



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Guardian Technologies International

File: B-270213; B-270213.2; B-270213.3

Date: February 20, 1996

Terrence O'Donnell, Esq., and Glenn J. Pfadenhauer, Esq., Williams & Connolly, for the protester.

Thomas Ainora, Esq., and James J. Jasinski, Department of Justice, for the agency. Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that proposed awardee obtained an unfair competitive advantage in a procurement by virtue of its employment of a former government employee is sustained where the record shows that the former government employee, a procurement official with respect to the procurement, had access to some competitively useful inside information, and may have had access to additional such information, and the combination of a contradictory record and the former government employee's refusal to appear at a fact-finding hearing to address these contradictions compels a conclusion that the firm may have obtained an unfair competitive advantage.

DECISION

Guardian Technologies International protests the proposed award of a contract to Progressive Technologies of America, Inc. under request for proposals (RFP) No. 6586, issued by the Department of Justice, Federal Bureau of Investigation (FBI) for armor load bearing vests. Guardian contends that Progressive obtained an unfair competitive advantage in this procurement by virtue of its employment of a former government employee.

We sustain the protest.

BACKGROUND

The solicitation, issued June 3, 1994, anticipated award of a fixed-price, indefinite quantity contract for these vests over 1 base year, with up to 2 option years. These vests are to be used by the FBI's Special Weapons and Tactics (SWAT) Program. The RFP guaranteed a minimum order of 1,000 vests over the contract period, but asked offerors to provide pricing for various ranges of quantities. Offerors were also asked to provide pricing on several optional accessory items.

Award would be made to the offeror whose proposal was determined to be in the best interest of the government, price and other factors considered. Under one of these other factors, technical approach, offerors were required to describe how they would comply with the specifications that had been developed for these vests. Offerors were also required to submit two sample vests for visual and physical inspection. The specifications and a full description of each of these inspections were included in the solicitation.¹

Eight firms submitted initial proposals and sample vests by the October 4, 1994, closing date, and the SWAT Training Unit commenced the evaluation process. The proposals of both Progressive and Guardian were included in the competitive range of seven; discussions were conducted; and best and final offers were submitted on July 14, 1995. The evaluators recommended award to Progressive as the offeror whose proposal represented the best value to the government. Progressive's proposal was ranked first technically, with a per vest price of \$1,194. Guardian's proposal was ranked second technically, with a per vest price of \$1,553. Prices were evaluated based on the offered price for the base year's 501-1,000 quantity range. Offerors were advised that Progressive was the apparently successful offeror by letter dated September 28, and Guardian's initial protest followed. Award of the contract has been suspended pending resolution of these protests.

Guardian argues that Progressive has violated various provisions of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423 (1994), as implemented by Federal Acquisition Regulation (FAR) § 3.104. Guardian alleges that Progressive's current president, David W. Pisenti, is a retired FBI employee who had access to inside information concerning this procurement and disclosed such information to Progressive, affording the firm an unfair competitive advantage. The FBI concedes that Mr. Pisenti had access to some inside information concerning this procurement, but asserts that there is no evidence that Mr. Pisenti disclosed such information to Progressive, and that the firm was not afforded an unfair competitive advantage. We have carefully reviewed the facts and circumstances of this case and conclude

¹The RFP is not entirely clear as to whether the visual and physical inspections were separate evaluation factors, or whether they were subsumed into the technical approach factor. In any event, the only challenges Guardian has raised with respect to the evaluation of proposals were fully addressed in the agency's report and un rebutted by any of the protester's subsequent filings. We regard the issues as abandoned and will not consider them. See Litton Sys., Inc., Data Sys. Div., B-262099, Oct. 11, 1995, 95-2 CPD ¶ 215.

that there is sufficient evidence that Progressive may have obtained an unfair competitive advantage to warrant sustaining the protest.²

DISCUSSION

Timeliness

As a preliminary matter, the FBI argues that Guardian's protest is untimely under our Bid Protest Regulations. The FBI believes that Guardian knew or should have known of Mr. Pisenti's employment with Progressive, and of Progressive's likely status as a competitor here, long before it was informed that Progressive was the apparent awardee. There is no evidence that Guardian had such actual knowledge, and no basis to assume that it should have known of Mr. Pisenti's or Progressive's involvement. Since, under this negotiated procurement, the agency had not informed Guardian which firms had submitted proposals or which proposals were being considered, Guardian had no way of knowing until it received the notice of award, on October 2, 1995, that Progressive's proposal had not been eliminated from the competition. See Textron Marine Sys., B-255580, Aug. 2, 1994, 94-2 CPD ¶ 63; General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196. Accordingly, the protest, filed within 14 days after Guardian received the notice of award, is timely. See Bid Protest Regulations, section 21.2(a)(2), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(2)).

