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Decision

Matter of: Sehlke Consulting, LLC

File: B-420538

Date: May 18, 2022

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Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee’s proposal is unacceptable due to the subsequent unavailability of a proposed key person is sustained when the agency had actual notice prior to completing its evaluation and making its award decision that the individual was resigning from the awardee’s subcontractor and was scheduled to depart prior to the commencement of contract performance.

DECISION

Sehlke Consulting LLC, of Arlington, Virginia, protests the award of a contract to KPMG LLP, of McLean, Virginia, under request for proposals (RFP) No. NRO000-21-R-0226, which was issued by the Department of Defense, National Reconnaissance Office (NRO), for combined finance support services. The protester asserts that KPMG’s proposal should have been evaluated as technically unacceptable because one of its proposed key personnel became unavailable to perform on the resulting contract prior to the agency completing its evaluation and award decision.

We sustain the protest.

BACKGROUND

The RFP, which was issued in August 2021 and subsequently amended once, sought proposals for combined finance support services within NRO’s Business Plans and

Operations Directorate, Office of Finance. Agency Report (AR), Tab 1Y, Conformed RFP, Statement of Work (SOW) at 2.¹ The contractor will be responsible for providing financial support services across a host of financial management areas, including: accounting and finance consulting; accounts payable; audit liaison; auditable financial statement generation; budget execution, tracking, and reconciliation of current, prior, and future year funds; general financial management; internal controls; enterprise funds execution; policy development; posting contractual obligations; property management and accounting; standard general ledger analysis; treasury operations payment and reconciliation functions; and travel processing. *Id.* The RFP contemplated the award of a cost-plus-award-fee, level-of-effort contract, with a 2-year base period (with performance expected to commence on February 1, 2022), and two, 2-year option periods. AR, Tab 1Z, Conformed RFP, attach. 10, Section L – Instructions, Conditions, and Notices to Offerors at 3.

Award was to be made on a best-value tradeoff basis with non-cost and cost factors to be given equal weight. The non-cost factor included five constituent “items,” which are listed in descending order of importance: (1) management; (2) past performance; (3) organizational conflict of interest; (4) intellectual property; and (5) security. AR, Tab 1CC, Conformed RFP, attach. 11, Section M – Evaluation Factors for Award at 2. The management item was further divided into four factors: (a) key personnel; (b) staffing; (c) management approach; and (d) transition approach. The key personnel factor was slightly more important than the staffing and management approaches factors, which in turn were slightly more important than the transition approach factor. *Id.* at 3. As addressed herein, only the key personnel factor is material to our resolution of the protest.

The RFP required offerors to provide resumes and letters of commitment for four specific key personnel positions. AR, Tab 1Z, Conformed RFP, attach. 10, Section L – Instructions, Conditions, and Notices to Offerors at 12; Tab 1L, Conformed RFP, Section L – attach. 1, Resume Template for Key Personnel. For each of the four required positions, the RFP included both expected and desired education and experience levels. AR, Tab 1Y, Conformed RFP, SOW at 21-25. One of the four required positions was a senior financial consultant. *Id.* at 23. NRO was to evaluate offerors’ proposed key personnel in relation to the RFP’s experience and education qualifications requirements and assign the proposals adjectival ratings ranging from unsatisfactory to exceptional for the key personnel factor. AR, Tab 1CC, Conformed RFP, attach. 11, Section M – Evaluation Factors for Award at 3, 5.

NRO received three proposals in response to the RFP, including from Sehlke and KPMG.² Sehlke and KPMG received evaluation ratings as follows:

¹ References herein to page numbers of agency report exhibits are to the electronic pagination.

² KPMG is the current prime incumbent contractor for the requirements being acquired under the RFP.

	Sehlike	KPMG
Management Approach Item	Satisfactory	Very Good
Key Personnel Factor	Very Good	Exceptional
Staffing Factor	Satisfactory	Good
Management Approach Factor	Satisfactory	Good
Transition Factor	Satisfactory	Satisfactory
Past Performance Item (Confidence)	Significant	Significant
OCI Item (Confidence)	Moderate to High	Moderate to High
Intellectual Property Item (Risk)	Low	Low
Security Item (Risk)	Low	Low
Most Probable Cost	\$33,583,826	\$35,077,526
Overall Proposal Risk	Moderate-Low	Moderate-Low

AR, Tab 6, Source Selection Decision at 2 (prices rounded to nearest whole dollar).

The source selection authority found that KPMG’s proposal was the most advantageous across the non-cost criteria, and determined that the advantages of KPMG’s proposal, “specifically KPMG’s exceptional response to [the] most important management factor Key Personnel” warranted the associated cost premium. Thus, the source selection authority found that KPMG’s proposal presented the best value to the government, and selected the KPMG’s proposal for award. *Id.* at 7. Following a debriefing, this protest followed.

DISCUSSION

Sehlike challenges the agency’s evaluation of KPMG’s proposal under the key personnel factor--the factor the source selection authority found to be the determinative distinguishing factor supporting the selection of KPMG’s higher-priced proposal for award. The protester contends that the agency should have evaluated KPMG’s proposal as technically unacceptable when, prior to completing its evaluation of proposals and making its award decision, KPMG advised the agency that its proposed senior financial consultant had submitted a formal notice of resignation, thus putting the agency on notice that one of KPMG’s proposed key personnel was unavailable to perform the contract as KPMG had proposed. NRO argues that its evaluation of KPMG’s proposed key personnel, in particular, KPMG’s senior financial consultant, was reasonable. Specifically, the agency contends that despite the individual’s pending departure and despite the agency’s knowledge of the pending departure, the individual technically remained an employee of KPMG’s subcontractor on January 25--the date

the agency executed the source selection decision. For the reasons that follow, we sustain the protest.³

It is a fundamental principal of federal procurement law that an agency's evaluation of proposals must reflect a reasonable assessment of each offeror's ability to successfully perform the contract requirements, and that the evaluation and the agency's source selection decision must be adequately documented. Federal Acquisition Regulation 15.305(a), 15.308; *Wyle Labs., Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD

³ Sehlke also asserts discrete alleged errors in the agency's evaluation of the protester's own proposal. We find no basis to sustain the protest on any of these grounds. First, Sehlke alleges that the agency unreasonably failed to assess two distinct strengths for the experience of certain of the protester's proposed key personnel. We have explained, however, that an agency's judgment that the features identified in a proposal do not significantly exceed the requirements of the RFP or provide advantages to the government--and thus do not warrant the assessment of unique strengths--is a matter within the agency's discretion and one that we will not disturb where the protester has failed to demonstrate that the evaluation was unreasonable. *Protection Strategies, Inc.*, B-416635, Nov. 1, 2018, 2019 CPD ¶ 33 at 8 n.4. Sehlke's disagreement with the assessment, without more, does not render the evaluation unreasonable. *The Ginn Grp., Inc.*, B-420165, B-420165.2, Dec. 22, 2021, 2022 CPD ¶ 17 at 9.

Second, Sehlke objects to the assessment of a weakness under the incoming transition approach factor. Specifically, the evaluators assessed a weakness because, notwithstanding that Sehlke expressed its intent to recruit four specific incumbent personnel to support the incoming transition to mitigate potential loss of incumbent knowledge, the named individuals were not identified in the protester's staffing matrix, and Sehlke did not provide any letters of intent for the named individuals. The evaluators found that "[t]he potential loss of historical knowledge and awareness . . . slightly decreases the confidence that [Sehlke] would have a seamless transition." AR, Tab 5, Source Selection Authority Award Briefing at 25. The protester objects to the weakness arguing, among other alleged bases, that it was unreasonable to penalize Sehlke for proposing what amounted to additional incumbent personnel beyond those already recruited by the protester. In other words, the protester argues that the identified individuals would be additional resources which, if successfully recruited, would further reduce transition risk.

We find no basis to object to the agency's evaluation. While Sehlke specifically identified by name four incumbent individuals that it hoped to recruit during the transition, it provided no evidence of any efforts to secure their interest in joining the company if it prevailed here. On this record, we find no basis to object to NRO's concern that, notwithstanding that Sehlke identified these individuals as incumbent targets for future hiring, there was nothing in the proposal to suggest that the protester had taken any steps to secure commitments from (or at least gauge the potential interest of) the identified targets.

¶ 16 at 8. A proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. *Pioneering Evolution, LLC*, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 7. Relatedly, we have recognized that it is generally improper for an agency to award a contract or task order with the intent to materially alter it at or shortly after award. *Naval Sys., Inc.*, B-407090.3, Nov. 20, 2012, 2012 CPD ¶ 326 at 3; *Business Computer Apps., Inc.*, B-406230.3, May 16, 2012, 2012 CPD ¶ 159 at 3 n.2.

Relevant here, we have explained that when a solicitation requires resumes for--or otherwise requires the identification of--specific personnel, the proposed person forms a material requirement of the solicitation. See also AR, Tab 1X, Conformed RFP at 32 (stating that the four required key personnel “are considered essential for the work to be performed under this contract”). In the event of a change in availability of such staff or resources, the agency may either evaluate the proposal as submitted in light of the change, or hold discussions to allow for proposal revisions.⁴ See, e.g., *Ashlin Mgmt. Grp.*, B-419472.3, B-419472.4, Nov. 4, 2021, 2021 CPD ¶ 357 at 4-5; *PAE Applied Techs., LLC*, B-419133, Nov. 4, 2020, 2020 CPD ¶ 363 at 4; *M.C. Dean, Inc.*, B-418553, B-418553.2, June 15, 2020, 2020 CPD ¶ 206 at 4; *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 3-4 n.2.

⁴ Sehlke also argues that KPMG materially misrepresented the availability of a proposed key person. We note that the above line of decisions involving the subsequent unavailability of key personnel is distinct from the unique, but related, line of decisions addressing instances of intentional or grossly negligent misrepresentations regarding the availability of proposed key personnel, *i.e.*, a “bait and switch.” 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. *Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4.

Notwithstanding the protester’s arguments to the contrary, there is no basis here to conclude that KPMG engaged in an improper bait and switch. First, there is no evidence to suggest that the awardee had anything other than a good faith belief at the time of proposal submission that its proposed senior financial consultant, who was currently performing on the incumbent contract, would be available to perform on the follow-on effort. In this regard, KPMG submitted its proposal including a signed letter of commitment for its proposed senior financial consultant on September 30, 2021. See AR, Tab 2C, KPMG Mgmt. Proposal, KPMG Comments, exh. B, Decl. of Subcontractor Manager, ¶ 3. However, the individual resigned several months later in January 2022. Additionally, KPMG promptly notified the government of the key person’s unavailability following his resignation. Thus, there is no basis to find any knowing or negligent misrepresentation on KPMG’s part.

The material facts here are not in dispute. On September 30, 2021, KPMG submitted a proposal identifying a candidate for the required senior financial consultant position. This candidate was employed by KPMG's subcontractor and was performing on the incumbent contract. See, e.g., AR, Tab 2C, KPMG Mgmt. Proposal at 5; KPMG Comments, exh. B, Decl. of Subcontractor Manager, ¶ 3. On January 11, 2022, the proposed senior financial consultant notified KPMG's subcontractor that he was resigning to accept employment with another company. KPMG Comments, exh. B, Decl. of Subcontractor Manager, ¶ 4. On the same date, the individual submitted a letter of resignation to the subcontractor's human resources department identifying his last day as January 28. *Id.*, ¶ 5.

On January 14, the subcontractor notified KPMG of the individual's resignation. On or around January 17, the subcontractor and KPMG discussed a potential candidate to replace the previously proposed financial consultant. *Id.*, ¶ 6; see also KPMG Comments, exh. A, Decl. of KPMG Director, ¶ 9 (stating that KPMG provided "advance notice" to the agency of the resignation "to ensure that [the senior financial consultant's] ongoing, daily responsibilities were transferred to a suitable replacement should he leave [the subcontractor]"). On January 18, KPMG notified the contracting officer's technical representative (COTR) for the incumbent contract that the financial consultant had resigned and would be departing within two weeks. KPMG Comments, exh. A, Decl. of KPMG Director, ¶ 9; AR, Tab 10, Skype Message from KPMG to COTR (stating that the individual "turned in his two weeks to [KPMG's subcontractor] on Friday"). The COTR for the incumbent contract is also the proposed COTR for the follow-on contract, and was the chair of the team that evaluated the management proposals here, to include their proposed key personnel. See AR, Tab 1X, Conformed RFP at 12; Tab 3, Management Panel Report, at 1.

On January 24, the Source Selection Evaluation Team completed its evaluation and issued its final evaluation report. AR, Tab 4, Source Selection Eval. Team Report. On January 25, the source selection authority received an award recommendation briefing and executed the source selection decision. AR, Tab 5, Award Recommendation Briefing; Tab 6, Source Selection Decision. On January 27, NRO notified offerors of the agency's award decision. AR, Tab 7A, Unsuccessful Offer Notice; KPMG Comments, exh. A, Decl. of KPMG Director, ¶ 15. On January 28, KPMG's proposed senior financial consultant ceased working on the incumbent contract and left the employ of KPMG's subcontractor. KPMG Comments, exh. A, Decl. of KPMG Director, ¶ 16; *id.*, exh. B, Decl. of Subcontractor Manager, ¶ 10.

Thus, the undisputed facts reflect the following: (1) KPMG's proposed senior financial consultant submitted a letter of resignation to his employer and provided a firm resignation date predating the RFP's anticipated February 1 performance commencement date; (2) KPMG notified the government of the individual's resignation prior to the agency completing its evaluation and award decision; (3) the agency did not consider the impact of the resignation on KPMG's proposal or conduct discussions; and (4) the individual in fact left the employ of KPMG's subcontractor prior to the start of the resulting contract's performance. We find that the agency had actual notice with

KPMG's pre-award notice that one of its proposed key persons had resigned, and therefore would not be available to perform on the contract as KPMG had proposed. With that knowledge, we find that NRO was required either to evaluate the proposal as submitted in light of the change, or to conduct discussions with offerors.

The agency argues that notwithstanding the senior financial consultant's letter of resignation and the government's actual notice thereof, which *predated* the completion of the agency's evaluation and award decision, the individual was still an employee of KPMG's subcontractor at the time the agency made its award decision. In this regard, the agency and intervenor contend that the individual in question was technically not "unavailable" when the agency selected KPMG for award on January 25, because the effective date of the resignation was January 28. The parties further assert that because the individual was technically "available" at the time of the source selection decision--but would be unavailable prior to the commencement of performance of the resulting contract--our key personnel line of decisions is inapplicable. In this regard, the agency and intervenor assert that our Office has not previously found that a key person is unavailable when that person had not actually left their employer prior to award. The agency and intervenor additionally argue that it would not be reasonable to consider an employee unavailable before the employee has actually left their employer--what they refer to as "prospective unavailability." In their view, considering the employee unavailable before the employee's departure ignores the possibility that the individual could reverse course and elect not to resign.

We disagree with the agency's apparent view that it could ignore the pending departure of this key person. Based on the facts here, we find that it was unreasonable for the agency to base its evaluation on KPMG's offer of a senior financial consultant it had no realistic expectation would perform on the contract.

As an initial matter, we reject the argument advanced by the agency and the intervenor that KPMG's key person could reasonably be viewed as available to perform the contract simply because the individual continued as an employee for two weeks after submission of the letter of resignation. In our view, this argument elevates form over substance and fails to appreciate that our prior decisions (discussed below) turn on whether there was definitive knowledge of the proposed key person's unavailability to perform the intended contract.

While we recognize that these prior decisions are inherently fact specific, one of the touchstones of these cases is the definitive nature of the key person's unavailability. For example, in *PAE Applied Techs., LLC, supra*, we denied a protest challenging an agency's unacceptability determination when one of the protester's proposed key persons became unavailable before the agency completed its evaluation and made its award decision. In *PAE*, the protester was the incumbent contractor, and proposed an individual working on the incumbent contract as a key person for the follow-on effort. That individual tendered a letter of resignation, and the protester notified the government in connection with its incumbent contract of the key person's unavailability. Notwithstanding the protester's efforts to negotiate with the departed key person

candidate, we found that the agency reasonably concluded that the individual was unavailable after he terminated his employment with the protester's subcontractor and there was no evidence of any intent to work on the follow-on contract. *PAE Applied Techs., LLC, supra* at 5-6.

In contrast, in *MindPoint Grp., LLC*, B-418875.2, B-418875.4, Oct. 8, 2020, 2020 CPD ¶ 309, we found that a proposed key person's unavailability was not sufficiently definite. In that case, which we characterized as "a close call," we denied a protest alleging that an offeror failed to notify the government of the apparent unavailability of one of its proposed key persons when the individual in that case notified the awardee prior to award that, due to the delay in awarding the contract at issue, he "would be pursuing another offer." *Id.* at 6, 8. We explained that this "statement [was] not sufficiently definite to communicate unequivocally that the proposed key person would be unavailable" and the record did not otherwise reflect that the candidate had rescinded its offer to serve as a key person. *Id.* at 8.

Here, however, the senior financial consultant unambiguously resigned to take a position with a different firm, thereby making it clear that the individual would not be available to perform as part of the follow-on contract effort.⁵ The agency could not reasonably ignore this fact simply because the individual had not yet completed the final two weeks of employment when the agency made its selection decision. The entire purpose of the evaluation and selection process was to discern which contractor offered the best value to the government to perform a contract that was not scheduled to begin until February 1, after the key person was scheduled to leave KPMG's subcontractor. Thus, the operative date for consideration of the impact of the key person's departure was February 1 (at the start of contract performance), not the January 25 selection decision date.⁶

⁵ To the extent NRO and KPMG argue that the awardee had no duty to notify the agency of the senior financial consultant's resignation because he had not yet stopped working for the subcontractor, this argument ignores the fact that KPMG notified NRO that the senior financial consultant had resigned and had "turned in his two weeks." AR, Tab 10, Skype Message from KPMG to COTR. Thus, regardless of whether KPMG had an obligation to notify the government, there is no dispute that KPMG in fact notified the agency of the resignation.

⁶ In this regard, we need not address each of the hypothetical arguments posited by the agency involving materially different potential factual circumstances. As addressed above, these types of cases are highly fact specific and our decision here--which is based on the proposed key person's resignation and unavailability prior to the commencement of performance, and the agency's knowledge of these developments--would not necessarily be applicable to other scenarios where a proposed key person will become unavailable at some point after the commencement of performance (e.g., if an individual provides notice that they will be retiring at a later point in time).

KPMG and NRO also argue that the resignation should somehow be interpreted as limited to the incumbent contract, and had no actual bearing on the resulting follow-on effort protested here. This argument attempts to interject ambiguity about the scope of the resignation where none exists. In short, there is nothing to suggest that the individual's notice of resignation was somehow limited to working on the incumbent contract. The record establishes that the individual was resigning to join another firm. We see no basis to assume, without evidence to the contrary, that despite this individual's resignation during the course of the incumbent contract, the individual might return a week later to perform the follow-on contract for the same company.

There is also nothing in the record to suggest that the proposed senior financial consultant's resignation was anything other than unequivocal. Indeed, as addressed above, the resignation was sufficiently definite for KPMG to notify the agency that the individual had resigned and would be departing within two weeks. In addition, although KPMG posits that it "was hopeful that [the senior financial consultant] would stay at [the subcontractor]" based on KPMG's and its subcontractor's overtures to the individual, KPMG Comments, exh. A, Decl. of KPMG Director, ¶ 11, KPMG's own protest submissions suggest no basis for such a hope.⁷

In summary, our decision turns on the uncontested facts demonstrating that the awardee and agency both knew the proposed key individual was unavailable to perform in the key personnel role. Indeed, KPMG found the notice to be sufficiently definite to promptly disclose the anticipated departure to its government customer. At that point, before the agency had completed its evaluation and made its award decision, there was no reasonable basis for proceeding with an evaluation that KPMG would perform the contract as it had proposed. Thus, we find that the agency either needed to (i) evaluate KPMG's proposal without reliance on this candidate for a required key person position, or (ii) open discussions and solicit revised proposals. Since the agency took neither of these limited options, we sustain the protest.⁸

⁷ In this regard, KPMG also submitted a declaration from its subcontractor's manager responsible for oversight of both the incumbent subcontract and pursuit of the follow-on work stating that upon receiving oral notice of the individual's resignation, the manager asked "whether there was anything that [the subcontractor] could do to change [the senior financial consultant's] mind," and the individual "responded that there was not, but that he very much enjoyed working for [the subcontractor] and would stay in touch." KPMG Comments, exh. B, Decl. of Subcontractor Manager, ¶ 4.

⁸ The agency and intervenor also direct our attention to the United States Court of Federal Claims's recent decision in *Golden IT, LLC v. United States*, 157 Fed. Cl. 680 (2022), upholding an agency's award when, prior to award, one of the awardee's key personnel became unavailable to work on the contract as the awardee had proposed. In upholding the award, the court explained that the awardee had no obligation to notify the government of material changes to the availability of its proposed key person.

RECOMMENDATION

We recommend that the agency either evaluate KPMG's proposal as submitted, without considering the previously proposed and unavailable senior financial consultant, or open discussions with all offerors and allow for revised proposals to be submitted. The agency should 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). Sehlke 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

As an initial matter, our Office is not bound by decisions of the Court of Federal Claims. *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 7; *Kingdomware Techs.--Recon.*, B-407232.2, Dec. 13, 2012, 2012 CPD ¶ 351 at 3.

In any event, the facts of that case are materially distinguishable from the facts at issue here. In *Golden IT*, prior to making award, the agency had no knowledge that the awardee's key person was unavailable to perform on the contract as proposed. See *Golden IT*, 157 Fed. Cl. at 703-704. In contrast, as discussed above, KPMG in fact notified the agency of the resignation, and, thus, NRO had actual knowledge of the key person's resignation *prior* to completing its evaluation and making its award decision. Accordingly, we find that it was unreasonable for the agency to intentionally disregard the fact that KPMG's proposal was based on a key person it knew would not be available to perform on the contract as proposed.