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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Snell Enterprises, Inc.

File: B-290113; B-290113.2

Date: June 10, 2002

Kevin P. Mullen, Esq., and Maureen A. Kersey, Esq., Piper Rudnick, for the protester.
Devon E. Hewitt, Esq., and Daniel S. Herzfeld, Esq., Shaw Pittman, for Impact Innovations Group, Inc., an intervenor.
Mary E. Clarke, Esq., and Thomas Tinti, Esq., Department of Defense, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that a firm should be excluded from competition under a solicitation for information technology services because it assisted in the preparation of the solicitation is denied, where the allegation is based on inference and suspicion rather than substantial facts or hard evidence, and the agency unequivocally and credibly asserts that the firm did not assist in the preparation of the solicitation.

2. Protest that a firm should be excluded from competition under a solicitation for information technology services because the firm, through its performance of a delivery order for the agency, was given access to information that the protester now claims as proprietary, is denied, where the information was furnished voluntarily and without restrictions on its use.

3. With regard to a solicitation that consolidates services previously performed by two contractors under separate delivery orders into one contract, protest by one of the contractors that the other contractor (a competitor) gained an unfair competitive advantage by obtaining from the agency the names and home telephone numbers of the contractor's employees is denied where the contractor's competitor was already familiar with the contractor's employees and there is thus no indication that the agency's actions resulted in any unfair competitive advantage.

4. Prior performance of similar requirements by a firm does not give rise to a prohibited conflict of interest or provide an unfair competitive advantage where any advantage the firm may have is merely that of an incumbent contractor.

DECISION

Snell Enterprises, Inc. protests a procurement under request for proposals (RFP) No. MDA112-02-R-0009, issued by the Television-Audio Support Activity (T-ASA), American Forces Information Service (AFIS), Department of Defense (DOD), for on-site information systems administration and engineering support for the AFIS-Headquarters (AFIS-HQ), the Defense Information School (DINFOS), and other AFIS locations. Snell contends that Impact Innovations Group, Inc., which has also submitted a proposal in response to the solicitation, has an impermissible conflict of interest.

We deny the protest.

The AFIS provides, among other things, advice and assistance to the Office of the Assistant Secretary of Defense regarding the management and operation of certain DOD internal information programs, public affairs programs, and audiovisual training and education. The information and technology engineering services in support of AFIS have been performed since 1997 by Snell and Impact under their respective General Services Admininstration Federal Supply Schedule (FSS) contracts. Snell has been providing on-site technical support to DINFOS, including the integration, installation, operation and maintenance of approximately 1,400 computer systems, at an annual cost to the government of $1.85 million. Impact has been providing on-site application development support primarily at AFIS-HQ under one delivery order at an annual cost of $1.3 million, and on-site technical support to AFIS-HQ and support to all AFIS field activities, including DINFOS, under another delivery order at an annual cost of $2 million. Agency Report (AR) at 1-3.

The agency explains that in late 2001, it decided to begin planning for the consolidation of the services currently provided by Snell and Impact under one contract vehicle in order "to promote the implementation of a standard information technology architecture, standards, and procedures at AFIS-HQ and DINFOS." This RFP provides for the "award of an interim contract" to "provide time for the preparation of a more comprehensive follow-on acquisition." AR at 2.

The RFP, issued March 4, 2002 to four FSS vendors, provides for the award of a fixed-price delivery order under the successful offeror's FSS contract. The RFP states that the period of performance for this delivery order will be from date of award through January 31, 2003, and provides that the award will be made to the offeror submitting the proposal representing the best value to the government considering the following evaluation factors listed in descending order of importance: technical/management, past performance, and price.

The RFP requests that offerors submit price and performance proposals. Performance proposals are to include, among other things, a description of the

offerors' "abilities to carry out the Government's performance requirements, as delineated in the Performance Work Statement [PWS]," and current and relevant past performance data. RFP at 8. With regard to price proposals, the RFP includes price schedules setting forth the basic tasks required, as well as the agency's estimate of each functional position (such as "project manager") and staff year(s) required per position to accomplish the listed tasks. Offerors are to complete the price schedule by providing an hourly rate per position, and calculating, based upon the offeror's hourly rates and the RFP's staff years, a net amount per task. RFP at 3-9.

Snell filed this protest 2 days before the March 15 proposal due date. Snell contends that Impact has a conflict of interest and should not be allowed to compete under the RFP. Specifically, Snell argues that Impact was involved in the preparation of the RFP's PWS, had access to Snell's proprietary information during Impact's performance of the delivery orders mentioned above, and has source selection information that is not available to Snell or any other offeror.

Section 2.101 of the Federal Acquisition Regulation (FAR) provides as follows:

> 'Organizational conflict of interest' means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Contracting officers are required to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a); 9.505. The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.

The first group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or the specifications. In these "biased ground rules" cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR §§ 9.505-1, 9.505-2. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 13.

The second group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR § 9.505-4. In these "unequal access to information" cases, the concern is limited to the risk of the firm gaining an unfair competitive advantage; there is no issue of possible bias. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 12

The third group comprises cases where a firm's work under one government contract could entail its evaluating itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals. FAR § 9.505-3. In these "impaired objectivity" cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by the relationship with the entity whose work product is being evaluated. Aetna Gov't Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 13.

The responsibility for determining whether an actual or apparent conflict will arise, and to what extent a firm should be excluded from the competition, rests with the contracting agency. RMG Sys., Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 at 4. Contracting officers are to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant conflict of interest exists. FAR § 9.505. Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. RMG Sys., Ltd., supra; Chemonics Int'l, B-222793, Aug. 6, 1986, 86-2 CPD ¶ 161 at 7. We will not overturn an agency's determination as to whether an offeror or potential offeror has a conflict of interest except where it is shown to be unreasonable. RMG Sys., Ltd., supra. Here, Snell's allegations raise concerns about both biased ground rules and unequal access to information, and as explained in detail below, we find reasonable the agency's position that Impact does not have any significant conflicts of interest that require resolution or Impact's exclusion from the competition.

Snell first contends that "Impact assisted AFIS in preparing the new PWS," and that because of this, Impact should be "declared ineligible to compete for the AFIS contract." Protester's Comments at 2-3.

In response, the agency explains that it

> prepared the PWS using the existing descriptions and statements of work (SOWs) that have been in use for years and are found in the three existing task/delivery orders. These SOWs were written without assistance or input from contractors. In drafting this PWS, T-ASA did modify these SOWs, though only slightly, to reflect the current requirements. The respective Contracting Officer's Representatives contacted [Snell] and Impact and asked them to provide technical information describing their current contract requirements. This information was reviewed by those preparing

the PWS and incorporated to create a PWS that adequately described the needs of the government. The information was neutral in nature and did not favor one contrator over the other.

AR at 6-7.

The protester asserts that the agency's explanation regarding the development of the RFP's PWS "appears to be untrue." In this regard, Snell argues, for example, that the new PWS could not have been prepared by revising past SOWs, given that the previous SOWs "describe[ed] the work requirements by reference to the various labor positions and their respective responsibilities," in contrast to the new PWS that "sets forth the requirements in terms of tasks." Snell adds here that the new PWS also differs in that it "reflects the present Windows2000 desktop environment, software applications, and future project plans, none of which existed when the current DINFOS PWS was issued." Finally, the protester asserts that in its view, the agency personnel simply lack the "high-end" technical expertise required to develop the new PWS by revising the previous SOWs. Protester's Comments at 3-5.

In our view, Snell's arguments here are based entirely on inference and suspicion, not substantial facts or hard evidence. The agency asserts unequivocally, with supporting statements from the responsible agency technical representative, that Impact personnel did not participate in the development of the new PWS. AR, Tab C, Statement by Chief, AFIS-HQ Enterprise Information Technology Operations; Agency Supplemental Report (ASR), Tab 1, Statement by Chief, AFIS-HQ Enterprise Information Technology Operations. We find credible the agency's explanation regarding its development of the PWS. For example, we fail to see why the PWS's reference to the Windows2000 desktop environment or future project plans, or its description of the work required by task rather than position, establishes that Impact personnel, despite the agency's statements to the contrary, actually wrote the PWS. Accordingly, we deny this aspect of Snell's protest. See Chemonics Int'l, supra.

Snell next argues that Impact should be excluded from the competition because Impact, during its performance of one of the delivery orders mentioned above, had access to information that Snell now claims is proprietary. Snell contends that its "proprietary information released to Impact involves DINFOS networking materials and software applications information." Snell gives examples of the materials regarding the DINFOS network which Snell argues are proprietary to it and to which it asserts Impact had access, and explains that "[t]hese materials are proprietary because they reflect [Snell's] technical and business expertise and expertise gained from the incumbent DINFOS support contract." The protester adds that in its view, the "materials are competively sensitive because they enable [Snell] to more effectively compete for the new AFIS contract." Snell claims that it did not object to Impact's access during the performance of the delivery order to the materials, which Snell now claims as proprietary, because Snell assumed that the DINFOS requirements would be competed as a separate contract, rather than as part of the

AFIS requirements as provided for by the RFP here, and because Snell "presumed that Impact would not be permitted to compete for the DINFOS RFP, because of [Impact's] obvious conflict of interest." Protester's Comments at 7-8; exh. 1, Declaration of Snell's Chairman and Chief Executive Officer, at 3-4. Snell concludes here that had it "known that Impact would be permitted to compete for the new AFIS contract, [Snell] would not have allowed Impact to obtain this sensitive information." Protest at 10.

The agency responds that none of the information now claimed by Snell as proprietary can properly be considered to be so. The agency explains that the information now claimed by Snell as proprietary "was furnished voluntarily, with no stated limitations on its use, and all government and Impact personnel in attendance understood it to be property of the U.S. Government." ASR, Tab 1, Statement by Chief, AFIS-HQ Enterprise Information Technology Operations, at 7, 15. The agency states that "[s]ystem documentation of government networks, including network diagrams, no matter who develops them, is and must be the property of the government as system security and integrations are inherently government functions." Id. at 6. The agency adds that "[a]ll plans were developed in consultation with government personnel," and that "[i]nformation regarding the present state and plans for government networks cannot be proprietary, as the government must operate these systems without encumbrances." Id. Finally, the Chief, AFIS-HQ Enterprise Information Technology Operations states that she "did not tell [any Snell personnel] that Impact would not compete for the new contract," as claimed by Snell, and she did not hear any Impact representative make any such statements. Id. at 16-17.

Our Office has stated that, as a general rule, proprietary information is that which is so marked or otherwise submitted in confidence to the government. Interior Sys., Inc., B-271469, July 23, 1996, 96-2 CPD ¶ 34 at 2; John Baker Janitorial Servs., Inc., B-201287, Apr. 1, 1981, 81-1 CPD ¶ 249 at 2. FAR § 9.505-4(a) specifically provides:

> When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—
>
> (1) Furnished voluntarily without limitations on its use; or
> (2) Available to the Government or contractor from other sources without restriction.

Here, the record reflects, and the protester does not persuasively argue otherwise, that the information now claimed by Snell as proprietary was "[f]urnished voluntarily

without limitations on its use." That is, the information was not marked as proprietary, nor was it submitted in confidence to the government or Impact. Accordingly, Snell's assertion that Impact should be excluded from this competition because Snell provided it with information that Snell did not claim at the time, but now claims in this protest, was proprietary, is without merit.[1]

Snell next contends that Impact, and another competitor, CACI Technologies, Inc., should be excluded from the competition because the agency provided these firms with the names and home telephone numbers of Snell employees working at DINFOS. Snell states that it never consented to the release of this information, and that it is competitively prejudiced by the agency's actions, given that "[p]ersonnel are the core of any competitive services contract" and these firms now have "an important advantage over [Snell] in the competitive search for qualified profession[als] to perform the new AFIS contract." Protest at 5; Protester's Comments at 11.

The agency concedes that it provided Impact and CACI with the names and home numbers of Snell's DINFOS employees. The agency asserts, however, that Snell was not prejudiced by the agency's actions here, given that [DELETED] and "there is ample evidence that Impact could have gained access [DELETED] through other means," and because CACI's offer did not propose or contain the names of any of the Snell DINFOS employees that had been provided by the agency. ASR at 4-5. With regard to Impact, the agency has provided an "HQ/DINFOS Interaction Log," which documents 18 instances where Impact and Snell DINFOS employees "met to discuss technical issues relevant to their performance under their delivery orders." Id.; AR, Tab C, HQ/DINFOS Interaction Log. The log also establishes that Impact employees [DELETED]. ASR at 5.

Based on the record here, we cannot object to the agency's determination not to exclude Impact and CACI from competing under this RFP, despite the agency's provision of the names and home telephone numbers of Snell's DINFOS employees to these firms. Although the release of the names and telephone numbers may have made it easier for Impact and CACI to contact Snell's DINFOS employees, it appears that their identities and telephone numbers could easily have been otherwise obtained. For example, as set forth above, the names of Snell's DINFOS employees [DELETED] were known to Impact, and [DELETED] presumably the telephone numbers of [DELETED] Snell DINFOS employees, appear in the local telephone directories. Under these circumstances, we deny this aspect of Snell's protest. Cf. RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213 at 4-5 (protest

[1] We note that FAR § 9.505-4(b) provides that where a contractor obtains access to another contractor's proprietary data, it must enter into an agreement with the other contractor to protect information from unauthorized use. No such agreement was requested or executed here.

that agency disclosed the incumbent protester's employees' names to competitors was denied, where an agency employee, now working for awardee, provided the names and telephone numbers of two of the protester's employees to the awardee, and the record demonstrated that the names and numbers of these individuals could have been otherwise obtained).

Finally, Snell protests that Impact should be excluded from the competition under this RFP because "[t]hrough its AFIS-HQ contract activities, Impact alone has access to complete technical and cost information regarding the information systems at AFIS-HQ, Dinfos and the other AFIS field offices." Protest at 10. The protester adds here that "[a]s the AFIS-HQ support contractor, only Impact knows the true nature and scope of these requirements, enabling Impact to prepare a more effective technical/management and past performance proposal for the new AFIS solicitation." Protetster's Comments, exh. 1, Declaration of Snell's Chairman and Chief Executive Officer, at 11.

The agency responds that it "sought to neutralize and mitigate any advantage gained by the incumbency" by providing the functional positions/labor mix and hours needed to perform the required tasks in the RFP. The agency explains that, in its view, "[a]ny firm having relevant experience as a service provider for the operation and maintenance of the [information technology] systems described in the PWS should be able to determine the appropriate labor categories for the functional positions identified" in the RFP, and thus should be able to effectively compete for the award. The agency adds that to the extent that Impact has an advantage in this competition because of its previous performance of the AFIS delivery orders, Snell enjoys a similar advantage because of its performance of the DINFOS delivery order. AR at 9-11.

The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror's prior performance of a particular requirement. For example, an incumbent contractor's acquired technical expertise and firsthand knowledge of the costs related to a requirement's complexity are not generally considered to constitute unfair advantages the procuring agency must eliminate. Optimum Tech., Inc., B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7; Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230 at 12.

Here, Impact's status with regard to the protested procurement is essentially that of an incumbent contractor (as is Snell's to a somewhat lesser degree). This aspect of Snell's protest constitutes nothing more than Snell's complaint that its performance experience is not the same as Impact's. There is no basis to object to an offeror's advantage unless it is created by an improper preference or other unfair action by the procuring agency. Optimum Tech., Inc., supra; Versar, Inc., supra. In our view, the record indicates that the agency structured the solicitation is such a way as to

minimize Impact's (and Snell's) "incumbent advantage," and there is no suggestion in the record that the agency's actions were the result of any improper preference for Impact or were otherwise unfair.

In sum, we agree with the agency that Impact does not have any conflicts of interest or other unfair competitive advantage with regard to this RFP.

The protest is denied.

Anthony H. Gamboa
General Counsel