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**Comptroller General
of the United States**

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

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Decision

Matter of: S&K Aerospace, LLC

File: B-411648

Date: September 18, 2015

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DIGEST

Protest that agency unreasonably concluded that agency’s inadvertent disclosure of protester’s price information under prior incumbent contract did not result in an unfair competition is denied where the protester has failed to demonstrate that it was competitively harmed.

DECISION

S&K Aerospace, LLC, of St. Ignatius, Montana, protests the terms of request for proposals (RFP) No. FA8630-14-R-5030, issued by the Department of the Air Force for the Parts and Repair Ordering System (PROS). S&K contends that the agency improperly disclosed its proprietary pricing data under the incumbent PROS contract.

We deny the protest.

BACKGROUND

The Parts and Repair Ordering System includes logistics supply support (parts, support equipment, components, and end items), maintenance support (repair, upgrade, and overhaul), and analytical/technical services for foreign military sales partners. RFP at 115; see Contracting Officer’s (CO) Statement at 3. The PROS prime contractor receives requisitions from foreign military sales customers and is

responsible for purchasing non-standard and difficult-to-purchase standard supply items, maintenance and repair services, and the management of task orders for installation, studies, analysis, technical support, and training.¹ RFP at 113.

The Air Force Security Assistance and Cooperation Directorate issued the PROS V solicitation on April 20, 2015. The solicitation envisions the award of a single indefinite-delivery/indefinite-quantity (ID/IQ) contract with a base period of five years and five one-year options, followed by a five-year closeout period. RFP at 4. The contract has an estimated value of \$4.2 billion. Id. The agency refers to the current procurement as the PROS V procurement, and the prior procurement of these items and services as the PROS IV procurement. Id. at 4, 7.

The RFP includes both fixed-price and cost-reimbursable contract line item numbers (CLINs). RFP at 2-38. The RFP requires offerors to provide proposed prices or costs for various CLINs including, for example: fill fees; cancellation fees; travel costs; research fees; material, PCH&T (packing, crating, handling, and transportation), and storage costs; expedite order fees; and contingency operations fees. RFP at 2-38; see also CO Statement at 5-6.

On May 8, URS Federal Services, Inc., an AECOM company (AECOM) and a potential offeror, sent a letter to the agency notifying it that a member of the company's proposal team had unlocked a password-protected pricing matrix that was included as part of the RFP, which revealed "information that might include Government cost or price data." AR, Tab 86, AECOM Letter to Agency, May 8, 2015, at 1. Specifically, AECOM's letter stated:

¹ The solicitation explains the purpose of PROS as follows:

Prior to 1990, organic non-standard supply support was unacceptably slow and unreliable to the FMS [foreign military sales] customer, resulting in a 60% cancellation rate. This high rate was due to the type of materials being ordered, which were no longer available in the United States Government (USG) inventory system (non-standard). In 1990, the United States Air Force (USAF)/AFSAC [Air Force Security Assistance and Cooperation Directorate] developed the Non-standard Item Parts and Repair System (NIPARS) to fulfill the FMS customers' non-standard requirements. In the mid-1990s, the program was expanded to include "difficult to support" standard items and the name was changed to the Parts & Repair Ordering System (PROS) . . . PROS is used for the acquisition of non-standard items that are not actively managed in the DoD inventory, or "difficult to support" standard items that the USG Source of Supply (SoS) is unable to support.

RFP at 113.

I write to inform you that a member of our proposal team inadvertently gained access to what may possibly include government internal information embedded in a supporting document. . . . [A] member of our proposal team . . . was working on our price proposal. In order to facilitate her work, [she] attempted to import the data from the Pricing Matrix to [our] pricing model. [The employee] wanted to import the data directly in order to eliminate the risk of any error that might result from transcribing the Pricing Matrix information manually or in cutting-and-pasting the individual fields. The Pricing Matrix, however, was secured and she was not able to import the data directly.

In order to defeat the password, [the employee] used a publicly available application to defeat the password to access the Pricing Matrix. Upon doing so, [the employee], who is very proficient with Microsoft Excel, noticed several hidden tabs in the Pricing Matrix. When she accessed the hidden tabs, she noticed that they contained information that might include Government cost or price data. She quickly closed the application and did not attempt to save the Pricing Matrix file on which she had defeated the password. [The employee's] access to the Pricing Matrix, including the time she spent applying the application to defeat the password, lasted no more than about four or five minutes.

Id. at 1-2.

The AECOM employee promptly reported the above to her superior. As a result, AECOM removed the employee from the proposal team and instructed her not to discuss or disclose her knowledge of the hidden data contained in the Pricing Matrix to anyone else. See AR, Tab 86, AECOM Letter to Agency, May 8, 2015, at 2. AECOM also suggested to the Air Force that “you may wish to consider taking action to ‘sanitize’ and re-post the Pricing Matrix to prevent a recurrence going forward.” Id.

After the agency received this letter, it conducted an investigation which concluded that the information contained in the pricing matrix was S&K's cancellation fees for the base period of the incumbent contract (PROS IV).² The agency states that,

² In the course of preparing its protest, S&K also discovered that the same information--its cancellation fees for the base period of the PROS IV contract--was available in the [DELETED], which was posted on the agency's website. Protest at 5 n.3. The agency removed S&K's proprietary information from the [DELETED] the same day that it was informed of the cancellation fees inclusion. CO Statement at 15.

during its investigation, it “scoured” all Air Force Security Assistance and Cooperation Directorate websites searching for any other proprietary information that might have been inadvertently disclosed. CO Statement at 8. In the course of this investigation, the agency discovered a second inadvertent disclosure; a briefing entitled “[DELETED],” which contained the PROS IV fill fees for the base period of the incumbent contract, was posted on the agency’s website and accessible to the public.³ Id. at 8. In its Procurement Integrity Act determinations and findings memorandum, the agency found that “the Government team wasn’t aware that this briefing was publicly accessible until the investigation revealed that fact.” AR, Tab 20, Procurement Integrity Act Determination and Findings Memorandum, at 3. Upon discovering this information, the agency removed the proprietary information from its website the same day. CO Statement at 9.

After discovering these disclosures, the contracting officer reported them to the head of the contracting activity. CO Statement at 11. The agency thereafter conducted an investigation from approximately May 11 to June 4. CO Statement at 9. Ultimately, the agency took several remedial actions. First, it amended the solicitation to provide that the cancellation fee will be calculated as 80% of an offeror’s corresponding fill fee, rather than allowing offerors to propose their own cancellation fees. AR, Tab 59, Amend. 2, at 85. The agency also amended the solicitation to adopt one of the remedial measures requested by S&K, a requirement that each offeror submit the following signed certification statement in order to be eligible for award:

I, _____, certify, to the best of my knowledge, information, and belief after a diligent inquiry, that our company, _____, is not in possession of, nor have we accessed without authority from S&K Aerospace, any S&K Aerospace proprietary information.

AR, Tab 61, Amend. 3, at 66; see AR, Tab 91, S&K Letter to Agency, at 2. Finally, the agency required the AECOM employee who accessed S&K’s pricing data in the pricing matrix to sign a non-disclosure agreement. CO Statement at 12; AR, Tab 13, Signed Non-Disclosure Agreement.

In addition, the agency prepared a seven page “determination and findings” regarding its investigation and mitigation measures. AR, Tab 20, Procurement Integrity Act Determination and Findings Memorandum. In this regard, the head of

³ The contracting officer explained that this document was initially used at quarterly meetings with foreign liaison officers, which S&K attended. CO Statement at 15. Neither the briefing nor the particular slides containing S&K’s fees were labeled as proprietary, and “[a]t no point did SKA request the Air Force include proprietary markings on the fill fees presented in the briefing or ask the Air Force to remove the briefing from the website.” Id.

the contracting activity concluded that there was no evidence that the disclosures of S&K's information were intentional. Id. at 2. The memorandum also concluded that the unintentional disclosures had been sufficiently mitigated. First, the agency noted that the fees that had been disclosed were proposed in 2011 and did not contain escalation factors over the three-year base period; therefore, their utility was diminished through the passage of time. Id. at 2. Second, the agency noted that "the makeup of what constitutes fill fees for PROS IV and PROS V is significantly different," due to changes in the requirements of the solicitation, such that other offerors' knowledge of the PROS IV fees would not cause S&K competitive harm in the PROS V procurement. Id. at 3, 5. Finally, the agency concluded that its remedial measures removed any remaining competitive advantage that other offerors might have obtained. As a result, the head of the contracting activity found that the disclosures had been sufficiently mitigated and that the integrity of the PROS V procurement was not adversely impacted. Id. at 6. After learning of the agency's conclusions, S&K filed this protest with our Office.

DISCUSSION

S&K contends that the agency's disclosure of its proprietary pricing information resulted in a violation of the Procurement Integrity Act and caused the protester competitive harm. S&K further contends that the agency's investigation and remedial actions were an insufficient remedy.⁴ Protest at 14.

Procurement Integrity Act

As noted, S&K contends that the agency's disclosures violated the Procurement Integrity Act. Protest at 9. The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107, known as the Procurement Integrity Act, provide, 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).

The Federal Acquisition Regulation (FAR) requires that if a possible violation of the Procurement Integrity Act could impact the pending award or selection of the contractor, then the head of the contracting activity must review the information and take appropriate action, which may include: (1) advising the contracting officer to proceed with the procurement; (2) beginning an investigation; (3) referring information to appropriate criminal investigative agencies; (4) concluding that a

⁴ Initially, S&K also protested provisions of the solicitation regarding transportation costs. The agency took corrective action in response to this portion of the protest and, on July 9, GAO dismissed these challenges as academic.

violation occurred; or (5) recommending that the agency head determine that a violation has occurred and voiding or rescinding the contract. FAR § 3.104-7.

Here, based on our review of the record, we find that S&K's Procurement Integrity Act allegation provides no basis on which to sustain its protest. Not only does the record support the agency's conclusion that no Procurement Integrity Act violation occurred, but in any case, the agency's remedial measures were a reasonable response to the potential violation.

As an initial matter, we find that the disclosures here do not fall within the purview of the Procurement Integrity Act. First, the Act 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 held, the release of information regarding a prior incumbent contract does not meet this definition. See Engineering Support Personnel, Inc., B-410448, Dec. 24, 2014, 2015 CPD ¶ 89 at 6 ("cost figures in the [independent government cost estimate] that 'were derived from . . . costs on the current [Price Breakout Worksheets]' from incumbent contracts or task orders, including one being performed by the protester--[are] not 'contractor bid or proposal information'; rather, it is information that was generated during the performance of a contract or task order"). Here, the agency did not release S&K's proposed PROS IV fees before the award of the PROS IV contract. Rather, the PROS IV contract fees were released years after the award of the contract to which those fees related. Thus, the disclosure does not fall within this provision of the Procurement Integrity Act.

Further, the Procurement Integrity Act prohibits "knowingly" disclosing bid or proposal information. 41 U.S.C. § 2102(a)(1). S&K concedes that it "does not allege that the Air Force intentionally disclosed SKA's proprietary information." Protester Comments at 5. Rather, the protester complains that the agency's release was "caused by the Air Force's negligence," and that the agency acted too slowly in addressing the disclosures. Id. at 5. S&K, however, has not explained, nor is it otherwise apparent, how such allegedly negligent disclosures meet the "knowingly" disclosed standard under the Procurement Integrity Act.

