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Decision

Matter of: McKissack-URS Partners, JV

File: B-406489.7

Date: January 9, 2013

Joseph J. Dyer, Esq., Bennett Greenberg, Esq., Caroline A. Keller, Esq., and Erica L. Marshall, Esq., Seyfarth Shaw LLP, for McKissack-URS Partners, JV; and Kenneth B. Weckstein, Esq., and Michael D. Maloney, Esq., Brown Rudnick LLP, for Facilities For The Future-JV, the protesters.

Paul F. Khoury, Esq., John R. Prairie, Esq., and William M. Novak, Esq., Wiley Rein LLP, for Parsons Infrastructure & Technology Group, Inc., the intervenor.

Dennis Adelson, Esq., David R. Koepfel, Esq., Colin W. O'Sullivan, Esq., Department of Labor, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's use of a former government employee in connection with an architect-engineer Brooks Act procurement provided the firm with an unfair competitive advantage due to the employee's access to the protesters' proprietary information is denied where the contracting officer reasonably concluded that the information at issue was not competitively useful in the current procurement.

2. Protest that evaluation board members were biased in favor of awardee based on the awardee's use of a consultant who had previously supervised several of the evaluation board members at a time when he worked for the government is denied where the contracting officer's investigation revealed no improper contacts and the protesters failed to provide any evidence of bias beyond mere suspicion and innuendo.

DECISION

McKissack-URS Partners, JV, of Washington, D.C., and Facilities For The Future-JV (F3), of Fairfax, Virginia, incumbent contractors, protest the award of a contract to Parsons Infrastructure & Technology Group, Inc., of Washington, D.C., in connection with Federal Business Opportunities announcement No.

DOL111RP20406, issued by the Department of Labor, Office of Job Corps, for

architect-engineer (A/E) design and construction management support services. The protesters argue that the award to Parsons was tainted by Parsons' employment of former government employee as a consultant in competing for the contract.

We deny the protests.¹

BACKGROUND

These protests concern the actions of a consultant hired by Parsons in 2010 who had previously been employed by the agency's Office of Job Corps, from 1992 until December 2008. During his period of government employment, the consultant served as a contracting officer's technical representative and as the senior architect of the Job Corps' facilities program.

This procurement was conducted pursuant to the Brooks Act, 40 U.S.C. §§ 1102-1104 (2006) and its implementing regulations, Federal Acquisition Regulation (FAR) subpart 36.6. Pursuant to these regulations, on October 18, 2011, the agency publicly announced through the Federal Business Opportunities website, the subject A/E requirements, and invited capable firms to submit Standard Form (SF) 330, "Architect-Engineer Qualifications" statements. This is not, however, DOL's first effort to procure these A/E services. Rather, the record reflects that DOL has been attempting to award the subject requirements for over seven years.

The agency initially announced the requirement for A/E design and construction services for DOL's Job Corps centers in 2005. The procurement was eventually cancelled following a pre-award bid protest at our Office.

Several years later, on March 19, 2008, DOL attempted to procure the Job Corps' A/E services contract using procedures established under FAR part 12 for the acquisition of commercial items. The consultant at issue in this case was a government employee at that time and served as the "Evaluation Board Official" for the procurement. On May 29, before the submission of proposals, however, a prospective competitor filed a protest at our Office arguing that DOL was required to use the Brooks Act procedures of FAR subpart 36.6 to procure the A/E services.

¹ The protesters have each filed numerous previous protests of the agency's selection of Parsons raising the allegations addressed in this decision, among others. In each previous protest our Office dismissed the issues as premature, citing the agency's representation that the matters were under investigation. Now that the agency has completed its investigation, and proceeded with awarding the A/E contract to Parsons, the issues are ripe for consideration by our Office.

While the protest was pending, on June 5, 2008, McKissack & McKissack of Washington, Inc., and [DELETED] (a member of F3's current team) submitted proposals consisting of past performance, technical, and price sections. Just days later, on June 10, both firms' proposals were returned to them by DOL with the explanation that the solicitation would be converted to a Brooks Act procurement under FAR subpart 36.6, which did not require submission of price information.

After restructuring the procurement under the Brooks Act procedures, 13 firms timely submitted their SF-330 forms on June 16, 2008. McKissack was among the 13 firms, while [DELETED] was proposed as a subcontractor to [DELETED] (also a member of F3's current team). As required by DOL, the firms redacted company names, logos, and employee names from their SF-330 parts I and II submissions. At this stage of the procurement, Parsons' consultant had access to the redacted SF-330 submissions for evaluation purposes. Based on the initial evaluation, [DELETED] was selected as a short-listed firm and made an oral presentation to the technical evaluation board, of which Parsons' consultant was a member. Ultimately, however, the procurement was cancelled in its entirety on September 19, 2008. Parsons' consultant retired from DOL in December 2008.

