

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Phoenix Management, Inc.

File: B-406142.3

Date: May 17, 2012

Joan Kelley Fowler Gluys, Esq., John C. Dulske, Esq., and Bryan L. Kost, Esq., Dulske & Gluys, P.C., for the protester.
Michael J. Gardner, Esq., George G. Booker, Jr., Esq., and Shomari B. Wade, Esq., Troutman Sanders, LLP, for Alliance Technical Services, Inc., the intervenor.
Marvin K. Gibbs, Esq., Department of the Air Force, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee, in preparing its proposal, violated the Procurement Integrity Act and made material misrepresentations, and that an award to the awardee was precluded by an impermissible organizational conflict of interest, is denied, where as part of earlier corrective action in response to a prior protest, the agency investigated the protester's allegations and reasonably found them to be unsupported by the record.

2. Protester's argument that the agency's evaluation of the awardee's proposed price was flawed because the agency did not evaluate the awardee's price for realism or verify that the awardee would comply with the Service Contract Act (SCA) is without merit where the solicitation did not provide for a price realism analysis or for verification of SCA compliance.

DECISION

Phoenix Management, Inc., Austin, Texas, protests the award of a contract to Alliance Technical Services, Inc. (ATS), Norfolk, Virginia, under request for proposals (RFP) No. FA4610-09-R-0013, issued by the Department of the Air Force, for launch support services at Vandenberg Air Force Base, California. Phoenix argues that ATS materially misrepresented in its proposal that certain personnel would be available for contract performance. Phoenix also argues that ATS violated the Procurement Integrity Act (PIA) in preparing its proposal, and that

award to ATS was precluded by an impermissible organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

The solicitation, issued as a total set-aside for small businesses, provided for the award of a fixed-price contract for a 60-day base period and a 10-month option period, followed by four 1-year option periods. RFP at 112, 154-157, 226.¹ The RFP stated that a contract would “be awarded using Lowest Priced Technically Acceptable source selection procedures,” and set forth the evaluation factors of technical and price. RFP at 230-231. The solicitation continued by explaining that the technical factor was comprised of the following four subfactors: understanding of requirements and technical approach; technical capability-launch refurbishment services (required licenses, training, and certifications); technical capability-corrosion control services (required licenses, training, and certifications); and technical capability-vehicle management services (required licenses, training, and certifications). Id. The RFP included detailed definitions of “acceptable” and “not acceptable” ratings for each of the evaluation subfactors, and required, for example, that in order to receive an “acceptable” rating under the technical capability-launch refurbishment services subfactor, the proposal would have to include “evidence that each proposed staff member performing launch refurbishment services” has certain specified licenses, training and certifications. Id. With regard to price, the solicitation stated that each offeror’s proposed price would be evaluated “for reasonableness and affordability.” RFP at 231.

The agency received proposals from four offerors, including Phoenix and ATS. Agency Report (AR) at 3. The agency evaluated each of the four proposals as technically acceptable, and ultimately selected ATS’s proposal, which was lowest in price at \$10,503,640, for award. AR, Tab 11, Proposal Analysis Report (PAR), at 784; Tab 13, Source Selection Decision, at 809.

Phoenix, which had submitted the second low-priced proposal at \$11,308,460, protested the award to our Office on November 14, 2011.² Phoenix argued, among other things, that because ATS lacked qualified personnel to perform the services

¹ Our citation to page numbers refers to the BATES numbers in the agency report.

² Phoenix had performed the predecessor contracts as a prime contractor from 2001-2006, and as a subcontractor to the incumbent contractor--Santa Barbara Applied Research (SBAR)--from 2006 to the present. SBAR, which is not a small business for this procurement and thus would be ineligible for this award, is ATS’s proposed subcontractor for this effort.

here, ATS must have improperly accessed and used without authorization information in the preparation of its proposal concerning certain Phoenix employees.³ Phoenix Initial Protest (B-406142). Phoenix asserted that this information, which consisted of the employees' names and their respective licenses, training, and certifications, was proprietary to Phoenix, and had resulted in ATS's proposal being rated as acceptable under the RFP's technical evaluation subfactors. Phoenix concluded here that ATS's use of this information constituted a material misrepresentation in ATS's proposal,⁴ a violation of the PIA,⁵ and resulted in an impermissible "unequal access" OCI that precluded the award to ATS.⁶ Phoenix Supp. Protest (B-406142.2).

On November 29, the agency notified our Office of its intent to take corrective action in response to Phoenix's protest. The agency stated that it would investigate the protester's allegation that ATS's alleged actions had violated the PIA and had resulted in an impermissible OCI. Our Office found that the agency's proposed corrective action rendered Phoenix's protests academic, and dismissed the protests on December 1.

³ Phoenix also timely protested ATS's size status. On December 22, 2011, the Small Business Administration (SBA) found that ATS was a small business for this procurement. AR, Tab 26, SBA Size Determination, at 1104.

⁴ An offeror's misrepresentation that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection, or for termination of a contract based upon the proposal. Vizada, Inc., B-405251 et al., Oct. 5, 2011, 2011 CPD ¶ 235 at 9.

⁵ The PIA provides in relevant part that "[a] person shall not, other than as provided by law, knowingly obtain 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. § 423(b) (2006).

⁶ An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition. FAR §§ 9.505(b), 9.505-4; The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 5. The concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of "[p]roprietary information that was obtained from a Government official without proper authorization," or "[s]ource selection information . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." FAR § 9.505(b); The GEO Group, Inc., supra, at 6.

The record reflects that the cognizant contracting officer conducted an investigation into the PIA and OCI allegations made by Phoenix. In doing so, the contracting officer prepared separate determinations and findings (D&F) for the PIA and OCI allegations, complete with supporting documentation, which detail the contracting officer's investigations. AR, Tab 21, D&F Relative to Allegations of PIA Violations by Phoenix (PIA D&F); Tab 22, D&F Relative to Allegation of OCI by Phoenix (OCI D&F).

The contracting officer first noted in the PIA D&F that the "licenses, certifications and training documentation involved contained no markings or labels identifying them as proprietary or source selection sensitive." AR, Tab 21, PIA D&F, at 1046. The contracting officer added here that licenses, certifications, and records of training "are issued by state offices or commercial training companies and are available to the public upon request." Id.

With regard to Phoenix's assertion that ATS had improperly accessed and obtained the information, the PIA D&F noted that the documentation in question "was contained in the contract file as part of [Phoenix's] proposal documentation," and was not "accessible to anyone except the [contracting officer] and other authorized SBAR contract employees."⁷ AR, Tab 21, PIA D&F, at 1046. The contracting officer noted in this regard that "SBAR did maintain a restricted folder on [a contracting agency] server with access limited to 13 contractor personnel," but found after conducting a search of the "SBAR file folder system in question" that none of the "licenses, certifications, or training documentation for the personnel cited in ATS's technical proposal [were] located on the file server." Id. at 1046-47. The contracting officer added here that he next sent a questionnaire to certain Air Force personnel to ensure that Air Force personnel did not otherwise have access to, or "maintain copies of any related licenses, certificates and training records," and received written assurance that this was the case. Id. at 1047; attach. 1, Memorandum for Contracting Office (Dec. 1, 2011), at 1049-50.

The contracting officer also sent a list of questions to the president of ATS asking how ATS had obtained the copies of the licenses, certifications and training records for certain of the incumbent personnel. The president of ATS responded that "[e]arly in the developmental phase of the proposal, we were pleased to learn that many of the current workers were willing to provide their credentials in support of ATS Team's response." AR, Tab 21, PIA D&F, attach. 2, Letter from ATS (Dec. 1, 2011), at 1051. In response to questions asking who had provided the licenses, certifications, and training records to ATS, and whether ATS had obtained written authorization from the respective individuals, the ATS president stated that the licenses, certifications and training records had been provided to an employee

⁷ As mentioned previously, SBAR is the incumbent contractor for these services, and Phoenix was a subcontractor to SBAR under the incumbent contract.

of SBAR, and that oral, rather than written, authorization had been provided. Id. The ATS president added that, “[b]ased on this inquiry,” he had asked that the individuals in question “confirm” their permission in writing, and provided the written confirmations of the eight individuals as attachments to his response to the contracting officer.⁸ Of these eight individuals, the record reflects that Phoenix and ATS had proposed five of the same individuals in their respective proposals, and that three of these individuals had been Phoenix employees and two had been employees of another subcontractor. Protester’s Comments at 3; AR, Tab 5, ATS Proposal, at 545-46, 551-52, 556, 564-69; Tab 6, Phoenix Proposal, at 700, 705-06, 708, 710-12.

The contracting officer also sent a list of questions to a SBAR contract manager. In response, the SBAR contract manager advised that SBAR’s subcontractors on the incumbent contract (such as Phoenix), and not SBAR, maintained copies of the required licenses, certifications, and training records. AR, Tab 21, PIA D&F, at 1047; Tab 21, PIA D&F, attach. 3, Letter from SBAR, at 1060-1061. The SBAR contract manager added that, in SBAR’s view, the licenses and certifications issued to employees “belong to the individual” and not their employer, and that the three individuals previously employed by Phoenix and referenced in both ATS’s and Phoenix’s proposals, had voluntarily offered their licenses and certifications to the SBAR contract manager for use in ATS’s proposal and for future employment considerations. Id.

In investigating Phoenix’s OCI complaint, the contracting officer noted, among other things, that Phoenix had provided, as part of its complaint, signed statements from the three Phoenix employees that had been referenced in both ATS’s and Phoenix’s proposals. These statements each provided as follows: “I have not been asked for my resume or any certificates nor have I authorized the use of the same except to Phoenix Management Incorporated.” AR, Tab 21, PIA D&F, at 1047. Given that these statements conflicted with the statements of these same individuals that had been provided by the president of ATS, the contracting officer conducted separate telephone interviews with each of these individuals. During these interviews, each individual confirmed that he had provided his licenses, certifications, and training records to the SBAR employee, either directly or through another individual, and

⁸ The eight written confirmations are identical with the exception of the proper names, and read as follows:

I, [proper name], voluntarily provided copies of my licenses and certificates and gave verbal authorization to [the SBAR employee] to forward these documents to [ATS] for use in their proposal submittal and consideration for future employment under Solicitation FA4610-09-R-0013.

AR, Tab 21, PIA D&F, attach. 2, Letter from ATS (Dec. 1, 2011), at 1053-59.

had authorized their use for future employment opportunities. Additionally, two of the three employees explained that they had signed the statement providing that they had not authorized any firm other than Phoenix to use their names and other information in a proposal, at the request of a Phoenix manager, because they felt that their job was in jeopardy or they were otherwise concerned.⁹ AR, Tab 21, PIA D&F, at 1047-48.

The contracting officer ultimately concluded that, contrary to Phoenix's assertions, the individuals in question had voluntarily provided their licenses, certifications, and training records to ATS for use in its proposal, and that the licenses, training and certifications, which had been "issued by state offices or commercial training companies and are available to the public and releasable under Freedom of Information Act guidelines," could not be considered information proprietary to Phoenix. AR, Tab 22, OCI D&F, at 1066. Given this, the contracting officer determined that no violation of the PIA had occurred, and that Phoenix's assertion that ATS had an impermissible OCI given its access and use in ATS's proposal of the individuals' names and their respective licenses, training, and certifications, was without merit. The agency subsequently informed the offerors of the agency's findings, and reaffirmed the award to ATS. AR, Tab 23, Contract Award Notice (Feb. 17, 2012). This protest followed.

DISCUSSION

Phoenix again protests that "ATS misrepresented its authority to use the licenses and certifications of certain incumbent employees," and that "[w]ithout these employees ATS's technical proposal falls short of the RFP requirements." Protest at 4; see Protest at 16-20. The protester also argues, based on its allegation that ATS improperly obtained and used in its proposal the names of the Phoenix and subcontractor employees and their respective licenses, certifications, and training records, that ATS violated the PIA and created an impermissible "unequal access" OCI. Protest at 25-34. The protester asserts here that the agency's PIA and OCI investigations were incomplete, inadequate and unreasonable because, among other things, the contracting officer did not ask certain questions during the interviews, and did not interview the SBAR employee and president of ATS mentioned above. Protester's Comments at 3-12.

The protester's allegations are based upon the common assertion that ATS used in its proposal, and without authorization, the names of certain Phoenix and another subcontractor's employees and their respective credentials. In this regard, although the protester disagrees with certain aspects of the contracting officer's methodology in performing his investigations, and disagrees with the entirety of the contracting

⁹ There is no explanation in the record as to why the third Phoenix employee signed conflicting statements.

officer's conclusions, we find the contracting officer's actions and ultimate conclusions to be reasonably based. As set forth previously, the contracting officer, in determining that no PIA violation had occurred or OCI existed, and that there was no material misrepresentation in ATS's proposal, investigated the protester's assertions through the issuance of written questions to representatives of ATS and SBAR, and considered the responses, which included written statements from all of the Phoenix and other subcontractor employees involved. Additionally, and as mentioned previously, the record reflects that the contracting officer conducted telephonic interviews with the individuals involved in order to explore and resolve apparent conflicts in the written record. In our view, the record evidences that the contracting officer acted reasonably in investigating Phoenix's allegations, and reasonably concluded based upon the results of the investigations that the individuals in question had authorized ATS to use their names and credentials in ATS's proposal. As a result, we conclude that the contracting officer reasonably determined that ATS had not violated the PCI, had not made a misrepresentation in its proposal, and did not have an impermissible OCI. See The GEO Group Inc., supra, at 4.

The protester also argues that the agency's evaluation of ATS's proposal under the solicitation's price factor was flawed. Protest at 20-22. The protester points out in this regard that the RFP, under a section entitled "Other Solicitation Requirements," provided that "[a] thorough review of all [contract line items] will be accomplished for accuracy and completeness," and admonished offerors that they were to "provide certification" that their employee compensation would be consistent with the applicable Service Contract Act (SCA) wage determinations or their proposals could be deemed "non-responsive." RFP at 232. The protester contends that the RFP thus provided for a price analysis involving "a comparison of an offeror's price to its unique approach to the work." Protester's Comments at 15-16. The protester argues that the agency's evaluation cannot be found reasonable because there is nothing in the record evidencing that the agency engaged in such a price analysis.

Contrary to Phoenix's assertion, there was no requirement here for a cost or price realism analysis, inasmuch as this is a fixed-price contract and the RFP did not provide for such an analysis to ascertain whether the offered price was unrealistically low. Indtai Inc., B-298432.3, Jan. 17, 2007, 2007 CPD ¶ 13 at 4. Specifically, and contrary to the protester's assertion, the RFP's admonishment that the price schedule would be reviewed for "accuracy and completeness" cannot reasonably be construed as providing for a price realism analysis involving a comparison of "an offeror's price to its unique approach to the work." See Protester's Comments at 15-16. Additionally, we note here that the RFP did not require the submission of information that would permit a price realism analysis.

There is also no merit to the protester's argument that the agency's price analysis was inconsistent with the terms of the solicitation because the agency did not "verify whether [ATS] included the proper SCA wages for its proposed workforce in its

price.” Protester’s Comments at 15. In this regard, the RFP did not provide that the agency would “verify” that an offeror’s proposed price included “the proper SCA wages for its proposed workforce,” nor did the solicitation request the information necessary to perform such a verification. Rather, as noted by the agency, the RFP required only that offerors “provide certification that the labor rates and fringe benefits provided employees covered by the [SCA] are no less than the [Department of Labor] wage determination for the applicable region.” Contracting Officer’s Statement at 21; RFP at 232. As evidenced by the record, ATS’s proposal provided the requisite certification. Contracting Officer’s Statement at 21; AR, Tab 5, ATS Proposal, at 423.

The protester argues, based upon its understanding of a past conversation between a Phoenix employee and a SBAR employee, that ATS was able to propose a lower price than Phoenix because ATS may “downgrade” certain labor classifications to “General Maintenance Workers,” and use two painters rather than the three used on the incumbent contract. Protest at 21-22; Protester’s Comments at 15-16.

The record reflects that the agency evaluated ATS’s proposed technical approach in accordance with the terms of the solicitation, including ATS’s proposed organizational chart reflecting a total of 20 full time equivalent (FTE) personnel and their respective positions. AR, Tab 5, ATS Proposal, at 511; Tab 12, PAR, at 789-91. The agency found, among other things, that ATS’s “proposed organizational structure delineates a proper manpower structure and skill set necessary to perform the work,” and as mentioned previously, evaluated ATS’s proposal as technically acceptable. AR, Tab 12, PAR, at 789, 791.

As noted by the agency, the solicitation did not specify a certain number of FTEs or labor classifications. As such, we fail to see, and the protester has not explained, despite its access under the terms of a protective order issued by our Office to, among other things, the awardee’s proposal and the agency’s evaluation and

source selection decision, the relevance of its observation that ATS proposed to use two rather than three painters to perform the required work.¹⁰

The protest is denied.

Lynn H. Gibson
General Counsel

¹⁰ To the extent that the protester's assertions here relate to ATS's intentions during contract performance, ATS's concerns involve a matter of contract administration which our Office does not review. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2011). Similarly, to the extent that Phoenix's assertion is that ATS will utilize labor categories that will result in a violation of the SCA, we note that the determination of prevailing wages and fringe benefits, and the issuance of appropriate wage determinations under the Service Contract Act, 41 U.S.C. §§ 351 et seq. (2006) are matters for the Department of Labor. SAGE Sys. Techs., LLC, B-310155, Nov. 29, 2007, 2007 CPD ¶ 219 at 3. Concerns with regard to establishing proper wage rate determinations or the application of the statutory requirements should be raised with the Wage and Hour Division in the Department of Labor, the agency that is statutorily charged with the implementation of the Act. See 41 U.S.C. § 353(a); 40 U.S.C. § 276a; SAGE Sys. Techs., LLC, supra.