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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Threat Management Group

File: B-407766.5

Date: March 28, 2013

J. Alex Ward, Esq., and Charles L. Capito, Esq., Jenner & Block LLP, for the protester.
Col. Barbara E. Shestko, Christine C. Piper, Esq., and Capt. Joel B. Lofgren, Department of the Air Force, for the agency.
Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed is dismissed in part and denied in part where agency does not object to such reimbursement as to one protest ground, and where remaining grounds of protest are clearly severable from that ground and not clearly meritorious.

DECISION

Threat Management Group (TMG), of Ladson, South Carolina, requests that we recommend that it be reimbursed the costs of filing and pursuing its protest challenging the Department of the Air Force's award of a contract to R3 Strategic Support Group, Inc. (R3), of Coronado, California, under request for proposals (RFP) No. FA4452-12-R-0003, for explosive ordnance disposal support services.

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

The solicitation, issued on May 31, 2012, anticipated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract based on an evaluation of the offerors' technical proposals, pricing, and past and present performance history. Award was to be made to the proposal that represented the "best value" to the government, with past and present performance history to be considered "significantly more important than price." The solicitation explained that the evaluation process would begin with a pass/fail technical evaluation of proposals under three subfactors: (1) project plan; (2) quality control plan; and (3) staffing plan. Then, starting with the

lowest-priced technically acceptable proposal, the agency was to consider the offeror's recent and relevant performance and to assign a performance confidence rating of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. If the lowest-priced technically acceptable proposal was judged to have a substantial confidence rating, that proposal would represent the best value for the government and the evaluation would stop at that point; award was to be made to that offeror without further consideration of any other proposals. RFP at 71-76, RFP Amend. No. 4 at 14.

The Air Force received proposals from five firms by the June 29 closing date. Three proposals, including those of R3 and TMG, were evaluated as technically acceptable by a source selection evaluation team (SSET). R3's offer was the lowest-priced, and TMG's the highest-priced. Because R3's proposal was assessed a substantial confidence rating, in accordance with the terms of the solicitation, the evaluation stopped, with R3's proposal deemed represent the best value to the government.

On November 8, TMG filed a protest in our Office. TMG argued that R3 had an unfair competitive advantage because the firm's proposed program manager was a current government employee with responsibilities for the agency's explosive ordnance disposal (EOD) program.[1] TMG alleged, without any documentary support, that this individual had access to non-public information about TMG and other existing EOD contractors. Protest at 9. TMG next argued that the agency unreasonably found R3's proposal technically acceptable because R3 could not have proposed the level of staffing that TMG believed necessary. TMG finally argued that the agency unreasonably assigned R3's past performance a substantial confidence rating because, TMG alleged, R3 lacked relevant past performance for a certain portion of the performance work statement (PWS).

In its report responding to the protest, the agency rebutted each allegation. With respect to TMG's unfair competitive advantage allegation, the Air Force explained

[1] TMG styled its allegation in this regard as an "unequal access" organization conflict of interest (OCI). As we have indicated, the unfair competitive advantage analysis stemming from a firm's hiring of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests alleging that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest. See Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28 n.15. TMG also alleged that the facts gave rise to "impaired objectivity" and "biased ground rules" OCIs. After reviewing the agency report, indicating that the individual had no involvement with planning the procurement, evaluating proposals, or the award decision, TMG withdrew these allegations. TMG Comments at 3 n.2.

that the individual in question was a current government employee who had, some months earlier, notified the agency of his intent to work for R3 in the future. The Air Force explained that he had no role in the procurement, and did not have access to TMG's or other EOD contractors' ratings, pricings, strategies, approaches, or performance records. Contracting Officer's Statement at 14.

Regarding R3's allegedly inadequate staffing, the Air Force asserted that the PWS did not specify a number of required personnel. The agency explained that R3 used a method other than the one used by TMG to calculate staffing needs, and cited to portions of the record showing the SSET's favorable consideration of R3's proposal. This included a review of R3's personnel matrix, which detailed the personnel resources R3 planned to use to meet the PWS requirements. Id. at 14. Finally, in response to TMG's allegations concerning R3's past performance, the agency cited a passage from the source selection decision document as evidence that its evaluation was reasonable.

On December 21, TMG filed its comments in response to the agency report, as well as a new supplemental protest allegation. In its comments, TMG, for the first time, proffered documentary support for its allegation that the government employee in question had access to non-public information. Specifically, TMG provided several 2011 e-mails transmitting monthly reports on the EOD program to recipients that included both the individual in question and a TMG employee. TMG next argued that the agency failed to specifically find that R3's proposed staffing was sufficient to provide all the required services. Finally, TMG reiterated its initial allegations that R3 had no relevant past performance in certain areas of the PWS; its supplemental protest alleged that the actual contracts considered by the agency in its evaluation of R3's past performance were not relevant due to their low dollar value.

Our Office asked the Army to submit a supplemental agency report by January 8, 2013. In addition to responding to the supplemental protest allegation, our Office asked the Air Force to address TMG's arguments concerning R3's staffing and past performance. On the supplemental agency report due date, the Air Force advised our Office that it intended to take corrective action in light of TMG's supplemental protest allegation. Specifically, the agency stated that it intended to reevaluate past performance to ensure the evaluation comported with the solicitation's evaluation criteria. The Air Force also stated that it planned to reassess the unfair competitive advantage allegation in light of the documentary evidence submitted by TMG in its comments. On January 10, 2013, our Office dismissed the protest as academic. Thereafter, TMG filed its request for protest costs.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the

protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2012); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.--Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 5. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

As a general rule, we recommend that a successful protester be reimbursed protest costs with respect to all issues pursued, not merely those upon which it prevails. Nevertheless, in appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues that it essentially constitutes a separate protest. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., whether the successful and unsuccessful arguments share a common set of facts, are based on related legal theories, or are otherwise not readily severable. Core Tech Int'l Corp.--Costs, B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59 at 8.

Here, TMG requests that we recommend that it be reimbursed the reasonable costs of filing and pursuing its initial protest, including attorneys' fees. TMG asserts that all of the above allegations were clearly meritorious, and the Air Force's corrective action was unduly delayed because it was filed after submission of the agency report. The Air Force does not object to reimbursing TMG the reasonable costs of filing and pursuing its protest grounds related to the evaluation of R3's past performance, consequently we dismiss this aspect of the request as academic.[2] See Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

The agency, however, opposes TMG's recovery with respect to the remaining protest grounds--TMG's unfair competitive advantage allegation, as well as its challenge to the technical evaluation. Because these allegations are readily severable from the past performance issues--the questions involved distinct aspects of the record, and were not intertwined factually or legally--we must assess whether the allegations were clearly meritorious. We conclude that they did not meet this standard.

[2] TMG should submit its certified claim for these costs, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Regarding the unfair competitive advantage claim, even if TMG had timely provided documentary support for this allegation, which it did not,[3] and even if we had concluded that the information giving rise to the alleged advantage was competitively useful, a matter which we did not reach and which is vigorously disputed by the Air Force, the allegation was not clearly meritorious.

Our Office will presume the existence of an unfair competitive advantage where an offeror possesses competitively useful non-public information that would assist that offeror in obtaining a contract, without the need for further inquiry into whether that information was actually used by the offeror in preparing its proposal. Health Net Federal Services, LLC, supra. We have applied this presumption in cases where an offeror obtains competitively useful non-public information from a former government employee who had access to such information, and was already employed by the offeror when the offeror prepared its proposal. See id. at 30-31; Guardian Technologies Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 6-11; Holmes and Narver Servs., Inc./Morrison-Knudson Services, Inc., a joint venture; Pan Am World Services, Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 7-9, aff'd on reconsideration, Mar. 16, 1990, 90-1 CPD ¶ 299.

Here, the individual in question signed a conditional letter of intent to work for R3 in June 2012, just prior to the time R3 submitted its proposal, but remained a government employee at all times relevant to the protest and did not, in fact, begin employment with R3 until 2013. TMG never alleged that the offeror, R3, had access to competitively useful, non-public information, and never alleged that the individual in question participated in the preparation of the firm's proposal. In our view, these facts, showing that the individual had only indicated an intention to work for the offeror in the future, without more, do not support a conclusion that the alleged unfair competitive advantage was clearly meritorious. See Cleveland Telecommunications Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 at 6-7 (protest alleging unfair competitive advantage was denied where agency employees not participating in the procurement signed letters of intent to work for awardee, but were still working for the government when awardee submitted its final proposal and there was no evidence that they participated in the preparation of the proposal).

We also conclude that TMG's allegation concerning R3's staffing was not clearly meritorious. Our review of the record shows that the agency's response to TMG's protest allegation--that R3 could not have proposed the number of personnel TMG

[3] TMG was clearly in possession of these 2011 e-mails when it filed its protest on November 8, 2012, but did not provide them until it filed its comments on December 21. Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. 4 C.F.R. § 21.2(a) (2012); AINS, Inc., B-405902.3, May 31, 2012, 2012 CPD ¶ 180 at 6 n.12.

thought necessary--was legally defensible. Moreover, the arguments in TMG's comments--that the agency did not specifically find that the number of personnel proposed by R3 was sufficient--raised new concerns. Indeed, our Office required the agency to provide additional explanations in response to the comments in recognition of the different nature of the allegations. Ordinarily, we do not regard a protest as clearly meritorious where, as here, resolution of the protest required further record development to complete and clarify the record. See URS Federal Servs., Inc.--Costs, B-406140.4, July 17, 2012, 2012 CPD ¶ 223 at 4.

The request is dismissed in part and denied in part.

Susan A. Poling
General Counsel