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**United States Government Accountability Office
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Decision

Matter of: Health Net Federal Services, LLC

File: B-401652

Date: October 13, 2009

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David R. Hazelton, Esq., Roger S. Goldman, Esq., Eric J. McCarthy, Esq., Kyle R. Jefcoat, Esq., Benjamin Wei, Esq., and Anne W. Robinson, Esq., Latham & Watkins LLP, for Aetna Government Health Plans, the intervenor.

Gerald A. Wesley, Esq., Hattie Russell DuBois, Esq., Michael E. Jonasson, Esq., and Rhonda L. Bershok, Esq., Office of TRICARE Management Activity, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that disclosure of protester's initial proposed total price resulted in an unfair competition is denied where record does not demonstrate that protester was competitively harmed.

DECISION

Health Net Federal Services, LLC of Rancho Cordova, California, protests the award of a contract to Aetna Government Health Plans, LLC (AGHP) of Hartford, Connecticut, under request for proposals (RFP) No. H94002-07-R-0007, issued by the Department of Defense TRICARE Management Activity (TMA) for T-3 TRICARE managed health care support services for the North Region. Health Net contends that the agency failed to properly consider and investigate "a substantial and material" procurement integrity violation by the Department of Defense (DOD) which tainted the integrity of the procurement and the award to AGHP. Protest at 2.

We deny the protest.

By way of background, TMA issued the RFP on March 24, 2008 for the purpose of awarding separate contracts to provide managed health care support for eligible beneficiaries in the Department of Defense TRICARE program for three regions:

North, South, and West. The award of the North region contract is the subject of this protest.¹

Initial proposals were due on June 30. As it relates to the protest, the RFP provided for evaluating offerors' total cost/price, which included both fixed-price line items and cost-reimbursable line items. As a general matter, the fixed-price line items related to offerors' administrative activities under the contract, while the majority of the reimbursable line items were tied to the government's estimated health care and disease management costs. The RFP provided estimated values for the government's health care and disease management costs, which totaled \$17,481,639,754,² and required offerors to use these values, essentially establishing them as "plug numbers," for purposes of calculating an offeror's total cost/price.

Health Net submitted a timely initial proposal for the North Region with a total evaluated cost/price of [DELETED]. AGHP also submitted a timely initial proposal for the North Region with a total evaluated cost/price of [DELETED]. Subtracting the line item values for estimated health care and disease management costs (the plug numbers), Health Net's cost/price was [DELETED], while AGHP's cost/price was [DELETED], a difference of approximately [DELETED] million. TMA held discussions with both offerors in December 2008 and established a deadline of January 5, 2009 for the submission of final proposal revisions.

In their final proposals, subtracting the plug numbers, Health Net's cost/price was [DELETED] and AGHP's was \$1,083,642,320, a difference of approximately [DELETED].

For the purpose of evaluating the cost and price information contained in Health Net's initial proposal, TMA sought the assistance of the Defense Contract Audit Administration (DCAA). DCAA provided TMA with a report dated September 24, 2008, in which it questioned [DELETED] as it related to Health Net's proposed [DELETED]. Agency Report (AR), Tab 12, Price/Cost Team Report, at 12.

The record reflects that on October 8, 2008, before final proposals were due, DCAA provided a summary of these audit findings to the DOD Office of the Inspector General (OIG) for inclusion in a statutorily required report to Congress, referred to as the DOD OIG's Section 845 Annex of Audit Reports with Significant Findings, issued as an attachment to the DOD OIG's Semiannual Report to Congress for the

¹ Health Net filed a second protest challenging the award to AGHP on other grounds. We will resolve that protest by separate decision, to be issued no later than November 5.

² These values were revised downward for the purpose of final proposal submissions.

period from April 1 to September 30, 2008.³ See Declaration of DOD OIG Supervisory Auditor, July 31, 2009. As a result, the Section 845 Annex included the following information:

Audit Report: 4141-28008F27000001	Date: September 24, 2008
Subject: Cost Realism Report on Parts of a Proposal – Health Net Federal Services (HNFS), TRICARE T3 Managed Care Support Services – North Region	
Prepared for: TRICARE Management Activity	
Contractor: Health Net Federal Services, LLC	
Report: [DELETED] Questioned Costs	
The audit of parts of the [DELETED] ⁴ cost realism proposal resulted in [DELETED] of questioned costs. Questioned costs were the result of [DELETED] and [DELETED].	

On December 15, 2008, the DOD OIG SemiAnnual Report to Congress, which included the 845 Annex, as well as a separate classified Annex on Intelligence-Related Oversight, was delivered to various Congressional offices.⁵ Two days later, on December 17, the DOD OIG posted the Semiannual Report on its Internet website. Importantly, the record demonstrates, and is undisputed in this regard, that when the Semiannual Report was initially posted, it did not include the 845 Annex; rather, the 845 Annex was later posted on January 6, 2009, the day after final proposals under the RFP here were due. See Declaration of Deputy to the Assistant Inspector General for Communications and Congressional Liaison, DOD OIG, July 31, 2009, and Declaration of DOD OIG Web Team Chief, July 31, 2009.

³ Section 845 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-81, requires DCAA to provide to the DOD OIG “an annex on final, completed contract audit reports . . . containing significant audit findings” for inclusion in the DOD OIG’s semi-annual report submitted to Congress pursuant to the Inspector General Act of 1978. As relevant to the protest, it provides that there is no requirement to release information to the public that is exempt from public disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b).

⁴ The Annex had an obvious typographical error where it reported a proposed price of [DELETED] “million” instead of “billion.” The error is apparent on its face to any person at all familiar with the procurement, and the actual intended figure likewise is clear given that the same sentence in the Annex references [DELETED] in questioned costs.

