



Decision

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Matter of: Archimedes Global, Inc.

File: B-415886.2

Date: June 1, 2018

Jennifer S. Zucker, Esq., and Melissa P. Prusock, Esq., Greenberg Traurig LLP, for the protester.

Daniel J. Strouse, Esq., and John J. O'Brien, Esq., Cordatis LLP, for Savvee Consulting, Inc., an intervenor.

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DIGEST

Protest challenging agency's exclusion of protester from consideration based on a possible organizational conflict of interest is sustained where record shows that agency's exclusion of protester was not based on facts, but rather on innuendo and supposition not supported by the record.

DECISION

Archimedes Global, Inc. (AGI) protests its elimination from consideration under request for proposals (RFP) No. 70SBUR18R00000002, issued by the Department of Homeland Security, United States Citizenship and Immigration Services, for the issuance of a task order to perform management and support services. AGI maintains that it was unreasonably eliminated from consideration for award of the subject task order based on an alleged organizational conflict of interest (OCI) that the protester argues does not exist.

We sustain the protest.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a fixed-price task order for a base period and four 1-year option periods.¹ Firms were advised that proposals would be evaluated considering price and three non-price evaluation factors. All of the evaluation factors, listed in descending order of importance, were as follows: technical approach and key personnel qualifications, management approach and staffing, corporate experience, and price. RFP at 43. The propriety of the agency's evaluation of proposals is not at issue in this case. The record shows that the protester was found to be technically superior to all other offerors. Agency Report (AR), exh. 10, Source Selection Decision Document (SSDD), at 4. However, AGI's proposal was disqualified from award consideration because the agency found that AGI had an apparent OCI. Id. at 5. The agency then issued a task order to another concern, Savvee Consulting, Inc., for \$14,953,388. Id. at 4, 10.

By way of background, the predecessor task order required the successful contractor to have access to procurement sensitive information. Accordingly, the underlying contract for that task order (as well as the task order itself) included a clause permitting the agency to disqualify the incumbent contractor from competing for follow-on requirements. AR, exh. 1, at 5.² The current solicitation also includes these same restrictions, namely, that the successful contractor for the currently-solicited work may be precluded from competing for any follow-on requirements. RFP at 39.³ The predecessor task order was awarded to Ambit Group, LLC, and all parties agree that Ambit was precluded from competing for the current requirement. The agency's disqualification of AGI stems from the fact that it proposed to hire the senior and intermediate program managers currently working for Ambit to perform the solicited requirement. The agency found that the Ambit employees could have provided AGI with unequal access to non-public, competitively useful information, and, accordingly, that AGI had what the agency characterized as an apparent "unequal access" type OCI. See Dell Services Federal Government, Inc., B-414461, B-414461.2, June 21, 2017, 2017 CPD ¶ 192 at 8 ("unequal access" type OCI exists where offeror obtains non-

¹ The underlying multiple-award, indefinite-delivery, indefinite-quantity contracts being used to solicit the current task order are the Program Management, Administrative, Operations (Clerical), and Technical Services II (PACTS II) contracts. The PACTS II contract program is administered by the Department of Homeland Security.

² The agency report includes a copy of the underlying indefinite-delivery, indefinite-quantity contract that was used to award the predecessor task order, but not a copy of the predecessor task order. Nonetheless, the agency represents that the awarded task order also included these restrictions allowing the agency to disqualify the predecessor contractor from competing for the currently-solicited task order. Agency Report at 3.

³ The PACTS II contracts also include restrictions on the ability of contractors to compete for follow-on requirements. AR, exh. 2, PACTS II Contract, at 57-58.

public information that may be competitively useful); Federal Acquisition Regulation (FAR) § 9.505(b).

After initially being advised that the agency had eliminated its proposal from consideration, AGI filed a protest with our Office on January 5, 2018, alleging that the agency's actions were improper. In response to that protest, the agency advised our Office that it intended to take corrective action and afford AGI an opportunity to provide it with information relating to the question of whether or not it had an OCI, consistent with the requirements of FAR § 9.504(e). Based on the agency's proposed corrective action, we dismissed AGI's initial protest as academic. B-415886, Jan 17, 2018 (unpublished decision).

The agency and AGI engaged in correspondence in connection with the question of its alleged OCI. AR, exhs. 14, 15. After reviewing the information provided by AGI, the agency sent the firm a letter dated February 13, advising it that the agency had once again eliminated AGI from consideration due to the contracting officer's conclusion that AGI had what he characterized as the appearance of a conflict of interest. AR, exh. 16, Letter to AGI, Feb. 13, 2018, at 2-3. After being advised of the agency's conclusion, AGI filed the instant protest.⁴

PROTEST

AGI argues that the agency unreasonably eliminated it from consideration based on an alleged OCI. As noted, the record shows that the basis for the agency's action was AGI's inclusion of two current Ambit employees as key employees to perform the roles of senior program manager and intermediate program manager. AR, exh. 8, AGI Technical Proposal, at 5-6. AGI argues that the agency's conclusion that it has an OCI is unreasonable.

As a preliminary matter, the agency argues that AGI's protest is an untimely challenge to the terms of the solicitation. In this connection, the agency directs our attention to two questions and answers that were provided to offerors prior to the submission of proposals. According to the agency, these questions and answers put offerors on notice that no Ambit employees could be used in connection with their proposals.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), provide that, to be timely, any challenge to the propriety of the terms of a solicitation that is apparent on its face must be filed before the deadline for submission of proposals. On the other hand, all other

⁴ The agency initially issued a task order to Savvee Consulting in the amount of \$14,953,388 after finding that AGI had an apparent OCI, and subsequently affirmed its selection of that firm after reconsidering and affirming its original finding that AGI had an apparent OCI. Because the task order at issue is valued at more than \$10 million, our Office has jurisdiction to consider the protest. 41 U.S.C. § 4106(f)(1)(B).

protests, to be timely, must be filed within 10 days of when the protester knows or should know of its basis for protest. 4 C.F.R. § 21.2(a)(2).

Here, the two questions and answers that were provided to the offerors before the deadline for submission of proposals were:

[Q No. 50:] We understand that the previous MSS [management support services] contract, awarded to Ambit, contained similar restrictions and limitations of future contracting as specified in this solicitation. Is Ambit and its subcontractor employees precluded from bidding or participating as a subcontractor on this solicitation since it's a follow on to their work? If not, how will the Government ensure that Ambit and their employees who have unequal access to information do not share that information with their prime contractors?

[A:] The current awarded Task Order# HSSCCG-14-J-00191 to Ambit does preclude follow-on orders. Under this TORFP [task order request for proposals] requirement a mitigation plan may be submitted in accordance with Part IV - Instructions to Offerors.

[Q No. 51:] We understand that the previous MSS contract, awarded to Ambit, contained similar restrictions and limitations of future contracting as specified in this solicitation. Ambit and its subcontractor employees performing work under the MSS contract are "closely involved in helping . . . define requirements, project budgets and other strategic sources of procurement sensitive information." We also understand that Ambit and its subcontractor employees are assisting PACTS II prime contractors with their current MSS proposals. Can the government please clarify whether individual Ambit (and its subcontractors') employees are precluded from bidding/participating on this procurement?

[A:] SEE RESPONSE TO QUESTION 50.

AR, exh. 7, Offeror Questions and Answers, at 20-21. According to the agency, these two questions and answers advised offerors that they were precluded from proposing to use individual Ambit employees in connection with their proposals. We disagree.

In responding to the first question--which arguably sought information about "Ambit and its subcontractor employees"--the agency did not provide offerors with any information relating to the use of individual Ambit employees. Instead, the agency merely advised offerors that the predecessor task order precluded follow-on orders to Ambit, and advised offerors, without elaboration, that a mitigation plan "may be submitted" in connection with their proposals. Simply stated, there is no information in the answer to the first question relating to a prohibition by the agency against including individual Ambit employees in their proposals.

In responding to the second question--which clearly did seek information about whether individual Ambit (and its subcontractors') employees were precluded from bidding or participating in the current solicitation--the agency simply referred back to the answer it provided to the preceding question, which, as discussed, did not provide offerors any information about whether individual Ambit employees could be included in a proposal. Accordingly, we conclude that the agency did not advise offerors, either through the terms of the RFP as originally issued, or in responding to the offerors' questions, about the agency's apparent concern relating to the inclusion of individual Ambit employees with their proposals. Under the circumstances, we conclude that AGI's protest is timely, having been filed within 10 days of the agency advising it that its proposal had been eliminated from consideration for offering to hire two Ambit employees. 4 C.F.R. § 21.2(a)(2).

Turning to the merits of the protest, the record shows that the agency disqualified AGI because of the contracting officer's conclusion that AGI may have had access to competitively useful, non-public information that may have been helpful in preparing its proposal. In particular, he concluded that one of the two individuals proposed by the protester, AGI's intermediate program manager, had the capability to access files on the agency's computer system that contained competitively useful information, including an independent government estimate prepared in connection with the current acquisition, the statement of work for the current RFP, and agency budgetary information. AR, exh. 10, SSDD, at 5-7; exh. 16, Letter from the Contracting Officer to AGI, Feb. 13, 2018, at 1-3.

The record also shows that AGI represented in a letter and affidavits submitted to the agency that neither of the Ambit employees that it proposed actually accessed competitively useful information during performance of the Ambit task order. AR, exh. 15, Letter and Affidavits from AGI to the Agency, Jan. 24, 2018. Specifically, the proposed senior program manager represented that he was precluded from accessing competitively useful information on the agency's computer system because of a firewall implemented by Ambit. Id. at 5-6. The intermediate program manager, for his part, represented that, although theoretically he had access to non-public, competitively useful information, he did not, in fact, access the information during any relevant time. Id. at 8-9.

In considering the information provided by AGI, the contracting officer queried the agency's information technology support staff to find out whether the agency's computer logs showed, one way or the other, whether Ambit's intermediate program manager actually had accessed the agency's non-public information. In response to the contracting officer's query, agency personnel advised that the agency's logs only went back some 30 days; consequently the agency had no way of determining with certainty whether or not the intermediate program manager actually had accessed the information in question. AR, exh. 16, Letter from the Contracting Office to AGI, Feb. 13, 2018, at 2. In summing up the agency's position, the contracting officer stated as follows:

While the conflict of interest posed by [Ambit's program manager and intermediate program manager] supervising Ambit personnel who had access to procurement sensitive information may have been mitigated by the undefined Ambit firewall; the fact that [the intermediate program manager] currently has access to USCIS [United States Customs and Immigration Services] systems containing USCIS procurement sensitive information (notwithstanding his protestations that he has not actually accessed the procurement sensitive information in those systems within the last year) gives rise to an appearance of conflict of interest. This appearance of a conflict of interest is aggravated by the certification by Archimedes Global Inc. that they were not aware of any facts that create actual or potential conflicts of interest relating to the award of this task order. In light of the facts giving rise to an appearance of a conflict of interest, I am reaffirming that Archimedes Global Inc. is not eligible for award due to the appearance of conflict of interest.

Id. at 3.

AGI argues that it was unreasonable for the agency to disqualify it from consideration, principally because the agency's analysis ignored the fact that the individuals in question are not AGI employees and did not participate in the preparation of AGI's proposal.

We sustain AGI's protest. In challenging an agency's identification of a disqualifying conflict of interest, a protester must demonstrate that the agency's determination did not rely on hard facts, but instead was based on mere inference or supposition of an actual conflict of interest, or is otherwise unreasonable. VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 8. Here, we find that the agency's decision to disqualify AGI is not based on hard facts, but, rather, on innuendo and supposition concerning the activities of the Ambit employees.

Chief among our concerns is the fact that the contracting officer, without any underlying evidence, concluded that, because there was a possibility that the individuals in question may have had access to competitively useful, non-public information, that information necessarily was provided to AGI. However, the record shows that neither individual currently is employed by AGI, and there is no evidence to show that the individuals provided AGI with competitively useful, non-public information, or otherwise participated in preparing the AGI proposal.

On the contrary, the record shows that both individuals currently are employed by Ambit, not AGI. AR, exh. 15, Letter and Affidavits from AGI to the Agency, Jan. 24, 2018, at 7, 10. In addition, both individuals represented under oath that they did nothing more than give AGI permission to propose them for possible positions under the resulting task order being solicited; that they did not participate in proposal preparation activities for, or on behalf of, AGI; and that, by virtue of being bound by nondisclosure agreements, they did not share any information learned while working for Ambit with AGI. Id. at 8, 10.

The contracting officer ignored these facts in reaching his conclusion. In particular, the record shows that the contracting officer based his finding that there was an “appearance” of an OCI entirely on the possibility that the two individuals in question may have had access to procurement sensitive information. He states as follows:

There does, however, appear to be an *appearance* of conflict of interest based upon 1) the fact that both [the program manager and intermediate program manager] supervised personnel who had access to procurement sensitive information; and 2) [the intermediate program manager] had access to USCIS [United States Customs and Immigration Services] systems containing procurement sensitive information, . . . and at some time prior to the last year, [he] actually accessed those USCIS systems containing procurement sensitive information.

* * * * *

While the conflict of interest posed by [the program manager and intermediate program manager] supervising Ambit personnel who had access to procurement sensitive information may have been mitigated by the undefined Ambit firewall; the fact that [the intermediate program manager] currently has access to USCIS systems containing USCIS procurement sensitive information (notwithstanding his protestations that he has not actually accessed the procurement sensitive information in those systems within the last year) gives rise to an appearance of conflict of interest.

AR, exh. 16, Letter from the Contracting Office to AGI, Feb. 13, 2018, at 2-3 (emphasis in original). In light of these considerations, we sustain AGI’s protest.

RECOMMENDATION

We recommend that the agency reconsider its exclusion of AGI in light of the concerns outlined above. Should the agency conclude, on the basis of its reconsideration, that AGI is eligible for the task order, we further recommend that the agency include AGI’s proposal for consideration, and make a new source selection decision. Finally, we recommend that the agency reimburse AGI the costs associated with filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d). AGI’s certified claim for costs, detailing the time expanded and costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel