



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Nexagen Networks, Inc.; LinTech Global, Inc.

File: B-408685.15, B-408685.17

Date: July 28, 2014

Robert G. Freeman, Nexagen Networks, Inc.; Michael Lin, LinTech Global, Inc., the protesters.

John E. Cornell, Esq., General Services Administration, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that an agency's inadvertent disclosure to a different protester in an earlier, unrelated protest, of the agency's business case and market research documents (marked as pre-decisional source selection material) constituted a procurement integrity violation are denied where the agency reasonably concluded that the protesters were not competitively prejudiced by the disclosure and where the protesters have not identified any aspects of the disclosed materials that support their prejudice arguments.

DECISION

Nexagen Networks, Inc., of Marlboro, New Jersey, and LinTech Global, Inc., of Farmington Hills, Michigan, protest the award of multiple contracts by the General Services Administration (GSA) under request for proposals (RFP) No. GS00Q-13-DR-0002, which was set aside for small businesses under the One Acquisition Solution for Integrated Services (OASIS) program. The protesters contend that GSA should cancel the solicitation, terminate the contracts, and re-compete the requirements, because of an alleged procurement integrity violation resulting from the agency's inadvertent disclosure of market research documents that were marked as pre-decisional, source selection material.

We deny the protests.

BACKGROUND

GSA's OASIS program will provide a new, government-wide acquisition vehicle for federal agencies to issue fixed-price, cost-reimbursement, time-and-materials, or labor-hour task orders for a broad range of integrated professional services with information technology components. www.gsa.gov/oasis; see, e.g., ADNET Sys., Inc., et al., B-408685.3 et al., June 9, 2014, 2014 CPD ¶ 173 at 2. The procurement provides for the establishment of hundreds of multiple, indefinite-delivery, indefinite-quantity contracts for any of six "core disciplines" of professional services: program management, management consulting, logistics, engineering, scientific, and financial services.¹ See RFP at 10, 19-23.

The agency conducted extensive market research throughout 2011 and 2012, preparing a comprehensive Business Case on whether to implement OASIS and how to structure the procurement. See Nexagen Agency Report (AR) at 2; Tab 3, Bus. Case, Jan. 2012, at 7-9; § XVI, Acquisition Timeline, at 57; App. C, Methodology, at 62-65. At issue in these protests is GSA's inadvertent release (by email) of that Business Case and its underlying market research data.

Business Case

The Business Case was marked as follows: "THIS DOCUMENT IS THE GSA INTERNAL OASIS BUSINESS CASE. THIS DOCUMENT IS PRE-DECISIONAL SOURCE SELECTION MATERIAL AND IS NOT RELEASABLE." See, e.g., LinTech AR, Tab 3, Bus. Case, at 1 (emphasis in original). The business case includes several attachments, variously marked: "PRE-DECISIONAL SOURCE SELECTION MATERIAL AND PROPRIETARY INFORMATION [and] NOT RELEASABLE"; "DOCUMENT IS RELEASABLE EXCEPT FOR CONTRACTOR NAMES AND COMPANY IDENTIFICATION"; "GSA INTERNAL MEMO [CONTAINING] PRE-DECISIONAL SOURCE SELECTION MATERIAL [and] NOT RELEASABLE"; "DOCUMENT CONTAIN[ING] PROPRIETARY RESPONSES OF COMPANIES [and] MAY ONLY BE RELEASED IF THE IDENTITIES OF THE COMPANIES ARE REDACTED". Id., attach. 2, Internal Bus. Case Initial Interviews; attach. 3, Customer Focus Group Outreach & Meeting Notes; attach. 4, 2012 Indus. Day Response Summary; attach. 6, Internal Mem. of Program Manager; attach. 7, Indus. Responses to Joint Venture Question (emphasis in original). The attachments are essentially the agency's market research data and

¹ GSA's OASIS procurement is distinct from the procurement of the Department of Homeland Security, Transportation Security Administration, for Operational Applications Support and Information Services (also referred to as "OASIS").

work papers, and include notes from numerous interviews with federal customers² that are marked “**CONFIDENTIAL**”, and notes from interviews with large prime government contractors that are marked “**PROPRIETARY AND CONFIDENTIAL**”. Id., attach. 2, Internal Bus. Case Initial Interviews (emphasis in original).

GSA approved the Business Case on January 3, 2012, prepared acquisition and source selection plans, and issued two solicitations on July 31, 2013, for the award of OASIS contracts: the RFP here, which was set-aside for small businesses, and RFP No. GS00Q-13-DR-0001, which was issued on an unrestricted basis.³ The RFPs, which are virtually identical, span 28 North American Industry Classification System (NAICS) codes, 6 NAICS code exceptions, and numerous Product Service Codes (PSC),⁴ and are grouped by business size standard into seven contract “pools.” See RFP at 10, 86-87, 101-4; RFP No. GS00Q-13-DR-0001, §§ L, M.⁵

Disclosure

On August, 8, 2013, Aljucar, Anvil-Incus & Company (AAI), of Washington, D.C., filed an agency-level protest with GSA challenging the terms of the unrestricted RFP with respect to the requirements for joint venture offerors. In preparing the agency’s response to AAI’s protest, GSA inadvertently emailed to AAI on September 3 the OASIS Business Case, including all the attachments described above. GSA Email to GSA Protest Official, Sept. 3, 2013, 4:51 p.m. The email, which was otherwise intended to be sent to only GSA contracting staff, stated that the documents contained source selection information that is not to be disclosed outside of the government, and that redacted material would be provided to the protester. Id. Eight minutes later, realizing the mistake, the agency official promptly emailed AAI, explaining that he had mistakenly sent unredacted exhibits to AAI, and

² Under the Federal Property and Administrative Services Act of 1949, as amended, GSA is required to procure and supply certain property and services for executive agencies. 40 U.S.C. § 501 (2006).

³ See, e.g., Nexagen AR, Bus. Case, Acquisition Timeline, at 57; OASIS small business synopsis, www.fbo.gov/notices/261ac537ac765bdde58b2fe010e7eee9, unrestricted synopsis, www.fbo.gov/notices/9fd234674acd306249efa925927a0542.

⁴ NAICS codes classify businesses for statistical purposes and are used by the Small Business Administration to establish business size standards; PSC codes describe the product or service purchased. See www.acquisition.gov.

⁵ Our citations are to the conformed version of the OASIS small business RFP, except as indicated.

requested that AAI delete the email and attachments.⁶ GSA Email to AAI, Sept. 3, 2013, 4:59 p.m.

GSA denied AAI's agency-level protest on September 12, and AAI subsequently protested to our Office, asserting the same protest grounds. We denied AAI's protest on January 2, 2014, and denied its request for reconsideration on March 20. Aljucar, Anvil-Incus & Co., B-408936, Jan. 2, 2014, 2014 ¶ 19; Aljucar, Anvil-Incus & Co.--Recon., B-408936.2, Mar. 20, 2014, 2014 ¶ 102.⁷

Solicitation

The small-business RFP, relevant here, stated that awards would be made to the highest technically-rated offerors with fair and reasonable prices, considering the following five factors: responsibility; relevant experience; past performance; systems, certifications, and clearances; and price. See RFP at 129-30. Offerors were informed that GSA would award 40 contracts each for pools 1, 2, 3, 4, and 6; and award 20 contracts each for pools 5A and 5B. Id. at 87, 129. Offerors were allowed to compete under more than one pool, but were instructed to submit a single proposal. Id. at 99.

As pertinent to our analysis of the protesters' procurement integrity allegations, discussed below, the solicitation required offerors in their proposals to identify at least three, but no more than five, relevant experience projects, which would be scored under an intricate, multi-phased process for screening and evaluating proposals in accordance with a point scoring table provided by the RFP. See id. at 113-43. The RFP provided a self-scoring worksheet for offerors to claim points as specified in the solicitation's scoring table, for various elements under the

⁶ GSA subsequently contacted AAI seeking confirmation that it had deleted the email and destroyed any printed copies of the attachments, and explained that the email included pre-decisional documents created by GSA and confidential information provided to the agency. GSA Email to AAI, Sept. 9, 2013, 3:36 p.m. AAI responded, questioning GSA's legal basis for requesting that AAI delete and destroy the documents; GSA replied that its request was consistent with the restrictive legends posted on those documents. AAI Email to GSA, Sept. 9, 2013, 3:43 p.m.; GSA Email to AAI, Sept. 9, 2013, 3:52 p.m. AAI responded further, "assur[ing] that AAI] will honor any and all restrictive legends posted on the documents in question." AAI Email to GSA, Sept. 9, 2013, 3:56 p.m. Asked once again by the agency whether it would delete the message and any printed copies of the documents, AAI replied that it had "already stated what we will do." GSA Email to AAI, Sept. 9, 2013, 4:02 p.m.; AAI Email to GSA, Sept. 9, 2013, 4:03 p.m.

⁷ Our decision resolving AAI's protest summarizes GSA's market research with regard to joint ventures. Aljucar, Anvil-Incus & Co., supra, at 2, 4-5.

relevant experience, past performance, and systems, certifications, and clearances factors. See id. at 104; attach. 5.A, Self-Scoring Worksheet. For example, for each relevant experience project, offerors could claim an increasing number of points for a project's dollar value, number of OASIS core disciplines performed, and performance in multiple locations or outside the continental United States, among other things.⁸ The RFP included a sample, completed self-scoring worksheet as an example for offerors to use in filling out their own worksheet.⁹ See RFP, attach. 5.B, Sample Self-Scoring Worksheet.

The RFP provided for an initial screening process to verify that an offeror submitted the required documentation for each relevant experience project identified in its proposal and that corresponded to the offeror's self-scoring worksheet.¹⁰ RFP at 129. Proposals that passed the initial screening would be preliminarily ranked according to offerors' self scores. See id. at 129-30. The top-ranked proposals (the top 40 or 20 depending on the pool) would then be the subject of a more detailed evaluation on a pass/fail acceptability basis under the non-price evaluation factors. Id. at 130-33. The documentation for those proposals that passed the acceptability review would be further evaluated; any unsubstantiated points claimed by an offeror would be deducted; and proposals would be re-ranked according to their new evaluated scores. Id. at 130-43. Finally, proposals that remained in the top 40 (or 20) ranking would be evaluated for price reasonableness. Id. at 130, 143. The RFP stated that this evaluation cycle would continue until the top 40 (or 20) offerors in each pool with a fair and reasonable price were identified. Id. at 130.

According to GSA, the over-arching goal of this evaluation process was to reduce subjectivity as much as possible. See ADNET Sys. Inc., et al., supra, at 5 n.13. GSA explains that this evaluation approach allocated to offerors the burden of accurately claiming the proper number of points and submitting the proper documentation, and allocated to the agency the burden of validating those claims. Id.

⁸ For each relevant experience project, offerors were required to identify, using a template included with the RFP, the project agency or customer, type of contract vehicle, award number, and dollar value, among other things. See RFP at 113; attach. 7, Relevant Experience Template, at 1-6.

⁹ The RFP's instructions and evaluation scheme are described in greater detail in our decisions resolving several protests of the small business awards. ADNET Sys., Inc., et al., supra, at 3-6; Planned Sys. Int'l, Inc.; Tech. Prof'l Servs., Inc., B-408685.7, B-408685.11, June 13, 2014, 2014 CPD ¶ 176 at 2-4.

¹⁰ The RFP stated that an offeror was only required to provide substantiating documentation for evaluation elements for which the offeror was claiming points. RFP at 177.

Small Business Awards

GSA received 330 proposals under the RFP, including, as pertinent here, 186 proposals for pool 1 and 99 proposals for pool 3. See id. at 6; but see LinTech AR, Tab 5b, LinTech Debriefing, at 1 (stating that GSA received 100 proposals for pool 3). Nexagen competed under pool 1; LinTech competed under pools 1 and 3. Their proposals passed the agency's initial screening, but were not ultimately selected for award based on their evaluated scores. Nexagen AR, Tab 5a, Nexagen Debriefing, at 1-2; LinTech AR, Tab 5b, LinTech Debriefing, at 1-2. On February 24, 2013, the agency notified offerors of the OASIS small business awards and provided written debriefings to Nexagen and LinTech. See, e.g., Nexagen AR, Tab 4, Notice of OASIS Small Business Awards. Neither firm protested the rejection of its proposal.

Protesters' Notification of Alleged Procurement Integrity Violation

Nexagen and LinTech subsequently contacted GSA to report the disclosure of GSA's Business Case and related documents as a procurement integrity violation, arguing, as they do in the instant protests, that the contracts must be terminated and the requirement re-competed, because the disclosure had allegedly tainted the procurement. Id., Tab 5a, Nexagen Procurement Integrity Rep., Apr. 7, 2014, at 4-5; LinTech AR, Tab 5b, LinTech Procurement Integrity Rep., Apr. 24, 2014, at 3. The firms state that they learned of the disclosure of the market research on March 25 and April 22, respectively, from an AAI-affiliate. Nexagen Protest at 1; LinTech Protest at 1-2.

GSA responded to the firms that it was aware of the disclosure. The agency advised Nexagen that it was taking no further action on the request because Nexagen had not shown that it was competitively prejudiced by the disclosure. Nexagen AR, Tab 5a, Contracting Officer's Email to Nexagen, Apr. 9, 2014. The agency advised LinTech (separately, because the protesters filed their allegations of a procurement integrity violation almost 3 weeks apart) that there was no procurement integrity violation because the disclosed market research, while pre-decisional and sensitive, did not amount to source selection information or contractor bid or proposal information. See LinTech AR, Tab 5b, Contracting Officer's May 6, 2014, Letter to LinTech, at 1-3.

These protests followed.¹¹

¹¹ Our Bid Protest Regulations provide that GAO will not review an allegation of a procurement integrity violation where the protester failed to report the information it believed constituted evidence of the offense to the procuring agency. See 4 C.F.R. § 21.5(d) (2014).

DISCUSSION

Nexagen and LinTech contend that GSA refused to investigate the alleged procurement integrity violation, arguing, as before, that the disclosure of the OASIS market research requires the agency to cancel the solicitation, terminate the contracts, and conduct a new competition. See, e.g., Nexagen Protest at 2. The protesters contend that the disclosure directly resulted in many of the awardees for pools 1 and 3 achieving their top 40 ranking. See, e.g., LinTech Protest at 2. Nexagen and LinTech contend the market research “reveal[s] the mental process of the decision-makers.” See, e.g., Nexagen Comments at 5, citing AAI Aff.¹²

In this regard, the protesters state that they learned from AAI, after contract awards, that AAI supposedly assisted a number of OASIS awardees in preparing their proposals, advising them to “strategically focus past performance” on those federal customer agencies noted in the Business Case, because GSA is marketing OASIS to certain federal customer agencies and is looking for those agencies’ “buy-in” to the OASIS program. Id. at 5-6, 8; LinTech Comments at 15. The protesters insist that, but for some awardees’ reliance on the market research in selecting relevant experience projects to cite in their proposals, Nexagen’s and LinTech’s proposals would have been ranked in the top 40 ranking for their respective pools, and the firms would have received contract awards. See, e.g., Nexagen Comments at 3.

GSA replies that the RFP’s point system was completely transparent to offerors, such that knowledge of any information in the Business Case would confer no advantage in selecting what relevant experience to cite in an offeror’s proposal. Nexagen AR at 5. Moreover, the agency asserts that the identity of the federal agency for an offerors’ relevant experience projects had nothing to do with how proposals were scored, and cites the RFP’s scoring table and offeror self-scoring sheets in that regard. LinTech AR at 5; see RFP at 104; attachs. 5.A., Self-Scoring Worksheet; 5.B., Sample Self-Scoring Worksheet. The protesters dispute GSA’s arguments that the RFP’s evaluation scheme is objective, on the grounds that the solicitation requires offerors to provide written details regarding their relevant experience projects, which, according to the protesters, can only be evaluated subjectively. See, e.g., LinTech Comments at 13-14.

¹² Our Office denied AAI’s request to intervene in the instant protests, because, as required by our Bid Protest Regulations, an intervenor must be an awardee if the award has been made. See 4 C.F.R. § 21(b)(1). AAI did not state that it was an OASIS awardee. In any event, the record here includes numerous declarations, affidavits, and statements that were prepared by AAI but were submitted to our Office by Nexagen and LinTech.

The procurement integrity provisions of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. §§ 2101-2107 (2011), commonly known as the Procurement Integrity Act (PIA), provide that “[e]xcept as provided by law, a person shall not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” 41 U.S.C. § 2102(b). 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.¹³ Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93 at 9.

An unfair competitive advantage is a necessary element of a procurement integrity allegation since it relates to the resulting prejudice. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 31. Even where a protester shows an actual or potential PIA violations, our inquiry does not end there. Rather, the question becomes whether the alleged PIA violation created an unfair competitive advantage. See, e.g., Unisys Corp., B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61 at 10 (protest that awardee’s use of former government employee in preparation of its proposal provided the firm with unfair competitive advantage due to employee’s access to protester’s proprietary information denied where record reflects that the information at issue was not competitively useful).

Nexagen and LinTech essentially suggest that, had they been able to consider the OASIS market research in preparing their proposals, as other offerors allegedly did, the protesters would have been able to claim higher points by emphasizing more

¹³ The Federal Acquisition Regulation (FAR) § 3.104-3(a) requires that a contracting officer who receives or obtains information of a possible violation of the PIA must determine if the possible violation has any impact on the pending award or selection of the contractor. If the contracting officer concludes that a violation may impact the procurement, the contracting officer is required to report the matter to the head of the contracting activity (HCA). FAR § 3.104-7(b). The HCA must review the information and take appropriate action, which includes either: (1) advising the contracting officer to proceed with the procurement; (2) beginning an investigation; (3) referring information to appropriate criminal investigative agencies; (4) concluding that a violation occurred; or, (5) recommending to the agency head that a violation has occurred, and void or rescind the contract. Id.

relevant experience.¹⁴ Notably, although the protesters were provided (by AAI)¹⁵ unredacted copies of the OASIS Business Case and its underlying market research documents during the course of this protest, the protesters have not identified any aspect of that research to support their prejudice arguments, nor identified any aspects of their proposals (including their relevant experience projects) that they would have changed based on information contained in the documents.¹⁶ Moreover, as we note above, neither Nexagen, nor LinTech protested the evaluation of their proposals.

Here, GSA concluded that no remedial steps (beyond requesting deletion and destruction of the documents) were necessary in response to the PIA allegations. Based on our review of the record—including the Business Case, market research, source selection and acquisition plans, and solicitation, as well as our review of the

¹⁴ Contrary to the protesters' assertions that AAI was able to provide a benefit to companies it sought to assist because, in AAI's view, GSA would evaluate offerors' past performance with an eye towards "marketing" or seeking customer agency "buy-in" for OASIS, the Business Case expressly states that every customer interviewed by GSA supported OASIS. See Nexagen AR, Tab 3, Bus. Case, at 18.

¹⁵ AAI Email to Nexagen, May 14, 2014; AAI Email to LinTech, May 22, 2014 (providing OASIS Business Case and market research documents to protesters because "this information is now considered legally stale because the competition has concluded."); Nexagen Emails to GAO, July 22, 2014 (indicating Business Case and all attachments were first provided to Nexagen on May 14); LinTech Email to GAO, July 22, 2014 (indicating Business Case and all attachments were first provided to LinTech on May 22).

¹⁶ GSA and the protesters have engaged in an extensive exchange about whether the Business Case and market research meet the PIA or FAR definitions of source selection information, or the FAR's requirements for marking such information accordingly. See, e.g., Nexagen AR at 3-4; LinTech Comments at 5-6. We need not, and do not, resolve that question because, as discussed above, the protesters have not shown how they were prejudiced by the disclosure. We are, however, concerned about the continuing dissemination of these documents. Dozens of large and small federal contractors provided the federal government with confidential and proprietary information as part of a collaborative government-industry effort to create an innovative, government-wide procurement vehicle. Thirty-four contractors disclosed the percentage of their annual business derived from specified professional services, and over 40 shared with the government, in confidence, their organizational views on joint ventures. Furthermore, GSA has requested, on a number of occasions, that this material be deleted or destroyed, and the agency advises that it has not made the Business Case public and that if it were to do so, it would redact the names of the entities that provided comments. GSA Email to Protest Parties, July 22, 2014.

evaluation record in response to seven protests of the small business awards, see Aljucar, Anvil-Incus & Co.; ADNET Sys., Inc., et al.; Planned Sys. Int'l; Tech. Prof'l Servs., Inc., supra--nothing supports the protesters' assertions that they were competitively prejudiced by the disclosure of the agency's market research. To the extent that the protesters suggest that the evaluation of offerors' narrative descriptions of their relevant experience projects is necessarily subjective, the RFP provided for a pass/fail acceptability evaluation and further evaluation of projects based, not so much on qualitative criteria, but largely on whether an offeror submitted the requisite documentation to substantiate the points it claimed in self-scoring its projects. RFP at 130-41; see ADNET Sys., Inc., et al., supra, at 5 n.13. Thus, we agree with GSA that the RFP's self-scoring point scheme is largely objective. As GSA explains, the evaluation approach allocated to offerors the burden of accurately claiming the proper number of points and submitting proper documentation in that regard, and allocated to the agency the burden of validating those claims. In other words, the solicitation's admittedly novel evaluation approach largely left it to the offerors to sort themselves based on a self-scoring point system, and any further evaluation was largely limited to an offeror's strict adherence to the RFP's instructions and documentation requirements. See ADNET Sys., Inc., et al., supra, at 8-16; Planned Sys. Int'l; Tech. Prof'l Servs., Inc., supra, at 7-8.

We find that GSA reasonably concluded that the protesters were not competitively prejudiced by the inadvertent disclosure of this information to AIA. In addition, the protesters have not identified any aspects of the inadvertently disclosed materials that support their prejudice arguments. See Y&K Maint., Inc., supra.

These protests are denied.

Susan A. Poling
General Counsel