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Decision

Matter of: Unisys Corporation

File: B-403054.2

Date: February 8, 2011

Richard J. Webber, Esq., Arent Fox LLP, and E. Charles Rowan, Esq., for the protester.

James J. McCullough, Esq., Michael J. Anstett, Esq., and Brian M. Stanford, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for Science Applications International Corporation, the intervenor.

Stephanie A. Kreis, Esq., Department of Defense, Defense Information Systems Agency, for the agency.

Kenneth Kilgour, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee's use of a former government employee in the preparation of its proposal provided the firm with an unfair competitive advantage due to the employee's access to proprietary information of the protester is denied where the record reflects that the information at issue was not competitively useful.

DECISION

Unisys Corporation, of Reston, Virginia, protests the issuance of a task order to Science Applications International Corporation (SAIC), of Alexandria, Virginia, by the Defense Information Systems Agency (DISA), Defense Information Technology Contracting Organization (DITCO), under request for proposals (RFP) No. E200257.00 for data center operations and technical support activities. The protester argues that SAIC's use of a former government employee in the preparation of its proposal lent the firm an unfair competitive advantage and that the same former government employee committed a procurement integrity violation.¹

¹ We previously dismissed the protester's price realism challenge for failure to state a valid basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2010). It was not clear that the agency was required to perform a price realism evaluation, and, even if it was, the protester unreasonably speculated that the

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We deny the protest.

BACKGROUND

On March 15, 2010, DITCO issued the RFP for task order 0014 under Encore II, a multiple-award task order contract. The Encore II task order at issue contemplated the issuance of fixed-price task order with a base year beginning July 1, 2010 and four 1-year option periods, for Defense Enterprise Computing Services (DECC), Technical and Operations Support, in Montgomery Alabama. DISA has a number of DECCs, or data centers, in various locations. Tasks include management of Unix and Windows environments, supporting the agency in implementing, maintaining, resolving, and upgrading a variety of applications, database administration (including the operation of the Service Desk), and storage management. Performance Work Statement, 6.1, Task 1-DECC Operations/Technical Support. The agency maintains that the Encore II contractor is to perform “industry standard tasks found in most, if not all data centers.” Agency Comments, Jan. 13, 2011 at 5. According to the agency, these tasks are not unique to DISA and are performed at all DISA data centers by a variety of contractors. *Id.* While the solicitation estimated that performance of the task order required 156 full-time equivalents (FTEs), it also provided that firms should offer their own selection of labor categories and number of FTEs that would, in the offeror’s judgment, provide the best value to the agency. RFP at 1; RFP Q&A at Question 15.

Task order 0014 is a follow-on to a task order issued to the protester under the prior Encore I multiple award contract. The protester’s performance of the Encore I task order, also a fixed-price task order, ran from 2004 until March 2010, the last possible extension following the original expiration date of September 30, 2009. The requirement is currently being provided through a bridge contract with Unisys.

As it relates to the issues raised in the protest, R.R.² was the Chief of the Technical Support Division at DECC Montgomery from October 2002 until November 2009, or much of the duration of the Encore I task order. The record reflects that he was one of four Division Chiefs overseeing Unisys’s performance. Of the approximately 156 personnel that Unisys utilized in the performance of the task order, 47, or roughly one third, worked in R.R.’s division. Protest at 10.

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difference between Unisys’s and SAIC’s prices was attributable to labor rates.
Facsimile from GAO, Nov. 5, 2010.

² Throughout this decision, we identify individuals by their initials rather than their full names.

The record reflects that from October 2007 until October 2008, R.R. received automated time, attendance, and production system (ATAAPS) reports. Memorandum of Law (MOL) at 13. The ATAAPS reports were a matrix of all Unisys personnel at DECC Montgomery—not just those employees within R.R.’s Division—with name, organization code, contractor work site, labor classification, and hourly rate.³ The record also reflects that, up until his retirement, R.R. received vacancy reports that contained a listing of vacant positions and were prepared in connection with semi-weekly meetings between Unisys and R.R. See Protest, Attach. A; Agency Report (AR), Tab J.

As R.R. was nearing his retirement, which was effective December 31, 2009, the Encore II procurement was still in its planning stages. The record contains evidence that he participated in the planning for Encore II at least through August 2009, see MOL at 9, and that from May 2009 through June 2009, R.R. was approached by SAIC about possible employment opportunities, and after each contact, R.R. rejected SAIC’s advances. AR, Tab F, E-mails between R.R. and SAIC.

Five weeks after R.R.’s retirement, on February 4, 2010, the contracting officer released the draft solicitation for task order 0014 to the Encore II contract holders. Two days later, the agency finalized the Acquisition Plan, and, on March 9, 2010, it finalized the evaluation plan. DITCO released the final RFP, which included the evaluation plan as an attachment, on March 15. On March 30, R.R. became a temporary consultant to SAIC. Proposals in response to the RFP were due April 5.

Unisys and SAIC submitted proposals for task order 0014. SAIC’s proposal contained fewer than the RFP-estimated 156 FTEs and was priced substantially lower than Unisys’s proposal. Protest at 15. After receipt and evaluation of the initial proposals, DISA conducted written discussions, and the offerors submitted revised proposals. The agency issued the task order to SAIC at a price of \$90,862,629.43. In the subsequent debriefing, DISA advised Unisys that, except for SAIC’s higher rating under one of the technical management subfactors, the ratings assigned to the two firms’ proposals were the same.

Unisys protested the selection of SAIC, alleging that it had obtained an unfair competitive advantage when it employed the former DISA Division Chief, R.R., to assist in its proposal preparation.⁴ The agency asserted that it had been unaware of

³ As discussed below, the protester asserts that a recipient of this report could determine how Unisys staffed the Encore I task order for each task and subtask of the statement of work, and how each task and subtask was priced. Protester’s Comments, Jan. 13, 2011 at 8.

⁴ The intervenor stresses that R.R. was hired, via an intermediary consultant firm, specifically to assist SAIC in the transition process. See Intervenor’s Comments, Jan. 28, 2011 at 2. While R.R. reviewed SAIC’s technical proposal—the extent of his
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R.R.'s involvement in SAIC's proposal preparation and announced that it would take corrective action, specifically, that it would investigate the facts surrounding R.R.'s employment with SAIC. We dismissed the protest. See Unisys Corp., B-403054, July 8, 2010.

Based on its internal investigation, the agency concluded that the Division Chief's activities did not provide SAIC with an unfair competitive advantage. In this regard, the report found that R.R.'s knowledge of Unisys's performance of the Encore I task order was limited to Unisys's labor categories and staffing, as it related to his own Division, and that he did not have insight into Unisys's overall labor categories or staffing. DITCO Investigation Report, at 4, 10. The report also found that R.R. did not have access to Unisys's pricing (labor rates) for the Encore I task order and that "even if he had knowledge of the Unisys labor rates, that information was outdated." Id. at 11. DISA informed Unisys that the selection of SAIC would not be disturbed, and this protest followed.

DISCUSSION

Unisys alleges that SAIC gained an unfair competitive advantage through R.R.'s access to Unisys's proprietary information, namely, the data contained in the ATAAPS and vacancy reports, as well as his alleged insider knowledge of pending workforce reductions that would affect the number of FTEs needed to perform the Encore II task order.⁵

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involvement is disputed and not dispositive of this protest—there is no evidence in the record that he assisted the intervenor with the preparation of its price proposal. See id. To the contrary, throughout the agency's investigation of the protester's allegations and these proceedings, R.R. and the intervenor have consistently maintained that R.R. did not have any involvement with the preparation of SAIC price proposal at any stage of the procurement process.