Unfair Competitive Advantage

Our Office conducted a fact-finding hearing to determine the information to which Mr. Pisenti had access during his tenure with the FBI, as well as the extent of his activities at Progressive in connection with this procurement. Since Mr. Pisenti was necessarily in the best position to answer these questions, we asked the FBI to produce him as its witness at the hearing. We also asked the FBI to produce, as its witnesses, Edward Coppage and Richard Coppage, Progressive's chairman of the board and chief executive officer, respectively. Despite their initial agreement with the FBI to provide testimony at the hearing, all three men subsequently refused to do so, with no explanation to this Office. Given the minimal level of factual information in the record, and the seriousness of the allegations, the FBI agreed to ask the three men to respond to interrogatories that had been prepared by the protester's counsel and approved by this Office. While Mr. Pisenti and Mr. Edward

²In a supplemental protest, docketed under our file number B-270213.3, Guardian contends that Progressive's proposal should be excluded from further consideration due to alleged irregularities concerning the firm's certificate of procurement integrity. In view of our decision here, we need not reach the issues raised in that protest.

Coppage provided sworn responses to these interrogatories, Mr. Richard Coppage refused to do so and elected to submit a short sworn statement instead. Although four FBI supervisory special agents with knowledge bearing on the some of the matters at issue here did appear at the hearing to provide relevant testimony subject to cross-examination, Progressive's refusal to participate in this fact-finding process necessarily constrains our discussion.

Until his retirement in July 1994, Mr. Pisenti served as a supervisory special agent in the Training Division, Firearms Training Unit, at the FBI Training Academy in Quantico, Virginia. Several of his colleagues testified that he was regarded as the FBI's expert in the field of body armor. Video Tape (VT) 9:11:05; 9:59:08; 11:38:35. In mid-1993, Mr. Pisenti was assigned to help the Training Division's Special Operations and Research Unit develop the specifications for this body armor solicitation, under the supervision of now-retired special supervisory agent Richard O'Rear. The FBI stipulates, and its records confirm, that Mr. Pisenti's participation in the drafting of these specifications rendered him a "procurement official" with respect to this procurement.³ Mr. O'Rear testified that he and Mr. Pisenti together drafted the specifications and the criteria for the visual and physical inspections under which vest samples would be evaluated. VT 11:51:30; 12:24:30-12:26:50.

In February 1994, Mr. Pisenti telephoned Ford R. Cole, a supervisory special agent at the FBI Headquarters' Contract Review Unit. According to Mr. Cole's testimony, Mr. Pisenti explained that he was eligible to retire and wanted to engage in post-employment discussions with private firms, including vendors in the body armor community. Mr. Pisenti relayed his involvement with this ongoing procurement to Mr. Cole, and asked his advice as to the procedures he should follow to lawfully engage in such discussions. Mr. Cole advised him of the regulatory requirements found in section 3.104 of the FAR, particularly those concerning the recusal procedures, FAR § 3.104-6(d), and post-employment restrictions, FAR § 3.104-7, and sent him a photocopy of the relevant provisions.

By memorandum dated February 25, Mr. Pisenti requested recusal from further participation in this procurement. The recusal proposal, drafted in accordance with Mr. Cole's instructions, confirmed that Mr. Pisenti was a procurement official by virtue of his involvement in specification development, and repeated the information previously provided to Mr. Cole, including the possibility that Mr. Pisenti might conduct employment discussions with potential offerors under this contract. The recusal proposal did not identify any specific firm with which Mr. Pisenti wanted to

³Under the OFPP Act, the term "procurement official" means, with respect to any procurement, any civilian or military official or employee of an agency who has participated personally and substantially in, among other things, the drafting of its specifications. 41 U.S.C. § 423(p)(3)(A)(i).

engage in post-employment discussions. Mr. Piseni's supervisors recommended his recusal and stated that his duties in connection with the procurement had been reassigned to supervisory special agent Wade Plucker. This memorandum was then forwarded to FBI Headquarters, where it was approved on March 4 by the appropriate authorities. Mr. Piseni's FBI colleagues testified that, to their knowledge, his involvement in the procurement ended at this point. VT 9:36:18-9:37:15; 9:47:28-9:47:35; 11:47:00.

