



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: IGIT, Inc.

File: B-271823

Date: August 1, 1996

Paul H. Schramm, Esq., and Daniel R. Schramm, Esq., Schramm & Pines, L.L.C., for the protester.

Lynn H. Patton, Esq., and Christopher Solop, Esq., Ott & Purdy, for Penn Enterprises, Inc.; Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for Crown American Laundry Services, Inc.; and Harold W. Robertson, for Robertson & Penn, Inc., the intervenors.

Col. Nicholas P. Retson, and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's decision to exclude protester from a competition because the protester possessed a page from the installation's solicitation register which included a lump-sum government estimate for the cost of the solicited work is sustained where there is no basis in the record to support a conclusion that the protester acted improperly in obtaining the document—even though the document should have been returned to the contracting officer—and where the information at issue could be provided to the other offerors to ameliorate any competitive advantage obtained by the protester with little damage to the integrity of the procurement.

DECISION

IGIT, Inc. protests its exclusion from a competition for laundry and dry cleaning services at Fort Leonard Wood, Missouri, under request for proposals (RFP) No. DABT31-95-R-0017, issued by the Department of the Army. IGIT challenges as unreasonable the agency's decision to exclude it from the competition due to its possession of an agency document showing the lump-sum government estimate of the cost for these services.

We sustain the protest.

BACKGROUND

IGIT is the incumbent contractor currently providing laundry and dry cleaning services at Fort Leonard Wood under a contract awarded January 31, 1995, using sealed bidding procedures. Although IGIT's initial contract was awarded for a period of 1 year with four 1-year options, the Army decided shortly after award to refrain from exercising the options.¹ Instead, the Army issued a new solicitation for these services on December 10, 1995. Proposals in response to the RFP were required by March 28, 1996.

By letter dated March 4, 1996, IGIT's African-American president and owner, Mr. Dewell Reeves, complained to his congressional representative that the Army's decision not to exercise the options in IGIT's laundry services contract reflected a pattern of ongoing bad faith and racial bias on the part of contracting personnel at Fort Leonard Wood. Mr. Reeves appended to his letter a page from Fort Leonard Wood's solicitation register, an internal agency document, to demonstrate that the decision not to exercise the options was made within weeks after the initial contract award.² The document, as provided to the congressman, contained one line of information showing the solicitation number; a short description of the requirement ("laundry"); the status of the procurement ("preparing RFP"); a lump-sum figure (entitled "estimate"); and two dates representing internal agency milestones in the preparation of the solicitation. The document contained no markings indicating that it should be treated as confidential. It was dated August 18, 1995.

The contracting officer at Fort Leonard Wood first learned of IGIT's letter to its congressman--and IGIT's possession of the lump-sum government estimate--on or about April 4, approximately 1 week after the receipt of initial proposals, when the installation's contracting personnel were provided the letter and its attachments with direction to prepare a draft reply to the congressional inquiry that followed receipt of the letter. Between April 4 and April 12, several contracting personnel at Fort Leonard Wood attempted to ascertain how IGIT came into possession of both the page from the solicitation register and the two internal memoranda prepared by

¹The written memorandum formally requesting resolicitation of these services is dated May 25, 1995.

²Other information appended to Mr. Reeve's letter to his congressional representative will be discussed below.

the installation's Small and Disadvantaged Business Utilization (SADBU) specialist.³

By letter dated April 12, the contracting officer disqualified IGIT's proposal from further consideration in the ongoing competition. The letter, delivered by hand in a face-to-face meeting, justified the exclusion as follows:

"Your Congressional inquiry . . . contained an excerpt of this directorate's solicitation register, which is not releasable to the general public. The register contains information developed by [Directorate of Contracting] personnel, and includes [g]overnment estimates of individualized procurement actions.

"Your possession of the government estimate clearly establishes an appearance and perception that you had privileged information which gave you an apparent competitive advantage over the other offerors."

During this meeting, the Director of Contracting asked Mr. Reeves how he obtained the page from the solicitation register. Mr. Reeves explained that the document appeared taped to the front door of the laundry site in July 1995, and that his secretary found it upon arriving at work. Handwritten notes from the meeting by the Director of Contracting also reflect that Mr. Reeves stated he believed the information was provided to him in order to let him know that there would be a new solicitation and that the Army would not be exercising the options in his contract.

