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Decision

Matter of: Obsidian Solutions Group, LLC

File: B-417134; B-417134.2

Date: March 1, 2019

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DIGEST

Protest that agency unreasonably excluded protester from a competition for a multiple-award indefinite-delivery, indefinite-quantity contract is sustained where the record does not support the contracting officer's determination that the hiring of a former government employee by the protester's subcontractor, and his appearance at an oral presentation on behalf of the protester (shortly after his retirement from the agency), created an unfair competitive advantage, in part because all qualified offerors with an acceptable proposal, and a fair and reasonable price, were to receive an award, and thus there seems to be little risk of an unfair competitive advantage from these actions at this stage in the procurement.

DECISION

Obsidian Solutions Group, LLC, of Fredericksburg, Virginia, protests a determination by the U.S. Marine Corps to exclude its proposal submitted under request for proposals (RFP) No. M67854-19-R-7800 from further consideration based on an appearance of impropriety caused by the hiring of a former government official. Obsidian asserts that the agency improperly excluded its proposal from consideration because the former official did not have access to competitively useful non-public information.

We sustain the protest.

BACKGROUND

The RFP was to procure services to support multiple programs under the umbrella name of Marine Air-Ground Task Force Training Support Services (MTSS). The

solicitation sought proposals for award of an indefinite-delivery, indefinite-quantity (IDIQ) multiple-award task order contract (MATOC). The RFP advised that the agency intended to make a contract award to each qualifying offeror, with a “qualifying offeror” defined as an offeror who met the following three conditions: the firm is a responsible source; it submitted a proposal that conforms to the requirements of the solicitation; and the contracting officer (CO) had no reason to believe that it would offer other than fair or reasonable pricing. Agency Report (AR), Tab 12, Conformed RFP at 2. The cumulative total ceiling value of all orders to be placed under the contract was \$245 million, with no limit on the number of task orders. Id. The contract would have a basic ordering period of 48 months, with two 36-month option ordering periods. Id. The solicitation advised that the agency anticipated making three initial task order awards, id. at 25, with the initial task order requests for proposals anticipated to be released concurrently with the post-award conference.¹ AR, Tab 12.26, attach. J26--Answers to Offeror Questions (amend. 0002), at 15.

The agency was to utilize a two-step selection process. In the first step, offerors were to provide preliminary documents demonstrating that they had met a limited set of “go/no-go” criteria. RFP at 87. In the second step, offerors’ proposals would be evaluated as acceptable or unacceptable under three factors: technical approach, past performance, and small business participation. Id. at 89-90. The solicitation advised that a rating of unacceptable under any of the above factors would be considered a failure to conform to the requirements of the solicitation. Id. at 88.

The RFP included attachment J6, the Exercise Standing Operating Procedures for the Marine Air-Ground Task Force Staff Training Program (MSTP). AR, Tab 12.6, RFP attachment J6. The standing operating procedures is an approximately 220 page document that describes how the MSTP develops, plans, and conducts MSTP-led exercises, including a 4-phase exercise life cycle. The latest version, published in June, 2018, indicates that it was [DELETED] by the [DELETED] of the MSTP Division. Id. at iii. The executive summary highlights numerous revisions since the last version, published in March, 2017. Id. at i. The summary explains that this “guiding document provides a common vision for accomplishing the MSTP mission and governs operations by all members of the MSTP team.” Id. The standing operating procedures was a public document under constant revision, with suggestions for changes being offered by personnel inside and outside the agency. Id.

Offerors were to demonstrate an acceptable technical approach by addressing, in oral presentations, two scenarios, one involving the Marine Corps Logistics Operations Group, and the other--as relevant to this protest--involving the MSTP. Id. at 83. The MSTP standing operating procedures served as the basis for the agency’s evaluation of the second scenario. The [DELETED] for the MSTP Division served as an advisor to

¹ The RFP provided that “task order selection will be tailored to specific project requirements and awarded [in accordance with] task order established evaluation criteria.” RFP at 2.

the technical evaluation team and the subject matter expert regarding the MSTP portion of the contract. AR, Tab 25, Decl. of [DELETED] at ¶¶ 1, 21, 22.