DOL made yet another attempt to fill its requirement for A/E services through another procurement initiated on October 1. This procurement was similarly unsuccessful. Following a bid protest at our Office, DOL cancelled the procurement in its entirety in January 2010.

On May 14, 2010, Parsons entered into a consultant agreement with the now retired government employee to, among other things, use his historical knowledge of the DOL Job Corps Program to support the "Parsons Proposal Development Group." The agreement established between Parsons and the consultant expressly provided that the consultant would not disclose "nor make use in the performance of any work hereunder, any trade secrets or other proprietary information of any kind." Agency Report (AR), Tab 18, Consultancy Agreement, at 11.

Prior to the current procurement, DOL made one additional attempt to fill the requirement on August 17, 2010. However, following another bid protest at our Office, DOL cancelled that procurement on March 23, 2011.

As noted above, DOL initiated the procurement, which is the subject of this protest, on October 18, 2011. On October 28, DOL hosted a conference in connection with the procurement, which was attended by over 50 individuals, including representatives of McKissack, F3, and Parsons, as well as Parsons' consultant. Interested firms submitted SF-330s by November 22, including McKissack, F3, and Parsons. By letter on February 28, 2012, DOL notified McKissack and F3 that they were shortlisted firms, but that Parsons was the most preferred firm and had been selected first for negotiations.

On March 9, 2012, F3 sent a letter to DOL alleging that Parsons improperly utilized a consultant previously employed by the agency, who had access to “highly confidential past performance and other evaluation information” providing Parsons “a significant, unfair, and improper competitive advantage,” inconsistent with the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-07, known as the Procurement Integrity Act, (PIA) and the FAR. Upon receipt of F3’s allegations, DOL began an investigation of the matter. This investigation concluded with the contracting officer’s (CO) completion of a 27-page report, finding that “there is no evidence of improper contacts, no improper disclosure of proposal or source selection information, and no Procurement Integrity Act or conflict of interest violations.” AR, Tab 1, CO Determination, at 2. DOL then announced notice of award to Parsons on September 28. The current protests followed.

DISCUSSION

The protesters allege that the contracting officer unreasonably and irrationally failed to eliminate Parsons’ from the competition based on the appearance of impropriety created by the consultant’s access to competing firms’ proprietary information during the agency’s prior attempts to fulfill this requirement, which afforded Parsons an unfair competitive advantage. The protesters also allege that the agency failed to consider whether the current evaluation board was tainted by the fact that Parsons’ consultant had previously been a direct supervisor of the evaluation board members.²

Contracting agencies are to avoid even the appearance of impropriety in government procurements. FAR § 3.101-1; Guardian Techs. Int’l., B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 5. In this regard, where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based on the appearance of impropriety which is created by this situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on hard facts and not mere innuendo or suspicion. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 31.³

² McKissack did not allege a violation of the PIA in its current protest. F3 did allege a violation of the PIA in its protest, but did not discuss the PIA in its comments on the agency report. We consider the allegation of a PIA violation to be abandoned, and do not address it in our discussion here.

³ As our Office has recognized, the unfair competitive advantage analysis stemming from a firm’s hiring of a former government employee is virtually indistinguishable from the concerns and considerations that arise in protests alleging that a firm has gained an unfair competitive advantage arising from its unequal access to information as a result of an organizational conflict of interest. See VSE Corp.,

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The existence of an appearance of impropriety based on an alleged unfair competitive advantage depends on the circumstances in each case and ultimately, the responsibility for determining whether to continue to allow an offeror to compete in the face of such an alleged impropriety is a matter for the contracting agency, which will not be disturbed unless it shown to be unreasonable. Health Net Fed. Servs., LLC, supra, at 29. As a general matter, in determining whether an offeror obtained an unfair competitive advantage in hiring a former government official based on the individual's knowledge of non-public information, our Office has considered a variety of factors, including whether the individual had access to non-public information that was not otherwise available to the protester, or non-public proprietary information of the protester, and whether the non-public information was competitively useful. See Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 13; ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 8.

Here, the CO conducted a thorough investigation--with the advice and input of the agency's Office of the Solicitor and Ethics Counsels--of Parsons' consultant's "role while employed at Job Corps; the information to which he may have had access; how that information may have aided Parsons for the purposes of this procurement; and whether he may or could have provided Parsons with an unfair competitive advantage." AR, Tab 1, CO Determination, at 1. The investigation included a review of the procurement files associated with the various attempts to fill the requirement dating to 2005, meetings with DOL and Job Corps program officials, supplementary information from McKissack, F3, and Parsons, and an interview with Parsons' Consultant.

Through this investigation the CO found that Parsons' consultant did not have access to information submitted in connection with the 2005, October 2008, or August 2010 procurement efforts. AR, Tab 1, CO Determination at 3-7. Regarding the March 19, 2008 procurement, for which the consultant served as the "Evaluation Board Official," the CO noted that the initial proposals were returned to the offerors five days after they were received because the procurement was to be conformed to FAR subpart 36.6 (i.e. converted to a Brooks Act procurement). The CO also noted that there was no evidence that the consultant reviewed the initial proposal submissions, or that any proposal information was retained. After the March 2008 procurement was converted to a Brooks Act procurement, as discussed above, the CO found that the consultant had access to only the redacted versions of the SF-330s submitted, and that he had attended [DELETED]'s oral presentation. The investigation revealed that [DELETED]'s oral presentation included a discussion of

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B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268 at 7 n.4 (citing Health Net Fed. Servs., LLC, supra, at 28 n.15).

[DELETED]'s key personnel; its management and organization; its design and construction management experience; its capacity to perform; its construction administration experience; and its approach to IT support, real estate, and asset management.⁴ The protesters have not provided any evidence to rebut these findings.

On this record, the CO determined that Parsons' use of the former DOL employee as a consultant did not provide a basis to exclude Parsons from the competition. The CO's conclusion in this regard was largely based on his finding that the information revealed to the consultant during the March 2008 cancelled procurement was stale, and provided Parsons with no unfair competitive advantage. In reaching this conclusion, the CO reviewed the March 2008 and current SF-330s and found little similarity between the documents submitted in 2008 and those submitted here. Comparing key personnel, the CO found only two of eight common key personnel between McKissack & McKissack's 2008 SF-330 and the SF-330 submitted by McKissack-URS Partners, JV, in 2011 for the current A/E procurement. The CO found only one of seven common key personnel between [DELETED]'s March 2008 SF-330 submission, and the submission now provided by F3 in 2011 (the submission for which [DELETED] is one of the F3 team members). Moreover, the CO found that of ten projects listed in McKissack's 2011 SF-330, only four appeared on the 2008 form, and that F3's entire organizational structure set forth in its 2011 SF-330 differed significantly from the structure of the [DELETED] organization set forth in 2008.

In assessing the alleged impropriety, the CO also noted that the FAR encourages firms to submit "annually an updated statement of qualifications and performance data on a SF-330," and advises agencies to discard "any material that has not been updated within the past three years, if it is no longer pertinent." FAR § 36.603(d)(1), (5). The CO concluded that this FAR provision contemplates that SF-330 information over three years old is of little value to describing a firm's contemporary qualifications. Where the information to which Parsons' consultant had access was over three years old, and was substantially different from the information submitted in the current SF-330s, the contracting officer determined that the disclosure of such information to Parson's consultant did not provide Parsons with a competitive advantage in the current procurement.

Based on the record here, we find that the CO conducted a meaningful, thorough, and well-documented investigation. We further find that the contracting officer

⁴ The contracting officer also noted that McKissack and [DELETED]'s SF-330s for the March 2008 procurement were not marked as "contractor bid or proposal information" or otherwise designated as confidential or proprietary, nor did [DELETED]'s oral presentation materials include any such designation.

reasonably determined that the information to which Parsons' consultant had access in 2008 had grown stale and was no longer competitively useful, where it was more than three years old, and bore little resemblance to the joint venture SF-330s submitted in response to the current procurement. In this regard, we note that the protesters have failed to explain in any way how access to the 2008 information at issue, which did not include any firm's pricing or unique technical approach, could have provided Parsons with a competitive advantage in the context of a Brooks Act competition, which is based solely on an assessment of each firm's own qualifications. Where there are no hard facts to establish that a former government employee had access to competitively useful information, the use of that individual by a competitor does not establish that the firm maintained an unequal competitive advantage. See VSE Corp., supra (sustaining protest where the record did not contain hard facts to support agency's finding that former government employee had access to competitively useful information). Accordingly, we find that the contracting officer's decision not to exclude Parsons' from this procurement was rational and well-founded.

The protesters also argue that the CO failed to reasonably consider or investigate their allegation that the evaluation board in this procurement was tainted by virtue of the fact that Parsons' consultant had previously supervised members of the evaluation board when he was a government employee. The alleged taint, which is tantamount to an allegation of bias in this instance, is without a basis.

Government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition; where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the successful firm, but must also show that this bias translated into action that unfairly affected the protester's competitive position. Detica, B-400523, B-400523.2, Dec. 2, 2008, 2008 CPD ¶ 217 at 4-5. Here, the CO found that there was no evidence of improper contacts between Parsons' consultant and the board members. Moreover, the sole evidence of bias presented by the protesters is the existence of the former supervisory relationship--which, without more, does not support such an allegation.

The protests are denied.

Susan A. Poling
General Counsel