By letter dated April 19, IGIT protested to our Office, complaining that its exclusion was made in bad faith in retaliation for Mr. Reeves' efforts to bring his claim of racial discrimination to the attention of his congressional representative.

DISCUSSION

An agency's decision to exclude an offeror from a competition in order to remedy a problem related to the integrity of a particular procurement requires a balancing of competing interests set forth in the Federal Acquisition Regulation (FAR). On the one hand, contracting officers are granted wide latitude in their business judgments to safeguard the interests of the United States in its contractual relationships. FAR § 1.602-2; Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435. On the other hand, the same section of

³These memoranda were also attached to the letter to the congressman. Neither document contains procurement sensitive information, although one contains sensitive internal information providing some support for the protester's views regarding his allegations of racial bias at the installation.

the FAR requires contracting officers to ensure impartial, fair, and equitable treatment of all contractors. FAR § 1.602-2(b); KPMG Peat Marwick, B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272, aff'd, Agency for Int'l Dev.; Development Alternatives, Inc.--Recon, B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201.

A contracting officer may protect the integrity of the competitive procurement system by disqualifying an offeror from a 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. v. U.S., 805 F.2d 372 (Fed. Cir. 1986); 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, aff'd, Brown Assocs. Management Servs., Inc.--Recon, B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299; Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267. We will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629; RAMCOR Servs. Group, Inc., B-253714, Oct. 7, 1993, 93-2 CPD ¶ 213.

In reviewing the reasonableness of an exclusion decision, we examine both the nature of the information to which the offeror had access, Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63, and the conditions under which access was gained. KPMG Peat Marwick, supra. For example, we consider whether the information at issue is cost-related, General Elec. Gov't Servs., Inc., B-245797.3, Sept. 23, 1992, 92-2 CPD ¶ 196; whether the information is proprietary, KPMG Peat Marwick, supra; or whether the information is source selection sensitive. Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., supra. We also consider whether the information was obtained through improper business conduct, Compliance Corp., supra, or through more innocuous means, such as a Freedom of Information Act (FOIA) request pursued through appropriate agency channels. KPMG Peat Marwick, supra.

IGIT's Possession of the Government Estimate

The contracting officer concluded here that IGIT's possession of the government estimate gave it an apparent competitive advantage over the other offerors, and it was IGIT's possession of this estimate that formed the basis of the decision to exclude IGIT from the procurement. While the Army concedes that the lump-sum government estimate in this case was not marked to indicate its confidential nature, it argues that the information is not normally given to offerors, and that it clearly imparts a competitive advantage when available to only one offeror. We agree. Given the obvious competitive value of an agency's estimate of the cost to perform solicited work, we find reasonable the contracting officer's determination that steps were necessary to alleviate the competitive advantage to IGIT. See Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World

Servs., Inc., supra (protest against failure to take steps to alleviate an alleged competitive advantage was sustained where the awardee had access to the independent government estimate, acquisition plan, and evaluation criteria). Based on our review of the record, however, we do not find reasonable the Army's conclusion that excluding IGIT from the competition was appropriate or necessary to remedy the advantage created by its possession of this information.

Looking first at IGIT's conduct in this matter, we cannot conclude that IGIT acted improperly in obtaining the solicitation register. Exclusion of an offeror is a more reasonable sanction if the offeror's conduct in obtaining a competitive advantage was improper. See Compliance Corp., supra (exclusion based on "industrial espionage" involving an attempt to induce an employee of competing offeror to sell proposal information); NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638 (exclusion based on the hiring of the contracting officer's representative between submission of initial proposals and receipt of best and final offers, and a subsequent significant drop in that offeror's final price). In contrast, when the record did not show a likelihood of an actual impropriety or conflict of interest, we have overturned an agency's decision to exclude an offeror from the competition. See KPMG Peat Marwick, supra. Here, nothing in the record before us contradicts IGIT's explanation for its possession of this document--i.e., that it was taped to the door of the laundry facility during the summer of 1995, apparently to advise IGIT of the agency's decision to resolicit for laundry services rather than exercise the existing options.⁴ We, therefore, have no basis to reject IGIT's version of events.

In addition, while we agree with the Army and the intervenors that IGIT should have returned the document to the contracting officer, IGIT's responses to the Army's questions suggest that it simply did not recognize the competitive value of the lump-sum estimate. IGIT's apparent failure to recognize the sensitive nature of the lump-sum estimate contained on the solicitation register may be explained by the fact that the figure included is essentially IGIT's bid price for the existing

⁴For the record, while we have no rebuttal of the protester's version of how it received the page from the solicitation register, the agency report's legal memorandum does express doubts about the protester's explanation. The report points out that: (1) Mr. Reeves has claimed to have a source in the Directorate of Contracting; (2) Mr. Reeves states that the SADBUE gave him the memorandum for the record that provides some support for his claims; and (3) certain IGIT documents were found on the SADBUE's computer. Thus, the Army implies that the SADBUE provided the page from the solicitation register, and explains that it has requested a Criminal Investigative Division review of whether the SADBUE was the protester's source. However, the SADBUE denies providing the document to IGIT, and the doubts expressed in the agency report amount only to suspicion.

contract.⁵ On the continuum between improper actions such as "industrial espionage" and the more innocuous filing of a FOIA request, we consider IGIT's failure to return the page from the solicitation register closer to the latter than the former.

Finally, in considering the appropriate remedy for alleviating an offeror's competitive advantage, in a case where there is little evidence of improper activity, we view exclusion as a severe remedy that is reasonable only when other, less drastic, remedies are not practicable, or are insufficient. For example, in a case where we sustained a protest on the ground that the awardee had a conflict of interest—specifically, the awardee employed a former government official with access to restricted information (including the government estimate) to help draft the proposal—we expressly rejected the remedy of excluding the awardee from the competition and instead recommended releasing the restricted information to all the offerors and calling for a new round of proposals. Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., supra.

Here, as in Holmes & Narver, release of the government estimate to all offerors is the reasonable remedy for the competitive advantage accruing to IGIT. Although the agency and the interested parties argue that the release of the estimate will create an auction, there are several factors to suggest that any adverse effect from the release of this estimate will be minimal, and will be consistent with our prior decisions. In this regard, we note that the government estimate in this case is considerably less detailed than the one released in Holmes & Narver, where the estimate included cost calculations for each of 27 separate functions. In addition, the estimate here conveys essentially no more information to offerors than the release of the contract price when the previous award was made to IGIT via sealed bids. Since the prior price of these services is clearly public information, and the difference between the two figures is essentially de minimis, we see no serious damage to the integrity of the procurement system from the release of this estimate.⁶ Thus, under the circumstances here, eliminating IGIT's competitive advantage while retaining IGIT as an offeror outweighs the government's interest in

⁵Although the two figures are very similar, they are not identical; nonetheless, the approximate 2.5-percent difference in the figures suggests that IGIT's successful bid price in the most recent competition provided the basis for the estimate.

⁶Since the previous procurement was awarded using sealed bidding procedures, under which bids are opened publicly, IGIT's previous price for these services is publicly available. FAR § 14.101.

not appearing to conduct an auction.⁷ KPMG Peat Marwick, supra; Holmes & Narver Servs., Inc./Morrison-Knudson Servs., Inc. a joint venture; Pan Am World Servs., Inc., supra.

RECOMMENDATION

We conclude that the decision to exclude IGIT from the competition here does not strike a reasonable balance between the agency's appropriate recognition of the need to ameliorate the competitive advantage arising from IGIT's possession of the government estimate, and the requirement to treat IGIT fairly. Thus, the Army's actions, no matter how well-intentioned, violate the mandate of FAR § 1.602 requiring contracting officers to ensure impartial, fair, and equitable treatment of contractors. We recommend that the Army eliminate any competitive advantage given IGIT by providing the lump-sum government estimate to all offerors and requesting a new round of proposals.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.8(d) (1996). The protester should submit its certified claim for protest costs directly to the agency within 90 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
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⁷We need not reach the protester's allegation that racial bias was, in part, a motivating factor in this case as we sustain the protest and recommend that IGIT be permitted to participate in the procurement.