

Decision

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Matter of: Ashlin Management Group

File: B-419472.3; B-419472.4

Date: November 4, 2021

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DIGEST

Protest that awardee's proposal is unacceptable due to failure to notify agency that a quoted key person became unavailable during corrective action period is sustained when the awardee had actual knowledge of its key person's unavailability.

DECISION

ASHLIN Management Group, Inc., a small business of Bowie, Maryland, protests the issuance of an order to Booz Allen Hamilton, Inc. (BAH), of McLean, Virginia, under request for quotations (RFQ) No. 1605C2-20-Q-00006, issued by the Department of Labor's Employment and Training Administration for consulting services connected to the Department's Job Corps program. Among other things, the protester contends that the agency should have evaluated BAH's quotation as technically unacceptable due to the unavailability of one of BAH's quoted key personnel.

We sustain the protest.

BACKGROUND

On September 9, 2020, utilizing the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, the agency issued the solicitation to federal supply schedule contract

holders. Agency Report (AR), exh. 1, RFQ at 1, 3.¹ The solicitation sought quotations for a vendor to assist the National Office of Job Corps in identifying, developing, and implementing career pathway programming with a “focus on transitioning Job Corps from a career technical training program to a career technical education program.” *Id.* at 3. Job Corps is a program with “more than 55 years of experience providing a combination of career technical training, academic instruction, and support services to at-risk young people ages 16-24.” *Id.* at 5. Through the solicitation, “Job Corps is seeking a system-wide assessment of its current career technical training (CTT) model and a study of similar programs or models from which conclusions and recommendations are made for expanding and strengthening the CTT program’s ability to identify and provide in-demand skilled work, competitive wages, and viable paths to career growth.” *Id.*

The solicitation contemplated issuance of a time-and-materials order for a 1-year base period and four 1-year option periods. RFQ at 9-11, 24, 36. The solicitation established that award would be made on a best-value tradeoff basis considering price and the following non-price factors: (1) technical approach; (2) key personnel, staff experience and qualifications (key personnel); (3) management plan; and (4) past performance. *Id.* at 37. The non-price factors were listed in descending order of importance, and combined were significantly more important than price. *Id.* As relevant here, under the second most important factor (key personnel), the solicitation required vendors to describe their “processes for recruiting, retaining, and providing highly skilled qualified personnel,” and advised that the agency would evaluate “[t]he effectiveness” of a vendor’s “proposed plan.” *Id.* at 32-33.

With respect to price, vendors were required to include in their quotations a price schedule that included fixed-price labor rates for a set number of hours for several labor categories (e.g., project director, senior specialist). RFQ at 9. As relevant here, the solicitation did not include FAR provision 52.222-46, Evaluation of Compensation for Professional Employees. See generally RFQ. In the context of a fixed-priced contract, such as here, our Office has explained that FAR provision 52.222-46 anticipates an evaluation of whether an awardee understands the contract requirements and has proposed a compensation plan for those requirements; in effect, a price realism evaluation regarding an offeror’s or a vendor’s proposed compensation. *The Bionetics Corp.*, B-419727, July 13, 2020, 2021 CPD ¶ 259 at 5. Here, however, the solicitation did not include FAR provision 52.222-46, nor did it otherwise require or provide for a price realism analysis. See generally RFQ.

The agency received seven timely quotations, including those submitted by ASHLIN and BAH. AR, exh. 6, Source Selection Decision Document (SSDD) at 1. In December 2020, the source selection authority (SSA) selected BAH’s quotation for award. *Id.* The incumbent contractor, ASHLIN, protested the award to our Office. *Id.*; AR, exh. 2, RFQ Questions and Answers at 3. In response to the protest, the agency notified our Office

¹ The citations in this decision utilize the Adobe.pdf page numbers of the documents submitted by the parties.

of its intent to take corrective action, committing to “reconsider” quotations and make a new award decision, which resulted in our dismissal of the protest as academic. *ASHLIN Mgmt. Group, Inc.*, B-419472, B-419472.2, Jan. 12, 2021 (unpublished decision).

Following the agency’s reconsideration, ASHLIN and BAHs’ quotations received the following ratings:²

	ASHLIN	BAH
Technical Approach	Good	Outstanding
Key Personnel, Staff Experience and Qualifications	Good	Good
Management Plan	Good	Outstanding
Past Performance	Significant Confidence	Significant Confidence
Price³	\$11,557,605	\$9,227,435

AR, exh. 6, SSDD at 3.

The SSA reviewed the evaluators’ findings and conducted a comparison of the quotations. AR, exh. 6, SSDD at 3, 37-39. The SSA concluded that BAH’s strong quotation “outweighed any benefits to be gained by awarding to” a third vendor (other than ASHLIN or BAH) that quoted a lower price but submitted an “inferior technical” quotation. *Id.* at 37. The SSA also compared BAH’s quotation with three other technically acceptable, lower-rated, higher-priced quotations (including ASHLIN’s quotation) “to determine whether any quote, after looking behind the ratings, provided any unique features that outweighed the value” of BAH’s lower-priced, higher-rated quotation. *Id.* at 38. The SSA concluded that none of the three quotations, including ASHLIN’s, had any “unique features . . . that provided better value based on non-price factors,” and that on the basis of non-price factors alone “BAH provided better value.” *Id.* The SSA found that it was “clear” BAH’s quotation provided better value when considering both the non-price factors and BAH’s lower price, and selected BAH’s quotation for award. *Id.* at 38-39.

On August 13, 2021, the agency notified ASHLIN that implementation of corrective action was complete, and BAH had been selected, again, for award. Comments, exh. 2, Email from Agency to ASHLIN. Following notification of the agency’s new award decision, ASHLIN filed this protest with our Office on August 20.

DISCUSSION

² The agency utilized the adjectival ratings outstanding, good, acceptable, marginally acceptable, and unacceptable for the three non-price factors other than past performance. AR, exh. 5, Consensus Technical Evaluation Report at 4.

³ Prices have been rounded to the nearest dollar.

As an initial matter, we note that ASHLIN does not challenge any aspect of the evaluation of its own quotation. The protester challenges multiple aspects of the evaluation of BAH's quotation, and argues that BAH's quotation became technically unacceptable during the corrective action period due to the unavailability of one of BAH's quoted key personnel. The protester further maintains that the agency erred by not amending the solicitation during the corrective action period to: (1) put vendors on notice of an alleged change in the evaluation method; and (2) add FAR provision 52.222-46. Finally, the protester argues that the agency failed to document adequately its evaluation and best-value tradeoff.

We have considered all of the protester's arguments, and find that only one provides a basis to sustain the protest. For the reasons discussed below, we sustain the protest because BAH had actual knowledge of the unavailability of one of its quoted key personnel during the corrective action period and failed to notify the agency. As further discussed below, we deny or dismiss the protester's remaining arguments.

Key Personnel

The solicitation established three key personnel positions—project director, project manager, and senior project specialist. RFQ at 23. The protester contends that the person quoted by BAH to fill the senior project specialist key position resigned from BAH's employ during the corrective action period. Supp. Protest at 2-3; Supp. Comments at 1-3. The protester maintains that due to this employee's resignation BAH had actual knowledge of the unavailability of one of its key personnel, and was obligated to notify the agency. *Id.* We agree.

The record reflects that when BAH submitted its quotation in October 2020 it quoted one of its then-current employees to fill the senior project specialist key position. AR, exh. 4, BAH Technical Quotation at 35. The record also shows that on March 23, 2021 the quoted senior project specialist submitted a resignation letter notifying BAH of the employee's intent to leave BAH in two weeks' time, and that the employee, in fact, did leave BAH's employ in April. Intervenor's Comments, exh. A, Decl. of Principal/Director at 2; exh. C, Resignation Letter at 1. At the time that BAH's senior project specialist resigned from BAH's employ, the agency was still implementing its corrective action stemming from ASHLIN's protest of the agency's December 2020 award to BAH. See Supp. AR at 2 ("On August 12, 2021, [the agency] completed its corrective action. . . .").

Our Office has explained that vendors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals, or as here quotations. *MindPoint Group, LLC*, B-418875.2, B-418875.4, Oct. 8, 2020, 2020 CPD ¶ 309 at 6. This premise is grounded in the notion that a firm may not properly receive award of a contract based on a knowing material misrepresentation in its offer. *M.C. Dean, Inc.*, B-418553, B-418553.2, June 15, 2020, 2020 CPD ¶ 206 at 4. An offeror or vendor generally is required to advise an agency when it knows that one or more key employees have become unavailable. *Id.* The duty to notify does not arise, however, if

an offeror or vendor does not have actual knowledge of the employee's unavailability. *DZSP 21, LLC*, B-410486.10, Jan. 10, 2018, 2018 CPD ¶ 155 at 10.

When an agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal, or as here quotation, as submitted without considering the resume of the unavailable employee (in which case the proposal or quotation would likely be rejected as technically unacceptable for failing to meet a material requirement); or open discussions to permit the offeror or vendor to amend its proposal or quotation. *M.C. Dean, Inc.*, *supra* at 4.

The intervenor, BAH, argues that it did not have actual knowledge of its senior project specialist's unavailability. Intervenor's Comments at 5-7. BAH acknowledges that its senior project specialist resigned from BAH "for another position" in April 2021. *Id.* at 3; exh. A, Decl. of Principal/Director at 2; exh. C, Resignation Letter at 1. BAH also acknowledges that after the agency made its new award decision BAH contacted the agency to request a "substitution of another key employee for [the senior project specialist]." Intervenor's Comments at 4; exh. A, Decl. of Principal/Director at 2; see also Supp. AR at 2 (indicating that the new award to BAH was made on or about August 12 and BAH's request for a key personnel substitution was submitted on or about August 20).

Despite acknowledging these facts, BAH contends that it did not "have actual knowledge that [its senior project specialist] [was] unavailable to perform." Intervenor's Comments at 7. In support of its contention, BAH represents that the agency has not yet approved BAH's request for a key personnel substitution, and that "[BAH] may well seek to re-hire [the resigned senior project specialist] if the Agency so prefers." *Id.* BAH further maintains that it "has no knowledge that [the resigned senior project specialist] would reject such an offer" of rehiring. *Id.* at 6. The agency similarly maintains that just because the senior project specialist "is not presently employed by [BAH] it does not necessarily follow that [the employee] would not agree to return to work under [the agency's] contract." Supp. AR at 3.

The agency and BAHs' arguments that BAH lacked actual knowledge of its senior project specialist's unavailability ring hollow, and we find them unpersuasive. The record reflects that the employee BAH quoted as its senior project specialist submitted a letter of resignation in March 2021 and left BAH's employ in April, providing BAH with actual knowledge of the employee's unavailability. See e.g., *M.C. Dean, Inc.*, *supra* at 6-7 (sustaining protest where key program manager who was required to have security clearance had been denied such clearance, despite protester's argument that the employee was going to appeal the denial because such an appeal did "not, by itself, excuse [protester] from having actual knowledge of the unavailability of its proposed program manager"); *PAE Applied Techs., LLC*, B-419133, Nov. 4, 2020, 2020 CPD ¶ 363 at 7 (denying protest challenging agency's evaluation of protester's proposal as unacceptable due to the unavailability of a key person because the employee had formally resigned and accepted an offer of employment with another firm, which provided the protester with actual knowledge of the employee's unavailability).

We find similarly unpersuasive BAH’s argument that, regardless of the resignation of its senior project specialist, no duty to notify arose here because the task order issued to BAH in December 2020 remained in place throughout the corrective action period. Thus, according to BAH, the replacement of a key person after award was a matter of contract administration not for consideration by our Office. Intervenor’s Comments at 4-5. Notwithstanding the fact that contract award was not terminated, the corrective action notice submitted by the agency in response to ASHLIN’s protest of the December 2020 award decision unequivocally represented that the agency would make a new award decision that would “supersede” the protested prior award decision. Comments, exh. 3, Notice of Corrective Action at 1.

As the source selection process was ongoing during the corrective action period, we conclude that all competitors still in consideration for award had an ongoing obligation to notify the agency in the event they obtained actual knowledge that a quoted key person had become unavailable. See *DZSP 21, LLC, supra* at 12 (denying protest that awardee’s proposal was unacceptable because the awardee failed to notify the agency during corrective action that multiple proposed key personnel were unavailable when the record contained no evidence that the awardee had actual knowledge that the key personnel were unavailable); *NCI Info. Sys., Inc., B-417805.5 et al.*, Mar. 12, 2020, 2020 CPD ¶ 104 at 8 (denying protest that awardee’s proposal was unacceptable because the awardee failed to notify the agency during corrective action that a proposed key person was unavailable when the record contained no evidence that the awardee had actual knowledge that the key person was unavailable).

BAH’s contention that it did not have a duty to notify because it did not know that its key personnel would be reevaluated during the corrective action period also is not supported by the record. See Intervenor’s Comments at 5. The agency’s corrective action notice provided that the agency would “reconsider some aspects of the evaluation of quotations.” Comments, exh. 3, Notice of Corrective Action at 1. As the agency did not specify which aspects of quotations it might reconsider, it left open the possibility that the agency might reevaluate key personnel. *Id.* Moreover, we note that the record reflects the agency did conduct “a new and comprehensive evaluation across every technical factor,” including the key personnel factor. Contracting Officer’s Statement at 9.

Here, we conclude that, prior to the completion of the agency’s source selection process, BAH had actual knowledge that one of its quoted key personnel was unavailable. Thus, BAH had an obligation to inform the agency of the unavailability of this person, which it did not do. Accordingly, we sustain the protest on this basis.⁴

⁴ We note that our finding here does not constitute a conclusion that BAH had an obligation to remain in contact with the resigned senior project specialist to ascertain whether an offer of re-employment might be accepted. We previously have declined to interpret our decisions to require such a “constant contact” result. *DZSP 21, LLC, supra*

Remaining Protest Grounds

The protester next argues that the agency failed to evaluate the effectiveness of BAH's recruitment and retention plan, as required under the key personnel factor. Protest at 5-10; Comments at 1-8. The protester also contends that BAH's quoted project director failed to meet the solicitation's minimum requirements for that key position.⁵ Protest at 12-13; Comments at 8-10.

In reviewing protests of an agency's evaluation, we do not reevaluate quotations or substitute our judgment for that of the agency, as the evaluation of quotations is a matter within the agency's discretion. *DigiFlight, Inc.*, B-419590, B-419590.2, May 24, 2021, 2021 CPD ¶ 206 at 5. Rather, we will review the record to determine if the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *Id.* Based on our review of the record here, we find no basis to question the agency's technical evaluation of BAH's recruitment and retention plan or of BAH's quoted project director.⁶

at 10. Here, however, BAH received contact from its quoted senior project specialist in the form of a resignation letter, which provided actual knowledge of the individual's unavailability.

⁵ The protester withdrew its allegation that the agency changed the evaluation method during implementation of its corrective action without amending the solicitation. Protest at 11-12; Comments at 8. The protester also withdrew its general argument that the agency's evaluation under the key personnel factor "was flawed," and as a result "so too was the best-value tradeoff decision." Protest at 13-14; Comments at 11. Additionally, the protester withdrew its contention that BAH's quoted program manager failed to meet the solicitation's minimum requirements for that key person position. Protest at 12-13; Comments at 8. Accordingly, we do not address further these withdrawn protest grounds.

⁶ The protester argued that the agency must have failed to evaluate the effectiveness of BAH's recruitment and retention plan because BAH's quotation could not have merited a rating of good under the key personnel factor when BAH would be unable to recruit and retain qualified personnel effectively at its low compensation rates. Protest at 5-6, 10. ASHLIN made projections about what it assumed BAH's labor rates would be based on the amount by which BAH's award price was lower than ASHLIN's quoted price. *Id.* at 7. The protester was adamant, however, that it was not raising a price realism challenge, and that, instead, its argument was a "garden variety protest alleging failure to follow the evaluation criteria." *Id.* at 6 and 6 n.3; Comments at 1-2. As noted above, based on the record of the agency's technical evaluation we have no basis to question the evaluators' assessment that BAH provided a sufficiently effective recruitment and retention plan. To the extent that the protester, in fact, was challenging the agency's evaluation of BAH's quotation on the basis that its price was too low to permit effective recruiting and retention, we dismiss the challenge for failing to state a valid basis of protest.

In its first protest, challenging to the agency's December 2020 award decision, ASHLIN argued that section 22.1101 of the FAR required the contracting officer to include in the solicitation FAR provision 52.222-46, and that the agency's failure to include the provision should be remedied by adding it to the solicitation under the so-called "Christian Doctrine." See Protest at 6 n.2. In light of our recent decision in *ORBIS Sibro, Inc.*, ASHLIN did not pursue the Christian Doctrine argument in its current protest challenging the agency's August 2021 award decision.⁷ *Id.*

On September 26, 2021, after receipt of the agency's report responding to the current protest, ASHLIN submitted a supplemental protest, in which it argues the agency erred by not amending the solicitation to add FAR provision 52.222-46 during the corrective action, asserting that the contracting officer was made aware of the solicitation error by ASHLIN's protest of the first award decision. Supp. Protest at 3-6. The protester knew, however, that the agency had not amended the solicitation to add the provision during the corrective action period by no later than August 13, when ASHLIN received notice of the agency's new award decision. Accordingly, we dismiss as untimely ASHLIN's challenge to the terms of the solicitation, which it waited to raise until after receipt of the agency's report, more than ten days after ASHLIN knew, or should have known, the basis of its protest.⁸ 4 C.F.R. § 21.2(a)(2).

As our decisions have explained, when a solicitation provides for issuance of a fixed-price order, or as here an order on the basis of fixed-price labor rates, and does not include a provision requiring a price realism analysis, an agency is neither required nor permitted to evaluate price realism. See e.g., *Trademasters Serv., Inc.*, B-418522.2 *et al.*, Apr. 2, 2021, 2021 CPD ¶ 161 at 5. When, as here, a price realism analysis is neither required nor permitted, an argument challenging an agency's technical evaluation of a vendor based on the vendor's low price fails to state a legally sufficient basis of protest. *Id.*; 4 C.F.R. §§ 21.1(c)(4), (f), (i).

⁷ In *ORBIS* we explained that "[a]s we have often observed, the Christian Doctrine provides only for incorporation by law of certain mandatory contract clauses into otherwise validly awarded government contracts; it does not stand for the proposition that provisions are similarly incorporated by law, into solicitations." *ORBIS Sibro, Inc.*, B-418165.7 *et al.*, Apr. 12, 2021, 2021 CPD ¶ 167 at 5 n.10.

⁸ ASHLIN argues that we should not dismiss as untimely its challenge regarding FAR provision 52.222-46, because the protester assumed that the agency had obtained a deviation from the FAR requirement when the agency, again, made award without amending the solicitation to incorporate the required provision. Supp. Protest at 1-2 n.1. ASHLIN maintains that it made this assumption because agencies are presumed to act in good faith, and it did not anticipate that the agency was choosing not to amend the solicitation in willful violation of the FAR; rather, it was only upon reviewing the agency's report that ASHLIN learned no FAR deviation had been obtained. *Id.*; Supp. Comments at 4-5.

Finally, because we sustain the protest and in light of our recommendation to reevaluate quotations and make a new selection decision, we need not reach the protester's contention that the agency failed to document adequately its evaluation and best-value tradeoff decision. See Protest at 15-16; Comments at 11-13.

RECOMMENDATION

We recommend that the agency either evaluate BAH's quotation as submitted, without considering the previously quoted senior project specialist, or open discussions with all vendors and allow for revised quotations to be submitted, and then make a new source selection decision based on the reevaluation. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). ASHLIN should submit its claim for costs, detailing and certifying the time expended and costs incurred, to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

We find, however, that it was apparent from the face of the solicitation that FAR provision 52.222-46 was not included, and that it continued to be apparent throughout the corrective action period, based on the lack of any solicitation amendments being issued prior to the agency making its new award decision. See e.g., *Trade West Constr., Inc.*, B-418252, Dec. 10, 2019, 2019 CPD ¶ 421 at 6 (dismissing as untimely protester's argument that a qualification requirement included in the solicitation violated an applicable statute, notwithstanding the protester's representation that it "did not reasonably anticipate that the Agency was adopting a requirement clearly in violation of [statute]").