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Decision

Matter of: Threat Management Group

File: B-407766.6

Date: July 3, 2013

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Richard B. Oliver, Esq., and J. Matthew Carter, Esq., McKenna Long & Aldridge, LLP, for R3 Strategic Support Group, Inc., an intervenor.
Christopher S. Cole, Esq., Department of the Air Force, 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

1. Protest that agency improperly failed to disqualify offeror for having an unfair competitive advantage is denied where record shows agency conducted a detailed investigation and reasonably concluded that there was no basis to disqualify the offeror.
 2. Protest alleging that agency misevaluated awardee's proposal is denied where record shows that agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations.
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DECISION

Threat Management Group (TMG), of Ladson, South Carolina, protests the award of a contract to R3 Strategic Support Group, Inc., of Coronado, California, under request for proposals No. FA4452-12-R-0003, issued by the Department of the Air Force for explosive ordnance disposal (EOD) support services. TMG argues that R3 had an unfair competitive advantage that should have disqualified it from the competition,¹ and that the agency misevaluated R3's proposal.

¹ TMG styled its allegation as an "unequal access" organizational conflict of interest. The unfair competitive advantage 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

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We deny the protest.

BACKGROUND

The RFP, issued as a service-disabled, veteran-owned small business (SDVOSB) set-aside, contemplates the award, on a “best value” basis, of a fixed-price contract for a 1-year base period and up to four 1-year option periods to perform EOD support services on a worldwide basis. Firms were advised that the agency initially was to evaluate technical approach proposals on a pass/fail basis, considering three subfactors: project plan, staffing plan and quality control plan. RFP at 71-72. Technically acceptable proposals were to be ranked according to price, and price proposals were to be reviewed for completeness and reasonableness. RFP at 72.

The RFP stated that, once the proposals were ranked, the agency would begin its past performance evaluation, starting with the lowest-priced proposal. The RFP advised that the agency was to assign performance confidence adjectival ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral), considering the recency and relevance of the offeror’s past performance information. RFP at 73. If the agency assigned a substantial confidence rating to the lowest-priced offeror’s proposal, that proposal would represent the best value to the government. RFP at 75.

If the agency assigned the lowest-priced proposal a performance confidence rating other than substantial confidence, the agency was to evaluate the next lowest-priced firm’s past performance. *Id.* The RFP provided for the successive evaluation of the ranked proposals until a proposal was assigned a substantial confidence rating, at which point the agency would make award to that firm. *Id.* If no proposal was assigned a substantial confidence rating, the agency was to perform an integrated best value source selection among all offerors, considering past performance and price.² RFP at 75-76.

The Air Force received a number of proposals in response to the solicitation, including those of TMG and R3. The agency evaluated the proposals for technical acceptability and determined that three, including those of TMG and R3, were

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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. As a result, our decision here generally couches the allegation in terms of an unfair competitive advantage.

² The RFP stated that past performance was significantly more important than price for purposes of the agency’s best value determination. RFP at 71.

technically acceptable. Agency Report (AR), exh. 23, Source Selection Decision Document, at 2. The agency next ranked the technically acceptable proposals based on price; R3's lowest-priced proposal was ranked first. Id. at 3. Finally, the agency performed its past performance evaluation and assigned R3 a rating of substantial confidence. Id. at 3. Since R3's past performance was rated substantial confidence, and since it submitted the lowest-priced proposal, the Air Force found that the firm's proposal represented the best value to the government. Id. at 3-4.

On November 8, 2012, TMG filed a post-debriefing protest in our Office. The firm alleged 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 EOD program. TMG also alleged that the agency had misevaluated R3's proposal. On January 8, 2013, the Air Force advised our Office that it intended to take corrective action in light of a supplemental protest allegation raised by TMG. The agency stated that it intended to reevaluate past performance and to reassess TMG's unfair competitive advantage allegation. Based on the agency's corrective action notice, we dismissed TMG's earlier protest as academic on January 10, 2013.³

By letter dated March 19, the agency advised TMG that, after performing a reevaluation, it had affirmed its decision to make award to R3. After requesting and receiving a debriefing, TMG filed its current protest.

UNFAIR COMPETITIVE ADVANTAGE

TMG argues that R3 had an unfair competitive advantage that should have resulted in the firm being disqualified from consideration for award. In this connection, R3 proposed as its project manager an individual who was, at the time, the agency's functional manager for EOD at Shaw Air Force Base. TMG contends that this individual had access to competitively useful, non-public information because he received monthly status reports during the performance of the predecessor contract that included information about TMG's and its proposed subcontractor's employees, their labor rates, and the labor mix used to perform the predecessor contract.⁴ In support of its contention, TMG provided e-mail transmissions from 2011 that included the name (but not the e-mail address) of the individual in question as a recipient. TMG alleges that this access gives rise to the presumption that R3 possessed competitively useful, non-public information that would have assisted the firm in obtaining the contract.

