick, Nathan and DAI;
4. the "proposer's price" or the average fixed daily rate, in the Nathan and DAI proposals; and,
5. the maximum fixed daily rate schedule.

By letter dated December 17, AID responded to Peat Marwick's FOIA request, providing the following information:

1. redacted versions of the Nathan and DAI technical proposals, released in accordance with the instructions of both awardees;
2. a 1-page table entitled "Proposals Ranked in Order of Weighted Technical and Price Scores," ranking the 7 offerors by their total weighted scores;
3. a 1-page table, without a heading, listing the maximum fixed daily rates of an unidentified offeror;
4. a 1-page document, with the handwritten title "Attachment One," showing 4 tables ranking the 7 offerors by different calculation methods (each table includes each offeror's point score and combined average daily rate);
5. 5 score sheets (apparently prepared by 5 different evaluators), entitled "Selection Criteria Summary," showing the scores given each of the 7 offerors on each of the 4 evaluation factors, and 21 subfactors; and,
6. handwritten narrative comments prepared by an unidentified evaluator assessing the 7 offerors under each of the 4 evaluation factors.

Upon reviewing AID's FOIA response, Peat Marwick learned that the agency had made its award decision on the basis of initial proposals without holding discussions, and had awarded to other than the lowest-priced offeror. Thus, on

January 4, 1993, Peat Marwick filed a protest in our Office challenging the award without discussions, and arguing that AID failed to follow the evaluation methodology stated in the solicitation.

AID acknowledged that Peat Marwick's initial protest had merit, and on March 1 advised our Office that the agency would "reopen the procurement and request BAFOs, taking whatever action is possible and appropriate to deal with the information access problems." Based on the promised corrective action, our Office dismissed the protest. KPMG Peat Marwick, B-251902, Mar. 4, 1993.¹

On April 1, all offerors were notified that the competition was being reopened and were asked to reconfirm their interest in the procurement. In this notice, AID informed the other offerors of the FOIA response provided to Peat Marwick, and of Peat Marwick's recommendation that the same materials be provided to all offerors electing to participate in the reopened competition. The notice to offerors also asked for suggestions about how AID should handle the FOIA disclosure. Most of the offerors expressed continued interest in the procurement and suggested that Peat Marwick be excluded from the competition. At least one offeror suggested that the agency simply provide the material to the other offerors.

In a memorandum dated June 7, the contracting officer set forth the facts surrounding the FOIA request and response, and concluded that Peat Marwick should be disqualified from participating in the reopened competition. The contracting officer based her decision on the fact that Peat Marwick "possesses information concerning its competitors' initial proposals and their evaluation and scoring." Thus, according to the contracting officer, exclusion of Peat Marwick is necessary "to assure a full and fair competition and to protect the integrity of the procurement system because it reasonably appears that the information would give the firm an unfair competitive advantage."

On June 24, Peat Marwick was advised of the decision to exclude it from the reopened competition, and was provided with the June 7 contracting officer's decision memorandum. On June 30, Peat Marwick protested to our Office, arguing that the agency's decision to exclude the firm from the reopened competition is unreasonable and inconsistent with prior decisions of our Office.

¹Subsequently, our Office denied a request from Peat Marwick that it be reimbursed its costs for pursuing the protest. KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

DISCUSSION

This protest, challenging AID's decision to exclude Peat Marwick from this competition, presents a matter of first impression for our Office. According to AID, its actions here are supported by prior decisions of our Office which have upheld a contracting officer's decision to exclude an offeror when the contracting officer finds exclusion necessary to protect the integrity of the competitive procurement process. Peat Marwick argues that the decisions cited by AID have no application here, and claims that AID's actions are unreasonable in the absence of any improper act by the protester, or in the absence of any conflict of interest on the protester's part.

The problem created by the release of information to Peat Marwick is not the result of any improper action by the firm; rather, Peat Marwick simply exercised its statutory right to file a FOIA request after contracts had been awarded under the RFP. Further, the information provided by the agency to Peat Marwick can be provided to the other offerors to level the playing field. Accordingly, as explained in detail below, we see no reason to exclude Peat Marwick, an otherwise responsible and competent offeror, from this follow-on competition.

Our review of an agency's decision to exclude an offeror from a competition in order to remedy a problem with a particular procurement requires a balancing of competing interests set forth in the Federal Acquisition Regulation (FAR). On the one hand, contracting officers are granted wide latitude in their business judgments to safeguard "the interests of the United States in its contractual relationships." FAR § 1.602-2. On the other, the same section of the FAR requires contracting officers to ensure impartial, fair, and equitable treatment of all contractors. See FAR § 1.602-2(b).

As a preliminary matter, we look first at the contracting officer's decision to take steps to correct the problem arising from the FOIA response that AID provided to Peat Marwick. According to the contracting officer's memorandum, the decision to exclude Peat Marwick is based on the firm's possession of "information concerning its competitors' initial proposals and their evaluation and scoring." Thus, the contracting officer concluded that excluding the company "is necessary to assure a full and fair competition and to protect the integrity of the procurement system because it reasonably appears that the information would give the firm an unfair competitive advantage."

There is little doubt that the information provided to Peat Marwick will impart a competitive advantage in a reopened competition. While we need not address each of the items separately, we note that the materials provided to Peat Marwick include one of the evaluator's narrative assessments of the strengths and weaknesses of each offeror, plus tables showing each offeror's technical scores and daily rates. Given the obvious value of such information in a reopened competition, we find reasonable the contracting officer's decision to attempt to alleviate the competitive advantage provided Peat Marwick by the agency's FOIA response; however, we do not think that the remedy chosen--exclusion of Peat Marwick from the competition--is warranted.

AID argues that Peat Marwick's exclusion from the competition here is appropriate since a contracting officer may exclude an offeror from a competition to protect the integrity of the procurement system where it reasonably appears that the firm may have obtained an unfair competitive advantage.² In support of its contention, AID points to our prior decisions in NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638, and in Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435.

In our view, AID's actions are not supported by our prior decisions in NKF Engineering and Compliance Corporation. In those cases, we concluded that exclusion was appropriate, in part, because the irregularity involved was the result of improper conduct by the offeror. See Compliance Corp., supra (exclusion based on the appearance of impropriety

²Although not directly applicable to the situation here, FAR subpart 9.5, "Organizational and Consultant Conflicts of Interest," defines unfair competitive advantage as arising:

"where a contractor competing for award of any [f]ederal contract possesses--

"(1) Proprietary information (as defined in 3.104-4(j)) that was obtained from a [g]overnment official without proper authorization; or

"(2) Source selection information (as defined in 3.104-4(k)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract."

FAR § 9.505 (b) .

created by "industrial espionage" involving an attempt to induce an employee of competing offeror to sell proposal information); NKF Eng'g, Inc., supra (exclusion based on the appearance of impropriety created by the hiring of the contracting officer's representative between submission of initial proposals and receipt of BAFOs, and a subsequent significant drop in that offeror's BAFO price).³ In contrast, when the record did not show that there was a likelihood of an actual impropriety or conflict of interest, we have overturned an agency's decision to exclude an offeror from the competition. See NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291.

AID also overlooks the fact that given the potential harsh effects of excluding an offeror--both on the contractor, and sometimes on the competition--when circumstances permit, we have recommended less drastic remedies to alleviate problems associated with an offeror's continued participation in a procurement. For example, even where we sustained a protest challenging selection of the awardee based on a conflict of interest--specifically, the fact that a former government employee with access to restricted information helped prepare the awardee's proposal--we expressly rejected the remedy of excluding the awardee from the competition and instead recommended releasing the restricted information to all the offerors and calling for a new round of BAFOs. Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, aff'd, Brown

³Both Compliance and NKF received additional review in the federal courts. In Compliance Corp. v. United States, 22 Cl.Ct. 193 (1990), the Claims Court denied Compliance's request for injunctive relief against an agency's decision to disqualify Compliance for consideration for award. The decision relied on the analysis in both our initial decision denying Compliance's protest of the exclusion decision, and our reconsideration decision (both cited above). In NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986), the Federal Circuit overturned an order of the Claims Court enjoining an agency from proceeding with an award without reexamining the decision to disqualify NKF. The Federal Circuit's decision dissolving the injunction and concluding that the decision to exclude NKF was reasonable, in effect, reinstated our decision denying NKF's protest of its exclusion.

Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299.⁴

Here, there is no suggestion that Peat Marwick acted improperly in its attempt to obtain information about the earlier procurement--rather, the firm simply exercised its statutory right to make a FOIA request at the conclusion of the procurement. As a result, we see no reasonable basis to bar Peat Marwick from the reopened competition when a significantly less onerous remedy is available to correct an advantage given an otherwise responsible and competent offeror.

This conclusion is consistent with our prior decisions interpreting whether or how to remedy the competitive advantage that develops due to the release of evaluation materials or proprietary information. In such cases we generally have rejected protesters' contentions that recipients of such information should be excluded from procurements to protect the integrity of the competitive process. See Computer Sciences Corp., B-231165, Aug. 29, 1988, 88-2 CPD ¶ 188; Aeronautical Instrument and Radio Co., B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170; Youth Dev. Assocs., B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126; White Mach. Co., B-206581, July 28, 1982, 82-2 CPD ¶ 89.

CONCLUSION AND RECOMMENDATION

We conclude that AID's decision to exclude Peat Marwick from the reopened competition strikes an unreasonable balance between the agency's attempt to ameliorate the competitive advantage given Peat Marwick, and imposing an economic hardship on one offeror to preserve the integrity of the competitive procurement system. As such, AID's actions violate the mandate of FAR § 1.602-2(b), requiring contracting officers to ensure impartial, fair, and equitable treatment of contractors.

In reopening the competition, AID should eliminate the competitive advantage given Peat Marwick by providing each offeror in the competitive range with the full text of the agency's December 17, 1992, FOIA response, with

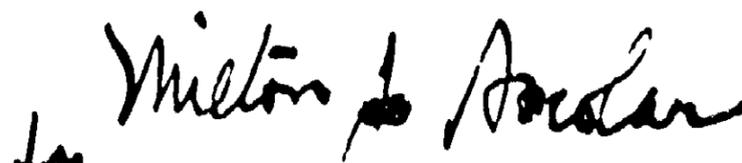
⁴We have also suggested that agencies first explore providing information to other offerors before excluding contractors from a competition when attempting to ameliorate the effects of an organizational conflict of interest. See GIC Agric. Group, 72 Comp. Gen. 14 (1992), 92-2 CPD ¶ 263.

attachments.⁵ If the evaluation of the new BAFOs results in the selection of different offerors, AID should terminate the contracts awarded originally and award new contracts.

In recommending that these materials be provided to all offerors, we are mindful that some of the information contained in the agency's FOIA response is not generally released to offerors. However, since the agency had already made an award at the time it released its FOIA response, it could waive its authority to protect the information. We also recognize that, in one sense, the release of the evaluation documents here arguably resembles an auction. Nonetheless, under the circumstances of this case, we conclude that eliminating an unfair competitive advantage by providing information to all offerors that has already been released to one--and for which continued protection may have been waived--outweighs the government's interest in not appearing to conduct an auction. Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. To the extent the agency can minimize the importance of the information it will release to the other offerors by undertaking a fresh review of all aspects of the revised proposals, we urge it to do so.

We also find that AID should reimburse Peat Marwick for its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f), Peat Marwick's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to AID within 60 days after receipt of this decision.

The protest is sustained.


for Comptroller General
of the United States

⁵During the course of this protest, an interested party argued that Peat Marwick also gained an unfair competitive advantage by auditing one of the other offerors on behalf of AID during the course of the competition. To date, the agency has made no decision about the impact of that audit, and instead based its decision to exclude Peat Marwick solely upon the advantage given the firm by the agency's FOIA response, as set forth in the contracting officer's justification memorandum. While Peat Marwick denies that it gained any competitive advantage from the audit, this issue is not ripe for our consideration because there has been no agency decision on the matter.