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Decision

Matter of: Dell Services Federal Government, Inc.

File: B-414461; B-414461.2

Date: June 21, 2017

Kevin J. Maynard, Esq., Tracye Winfrey Howard, Esq., and Cara L. Lasley, Esq., Wiley Rein LLP, for the protester.

Carl J. Peckinpugh, Esq., and Brian F. Wilbourn, Esq., for SRA International, Inc., an intervenor.

Jose Otero, Esq., and Sara Falk, Esq., Department of Education, 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 challenging agency's conclusion that possible Procurement Integrity Act violation will have no impact in connection with the conduct of an ongoing acquisition is sustained where record shows that agency's conclusion failed to take several material considerations into account.

2. Protest that a prospective offeror has either an "unequal access to information" or a "biased ground rules" organizational conflict of interest is sustained where record shows that the firm had access to nonpublic, competitively useful information, and also shows that the individual supplying that information may have participated in developing the agency's requirements for the current acquisition, and the agency has neither meaningfully evaluated whether an organizational conflict of interest exists, nor taken steps to avoid, neutralize or mitigate any such potential conflict.

DECISION

Dell Services Federal Government, Inc. (DSFG), of Herndon, Virginia, protests the actions of the Department of Education in connection with request for quotations (RFQ) No. ED-CIO-17-Q-0002, issued to acquire information technology (IT) services. DSFG maintains that the agency failed adequately to investigate and evaluate an apparent violation of the Procurement Integrity Act and also failed adequately to investigate and evaluate organizational conflicts of interest on the part of SRA International, Inc., of Falls Church, Virginia, another concern interested in participating in the agency's acquisition under the subject solicitation.

We sustain the protest.

BACKGROUND

The agency currently obtains its information technology requirements under a contract called the Education Department's utility for communications, applications and technology environment (EDUCATE) contract. This is a comprehensive contract to provide the agency with all of its IT services requirements; the agency describes the EDUCATE contract as a 'tip-to-tail' contract. Contracting Officer's Statement of Facts (COSF) ¶ 62. DSFG is the current incumbent contractor for this contract, which was awarded in 2007 for a ten-year period of performance.¹

The agency has decided to change the method it uses to acquire its IT services requirements. Rather than awarding a single, overarching contract for its requirements (such as the EDUCATE contract), the agency now intends to acquire segments of its IT requirements using multiple task or delivery orders. The current solicitation is one of a suite of six solicitations the agency intends to use to meet its IT requirements for the foreseeable future. The agency's name for these successor acquisitions is the portfolio of integrated value oriented technologies (PIVOT) program. The current RFQ was issued to acquire IT integrator and end user experience services and is referred to as the PIVOT I solicitation.² The RFQ was issued pursuant to a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) government-wide acquisition contract administered by the National Institutes of Health Information Technology Acquisition and Assessment Center.³

The record shows that, on February 16, 2017, counsel for SRA sent a letter to the contracting officer notifying him of the fact that the firm had come into possession of two DSFG proposals, one from 2007, and one from 2011. Agency Report (AR) exh. D, Letter to the Contracting Officer From SRA's Counsel. It appears that the first of these proposals was submitted by DSFG and resulted in the firm receiving award of the

¹ The contract was originally awarded to Perot Systems Government Services, Inc. That concern was purchased by Dell, Inc. and renamed DSFG. The protester is the successor-in-interest to the contract originally awarded to Perot. For ease of discussion, we refer to both Perot and DSFG simply as DSFG throughout the decision.

² The other solicitations contemplated by the agency are the PIVOT H solicitation (currently issued) to acquire hosting of applications, data, and IT systems services; the PIVOT M solicitation to acquire mobile services; the PIVOT N solicitation to acquire IT network services; the PIVOT O solicitation to acquire IT oversight function services; and the PIVOT P solicitation to acquire printing services.

³ The agency estimates the value of the task order to be issued as a result of the current solicitation at approximately \$[deleted] million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task or delivery orders under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f)(2).

EDUCATE contract. The second of these proposals was submitted by DSFG in 2011 in connection with the issuance of a modification to that contract.⁴ SRA's letter advised the contracting officer that the proposals had been provided to SRA electronically eight days earlier, on February 8, by an employee (Mr. X) of one of its teaming partners for the current RFQ, ClearAvenue, LLC. Id.

After receiving SRA's February 16 letter, the record shows that the contracting officer began to investigate the question of how Mr. X obtained the proposals. The record shows that the contracting officer ultimately was not able to reach a firm conclusion about that question, but he referred the matter to the agency's Office of Inspector General for further consideration. AR, exh. L, E-Mail Exchange Between the Contracting Officer and the Agency's Office of the Inspector General.⁵ The contracting officer also began preparing an assessment concerning whether the release of DSFG's proposals would have an impact on the PIVOT I procurement, as well as whether the other PIVOT procurements would be impacted by the release of DSFG's proposals.

On February 23, the contracting officer contacted DSFG for the first time and advised it that SRA had obtained a copy of its 2007 and 2011 proposals. That same day, the contracting officer provided DSFG with a copy of SRA's counsel's letter reporting the incident. AR, exh. H, E-Mail Correspondence between the Contracting Officer and DSFG, at 3. By e-mail dated February 27, DSFG submitted a letter to the agency notifying it of DSFG's position that there was a potential violation of the Procurement Integrity Act. Id.; Letter of Protest, exh. 4.

The contracting officer prepared a document titled "Procurement Impact Determination," which was dated February 27, and signed by the contracting officer on February 28. AR, exh. M, Procurement Impact Determination (PID). In the document, the contracting officer concluded that, despite the release of the DSFG proposals, there would be no adverse impact on the PIVOT I procurement in particular, or on the other PIVOT acquisitions planned by the agency. The document also was signed by the chief of the agency's contracting office on February 28, and by the head of the contracting activity (HCA) on March 1. Id. at 7. By e-mail dated March 2, the contracting officer represented to DSFG that the agency had concluded its impact determination "some time ago" (but did not advise DSFG of the outcome of that determination) and also advised DSFG that the agency would continue to investigate the possible Procurement Integrity Act violation. AR, exh. H, E-Mail Correspondence between the Contracting

⁴ All parties to the protest agree that these two proposals were the subject of SRA's letter to the contracting officer. Both of these proposals are included in the record for this protest. However, because SRA represented to the agency at the time of its February 16 letter that it had deleted the documents from its records, the proposals were tendered into the record by the agency, and not SRA.

⁵ Our record contains no information about whether the agency's Office of the Inspector General took action on the contracting officer's referral.

Officer and DSFG, at 1. After receiving the agency's March 2 e-mail, DSFG filed the instant protest in our Office.

DSFG's initial letter of protest to our Office alleged that a Procurement Integrity Act violation had occurred and that the agency may not adequately have considered the impact that the release of its proposals to SRA may have had. The agency filed a report responding to that allegation. The agency's report explained that the contracting officer was unable to determine how Mr. X had come to possess copies of the DSFG proposals, and suggested the possibility that Mr. X had obtained the proposals directly from DSFG while working as a subcontractor to the firm on an unrelated contract. COSF, ¶¶ 31-33. The contracting officer also concluded that no agency employees had been involved in Mr. X coming into possession of the DSFG proposals. Id.

In response to the agency report, DSFG filed comments and a supplemental protest. Based on its review of the record, DSFG argued that, in addition to a violation of the Procurement Integrity Act as originally alleged, SRA also had organizational conflicts of interest in connection with the PIVOT acquisitions. Significantly, the protester provided, based on a reading of the record, its conclusion regarding how Mr. X had come to possess the DSFG proposals. Comments and Supplemental Protest, at 9-10.

In this regard, the record shows that, in September 2011, the agency awarded a contract to a concern named Bowhead Systems Management, Inc., to perform an analysis of the EDUCATE contract (referred to in the record as the EDUCATE Analysis contract). AR, exh. EE, EDUCATE Analysis Contract. At the time that contract was awarded, Mr. X worked for Bowhead and he (along with another individual that previously worked for Bowhead and subsequently worked for ClearAvenue) was provided copies of the DSFG proposals by the agency, along with various other sensitive materials. AR, exh. I, Bowhead Non-Disclosure Agreement on its EDUCATE Analysis Contract and Certification Regarding Destruction of Confidential Documents, at 1. The contracting officer states that SRA told him that Mr. X provided the DSFG proposals to SRA. COSF ¶ 29.

