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Decision

Matter of: Satellite Tracking of People, LLC

File: B-411845; B-411845.2

Date: November 6, 2015

Jason L. Richey, Esq., William D. Wickard, Esq., and John P. Estep, Esq., K&L Gates LLP, for the protester.

Joseph P. Dirik, Esq., Norton Rose Fulbright US LLP, for BI Incorporated, an intervenor.

Willis J. Stamps III, Esq., Court Services and Offender Supervision Agency for the District of Columbia, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency's program manager has an apparent conflict of interest is sustained where record shows that the agency's contracting officer recognized the apparent conflict of interest, but did nothing to investigate or mitigate the conflict.

DECISION

Satellite Tracking of People, LLC (STOP), of Houston, Texas, protests the issuance of a task order to BI Incorporated, of Boulder, Colorado, under request for quotations (RFQ) No. 15-Q-0143, issued by the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) for global positioning system (GPS) equipment and monitoring services.¹ STOP maintains that the agency miscalculated quotations and made an unreasonable source selection decision. STOP also maintains that an employee of the agency had a conflict of interest that CSOSA failed to mitigate that resulted in the acquisition being tainted.

¹ CSOSA is a federal agency established in the executive branch and, therefore, subject to our jurisdiction. D.C. Code § 24-133(a); see also Cooper v. Johnson, et al., 652 F. Supp. 2d. 33 (D.D.C. 2009).

We sustain the protest.

BACKGROUND

The RFQ contemplates the issuance, on a best-value basis, of a fixed-price task order under the successful contractor's Federal Supply Schedule contract to provide GPS equipment and monitoring services to CSOSA for purposes of tracking offenders for a base period of one year and four 1-year options. Firms were advised that quotations would be evaluated considering technical capability and approach, past performance, and price. RFQ at 2. Technical capability and approach was deemed significantly more important than past performance; technical capability and approach and past performance combined were deemed substantially more important than price. Id. The RFQ further provided, with respect to the relative weights of the evaluation criteria, as follows:

However, upon the Government's review of the Price Quotes for "reasonableness," and finding that any other competing Quotes are considered technically equivalent, Price may become of primary importance in determining the Quote that is the "best value" to the Government.

Id. (Emphasis in original). Finally, the RFQ provided that the agency could reject any quotation that was evaluated as non-compliant, found to be unrealistically high or low in price, or that reflected a failure to comprehend the nature of the work to be performed. Id.

In response to the solicitation, the agency received three quotations, including those of the protester--the current incumbent contractor for these requirements--and BI. The agency's technical evaluators reviewed the quotations, identified various strengths and weaknesses, and assigned the following adjectival ratings:

	STOP	BI	Offeror A
Technical	Outstanding	Good	Good
Past Performance	Strong Confidence	Strong Confidence	Strong Confidence
Price	\$4,935,042	\$2,821,127	\$3,653,078

Agency Report (AR), exh. 30, Source Selection Decision Document, at 7. The record shows that the contracting officer, acting as the source selection authority, reviewed the proposals after the technical evaluation and reduced STOP's adjectival rating under the technical capability and approach factor from outstanding to good. Id. The contracting officer did not provide any detailed rationale for this reduction. In addition, the contracting officer assigned all three firms a substantial confidence rating (as opposed to the "strong confidence" ratings assigned by the technical evaluators). Id. at 16-22. On the basis of these evaluation results, the

agency made award to BI. The contracting officer found that all three quotations essentially were technically equivalent, and that BI offered the best value to the government because of its low price. Id. at 23-24. After being advised of the agency's source selection decision and requesting and receiving a debriefing, STOP filed the instant protest.

PROTEST

STOP's initial protest challenged the agency's evaluation and source selection decision for a number of reasons. In response, the agency filed a request for summary dismissal arguing, among other things, that the protester was not an interested party because it had an unmitigable organizational conflict of interest (OCI). According to the agency, because of this alleged OCI, STOP could not be awarded a contract under the subject solicitation, and as a result, was not an interested party to maintain its protest.

In response to the agency's request, STOP argued that it did not have an OCI, but that the facts presented by the agency demonstrated that an agency employee who participated extensively in CSOSA's acquisition activities had a conflict that should have required her recusal from participation in any acquisition-related activities. The individual in question is a former STOP employee that STOP describes as an individual who could have been a disgruntled former employee with "an axe to grind." Supplemental Protest at 7. STOP maintains that, because this individual was not recused from the procurement, the agency should terminate the task order awarded to BI, cancel its RFQ and begin its procurement anew. For the reasons discussed in detail below, we agree with the protester.²

After review of the agency's request for dismissal and the protester's response to that request (as well as the submission of a supplemental protest by STOP), we declined to dismiss the protest. The agency subsequently filed its report with our Office. In its report, the agency responded to the protester's allegations concerning the propriety of its evaluation and essentially repeated its contention that STOP has an OCI that cannot be mitigated.

The agency's request to dismiss the protest included a statement from the contracting officer. In that statement, the contracting officer represented that she reviewed STOP's protest when it was filed and determined that it included information that she alleged was proprietary to BI and included in BI's quotation. Request for Dismissal, Contracting Officer's Statement, at 3. Neither the

² Since we recommend below that the agency cancel its RFQ and begin its acquisition anew after evaluating the apparent conflict of its employee, we do not discuss STOP's evaluation allegations; those allegations are academic in light of our recommendation.

contracting officer's statement, nor any other submission from the agency, has identified with particularity the information in STOP's original letter of protest that led the contracting officer to this conclusion. Nonetheless, she states that her review of the protest prompted her to begin an inquiry to determine whether there had been an unlawful release of BI's allegedly proprietary information. Id.

According to the contracting officer, her concern prompted her to review the acquisition-specific non-disclosure/conflict of interest (ND/CI) statements that were submitted by all individuals who had worked on the procurement. Request for Dismissal, Contracting Officer's Statement, at 3. The contracting officer further states that, upon reviewing her files, she found that the agency's program manager had been asked to complete an ND/CI statement but had not submitted one. Id.

The contracting officer states that, because there was not an ND/CI statement in the acquisition file for the program manager, she decided to review the program manager's Form No. 450, Office of Government Ethics Confidential Financial Disclosure Form. Request for Dismissal, Contracting Officer's Statement, at 3. The contracting officer explains that: "The purpose of this report is to assist employees and their agencies in avoiding conflicts between official duties and private financial interests." Id. at 3-4. The contracting officer states that, upon reviewing the program manager's Form No. 450, she found that, in February 2015, the program manager had disclosed that STOP was her previous employer. Id. at 4. She states further that, upon learning of this fact, she asked the agency's contract specialist to obtain an ND/CI statement from the program manager. Id.

The contracting officer states further that, on August 5, the agency's program manager submitted an ND/CI statement. Request for Dismissal, Contracting Officer's Statement, at 4. The contracting officer advises that the ND/CI statement submitted by the agency's program manager was back-dated to April 21; that the program manager disclosed on that form that she was a prior employee of STOP; that she previously had owned stock in the firm; that some of the proceeds from the sale of her stock were in an escrow account; and that there were two outstanding payments due from the escrow account. Id.; see also, exh. 4 to the Contracting Officer's Statement, the Program Manager's ND/CI statement.

As a result of these facts, the contracting officer concluded that, because of the program manager's continuing financial interest (the outstanding escrow payments) in STOP, "I cannot make an award to STOP because STOP has a conflict of interest that cannot be mitigated." Request for Dismissal, Contracting Officer's Statement, at 4. The contracting officer describes the participation of the agency's program manager in the acquisition as follows:

[The program manager] supported the source selection evaluation board, was intimately involved in the development of the RFP documents, PWS [performance work statement], IGCE [independent

government cost estimate], and Q&As [solicitation questions and answers]. In fact, she developed the evaluation factors for the source selection. She was the subject matter expert on this program and there is not an area of the program that [she] has not worked on or had access to information.

Id.; see also Contracting Officer's Statement at 9.

ANALYSIS

The Federal Acquisition Regulation (FAR) sets forth clear and unambiguous guidelines concerning the conduct of government personnel that engage in contracting activities. The most fundamental guidance provides as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

FAR § 3.101-1. Our Office has had occasion to review cases that involve questions concerning former government officials that go to work for a contractor. E.g., Health Net Federal Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 26-36. Our Office also has had occasion to review cases in which private industry representatives performing evaluation activities on behalf of an agency have had an interest in the results of that evaluation, where the agency improperly failed adequately to investigate whether or not a conflict existed. See Celadon Laboratories, Inc., B-298533, Nov. 1, 2006, 2006 CPD ¶ 158. This case presents the first occasion where we are called upon to consider circumstances where an agency knowingly failed to investigate and resolve a question concerning whether an employee who actively and extensively engaged in procurement-related activities should have been recused from those activities.³

³ In Applied Resources Corp., B-249258, Oct. 22, 1992, 92-2 CPD ¶ 272, aff'd., Applied Resources Corp.--Recon., B-249258.2, Feb. 26, 1993, 93-1 CPD ¶ 180; Applied Resources Corp.--Second Recon., B-249258.4, Mar. 26, 1993, 93-1 CPD ¶ 269, we were presented with a case where the contracting officer's supervisor had a relationship with the owner of the firm submitting the low bid for a requirement.

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As an initial matter, there is no explanation in the record concerning why the agency failed to obtain an ND/CI statement from its program manager prior to beginning any acquisition-related activities. In this connection, the record includes correspondence dating from as early as January 2015 from the contracting officer to the agency's program manager concerning the terms of the solicitation's evaluation factors. E.g., E-Mail From the Contracting Officer to the Program Manager, January 29, 2015. Notwithstanding the fact that the program manager was engaged in acquisition-related activities at that point in time, there is no evidence in the record to show that the agency sought to obtain the information that the contracting officer now claims ultimately led her to be concerned about the relationship between the program manager and STOP.

The record does show that on April 10, 2015 (weeks after the RFQ was prepared and issued), the agency's contract specialist sent an ND/CI statement form to the program manager and chairman of the technical evaluation board and requested that they execute the forms. E-Mail from the Contract Specialist to the Program Manager and Chairman of the Technical Evaluation Board, Apr. 10, 2015. However, this form was never executed by the program manager or provided to the cognizant agency personnel until after the instant protest was filed in our Office. E-Mail from the Contract Specialist to the Program Manager, Aug. 4, 2015. There also is no explanation in the record concerning why the form was not obtained from the program manager in April when it was requested.

The agency's failure to obtain the ND/CI statement from its program manager in a timely fashion is--standing alone--a matter of concern. In effect, the record shows that the agency made no affirmative effort to pursue and obtain information that the contracting officer now claims would have shed light on the question of whether or not it would be appropriate for the program manager to participate in acquisition-related activities on behalf of the agency given her relationship with STOP.

Notwithstanding the agency's failure to timely obtain the ND/CI statement from the program manager, the record shows that the contracting officer actually recognized early during the acquisition process--before the RFQ was issued--that there was a conflict arising out of the relationship between the program manager and STOP. In

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The government employee was not extensively involved in procurement-related activities but had been privy to the government estimate. The government employee also apparently was not aware prior to bid opening that the firm submitting the low bid was interested in bidding for the agency's requirements. When she became aware that the firm submitting the low bid had responded to the solicitation, she disqualified herself from participation in procurement-related activities.

this connection, the record includes an e-mail from the contracting officer to the program manager and the chairman of the technical evaluation committee that states as follows:

In addition, [the program manager] will have to recuse herself “totally” from the GPS solicitation process once the solicitation goes out. There have been GAO protests based on the same facts surrounding an incumbent's [STOP's] prior personnel participating in the new solicitation and the outcome has not been favorable to the Government agencies, believe me we don't want a protest. Just FYI, should a protest occur everything stops until it is resolved.

E-Mail from the Contracting Officer to the Program Manager and Chairman of the Technical Evaluation Committee, Mar. 19, 2015.

This e-mail shows that, as early as March, the contracting officer concluded that the program manager should have been recused from the acquisition because of her former relationship with STOP. The contracting officer reached this conclusion before the RFQ was issued (but well after the program manager had engaged in extensive acquisition-related activities), but for reasons that are not explained in the record, the program manager was permitted by the contracting officer to continue her participation in acquisition-related activities. These activities included, at a minimum, preparation of the solicitation and the government's estimate, as well as participation as a subject matter expert advisor throughout the source selection process. Request for Dismissal, Contracting Officer's Statement, at 4; Contracting Officer's Statement at 9.

Moreover, the above-quoted e-mail from the contracting officer (concluding that the program manager should be “totally” recused from acquisition-related activities) was sent both prior to the date when the contract specialist sent out the ND/CI forms (April 10), and prior to the date when the program manager's ND/CI statement actually was provided to the contracting officer (August 4). Therefore, the record shows that the contracting officer concluded that the program manager should have been recused from acquisition-related activities well before reviewing the contents of the program manager's ND/CI statement. This fact is fundamentally inconsistent with the express representation of the contracting officer to our Office that she first became concerned about the relationship between the program manager and STOP as a result of her review of STOP's initial letter of protest and the program manager's ND/CI statement in August. Compare Request for Dismissal, Contracting Officer's Statement, at 3, with E-Mail from the Contracting Officer to the Program Manager and Chairman of the Technical Evaluation Committee, Mar. 19, 2015.