⁵ Because the report and the 845 Annex were accompanied by the classified Annex on Intelligence-Related Oversight, when the report was delivered to Congress, it included a coversheet with the heading “SECRET” with specific instructions for handling the “document,” as well as a cover letter labeled “SECRET/NOFORN.”

On June 19, 2009, one day after it allegedly discovered that the 845 Annex, which contained pricing information regarding its initial proposal, had been posted on the DOD OIG website, Health Net sent the contracting officer a letter, reporting the disclosure as a potential violation of 41 U.S.C. § 423(a)(1).⁶ The 845 Annex was removed from the DOD OIG website that same day.⁷

Thereafter, the contracting officer conducted an investigation of the matter and concluded that any possible violation of the statutory procurement integrity provisions had no impact on the competition. He based his determination in this regard on the fact that the public release of the proposal information on the DOD OIG website occurred on January 6, one day after final proposals were due, thus there was no possibility that competing offerors could have utilized this information for the purposes of the competition. In addition, he noted that to the extent the information had been provided to Congress, it was submitted shortly before final proposals were due; the competing offeror, AGHP, certified that it had no knowledge of Health Net's proposal information; an analysis of AGHP's final proposal revision did not show any evidence that it had made pricing changes based on the information provided to Congress; and [DELETED]. See Contracting Officer's (CO) Memorandum for the Record, June 26, 2009. Upon learning of the contracting officer's decision in this regard, Health Net filed this protest.

Discussion

Health Net argues that the integrity of the procurement process has been compromised 1) as a consequence of DOD's violation of the statutory procurement integrity provisions by disclosing, prior to award, Health Net's proprietary pricing and proposal information on a publicly accessible website and 2) because DOD submitted Health Net's proprietary proposal information to Congress, prior to the time final proposals were due, without identifying the information as competitively sensitive and relevant to an ongoing government procurement. In connection with the latter point, Health Net argues that the contracting officer failed to conduct a reasonable investigation regarding potential subsequent disclosures of Health Net's proprietary information.

⁶ Pursuant to the procurement integrity provisions of the Office of Federal Procurement Policy (OFPP) Act, government officials are precluded from "knowingly disclos[ing] contractor bid or proposal information . . . before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(a).

⁷ Health Net maintains that it first learned of this posting on June 18, 2009, through one of its proposed subcontractors, [DELETED].

We recognize that serious errors occurred in connection with DOD's handling of Health Net's price/cost information during the pendency of an active procurement. Simply put, Health Net's pricing information, as contained in the 845 Annex, should not have been posted to a public website prior to contract award, nor should it have been submitted to Congress without any indication that it contained contractor bid or proposal information related to the conduct of a Federal agency procurement and an indication that further disclosure of the information was restricted by the procurement integrity laws.⁸ Notwithstanding these errors, however, we find that the contracting officer reasonably concluded that the competition was not compromised.

The disclosure of source selection information, including an offeror's price, during the course of a procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the procurement process. Information Ventures, Inc., B-241441.4, B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583 at 4-5. Where an agency decides that no remedial steps are necessary, we will sustain a protest based on the improper disclosure only where the protester demonstrates that it was in some way competitively prejudiced by the disclosure. Kemron Env'tl. Servs., Inc., B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2. Here, the record reflects that Health Net was not competitively prejudiced by DOD's mishandling of its pricing information.

As noted above, the record reflects that the 845 Annex was not posted on the DOD OIG website until 1 day after final proposals were due. Thus, even assuming that AGHP accessed the website and learned the information contained in the Annex, it could not possibly have used it to its advantage in the competition. Health Net suggests that AGHP could have learned the information as a consequence of the disclosure to Congress, which occurred before final proposals were due, and argues that the contracting officer has yet to adequately investigate this possibility. Setting

⁸ FAR § 3.104-4(f) provides that when releasing to Congress contractor bid or proposal information or source selection information, the release must clearly identify the information as contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement and notify the recipient that the disclosure of the information is restricted by the procurement integrity provisions of the OFPP Act, 41 U.S.C. § 423. The agency admits that this was not done. See Letter from TMA to GAO, Aug. 11, 2009. Moreover, we do not think that DOD effectively complied with this requirement simply because the 845 Annex was delivered to Congress in a package with a "secret" coversheet. As explained above, the Semiannual Report included a "secret" intelligence annex, which prompted the need for special handling. The report itself, and the 845 Annex, however, were not marked "secret" and they were separate from the intelligence annex. This fact is made clear by the DOD's posting of these two documents, without the intelligence annex, on the DOD OIG's website.

aside the fact that such a disclosure seems improbable given the short period of time from when the information was delivered to Congress and final proposals were due (approximately 3 weeks), and the fact that a period of that time included the Christmas and New Year's holidays, the contracting officer reasonably determined that there was no evidence that AGHP's pricing changes were the result of its having known of the information set forth in the 845 Annex. In this regard, the contracting officer obtained an analysis regarding AGHP's pricing revisions in its final proposal which indicated that AGHP explained all of its pricing changes, that the changes were the direct result of discussions or otherwise resulted in price increases, and [DELETED]. See CO's Memorandum for the Record, June 26, 2009.

Moreover, even if we assume that AGHP did in fact learn Health Net's pricing information, as reflected in the section 845 Annex, before final proposals were due--an assertion that AGHP vehemently denies--Health Net has failed to explain how AGHP could have used the information to its advantage given the fact that [DELETED]. While such knowledge might have [DELETED]. In fact, armed with such knowledge, one might reasonably expect AGHP [DELETED], which at most would appear to disadvantage only the government, not Health Net.

In sum, based on the record here, we find that there is no basis for concluding that Health Net was competitively prejudiced as a consequence of DOD's improper handling of its pricing information.

The protest is denied.

Lynn H. Gibson
Acting General Counsel