



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Proteccion Total/Magnum Security, S.A.

File: B-278129.4

Date: May 12, 1998

Romulo A. Roux, Esq., Morgan & Morgan, for the protester.

Donald E. Barnhill, Esq., Douglas & Barnhill, for Prosegur/Universal Security, S.A., an intervenor.

Capt. John C. Lavorato, and C. B. Efthimiadis, Esq., Department of the Army, for the agency.

Mary G. Curcio, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's decision to reopen discussions after initial award and request an additional round of best and final offers (BAFO) is untimely where not filed prior to the closing time for receipt of BAFOs.
 2. Protest that awardee's employment of former government employee afforded it an unfair competitive advantage is denied where the former employee had left the government during the preliminary stages of developing the solicitation for the prior procurement for the services and he had no involvement in developing the current solicitation or evaluating proposals for the current procurement.
 3. Protest that agency failed to take into consideration deficiencies in the awardee's performance of prior contract for guard services is denied where agency was aware of and considered the performance deficiencies, but reasonably rated the awardee's overall past performance as good with a medium performance risk on the basis of the prompt corrective action taken by the awardee in response to a cure notice and the favorable evaluations received by the agency with respect to the awardee's performance on other contracts.
 4. Agency evaluation of protester's past performance for risk rating purposes properly took into consideration fact that protester had not performed contracts that were similar in size to the contract contemplated by the solicitation.
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DECISION

Proteccion Total/Magnum Security, S.A. protests the Department of the Army's award of a contract to Prosegur/Universal Security, S.A., under request for

proposals (RFP) No. DAJN21-97-R-0026, for security guard services for United States military installations and facilities in the Republic of Panama.

We deny the protest.

The solicitation, issued on July 21, 1997, provided for award to be made to the offeror whose proposal offered the best value under the following four factors (listed in descending order of importance): (1) management, including subfactors for past performance, general management techniques, and phase-in and phase-out; (2) technical adequacy, including subfactors for technical approach and schedule compliance; (3) quality control, including subfactors for specific inspection techniques and corrective action; and (4) price. The solicitation also provided for a performance risk evaluation to assess the offeror's current and past records of performance as they relate to the possibility of successful accomplishment of the required effort.

The Army initially awarded the contract to Proteccion on September 15. Prosegur protested the award and, on October 28, the agency advised offerors by facsimile transmission that it would take corrective action with respect to Prosegur's protest, by reopening discussions and requesting new best and final offers (BAFO). The agency reopened negotiations on November 26, and on December 11 requested BAFOs to be submitted by December 19. After evaluating the BAFOs, the agency selected Prosegur for award. This protest followed.

REOPENED DISCUSSIONS

Proteccion asserts that the Army's decision to reopen discussions and request new BAFOs was inconsistent with the requirement in the Federal Acquisition Regulation (FAR) that an agency not reopen negotiations after receipt of BAFOs unless it is clearly in the government's interest, FAR § 15.611(c) (June 1997), and was also improper because it resulted in prohibited technical leveling. See FAR § 15.610(d) (June 1997).

Under our Bid Protest Regulations, protests based upon alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be filed not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1998). As a general matter, an objection to an agency's decision to reopen discussions constitutes such a protest, and thus must be filed no later than the next closing time for receipt of proposals. Minact, Inc., B-237128.2, Nov. 9, 1989, 89-2 CPD ¶ 450 at 2-3. Proteccion did not challenge the Army's decision to reopen discussions and request an additional round of BAFOs until after award had been made to Prosegur, at the conclusion of the reopened negotiations. These allegations therefore are untimely.

Proteccion also argues that the agency improperly failed to provide it with information that was provided to Prosegur during a debriefing on the original award as required by FAR § 15.1007(c) (June 1997). That section provides that where, within 1 year of contract award, a protest causes the agency to issue a new request for BAFOs, the agency shall make available to the original offerors that are requested to submit new BAFOs, information provided in any debriefings conducted on the original award about the successful offeror's proposal, and other nonproprietary information provided to the original offerors. Neither the November 26 letter reopening discussions, nor the December 11 letter requesting new BAFOs--which was signed by the contracting officer and sent to all offerors and therefore constituted a solicitation amendment, see Scientific Research Corp., B-260478.2, July 10, 1995, 95-2 CPD ¶ 8 at 6--included the information Proteccion alleges was required under the FAR. As discussed above, our Regulations require that protests based on alleged improprieties incorporated into a solicitation be filed no later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). The alleged failure to disclose the debriefing information in a timely manner--so Proteccion could use the information in preparing its new BAFO--should have been apparent at least upon its receipt of the December 11 letter. Since the protest was filed after award to Prosegur, not prior to the December 19 BAFO closing time, this allegation also is untimely and will not be considered. See DGS Contract Servs., Inc., B-249845.3, Feb. 9, 1993, 93-1 CPD ¶ 115 at 2; Simpson Contracting Corp., B-238279, Feb. 8, 1990, 90-1 CPD ¶ 165 at 2.

UNFAIR COMPETITIVE ADVANTAGE

Proteccion asserts that Mr. Kenneth Nix, a former employee of the contracting activity in Panama who had been responsible for the procurement of guard services in Panama for the Army, was responsible for preparing Prosegur's proposal for this solicitation. Proteccion argues that, given Mr. Nix's prior employment by the Army, his role in preparing Prosegur's proposal violated post-employment restrictions on former government employees and afforded Prosegur an unfair competitive advantage.

The interpretation and enforcement of post-employment restrictions are primarily within the ambit of the Department of Justice and the procuring agency. Our general interest within the confines of a bid protest is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. FHC Options, Inc., B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366 at 4-5; see Guardian Techs. Int'l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 6. Specifically, we review whether an offeror may have prepared its proposal with knowledge of insider information sufficient to establish a strong likelihood that the offeror gained an unfair competitive advantage in the procurement. PRC, Inc., B-274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD ¶ 115 at 17. In our review, we consider whether the former government employee had access to competitively useful information, as well as whether the employee's activities with

the firm likely resulted in a disclosure of such information. Guardian Techs. Int'l, supra.

There is no evidence here of an unfair competitive advantage as a result of Mr. Nix's prior employment with the Army. The current solicitation, issued on July 21, 1997, was developed in the period May through July 1997, well after Mr. Nix had left government service, in March 1996. Further, the record indicates that he had no involvement in preparing the current solicitation or in the current source selection process. Agency Legal Statement of March 4, 1998 at 10; Agency Contracting Officer Statement of March 4, 1998 at 8. Therefore, there is no basis to find that Mr. Nix had access to any inside information regarding this procurement that would benefit Prosegur. See Creative Management Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 7; General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196 at 10-11.

Proteccion asserts that Mr. Nix would have learned competitively useful information by virtue of his substantial involvement in the prior procurement for guard services. The Army explains, however, and our review confirms, that there is little likelihood that this would be the case, in light of the substantial differences between the prior and current solicitations. Specifically, the current solicitation almost tripled the services required, and provided for evaluation on a best value, rather than a low price, technically acceptable, basis. Agency Legal Statement of March 4, 1998 at 10; Agency Contracting Officer Statement of March 4, 1998 at 8-9; Agency Supplemental Contracting Officer's Statement of April 1, 1998 at 2-4. Moreover, the Army has explained that Mr. Nix's involvement in the prior procurement before he left government service was limited to the preliminary stages of that procurement; he did not become involved in the development of the final statement of work and solicitation, or in the source selection process. Declaration of Director of Contracting; Agency Contracting Officer Statement of March 4, 1998 at 9. Proteccion has provided no evidence that refutes the Army's position in this regard. Given Mr. Nix's limited involvement in the prior solicitation, and the substantial differences between the prior and current solicitations, there is no basis to conclude that Mr. Nix learned any information during that procurement that would provide an unfair competitive advantage to Prosegur during this procurement. We note that the mere employment of a former government official who is familiar with the type of work required, but not privy to the contents of proposals or to other inside agency information, does not confer an unfair competitive advantage. FHC Options, Inc., supra, at 6.

Proteccion also argues that the awardee had an unfair competitive advantage because Mr. Nix's spouse worked for the procuring activity in its Office of the Principal Assistant Responsible for Contracting. According to Proteccion, Mr. Nix's spouse, and through her Mr. Nix, had inside knowledge of the source selection process. The record does not support this conclusion. Mr. Nix's spouse has submitted a declaration in which she states that she had no involvement with the

solicitation under protest. In addition, her supervisor has submitted a statement in which he explains that his office, although generally responsible for solicitation reviews, did not review this solicitation. He further states that, while he subsequently personally reviewed the evaluation of the revised BAFOs, Mr. Nix's spouse had no involvement in the review. Given these declarations, and the absence of any contrary information in the record, there is no basis to conclude that Mr. Nix, through his spouse, had access to any inside information related to the procurement, or otherwise gained an unfair advantage as a result of his spouse's employment with the Army.

EVALUATION

Proteccion maintains that the agency improperly failed to consider Prosegur's past performance in evaluating the three non-price criteria (management, quality control, and technical) and, specifically, did not consider the contracting officer reports (COR) that had been issued to Prosegur regarding deficiencies in its performance as the current contractor.

We will review an agency's evaluation of proposals only to determine whether it was reasonable and consistent with the terms of the solicitation. Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 3.

The evaluation here was reasonable. First, as noted above, the solicitation provided for the evaluation of past performance only under the management factor, not the quality control and technical factors; thus, the agency was not required to evaluate past performance under these latter factors.

With regard to the evaluation of past performance under the management factor, the record shows that while the evaluators did not review the actual CORs, they did review the cure notice that had been sent to Prosegur regarding the performance deficiencies; as a result, the evaluators were aware of the incidents reported in the CORs, including instances where Prosegur's guards had been charged with the theft of government property and sleeping on the job. Source Selection Memorandum of January 21, 1998 at 5; Agency Supplemental Contracting Officer's Statement of April 1, 1998 at 1. Indeed, the agency requested Prosegur during discussions to address the performance deficiencies cited in the cure notice. In response, Prosegur provided a detailed explanation of each instance and the corrective action that it had taken or proposed. For example, with respect to its guards' alleged theft of property from the Gorgas Hospital, Prosegur explained that (1) its guards had been given permission to remove the property because it was being discarded by the hospital, which was to be turned over to Panamanian control, and (2) the charges of theft therefore had been dismissed by a Panamanian court, but Prosegur nevertheless had terminated the employment of the guards involved and reemphasized to its remaining guards that they were not permitted to accept anything from Prosegur's customers. Although the performance problems led to a

reduction in Prosegur's risk rating from low to medium, Prosegur's prompt attention to the cure notice and the fact that the evaluations of Prosegur's performance on the three commercial security guard contracts was rated as good led the evaluators to assign Prosegur's proposal a good rating for past performance. Given the above considerations, we find nothing unreasonable in this rating.

Noting that its own proposal was rated good with medium risk for past performance, Proteccion asserts that its rating should have been higher than Prosegur's because it has a superior past performance record. However, the agency found that, while Proteccion's contract references indicated good past performance, a medium proposal risk assessment was warranted because none of the references were for contracts equal in size to the contract being awarded. Agency Supplemental Contracting Officer's Statement of April 1, 1998 at 5. In this regard, the solicitation provided that "[a]bsent any past or current performance history within the past three years on the same or similar efforts, the offeror's proposal will be considered moderate risk for performance." Solicitation Section M.3, "Evaluation Methodology," at M-5. Proteccion does not assert that it has performed contracts similar in size to the current solicitation and, in any case, the largest contract apparent from its proposal was less than 10 percent the size of the contract contemplated here. Proteccion does assert that size should not be considered in determining whether its prior contracts are the same as or similar to the current procurement. However, size is a proper consideration in determining whether an offeror has experience performing similar contracts. See NavCom Defense Elec., Inc., B-276163, May 19, 1997, 97-1 CPD ¶ 189 at 4-5.

The protest is denied.

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