



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Orion International Technologies, Inc.

File: B-293256

Date: February 18, 2004

Kenneth A. Martin, Esq., Martin & Associates, for the protester.
Carolyn Callaway, Esq., for Fiore Industries, Inc., the intervenor.
Capt. Charles K. Bucknor, Jr., Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester was not prejudiced by agency's alleged unequal evaluation of its proposal and the awardee's higher-rated proposal, where the awardee's proposal had a lower price and the protester does not assert that its proposal should be higher rated than the awardee's proposal.
 2. Protest that the awardee had an unfair competitive advantage by hiring a retired government employee prior to submitting a proposal does not provide a basis to sustain the protest where the record does not support protest allegations that the retired employee was a procurement official on the protested procurement, took the protester's proposal from the 1998 competition for some of these requirements, had access to source selection information, or had improper contacts with agency officials that provided the awardee with an unfair competitive advantage.
-

DECISION

Orion International Technologies, Inc. protests an award to Fiore Industries, Inc. under request for proposals (RFP) No. DABK39-03-R-0013, issued by the Department of the Army for support services for the Center for Counter Measures, White Sands Missile Range, New Mexico. Orion protests the agency's evaluation of proposals and alleges that Fiore had an unfair competitive advantage.

We deny the protest.

The RFP, issued as a small business set-aside on September 19, 2003, solicited proposals for support services to include providing a core staff of multi-disciplined engineers, scientists and analysts to perform susceptibility and vulnerability analyses

of precision guided weapon systems and related components; to serve as subject matter experts in the broad spectrum of precision guided weapon systems, countermeasures, and conduct of operational training and exercises; and to provide support throughout the planning, coordination and execution of countermeasure testing, training and exercises. The RFP contemplated the award of a fixed-price, award-fee/award-term contract (with reimbursable line items for surge support and travel) for a base period of 3 years with 12 option years.

Award was to be made on a “best value” basis considering the factors of technical/management and price, with technical/management being considerably more important than price. The RFP stated the following four subfactors under technical/management listed in descending order of importance: (1) overall mission understanding, (2) proposed management plan, (3) quality assurance, and (4) sample tasks. Offerors were to present oral technical/management proposals, which was done in October.

The agency evaluated the oral proposals using a color/adjectival rating scale. The agency rated Fiore’s proposal higher than Orion’s under each of the first three technical/management subfactors and rated both the same under the fourth subfactor. Fiore’s proposed price was almost \$2 million lower than Orion’s. The source selection authority (SSA) considered the evaluation, including the apparent advantages and disadvantages of the two proposals, and determined that Fiore’s higher-rated, lower-priced proposal represented the best value to the government. On November 5, the agency awarded the contract to Fiore. Following a debriefing, Orion filed this protest.

Orion alleges that the agency’s technical evaluation treated offerors unequally, and that Fiore had an unfair competitive advantage arising from the firm’s employment of a recently retired agency employee.¹

¹ In its comments following the agency report, Orion alleged that Fiore made a material misrepresentation in its proposal concerning the proposed employment of an Orion employee. This allegation, based on information about Fiore’s proposal that was included in the agency report, is an untimely basis of protest filed more than 10 days after the protester first knew or should have known of it. 4 C.F.R. § 21.2(a)(2) (2003). In this regard, the protester received the agency report on December 15 and, following its request for an extension on the comment period that our Office granted, Orion submitted its comments on December 31, 16 days after receiving the agency report. The last day for filing new bases of protest arising from the agency report was December 29 (December 25 and 26 were federal holidays and December 27 and 28 were the weekend). Therefore, we do not consider this allegation. See Oceanering Int’l, Inc., B-287325, Jun. 5, 2001, 2001 CPD ¶ 95 at 6-7 (new protest grounds must independently satisfy the requirements for a timely protest; extension of comment period cannot waive those timeliness requirements).

(continued...)

In alleging unequal treatment, the protester makes various contentions concerning the evaluation of its and the awardee's proposals under most of the technical evaluation subfactors. It alleges that the higher ratings given to Fiore's proposal are inconsistent with the ratings given to Orion because both proposals either include or exclude the same or similar information. For example, under the mission understanding subfactor, Orion alleges that the agency evaluated a weakness in Orion's proposal because it failed to explain "external processes," but Fiore did not receive a weakness for the same failure. Another example is that, under the management plan subfactor, the protester alleges that both proposals demonstrated that the offerors had access to nationally recognized subject matter experts, yet Fiore's proposal received a strength and Orion's a weakness for this criterion.

We do not consider these protest allegations because even if we were to find that the record supports them, the protester has not demonstrated that the agency's evaluation prejudiced Orion. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Myers Investigative and Sec. Servs., Inc., B-286971.2, B-286971.3, Apr. 2, 2001, 2001 CPD ¶ 59 at 3. Here, if the proposals were evaluated as equivalent under each of the technical/management subfactors, as the protest argues they should be, Fiore's proposed price would remain almost \$2 million lower than Orion's. Since Fiore's lower-priced proposal would remain in line for award ahead of Orion's even if all of the protester's allegations concerning the evaluation were supported by the record, there is no basis to consider these allegations further. Myers Investigative and Sec. Servs., Inc., *supra*; Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335 at 2-3.

The remainder of the protest concerns Orion's allegations that Fiore gained an unfair competitive advantage by means of employing a retired agency employee. Prior to his retirement from the agency in January 2004, this person served as the contracting officer's representative (COR) under Orion's incumbent contract for some of the services covered by the present RFP. Orion alleges that several actions by this person following his retirement were improper and gave Fiore an unfair competitive advantage.

(...continued)

Additionally, Orion's comments allege that the SSA was biased against Orion's chief executive officer based on communications between Orion employees and the SSA or other agency personnel that took place in July and August 2003. Since the protester could have presented this information in its initial protest, but did not, these allegations are also untimely and will not be considered.

First, Orion alleges that the retired COR was a procurement official with knowledge of inside information under this RFP as evidenced by his hosting a “sources sought” conference in November 2002. The agency states that the retired COR was never a procurement official under this RFP because the planning for this acquisition did not begin until March 2003, well after the COR had retired. Moreover, the conference he hosted was not part of the acquisition strategy for this RFP or any solicitation, but merely was an opportunity for potential contractors to tour the agency’s facilities. In short, the retired COR did not have access to any inside information about the agency’s acquisition strategy for this RFP. The protester has not shown otherwise. Thus, the record before us does not support the protester’s allegation.

Another allegation concerns Orion’s prior proposal that formed the basis for, and was incorporated into, its incumbent contract. Orion submitted that proposal in 1998 and the COR stored it in his agency office during contract performance up to the time of his retirement. Orion alleges that the COR took the proposal with him following his retirement and provided the proposal to Fiore. The agency and the retired COR state that he left all of the material relating to Orion’s incumbent contract, including the old proposal, with the succeeding COR. Contracting Officer’s Statement at 6; Agency Report, Tab 18, Declaration of Retired COR, at 1. Since the protester has provided no evidence that the old proposal was removed from the agency, this allegation does not rise above mere speculation. See Drytech, Inc., B-246276.2, Apr. 28, 1992, 92-1 CPD ¶ 398 at 8-9 (speculation unsupported by evidence is insufficient to sustain a protest).

Orion also alleges that the retired COR contacted agency management personnel in July 2003, prior to the issuance of the RFP, and inquired as to which of Orion’s personnel the agency would like to see retained under the follow-on contract, and provided this information to Fiore for use in preparing its proposal. The agency states that the retired COR did have informal, social conversations with various agency personnel following his retirement. The record provides evidence that the retired COR asked only one agency employee, who was neither an evaluator nor the source selection official for the RFP, for his opinion on retention of incumbent contractor personnel, and this opinion was asked prior to the issuance of the RFP.² While the protester generally alleges that this was a disclosure of “source selection information,” it does not explain how this information falls under the definition of source selection information provided in 41 U.S.C § 423(f); FAR §§ 2.101(b), 3.104-3, or show that these conversations provided Fiore with an unfair competitive advantage.

Finally, the protester alleges that the retired COR met with the SSA in August 2003 at a restaurant in Las Cruces, New Mexico to promote the interests of Fiore. The SSA states that the dinner did occur and that it was a social event planned prior to the

² The employee identified two people; neither was identified in Fiore’s proposal.

COR's retirement, but the event was delayed several times due to conflicting schedules. The SSA states that the only reference to work during this social engagement was that the retired COR mentioned that he was working for a contractor, which he did not identify, and that the contractor planned to submit a proposal under the RFP. The retired COR asked if this would be a problem. The SSA did not provide an answer, but instead stated that the retired COR should discuss the specifics of his situation with the Judge Advocate General (JAG) Corps.³ The SSA states that he has had no contact with the retired COR since that dinner. Agency Report, Tab 4, Declaration of the SSA. The protester has provided no evidence to show that this dinner was anything more than a social outing. Social interaction between an employee of an offeror and a procurement official, though perhaps in some cases reflecting poor judgment by the official, does not provide a basis to sustain a protest alleging procurement integrity violations. Oceanometrics, Inc., B-278647.2, June 9, 1998, 98-1 CPD ¶ 159 at 6; Laser Power Techs., Inc., B-233369, B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 at 8-9.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ The retired COR states that he had requested an ethics opinion at the time of his retirement, and had on-going contact with the JAG about this matter. In October 2003, an ethics opinion was issued. The opinion cleared his employment with Fiore with limited restrictions, which the protester has not shown to have been violated here. Agency Report, Tab 10, Ethics Opinion; Tab 18, Declaration of Retired COR, at 1.