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Decision

Matter of: Sev1Tech, Inc.

File: B-416811; B-416811.2

Date: December 18, 2018

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Barbara A. Duncombe, Esq., Suzanne Sumner, Esq., Erin R. Davis, Esq., and Brandon E. Dobyns, Esq., for Solutions Through Innovative Technologies, Inc., the intervenor.

Allen Lotz, Esq., Department of Homeland Security, for the agency.

Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee misrepresented the availability of incumbent staff through submission of resumes is sustained, where the awardee's proposal represented that it had already negotiated contingent offers of employment when it had not, and where the record shows that the awardee did not obtain prior consent from incumbent staff to use resumes in its proposal.

DECISION

Sev1Tech, Inc., of Woodbridge, Virginia, protests the issuance of a task order to Solutions Through Innovative Technologies, Inc. (STI-TEC), of Fairborn, Ohio, under request for proposal (RFP) No. 70Z03818RS0000001, issued by the Department of Homeland Security, U.S. Coast Guard, for professional services.

We sustain the protest.

BACKGROUND

The Coast Guard issued the RFP on March 6, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, to vendors holding indefinite-delivery, indefinite-quantity (IDIQ) contracts under the General Services Administration's One Acquisition Solution

for Integrated Services (OASIS) Small Business Pool 1.¹ Agency Report (AR), Tab 1a, RFP, at 1; Contracting Officer's Statement (COS) at 1. The RFP contemplated the issuance of a fixed-price task order for project management, technical support, and logistics services for the Coast Guard's Aviation Logistics Center's Business Operations Division. RFP at 2; RFP, attach. 2, Statement of Work (SOW), at 2. The RFP anticipated a period of performance of one base year and four option years. SOW at 39.

The RFP stated that the task order would be issued to the responsible offeror whose proposal is most advantageous to the government, considering technical capability, past performance, and price. RFP at 5. The RFP also stated that technical capability was significantly more important than past performance; past performance was more important than price. Id. at 5-6. In addition, the RFP stated that the three subfactors under the technical capability factor--management approach, staffing approach, and transition plan--were of equal importance. Id. at 5.

The RFP stated that, under the staffing approach subfactor, offerors were to submit resumes for all positions, which the government would evaluate to determine whether the qualifications and experience met or exceeded the position requirements. Id. at 6. The RFP also stated that the government would evaluate each offeror's ability to recruit and keep qualified personnel in an effort to minimize learning curves and retain the knowledge available. Id. The RFP identified a total of 26 positions, of which 6 were identified as key personnel.² Five additional positions were identified as optional contract line items that could be funded at any point during the life of the contract. SOW at 3; COS at 6.

The Coast Guard received six proposals. COS at 1. After evaluating proposals, the Coast Guard established a competitive range consisting of Sev1Tech and STI-TEC. Id. at 2. Sev1Tech proposed a team comprised of 95 percent incumbent personnel, and provided resumes for 18 incumbent personnel. AR, Tab 3b, Sev1Tech's Revised Proposal, at 1, 28-31. Sev1Tech's proposal stated that "[w]e have met with the current employees on two occasions and negotiated exclusive letters of commitment with incumbent personnel." Id. at 24.

¹ OASIS is a multiple-award IDIQ contract that provides a governmentwide procurement vehicle for ordering a broad range of professional services. See <https://www.gsa.gov/buying-selling/products-services/professional-services/one-acquisition-solution-for-integrated-services-oasis> (last visited Dec. 3, 2018).

² The key personnel positions were project manager (senior), senior operations research analyst, task leader--logistics, project manager (senior)--program depot maintenance schedule, management analyst--continuous process improvement, and lead auditor--certifications. SOW at 28.

STI-TEC provided the names and resumes for 10 of the incumbent staff that Sev1Tech proposed. Compare AR, Tab 3b, Sev1Tech’s Revised Proposal, at ii with AR, Tab 4c, STI-TEC’s Proposal Revision, at ii. STI-TEC’s proposal stated that it “has reached out to and negotiated contingent offers of employment with candidates for each position.” AR, Tab 4a, STI-TEC’s Initial Proposal, at 16. STI-TEC’s proposal also stated that, with respect to incumbent capture and retention, it had “leveraged [its] relationship with the incumbent personnel and begun negotiating contingent offers of employment with them.” Id. at 28. STI-TEC’s proposal further stated that “[i]n the event we were not able to discuss employment with an individual directly, our Executive Leadership and Board of Directors has made a commitment to [DELETED] when we take over a contract.” Id. The proposal stated that this commitment allowed the offeror to successfully transition to new contracts with incumbent retention rates of [DELETED] percent. Id.

After discussions concluded, the Coast Guard assigned the following ratings:³

| | Sev1Tech | STI-TEC |
|-----------------------------|----------------------------------|--------------------------------------|
| TECHNICAL CAPABILITY | SUPERIOR/LOW RISK | SUPERIOR/LOW RISK |
| Management Approach | Superior/Low Risk | Superior/Low Risk |
| Staffing Approach | Superior/Low Risk | Superior/Low Risk |
| Transition Plan | Superior/Low Risk | Superior/Low Risk |
| PAST PERFORMANCE | GOOD/LOW RISK (VERY RELEVANT) | GOOD/LOW RISK (SOMEWHAT RELEVANT) |
| PRICE | \$18,814,378 | \$16,312,750 |

AR, Tab 5b, Source Selection Evaluation Board (SSEB) Report Supplement, at 16.

The SSEB assigned a strength to Sev1Tech’s proposal under the management approach subfactor for obtaining letters of commitment from 95 percent of incumbent personnel. AR, Tab 5a, SSEB Report, at 62. The SSEB also assigned strengths to Sev1Tech’s proposal under the staffing approach subfactor on the basis of the resumes submitted. Id. at 63. The SSEB assigned a strength to STI-TEC’s proposal under the management approach subfactor for demonstrating a high likelihood of successfully providing qualified employees, which the SSEB stated was supported by their proposed incumbent capture rates of [DELETED] percent and the large number of incumbent resumes provided in the proposal. Id. at 74. The SSEB also assigned strengths to STI-

³ A superior rating--the highest rating--meant that the proposal demonstrated an excellent understanding of the requirements and an approach that significantly exceeded performance or capability standards; the proposal has exceptional strengths that will benefit the government, and the risk of unsuccessful performance is very low. AR, Tab 2, Fair Opportunity Consideration Plan, at 12.

TEC's proposal under the staffing approach factor on the basis of the resumes submitted. Id. at 75-76.

The selection authority noted that both Sev1Tech's and STI-TEC's proposals demonstrated a depth of understanding of the requirement and proposed subcontractors that had held prior contracts for the requirement. AR, Tab 9, Post-Negotiation Memorandum, at 8. The selection authority determined that the only distinguishing factor between the two offerors was past performance relevancy and price. Id. The selection authority concluded that it was not in the government's best interest to spend an additional \$2.5 million, or 12 percent, for a minor difference in past performance relevancy. Id. at 9. As a result, the selection authority selected STI-TEC's proposal for award. Id.

After a debriefing, Sev1Tech protested to our Office.⁴

DISCUSSION

Sev1Tech contends that STI-TEC's proposal contained a material misrepresentation because STI-TEC proposed personnel for which it did not have a reasonable expectation would be available for performance under the task order. Protest at 1; Protester Comments at 4. In this regard, Sev1Tech argues that STI-TEC did not obtain permission to use the resumes of incumbent personnel in its proposal and did not contact the individuals concerning working on the task order until after the task order was awarded.⁵ Protester Comments at 10.

The Coast Guard states that the RFP did not require offerors to provide commitment letters or signed contingent offers of employment. Memorandum of Law (MOL) at 4. The Coast Guard also states that STI-TEC's proposal clearly implied that it did not have

⁴ This protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(2).

⁵ The Coast Guard asks that we dismiss Sev1Tech's supplemental protest ground, which provided additional examples to support the protester's contention of material misrepresentation. Coast Guard Request for Dismissal, Oct. 5, 2018, at 1. The Coast Guard maintains that Sev1Tech failed to diligently pursue the information. Id. at 2. The protester states that it proactively sought out information about which incumbent staff STI-TEC proposed without their permission and filed its protest as soon as its subcontractor provided the information. Sev1Tech Response to Request for Dismissal, at 2. The protester also states that it merely provided additional support for its initial protest ground. Id. at 1. Sev1Tech filed its initial protest on September 12, 2018; it filed its supplemental protest on October 4, based on information its subcontractor provided on September 26. See Supp. Protest at 2. Based on these facts, we conclude that Sev1Tech diligently pursued the additional information from its subcontractor and find the supplemental protest to be timely.

firm commitments from all the personnel it proposed. Id. at 5. The agency states that it expected STI-TEC to be able to provide the personnel nonetheless, given STI-TEC's stated commitment to ensure a [DELETED] percent retention rate and that incumbent personnel [DELETED]. Id.

The issue of whether personnel identified in an offeror's proposal will, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See Bid Protest Regulations, 4 C.F.R. § 21.5(a); Patricio Enters. Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4-5. Nonetheless, we will consider an allegation that an offeror's proposal contains a misrepresentation concerning personnel that materially influences an agency's evaluation. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5. An offeror's submission of resumes for another offeror's employees is not a misrepresentation where prior to submission, the employees expressed a willingness to consider employment with the awardee. Agusta Int'l S.A., B-237724, Mar. 21, 1990, 90-1 CPD ¶ 311 at 6. An offeror, however, may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good on its representation. ManTech Advanced Sys. Int'l, Inc., supra, at 13. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Id. at 5.

STI-TEC provided the names and resumes for 26 individuals in its proposal; 10 of those were for the incumbent staff that Sev1Tech also proposed. Compare AR, Tab 3b, Sev1Tech's Revised Proposal, at ii with AR, Tab 4c, STI-TEC's Proposal Revision, at ii. In addition, STI-TEC's proposal specifically stated that it "has reached out to and negotiated contingent offers of employment with candidates for each position." AR, Tab 4a, STI-TEC's Initial Proposal, at 16. Elsewhere, STI-TEC stated that it had "leveraged [its] relationship with the incumbent personnel and begun negotiating contingent offers of employment with them." Id. at 28; see also AR, Tab 4b, STI-TEC First Revised Proposal, at 38 (stating that STI-TEC "has identified and begun negotiating contingent offers of employment with the incumbent staff").

The record shows, however, that STI-TEC received the resumes for the incumbent staff from its proposed subcontractor, which maintained a database that included the resumes of staff who performed under a previous task order. Intervenor Comments, Attach., Decl. of Subcontractor, at 1. Additionally, STI-TEC admitted that it did not contact incumbent staff until after it was notified of the award. See Intervenor Response to GAO Questions, at 2-3. Here, contrary to its representation in its proposal, STI-TEC did not reach out to and negotiate contingent offers of employment with candidates for each position and did not have prior permission to submit the incumbent employees' resumes or a prior expression of willingness by the individuals to consider employment with the awardee.

The agency argues that STI-TEC's proposal implied that it did not have firm commitments from all the personnel it proposed. MOL at 5. In this regard, STI-TEC

stated in its proposal that “[i]n the event we were not able to discuss employment with an individual directly” the leadership made a commitment to not negatively impact incumbent employees financially. AR, Tab 4a, STI-TEC’s Initial Proposal, at 28. As noted, however, STI-TEC’s proposal also stated that it had reached out to and negotiated contingent offers of employment with candidates for each position and that it leveraged its relationship with the incumbent personnel and begun negotiating contingent offers of employment with them. AR, Tab 4a, STI-TEC’s Initial Proposal, at 16, 28; AR, Tab 4b, STI-TEC First Revised Proposal, at 38. Based on these statements, STI-TEC also implied in its proposal that it had in fact contacted incumbent personnel.

STI-TEC contends that the statement in its proposal that it reached out to and negotiated contingent offers of employment with candidates for each position was an error caused by copying and pasting language from a previous proposal and was not included with the intention of misrepresenting its position vis-à-vis incumbent staff. Intervenor Response to GAO Questions, Dec. 6, 2018, at 2. We have stated before, however, that an offeror has an obligation to ensure the accuracy of its proposal representations. ManTech Advanced Sys. Int’l, Inc., supra, at 10.

STI-TEC also argues that it reasonably believed that it would employ the incumbent staff on the contract based on its historical incumbent capture rate of [DELETED] percent. Intervenor Comments at 4. Although STI-TEC may have had a reasonable basis to believe that the incumbent personnel would be available to work for STI-TEC upon award, this did not negate the awardee’s misrepresentations that it had contacted incumbent personnel whose resumes it submitted. See ManTech Advanced Sys. Int’l, Inc., supra, at 6 n.10. Further, to the extent that STI-TEC asserts that the incumbent staff expressed willingness to work for it after award, the eventual decision of these individuals to accept employment with the awardee does not make STI-TEC’s statements in its proposal true after the fact. Id. at 12-13; see Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD 53 at 13 (“it is also inappropriate to take note of [the awardee’s] post-selection efforts in regard to recruitment of [the incumbent’s] employees”).

Finally, we conclude that the misrepresentation is material because the Coast Guard relied on the resumes of incumbent staff that STI-TEC submitted and, as a result, the misrepresentation likely had a significant impact on the evaluation. See ManTech Advanced Sys. Int’l, Inc., supra, at 5. In this regard, the Coast Guard identified a strength in STI-TEC’s proposal under the management approach subfactor that relied in part on the “large number of incumbent resumes provided in the proposal.” AR, Tab 5a, SSEB Report, at 74. In addition, the Coast Guard identified multiple strengths in STI-TEC’s proposal based on the incumbent resumes under the staffing approach subfactor. See id. at 75-76. On this basis, we conclude that STI-TEC materially misrepresented the availability of incumbent staff without receiving prior assurances that the incumbent staff was interested in continuing to work on the new task order to perform professional services, and that the agency relied on the resumes of the incumbent staff in its evaluation of proposals. Accordingly, we sustain the protest.

RECOMMENDATION

In determining an appropriate remedy in misrepresentation cases, we typically consider such factors as the degree of negligence or intentionality associated with the offeror's misrepresentations, as well as the significance of the misrepresentation to the evaluation. XYZ Corp., B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296 at 6. Here, we recommend that the Coast Guard reevaluate STI-TEC's proposal, taking into consideration the awardee's misrepresentations concerning the resumes that STI-TEC submitted, and make a new selection decision. We also recommend that the protester be reimbursed its reasonable costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel