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Decision

Matter of: Tetra Tech, Inc.

File: B-419012; B-419012.2

Date: October 27, 2020

Holly A. Roth, Esq., Elizabeth Leavy, Esq., and William T. Kirkwood, Esq., Reed Smith LLP, for the protester.

John W. Cox, Esq., Department of State, for the agency.

Heather Self, Esq., and Peter Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency unreasonably concluded that disclosure of protester's profit margin information under prior incumbent contract did not violate the Procurement Integrity Act is denied because the disclosure did not relate to information protected by the Act and the protester has failed to demonstrate that the disclosure was made knowingly.

DECISION

Tetra Tech, Inc., of Arlington, Virginia, protests the disclosure of its proprietary information as part of request for proposals (RFP) No. 19AQMM20R0081, which was issued by the Department of State for local guard services. Tetra Tech argues that the agency improperly disclosed its proprietary information and has failed to mitigate the competitive disadvantage stemming from the disclosure. Tetra Tech also contends that the agency failed to conduct a reasonable investigation into whether the disclosure violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act (PIA).

We deny the protest.

BACKGROUND

On July 2, 2020, the agency issued the solicitation seeking proposals for the provision of local guard services at the United States embassy in Lilongwe, Malawi. Agency Report (AR), Tab 2, RFP at 1, 4. The solicitation contemplated award of a time-and-materials contract including some fixed-price and cost-reimbursement elements with a

1-year base period and four 1-year option periods to the offeror that submitted the lowest-priced, technically acceptable (LPTA) proposal. *Id.* at 4, 92.

As relevant here, the solicitation included exhibit M “Other Than Cost and Pricing Spreadsheet,” which offerors were required to complete and provide as part of their price proposals. RFP at 59, 78-79; AR, Tab 3, RFP exh. M. The solicitation required offerors to include in their completed exhibit M spreadsheets detailed information related to the development of their direct labor rates, indirect labor costs, profit margins, and any other direct costs. RFP at 79-81. The solicitation established that the agency would evaluate offerors’ completed exhibits M as one of the price evaluation subfactors. *Id.* at 88.

As initially issued, exhibit M identified the incumbent contractor, PRO-telligent, and also revealed PRO-telligent’s profit margin for option year three.¹ AR, Tab 1, COS at ¶¶ 4-5; Tab 3, RFP, exh. M at Price Proposal Worksheet. Also as initially issued, exhibit M contained formatting errors. COS at ¶¶ 5-6. On July 30, the contracting officer issued RFP amendment no. 1, which replaced exhibit M with a version that corrected the formatting errors. *Id.* at 6; Supp. COS at ¶ 1; AR, Tab 6, amended RFP exh. M. The record reflects that the amended exhibit also appears to have removed the profit margin information for option year three, though at the time the contracting officer issued RFP amendment no. 1, she was not even aware that the originally issued exhibit M had disclosed PRO-telligent’s pricing information. AR, Tab 6, Amended RFP exh. M at Price Proposal Worksheet; COS at ¶ 6.

On August 4, Tetra Tech notified the agency that exhibit M had disclosed PRO-telligent’s proprietary information to other potential offerors. COS at ¶ 7; AR, Tab 7, Letter from Tetra Tech to Agency. Tetra Tech expressed its belief that disclosure of PRO-telligent’s profit percentage on the incumbent contract “will provide our competitors with an unfair competitive advantage[,] especially in a[n] [LPTA] competition,” and requested that the agency mitigate the competitive advantage by amending the solicitation to provide for a best-value tradeoff, rather than an LPTA, source selection methodology. AR, Tab 7, Letter from Tetra Tech to Agency at 1. Tetra Tech further requested that the agency amend the solicitation to establish a floor for purposes of evaluating offerors’ proposed profit, which Tetra Tech argued should be set at the level of its disclosed profit margin. *Id.*

In response to Tetra Tech’s letter, the contracting officer investigated the matter and prepared a memorandum in which she confirmed that PRO-telligent’s profit margin for the third option year of its incumbent contract had been disclosed as part of solicitation exhibit M. COS at ¶ 8; AR, Tab 8, PIA Memorandum at 1. The contracting officer found that the disclosure had not resulted in a violation of the PIA because the disclosure had

¹ PRO-telligent is a wholly-owned subsidiary of Tetra Tech, Inc., and is the incumbent contractor providing local guard services at the embassy in Lilongwe, Malawi. Protest at 1-2. Tetra Tech, not its subsidiary PRO-telligent, submitted a proposal in response to the RFP at issue here. Supp. Contracting Officer’s Statement (COS) at ¶ 3.

been inadvertent and the information disclosed related to a previously awarded contract “and not to the current procurement.” *Id.* The contracting officer also found that the disclosure did “not provide enough information for any other vendor to determine all the other factors that also make up the fully burdened labor rates and give an unfair advantage to any potential offeror(s).” AR, Tab 8, PIA Memorandum at 1. Based on these findings, the contracting officer concluded that the disclosure had no impact on the current procurement. *Id.* The contracting officer forwarded her findings and conclusions to the agency’s procurement executive, who concurred that the contracting officer could proceed with the procurement. *Id.* at 1-2.

On August 14, the contracting officer notified Tetra Tech that she had “concluded that there is no impact on the procurement that would provide an unfair advantage to potential vendor(s) on the subject solicitation,” and that she had “received concurrence from the Procurement Executive[.]” Protest at 4-5. Following receipt of this notification, and prior to the solicitation’s proposal submission deadline, Tetra Tech filed this protest with our Office. See Supp. COS at ¶ 3 (the RFP established August 17 as the proposal submission deadline).

DISCUSSION

Tetra Tech contends that the agency knowingly disclosed PRO-telligent’s proprietary information resulting in a violation of the PIA. Comments & Supp. Protest at 2-3. Tetra Tech also argues that the agency failed to conduct an adequate investigation of the alleged PIA violation, and that the agency unreasonably concluded that the disclosure did not provide an unfair competitive advantage to other potential offerors. *Id.* at 6-10; Protest at 4-5, 7. For the reasons discussed below, we deny the protest.

The PIA provides, among other things, that a federal government official “shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(a)(1). Here, the information disclosed by the agency in RFP exhibit M is information related to a prior incumbent contract. As an initial matter, we find that the disclosure here does not fall within the purview of the PIA. The PIA prohibits release of information “before the award of a . . . contract to which the information relates.” 41 U.S.C. § 2102(a)(1). As we have previously stated, the release of information regarding a prior incumbent contract does not meet this definition. See *S & K Aerospace, LLC*, B-411648, Sept. 18, 2015, 2015 CPD ¶ 336 at 6 (finding that the disclosure of the fees pricing from the incumbent contract did not meet the definition of information prohibited from release under the PIA). Here, the profit margin information released by the agency was released years after the award of the contract to which the profit information related. Thus, the disclosure does not fall within this provision of the PIA. *Id.*

Further, the PIA prohibits “knowingly” disclosing bid or proposal information. 41 U.S.C. § 2102(a)(1). Here, the record reflects that the contract specialist utilized a document from PRO-telligent’s incumbent contract to create RFP exhibit M. AR, Tab 4, Email

Discussion between Contracting Officer and Contract Specialist, July 30, 2020. Apparently, in using the PRO-telligent spreadsheet, the contract specialist removed most, but not all, of PRO-telligent's previously proposed pricing information. As discussed above, the contract specialist failed to remove PRO-telligent's identifying information and PRO-telligent's profit margin pricing for option year three. Tetra Tech argues that the agency's admission that it utilized a spreadsheet from PRO-telligent's incumbent contract to create exhibit M is tantamount to an admission that the agency knowingly disclosed PRO-telligent's proprietary information. Comments & Supp. Protest at 2. We disagree.

The agency's use of the actual spreadsheet from PRO-telligent's incumbent contract, rather than creating a new, separate, similarly formatted document, undoubtedly was an ill-advised shortcut. A shortcut, which when combined with the agency's lack of diligence in thoroughly removing PRO-telligent's information (both visible data and meta data) from the spreadsheet, resulted in the disclosure of PRO-telligent's profit margin for option year three of the incumbent contract. Based on the record before us, however, we cannot conclude that it was an intentional or "knowing" disclosure. Accordingly, the contracting officer reasonably concluded that there was no violation of the PIA. See *e.g.*, *Lion Vallen, Inc.*, B-418503, B-418503.2, May 29, 2020, 2020 CPD ¶ 183 at 15 ("[W]here a disclosure is inadvertent or unintentional, a contracting officer may reasonably conclude that there was no violation of the PIA.").

Moreover, in accordance with the requirements of section 3.104-7(a)(1) of the Federal Acquisition Regulation, the contracting officer forwarded her finding to the agency's procurement executive. The procurement executive concurred with the contracting officer's determination that there had not been a violation of the PIA, and directed the procurement to continue. AR, Tab 8, PIA Memorandum at 1-2. On these facts, there is no basis to find that the agency's conclusions regarding the PIA were unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel