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Decision

Matter of: QMX Support Services, Inc

File: B-408959

Date: January 6, 2014

Shelton H. Skolnick, Esq., Skolnick Law Firm, PC, for the protester.
Pamela J. Mazza, Esq., Kathryn V. Flood, Esq., and Megan C. Connor, Esq., Piliero Mazza PLLC, for TechFlow, Inc., the intervenor.
Sandra Cain, Esq., and Scott E. Miller, Esq., Department of the Navy, Space and Naval Warfare Systems Command, for the agency.
Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee engaged in an impermissible bait and switch of its key personnel is denied where there is no evidence that the awardee made a material misrepresentation in its proposal with respect to its key personnel.
 2. Protest challenging agency's cost evaluation of awardee's proposal on basis that the awardee's total cost was substantially lower than agency's cost estimate and other offerors' total costs is denied where the agency's cost evaluation was based on a comprehensive review of the awardee's specific cost elements and the protester has not demonstrated that the agency's evaluation in this regard was unreasonable.
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DECISION

QMX Support Services, Inc., of Alexandria, Virginia, protests the award of a contract to TechFlow, Inc., of San Diego, California, under request for proposals (RFP) No. N66001-13-R-0101, issued by the Department of the Navy, Space and Naval Warfare Systems Center Pacific, for information technology and software engineering support services. QMX alleges that the awardee does not intend to use its proposed key personnel and has therefore engaged in an improper bait and

switch of its key personnel. The protester also argues that the agency's evaluation of the awardee's cost proposal was unreasonable.¹

We deny the protest.

BACKGROUND

The RFP, issued on April 25, 2013, as a small business set-aside, contemplated the award of a single cost-plus-fixed-fee, indefinite-delivery/indefinite-quantity contract with a 3-year ordering period. RFP at 2, 23, 38 and 90. The RFP established a 4-step best-value selection process. Under step one, the agency was to evaluate proposals for acceptability considering the offerors' agreement to comply with the terms of the RFP and their past performance. Id. at 90-91. Second, the RFP established that the agency would hold oral presentations with the acceptable offerors and evaluate their responses to sample tasks. Id. at 91, Attach. 6 at 1. Third, the agency would evaluate offerors' cost proposals for reasonableness and realism. Id. at 92. In the final step, the agency was to conduct a cost/technical trade-off analysis and select the best-value offeror for award. Id.

As it relates to the protest, for the purpose of evaluating cost, the RFP provided offerors with estimated labor hours for 13 required labor categories. Four of the 13 labor categories, for example, "Applications Developer III," included hours for both "key" and "non-key" personnel. Id. 83-84. Using this information, offerors were to provide detailed cost information, to include labor rates, fringe benefits, overhead rates, subcontracted labor rates, direct and indirect costs, general and administrative expense rates, and the fixed fee. Id. at 80-81. In this regard, the RFP instructed offerors to submit a cost matrix for all labor categories and hours. Although the RFP required actual rates for key personnel, average or composite rates were acceptable for unidentified non-key personnel. Id. at 82.

The RFP also required offerors to include a list of names of all key personnel (prime and subcontractor) and required that key personnel participate in the oral presentations under step two of the contemplated evaluation process. Id. at 83, 91. More specifically, the oral presentation instructions provided that "all members of this presentation team must be proposed technically as key personnel, and

¹ In its comments on the agency's report addressing the protest issues raised, the protester did not reply to the agency's responses to several of its initial protest contentions--including that the awardee was improperly evaluated under the oral presentation terms of the RFP, that the agency failed to properly evaluate the protester's cost proposal, and that the agency failed to promote full and open competition--we therefore consider the arguments abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218 at 5.

dedicated at a minimum of 940 hours per year in the cost proposal for their labor category.” RFP, Attach. 6 at 2.

The agency received five proposals by the RFP’s May 29 closing date. TechFlow’s proposal, which the agency evaluated as acceptable under step one, had a total evaluated cost of \$14,426,078 and received a rating of “good” for its oral presentation. QMX’s proposal, which also received an acceptable rating under step one, had a total evaluated cost of \$19,920,869, and received a rating of “outstanding” for its oral presentation. Agency Report (AR) at 7. With regard to the agency’s cost evaluation, the record reflects that the agency examined the cost elements of each proposal and conducted a statistical analysis of proposed labor rates by comparing them to the averages of the labor rates proposed for each labor category. AR, Tab 13, Business Clearance Memorandum, at 16-18. Since TechFlow’s rates were within two standard deviations of the average of the rates proposed, the agency considered them realistic. Id. Additionally, the record reflects that the agency obtained and considered audit information from the Defense Contract Management Agency (DCMA) in finding TechFlow’s proposed costs realistic. Id. at 19-23.

After the evaluation was complete, the source selection authority (SSA) reviewed the merits of each proposal, conducted a trade-off analysis, and made a best value award decision. Id. at 43. The SSA concluded that the strengths presented by the QMX proposal did not outweigh its approximately 38-percent cost premium in light of the strengths presented by the low-risk, significantly lower-cost TechFlow proposal. Id. Accordingly, the SSA selected TechFlow’s proposal for award and the agency notified QMX of the intended award on September 11. After receiving a debriefing, QMX filed this protest.

DISCUSSION

QMX alleges that the awardee does not intend to utilize its proposed key personnel during contract performance and, thus, has engaged in an improper bait and switch. In this regard, QMX focuses on the fact that the awardee has offered employment to several of its incumbent personnel. QMX also argues that the agency’s evaluation of the awardee’s cost proposal was flawed because the agency failed to account for the fact that the awardee’s total cost is substantially lower than the agency’s cost estimate and the total costs of the other offerors. For the reasons discussed below, the protest is without merit.

Bait and Switch

An offeror may not propose to use specific personnel that it does not expect to use during contract performance, as doing so would have an adverse effect on the integrity of the competitive procurement system and generally provides a basis for proposal rejection. AdapTech Gen. Scientific, LLC, B-293867, June 4, 2004,

2004 CPD ¶ 126 at 5. To establish an improper bait-and-switch scheme, however, a protester must show a firm either knowingly or negligently represented that it would rely on specific personnel that it did not reasonably expect to furnish during contract performance, that the misrepresentation was relied on by the agency, and that the misrepresentation had a material effect on the evaluation results. Data Mgmt. Servs. JV, B-299702, B-299702.2, July 24, 2007, 2007 CPD ¶ 139 at 10.

Here, we find that QMX has not shown that TechFlow engaged in a bait and switch. QMX has not furnished any evidence of the first prong of the test for a bait and switch. The record reflects that TechFlow identified [deleted] named key personnel in its proposal and QMX has not presented any evidence that any of these individuals will not be furnished during contract performance. AR, Tab 32, TechFlow Proposal at III-A-1. To the contrary, in response to the protest, the awardee has affirmed that all of its proposed key personnel are available to perform and have been included as key personnel in performance of its contract. Intervenor's Comments at 3.

In support of its protest, QMX relies solely on adverse inferences it has drawn from communications between the agency and TechFlow regarding the availability of incumbent personnel that TechFlow might use in performance of the contract. In this regard, the record reflects that TechFlow advised the agency of its interest in extending employment offers to incumbent personnel. AR at 13-15, 17-18. Such communications regarding the hiring of incumbent personnel do not demonstrate, in and of themselves, TechFlow's intention to utilize incumbent personnel in lieu of the key personnel identified in its proposal. Our Office has recognized that a firm's recruiting efforts to augment its personnel resources do not in themselves present persuasive evidence of misrepresentation to constitute an improper bait and switch. See Data Mgmt. Servs. JV, supra. Rather, we have noted that it is not unusual or inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. See Lifecare Mgmt. Partners, B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 at 6. Thus, we conclude that the protester has failed to sufficiently support its contention of an alleged bait and switch by the awardee.

Cost Evaluation

When, as here, an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. American Tech. Servs., Inc., B-407168, B-407168.2, Nov. 21, 2012, 2012 CPD ¶ 344 at 5; DPK Consulting, B-404042, B-404042.2, Dec. 29, 2010, 2011 CPD ¶ 12 at 11; Federal Acquisition Regulation (FAR) § 15.404-1(d). Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. An agency's cost realism analysis need not

achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the proposed costs are reasonable and realistic in view of other cost information reasonably available to the agency at the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7.

As noted above, the RFP set forth, as part of the cost proposal instructions, the labor categories and labor amounts that offerors were to use when preparing their proposals. Offerors were instructed to submit their direct labor rates, indirect rates and fee. RFP at 80-81. The RFP established that, as part of the cost evaluation factor, the agency would assess the reasonableness and realism of each offeror's proposal.² Id. at 92. In challenging the agency's evaluation, QMX does not dispute that TechFlow used the labor categories and labor hours established by the RFP, nor does QMX challenge the Navy's evaluation of TechFlow's (and its subcontractors') direct and indirect rates or specifically contend that TechFlow's rates are too low. Rather, the protester simply posits that the awardee's costs are not realistic because TechFlow's total price is significantly lower than both the agency's cost estimate and the average of the other offerors' prices.

Based on our review of the record, we have no basis to find the Navy's cost realism evaluation of TechFlow's proposal unreasonable. The record shows that the agency conducted a comprehensive, well-documented cost realism evaluation which analyzed each cost element of the awardee's cost proposal, including direct and indirect rates and proposed fee, and found the costs to be realistic. For example, as noted above, in evaluating the awardee's labor rates, the agency used a standard deviation analysis to assess proposed rates based on average labor rates. The protester has not challenged the agency's analysis of rates, and we have no basis to question the agency's evaluation methodology in this regard. See First Info. Tech. Servs., Inc., B-405602, Dec. 1, 2011, 2011 CPD ¶ 261 at 8 n.7 (finding that agency reasonably used a standard deviation analysis as a tool to analyze offerors' labor rates). The record also reflects that the agency considered audit information provided by DCMA in a report to the agency. In this report, DCMA compared Techflow's proposed labor rates to actual payroll and relevant market data. The DCMA did not take exception to TechFlow's proposed rates.³ The report

² To the extent the protester contends TechFlow's total price is unreasonable because it is substantially lower than the agency's estimate and other offerors' proposals, we note that the purpose of a price reasonableness review is to determine whether prices offered are too high, as opposed to too low. See Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3.

³ The record reflects that the DCMA did in fact take exception to higher indirect rates proposed for one of the awardee's subcontractors. Since this higher rate appeared to overstate, as opposed to understate, the awardee's costs, the matter
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also noted that TechFlow's escalation rate was "reasonable," and presented historical indirect rate information, which was consistent with the indirect rates set forth in TechFlow's proposal. AR, Tab 19, DCMA Rate Verification for TechFlow. Again, the protester has not challenged the agency's comprehensive evaluation of the awardee's cost information in this regard. The protester's failure to object to the specific cost information and analysis conducted by the agency is fatal to its protest since, as set forth above, an agency's cost evaluation is properly based on an offeror's actual and allowable costs.

Moreover, the protester's reliance on agency total cost estimates and total costs for other offerors is fundamentally misplaced. A cost realism evaluation is properly focused on the discrete cost elements of an offeror, which comprise the offeror's total cost, precisely the focus of the agency's evaluation of TechFlow's cost proposal. See FAR § 15.404-1(d)(1) (establishing that "[c]ost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed"); see also, ABSG Consulting, Inc., B-407956, B-407956.2, Apr. 18, 2013, 2013 CPD ¶ 111 at 9 ("mere fact that an offeror's labor rates do not mirror those in a government estimate does not mean that the rates are unrealistic, or mandate their adjustment to government estimate levels"); Wyle Laboratories, Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 6 (rejecting contention that awardee's proposed costs were unrealistic simply because they were lower than those of the government estimate and the protester). Since the record reflects that the agency properly engaged in a detailed evaluation of the awardee's cost elements, and the protester has not challenged the agency's evaluation in this regard, we find no basis to sustain the protester's challenge of the agency's cost realism evaluation.⁴

The protest is denied.

Susan A. Poling
General Counsel

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was not of concern to the agency. AR, Tab 13, Business Clearance Memorandum, at 21.

⁴ The protester also argues that the agency misevaluated the awardee's true costs given the bait and switch of the awardee's key personnel. As discussed above, however, the protester has failed to support its bait-and-switch allegation. Accordingly, this derivative argument is without merit.