



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

Decision

Matter of: Devres, Inc.
File: B-251902.8
Date: March 30, 1995

Donna Lee Yesner, Esq., and Kevin P. Mullen, Esq., Pettit & Martin, for the protester.
William A. Roberts, III, Esq., and Brian A. Darst, Esq., Howrey & Simon, for KPMG Peat Marwick, an interested party.
Gary M. Winter, 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

Protester's claim that one offeror was unfairly permitted to withhold more of its technical proposal from release than other offerors, and that protester provided a redacted version of its technical proposal under economic duress--in response to the agency's effort to ameliorate a competitive advantage given to one offeror in a reopened competition by the agency's release of certain portions of the technical proposals of the awardees in the earlier competition--is denied where the record shows that the protester's release of its technical proposal was voluntary, and the other offeror responded to the agency's request for further justifications until the agency was convinced that the proposed redactions were appropriate.

DECISION

Devres, Inc. protests actions taken by the Agency for International Development (AID) to remedy a disclosure of certain technical proposals submitted in response to request for proposals (RFP) No. OP/B/AEP-92-003. Specifically, AID concluded that all of the technical proposals received in response to this solicitation for technical assistance for macro and international economic analysis should be released to the other offerors, with redactions, to remedy a competitive advantage given one of the offerors, KPMG Peat Marwick, when the agency disclosed portions of the awardees' technical proposals in answering a Freedom of Information Act (FOIA) request. Devres argues that in negotiating the extent of redactions, AID unfairly permitted Peat Marwick to withhold more of its technical proposal from release than any other offeror. Devres also claims that its redacted

version of its technical proposal was provided under duress and that the agency insisted that Devres agree to the release of more of its proposal than its competitor, Peat Marwick.¹

We deny the protest.

BACKGROUND

On June 8, 1992, AID issued this solicitation seeking short-term technical and advisory services related to macroeconomic policy. After receiving and evaluating proposals from seven offerors, AID, on September 29, awarded contracts to two of the offerors on the basis of their initial proposals; the awardees were Nathan Associates and Developmental Alternatives Incorporated (DAI).

When one of the offerors, KPMG Peat Marwick, learned that its proposal was not selected for award, a representative of the company filed a FOIA request with AID. In response to the request, AID released redacted versions of the two awardees' technical proposals--and other information not relevant at this juncture--on December 17. When Peat Marwick reviewed the FOIA response, it learned that AID had awarded on the basis of initial proposals without holding discussions to other than the lowest-priced offeror. Peat Marwick protested to our Office; AID agreed to take corrective action; and the protest was dismissed. KPMG Peat Marwick, B-251902, Mar. 4, 1993.²

In taking corrective action in response to Peat Marwick's protest, AID recognized the impact of its earlier FOIA disclosure: its request for dismissal stated that the agency would "reopen the procurement and request [best and final offers], taking whatever action is possible and appropriate to deal with the information access problems." After notifying all offerors that the competition was being

¹In its initial protest, Devres also claimed that AID's decision to permit Peat Marwick to participate in this procurement violated organizational conflict of interest rules for reasons not relevant here. Our Office dismissed this issue as untimely since the agency advised offerors in a June 2 letter that Peat Marwick would be included in reopened discussions, but Devres did not protest this issue until November 22, 1994. KPMG Peat Marwick, B-251902.8, Dec. 9, 1994.

²Thereafter, our Office denied a request from Peat Marwick seeking reimbursement of its costs of pursuing the protest. KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443.

reopened, the agency decided on June 7, 1993, to resolve its problem by excluding Peat Marwick from the reopened competition. After Peat Marwick learned of AID's decision, it again filed a protest, this time arguing that the agency acted unreasonably in excluding the company from the competition.

Our Office sustained Peat Marwick's protest and concluded that AID's actions struck an unreasonable balance between attempting to ameliorate any competitive advantage given Peat Marwick by the FOIA response, and imposing an economic hardship on one offeror to preserve the integrity of the competitive procurement system. KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272, aff'd, Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201. To remedy the situation, our decision recommended that the agency provide each offeror in the competitive range with the full text of AID's December 17, 1992, FOIA response.

By letter dated June 2, 1994, AID advised offerors of our March 17 decision on the agency's reconsideration request, and advised that Peat Marwick would be permitted to participate in the reopened competition. In addition, AID extended the remedy recommended by our Office, as follows:

"To level the playing field to the greatest extent possible, and to be fair to [DAI] and Nathan, and to deal with pending [FOIA] requests, including a pending request from one of the competitors, we intend to provide the original technical proposals submitted by all the other competitors, subject to similar deletions."

AID's letter requested that by June 17, each offeror identify the portions of its technical proposal that "should be exempt from release because disclosure could reasonably be expected to cause substantial competitive harm."

Devres responded to AID's June 2 letter by deleting all but the two-page introduction to its technical proposal; specifically, Devres deleted 47 of 49 pages in its proposal. In reply, AID sent a June 24 facsimile notice to the president of Devres advising that the redacted proposal was "unusable as submitted." AID's notice requested that Devres provide an acceptable revised redacted proposal; stated that wholesale redactions were not appropriate; and directed Devres to remove only "procurement sensitive items--i.e., names or a paragraph here and there." The notice also warned that if Devres failed to provide an acceptable redacted proposal, "we have no choice other than to make the determination ourselves as to what will be released to the other offerors." AID requested a response by June 29.

Devres failed to reply by the June 29 deadline, but on July 11, submitted a response wherein it withheld approximately 9 full pages of text out of 49 pages in its proposal, and incidental information on 12 other pages. By letter dated July 19, AID's contracting officer raised five specific questions regarding the need to withhold certain information Devres insisted be withheld from its redacted technical proposal. At the conclusion of the letter, the contracting officer stated that Devres had not effectively shown that the questioned information was proprietary in nature or would cause competitive harm, but invited Devres to provide further justification for protecting the questioned information, and requested a reply by July 27. The letter asked for a prompt response to permit the agency to conclude the recompetition.

Devres failed to reply by the July 27 deadline and failed to answer several telephonic requests from the agency asking for a response to the July 19 letter. On September 2, the contracting officer again sent a facsimile notice to the president of Devres asking for a response to the July 19 letter to permit the agency to continue with its recompetition. The notice warned that "if I do not hear from you by [September 6, 1994,] I will have to release your proposal with only those redactions which I feel are appropriate under the circumstances." In response, Devres submitted a replacement version of its redacted proposal in which it agreed to release all but approximately 6 pages of text and incidental information on 12 other pages.³

On October 27, Devres received from AID copies of the other offerors' redacted technical proposals. Upon receipt of the materials, Devres learned that the agency had permitted the other offerors to provide redacted versions of only the technical approach portion of their technical proposals, and to withhold the remainder of their proposals. When Devres pointed out that it had provided a redacted version of its entire technical proposal--considerably more information than the other offerors provided--AID requested the other offerors to provide redacted versions of their entire

³Our review of the record shows that Devres's claims about the extent of its proposed redactions are often unreliable. Compare Devres's November 22, 1994, initial protest filing at 4 (stating that on September 9 "Devres submitted its entire proposal with only a few names deleted") with Devres's September 9 version of its redacted proposal showing the following deletions: all of page 14; most of page 15; approximately half of page 27; approximately two-thirds of page 31; all of page 32; all of page 45; and individual names on pages 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44.

technical proposals as well.⁴ On November 8, Devres received from AID redacted copies of the full technical proposals.

In reviewing the redacted technical proposals, Devres concluded that the Peat Marwick proposal was more heavily redacted than that of any other offeror. When Devres raised the matter with AID, the contracting officer replied that she considered the redactions to be reasonable, and stated that she would not release additional material from the proposal over Peat Marwick's objection. This protest followed.

ANALYSIS

This protest is the fifth review by our Office of issues related to this procurement. In essence, the protest here raises the issue of whether AID was evenhanded in attempting to remedy any competitive advantage given Peat Marwick by the disclosure of portions of Nathan's and DAI's technical proposals.⁵ For the reasons set forth below, we conclude that AID acted properly in its treatment of Devres and Peat Marwick.

⁴In an affidavit appended to the agency report, the contracting officer explains that this unequal approach resulted from a discrepancy between the earlier decisions of our Office and AID's June 2 letter. Our decision considered only AID's determination to exclude Peat Marwick from the competition because of the FOIA release of the technical approach sections of the Nathan and DAI proposals. AID's June 2 letter, however, requested redacted versions of the offerors' technical proposals. Devres responded to the request as set forth in the June 2 letter, while the other offerors apparently limited their response to the technical approach portion of their proposals. AID apparently failed to notice this problem until Devres brought the matter to the agency's attention on October 28. However, once AID became aware of the issue, it promptly took corrective action by requiring the other offerors to provide redacted versions of their entire technical proposals.

⁵Devres is not here challenging AID's decision to require each of the offerors to provide redacted versions of their technical proposals to each of the other offerors. That decision, announced in the agency's June 2, 1994 letter, was not challenged by any of the offerors and cannot be the subject of a timely protest at this juncture. 4 C.F.R. § 21.2(a)(2) (1995).

Our analysis begins with AID's decision to broaden the recommendation found in our decision in the Peat Marwick protest--and repeated in our decision on the agency's request for reconsideration.⁶ From this point forward, the agency had an obligation to proceed in an evenhanded manner, treating all offerors fairly. See George A. and Peter A. Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286. Devres claims that AID did not treat offerors fairly, and contends that AID's requests for redactions amounted to economic duress, wherein the agency tied further consideration for award to Devres's willingness to release proprietary information from its technical proposals to the other offerors.

Our Office has adopted a general definition of economic duress wherein: (1) a party coerces or compels another to assent to a transaction against his will; (2) such assent is induced by wrongfully threatening action the party has no legal right to take; and (3) the threatened action, if taken, will cause irreparable damage to the other party. Gene Peters, 56 Comp. Gen. 459 (1977), 77-1 CPD ¶ 225. In addition, while we have recognized that the need for business motivates most who seek government contracts, such need--even though extreme--cannot support a claim of duress unless there has been a violation of contractual rights. Fordice Constr. Co., B-193719, Nov. 9, 1979, 79-2 CPD ¶ 346.

In our view, it does not appear that Devres was coerced into releasing the version of its technical proposal it released. As explained above, on July 11, Devres provided a redacted version of its proposal that offered to release substantially more of the proposal than Devres had offered in June. In reply, AID's July 19 letter identified five areas where the contracting officer raised additional questions about Devres's claimed redactions. Although the letter stated that the contracting officer did not believe that the proposed redactions could be appropriately withheld, it invited Devres to provide further justification for its proposed redactions, and to do so quickly to permit the agency to proceed with its recompetition.

⁶The recommendation of our Office limited release to the Nathan and DAI proposals because both offerors had been properly notified that a FOIA request had been made for their technical proposal; both provided recommended redactions from their proposals to AID; and there was no suggestion that AID had failed to redact the materials as recommended. Thus, there is no dispute that the proposals of Nathan and DAI released to Peat Marwick were released voluntarily. Agency for Int'l Dev.; Development Alternatives, Inc.--Recon., supra at 5.

Although Devres does not explain why it failed to respond to the July 19 letter, Devres's inaction ultimately caused the contracting officer to send a follow-up facsimile notice more than 6 weeks later asking for a reply. In this September 2 notice, AID referred Devres to the July 19 letter, asked for a response by September 6, and repeated the agency's warning to release Devres's proposal with only those redactions deemed appropriate by the contracting officer. By letter dated September 9, Devres chose not to attempt to justify its proposed redactions of July 11, but agreed to release even more of its technical proposal than it had offered previously--apparently because Devres did not wish to engage in further debate about the redactions.⁷ The contracting officer accepted Devres's offer.

Devres's decision to simply redact less of its proposal, rather than respond to the agency's request for further justification, undercuts its claim that it was coerced into releasing significant portions of its technical proposal. Simply put, Devres cannot claim to have assented to this transaction against its will, see Gene Peters, supra, when it failed to avail itself of the opportunities AID repeatedly extended to Devres to justify its proposed redactions. Devres also failed to seek the judicial remedies that would have been available if Devres believed that the agency would make an unauthorized release of Devres's technical proposal.

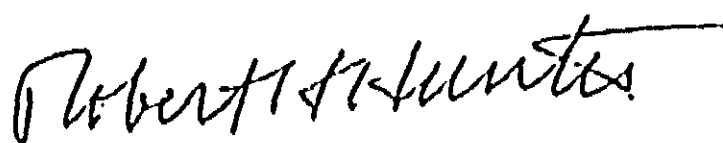
Devres also alleges that AID treated offerors unfairly when it permitted Peat Marwick to redact more of its technical proposal than it permitted Devres to redact.

Given our conclusions above, Devres cannot claim to have been treated unfairly when, in the final analysis, it volunteered redactions to its technical proposal consistent with those suggested by the contracting officer without availing itself of the opportunity to defend its claimed redactions. Devres's actions contrast with those of Peat Marwick, which responded to agency requests that it justify its proposed redactions until the agency was satisfied that it had adequately done so. In addition, there is no evidence that the agency unreasonably concurred with Peat

⁷Devres does not explain why it again failed to meet the agency's deadline of September 6, or why it failed to attempt to justify its earlier proposed redactions. In an affidavit from the contracting officer submitted with the agency's report--and not rebutted in the protester's subsequent filings--the contracting officer stated that Devres's president claimed that releasing more of the proposal "was quicker and easier than trying to answer [the] request for justification."

Marwick's proposed redactions. In short, we conclude that as a result of failing to defend its proposed redactions, and instead voluntarily acquiescing in most of the areas where the agency raised questions, Devres cannot now insist that the agency acted improperly because it did not demand that Peat Marwick match Devres's voluntary response. To hold otherwise would give to Devres the ability to set the standard of release to which the other offerors would be required to adhere.

The protest is denied.

for 
Robert P. Murphy
General Counsel