Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rothe Development, Inc.

File: B-279839

Date: July 27, 1998

David F. Barton, Esq., The Gardner Law Firm, for the protester.
Clarence D. Long, III, Esq., and Wilbert W. Edgerton, Esq., Department of the Air Force, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In soliciting proposals for a contract for operation and maintenance services, agency did not improperly disclose information proprietary to the protester regarding the number of individuals employed by the protester for the performance of the predecessor contract where the information disclosed cannot reasonably be considered proprietary and the protester's claim that it was competitively disadvantaged by the release of the information is speculative at best.

DECISION

Rothe Development, Inc. protests the award of a contract to any other offeror under request for proposals (RFP) No. F34608-98-R-0016, issued by the Department of the Air Force, for operation and maintenance services for the base telecommunications system (BTS) and network control center (NCC) at Columbus Air Force Base, Mississippi. Rothe, the incumbent contractor for a portion of the services, alleges that it was placed at a competitive disadvantage because the agency disclosed certain information which allegedly is proprietary to Rothe.

We deny the protest.

The RFP, issued on March 6, 1998, provides for the award of a fixed-price requirements contract for a base period with four 1-year options. The contractor will be required to provide all personnel, equipment, parts, materials, tools, operation and maintenance documentation, and other items and services necessary to perform operations and maintenance of the BTS and NCC. RFP § C 1.1.1.

The RFP lists company organization, quality, and safety as the technical evaluation factors, and includes evaluation subfactors under each of these evaluation factors. RFP § M-800 B. With regard to the company organization evaluation factor, the RFP lists eight evaluation subfactors, including personnel. Id. The RFP states that,

under the personnel subfactor, the "availability of sufficient personnel with the required skills, training, and experience will be evaluated." Id.

A preproposal conference was held, during which a potential offeror asked, "How many personnel are currently working at the NCC?" The Air Force explains that, in order to answer this question, the quality assurance evaluator (QAE) for the predecessor contract, who has a close working relationship with the Rothe employees performing the contract, "mentally went through each office and listed the names of the persons in the offices." Agency Memorandum of Law at 2. According to the Air Force, the QAE found "that Rothe had 23 people working the contract with approximately 15 performing the NCC work." Id. The agency subsequently issued 71 questions and answers (Q&A) regarding the RFP to potential offerors, with Q&A number 24 reading as follows:

> 24. How many personnel are currently working at the NCC?
> The contractor currently has 23 people working the NCC - however, only approx 15 of them are performing the work defined under this contract. Please note that individual personnel may be cross-trained and performing more than one function.

Rothe asserts that the agency's answer to question 24 improperly disclosed Rothe's "proprietary privileged and confidential manning criteria related to the solicitation . . . and destroyed its competitive position for the solicitation." Protest at 3. Rothe contends that, contrary to the agency's assertions, the number of Rothe personnel currently performing the contract could only have come from the technical proposal submitted by Rothe for the predecessor contract, and points out that this proposal contained language to preserve the confidentiality of the information contained therein. Rothe requests that the RFP be canceled, and its current contract extended through December 1999 with 4 option years and modified to include the additional work required under the RFP. In the alternative, Rothe requests that it be awarded a contract for the services on a sole-source basis, or that the RFP be amended to delete the evaluation preference for small, disadvantaged businesses or issued as a total small business set-aside.

We have recognized the right of a firm to protect its proprietary data from improper exposure in a solicitation in the context of a bid protest. The Source, B-266362, Feb. 7, 1996, 96-1 CPD ¶ 48 at 2; Ingersoll-Rand Co., B-236391, Dec. 5, 1989, 89-2 CPD ¶ 517 at 2. As a general rule, proprietary information is that which is marked proprietary or otherwise submitted in confidence to the government. Good Food Serv., Inc., B-260728, June 20, 1995, 95-2 CPD ¶ 123 at 2. Where a protester alleges that such information was improperly disclosed, the record must show that the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge, and establish that the protester was

competitively prejudiced by the release, before we will sustain the protest. Ursery Cos., Inc., B-258247, Dec. 29, 1994, 94-2 CPD ¶ 264 at 2; Ingersoll-Rand Co., supra. Such competitive prejudice may not be established on the basis of speculation. JL Assocs., Inc., B-239790, Oct. 1, 1990, 90-2 CPD ¶ 261 at 4-5.

Here, considering the record most favorably to the protester, we do not believe that the information disclosed by the agency could reasonably be considered proprietary to the protester or that its disclosure resulted in any competitive disadvantage to Rothe.

First, as stated by Rothe in its April 6 letter to the agency, "the information [disclosed in Q&A No. 24] is incorrect." Indeed, the record confirms that the staffing levels disclosed are in fact different than those set forth in the proposal submitted by Rothe in response to the predecessor RFP. Where the information released is substantively different than that which the protester claims as its own, we fail to see how the protester can claim that the agency released its proprietary information.

Moreover, it appears that the released information was ascertained from the QAE's "mental" headcount, as asserted by the agency, not through the agency's review of Rothe's proposal submitted in response to the predecessor RFP. In our view, it is more likely that inaccurate information would result from a mistaken mental headcount rather than the review of a firm's proposal. Such a mental headcount is, in our view, akin to "reverse engineering," and the release of information or data developed through reverse engineering is not improper. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974); Si Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1255 (3rd Cir. 1985); Ingersoll-Rand Co., supra, at 4. In any event, matters which are fully disclosed by the marketed product (such as the number of personnel performing a services contract monitored by the government) cannot be protected as a trade secret. Ingersoll-Rand Co., supra.

Further, we fail to see how the protester was competitively disadvantaged by the agency's release of the information. In this regard, the agency estimates that the contract being performed by Rothe includes 40 percent of the work required under this RFP. Rothe, on the other hand, estimates that its current contract includes 80 percent of the work required under the RFP. Assuming for the sake of argument that Rothe is correct, the fact remains that 20 percent of the work was not covered by the predecessor RFP, and neither the agency nor Rothe asserts that offerors construct a reasonable proposal by simply increasing the staffing levels disclosed by the agency proportionally to cover all of the work now being solicited. Moreover, the information disclosed did not reveal what labor categories, mix, or rates would be appropriate, or how Rothe calculated its profit, overhead, and management costs--important elements of price and in some instances, technical approach. At best, the agency's release of the information may operate to normalize to a small degree the competition so that all offerors will have a very rough estimate as to

how many individuals will be needed for contract performance. As such, even if the information disclosed could be considered proprietary, the effect of releasing the information on Rothe's competitive position under the terms of the RFP is speculative at best and provides no basis to sustain the protest. See Ursery Cos., Inc., supra, at 3.

The protest is denied.

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