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Decision

Matter of: TeleCommunication Systems Inc.

File: B-404496.3

Date: October 26, 2011

Jessica C. Abrahams, Esq., McKenna Long & Aldridge LLP, for the protester.
Stephanie A. Kreis, Esq., Defense Information Systems Agency, for the agency.
Michael Charness, Esq., Jamie F. Tabb, Esq., and Christine N. Roushdy, Esq., Vinson & Elkins, for Stratos Government Services, Inc., the intervenor.
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of propriety of agency's termination of contract with awardee that hired a former high-level agency employee on the basis that there was an appearance of impropriety that may have caused an unfair competitive advantage for the awardee is denied where the agency conducted a thorough and well-documented investigation, which found that the employee had access to non-public source selection sensitive information during his government employment and appeared to have input into awardee's preparation of its revised proposal when employed by the awardee.

DECISION

TeleCommunication Systems, Inc. (TCS), of Annapolis, Maryland, protests the decision of the Defense Information Systems Agency (DISA) to terminate contract No. HC1013-11-D-0100, which had been awarded to TCS, and to award the contract to Stratos Government Services, Inc. (SGSI). TCS complains that the agency's termination of TCS's contract, based on the agency's determination that there was an appearance of impropriety that may have caused an unfair competitive advantage for TCS, was improper.

We deny the protest.

BACKGROUND

The agency issued request for proposals (RFP) No. HC1013-09-R-2004 on March 2, 2010, and initial proposals were received on April 28. The purpose of the procurement was to provide end-to-end internet protocol communications connecting Military Sealift Command maritime and mobile platforms to two fixed continental United States network operations centers. This was part of DISA's Satellite Communications (SATCOM) program. The RFP contemplated the award of a fixed-price indefinite-delivery/indefinite-quantity contract for a 4-year base period with four 1-year options. The contract was awarded to TCS on November 3. The agency informed SGSI, the incumbent contractor, of the award on the same date, and debriefed SGSI on November 8.

SGSI filed a protest at our Office on November 12, alleging, among other things, that the agency had ignored a serious conflict of interest created by TCS's hiring of the agency's former SATCOM Special Interest Program Manager (SATCOM PM). The agency decided to take corrective action to investigate whether TCS's hiring of the SATCOM PM created an unfair competitive advantage. Based on the agency's proposed corrective action, our Office dismissed SGSI's protest.

The agency performed an 8-month investigation, in which it collected and analyzed documentary evidence from agency and TCS records. On July 22, 2011, the contracting officer found, based on the documentary evidence, that although there may not have been an actual impropriety, there was an appearance of impropriety, which could not be avoided, neutralized or mitigated. In this regard, the contracting officer found that the documentary evidence showed that the SATCOM PM had access to source selection information and provided advice to TCS in preparing its proposal revisions. Accordingly, the contracting officer excluded TCS from further participation in the procurement and terminated TCS's contract. Contracting Officer's Investigation Report at 24.

DISCUSSION

Legal Framework for Conflict of Interest Determinations

One of the guiding principles recognized by our Office is the obligation of contracting agencies to avoid even the appearance of impropriety in government procurements. See Federal Acquisition Regulation § 3.101-1; Celeris Sys., Inc., B-404651, Mar. 24, 2011, 2011 CPD ¶ 72 at 7; Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5. In this regard, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not on mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; see NKF Eng'g,

Inc. v. U.S., 805 F.2d 372 (Fed. Cir. 1986) (overturning lower court's holding that appearance of impropriety, alone, is not a sufficient basis to disqualify an offeror, and finding that agency reasonably decided to disqualify offeror based on the appearance of impropriety where the offeror had hired a former government employee with knowledge of contractor proprietary information and source selection sensitive information); 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 at 7-8, aff'd, Brown Assocs. Mgmt. Servs., Inc.–Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 at 2-3 (where former agency employee who had access to source selection information left the agency and went to work for a contractor and prepared the contractor's proposal, the likelihood of an unfair competitive advantage warranted corrective action to protect the integrity of process, despite the good faith behavior of all parties).

The existence of an appearance of impropriety based on an alleged unfair competitive advantage depends on the circumstances in each case. As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual's knowledge of non-public information, our Office has considered a variety of factors, including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful. See Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 13; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 8; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., et al., supra. An unfair competitive advantage is presumed to arise where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining the contract, without the need for an inquiry as to whether that information was actually utilized by the awardee in the preparation of its proposal. Health Net Fed. Servs., LLC, supra, 2009 CPD ¶ 220 at 28 n.15; Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 18-19 n.16.

In reviewing bid protests that challenge an agency's conflict of interest determinations, the Court of Appeals for the Federal Circuit has mandated application of the "arbitrary and capricious" standard established pursuant to the Administrative Procedures Act. See Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009). To demonstrate that an agency's conflict of interest determination is arbitrary or capricious, a protester must identify "hard facts" that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). In Axiom, the Court of Appeals noted that "the FAR recognizes that the identification of conflicts of interest, and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." Axiom Res. Mgmt., Inc., 564 F.3d at 1382. The standard of review employed by this Office in reviewing a contracting officer's conflict of

interest determination mirrors the standard required by Axiom. In this regard, we review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether a conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See CIGNA Gov't Servs., LLC, B-401068.4; B-401068.5, Sept. 9, 2010, 2010 CPD ¶ 230 at 12.

SATCOM PM's Activities at the Agency

TCS argues that the SATCOM PM's participation in this procurement was very limited and did not warrant the disqualification of TCS from the competition. The record shows that the SATCOM PM continued in his position until he decided to retire from Government service in June 2009. On November 2, 2009, the SATCOM PM signed a memorandum addressed to his supervisor, which stated that the SATCOM PM was seeking employment outside of the Government and that he would disqualify himself from any involvement in matters (including this RFP) that would have a direct and predictable effect on any potential private sector firm with whom he was seeking employment. AR, attach. 4, Tab 19, SATCOM PM Memorandum, Nov. 2, 2009. TCS asserts that, prior to November 2, the SATCOM PM's participation in this procurement was "limited to summary information only" and "early market research activities aimed at exploring industry capabilities and abilities to meet the Satellite Communication program objectives." Protest at 10. TCS further claims that, after November 2, the SATCOM PM did not participate in any non-written communications concerning the RFP. Id. The protest states that the SATCOM PM does not recall being copied on any acquisition sensitive information, but, if he was, he did not solicit such information, and did not provide such information to TCS. Id. at 11. The SATCOM PM began his employment discussions with TCS ~~deleted~~, TCS submitted its proposal on April 24, 2010, and the former SATCOM PM began working for TCS on May 17, 2010.¹ Id.

The contracting officer determined that the documentary evidence he compiled indicated that the SATCOM PM's participation in the procurement was more involved than being "limited to summary information only" and "early market research exploring industry capabilities," and that the SATCOM PM did, in fact, have access to, and receive, acquisition sensitive information. Contracting Officer's Investigation Report at 22.

For example, the contracting officer found that numerous industry responses (marked proprietary) to the request for information (RFI), including those from Stratos and TCS, received in March 2009, were provided to an individual supervised by the SATCOM PM. Id. at 3. The contracting officer found that although "[i]t is not clear in the record whether [the SATCOM PM] received and reviewed the individual

¹ These contentions are supported by a declaration of the SATCOM PM.

responses,” they were provided to an individual supervised by him and were used for “one on one meetings with contractors during Industry Days held in April 2009.” Id. at 14, 22.

The contracting officer further notes that in October 2009 the SATCOM PM took part in at least one meeting concerning “critical decisions” about the procurement—i.e., the source selection strategy and process, the requirements for a statement of work or performance work statement, the desired selection team skill mix, and whether alternate proposals would be allowed. Id. at 4, 15; see AR, attach. 4, Tabs 13 and 17, E-mails and Attachments. At around the same time, the SATCOM PM was a recipient of a 75-page e-mail attachment containing a cost/benefit analysis, prepared by his office; this document was marked “FOUO [For Official Use Only], close hold, pre-decisional, not releasable under [Freedom of Information Act],” and included a detailed discussion of technical alternatives, their potential costs, and associated risks. Contracting Officer’s Investigation Report at 4, 15; see AR, attach. 4, Tab 16, E-mail, Oct. 20, 2009; Cost/Benefit Analysis, May 20, 2009.

The contracting officer also considered documentary evidence that, after November 2, the SATCOM PM received a consolidated list of comments to a draft RFP, which identified vendors by name, in preparation for a teleconference meeting in November 2009 to discuss certain elements of the RFP. Contracting Officer’s Investigation Report at 4-5, 16-17, 22; AR, attach. 4, Tab 18, E-mail, Oct. 30, 2009; Tab 23, Meeting Minutes, Nov. 19, 2009. The contracting officer noted that issues discussed at the meeting (attended by the SATCOM PM) included market research, industry responses, and a risk assessment of the acquisition. Also discussed were the composition of the technical evaluation team, the requirement of a statement of objectives or a statement of work in the solicitation, and the possible use of operational capability demonstrations during the evaluation. Contracting Officer’s Investigation Report at 6; AR, attach. 4, Tab 23, Meeting Minutes, Nov. 19, 2009.

The contracting officer also found that the SATCOM PM participated in another meeting 4 days later, where the topics again included specific issues for this procurement, including acquisition and source selection plans, peer review, dedicated source selection team members, and the use of operational capability demonstrations in the evaluation. Contracting Officer’s Investigation Report at 6, 17, 22; AR, attach. 4, Tab 24, Meeting Minutes, Nov. 23, 2009. The contracting officer further determined that in December, the SATCOM PM was included among the addressees on an e-mail that discussed various cost estimates and identified the current independent government cost estimate for this acquisition. Contracting Officer’s Investigation Report at 6; AR, attach. 4, Tab 25, E-Mail, Dec. 11, 2009.

Based on his review of the record, the contracting officer found that prior to his employment with TCS, the SATCOM PM had access to non-public procurement sensitive information, and possibly had access to the proprietary information of

potential offerors.² Contracting Officer's Investigation Report at 22. The contracting officer found that this access continued even after the SATCOM PM promised to disqualify himself from any involvement in this procurement because the SATCOM PM "failed to properly remove himself from the . . . procurement." *Id.* at 23. We find that that the contracting officer's judgments were reasonable and consistent with the record.

SATCOM PM's Employment With TCS

TCS also claims that the former SATCOM PM was "walled off" after he was employed by TCS and that he had nothing to do with this procurement. TCS first notes here that it submitted its proposal prior to hiring the SATCOM PM. Protest at 11. TCS further states that "[u]pon his employment [with TCS], [the former SATCOM PM] was 'walled off' from all activities related to this procurement;" that he "has not had any discussions with TCS personnel regarding its proposal, the relevant RFP, or the procurement generally;" and that TCS took "extraordinary measures to be certain that [the former SATCOM PM's] employment with TCS was in no way related to this procurement." AR, attach. 4, Tab 79, TCS Responses to Agency Questions, Feb. 4, 2011, at 1. TCS stated in a later response that it "took appropriate steps to "wall [the former SATCOM PM] off completely from the proposal and the proposal effort." AR, attach. 4, Tab 81, TCS Responses to Agency Questions, Feb. 11, 2011, at 3. TCS also stated:

In fact, TCS was so concerned about making sure its competitive position on this procurement was not tainted by the employment of [the former SATCOM PM] that the interviews discussions specifically did not mention this procurement and the capture responsibilities were assigned to another company vice president, . . . , with specific instructions to maintain a firewall with [the former SATCOM PM] for all matters related to this procurement.

AR, attach. 4, Tab 79 at 2.

The contracting officer reviewed numerous communications involving the former SATCOM PM while employed by TCS indicating that he was privy to, and had input regarding, information concerning TCS's revised proposal under the procurement. Contracting Officer's Investigation Report at 19, 24. The contracting officer found

² This contradicts TCS's arguments that the SATCOM PM had only "highly attenuated involvement with only the very preliminary stages of the . . . procurement," and that there was not a "scintilla of evidence establishing [the SATCOM PM's] access to non public information that would provide TCS with a competitive advantage." *See* Protest at 2, 13.

that the former SATCOM PM's participation in TCS's response to this procurement included reviewing and providing feedback on TCS's ~~Id.~~ at 19-22; see AR, attach. 4, Tabs 44-67, E-mails dated August 19 through October 8, 2010. Based on his review, the contracting officer determined that rather than being completely walled off from all activities related to this procurement as alleged by TCS, the former SATCOM PM "was repeatedly and regularly informed of the progress of revisions to the final proposal and asked for his opinion regarding some of those revisions." Contracting Officer's Investigation Report at 24. While the protester asserts that the contracting officer has overstated the former SATCOM PM's involvement in the preparation of TCS's revised proposal, we find that the contracting officer could reasonably be concerned about the propriety of these activities.

Conclusion

Based on the record, we conclude that the contracting officer conducted a thorough and well-documented investigation. We further conclude that the contracting officer reasonably determined that "the manner and extent of [the SATCOM PM's] involvement in the procurement may have created an actual unfair competitive advantage, but certainly created an appearance of impropriety that is based on significant documentary evidence and cannot be avoided, neutralized or mitigated." Id. at 24. In this regard, the contracting officer determined that the facts here indicated that the SATCOM PM not only had access to non-public information, but also provided input related to TCS's revised proposal. Contracting Officer's Investigation Report at 22-24. These facts, as identified by the contracting officer, create the presumption that an unfair competitive advantage has arisen, without the need to inquire as to whether the information was actually used by TCS in the preparation of its proposal. See Health Net Fed. Servs., LLC, supra.; Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra. While TCS disagrees with the contracting officer's determination to terminate TCS's contract and to eliminate it from the competition because of an apparent conflict of interest, it has not shown that the contracting officer's conclusion was unreasonable or not based on hard facts. Because the agency has given meaningful consideration to whether a conflict of interest existed and its judgment has not been shown to be unreasonable,

we will not substitute our judgment for that of the agency.³ See CIGNA Gov't Servs., LLC, supra.

The protest is denied.

Lynn H. Gibson
General Counsel

³ We have considered all of TCS's various allegations and find no basis to sustain its protest. Specifically, TCS claims that the award to SGSI was improper because its proposal was not reasonably evaluated, no best-value evaluation was conducted after it was decided to terminate TCS's contract, and SGSI may have gained an unfair competitive advantage because it hired a former agency employee more than a year before the RFP was issued. However, TCS is not an "interested party" entitled to raise these issues under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2011), given that TCS was reasonably disqualified from the competition. TCS's assertions that the agency had communications with SGSI employees during the course of the agency's investigation, which may have violated the Procurement Integrity Act, will not be considered because there is no evidence that TCS raised these issues with the agency within 14 days of allegedly learning of them, as required by the Act. Our Bid Protest Regulations provide that our Office will not consider allegations that the Procurement Integrity Act was violated unless they had previously been timely brought to the agency's attention. 4 C.F.R. § 21.5(d).