While we agree with the contracting officer's conclusion that the program manager's relationship with STOP should have led to her recusal from this procurement, the

impact of her ongoing participation in the procurement is not clear. For example, the contracting officer states that the RFQ included specifications that favored STOP's products over the products of competitors, and that these specifications had to be removed. Contracting Officer's Statement of Facts at 11. In contrast, the protester suggests that the program manager may have been a disgruntled former employee disappointed with the nature of her employment with, or the terms of her departure from, STOP, or the terms upon which she sold her stock in STOP. Supplemental Protest at 7. The protester therefore argues that the program manager actively attempted to steer the award away from STOP.

We need not resolve the question of whether the program manager's participation in the acquisition favored, disfavored, or had no impact on STOP. Here, the record shows that the contracting officer identified a conflict of interest issue, but undertook no actions to safeguard the procurement process. As stated above, the general rule is "to avoid strictly any conflict of interest or even the appearance of a conflict of interest" FAR § 3.101-1. These strict limitations reflect the reality that the potential harm flowing from such situations frequently is, by its nature, not susceptible to demonstrable proof of bias or prejudice. Department of the Navy--Recon., B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 11. Thus, where, as here, the record establishes that a conflict or apparent conflict of interest exists, and the agency did not resolve the issue, to maintain the integrity of the procurement process, we will presume that the protester was prejudiced, unless the record includes clear evidence establishing the absence of prejudice. Id. We see no such evidence here.⁴

⁴ Our conclusion here is analogous to situations where the record shows, at a minimum, that there is at least the appearance of an impropriety, even if that impropriety cannot conclusively be established by evidence in the record. 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). See also Holmes & 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, aff'd., Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (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). Cf. The Jones/Hill Joint Venture, B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194 (agency improperly failed to recognize, in the context of an A-76 competition, appearance of impropriety created where government employee, with knowledge of relevant non-

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As a final matter, we are concerned about one other aspect of the events surrounding this apparent conflict of interest. As noted above, the contracting officer represented to our Office that, upon reading STOP's letter of protest, she determined that it included the awardee's proprietary information from its quote. The agency has never identified the information that the contracting officer concluded was proprietary to BI, and from a reading of the protest letter and its accompanying exhibits, it is not apparent or obvious to us what information the contracting officer identified as proprietary.

We view the contracting officer's representation that STOP's protest included its competitor's proprietary information to be a serious allegation. It may imply that one or more individuals within the agency knowingly provided STOP with BI's proprietary information, and that both STOP and its counsel may knowingly have received such information. Such activity on the part of agency personnel, STOP personnel, or STOP's counsel, could give rise to a violation of the Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101-2107. Violations of the PIA are punishable by both criminal and civil penalties. 41 U.S.C. § 2105.

As discussed above, the contracting officer claims to have used her conclusion about BI's allegedly proprietary information in STOP's protest as a starting point for her subsequent investigative efforts surrounding the alleged OCI on the part of STOP. However, there is nothing in the record to show that the contracting officer--or anyone else in the agency--ever actually investigated the possible PIA violations that could arise as a consequence of the alleged disclosure, or receipt, of BI's allegedly proprietary information. Rather, the contracting officer states only that the alleged OCI on the part of STOP (rather than any possible violation of the PIA) has been referred to the agency's office of professional responsibility for investigation. Contracting Officer's Statement of Facts at 12.

Other than referral of STOP's alleged OCI to the agency's office of professional responsibility, the record is silent on the question of actions taken by the agency to investigate or resolve the possible PIA violations that are implied by the contracting officer's representation. Given the seriousness of the contracting officer's representation, we do not understand why the alleged possible PIA violation also has not been actively and thoroughly investigated by the agency.

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public information, was later assigned to assist in-house competitor with preparation of its most efficient organization).

RECOMMENDATION

In light of the foregoing discussion, we sustain STOP's protest that the agency's program manager had an apparent conflict of interest that was not satisfactorily addressed by the agency. Because we conclude that the apparent conflict has not been addressed, and because the ultimate impact of the conflict undercuts the integrity of the acquisition, we recommend that the agency terminate the task order issued to BI for the convenience of the government. We further recommend that the agency cancel its RFQ and begin its acquisition anew after considering whether the facts here require recusal of the program manager (and possibly other agency contracting officials) from the agency's subsequent acquisition for these requirements. We also recommend that the agency thoroughly investigate and resolve the possible PIA violations implicated by the contracting officer's representation to our Office. Finally, we recommend that the agency reimburse STOP the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel