



Decision

Matter of: M3 Partners, LLC

File: B-416685.6

Date: May 4, 2020

Michael W. Middleton for the protester.

Eric M. Carlson, Esq., and Theresa Francis, Esq., Department of the Navy, 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

1. Protest challenging agency's evaluation and rejection of an unsolicited proposal is dismissed because GAO will not generally review a protest which would mandate that an agency accept an unsolicited proposal and procure from the firm on a sole-source basis.

2. Protest that the agency improperly used the contents of the protester's unsolicited proposal is denied where the record does not support the protester's contention that the agency appropriated its idea, or that its solution was innovative or unique.

DECISION

M3 Partners, LLC, of Greenville, South Carolina, protests the handling and evaluation of its unsolicited proposal by the Department of the Navy, Naval Air Systems Command (NAVAIR). M3 also asserts that the agency has improperly used the contents of M3's unsolicited proposal in a subsequent solicitation.

We deny the protest.

BACKGROUND

The protester's unsolicited proposal at issue here concerns certain systems on the UC-35C aircraft. The systems at issue are similar to systems on the Navy's UC-12W aircraft. Both of these aircraft fall within the purview of the Navy's Lead Class Desk Engineer for PMA 207 Commercial Derivative Aircraft programs (hereinafter, the lead program engineer).

In responding to M3's allegations, the Navy's lead program engineer explains that the Navy took delivery of six UC-12W aircraft in June 2010. Aff. of Lead Engineer at ¶ 4. These aircraft were "forward deploy[ed] to directly support the warfighter as a force multiplier." Shortly after delivery of the first UC-12W aircraft, the aircrew found that during operations the engine of the aircraft exceeded the maximum allowable Internal Turbine Temperature (ITT). Despite efforts to develop new procedures to avoid the problem, the aircraft engine continued to exceed maximum allowable temperatures. As a result, the agency was required to lease costly spare engines to keep aircraft operational. In 2011-2012, the Navy developed an engine aural tone warning system for its UC-12W aircraft that would provide an audible tone to the aircrew once engine temperatures or torque were approaching maximum allowable limits. Since installing the aural tone warning system in the UC-12W aircraft, the Navy has not needed spare engines to support operations due to incidents where the aircraft's engine exceeded the maximum allowable ITT. *Id.*

In late 2019, the desk engineer for UC-35 aircraft approached the Navy's lead program engineer "to help review data and develop a [statement of work (SOW)] for a UC-35C aural tone generator system that would address aircraft over-speeds." *Id.* ¶ 6. The lead program engineer explains that these discussions focused on lessons learned from the UC-12W project. *Id.* It was during this time period that M3 first submitted--in March, 2018--and then resubmitted, an unsolicited proposal to the Navy to prevent the UC-35C engines from exceeding their operating limits. See Protest, attach. A-A001, M3 Unsolicited Proposal. The Navy's rejection of that proposal has been the subject of two prior M3 Partners protests and two requests for reconsideration--all of which this Office has dismissed.

The protester's unsolicited proposal explains that "[f]rom [its] technical analysis [M3] believe[s] that the [engine trend monitors (ETMs)] can be reconfigured to alert the pilots preemptively that an engine is approaching its operating limit." Protest, attach. A-A001, M3 Unsolicited Proposal at 3. The proposal advised the agency that M3 was "proposing that [it] be given access to historical ETM data and maintenance data, and the opportunity to collect the other maintenance information and facts needed to validate [its] assumption that the ETM can be reconfigured to produce tremendous cost savings," and that "[a]fter determining that the data supports [its] hypothesis, [M3] would work with relevant [original equipment manufacturers], current maintenance contractors, NAVAIR, and other stakeholders to finalize and implement a technical solution." *Id.*¹

¹ The unsolicited proposal included a legend stating that "data that shall not be disclosed outside the Government," while noting that the restriction on use "does not limit the Government's right to use information contained in these data if they are obtained from another source without restriction." *Id.* at 1.

DISCUSSION

M3 alleges that the Navy failed to follow numerous provisions of the Federal Acquisition Regulation (FAR), that the Navy's evaluation of M3's unsolicited proposal was unreasonable, and that the Navy improperly divulged proprietary information from that proposal. We address each allegation below.

M3 asserts that the Navy's actions with respect to evaluating unsolicited proposals do not comply with FAR 15.604(a)(6), requiring that agencies make available to potential offerors "[p]rocedures for [the] submission and evaluation of unsolicited proposals."² FAR 15.604(a)(6). In response, the Navy has provided the protester with a copy of those procedures. *Id.* The protester has failed to establish how the agency's delay in providing these procedures constitutes a violation of procurement law or regulation within the meaning of our Bid Protest Regulations, and so we dismiss the challenge as failing to state a valid basis of protest. See 4 C.F.R. § 21.1(c)(4) and (f).

M3 contends that the Navy's evaluation of the protester's unsolicited proposal was unreasonable because the Navy declined to make a sole-source award to M-3. As explained in our prior decisions, an agency's determination not to make a sole-source award is one that is within the agency's discretion. *M3 Partners, LLC*, B-416685, Oct. 25, 2018, at 2 (unpublished decision); *M3 Partners, LLC*, B-416685.2; B-416685.3, Feb. 1, 2019, at 2 (unpublished decision). We again dismiss the allegation that the agency unreasonably evaluated the protester's unsolicited proposal. See *M3 Partners, LLC*, B 416685.2; B-416685.3, *supra* (dismissing challenge that an agency unreasonably evaluated an unsolicited proposal); *Rante Corp.*, B-411188, June 1, 2015, 2015 CPD ¶ 166 at 2-3.