The RFP was synopsisized in the Commerce Business Daily on May 11, 1994. At about this same time, Mr. Piseni began discussing possible employment with Progressive. The RFP was issued on June 3, and several amendments followed. Mr. Piseni retired effective July 31, and began his employment as Progressive's president on August 8. The FBI has no record of Mr. Piseni's having ever advised the agency of his employment discussions or impending employment with Progressive. Further, there is no evidence that, prior to his retirement, Mr. Piseni certified to the contracting officer that he was aware of his continuing obligation not to disclose any proprietary or source selection information related to this procurement, in accordance with FAR § 3.104-7(a).

The only certification signed by Mr. Piseni with respect to the OFPP Act was signed in conjunction with a February 1994 procurement ethics course, taught by Mr. Cole, and thus appears to be associated with the requirements of FAR § 3.104-12(a)(2) (which requires, as part of an agency's ethics training program, that each procurement official certify that he or she is familiar with the procurement integrity provisions of the OFPP Act). The FBI asserts that the reference in Mr. Piseni's certification to his "continuing obligation . . . not to disclose proprietary or source selection information" should he leave the government during the conduct of a procurement for which he served as a procurement official satisfies the certification requirement. We disagree. While Mr. Piseni's certification does refer to this "continuing obligation," it also calls for him to certify separately to that obligation when he leaves government service. Executing a certification at that point--rather than relying on prior certifications--puts the contracting officer on notice of the potential appearance of an impropriety, enabling him to protect the integrity of the procurement system. See ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30.

Contracting agencies are to avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. FAR § 3.101-1. A contracting officer may protect the integrity of the procurement system by disqualifying an offeror from the competition where the firm may have obtained an unfair competitive advantage, even if no actual impropriety can be shown, so long

as the determination is based on facts and not mere innuendo or suspicion. NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379; Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. Our review is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation of an apparent conflict of interest. Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra.

Where a protester alleges that the awardee has obtained an unfair competitive advantage by virtue of its employment of a former government employee, our role is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. General Elec. Gov't Servs., supra; FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366; Technology Concepts and Design, Inc., B-241727, Feb. 6, 1991, 91-1 CPD ¶ 132. In so doing, we typically consider whether the former government employee had access to competitively useful inside information, as well as whether the former government employee's activities with the firm were likely to have resulted in a disclosure of such information. These are the same questions to be considered in reviewing an allegation that source selection information has been disclosed to a competing contractor in violation of the procurement integrity provisions of the OFPP Act. 41 U.S.C. § 423(d).

It is undisputed that Mr. Piseni helped to draft the RFP's specifications and the criteria for the visual and physical inspections set forth as evaluation elements in the solicitation. However, while participation in such activities confers the status of a procurement official under the OFPP Act, and did so here, such participation by itself does not necessarily create a conflict of interest. FHC Options, Inc., supra. The mere employment of an individual who is familiar with the type of work required and helped prepare the specifications or statement of work, but who is not privy to the contents of proposals or other inside information, does not itself establish a conflict of interest or confer an unfair competitive advantage. ITT Fed. Servs. Corp., supra; General Elec. Gov't Servs., supra; FHC Options, Inc., supra. Here, both the specifications and the visual and physical inspections criteria were disclosed in the RFP and available to all offerors, so it is unlikely that any information Mr. Piseni could have derived from his participation in their drafting created any competitive advantage. Textron Marine Sys., supra; FHC Options, Inc., supra.

However, the record shows that Mr. Piseni had access to some competitively useful inside information, and may have had access to additional such information.

First, the FBI stipulates that Mr. Piseni had access to the government estimate for these vests: \$1,152 per vest, or \$1,152,000 for 1,000 vests. These figures are listed in several documents in the record that were prepared prior to Mr. Piseni's recusal. None of the witnesses at the hearing could state with certainty whether Mr. Piseni had seen any of these documents, all of which were either initialed or signed by Mr. O'Rear. However, Mr. O'Rear testified that Mr. Piseni would have had access to the same information that was available to him, VT 11:42:20-11:42:50, and Mr. Plucker testified that Mr. Piseni would have had access to all of the underlying information regarding the procurement, including all cost estimates prepared for the procurement. VT 9:51:00-9:51:20. Further, both Mr. O'Rear and Mr. James Pledger, Mr. Piseni's immediate supervisor, testified that Mr. Piseni used his expertise and experience to help "come up with" the budgeting figure. VT 11:43:20; 9:25:50.

Contrary to the specific testimony that he knew the government estimate, information that was clearly related to the procurement and not provided in the RFP or its amendments, when asked by interrogatory if he had discussed or learned any information in any way relating to the procurement which was not expressly described in the RFP or its amendments, Mr. Piseni responded, "No." Contrary to the specific testimony that he helped to prepare the government estimate, when asked if he participated in any way in establishing the internal FBI budget, estimated cost, or acceptable price range for the procurement, Mr. Piseni responded, "No." The FBI attributes these contradictions to Mr. Piseni's faulty "recollection." In our view, the most benign interpretation of these contradictions is that Mr. Piseni does not understand that cost information is information "related to the procurement," casting doubt on the accuracy of his responses; a more unfavorable interpretation is that Mr. Piseni's responses are not credible.

Second, the record remains unclear as to whether Mr. Piseni had access to inside information concerning source selection. In response to a discovery request, the FBI reported that it was unable to locate a source selection plan, and the FBI's post-hearing comments state that "[t]here is no evidence that a source selection plan other than section M of the [RFP] existed, or if such a plan existed, that it varied from section M of the [RFP]." The FBI is apparently incorrect. Mr. Plucker testified that he had access to the source selection plan. VT 10:07:30-10:08:15. At the conclusion of the hearing, Mr. Plucker reviewed the solicitation, including section M, and reported that the source selection plan was not contained therein. We believe that this is clear evidence of the existence of a source selection plan, notwithstanding the FBI's inability to find it.

While we are unable to review the plan to ascertain its contents, such a plan typically contains competitively useful information, including subfactors for evaluation criteria, standards to be used in determining ratings, and the rating scheme itself. See Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. We can only conclude that the

source selection plan here contained similar information. Indeed, formal source selection plan or not, the record shows that proposals were given color-coded ratings, which must have been accompanied by some guidance for their assessment, and that, in addition to the combination of the visual and price inspections, evaluation consideration was given to "the inherent safety factors of the submission based on design"; "the capability of the manufacturer to design a product that exhibited a practical design to enhance the tactical nature of its use"; and "the apparent comfort level of the evaluators." There is no mention of these considerations in the RFP or its amendments. We must conclude that all of this information, which was not disclosed publicly, could have been competitively advantageous.

Mr. Plucker testified that he believed the source selection plan had been prepared after Mr. Pisenti's recusal. VT 10:07:30-10:08:15. However, we were unable to ascertain when the underlying information had been formulated, including that discussed above. Mr. Plucker testified that he had attended a meeting with Mr. Pisenti, the contracting people, and the SWAT Unit prior to the recusal to work on issues regarding the "entire procurement," VT 9:53:56-9:54:40, but it is not clear what was discussed at that meeting. Mr. Plucker testified that Mr. Pisenti did not talk to him about the testing or evaluation, but that Mr. Plucker does not know if Mr. Pisenti participated in their development. VT 9:55:56-9:56:20.

When asked if he had discussed or participated in any way in establishing criteria for evaluating the proposals, Mr. Pisenti responded, "No." He elsewhere denied having discussed or participated in preparing the evaluation criteria. However, not only is this response inconsistent with the testimony of the FBI agents, discussed above, it contradicts his response to other questions, wherein he states that he discussed the elements of the visual and physical inspections, which were clearly evaluation factors set forth in the solicitation. Mr. Pisenti also denies having seen the source selection plan or any other preliminary procurement documents, or having participated in their preparation. But the specifications and inspections which he helped to prepare are preliminary procurement documents, as are the documents containing the government estimate to which he may have had access. We were unable to ask Mr. Pisenti whether he knew the contents of the source selection plan or any other information bearing on source selection, such as that described above. Similarly, while Mr. Pisenti denies having discussed or participated in preparing the scoring sheets to be used in the evaluation, we were unable to ask him if he had seen these documents, or if he knew their contents.

Finally, it is true that the FBI's witnesses testified that, to their knowledge, Mr. Pisenti had nothing to do with this procurement after his recusal, and Mr. Pisenti denies having ever discussed any aspect of this procurement with any FBI employee thereafter. However, Mr. Pisenti's desk remained in the same "bull-pen" area as Mr. Plucker's after the recusal. VT 10:11:32-10:12:20. Although

Mr. Plucker testified that it was "doubtful" whether Mr. Piseni could have overheard anything regarding the procurement, given the distance involved, id., this testimony raises the possibility that Mr. Piseni may have learned inside information inadvertently. This is particularly troubling since, not only have we seen that Mr. Piseni may not have understood what types of information were procurement-related, Mr. Piseni has only denied having discussed the procurement with his colleagues after his recusal. We were unable to ask him whether he overheard or otherwise learned of any information relating to the procurement.

At a minimum, then, Mr. Piseni knew the government estimate in this procurement, a single, easily-remembered figure of unquestionable competitive value. See Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., supra. Given that Mr. Piseni's responses are inconsistent both internally and with the written and testimonial record; that he refused to appear at the hearing to resolve these inconsistencies; and that his testimony would not merely have been useful, see Forbes Aviation, Inc., B-248056, July 29, 1992, 92-2 CPD ¶ 58, but critical, we conclude that Mr. Piseni also may have had access to the other inside information discussed above.

The only evidence bearing on Mr. Piseni's activities at Progressive with respect to this procurement comes from the interrogatory responses of Mr. Piseni and Mr. Edward Coppage and the declaration submitted by Mr. Richard Coppage.

Mr. Piseni states that, as Progressive's president, he has technical responsibility for supervising all employees of the company, but, "[a]t the time the procurement was initially advertised," he advised all employees that he could not participate in any way with this procurement, and that he was delegating this responsibility to Mr. Richard Coppage. We were unable to query Mr. Piseni regarding his authority to delegate such responsibility "at the time the procurement was initially advertised," a date when Mr. Piseni still worked for the FBI. Moreover, we are unable to assure ourselves that he was able to separate his overall responsibilities from the tasks involving Progressive's preparation of this proposal or its planned performance of this contract,⁴ because Mr. Piseni refused to appear at the hearing and Progressive states that it had no written guidance in this regard.

Mr. Piseni states that he advised all officers, directors, and employees at Progressive that he was not permitted to have any involvement in the preparation or negotiation of Progressive's proposal, or to provide anyone associated with

⁴Under FAR § 3.104-3(d)(1)(ii), no individual who was a procurement official with respect to a particular procurement may knowingly participate personally and substantially on behalf of the competing contractor in the performance of such contract.

Progressive with any information or advice which might influence the preparation or presentation of its proposal. Messrs. Coppage state that Mr. Piseni provided no information on this procurement.⁵ However, as discussed above, Mr. Piseni apparently did not consider the government's cost estimate to be procurement-related information, and we were unable to ask him precisely what information he would have considered to be procurement-related. There is also no way to know whether Messrs. Coppage would have been able to define such information. We note that Progressive's price per vest, in every quantity range, for every contract period, was a mere \$42 more than the government estimate. We were unable to query anyone at Progressive as to the relationship between these two figures, if any.

Mr. Piseni and Mr. Richard Coppage state that Mr. Piseni was present at executive committee meetings, board meetings and other conversations where he heard Progressive's proposal discussed, but provided no input or information regarding the procurement. As above, there is no way to determine whether these men could have properly identified procurement-related information; moreover, Guardian's--and our--questions as to how Mr. Piseni concealed his reactions, both verbal and nonverbal, to the specifics of the proposal discussed at these times remain unanswered.

Finally, when asked whether he had ever had discussions with anyone associated with Progressive about the FBI's preferences, uses, prices, plans, programs, requirements, budgets, or procurements for body armor, Mr. Piseni responded, "Yes, but not regarding the procurement or any other contract." Again, the evidence shows that Mr. Piseni may not have understood the definition of procurement-related information, and this response raises the possibility that he may have inadvertently disclosed such information to Progressive. Mr. Piseni refused to make himself available to dispel this possibility.

When it appears that an offeror may have prepared its proposal with knowledge of source selection information, such an appearance taints the integrity of the procurement process, regardless of whether any source selection information was actually obtained or used, and the agency may disqualify the offeror from the competition. See Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992). The record here establishes Mr. Piseni's access to competitively useful inside information and his position with a competing firm that brought with it a strong motivation to disclose that information, resulting in a clear conflict of interest. This evidence, along with the errors and inconsistencies in sworn statements submitted by Mr. Piseni and other officials of his firm, which deprive them of any credibility, remains unrebutted. The only person whose

⁵Progressive's submissions indicate that all three men discussed the interrogatory questions and answers with one another prior to their submission of responses.

testimony, subject to cross-examination, could have provided a rebuttal, Mr. Pisenti, refused to appear at the hearing, with no explanation to this Office. The evidence in the record with respect to whether Mr. Pisenti disclosed the source selection information to which he had access raises the question whether there was a violation of the procurement integrity provisions of the OFPP Act. At a minimum, in the absence of any credible rebuttal, the evidence is sufficient to establish a strong likelihood that Progressive gained an unfair competitive advantage in this procurement. Id.; NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986).

RECOMMENDATION

One possible remedy in cases like this one—disclosure to all offerors of the inside information to which the offeror may have had access—is not a feasible recommendation because of an inability to clearly identify such information and the passage of time since the procurement was initiated. Since performance has not commenced, we recommend that the FBI disqualify Progressive from the competition. We also recommend that the agency pay the protester the costs of filing and pursuing this protest, including attorneys' fees. Section 21.8(d)(1), 60 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(d)(1)). In accordance with section 21.8(f)(1), 60 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)(1)), Guardian's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States