³ TMG's subsequent request that we recommend it be reimbursed the costs of filing and pursuing its protest was dismissed in part and denied in part. Threat Management Group, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84.

⁴ TMG and its proposed subcontractor were subcontractors to the prime incumbent contractor for this requirement.

We find no merit to this aspect of TMG's protest. As a general rule, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm may be disqualified from a competition based on the appearance of impropriety created by those actions--even if no actual impropriety can be shown--provided that the determination that the firm may have gained an unfair competitive advantage is based on hard facts, and not mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28, 29. Our Office reviews a contracting officer's consideration of an OCI for reasonableness, and where an agency has given meaningful consideration to whether a conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17.

Here, the record shows that the agency performed a detailed investigation of TMG's allegations in response to TMG's earlier protest, and determined, on the basis of that investigation, that R3 did not have an OCI that would require disqualification of the firm from competing for this requirement.

The contracting officer and contract specialist conducted several interviews with the individual in question to determine whether he may have had access to non-public information about TMG and its subcontractor. He explained that the nature of his official duties was such that he did not have access to the proprietary information of TMG or its subcontractor. Specifically, the contracting officer states in a declaration filed during the prior protest as follows:

His [the individual in question] duties primarily focus on matters relating to deployment and contingencies in CENTCOM [Central Command], not on installation level support services. He had absolutely nothing to do with the current contract that TMG is working under, and thus, does not have access to TMG's or other EOD contractors' rates, pricing, strategies, approaches, or performance records.

AR, exh. 19, Contracting Officer's Declaration at 1.

The agency also had the supervisor of this individual perform a search of his computer, and the search results--dating back to 2010--did not show that the individual in question actually had the e-mail transmissions on his computer. AR, exh. 29, Agency OCI Investigation Report, at 4. In addition, the individual represented to the contract specialist that he had no recollection of ever receiving, reviewing or forwarding the monthly status reports in question. By way of

explanation, he states that his e-mail address domain had changed from @shaw.af.mil to @kadena.af.mil. Id. at 10.

As a result, it is not clear from the record that this individual did, in fact, have access to non-public, competitively useful information. More important, even if he did have access to such information, he was a government employee at all times relevant to this procurement, and there is no evidence that he provided any information to R3 prior to the submission of its proposal or otherwise engaged in proposal preparation activities.

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, provided the determination of an unfair competitive advantage is based on facts, and not mere innuendo or supposition. Health Net Federal Servs, LLC, supra at 28. 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, after speaking with his agency's legal advisor and obtaining a written ethics opinion, the individual in question signed a conditional letter of intent to work for R3 on June 20, 2012. AR, exh. 17, Declaration of the EOD Functional Manager, at 1-2. Proposals were submitted on June 29, just 9 days later. However, the individual continued in his official capacity until he retired in March 2013. Id. at 1; Contracting Officer's Statement of Facts, at 24. In other words, at all times relevant to this procurement, the individual in question was employed by the government, not R3.

There also is no evidence that R3 had access to competitively useful, non-public information. TMG's sole support for its assertion that the individual in question provided R3 with such information is R3's representation in its proposal that it intended to recruit incumbent personnel to perform the contract, along with a listing of certain incumbent employees in its proposal. However, a reading of R3's proposal shows no more than that the firm engaged in the relatively common strategy of contacting incumbent personnel in order to obtain their commitment to work for R3 in advance of submitting its proposal. AR, exh. 13.2, R3 Technical Proposal, at 40-41. Moreover, the R3 proposal includes a chart that lists the names of not only TMG employees, but a much larger group of the incumbent EOD support services contract personnel. Id. Simply stated, R3's mere inclusion of the names of

the EOD support services contract workforce members in its proposal does not demonstrate that the individual in question provided this information to R3.

In sum, the facts in the record, showing that the individual in question had only indicated an intention to work for R3 in the future, without more, do not support a conclusion that R3 had an unfair competitive advantage. See Cleveland Telecommunications Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 at 6-7 (protest alleging unfair competitive advantage 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). As a result, we deny this aspect of TMG's protest.

R3's PROPOSED STAFFING

TMG argues that R3 proposed inadequate staffing to meet the solicitation's requirements and should have been found technically unacceptable. TMG contends that the agency never considered whether R3's proposed staffing was adequate to perform at all of the contract's locations. TMG's argument relies primarily on the fact that it proposed more full-time equivalents (FTEs) than did R3. In effect, TMG takes the position that, since it is an incumbent subcontractor, it is in a better position than R3 to assess the staffing necessary to meet all of the requirements of the solicitation.

We find no merit to this argument. In considering protests relating to an agency's evaluation, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's mere disagreement with the agency's evaluation conclusions does not provide a basis for our Office to object to the evaluation. OPTIMUS Corp., B-400777, Jan. 26, 2009, 2009 CPD ¶ 33 at 6.

The RFP did not include staffing profiles or estimates--or even an overall level of effort--with which offerors were required to comply. Rather, the solicitation contemplated that the offerors would propose staffing they thought would be adequate to accomplish the RFP's requirements. Because the RFP required the offerors to show how their proposed staffing would meet the solicitation's requirements, it necessarily contemplated that offerors could propose different technical approaches and staffing to accomplish the work. As a result, the mere fact that R3's proposed staffing differed from that proposed by TMG does not show that R3's proposed staffing is inadequate. Rather, it shows only that R3 and TMG proposed different staffing.

The record also shows that R3's proposed staffing is in line both with the staffing proposed by the third offeror, as well as the staffing currently being used by the

incumbent contractor to perform what essentially are identical requirements to those being solicited. In this connection, the record shows that R3 proposed a total of [deleted] FTEs, while the other technically acceptable offeror proposed the same number of FTEs. AR, exh. 21a, Proposal Analysis Report, at 23. Further, the agency states that the current requirements are being performed using [deleted] FTEs; that the CPARS report for that contract found that the contractor's performance was very good; that 100 percent of the required training classes were being conducted on time and were properly documented; that 100 percent of all required equipment was available and in serviceable condition; and that the current contractor managed the EOD safety program correctly with 100 percent of all operations conducted safely with no discrepancies. Contracting Officer's Statement at 26. Simply stated, TMG has failed to show that the agency's evaluation of R3's proposed staffing was unreasonable.⁵

PAST PERFORMANCE EVALUATION

TMG asserts that the agency miscalculated R3's past performance. The protester does not take issue with the substantive conclusions about the merit of R3's past performance, and, in fact, the record shows that R3 received uniformly high ratings for its past performance. AR, exh. 14.2, Past Performance Questionnaires (PPQs) and Contractor Performance Assessment Reporting System (CPARS) Reports. Instead, TMG contends that the Air Force unreasonably found R3's past performance examples relevant. According to TMG, R3 does not have past performance examples that are of the same magnitude as the contract contemplated here, and does not have relevant past performance in two of the areas of contract performance required under the RFP. TMG therefore argues that the agency acted unreasonably in finding any of R3's past performance examples relevant.

The evaluation of past performance, including assessments of relevance and significance of an offeror's performance history, is a matter of agency discretion, and we will not substitute our judgment for reasonably-based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10.

⁵ In a related assertion, TMG contends that the agency also should have found R3's price proposal incomplete because it did not include the cost of all the personnel necessary to perform the requirement. TMG does not contend that R3's price proposal is inconsistent with its technical proposal (for example, that R3 included fewer FTEs in its price proposal than the number included in its technical proposal), and TMG also expressly represents that it is not arguing the agency should have conducted a price realism evaluation. Protest at 34-35. Given TMG's arguments, and because we conclude that the evaluation of R3's proposed staffing was reasonable, it follows that there would have been no basis for the agency to conclude that R3's proposed price was incomplete.

An offeror's disagreement with an agency's past performance evaluation judgments does not demonstrate that those judgments are unreasonable. Glenn Def. Marine-Asia PTE, Ltd., B-402687.6, B-402687.7, Oct. 13, 2011, 2012 CPD ¶ 3 at 7. Our review of the record here provides us no basis to question the agency's evaluation.

The RFP stated that the agency was to evaluate the relevance of each offeror's past performance based on the similarity of the prior work to the current requirement in terms of both size or magnitude, and also in terms of the similarity of the prior work to the technical requirements of the current requirement. RFP at 74. The RFP contemplated assignment of a "very relevant" rating where the past performance example involved an effort of essentially the same scope and magnitude compared to the solicitation; while it contemplated the assignment of a "relevant" rating where the past performance example involved an effort of a similar scope and magnitude compared to the solicitation. RFP at 75.

First, to the extent TMG asserts that R3's contracts were not relevant because of their comparative size, the agency points out that this procurement was conducted as a SDVOSB set-aside with a size standard of \$14 million, and as a result, it would be unreasonable for the agency to expect any of the offerors to submit references for prior work valued in excess of \$14 million. Contracting Officer's Statement at 21. The agency also notes that the applicable size standard (\$14 million) is approximately [deleted] percent of the independent government estimate for the current requirement. Id. Moreover, the agency also points out that the yearly value of R3's largest contract was \$[deleted], while the yearly value of TMG's largest contract was \$[deleted]. Id.

The record shows, then, that neither R3 nor TMG had contracts that were directly comparable to the size and magnitude of the contract at issue. Accordingly, we conclude that, to the extent the agency found R3's contracts relevant in terms of their size or magnitude, TMG was not prejudiced by the agency's actions, since TMG had similarly-valued past performance.⁶

Second, TMG challenges the technical similarity of all of R3's past performance examples. As noted above, TMG asserts that R3 does not have relevant past performance in two areas of contract performance, specifically, logistics support services and training support services. We have reviewed all of TMG's allegations and find them to be without merit. We discuss below one of these allegations for illustrative purposes.

⁶ Again, the RFP contemplated that past performance would be evaluated sequentially, beginning with the lowest-priced offeror. Because the agency made award to R3, it never evaluated TMG's past performance information.

One of the R3 contracts found relevant by the agency was Navy contract No. N00174-12-C-0009. The agency received two PPQs for that contract. The first questionnaire was prepared by the contracting officer's representative (COR), while the second was prepared by a contract specialist. TMG argues that these PPQs show that R3 never performed training support services or logistics support services (which would include EOD equipment support services such as maintenance, cleaning, inventory and repair of the equipment). TMG relies more heavily on the ratings in the PPQ prepared by the contract specialist to support its position.

The record does not support TMG's position. As noted, TMG relies heavily on the PPQ prepared by the contract specialist. That PPQ, however, represents that it was based on reports prepared by the COR rather than the direct observations of the contract specialist. AR, exh. 14.2, PPQs and CPARS, at 20. Additionally, while TMG cites the contract specialist's assignment of certain "not applicable" ratings in that PPQ, there is no narrative explanation for those ratings.

In comparison, the PPQ prepared by the COR includes detailed observations that show that R3 performed training support services (*id.* at 13-14), as well as logistics support services (*id.* at 14).⁷ Moreover, the COR assigned uniformly high ratings to R3 in response to all of the technical approach questions on the PPQ.

In addition, the RFP specifically provided that the agency would evaluate the past performance of the prime contractor and any subcontractors or teaming partners in the aggregate. RFP at 74. As discussed below, consistent with that requirement, the record shows that the agency arrived at an overall relevancy rating for the past performance of the R3 team as a whole.

⁷ On the subject of logistics support services, the COR rated R3 as blue/exceptional, but included the following qualifying explanation: "Not much as in support but advised on best practices concerning TOA [table of allowance] and procurement start to finish." AR, exh. 14.2, PPQs and CPARS, at 14. The record shows that the agency evaluators assigned this contract a rating of very relevant in terms of technical similarity, and TMG challenges that finding based, in part, on this language. AR, exh. 21a, Proposal Analysis Report, at 18. Even if, as TMG suggests, this qualifying language somehow shows that R3 did not perform the full spectrum of logistics support services contemplated by the RFP, it would appear that the assignment of a relevant rather than a very relevant rating would have been appropriate, since the requirements of this contract were similar to--but not essentially the same as--the requirements of the RFP. The record shows that the assignment of a relevant--rather than very relevant--rating for the technical element of this contract would not have affected R3's overall relevant rating for the contract. AR, exh. 21a, Proposal Analysis Report, at 18.

First, the record shows that R3's principal subcontractor will be performing [deleted] percent of the overall requirement, and the relevance of that firm's past performance examples was factored in by the agency in its overall relevancy determination of the R3 team's past performance. AR, exh. 21a, Proposal Analysis Report, at 19. TMG does not take issue with the relevancy of the subcontractor's past performance examples, and the record shows that the agency found all five of those examples relevant--four were considered very relevant and one was considered relevant. AR, exh. 21a, Proposal Analysis Report, at 18.

Second, the record shows that the evaluators confined their consideration of past performance examples to just those contracts rated either very relevant or relevant. Again, that evaluation included all of the subcontractor's contracts because they had all been rated very relevant or relevant. For R3, only two of its five past performance examples received overall ratings of relevant. AR, exh. 21a, Proposal Analysis Report, at 18. The agency then considered these seven contracts in the aggregate to arrive at its overall rating of substantial confidence for the R3 team. Id. at 18-19. This overall approach was consistent with the terms of the RFP and otherwise unobjectionable.

In view of the foregoing discussion, we conclude that the agency reasonably found R3's past performance examples relevant, and appropriately considered R3's past performance, in conjunction with the past performance of its principal subcontractor, in arriving at an overall past performance rating for R3 of substantial confidence.

The protest is denied.

Susan A. Poling
General Counsel