During the course of this protest, neither the agency nor the intervenor have disputed--or for that matter, even commented upon--this explanation regarding how the DSFG proposals ended up in SRA's possession. In light of that fact, along with the fact that the protester's explanation withstands logical scrutiny and is buttressed by the evidence in the record, we conclude that this is the most likely explanation for how events transpired.

PROTEST

Potential Procurement Integrity Act Violation

DSFG argues that a violation of the Procurement Integrity Act occurred in connection with the release of its proposals, and that the agency has not adequately considered the impact of that release in deciding to move ahead with the PIVOT I solicitation. As

noted, the agency prepared the PID, AR, exh. M, and determined that the release of the DSFG proposals did not have an adverse impact on the PIVOT I procurement, and also more generally, that the release did not have an adverse impact on the other PIVOT procurements contemplated by the agency. DSFG maintains that the agency failed to take into consideration several important factors in reaching its conclusion.

We sustain this aspect of DSFG's protest. 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 "[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). The Federal Acquisition Regulation (FAR) states that a contracting officer who receives or obtains information of a violation or possible violation of the Procurement Integrity Act must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor. FAR § 3.104-7(a). If the contracting officer determines that there is no impact on the procurement, he or she must forward the information concerning the violation or possible violation, along with documentation supporting the determination that there is no impact on the procurement, to an individual designated in accordance with agency procedures (in this case, the chief of the contracting office). FAR § 3.104-7(a)(1). If that individual agrees with the contracting officer's analysis, the procurement may proceed; if the individual does not agree, the individual must forward the information to the HCA and advise the contracting officer not to proceed with the award. FAR § 3.104-7(a)(2). Here, as noted, the contracting officer prepared the PID, and that document was reviewed by and concurred with by both the agency's designated individual, along with the HCA.

A review of the agency's PID shows that it was confined entirely to a comparison of the differences between how the agency previously satisfied its IT requirements versus how it will meet those requirements going forward. For example, the PID focuses on the fact that the PIVOT I procurement differs from the EDUCATE contract in that the PIVOT I contractor will be required to coordinate among the various other PIVOT contractors rather than building a team of its own subcontractors. AR, exh. M, PID, at 4. In addition, the PID focuses on the fact that there are differences both in the nature of the agency's IT requirements going forward, as well as the fact that technology has significantly evolved since the award of the EDUCATE contract, such that any technical solutions proposed by DSFG in 2007 would be stale if proposed today. Id. at 4-6.

The protester has identified several concerns relating to the adequacy of the agency's PID in light of its limited scope, as described above; we share those concerns. First, as pointed out by the protester, there is nothing to show that the agency gave any consideration to the fact that the DSFG proposals included detailed and extensive information relating to how DSFG priced the EDUCATE contract. Of particular concern is the fact that the 2007 DSFG proposal included detailed information relating to DSFG's labor rates over a 10-year period of time. Specifically, the proposal includes labor rates for ongoing work currently being performed under the EDUCATE contract,

under which DSFG is obliged to continue performance at least through November of this year. AR, exh. J, Business Proposal, attach. 9, DSFG labor rates for the EDUCATE contract. (The 2011 DSFG proposal also contains detailed information relating to DSFG's labor rates and pricing for the work contemplated under that modification, AR, exh. K, DSFG 2011 Proposal. The protester claims that this information also could be competitively useful to the extent that it provides a second point of comparison for DSFG's pricing and labor rates.) Thus, a review of the DSFG proposals could provide significant insight into DSFG's current and historical pricing and labor rates, and such information could provide a competitive advantage to SRA that was never considered by the agency in its PID.

Moreover, as also noted by the protester, the DSFG proposals include the firm's staffing strategies and level of effort for performance of generic work that arguably will be performed under both the EDUCATE and PIVOT contracts, such as the provision of help desk services. AR, exh. J, Business Proposal, Section 2, Business Approach. Such information also could provide a significant competitive advantage to SRA that was never considered by the agency in its PID.

In addition to these concerns, the record also shows that the agency did not critically examine the actions of SRA in connection with the reporting of its receipt of the DSFG proposals. Several things are of particular concern to our Office. First, the record shows that SRA represented that Mr. X was a low-level administrative employee of ClearAvenue. COSF, ¶ 30. In point of fact, as correctly noted by the protester, an examination of the ClearAvenue website shows that Mr. X is ClearAvenue's chief technology officer, and not merely a low-level employee. See http://www.clearavenue.com/our_team.html (last visited on June 21, 2017).

Second, SRA represented to the agency that it had terminated its teaming agreement with ClearAvenue. In making that representation, SRA referenced a copy of a conflict of interest certification executed by a ClearAvenue corporate officer on January 12, 2017. There is nothing about that document that demonstrates that SRA, in fact, terminated its teaming agreement with ClearAvenue. The document itself was executed more than a month before the disclosure occurred, and several weeks before SRA reported the disclosure to the agency. Once again, as pointed out by the protester, an examination of the ClearAvenue website draws into question this representation on the part of SRA, because SRA currently is listed as a partner of ClearAvenue on that firm's website. See <http://www.clearavenue.com/partners.html> (last visited on June 21, 2017).⁶

⁶ We point out that the contracting officer represented to our Office that he had visited the ClearAvenue website, and even included a screenshot from the website in his statement of facts. COSF, ¶ 32. While the record therefore shows that the contracting officer did examine the ClearAvenue website, his examination was confined to discovering the existence of a contractual relationship between DSFG and ClearAvenue. Id.

Finally, SRA downplayed the nature and extent of ClearAvenue's participation as a teaming partner in connection with the PIVOT proposal effort, describing it as "extremely limited." AR, exh. D, Letter to the Contracting Officer From SRA's Counsel, at 1-2. SRA represented that ClearAvenue's activities were confined to participating in 'data calls,' attending meetings, and being provided an opportunity to recommend key personnel for the contract. Id. SRA also stated that it had "no record" of ClearAvenue's input on the PIVOT I proposal. Id. SRA did not offer any evidence in support of this explanation, and in fact, the teaming agreement entered into between SRA and ClearAvenue is not even included in the record. Accordingly, there is no way either for our Office or the agency to have considered, empirically, the nature and extent of ClearAvenue's ongoing obligations, its level of participation contemplated under the teaming agreement, or the nature and extent of its actual activities in preparing the SRA response to the PIVOT I solicitation.

In the final analysis, the only evidence in the record shows that ClearAvenue entered into a teaming agreement with SRA in November, 2016; ClearAvenue's chief technology officer had possession of the DSFG proposals throughout this time period; and, ultimately, he provided the proposals to SRA. AR, exh. D, Letter to the Contracting Officer From SRA's Counsel, at 1. Simply stated, the record shows that SRA was in possession of the DSFG proposals for some period of time, and there is no way objectively to determine, based on the current record, whether ClearAvenue's chief technology officer shared competitively useful information with SRA by some other means in addition to directly providing SRA copies of the DSFG proposals. No critical analysis of these considerations by the agency ever occurred.

In view of the discussion above, we sustain DSFG's challenge to the reasonableness of the agency's determination that disclosure of the DSFG proposals to SRA by ClearAvenue did not adversely impact the PIVOT I competition. We also find that, inasmuch as the agency's conclusions relating to the remaining PIVOT acquisitions relied on the same limitations outlined above for the PIVOT I competition, that conclusion was similarly unreasonable. We therefore sustain this aspect of DSFG's protest.

Organizational Conflicts of Interest

DSFG also argues that SRA suffers from organizational conflicts of interest (OCIs) because of its engagement with ClearAvenue and its receipt of the DSFG proposals.⁷

⁷ Both the agency and SRA argue that these allegations are untimely because DSFG did not advance them in its initial protest. We disagree. A protest concerning an alleged OCI need only be filed where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award.

Honeywell Technical Solutions, Inc. B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 6. Here, the agency's original notice to DSFG advised that the agency's

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DSFG argues that SRA suffers from both an “unequal access to information” OCI, as well as a “biased ground rules” OCI. Specifically, DSFG argues that SRA’s unequal access to information OCI stems from the fact that it had DSFG’s EDUCATE proposals. DSFG argues that SRA’s biased ground rules OCI stems from the fact that during Bowhead’s performance of the EDUCATE Analysis contract, Bowhead (and more specifically Mr. X) worked to help the agency identify its approach for acquiring its IT requirements for the follow-on PIVOT procurements.

In response to DSFG’s unequal access to information allegation, the agency largely repeats its arguments concerning the differences between the EDUCATE and PIVOT acquisitions, and maintains that because the technical solutions from the EDUCATE proposals were stale, they did not provide SRA with an unfair competitive advantage. With respect to DSFG’s biased ground rules allegation, the agency argues that the information developed under the EDUCATE Analysis contract was not used to formulate the PIVOT requirements.

The FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can broadly be categorized into three groups, two of which are pertinent here: (1) unequal access to information; (2) biased ground rules; and (3) impaired objectivity. An unequal access to information OCI exists where a firm gains access to nonpublic information, either during its performance of a government contract or otherwise (such as the current circumstance where SRA obtained copies of the DSFG proposals), and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR §§ 9.505(b), 9.505-4; Cyberdata Techs., Inc., B-411070 et al., May 1, 2015, 2015 CPD ¶ 150 at 6. A biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract. FAR §§ 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. Energy Sys. Grp., B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 4.

For the reasons discussed in detail above, we conclude that SRA may have an unequal access to information OCI by virtue of its having had copies of the DSFG proposals and, more generally, by virtue of its teaming arrangement with ClearAvenue. We also are concerned that SRA had information relating to DSFG’s prices, labor rates and staffing strategies. The agency argues that the information in the DSFG EDUCATE proposals is stale in relation to the technical solutions that may be required to respond to the

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investigation was continuing, and it was not until the agency filed its report that DSFG actually was on notice that the agency had completed its Procurement Integrity Act investigation and considered SRA eligible to compete for the PIVOT I requirement.

PIVOT acquisitions (and on this issue the agency may be right), but the agency has not meaningfully addressed SRA's receipt and possession of DSFG's pricing, labor rates, and staffing strategies information. In short, there is nothing in the record to show that the agency made any effort either to investigate, or to avoid, neutralize or mitigate, any possible OCI on the part of SRA in relation to these concerns. We therefore sustain this aspect of DSFG's protest.

With respect to the question of whether or not SRA has a biased ground rules OCI, as noted, the agency argues that it did not use the information generated in connection with the EDUCATE Analysis contract in preparing for the PIVOT acquisitions. Nonetheless, the EDUCATE Analysis contract included a broad prohibition concerning participation of either the EDUCATE Analysis contractor, or any of its employees (such as Mr. X) in any follow-on acquisition to meet the agency's IT requirements because of the extremely high likelihood of an OCI. Specifically, the EDUCATE Analysis contract provided as follows:

Due to the nature of services and deliverables being rendered by the Contractor to the U.S. Department of Education (Department) under the terms of this contract, which present an extremely high likelihood of presenting a conflict of interest, the Contractor shall not perform any services that stem from the findings and/or recommendations that are provided to the Department under this contract. This exclusion further extends to any acquisitions that may be competed and logically tied to a recommendation, finding or replacement service under the EDUCATE Contract.

This conflict of interest limitation is applicable to the Contractor as an organization, its individual employees that provide services under this contract, any subcontractors at any tier, and the subcontractor's individual employees that provide services under this contract.

AR, exh.EE, Fully Executed EDUCATE Analysis Contract, at 11 (emphasis supplied).

Although the agency argues that it did not use the information resulting from the EDUCATE Analysis contract in formulating its requirements for the PIVOT acquisitions, the protester points out that, in advising the agency of a path forward for its IT requirements, Bowhead identified four possible alternatives, one of which was the use of a 'hybrid' approach of entering into multiple, separate contracts to support its requirements, which essentially is the approach taken by the agency in the PIVOT acquisitions. AR, exh. HH, Consolidated Informational Report and Recommendations at 20, 57-63. While we do not reach a conclusion regarding whether SRA also has a biased ground rules OCI (in addition to its apparent unequal access to information OCI discussed above), the record here shows that further investigation by the agency of this question as part of its overall OCI review would be both prudent and appropriate under the circumstances.

RECOMMENDATION

In light of the foregoing considerations, we sustain DSFG's protest. We recommend that the agency reconsider whether the release of the DSFG proposals to SRA will have an adverse impact on the PIVOT acquisitions given the concerns identified above associated with the Procurement Integrity Act. Should the agency conclude that the release of the DSFG proposals to SRA will have an adverse impact on the PIVOT acquisitions, we recommend that the agency take appropriate action to address that concern.

We also recommend that the agency evaluate whether SRA has an OCI in light of the concerns identified above. If the agency concludes that there exists one or more OCIs, we recommend that the agency take appropriate action to avoid, neutralize or mitigate those conflicts. Finally, we recommend that the agency reimburse DSFG the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel