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Decision

Matter of: T3I Solutions, LLC

File: B-418034; B-418034.2

Date: December 13, 2019

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Michelle F. Kantor, Esq., and William J. Beckley, Esq., McDonald Hopkins LLC, for Darton Innovative Technologies, Inc., the intervenor.
Colonel Patricia S. Wiegman-Lenz, Lawrence Anderson, Esq., and Colonel Tammie L. Sledge, Department of the Air Force, for the agency.
April Y. Shields, Esq., and Christina Sklarew, 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 is sustained where the record shows that the awardee did not have a reasonable basis to propose a named individual for a required position and that the misrepresentation had a material effect on the agency's evaluation of the awardee's proposal as technically acceptable.

DECISION

T3I Solutions, LLC, of Las Vegas, Nevada, protests the award of a contract to Darton Innovative Technologies, Inc., of Plattsmouth, Nebraska, under request for proposals (RFP) No. FA680019RA005, issued by the Department of the Air Force for courseware development and training services. The protester argues that the awardee's proposal contained material misrepresentations concerning the availability of its proposed personnel. The protester also challenges the agency's price evaluation and best-value tradeoff decision.

We sustain the protest.

BACKGROUND

The agency issued the RFP on August 14, 2019, as a total small business set-aside, to acquire courseware development and training services. See Agency Report (AR), Tab 5, RFP; AR, Tab 7, RFP Performance Work Statement (PWS). The RFP sought a

contractor to provide crew resource management training to the agency's operators and Security Forces that are responsible for handling intercontinental ballistic missiles (ICBM). See RFP PWS at 3. Among other things, the contractor would be required to provide all personnel, including instructors or subject matter experts (SMEs).¹ Id. at 3, 17. Because the predecessor contract had already established training for the operators, the RFP specifically noted the requirement that “[o]perators will continue to receive [training] without a break from the previous contract.” Id. at 3.

The RFP contemplated the award of a single fixed-price contract for a phase-in period of 2 months, a base period of 4 months, four 1-year option periods, and a potential 6-month extension. RFP at 3-6, 59. The RFP established that award would be made on a best-value tradeoff basis, weighing three factors: mission capability (technical), past performance, and price. Id. at 58. The RFP advised that “[t]echnical acceptability and past performance, when combined, are approximately equal to price.” Id.

With regard to the technical factor, the RFP advised that the agency would evaluate technical proposals on an acceptable/unacceptable basis under three subfactors. RFP at 59. Of relevance here, under the manning requirements and analysis technical subfactor, the RFP required offerors to “[s]ubmit a manning level and personnel mix plan for all workload identified in the PWS to include all instructors, courseware developers and any other required positions.” Id. at 53. The RFP also explained that the agency's evaluation would consider whether the qualifications of the personnel met the requirements of the PWS.² Id. at 59.

¹ The RFP suggested the positions of instructor and SME could be different individuals, but stated that “[u]se of instructors as SMEs and SMEs as instructors is encouraged.” RFP PWS at 17. Because Darton proposed “instructor/subject matter experts,” see, e.g., AR, Tab 8, Darton Proposal, Sept. 5, 2019, at 26, and for simplicity, this decision refers to “instructors.”

² Specifically, the RFP noted that the agency would consider the following qualifications for the instructors:

[Section] 4.1.4. Instructor/Subject Matter Expert Qualifications. All new Instructors and [SMEs] must have 1) a minimum of two years of work traveling out to the missile fields (can include any combination of ICBM shops/positions); 2) one year of instructor/evaluator experience, and 3) missile-related experience within the last seven years. Recent experience and [Minuteman III ICBM]-specific expertise are highly desirable. Contractor instructors and SMEs will also have a working knowledge of all applicable regulations, procedures, tech orders, and other publications as required. Use of instructors as SMEs and SMEs as instructors is encouraged.

RFP PWS at 17.

The RFP was amended once and closed on September 5, 2019. AR, Tab 6, RFP amend. 0001, Aug. 21, 2019. The agency received proposals from two offerors--T3I (the incumbent contractor) and Darton--and evaluated them as follows:

	T3I	Darton
Technical	Acceptable	Acceptable
Past Performance	Substantial Confidence	Satisfactory Confidence
Total Evaluated Price	\$3,669,544	\$2,067,882

AR, Tab 11, Proposal Analysis Report (PAR), Sept. 13, 2019, at 21-22.

Of relevance here, Darton proposed one instructor for the operators and [REDACTED] for the Security Forces. For the operators instructor position, Darton’s proposal identified an individual by name; stated that he “currently serves as the [] instructor and program manager for the incumbent contractor” and “brings the expertise and know-how to conduct this [crew resource management training] program”; and detailed his qualifications, experience, and credentials. AR, Tab 8, Darton Proposal, at 26. Darton’s proposal also stated, among other things, that in developing its personnel plan “[w]e consider[ed] the mix of incumbent employees who will continue employment in the follow-on effort as well as new personnel whom we will hire for new requirements, such as Special Forces courseware and instruction.” Id. at 9.

In finding that Darton’s proposal was technically acceptable, the agency noted that Darton’s proposal “only shows one instructor for [operators] and [REDACTED] for [Security Forces][,]” which “meets the basic requirement but may not be sustainable.” AR, Tab 11, PAR, at 5. In this regard, the agency also reiterated that “the PWS requires Security Forces SMEs to teach [Security Forces] classes and [operators] SMEs to teach [operators] classes.”³ Id. at 5. The agency also found that Darton had proposed instructors that met the qualifications requirements. Id. at 4 (“[m]eets qualification requirement in the PWS of [Section] 4.1.4.”).

The selection official, who was also the contracting officer, concluded that Darton’s proposal presented the best value to the agency “based upon an integrated assessment of technical acceptability, past performance, and price [in accordance with] the instructions outlined in the solicitation.” AR, Tab 11, PAR, at 22. On September 13, the agency made award to Darton and, on September 16, notified T3I of its decision. After a debriefing, this protest followed.

³ The agency at times uses the term “ICBM” to refer to operators where it discusses requirements to provide separate trainings to operators and Security Forces. For simplicity, this decision refers to “operators.”

DISCUSSION

T3I argues that Darton's proposal contained material misrepresentations because Darton proposed an incumbent employee to serve as the sole operators instructor when it did not have a reasonable expectation that this individual would be available for performance. T3I asserts that Darton did not contact this individual prior to the submission of proposals and did not obtain permission to use the qualifications of this individual in its proposal. Comments and Supp. Protest, Nov. 7, 2019, at 12-15; Protester's Supp. Comments, Nov. 19, 2019, at 2-6. In support of its position, T3I submitted a declaration from this individual stating that he had not been contacted by Darton or had any discussion with the awardee regarding potential employment opportunities prior to the time for submission of proposals. Comments and Supp. Protest, Exh. A, Declaration, Nov. 4, 2019, at 1.

In their responses, neither the agency nor the intervenor dispute this individual's declaration of facts. Instead, the intervenor simply asserts that it "made no specific representations" in its proposal and that it "had a reasonable basis to believe [this individual] would be available to work for Darton upon award." Intervenor's Supp. Comments, Nov. 19, 2019, at 1-2. The agency and the intervenor further argue that there was no misrepresentation because "[t]he solicitation did not require offerors to provide commitment letters or representations from employees that it planned to use to staff the effort, nor did Darton represent that it had obtained these from [this individual]." Supp. Contracting Officer's Statement and Memorandum of Law (COS/MOL), Nov. 15, 2019, at 6; see also Intervenor's Supp. Comments at 1-3.

The protester asserts in response that "none of these points support the conclusion that what Darton did here was acceptable." Protester's Supp. Comments at 3. T3I reiterates its position that Darton, among other things, presented this individual "as a member of its team" without "any other conditional language." Id. T3I further contends that "Darton was not candid" about how it presented its proposal because that "would not have been as impressive as specifically naming [this individual] and touting his particular experience doing the precise tasks of this RFP." Id. In the protester's view, "Darton leveraged [this individual's] experience in order to boost its chances of receiving favorable ratings" and for the agency to find that its proposal was technically acceptable. Id.

For the reasons discussed below, we agree with the protester, and we sustain the protest on this basis.⁴

⁴ T3I also contested various aspects of the agency's price evaluation and best-value tradeoff decision. We have considered all of T3I's other challenges and find no merit to them.

The issue of whether personnel identified in an offeror's proposal, 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, our Office will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 8. Our decisions frequently refer to such circumstances as a "bait and switch." Id. In order to establish an impermissible "bait and switch," a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. CACI Techs., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 at 5; ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 3, 10.

Here, we conclude that Darton represented that it would provide this individual for the operators instructor position, whom it did not have a reasonable basis to expect to furnish during contract performance. First, the record shows that Darton represented in its proposal that it based its personnel plan on incumbent employees, including the incumbent operators instructor. Darton's proposal specifically stated, among other things, that its personnel plan was based on "the mix of incumbent employees who will continue employment in the follow-on effort[.]" AR, Tab 8, Darton Proposal, at 9 (emphasis added). Darton's proposal then identified this individual by name; stated that he "currently serves as the [] instructor and program manager for the incumbent contractor" and "brings the expertise and know-how to conduct this [crew resource management training] program"; and detailed his qualifications, experience, and credentials. Id. at 26. In this regard, the intervenor's assertion that it "made no specific representations," Intervenor's Supp. Comments at 2, is contradicted by the record.

Second, the intervenor's assertion that it "had a reasonable basis to believe [this individual] would be available to work for Darton upon award" is unsupported by the record. Intervenor's Supp. Comments at 1. As noted above, this individual declared that he had not been contacted by Darton nor had any discussion with the awardee regarding potential employment opportunities prior to the time for submission of proposals. Comments and Supp. Protest, Exh. A, Declaration, at 1.⁵ Darton does not

⁵ In his declaration, this individual also stated that Darton contacted him after award to offer him a position "at a salary significantly less" than his position at T3I at that time; that he "informed [Darton] of [his] disappointment regarding the significant pay decrease"; and that, as of the date of the declaration, he had received no further communication from Darton. Comments and Supp. Protest, Exh. A, Declaration, at 1-2. While these details support the proposition that Darton did not contact this individual

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dispute this individual's declaration. In this regard, we also note that intervenor's counsel requested--in preparing to submit supplemental comments--that it be permitted to "discuss with Darton how they located the prospective employees identified in their proposal." Darton Request for Approval to Discuss a Particular Issue, Nov. 18, 2019, at 1. The parties and GAO expressed no objection to the request. Yet, in its subsequently filed supplemental comments, the intervenor offered no such explanation.

Third, even were we to acknowledge the intervenor's assertion that it "had a reasonable basis to believe [this individual] would be available to work for Darton upon award[,]" Intervenor's Supp. Comments at 1, we note that speculation cannot reasonably support Darton's inclusion of this individual in its proposal. As our Office has recognized, it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Invertix Corp., B-411329.2, July 8, 2015, 2015 CPD ¶ 197 at 6. However, an offeror 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., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 13; see also ACS Gov't Servs., Inc., supra, at 9-10 (awardee's misrepresentations may be material, even where they were not intentionally misleading). In the absence of any other explanation in the record, we cannot agree that Darton had a reasonable basis to propose this individual.

We also conclude that the misrepresentation here is material because the agency relied on Darton's proposed use of this individual to meet a minimum pass/fail requirement. As noted above, the contractor would be required to provide instructors to train operators, with the requirement that "[o]perators will continue to receive [training] without a break from the previous contract." RFP PWS at 3, 17. Moreover, the RFP required offerors to "[s]ubmit a manning level and personnel mix plan for all workload identified in the PWS to include all instructors, courseware developers and any other required positions." RFP at 53. The RFP also advised that the agency would evaluate technical proposals on an acceptable/unacceptable basis, which would include considering qualifications noted in the requirements of the PWS. Id. at 59; RFP PWS at 17.

The record shows that the agency noted that Darton's proposal "only shows one instructor for [operators] and [REDACTED] for [Security Forces][,]" which "meets the basic requirement but may not be sustainable." AR, Tab 11, PAR, at 5. The agency also found that Darton had proposed instructors that met the qualifications requirements. Id. at 4 ("[m]eets qualification requirement in the PWS of

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prior to the submission of proposals, we note that this alone is not dispositive, because unsuccessful post-award salary negotiations are not necessarily an indication of an offeror's bad faith in proposing specific individuals. Agusta Int'l S.A., B-237724, Mar. 21, 1990, 90-1 CPD ¶ 311 at 6, citing Individual Dev. Assocs., Inc., B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.

[Section] 4.1.4.”). Moreover, in our view, it is readily apparent that Darton’s proposed use of the incumbent operators instructor, if valid, would meet the agency’s requirement that “[o]perators will continue to receive [training] without a break from the previous contract.” RFP PWS at 3; see also Supp. COS/MOL at 4 (contracting officer’s assertion that Darton included this individual “because he appears to be a good candidate to do the work for obvious reasons”). In other words, this individual was the only one that Darton intended to use for this required position, and the agency relied on this to find that Darton’s proposal met the minimum requirements.

As a final matter, we are unpersuaded by the agency and the intervenor’s views that there was no misrepresentation because “[t]he solicitation did not require offerors to provide commitment letters or representations from employees that it planned to use to staff the effort, nor did Darton represent that it had obtained these from [this individual].” Supp. COS/MOL at 6; see also Intervenor’s Supp. Comments at 1-3. The issue here is what the RFP required and what Darton chose to propose to meet that requirement; under these circumstances, any arguments about what the RFP did not require are inapposite. See, e.g., ManTech Advanced Sys. Int’l, Inc., supra, at 2, 5 (misrepresentations regarding availability of proposed personnel were material even where the RFP did not require letters of commitment). In addition, and as set forth above, Darton’s proposal, on its face, represented that “[w]e consider[ed] the mix of incumbent employees who will continue employment in the follow-on effort[.]” AR, Tab 8, Darton Proposal, at 9.

In sum, based on the record and the above discussion, we conclude that Darton materially misrepresented the availability of an incumbent employee in its proposal, and that the agency relied on this misrepresentation in its evaluation of Darton’s proposal as technically acceptable. Accordingly, we sustain the protest.

RECOMMENDATION

In determining the 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. For example, we have recommended reevaluation of proposals where, among other factors, the awardee materially misrepresented the availability of incumbent staff by stating in its proposal that it had “reached out to and negotiated contingent offers of employment” and including resumes for those individuals. Sev1Tech, Inc., B-416811, B-416811.2, Dec. 18, 2018, 2018 CPD ¶ 429 at 5, 7. As another example, we have recommended the exclusion of the awardee from further consideration where, among other factors, the awardee materially misrepresented the availability of incumbent staff by stating in its proposal that it had “signed contingent offers in place” and suggesting that it would be able to provide those individuals at the start of performance. Patricio Enters Inc., supra, at 10, 15. In our view, the misrepresentation here is less egregious than the misrepresentation in Patricio.

We recommend that the agency reevaluate Darton's proposal, taking into consideration the awardee's misrepresentations; take any other actions that the agency believes are necessary; and make a new selection decision. 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). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel