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Decision

Matter of: The GEO Group, Inc

File: B-405012

Date: July 26, 2011

Caroline M. Mew, Esq., Joseph P. Dirik, Esq., and Matthew H. Kirtland, Esq., Fulbright & Jaworski, LLP, for the protester.

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., and Richard H. Snyder, Smith Pachter McWhorter PLC, and Michael D. Brown, Esq., Paul A. Kemnitzer, Esq. and Matthew Bryant, Esq., Ohrenstein & Brown, LLP, for the intervenor.

William D. Robinson, Esq., and Christine M. Ciccotti, Esq., Department of Justice, Bureau of Prisons, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest based on an alleged violation of the Procurement Integrity Act and alleged conflicts of interest is denied where the record does not support the protester's allegations.

2. Protest challenging contracting officer's affirmative determination of responsibility is dismissed where the assertion on which the protest is based does not constitute the type of allegation that triggers Government Accountability Office (GAO) review of affirmative responsibility determinations under GAO's Bid Protest Regulations.

DECISION

The GEO Group, Inc., of Boca Raton, Florida, protests the award of a contract to Community First Services, Inc. (CFS), of New York, New York, by the Department of Justice, Bureau of Prisons (BOP), under request for proposals (RFP) No. 200-1042-NE, for residential reentry center (RRC) services. In its protest, GEO alleges that CFS violated the Procurement Integrity Act, 41 U.S.C. § 423(a) (2006), CFS had an improper, unmitigated, unequal access to information organizational conflict of interest, and the agency should have found CFS nonresponsible.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the RFP on January 16, 2009, seeking a contractor to provide community-based residential and non-residential correctional services. GEO, the incumbent contractor, and CFS submitted proposals by the March 16 closing date.

With the submission of its proposal, GEO included a letter to the agency alleging that its vice president for community corrections, who had directed its incumbent contract efforts, resigned suddenly on March 13 after transmitting copies of confidential GEO information to his private email account. Apparently, unbeknownst to GEO group at the time, its former vice president was also the CEO and sole owner of CFS, which he had founded in New York in 2005. Upon receiving the GEO letter, the contracting officer recognized that GEO's former vice president was the CEO of CFS, and noted similarly drafted passages in the GEO and CFS proposals. Based on these facts, the contracting officer recommended to the contracting section chief that the procurement be put on hold and that the issues presented in the GEO letter be investigated as a potential violation of the Procurement Integrity Act (PIA), 41 U.S.C. § 423(a) (2006).

Two special agents from the Department of Justice, Office of Inspector General (DOJ OIG), were assigned to conduct the investigation. At the BOP, the special agents interviewed the contracting officer, contracting section chief, and chief of the acquisitions branch, to discuss the allegations. Additionally, the special agents interviewed GEO's former vice president (hereafter referred to as the CFS CEO), CFS's proposal writer, and GEO's business manager, among others. They also took possession of the office computer used by the CFS CEO during his employment with GEO.

The special agents completed their investigation in November 2009 and reported to the BOP contracting staff that based on a review of the interviews and relevant records, the DOJ OIG "could not substantiate bid rigging or procurement integrity violations." DOJ OIG Abbreviated Report, at 3.¹ In this regard, the DOJ OIG did not find any evidence that elements of CFS's proposal had been derived from any of GEO's information. Specifically, it found that CFS's proposal had been prepared by a third-party private proposal writer, [DELETED]. *Id.* at 2-3. The DOJ OIG also

¹ The results of the DOJ OIG investigation were discussed with the BOP orally in November 2009. The DOJ OIG Abbreviated Report for the record was prepared by the DOJ in January and February 2010.

relied on statements by the Business Manager for GEO's New York City RRC properties indicating that she did not share any pricing materials with the CFS CEO.² Id. [DELETED]. Id. at 3. Based on these findings, the BOP directed the procurement to continue.

The agency engaged in three rounds of discussion with the offerors before requesting revised final proposals. [DELETED] offerors timely submitted revised final proposals in October 2010. After evaluation of [DELETED] proposals, the contracting officer found that CFS's proposal represented the best value to the government. The contracting officer then completed a certification of procurement integrity stating that, to the best of his knowledge, he was not aware of any violation of the procurement integrity act. The contracting officer also documented his affirmative responsibility determination. Notice of award to CFS was issued to the offerors on February 16, 2011.

GEO received a debriefing on February 18, and timely filed a bid protest with the BOP agency protest official (APO) on February 28, alleging that CFS violated the PIA, had an improper organizational conflict of interest, and was not a responsible contractor. The APO reviewed the pre- and post-award contract file, the DOJ OIG abbreviated report, and supplemental information provided by GEO. The APO also contacted the lead DOJ OIG special agent on this matter, to discuss whether any supplemental information obtained since the time of the DOJ OIG report would have changed the report's conclusions. The special agent indicated that the supplemental information would not have changed the report. The BOP APO denied GEO's agency protest on April 8. This protest followed.

PROCUREMENT INTEGRITY ACT

GEO again alleges that CFS violated the PIA, asserting that it is implausible that CFS did not utilize confidential GEO information obtained by the CFS CEO in preparing its proposal, and that the agency erred in ignoring this PIA violation. However, our review of the record demonstrates that the agency acted in accordance with applicable regulations in reviewing the alleged PIA violation, reasonably concluded that no violation occurred, and properly determined to continue with the procurement.

The PIA provides that "[a] person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information

² The DOJ OIG report states that "OIG interviewed . . . the Business Manager for GEO's New York City RRC properties" and "[The business manager] stated she did not share any pricing materials with [the CFS CEO]." DOJ OIG Abbreviated Report, at 3.

relates.” 41 U.S.C. § 423(b). FAR § 3.104-3(a) dictates that a contracting officer who receives or obtains information of a possible violation of the PIA must determine if the possible violation has any impact on the pending award or selection of the contractor. If the contracting officer concludes that a violation may impact the procurement, the contracting officer is required to report the matter to the head of the contracting activity (HCA). FAR § 3.104-7(b). The HCA must review the information and take appropriate action, which includes either: 1) advising the contracting officer to proceed with the procurement; 2) beginning an investigation; 3) referring information to appropriate criminal investigative agencies; 4) concluding that a violation occurred; or 5) recommend to the agency head that a violation has occurred and void or rescind the contract. Id. In the case of the BOP, the Justice Acquisition Regulation (JAR) further directs the contracting officer to refer possible violations of the PIA to the DOJ OIG. JAR § 2803.104-10.

Here, the agency followed exactly the procedures set forth above in investigating the alleged violation. Upon receiving information concerning a potential PIA violation from GEO, the contracting officer referred the matter to the HCA and the DOJ OIG. The DOJ OIG then thoroughly investigated the record, conducted interviews, and analyzed GEO computers before concluding that there was no indication of theft of GEO property or proprietary information, and no information to substantiate a PIA violation. On the basis of the investigation results, the HCA directed the contracting officer to proceed with the procurement. On this record, we see no basis to conclude that a PIA violation occurred, or that the agency’s actions were unreasonable.

GEO alleges that the DOJ OIG and BOP investigations failed to reasonably consider declarations of GEO’s business manager stating that the CFS CEO requested, and was provided with, a draft of GEO’s price proposal for this procurement prior to his resignation.³ In its rejection of this allegation, the agency reasonably questioned the credibility of GEO’s allegations given that they were inconsistent with previous statements made by GEO’s business manager to the DOJ OIG. As noted above, the DOJ OIG report states that “OIG interviewed . . . the Business Manager for GEO’s New York City RRC properties” and “[The business manager] stated she did not share any pricing materials with [the CFS CEO].” DOJ OIG Abbreviated Report, at 3. In any event, the agency argues, and we agree, that any protected pricing materials obtained by the CFS CEO in this manner are covered by the PIA’s “savings clause,” which provides in relevant part that “[t]his section does not . . . restrict a contractor

³ We have also reviewed all other documents allegedly obtained by the CFS CEO prior to his resignation and previously considered by the DOJ OIG and BOP. We agree with the agency that none of these documents constitute “bid or proposal information” or “source selection information,” as defined by the PIA. See 41 U.S.C. § 423(f).

from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 423(h)(2).⁴

GEO objects to the application of the PIA savings clause in this context. GEO argues that where the CFS CEO failed to disclose his interest in CFS to GEO, and purposefully lied to GEO in breach of his fiduciary duties and GEO’s code of ethics, the savings clause protections of the PIA have been waived. We disagree. We have repeatedly determined that the PIA’s savings provisions apply notwithstanding the fact that the voluntarily provided information is subsequently misused or not properly safeguarded. See, e.g., Telephonics Corp., B-401647, B-401647.2, Oct. 16, 2009, 2009 CPD ¶ 215 at 6; Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2, at 12. Here, GEO voluntarily provided its confidential information to the CFS CEO in the course of his employment with GEO. The CFS CEO’s alleged misuse of that information in transferring it to CFS, breach of his fiduciary duties to GEO, or breach of GEO’s corporate code of ethics, are matters of a private dispute not for resolution by our Office.⁵ Id.

ORGANIZATIONAL CONFLICT OF INTEREST

GEO also alleges that, based on the same facts underlying its PIA allegation, CFS has an improper, unmitigated, unequal access to information OCI. More specifically, GEO states that CFS obtained nonpublic, procurement-related information as a result of the CFS CEO’s participation in GEO’s management of the incumbent contract for these services. We conclude that GEO misunderstands the circumstances under which an unequal access to information OCI occurs, and that GEO’s allegations are without merit.

An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR §§ 9.505(b), 9.505-4; Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 at 8; see also McCarthy/Hunt, JV, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 at 5. As the FAR makes clear, the concern regarding this category of OCI is that a firm may

⁴ Additionally, the agency did not find any credible evidence to support a conclusion that elements of CFS’s proposal were derived from GEO’s confidential information. As noted above, the DOJ OIG investigation found that CFS had contracted with a private proposal writer for the development of its proposal. [DELETED]. The DOJ OIG investigated this matter and found that the proposal submitted by the proposal writer to the CFS CEO was identical to the proposal CFS submitted to the BOP. DOJ OIG Abbreviated Report, at 2-3.

⁵ We note that this dispute is the subject of litigation at the United States District Court for the Eastern District of New York, Docket No. 11-CV-1711.

gain a competitive advantage based on its possession of “[p]roprietary information that was obtained from a Government official without proper authorization,” or “[s]ource selection information . . . 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).

As an initial matter, the agency reasonably found the protester’s allegations to be unsubstantiated. In this regard, the agency relied on the findings of the DOJ OIG investigation, which found that CFS’s proposal had been prepared by a third-party proposal writer, CFS’s CEO did not alter the proposal in any way, and there was no credible evidence of the CFS CEO of having obtained GEO’s pricing information. Moreover, as discussed in the context of the alleged PIA violation, above, the CFS CEO’s alleged misuse of GEO’s confidential information amounts to a private dispute not for resolution by our Office. In the OCI area, our Office has held that “where information is obtained by one firm directly from another firm—by, for example, dissemination of information by former employees—this essentially amounts to a private dispute between private parties that we will not consider absent evidence of government involvement.” Ellwood Nat’l Forge Co., B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 3.

RESPONSIBILITY DETERMINATION

Finally, GEO alleges that the contracting officer’s affirmative determination of responsibility was arbitrary and capricious, for failure to consider evidence that the CFS CEO: held undisclosed concurrent executive positions with GEO and CFS, violated GEO’s code of ethics, and breached his fiduciary duties. GEO argues that proper consideration of these issues could only support a determination that CFS did not meet the “ethics and integrity” requirements for an affirmative responsibility determination, and that the affirmative determination of responsibility must be rescinded. FAR § 9.104-1(d).

There is no requirement that contracting officers explain the basis for an affirmative responsibility determination, FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8; a written explanation is only required when a CO makes a determination of nonresponsibility. FAR § 9.105-2(a)(1). Since an affirmative determination of responsibility is largely a matter within a CO’s discretion and need not be documented, our Office, as a general matter, will not consider a protest challenging an affirmative determination of responsibility except under limited exceptions. 4 C.F.R. § 21.5.

Our Office will consider a protest of an affirmative determination of responsibility where the protest identifies evidence raising serious concerns that, in reaching the responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); T. F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5. In that context, we will review a challenge to an agency’s affirmative

responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5.

This basis of GEO's protest fails to meet the threshold for our review, and must be dismissed. The allegations that our Office has reviewed in the context of an affirmative determination of responsibility generally pertain to very serious matters such as potential criminal activity; not disputes between private parties. For example, in FN Mfg., Inc., our Office reviewed an allegation that the agency failed to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement. In Southwestern Bell Tel. Co., we reviewed an allegation that the agency failed to consider that the awardee's CEO had been indicted for conspiracy and fraud by the U.S. Attorney for Southern New York. In Verestar Gov't Servs. Group, we reviewed an allegation that the agency had failed to consider that the awardee was embroiled in a massive public accounting scandal and had vastly misstated its earnings.

In contrast, the only allegation in this case that rises to the level of involvement in potential criminal activity relates to the PIA, an issue which was investigated by the DOJ OIG and ultimately not substantiated. The remaining allegations, that the CFS CEO improperly failed to disclose work for a competing firm in violation of his fiduciary duties and the GEO code of ethics, as previously discussed, amount to a private dispute between private parties. These matters do not meet the standard of review for our Office's consideration of an affirmative responsibility determination. See Hendry Corp., B-400224.2, Aug. 25, 2008, 2008 CPD ¶ 164 at 3-4 (existence of an applicable nondisclosure agreement and alleged violations of such an agreement by the awardee are matters of a private dispute between private parties and do not meet the threshold for our Office's review in the context of an affirmative determination of responsibility). Moreover, our review of the record demonstrates that the contracting officer was well aware of the allegations concerning the CFS CEO when making his affirmative responsibility determination. This aspect of GEO's protest is therefore dismissed.

The protest is denied in part and dismissed.

Lynn H. Gibson
General Counsel