



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Kemron Environmental Services, Inc.

File: B-299880

Date: September 7, 2007

Kevin R. Armbruster, Esq., and Jason C. Grech, Esq., Cushing, Morris, Armbruster & Montgomery, LLP, for the protester.

Kenneth A. Redden, Esq., Environmental Protection Agency, for the agency.

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

DIGEST

Protest that agency's inadvertent disclosure of protester's price information, which was limited in scope, resulted in unfair competition is denied where record does not demonstrate that protester was competitively harmed.

DECISION

Kemron Environmental Services, Inc. protests the award of a contract to WRS Infrastructure & Environment, Inc. under request for proposals (RFP) No. PR-R4-06-10166, issued by the Environmental Protection Agency (EPA) for superfund emergency and rapid response services for the removal of hazardous substances. Kemron argues that, because EPA disclosed certain of its price information to WRS in the course of the procurement, the agency should be required either to cancel the solicitation and resolicit for its needs or award a contract to Kemron.

We deny the protest.

The RFP provided for the award of up to three indefinite-delivery/indefinite-quantity time and material contracts to the lowest-cost, technically acceptable offerors. RFP § M at 1. The RFP provided a list of 15 labor categories, with the maximum number of hours required annually for each, and 73 items of equipment, with the maximum number of days annually that each piece of equipment would be in use. RFP § L at 5-8. With respect to price, offerors were required to propose a loaded fixed hourly rate for each identified labor category, and a fixed daily use rate for each piece of equipment. RFP § L at 30, 31. In evaluating price, the agency would multiply the loaded rates by the estimated maximum number of labor hours, and the daily

equipment rates by the estimated maximum number of days, and add the resulting prices to arrive at a total price. RFP § L at 31.

On March 6, 2007, the agency sent each offeror in the competitive range an e-mail containing discussion items to address. On March 7, WRS advised the agency by telephone that it had received Kemron's discussion letter. WRS explained that the company treasurer received the e-mail and started scanning it, but noticed that the letter referred to companies that were not named in its proposal. Agency Report (AR) at 2. At that point, the treasurer looked at the top of the letter and found that it was addressed to Kemron. After telephoning the company president for instructions on how to proceed, he sent the e-mail back to the agency and destroyed all copies. The treasurer advised EPA that he did not recall any specific information from the letter. Subsequently, on March 19, the agency received revised proposals and, on April 5, final proposal revisions (FPR). After evaluating the FPRs, the agency selected the three lowest-priced proposals for award, including WRS's, which was the second lowest priced proposal. Kemron's proposal was fourth-low, and the firm complains that it was harmed by the disclosure of its pricing.¹

The disclosure of proprietary or source selection information, including an offeror's price, to an unauthorized person during the course of a procurement is improper. Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 4; Motorola, Inc., B-247937.2, Sept. 9 1992, 92-2 CPD ¶ 334 at 9. Where an agency inadvertently discloses an offeror's proprietary information, the agency may choose to cancel the procurement if it reasonably determines that the disclosure harmed the integrity of the procurement process. Information Ventures, Inc., *supra*, at 4-5; Norfolk Shipbuilding & Drydock Corp., B-247053.5, June 11, 1992, 92-1 CPD ¶ 509 at 4-5. Where an agency chooses not to cancel the procurement after such a disclosure, we will sustain a protest based on the improper disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure. Motorola, Inc., *supra*, at 9; Gentex Corp.—Western Operations, B-291793 *et al.*, Mar. 25, 2003, 2003 CPD ¶ 66 at 8-9. Here, the record shows that Kemron was not competitively prejudiced by the disclosure.

EPA reviewed WRS's revised proposal and FPR prior to making its award decisions, found that WRS did not use Kemron's price information, and concluded that cancellation of the RFP thus was not warranted. In this regard, the agency explains that the Kemron discussion letter WRS received included Kemron's rates for only 1 of 15 labor categories (equipment operator), and for only 7 of 73 pieces of

¹ EPA notified Kemron of the disclosure and Kemron expressed concern that it could be competitively harmed as a result, and Kemron and the agency had some discussion about how to remedy the issue before EPA ultimately determined that corrective action was not called for.

equipment. AR at 4. With respect to the labor category, in its revised proposal WRS reduced all of its labor rates based on instructions EPA had provided in WRS's own discussion e-mail. AR at 4. Specifically, in its initial proposal WRS included the cost of personal protective equipment in its loaded hourly labor rate before applying profit (calculated as a percentage of the loaded hourly rate). During discussions, the agency informed WRS that the cost of personal protective equipment should be added after applying profit to the hourly rate; WRS changed its labor rates in its revised proposal accordingly. AR at 4. WRS did not then change any labor rates in its FPR. Regarding equipment, WRS's revised proposal increased the daily rates for two of the seven items for which Kemron's prices were revealed—a pickup truck and an excavator. WRS explained that it was raising the daily rate for the truck (its rate already had been higher than Kemron's) from [DELETED] to [DELETED], to correct a miscalculation, and for the excavator from [DELETED] to [DELETED], because its initial price incorrectly had been based on owning the excavator, rather than leasing it from Hertz, as was intended. AR at 4-5. In its FPR, WRS lowered the rates for four pieces of equipment and raised the rate for four. These changes included only one rate—for the excavator—that had been revealed to WRS; WRS raised the excavator rate to [DELETED] because Hertz raised the rental rate. AR at 6. The agency concluded that, given the nature of the changes in WRS's proposal, there was no basis for finding that Kemron was prejudiced by the disclosure.

Kemron argues that it suffered competitive harm from—and, more generally, that the integrity of the procurement system was harmed by—the disclosure because, despite EPA's explanation, the information disclosed was sufficient to allow WRS to “reverse engineer” Kemron's prices, and then adjust its price so that it would be as high as possible without exceeding Kemron's price. Kemron notes, in this regard, that the price difference between the two proposals decreased from four percent in the initial offers to only one percent in the FPRs.

Kemron's arguments do not persuade us that WRS gained a competitive advantage, that it was otherwise competitively prejudiced, or that the integrity of the procurement system suffered harm as a result of the disclosure of Kemron's prices. First, Kemron's total price was not disclosed, and Kemron has not explained, and we fail to see, how WRS would be able to derive Kemron's total price from only 1 of Kemron's 15 labor rates, and only 7 of its 73 equipment rates. Kemron's mere assertion in this regard, without any supporting explanation or evidence, is not sufficient to establish that WRS was able, even theoretically, to ascertain Kemron's total price from the disclosed information. Moreover, even if we assume that WRS was able to determine Kemron's initial total price, there is no evidence supporting Kemron's claim that WRS was then somehow able to target its FPR price to a level just below Kemron's. In this regard, in order for WRS to accomplish this result, WRS

would have had to know how Kemron would revise its price following discussions.² Since WRS was not provided any revised proposal or FPR price information, we fail to see, and the protester has not shown, how WRS could have targeted its price in this manner.

Further, we note that Kemron's argument is premised on the idea that WRS knew it would be assured of an award if it targeted its FPR price to a level just below Kemron's. In fact, there is no reasonable basis for assuming that WRS proceeded in this manner, since it did not know the number, identities, or prices of other offerors in the competition; WRS presumably would have been aware that keying its price to Kemron's could have left it in an unfavorable competitive position vis-a-vis any other offerors. In addition, while the difference in Kemron's and WRS's prices was reduced from four to one percent between the initial proposals and FPRs, this difference was not simply the result of WRS's increased price; rather, it was the result of a combination of WRS's raising its price and Kemron's lowering its own.

Finally, regarding the alleged harm to the procurement system, it is undisputed that the disclosure of Kemron's information was inadvertent, and that the agency and WRS proceeded appropriately once the disclosure was discovered. Since, as discussed above, we find that Kemron was not competitively harmed by the disclosure, there is no basis for finding the agency's actions objectionable based on harm to the procurement system.

We conclude here that there is no basis for finding that Kemron was competitively prejudiced by the agency's inadvertent, limited disclosure of the firm's pricing information.

The protest is denied.

Gary L. Kepplinger
General Counsel

² Kemron lowered its total price from \$138,094,578 (initial) to \$136,593,925.38 (revised) to \$134,989,931.25 (FPR), while WRS raised its price from \$132,479,860.65 to \$133,800,005.05 to \$133,817,830.41.