⁵ The protester alleged that R.R. had access to the evaluation plan and the initial government cost estimate. The agency addressed these issues in its January 6, 2011 comments, explaining that there was no evidence that he had such information. See Supp. AR, Jan. 6, 2011, at 9-10. The protester did not rebut the agency's arguments in its reply. Consequently, we consider these allegations to be abandoned. Washington-Harris Group, B-401794, B-401794.2, Nov. 16, 2009, 2009 CPD ¶ 230 at 5 n.3. Unisys also alleges that R.R. had access to periodic "technical proposals" submitted by Unisys in the course of its performance of the Encore I task order and may have assisted in evaluating some. Protest at 11. The protester offered no support for this allegation, nor did it further pursue it. We therefore dismiss this ground as speculative, and as having been abandoned by Unisys as well. See Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2010).

Contracting agencies are to avoid even the appearance of impropriety in government procurements. Federal Acquisition Regulation (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 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. To resolve this question, we typically consider all relevant information, including whether (in cases such as this) 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. Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198 at 4-5; Guardian Techs. Int'l, supra. Whether the appearance of impropriety based on an alleged unfair competitive advantage exists 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 is shown to be unreasonable. Health Net Fed. Servs., LLC, supra.

ATAAPS Reports

As noted above, the agency's investigation of the unfair competitive advantage concluded that R.R. had no knowledge of Unisys's overall staffing, labor categories, or actual labor rates for the Encore I task order. The record, however, reflects, as explained above, that R.R. did in fact have access to this information through the ATAAPS reports, which he received between 2007 and 2008. Unisys contends that this information was competitively useful because, as noted above, it identified all of its labor categories and labor rates; using the information in these reports, Unisys argues, a competitor could therefore determine how Unisys staffed each task and subtask of the Encore I work, and how it had priced each task and subtask. Protester's Comments, Jan. 13, 2011 at 8.⁶ The agency contends that the information was outdated, rendering it not competitively useful, and thus its disclosure would not have provided SAIC with any competitive advantage in the Encore II task order competition. We agree.

⁶ The agency notes that Unisys did not mark the information contained in the ATAAPS reports as proprietary and argues that much of it was not. Given our conclusion that the information at issue was not competitively useful and therefore did not afford SAIC an unfair competitive advantage in the task order competition, we need not address the agency's arguments in this regard.

The following table lists labor categories and rates used by Unisys for the Encore I and those it proposed for Encore II. The Encore I labor rates are for 2008-2009, or the rates that would have been disseminated to R.R., and the rates proposed for the base year of Encore II, 2010-2011.

Labor Category	Authorization Rate	
	2008-2009	2010-2011
Task Order Project Manager	[DELETED]	[DELETED]
Senior Functional Analyst	[DELETED]	
Functional Analyst	[DELETED]	
Principal Information Engineer	[DELETED]	[DELETED]
Senior Information Engineer	[DELETED]	
Senior Computer Systems Analyst	[DELETED]	[DELETED]
Computer Systems Analyst	[DELETED]	[DELETED]
Junior Computer Systems Analyst	[DELETED]	[DELETED]
Database Management Specialist	[DELETED]	
System Operator	[DELETED]	
Network Draftsman	[DELETED]	
Communications Network Manager	[DELETED]	
Principle BPR Specialist	[DELETED]	[DELETED]
Documentation Specialist	[DELETED]	
Senior Systems Administrator		[DELETED]
Administrative Support & Graphics Specialist		[DELETED]
Senior Information Technology Expert		[DELETED]
Subject Matter Expert (Intermed.)		[DELETED]
Computer Security Sys. Specialist (Intermed.)		[DELETED]
Computer Security Sys. Specialist (Lead)		[DELETED]

AR, Tab I.

The chart demonstrates that Unisys proposed a substantially different labor mix to satisfy the requirements of Encore II as compared to its Encore I task order, replacing eight of its 14 Encore I labor categories with six new ones.⁷ Where Unisys did retain previously used labor categories, it substantially lowered its labor rates,

⁷ The contracting officer maintains that any information about Encore I staffing was not competitively useful since, over time, the nature of the agency's requirement changed. In this regard, the contracting officer explained that the base year for the Encore I task order was 2004-2005, and the labor categories originally identified by Unisys to fulfill that requirement reflected the effort required in the 2004-2005 time-frame to launch a successful data center. Teleconference, Jan. 19, 2011, Comments of Contracting Officer.

one by over \$50 per hour. This fundamental change rendered the labor category and labor rate information not competitively useful.

Unisys contends that knowledge of how it had historically staffed the Encore I task order “would be very helpful to SAIC’s ability to demonstrate, from a technical standpoint, its understanding of how each task and subtask needed to be staffed to get the work done efficiently, and how that staffing would then translate into a price by task.” Protester’s Comments, Jan. 13, 2011 at 8-9. The protester’s arguments in this regard, however, merely demonstrate that the information might have been useful to SAIC from a general business perspective, that is, to provide SAIC generally with a different perspective on how the work could possibly be performed. It would not, however, have provided SAIC with any advantage in its competition with Unisys because, as explained above, the information did not provide any useful insight into the approach taken by Unisys for the purposes of the Encore II competition.⁸ Moreover, where an incumbent’s “organizational structure and staffing” could be “discerned by regular observation,” we will not consider that information proprietary. *Textron Marine Sys.*, B-255580, B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63 at 16. As the ATAAPS reports indicate, the agency employed numerous different contractors to support its efforts, Unisys being but one of them. Thus, information regarding how Unisys historically staffed the Encore I task order would have been discernable by regular observation, and we would not consider such information proprietary. *Id.*

Workforce Reductions

Unisys alleges that R.R. had access to competitively useful inside information concerning the agency’s requirements for Encore II, namely, the agency’s intent to reduce the number of FTEs available for the performance of the Encore II task

⁸ Unisys also cites R.R.’s access to vacancy reports under the Encore I task order as having provided SAIC with an unfair competitive advantage in the Encore II task order competition. These reports, which were provided on a monthly basis, listed vacant positions, identifying the relevant agency section, the vendor, the date the position opened, any particular requirement the applicant should possess, the names of any candidates and the person coordinating the hiring, and “remarks,” which appear to be the name of the agency Branch Chief and Manager. The salient information contained in these reports is that, Division-wide, the agency consistently experienced multiple vacancies, some of which were positions staffed by Unisys under the Encore I task order. The agency considered R.R.’s access to these vacancy reports as part of its investigation of the alleged unfair competitive advantage and concluded that R.R.’s knowledge of particular vacancies experienced by Unisys was not competitively useful. We have no basis to find the agency’s determination in this regard to be unreasonable.

order. In December 2010, during discussions regarding the potential need to modify Unisys's bridge contract, the Unisys Encore Program Manager learned from the DECC Director that he had previously received notice from his headquarters that he would have to reduce his FTEs from 156 to perhaps as few as 145. The director was offered no timetable for the eventual workforce reductions. The director recalls informing the Unisys Program Manager "that some of these reductions were based on workload adjustments that started over a year back, but that [he] really did not know either when [DECC Montgomery] would actually receive the direction to make the reductions or the actual number of contractor positions that would be affected." Agency Comments, Jan. 6, 2011, Attach. 4, Decl. of D.D. at 1-2. The director denies the protester's allegation that the agency had been planning for more than a year to reduce the number of FTEs for the Encore II task order. He states that neither he nor his Division Chiefs--which included R.R.--knew when the agency would be directed to make the reductions or the actual number of contractor positions that would be eliminated. Id. The agency asserts that at the time it issued the RFP, it had authorization for 156 FTEs and properly included an estimate of 156 FTEs in the solicitation. Thus, DISA argues, knowing that at some undefined point in the future headquarters could potentially mandate a reduction by some unknown number of positions the FTEs available to support the Encore task order was not competitively useful inside information given the vagueness and indefinite nature of the information.

As an initial matter, there is no evidence in the record that R.R. had access to plans to reduce staffing for the Encore II task order. Rather, according to Unisys, based on R.R.'s position within the agency, "[i]t seems likely that [R.R.] would have been aware that DISA was planning to reduce the number of FTEs for Encore II work." Decl. of Unisys Program Manager for Encore I Task Order, at 5 (emphasis added). Given the lack of "hard facts" in this regard, there is no basis on which to find that R.R. afforded SAIC a competitive advantage as Unisys has alleged. See Health Net Federal Services, LLC, supra, at 29 (explaining that there must be "hard facts" establishing access to non-public information, which could provide a firm with an unfair competitive advantage).

In any event, even assuming that R.R. had access to information about the potential for future FTE reductions, the information, by its nature, could not have provided SAIC with an advantage.⁹ As DITCO maintains, the information was of such an undefined and indefinite nature that its knowledge could not have been of any meaningful competitive utility. Moreover, the record reflects, as DITCO argues, staffing for the task order was authorized at 156 FTEs, see Decl. of Director of DECC

⁹ While the record reflects that contractor FTE reductions were ultimately implemented, DECC Montgomery did not receive notice of these reductions until December 2010, after SAIC had been issued the task order, and approximately one year from when R.R. retired from the government.

Montgomery, Jan. 5, 2010, at 2, this number was provided as the government's staffing estimate in the solicitation, and there is nothing to indicate that the agency's understanding of this estimate changed at any point up until the time of SAIC's award.¹⁰ Given this record, we have no basis to conclude that R.R. had access to non-public information that could have provided SAIC with an unfair competitive advantage.

Procurement Integrity Act Violation

The protester also alleges that R.R. "likely" violated the Procurement Integrity Act (PIA), 41 U.S.C. § 423(c) (2006), because he was substantially and personally involved with preparation of the statement of work for the Encore II task order and failed to promptly report, in writing,¹¹ his employment discussions with SAIC in May and June of 2009. Protester's Comments, Dec. 20, 2010 at 20.

As a general matter, the PIA contains strict prohibitions on the knowing disclosure by a present or former official of the United States of contractor bid or proposal information or source selection information. 41 U.S.C. § 423(b). The PIA also includes reporting requirements for certain government employees who engage in employment discussions with bidders or offerors, which provide in relevant part as follows:

- (1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-federal employment for that official, the official shall –
 - (A) Promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

¹⁰ Unisys alleged that the agency maintained an undisclosed government estimate of 147 FTEs for the Encore II task order as reflected by a July 22, 2009 e-mail message. See AR, Tab C-22. The agency explains that, while the message references 147 FTEs, this number merely reflected a count of Unisys employees then working on the Encore I task order and did not reflect an undisclosed government estimate. See Supp. AR, Jan. 6, 2011, at 7-8. Unisys accepted the agency's representations in this regard, and thereby conceded the point. Protester's Comments, Jan. 13, 2011 at 3.

¹¹ R.R. asserts that he informed DECC management of his pre-retirement employment conversations with SAIC, however, there is no indication in the record that this was ever done in writing. Decl. of R.R., Dec. 8, 2010 at 5.

(B) (i) Reject the possibility of non-federal employment; or (ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time until the agency has authorized the official to resume participation in such procurement.

41 U.S.C. § 423(c)(1).

Even if R.R.'s failure to provide the proper written notice of his pre-retirement employment discussions with SAIC in May and June of 2009 was a violation of the PIA, our inquiry with respect to the protest does not end there. Rather, the question becomes whether the individual acted in a way to have created an unfair competitive advantage. See Health Net Fed. Servs., LLC, *supra*, at 34 (stating that "an unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice"). In this regard, Unisys asserts that the "probable" violation in this case "adds to the appearance that his access to competition sensitive, inside information may have led to an improper disclosure to SAIC" and increased the possibility that he would have learned of "the planned staffing reduction" through conversations with his colleagues from whom he should have been walled-off. Protester's Comments, Jan. 13, 2011 at 11. As discussed above, however, the information to which R.R. may have had access, and about which Unisys has complained, (*i.e.*, the ATAAPS and vacancy reports, as well as the agency's unsettled plans to implement staffing reductions) could not have afforded SAIC with an unfair advantage in the Encore II task order competition. Having failed to establish that R.R.'s alleged PIA violation created an unfair competitive advantage, there is no basis on which to sustain Unisys's PIA protest allegations.

The protest is denied.

Lynn H. Gibson
General Counsel