The [DELETED]'s portion of the technical evaluation focused on the proper representation of all phases of the exercise life cycle, included the elements of each phase, and their proper sequencing, along with a clear understanding of which events were MSTP-driven. Id. at ¶ 23. The contracting officer noted that the exercise life cycle and the MSTP-driven events in the standing operating procedures "provided objective evaluation criteria," because "there were exact outputs or events that could be identified in the [standing operating procedures] at each stage that would make 'Acceptability' easily identifiable." Contracting Officer's Statement at 4. In fact, the contracting officer stated, given the "abundance of information available in the [performance work statement] and the attachments, offerors with experience performing similar services for other Department of Defense entities would not be at a disadvantage for lacking Marine Corps experience." Id. at 3-4.

The RFP required offerors to identify any actual or potential organizational conflicts of interest (OCIs), including access to non-public information that would give the offeror an unfair competitive advantage. RFP at 74. The solicitation advised offerors that if the government determined that an OCI existed that could not be avoided, neutralized, mitigated, or waived, the contracting officer had the discretion to exclude potential offerors. Id. at 87. The solicitation further advised offerors that "the Contracting Officer may exclude an Offeror from the competition because of an appearance of an OCI in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or suspicion." Id.

The protester's proposal, which included a company called Whitney, Bradley and Brown (WBB) as a proposed subcontractor, passed the "go/no go" review in step 1 of the competition and advanced to step 2, the oral presentations.² Each offeror was to submit up to 50 PowerPoint slides in advance of its presentation. Obsidian's briefing team, pictured on the protester's second slide, included the former MSTP [DELETED], now retired, who had [DELETED] the June, 2018, version of the standing operating procedures. AR, Tab 17, Obsidian Phase II Proposal, Nov. 15, 2018, at 2. The former [DELETED] was identified as an employee of WBB, and as "[DELETED]." Id.

The former MSTP [DELETED], while still on active duty, sought and received a post-government employment opinion letter, commonly referred to as an ethics letter. See AR, Tab 20, Email from Obsidian to Contracting Officer, Nov. 15, 2018, attach. Post-Government Employment Opinion Letter, June 27, 2018. Based on the information provided, the ethics counselor opined that the [DELETED] was, upon his retirement

² Step 1 included a certification by Obsidian's contracts manager that, to the best of his knowledge, no Obsidian employee, consultant, or proposed subcontractor had any actual or potential OCI. AR, Tab 13, Obsidian Phase I Proposal at 1.

from the Marine Corps, permitted to represent Obsidian and WBB before the government.³ Id. The former [DELETED] retired on September 30. AR, Tab 25, Decl. of [DELETED] at ¶ 5.

The day after Obsidian submitted the names of its presenters, the contracting officer emailed the protester to advise that, in the contracting officer's view, the former MSTP [DELETED]'s presence at the oral presentation would constitute an appearance of impropriety. AR, Tab 15, Email from CO to Obsidian, Nov. 8, at 1. The contracting officer requested an explanation of Obsidian's screening procedures, a copy of the former [DELETED]'s post-government employment ethics letter, and a description of the scope of his duties, including the date he was hired. The contracting officer advised Obsidian that he would permit it to proceed with an oral presentation on November 15, but he requested a prompt response so that he could make a responsibility determination no later than November 17. Id. at 1-2.

The following day, the contracting officer memorialized his concerns in a memorandum for record. AR, Tab 16, CO Memorandum for Record, Nov. 9, 2018. The contracting officer noted that he had informed Obsidian that the former [DELETED]'s presence at the oral presentations would constitute an appearance of impropriety for the following four reasons:

- Because the former [DELETED]'s name "appears in the solicitation materials," his participation in the oral presentations creates the appearance that there is a special relationship between Obsidian and the government.
- The evaluation criteria require offerors to demonstrate their understanding of the standing operating procedures, and because the former [DELETED] the latest version of that document, it may appear that the evaluators afford greater weight to the [DELETED]'s interpretation of the requirement.
- Although the contracting officer did not have complete information regarding the [DELETED]'s involvement in the RFP preparation, he [DELETED] the standing operation procedures in June, 2018, which was "relatively recent" in terms of the procurement cycle.
- The former [DELETED] was the supervisor of one of the technical evaluation team members, and that close prior relationship would create the appearance of impropriety.

Id. The contracting officer noted that, while he requested additional information from Obsidian, he had sufficient information to conclude that there would be at least an apparent OCI if the former [DELETED] were to participate in the oral presentation. Id.

³ The ethics letter also considered, in part, whether the anticipated actions of the [DELETED] were permissible under 18 U.S.C. § 207, which is a criminal statute; the interpretation and enforcement of criminal statutes is a matter for the Department of Justice, and not our Office. KAR Contracting, LLC, B-310454, B-310537, Dec. 19, 2007, 2007 CPD ¶ 226 at 5.

On November 14, the day before the oral presentation, the contracting officer received Obsidian's response to his request for additional information. Protest, exh. C, Memo from Obsidian Contracts Manager to CO, Nov. 14, 2018. Obsidian argued that the standing operating procedures was "clearly a public document that was provided to all bidders, thus, no unfair competitive advantage" was derived from the former [DELETED]'s access to it and [DELETED]. Id. at 2. Moreover, Obsidian asserted that the former [DELETED] had executed a non-disclosure agreement with his employer, WBB, confirming that he neither obtained nor would disclose any proprietary or source selection information. Id. WBB also signed a non-disclosure agreement. Id. The protester advised the contracting officer that it took organizational conflict of interest issues "very seriously" and was "willing" to work with the agency to ensure that any potential OCI was properly mitigated. Id.

On the morning of the protester's oral presentation, the contracting officer advised Obsidian that, because the former MSTP [DELETED]'s presence at the oral presentation would constitute the appearance of impropriety, the contracting officer would remove the second slide that identified the presenters, included the former [DELETED]. AR, Tab 18, Email from CO to Obsidian, Nov. 15. The contracting officer further advised Obsidian that, to the extent the former MSTP [DELETED]'s "information appears in the slide deck or he is present at the oral presentations, the Government will be in a position to exclude Obsidian Solutions Group from the competition in accordance with the terms of the solicitation." Id. The former MSTP [DELETED] participated as planned in Obsidian's oral presentation, addressing the second scenario involving the MSTP.⁴

On November 20, the contracting officer issued Obsidian a notice of exclusion setting forth why the employment of the former government official provided Obsidian with competitively useful non-public information. AR, Tab 24, Notice of Exclusion. In the contracting officer's view, "knowing what was excluded from the [standing operating procedures] could give [Obsidian] an advantage." Id. at 3. The contracting officer argued that the former MSTP [DELETED] "would have had access to information that was developed during the [standing operating procedures] revision as well as the internal deliberations surrounding what was excluded from the [standing operating procedures]." Id. The contracting officer concluded that "it appears" that the former [DELETED] had "information regarding MSTP that gave him a better understanding of the Government's needs and requirements." Id. The contracting officer also advised Obsidian that the former [DELETED] had information regarding the incumbent contractor's performance and the budget for program funding, neither of which were publically available. Id.

⁴ Obsidian's proposal was found to be technically acceptable with respect to the MSTP scenario. AR, Tab 25, Decl. of [DELETED] at ¶ 24.

The contracting officer further noted that the agency had evaluated oral presentations for purposes of the award here, and that “the nature of oral presentations is such that the individual presenter becomes part of the proposal.” Id. at 4. According to the contracting officer, the former [DELETED]’s “physical presence in the room to demonstrate his understanding of the document he recently oversaw the drafting of, approved, [DELETED]--especially where one of his former employees sat across the table from him as an advisor to the technical team--gave rise to an insurmountable perception that the Government contemplated making an award to [Obsidian] because of [this individual’s] involvement.” Id.

After receiving the notice of exclusion, the protester filed this protest.

DISCUSSION

As an initial matter, the protester contests the agency’s reliance, in part, on Federal Acquisition Regulation (FAR) subpart 3.1 as a basis for excluding Obsidian from the competition. The protester argues that FAR part 9 addresses the government’s relationship with prospective contractors and organizational conflicts of interest identified in the pre-award phase of a procurement. Comments at 14. Obsidian asserts that FAR part 3 governs relationships between current contractors and government personnel. Id. For that reason, the protester argues, FAR part 3 “does not apply to this matter.” Id.

As our Office has explained in numerous decisions, challenges based on an offeror’s hiring or association with former government employees who are alleged to have access to non-public, competitively useful information are more accurately categorized as unfair competitive advantages under FAR subpart 3.1 rather than as OCIs under FAR subpart 9.5. See e.g. Dewberry Crawford Grp.; Partner 4 Recovery, B-415940.11 et al., July 2, 2018, 2018 CPD ¶ 298 at 22-23 n.11; Interactive Info. Solutions, Inc., B-415126.2 et al., Mar. 22, 2018, 2018 CPD ¶ 115 at 4-5; Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 6-8. Consequently, we read this protest as an allegation that the agency unfairly excluded the protester’s proposal due to an appearance of impropriety under FAR subpart 3.1.

The protester argues that the contracting officer unreasonably excluded Obsidian’s proposal from the procurement. The agency argues that it properly excluded the protester because Obsidian had an unfair competitive advantage due to its access to competitively useful non-public information.⁵ As explained below, the record fails to show that the former [DELETED] had access to non-public information that could have

⁵ See AR, Tab 24, Notice of Exclusion at 1 (noting that the “main concern posed here is with respect to an unequal access to information OCI, which exists where a firm has access to non-public information and where that information may provide the firm a competitive advantage in a competition for a government contract”) emphasis in original.

provided Obsidian with a competitive advantage in the procurement here; as a consequence, we sustain the protest.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR § 3.101-1; Dewberry Crawford Grp.; Partner 4 Recovery, supra, at 24; Interactive Info. Solutions, Inc., supra, at 5. 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 on the appearance of impropriety which is created by this situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not mere innuendo or suspicion. Dewberry Crawford Grp.; Partner 4 Recovery, supra; Interactive Info. Solutions, Inc., supra.

A person's familiarity with the type of work required resulting from the person's prior position in the government is not, by itself, evidence of an unfair competitive advantage; rather, there must be "hard facts" establishing the person's access to non-public information that could provide the firm with an unfair competitive advantage. Interactive Info. Solutions, Inc., supra, at 5. The responsibility for determining whether to continue to allow an offeror to compete in the face of an alleged impropriety is a matter for the contracting agency, and we will not disturb that determination unless it is shown to be unreasonable. Id. at 6.

At the outset, we note that the offerors here were not competing against one another for a single award; rather, every qualified offeror was to receive an IDIQ contract. The acceptability of each proposal was determined independently, and the only limitation on the number of contract holders was the ability of each individual offeror to demonstrate that it met the requirements to be considered qualified. In other words, the finding that Obsidian's proposal was acceptable did not diminish the potential for other offerors' proposals to be found acceptable. Because every qualified offeror was to receive award of an IDIQ contract, we fail to see a basis to conclude that Obsidian obtained a competitive advantage through the hiring of the former [DELETED] by its proposed subcontractor or his appearance at the oral presentation.

We also find unreasonable the contracting officer's conclusion that the former MSTP [DELETED] had access to competitively useful non-public information. In this regard, the agency asserts that the former [DELETED] had access to competitively useful non-public information because: he was involved in the drafting of the standing operating procedures; he had knowledge of the program budget; and he had knowledge of the incumbent's contract performance. We address each of the three types of information at issue.

Standing Operating Procedures

The agency contends that the former MSTP [DELETED] had access to information regarding what was excluded from the revised standing operating procedures, and why it was excluded, sometimes based on his decision and direction. This gave him, the agency argues, "an insider's view of the evaluation criteria" that was available to no other offeror, including the incumbent. AR, Tab 25, Decl. of [DELETED] at ¶ 19.

The [DELETED] for MSTP Division, who describes his function as “the de-facto ‘Business Manager’ for the program,” offered the following description of how the standing operating procedures were updated. Id. at 1. The process involved a number of stakeholders, and working groups were formed within the organization. Each working group reviewed, discussed, revised, and updated their section of the document. Contractors comprise half of the MSTP workforce, and contractors were asked to provide feedback regarding the standing operating procedures. The working group products were eventually brought together into a single product. Id. at ¶ 17.

The MSTP [DELETED] then reviewed the outputs from working groups. The [DELETED] participated in in-process reviews where representatives from the working groups sat down with him and explained where they were in the process. To the extent there were contentious issues, those were brought to the [DELETED]’s attention for guidance. While he was not a member of a working group, the [DELETED] states that the MSTP [DELETED] was “fully involved” in the development of the standing operating procedures “as the senior reviewer of the working group product and final arbiter of any conflicts arising from the [standing operating procedures] development process.” Id. at ¶ 18.

A former government official’s involvement with drafting solicitation documents that are then made public does not, generally, create an impropriety. See VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 12-13. With any solicitation document, presumably, information is discussed and excluded. Offerors are evaluated, however, on what was in the document, and not what was edited out, and therefore the exclusions and the deliberations themselves are not generally considered competitively useful non-public information. Here, the standing operating procedures is a publicly available document, and nothing in the record supports a finding that the former [DELETED]’s role in overseeing the June, 2018, revision of that document provided him with competitively useful non-public information.

The record also does not establish, or even suggest, that the former [DELETED] steered the content of the standing operating procedures in a way that would eventually benefit Obsidian. The former [DELETED] is described by the [DELETED] as the “senior reviewer of the working group product and final arbiter of any conflicts” arising in the revision process. The working groups, not the [DELETED], reviewed, discussed, revised, and updated various sections of the standing operating procedures. Thus, we see no support for any conclusion that the former MSTP [DELETED] gained an unfair competitive advantage from this activity.⁶

⁶ The contracting officer also acknowledges that the agency’s determination to use the standing operating procedures as the basis for evaluation was made public with the publication of the synopsis and draft solicitation in August 2018. AR, Tab 24, Notice of Exclusion, at 2.

Budgets

The agency also argues that the former MSTP [DELETED] had access to competitively useful non-public information regarding MSTP's budget. Id. at ¶ 9. In advance of the solicitation, the agency prepared an independent cost estimate that exceeded the budget set aside for MSTP. The [DELETED] relayed that information to the former [DELETED], whose responsibility it was to brief his chain of command on the importance of this contract and the budget shortfall. Id. at ¶ 10. The [DELETED] stated that he has personal knowledge that the former MSTP [DELETED] participated in meetings that addressed the budget shortfall. Id. at ¶ 11.

In this competition, however, price was not an evaluation factor; instead, the contracting officer would determine whether an offeror's price was likely to be fair and reasonable. RFP at 2. As noted above, the agency advised offerors that the total ceiling value of all orders placed under the contract was \$245 million, with no limit on the number of task orders. Id. Moreover, the total ceiling value would be apportioned among an indefinite number of task orders over the potential 10-year duration of the IDIQ contract. In our view, the knowledge that there was once a budget shortfall in this program could provide no competitive advantage, where the total ceiling value of all task orders to be issued over a 10-year period was announced in the solicitation, where price was not an evaluation factor, and where every qualified offeror would receive a contract.

Incumbent Performance

Lastly, the agency states that performance issues that could impact the MSTP's mission were brought to the former [DELETED]'s attention. AR, Tab 25, Decl. of [DELETED] at ¶ 14. Without stating that the former [DELETED] had knowledge of them, the [DELETED] identified the following three non-public pieces of information concerning the incumbent's performance. First, the incumbent's initial approach had been to [DELETED]. The incumbent subsequently "changed its approach and resolved these issues." Id. Next, the incumbent [DELETED] was successful at the mission critical task of securing the recertification of the MSTP classified data network in order to earn an authority to operate on the Marine Corps data network. Id. at ¶ 15. Thirdly, the incumbent contractor was issued several performance assessment reports [DELETED]. Id.

That the incumbent experienced [DELETED] performance, [DELETED], cannot be competitively useful information here, where the technical requirement at issue was an understanding of the tasks set forth in the standing operating procedures. The agency did not request, and the protester did not provide, specific information on [DELETED] in its proposal. Nothing in the record suggests that the agency has a recurring need for recertification of the MSTP classified network, such that the initial difficulties encountered by the incumbent contractor in securing that recertification are relevant.

To achieve an acceptable technical rating, an offeror's proposal was required to demonstrate an understanding of all phases of the exercise life cycle, including the

elements of each phase and their proper sequencing, along with a clear understanding of which events were the MSTP-driven events. Id. at ¶ 23. The record does not support a conclusion that the potential knowledge of the incumbent's shortfalls would be competitively useful to Obsidian, or competitively harmful to the incumbent, in this competition, where all qualified offerors would receive contract award.

In conclusion, we find that the record fails to establish that the protester had access to competitively useful non-public information that would justify excluding the company from the competition, and we sustain the protest.⁷

RECOMMENDATION

We recommend that the agency make a new assessment of whether Obsidian should be excluded from the procurement consistent with this decision. We also recommend that the agency reimburse the protester the costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). Obsidian's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

⁷ The protester also asserts that the agency engaged in disparate treatment of prospective offerors. Government officials are presumed to act in good faith, and a protester's contention that procurement officials were motivated by bias or bad faith must be supported by convincing evidence. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Here, to the extent that Obsidian is suggesting that the agency has acted in bad faith, it has not provided evidence of bad faith on the part of the agency.