The Procurement Integrity Act also provides that, "[e]xcept as provided by law, a person shall not 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. § 2102(b). S&K has not established that any person "knowingly" obtained S&K's fees under the incumbent contract. In this regard, the AECOM employee who self-reported her access explained that her aim was simply to transfer the pricing matrix into her excel spreadsheet in a way that would prevent clerical errors, and that her discovery of pricing information in the pricing matrix was unintentional. AR, Tab 86, AECOM Letter to Agency, at 1. Further, the record indicates that, once the AECOM employee discovered pricing information in the price matrix, she immediately notified her supervisor and closed

the file without saving or printing the information. AR, Tab 86, AECOM Letter to Agency, at 1-2; cf. Computer Tech. Assocs., Inc., B-288622, Nov. 7, 2001, 2001 CPD ¶ 187 (offeror obtained transcripts of other offerors' oral presentations from the agency's email system, produced copies, and then disseminated them to the company's project manager, who in turn provided them to the deputy project manager).

Moreover, even if the agency's disclosures may have resulted in a Procurement Integrity Act violation, the agency's response was reasonable. In this regard, once the agency was informed of the disclosures, it referred the matter to the head of the contracting activity, conducted an investigation, and took remedial measures to decrease the potential for competitive harm by amending the solicitation and requiring the AECOM employee to sign a non-disclosure agreement. See CO Statement at 8-11.

S&K argues that, once the agency was informed that the solicitation contained S&K's proprietary information, the agency "knowingly" allowed the pricing matrix to remain with the solicitation on the FedBizOpps website (FBO) for several days before it was removed. Protest at 11. The record does not support this claim. The email from AECOM informing the agency of the existence of hidden data in the pricing matrix was received in the agency's email system on the afternoon of Friday, May 8. The agency contacted FBO on the next business day, Monday, May 11. CO Statement at 16. A day later, FBO responded and directed the agency to contact the FBO Administrator. The same day, the agency's contract specialist began trying to contact the FBO Administrator. AR, Tab 66, Email from Contract Specialist re: FBO Agency Administrator, May 12, 2015, at 1. The following day, the agency was successful in contacting the FBO Administrator to request removal of the pricing matrix from FBO. AR, Tab 67, Email to FBO Administrator, May 13, 2015. After several rounds of emails, on Monday, May 18, FBO informed the agency that it was impossible to delete particular attachments from a FBO posting; to remove the pricing matrix, the entire FBO posting would need to be deleted. AR, Tab 73, FBO Email to Agency, May 18, 2015, at 1. The agency replied within a few hours of receiving this information and instructed the FBO Administrator to delete the entire posting. AR, Tab 74, Contracting Officer Email to FBO Administrator, May 18, 2015, at 1. The agency also sent FBO a follow-up email the same day asking for confirmation that the posting had been deleted. AR, Tab 75, Follow-up Email to FBO Administrator, May 18, 2015, at 1. Two days later, FBO confirmed that the posting had been deleted. AR, Tab 77, FBO Email to Agency Confirming Deletion, May 20, 2015, at 1; see CO Statement at 16. Thus, the record demonstrates that, while there was some delay on the part of FBO, the Air Force diligently pursued the deletion of the pricing matrix from the FBO website. Contrary to S&K's claim, we find no basis for concluding that the agency "knowingly" allowed the pricing matrix to remain on the FBO website. For the reasons discussed above, we deny S&K's Procurement Integrity Act allegations.

Unfair Competitive Advantage

Next, S&K contends that the inadvertent disclosures of its proprietary information give other offerors an unfair competitive advantage for the PROS V procurement. The disclosure of proprietary or source selection information to an unauthorized person during the course of a procurement is improper. Kemron Env'tl Servs., Inc., B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2. Where an agency inadvertently discloses an offeror's proprietary information, the agency may choose to cancel the procurement if it reasonably determines that the disclosure harmed the integrity of the procurement process. Id. Where an agency chooses not to cancel the procurement after such a disclosure, we will sustain a protest based on the improper disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure. Id.; Gentex Corporation--Western Operations, B-291793, et al., Mar. 25, 2003, 2003 CPD ¶ 66 at 8-9.

Here, S&K has not demonstrated that AECOM received an unfair advantage or that S&K was competitively prejudiced by the disclosures. In this regard, after investigating the disclosures, the agency concluded that any potential competitive prejudice to S&K was mitigated by several factors, as set forth in further detail below. S&K has failed to demonstrate that the agency's conclusion was unreasonable.

First, the agency notes that there are several ways in which the PROS V procurement differs from the preceding PROS IV procurement. Specifically, the PROS V procurement adds a "higher level of service fee" category to the fill fees. AR at 13-14. This is a category of fill fee that was not priced under the incumbent PROS IV contract. Id. at 14. The contracting officer notes in this regard that the addition of this fee category represents a "50% increase in the number of requisition categories." CO Statement at 19. In this regard, the addition of categories that were not priced under the incumbent contract decreases the competitive advantage that an offeror under the PROS V procurement could obtain from any knowledge of the PROS IV fees.

The contracting officer also notes that the PROS V procurement requires offerors to include more overhead costs in their fill fees, which also decreases the usefulness of knowing the fill fees under the incumbent contract. CO Statement at 19. For example, under the PROS IV contract, prime contractor packaging, crating, handling, transportation, and storage costs were not built into offerors' fill fees. Id. However, under the PROS V procurement, those costs must now be included in offerors' fill fees. Id.; see RFP at 175. According to the contracting officer, this is a significant change from the current PROS IV contract, under which the contractor was reimbursed for these costs under a cost reimbursable CLIN. CO Statement at 19.

The PROS V solicitation also increases the OPI (objective performance incentive) available to the PROS V contractor to \$10 million (versus the \$1 million OPI available under the incumbent contract), changes objective award dates, and changes contract award objectives. CO Statement at 19-20; AR at 14; see also AR, Tab 12, Contract Award Objectives Comparison, at 1. For example, with regard to the contract award objectives, under the PROS V solicitation, contract awards for each requisition are required to be made within 150 days, regardless of the category. RFP at 153; CO Statement at 20. In contrast, under the PROS IV contract, the amount of allowed time varied from 7 days to 75 days, depending on the category of contract. AR, Tab 22, PROS IV Contract, at 119; CO Statement at 20.

In addition, the PROS V solicitation adds a requirement to refund to the government both the vendor refund and the prime contractor's fill fee if the contractor is at fault for a supply discrepancy, while under the PROS IV contract the contractor did not need to account for the risk of supply discrepancies because it still retained its fee. AR at 14. While the contracting officer acknowledges that, "if" the contractor maintains a low "SDR" (supply discrepancy report) rate, this change will have a minimal impact on cost, he maintains that the additional risk associated with the requirement for refunds could nevertheless impact how offerors' calculate their proposed fill rates. CO Statement at 21. We find his conclusion in this regard reasonable, since, generally, when a contractor undertakes higher levels of risk, this can result in a higher price to compensate for the additional risk. See also id. at 21-24 (detailing other changes in the PROS V procurement that make knowledge of S&K's prior fill fees less useful for the PROS V procurement).

Finally, the agency notes that S&K proposed these fees in August 2011; the fees did not contain escalation factors; and only the fees applicable to the 2012-2015 base period were disclosed, not those for the option periods. See CO Statement at 8; AR, Tab 20, Procurement Integrity Act Investigation Determination and Findings, at 3. In our view, given the differences between the PROS IV and PROS V procurements, and the fact that the disclosed PROS IV fees were proposed approximately 4 years ago, there is no basis to question the reasonableness of the agency's conclusion that knowledge of the PROS IV pricing would be of only limited utility for the PROS V procurement.

Furthermore, the agency has taken several steps to minimize the potential for competitive harm from the disclosure of S&K's prior fill and cancellation fees. First, the agency amended the RFP to change the way offerors propose cancellation fees. Instead of allowing offerors to propose their own cancellation fees, the solicitation now sets cancellation fees at a set percentage (80%) of fill fees. In addition, as requested by S&K, the agency also amended the RFP to require that each offeror certify that they have not accessed, and do not possess, any S&K proprietary information. AR, Tab 61, Amend. 3, at 66; AR, Tab 91, S&K Letter to

Agency, at 2. These remedial actions also decrease the risk of competitive harm as a result of the inadvertent release of S&K's prior contract fees.

Finally, we note that S&K has failed to establish that potential offerors have accessed this information or will use it in submitting a proposal. With regard to AECOM, the company and the agency instituted the following remedial measures to preclude any use of the disclosed fees: (1) the AECOM employee was directed not to disclose the existence of the hidden tabs on the pricing matrix with anyone else; (2) AECOM removed the employee from its proposal team and decided that she would have no involvement in preparing AECOM's proposal; (3) the agency had the employee sign a non-disclosure agreement. AR, Tab 13, Non-Disclosure Agreement, at 1.

As for other companies, the agency's information technology (IT) department attempted to identify companies that may have accessed the [DELETED] on the agency's external website. AR, Tab 20, PIA Investigation Determination and Findings, at 3. The agency found that the briefing had been initially posted in June 2012. AR, Tab 99, Agency Response to S&K Letter, at 2. The agency IT specialists then "researched the IP addresses that 'hit' the briefing." Id. According to the agency, "[t]wo dedicated IT technicians, who possessed subject matter expertise, spent weeks researching and responding to [the request to identify all parties that accessed the briefing]." Id. To do this, the IT specialists downloaded and reviewed the IP addresses contained in the agency's logs, then cross-referenced those IP addresses with company names. Id. Although the agency's logs only contained information from February 2014 forward,⁵ the agency determined that, during that time, 91% of the "hits" on the website were from U.S. government or foreign military sales addresses. AR, Tab 20, PIA Investigation Determination and Findings, at 3. Approximately 1% of the "hits" were from companies that are currently teaming partners of S&K on the incumbent contract. Id.; CO Statement at 9. (8% of the "hits" could not be identified as associated with any particular company or organization. Id.) Moreover, the agency noted that none of the companies that had visited the website on which the briefing was posted submitted advance past performance proposals, indicating that they were unlikely to submit proposals in response to the solicitation.⁶

Based on our review of the record, we find that S&K has not demonstrated that any offeror is likely to obtain an unfair advantage from the disclosures of S&K's

⁵ The agency upgraded its servers in February 2014 and therefore does not have internet access logs for the time prior to the upgrade. AR, Tab 99, Agency Response to S&K Letter, at 2.

⁶ The RFP stated that offerors were encouraged to submit their past performance proposals 15 days prior to the date set for receipt of proposals. RFP at 211.

PROS IV contract fees. See Gentex Corporation--Western Operations, supra, at 10. The protester cites a number of cases where we affirmed an agency's decision either to cancel a solicitation or contract, or to disqualify an offeror, in the face of a disclosure that may have resulted in an unfair competition. See, e.g., Protest at 10-14 (citing Norfolk Shipbuilding & Drydock Corp., B-247053, B-247053.5, June 11, 1992, 92-1 CPD ¶ 509; Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 5). However, in those cases, our review was limited to whether the agency's actions in canceling the solicitation or contract were reasonable. Gentex Corporation--Western Operations, supra, at 9 n.11. The cited cases do not indicate that the Air Force here was required to cancel the solicitation or disqualify AECOM because of the agency's inadvertent release of information where S&K has not established that it was competitively harmed. Id.

The protest is denied.

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General Counsel