Finally, the protester contends that the agency misused the contents of M3's unsolicited proposal in violation of FAR 15.608, which prohibits government personnel from using "any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation or in negotiations with any other firm unless the offeror is notified of and agrees to the intended use." Protest at 1, *citing* FAR 15.608. In support of its argument, the protester cites to numerous pieces of evidence that show, in M3's view, the Navy has appropriated its concepts. These include the following: (1) a Rough Order of Magnitude (ROM) pricing estimate request and SOW issued to the Navy's Contractor Logistics Support (CLS) provider, Precision Turbine, on March 15, 2018, which called for the contractor to install a visual and audio sensor system into the

² The protester bases several additional allegations on information obtained from Freedom of Information Act requests. See Protest at 4-5; Protest, attachs. K, L, & M. The protester received these documents on October 31, 2019. See Protest, attach. K at 1; see also, M3 Chronology, Feb. 10, 2020, at 3. This protest was filed on January 21, 2020, well beyond the 10 days which a protester has to file a timely protest, and these allegations are dismissed as untimely. 4 C.F.R. § 21.2(a)(2). In addition, while we do not address every specific protest allegation, we have considered them all, and find none to have merit, including those in the protester's filing of April 27.

UC-35C Ultra aircraft; (2) the agency's decision to rescind the ROM/SOW pricing estimate to allow for further evaluation of the ETMs after the agency received M3's unsolicited proposal the next day (March 16, 2018); and (3) the Navy's decision (during the summer of 2019) to issue another ROM/SOW to its new CLS, DynCorp International, for installation of a UC-35C engine auditory alert system, which "shall replicate the [Marine Corps's] UC-12W aural tone alert system." Protester's Comments, April. 20, 2020, at 1-3.

In particular, M3 contends that the modified ROM/SOW sent to DynCorp in the summer of 2019 reflects the idea of using the existing ETMs to provide the pilot warning as presented in M3's unsolicited proposal. M3 argues that this "fact is validated by the Agency's new reference to the UC-12W aircraft that suffered similar engine exceedance problems prior to having its own ETM system reconfigured."³ *Id.* at 3. M3 maintains that after the Navy received M3's unsolicited proposal, the agency changed its original strategy of procuring audio and visual sensors. Specifically, M3 argues that the strategy of replicating the UC-12W aural tone alert system constituted misuse of M3's unsolicited proposal. *Id.*

While GAO will consider a protest that an agency improperly appropriated information from an unsolicited proposal in a solicitation, *Digital Healthcare, Inc.*, B-296489, Aug. 24, 2005, 2005 CPD ¶ 166, the burden is on the protester to demonstrate by clear and convincing evidence that its proprietary rights have been violated. *Id.* at 3; *EDN Corp.*, B-225746.2, July 10, 1987, 87-2 CPD ¶ 31 at 3. To prevail on a claim of violation of proprietary rights, the protester must show (1) that its material was marked proprietary or confidential or that it was disclosed to the government in confidence, and (2) 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. *Digital Healthcare, Inc.*, *supra*; *Porta Power Pak, Inc.*, B-196218, Apr. 29, 1980, 80-1 CPD ¶ 305 at 4. Ideas or concepts that are obvious, and not innovative or unique, are not considered proprietary. *Digital Healthcare, Inc.*, *supra*; *Chromalloy Div.-Oklahoma of Chromalloy Amer. Corp.*, B-187051, Apr. 15, 1977, 77-1 CPD ¶ 262.

Here, M3 has provided no examples of any specific information from its unsolicited proposal that were included in the ROM/SOW issued to DynCorp. Indeed, as previously noted, there is no mention of ETMs in that document.

Moreover, to the extent that M3 offered a solution--reconfiguring the existing ETM rather than replacing the sensors--it was neither innovative nor unique. In essence, the protester makes the illogical argument that the Navy rectified its problems with the engines in 2011 to 2012 by using M3's unsolicited proposal--first submitted in 2018. The agency's strategy, successfully employed some years prior to M3's submission of

³ Although M3 maintains that the ROM provided to DynCorp reflects its idea of using the ETMs, it points to no place in the ROM where ETMs are mentioned.

its unsolicited proposal, could not, of course, have been based on M3's unsolicited proposal. M3 cannot reasonably claim that the Navy misused its unsolicited proposal.⁴

Finally, to the extent the protester argues that the agency changed its procurement strategy as a result of M3's unsolicited proposal, the record shows that the agency changed its strategy after it received the protester's proposal, but does not show that the agency relied on the contents of the protester's proposal in changing its strategy. In this connection, the lead project engineer states that "[a]t no time was the M3 Partners data used to develop the SOW for an aural tone generator project." Aff. of Lead Engineer at ¶ 6. Instead, the lead project engineer worked with the UC-35 desk engineer to develop a solution. Aff. of Lead Engineer at ¶ 6. In fact, the lead project engineer states that he has "never seen or reviewed M3 Partners proposal or any technical data they may have supplied." *Id.*

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ The protester argues that its proposal was unique because, for example, the aircraft are unique. This argument is without merit, because "the mere reformulation of a concept" cannot be proprietary unless "the restatement represents a valuable contribution arising from the independent efforts of the claimant." *Digital Healthcare, Inc., supra* at 3.