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Decision

Matter of: TRAX International Corporation

File: B-420361.6

Date: March 9, 2023

Daniel P. Graham, Esq., and Tara L. Ward, Esq., McDermott Will & Emery LLP, for the protester.

J. Hunter Bennett, Esq., Evan R. Sherwood, Esq., Chanda Brown, Esq., and Paul Rowley, Esq., Covington & Burling LLP, for Engineering Research and Consulting, Inc., the intervenor.

Captain Paula F. Barr, Department of the Army, for the agency.

Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee violated the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-07, is dismissed as legally and factually insufficient where the protester's allegations, even if unrebutted, fail to establish a violation of law by the agency.

DECISION

TRAX International Corporation, of Las Vegas, Nevada, protests the award of a contract to Engineering Research and Consulting, Inc. (ERC), of Huntsville, Alabama, under request for proposals (RFP) No. W91CRB-21-R-0016, for Aberdeen Test Support Services (ATSS) at the Aberdeen Test Center at Aberdeen Proving Ground, Maryland. TRAX contends that the Army failed to conduct a reasonable investigation of ERC's alleged violation of the integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-07 (hereinafter, the Procurement Integrity Act, PIA, or the Act), despite evidence that ERC personnel, who would be expected to be involved in competitive decision making for ERC in this procurement, had improper access to TRAX's bid or proposal information.

We dismiss the protest.

BACKGROUND

The RFP, issued on November 24, 2020, sought proposals for the award of a single cost-plus-fixed-fee indefinite-delivery, indefinite-quantity contract with fixed-price and cost-reimbursable contract line items. Request for Dismissal, exh. 1, RFP at 170. Award would be made to the offeror whose proposal represented the best value to the government, considering four non-price factors--technical, small business participation, past performance, and experience--and cost/price. *Id.* at 169-170. Only the technical factor--and its three subfactors--would be adjectivally rated; the other three non-price factors would be evaluated as acceptable or unacceptable. *Id.* at 170. The technical factor was significantly more important than cost/price; only proposals evaluated as at least acceptable under every factor--and the technical factor's three subfactors--would be considered for award.

This procurement has been the subject of multiple protests; the agency is currently reevaluating offerors' professional compensation plans, in accordance with Federal Acquisition Regulation (FAR) provision 52.222-46, prior to making a new award decision. See *Jacobs Tech., Inc.*, B-420361.3, Dec. 12, 2022 (unpublished decision); and *TRAX Int'l Corp, Inc.*, B-420361.4, B-420361.5, Dec. 13, 2022 (unpublished decision). TRAX has been a competitor in the acquisition throughout.¹

Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds of protest with evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claims of improper agency action. *IBM Corp.*, B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 4. For the reasons that follow, we find that TRAX's PIA allegations fail to state legally or factually sufficient bases of protest, and therefore we dismiss the allegations.

Procurement Integrity Act

The Act provides that a federal government official "shall not knowingly disclose 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(a)(1). This prohibition applies to anyone who "(i) is a present or former official of the Federal Government; or (ii) is acting or has acted for or on behalf of, or who is advising or has advised the Federal Government with respect to, a Federal agency procurement." *Id.* at § 2102(a)(3)(A). The PIA further requires that, other than "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." Section 2107 of the PIA, referred to as the "savings provisions," provide that the Act does not "restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information." *Id.* at § 2107(2).

¹ TRAX was the first awardee; the recent award was to ERC. Protest at 2-3.

The PIA, as implemented by the FAR, requires a contracting officer (CO) who has been advised of a violation or possible violation of the PIA to determine whether the violation or possible violation has any impact on the pending award or source selection; if the contracting officer finds any impact, the contracting officer must refer the matter to the head of the contracting activity (HCA) or designee. FAR 3.104-10(a). If the HCA concludes that the PIA has been violated, the HCA may, among other alternatives, direct the contracting officer to disqualify an offeror. FAR 3.104-7(d)(1)(ii).

Facts Giving Rise to Alleged PIA Violation

The facts set forth below provide the protester's foundation for its allegation of a PIA violation. With the aim of pursuing the contract at issue, in May of 2019, TRAX and Oasis Systems, LLC, entered into a non-disclosure agreement (NDA). Protest at 3. In April of 2020, TRAX and Oasis entered into a teaming agreement outlining the terms under which Oasis would assist in the preparation of TRAX's proposal for this procurement, with the understanding that if TRAX was awarded the contract, Oasis would support the contract as a subcontractor to TRAX. *Id.* TRAX contends that its collaboration with Oasis included a discussion of "TRAX's specific, highly confidential and proprietary win strategies and themes," as the two firms "worked closely to develop a cohesive and competitive proposal." *Id.* at 4.

The relationship between TRAX and Oasis unraveled in November of 2020, when Oasis informed TRAX that it was withdrawing from the teaming agreement. *Id.* TRAX sent Oasis a termination agreement that acknowledged that Oasis possessed TRAX's proprietary bid and proposal information and prohibited Oasis from competing as a prime or subcontractor on another team, "further underscoring the sensitivity of the bid and proposal information Oasis possessed at the time of termination." *Id.* In April 2022, ERC announced that it had entered into an agreement to acquire Oasis. *See id.* The former Chair of Oasis became the Chief Executive Officer (CEO) of ERC, and the former CEO of Oasis became the Chief Operating Officer of ERC. *Id.*

PIA Notification

The protester states that "[o]n November 4, 2022, in accordance with 41 U.S.C. § 2106^[2] and FAR 3.104-7^[3], and within 14 days of learning that ERC, Oasis's new owner, was competing in the competition and had been awarded the contract, TRAX

² GAO "may not consider" an allegation of a PIA violation unless it was "reported to the Federal agency responsible for the procurement" "no later than 14 days after the person first discovered the possible violation." 41 U.S.C. § 2106.

³ The FAR requires a contracting officer who receives or obtains information of a possible PIA violation to "determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor." FAR 3.104-7.

submitted a Notification of PIA Violation to the Contracting Officer.”⁴ Protest at 5. That notification stated:

By virtue of Oasis and ERC merging to become the same entity, and because Oasis personnel who were instrumental in the preparation and revision of TRAX’s proposal remained with the new entity, ERC very likely obtained contractor bid or proposal information in violation of the PIA--information TRAX did not willingly or intentionally disclose to ERC. Given the overlapping timeframe between the ATSS procurement and the ERC-Oasis merger, and given the fact that Oasis leadership became the leaders of the surviving entity, there is no practical way for the surviving entity to have submitted a final proposal revision without access to TRAX’s proprietary ATSS information.

Protest at 5, *quoting* Protest, exh. 1, Notification of PIA Violation to CO (Notification) at 2.

The Army conducted its investigation of the alleged PIA violation. In the agency’s view, TRAX’s “entire basis for the PIA Notification Letter was summed up” in the paragraph quoted above. Protest, exh. 4, Army Response to PIA Notice, Dec. 15, 2022, at 2, *citing* Protest exh. 1, Notification at 4. The contracting officer reviewed all of ERC’s proposal revisions submitted during the three rounds of discussions for the ATSS requirement and found that “[t]here was no indication that ERC utilized TRAX’s proprietary information in their proposal.” Protest, exh. 4, Army Response to PIA Notice, Dec. 15, 2022, at 3. The Army advised TRAX that the agency had determined that there was “no evidence of a PIA violation.” *Id.* at 4.

TRAX contends that the Army’s determination that there is no evidence of a PIA violation was unreasonable. Protest at 8. The protester asserts that “the Army did not conduct a reasonably sufficient investigation into ERC’s possession and potential use of TRAX proprietary information.” *Id.* TRAX claims that “the Army has not critically examined or analyze[d] key facts that bear on the existence and potential impact of a PIA violation.” *Id.*

Agency Request for Dismissal

The agency requests dismissal of the protest, asserting that the protester’s allegation pertains to a dispute between private parties that GAO will not consider. Request at 3-4, *citing DynCorp Int’l LLC, B-408516 et al.*, Oct. 29, 2013, 2013 CPD ¶ 243 at 6 (dismissing PIA allegation based on subcontractor’s alleged use of protester’s

⁴ The record contains no challenge to the timeliness of TRAX’s PIA notification. See Request for Dismissal; Intervenor’s Response. While TRAX was a prior awardee, the record contains no suggestion that, prior to the most recent award announcement, TRAX was aware that ERC was competing for contract award.

proprietary information obtained under previous teaming agreements). The Army argues that GAO has “repeatedly determined that the PIA’s savings provisions⁵ apply notwithstanding the fact that the voluntarily provided information is subsequently misused or not properly safeguarded.” Request at 4, *quoting The GEO Grp., Inc.*, B-405012, July 26, 2011, 2011 CPD ¶ 153 at 5. The agency contends that our Office has recently dismissed an argument similar to the protester’s as factually and legally insufficient where the protester “alleged a dispute between private parties.” Request at 4-5, *citing IBM Corp., supra* at 7-8.

ERC joined the Army’s request, contending that TRAX’s allegations “fall squarely within the PIA’s savings provisions rendering this a dispute between private parties, which GAO does not consider.” Intervenor’s Response at 4, *citing IBM Corp., supra* at 7-8 (noting that our Office has found repeatedly that allegations involving breaches of NDA, confidentiality, contractual, or employment agreements or other improper disclosure of competitive information, without government involvement, constitute private disputes, which we will not consider as part of our bid protest function).

DISCUSSION

TRAX seeks to articulate a meaningful distinction between our decisions in *IBM Corporation* and *DynCorp International LLC* and the facts of this case. See Response at 4-5. In *IBM Corporation*, an employee of one of IBM’s subcontractors for the incumbent effort accessed information regarding IBM’s performance on that contract, and that employee went on to provide that information to Accenture Federal Services LLC, which was competing against IBM for the “follow-on” work. *Id.* at 4. TRAX contends that *IBM Corporation* does not address “the exchange of information between teammates” or “the effect of a corporate transaction on the PIA analysis--let alone a corporate transaction that transforms the recipient into a direct competitor.” *Id.*

Regarding *DynCorp International LLC*, the protester highlights the fact that DynCorp International’s “former teammate who had gained access to contractor bid or proposal information through a garden-variety subcontracting arrangement retained and later used that same information to its benefit in a follow-on contract.” *Id.* TRAX argues that here, unlike in *DynCorp International LLC* or *IBM Corporation*, the challenged misuse of voluntarily disclosed proprietary information occurred after TRAX’s subcontractor merged with TRAX’s competitor, that is to say, after a corporate transaction. *Id.* at 4-5. According to TRAX, what distinguishes the protester’s PIA allegation from those in *IBM Corporation* and *DynCorp International LLC* is the absence in those two protests of any “event--corporate transaction or otherwise,” that, after the disclosure, changed the identity of the entity to which the information was willingly disclosed. *Id.* at 5.

⁵ As noted above, the PIA savings provisions provide that the act does not “restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 2107(2).

TRAX reads into the savings provisions of the PIA a nonexistent exception to the rule that the Act does not “restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” 41 U.S.C. § 2107(2). The protester’s contention that the savings provisions are inapplicable where the firm to which the information is disclosed is subsequently party to a corporate transaction is unsupported by the plain language of the provisions. See *id.* At the heart of the protester’s claim is its insistence that, while TRAX voluntarily disclosed its proposal information to Oasis, TRAX did not voluntarily disclose its information to ERC. Response at 5. Yet, receipt of proprietary information by an entity other than the one to which it was voluntarily disclosed was central to the PIA allegations in *IBM Corporation* and *DynCorp International LLC*. As noted above, in both cases the alleged PIA violation stemmed from a subcontractor’s receipt of proprietary information, which it then either disclosed to a third party or used for its own benefit--when neither subsequent use of the information was intended by the protester at the time the information was voluntarily disclosed.

Simply put, TRAX relies on a distinction without meaning--the corporate transaction that merged the protester’s former teaming partner with one of TRAX’s competitors. TRAX voluntarily disclosed its information to its teaming partner. It is well settled that the savings provisions of the PIA do not restrict such disclosures and that a dispute as to the possible misuse of that information is a dispute between private parties that is not for our consideration. Therefore, we find TRAX’s protest allegations with respect to an alleged violation of the PIA are legally and factually insufficient, and we dismiss them.⁶

We have also previously found that where a protester fails to allege any government misconduct or involvement in the disclosure of proprietary information, it has failed to allege a legally or factually sufficient basis of protest that a violation of the PIA occurred. *IBM Corp.*, *supra* at 7-8. In such circumstances, we have found no basis to review protest allegations challenging the adequacy of the agency’s PIA investigation. *Id.* at 8 n.4. Here, TRAX does not allege that the purported shortcomings in the agency’s investigation would possibly establish any misconduct on the part of the government. Rather, TRAX’s allegations are that a more thorough investigation would likely demonstrate that “ERC knowingly obtained, had knowledge of, and used TRAX proprietary information to gain an edge in this competition.” Protest at 9. As TRAX has failed to demonstrate a nexus between the alleged shortcomings of the agency’s investigation and any alleged government misconduct or involvement in the alleged

⁶ TRAX has filed suit against Oasis in U.S. District Court. See Protest, exh. 2, PIA Notification, exh. A., District Court Complaint. Because we dismiss the protest for failing to state a legally or factually sufficient basis for protest, we do not address whether this protest also should be dismissed under 4 C.F.R. § 21.11(b), requiring dismissal of any protest where the matter involved is the subject of litigation, or has been decided on the merits, by a court of competent jurisdiction.

disclosure, we find that these allegations fail to state a valid basis to challenge the adequacy of the agency's investigation.

The protest is dismissed.

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