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## Decision

**Matter of:** ASRC Federal Data Solutions, LLC

**File:** B-421008; B-421008.2; B-421008.3

**Date:** December 2, 2022

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### DIGEST

Protest that the awardee's quotation contained a material misrepresentation concerning the availability of a proposed key person is sustained where the record shows that the awardee's quotation stated the awardee had contingent offers for key personnel, but the identified individual stated that they were exclusively committed to another firm, did not consent to the use of their name or qualifications in the awardee's quotation, and did not accept a contingent offer of employment. In addition, the record shows that the misrepresentations had a material effect on the agency's evaluation of the awardee's quotation.

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### DECISION

ASRC Federal Data Solutions, LLC (ASRC), a small business of Beltsville, Maryland, protests the establishment of a blanket purchase agreement (BPA) with Arlluk Technology Solutions, LLC (Arlluk), a small business of Chantilly, Virginia, under request for quotations (RFQ) No. NIEHS-RFQ-22-6223146, which was issued by the Department of Health and Human Services, National Institute of Environmental Health Sciences for information technology (IT) services supporting the Division of the National Toxicology Program (DNTP). ASRC challenges the agency's evaluation of quotations, tradeoff analysis, and resulting source selection decision.

We sustain the protest.

## BACKGROUND

The agency issued the RFQ on June 30, 2022, under the General Services Administration's (GSA) Federal Supply Schedule (FSS) procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. The RFQ, which was subsequently amended once, sought quotations from small business vendors holding schedule 70 contracts for IT professional services and health IT services. Agency Report (AR), Tab 2.1, RFQ at 4, 18; Tab 2.2, RFQ amend. 1; Tab 1.1, Contracting Officer's Statement (COS) ¶¶ 4. The RFQ contemplated establishment of a single BPA with a 1-year base period and four 1-year options, under which the agency could place fixed-price, time-and-materials, or labor-hour orders. RFQ amend. 1 at 5-8. The agency estimated the total value of orders to be placed under the BPA over the entire 5-year ordering period to be \$90 million. *Id.* at 4.

The agency is acquiring IT services supporting the management and reporting of environmental health research data from DNTP studies and other sources. RFQ amend. 1, Statement of Work (SOW) at 4. The services involve data integration from across multiple studies and domains, and the presentation of that data in meaningful and accurate formats for use in decision-making by DNTP scientists, other government agencies, and the public. *Id.*

Selection was to be made on a best-value tradeoff basis utilizing the following evaluation factors: (1) approach to hypothetical projects; (2) organizational experience and management; (3) personnel technical capabilities and qualifications; and (4) price. RFQ amend. 1 at 24-25. The non-price factors were equally important to each other, and when combined, were significantly more important than price. *Id.* at 24.

As relevant here, under the personnel technical capabilities and qualifications factor, vendors were to submit information detailing the experience, qualifications, accomplishments, and abilities for three labor categories deemed by the agency to be critical to the success of DNTP's BPA requirements: technical point of contact (TPOC); technical lead; and curation lead. *Id.* at 22. The agency would evaluate submissions under this factor for adequacy and appropriateness of the demonstrated technical experience, qualifications, accomplishments, and abilities requested by the agency for the quoted critical labor category personnel. *Id.* at 25. The RFQ stated that the agency anticipated identifying these positions as key personnel in task orders issued under the BPA, and that substitution of key personnel would require prior written consent of the agency. *Id.* at 12-13, 16; SOW at 38-39.

Quotations in response to the RFQ were due by July 25, 2022. COS ¶¶ 6. The agency received four quotations, including from ASRC and Arlluk. *Id.* The agency evaluated the quotations of ASRC and Arlluk as follows:

	ASRC	Arlluk
<b>Factor 1</b> – Approach to Hypothetical Projects	Good	Outstanding
<b>Factor 2</b> – Organizational Experience and Management	Good	Good
<b>Factor 3</b> – Personnel Technical Capabilities and Qualifications	Good	Outstanding
<b>Factor 4</b> – Price	\$31,552,973	\$37,399,549

AR, Tab 6.1, Source Selection Determination (SSD) at 13.

On August 17, 2022, the agency notified ASRC that it had not been selected, identifying Arlluk as the selected vendor. AR, Tab 7.2, Notification to Unsuccessful Quoter/Offeror. That same day, ASRC requested a brief explanation of the agency’s decision pursuant to FAR subsection 8.405-3(b)(3). AR, Tab 7.3, Email from Protester to Agency, Aug. 17, 2022. On August 22, the agency provided ASRC with a written brief explanation, which included the adjectival ratings assigned to the quotations of ASRC and Arlluk, the quotations’ total evaluated prices, and a brief summary that the agency had determined that Arlluk’s quotation offered a technically superior solution that warranted the associated price premium. AR, Tab 7.4, Post Award Brief Explanation Letter at 1-2.

ASRC filed a protest with our Office on August 29, and thereafter filed a supplemental protest on September 1. Following the submission of the agency’s report on September 28, ASRC filed a second supplemental protest on October 11.

## DISCUSSION

ASRC alleges that Arlluk’s quotation contained material misrepresentations concerning the availability of two of the key personnel identified in Arlluk’s quotation. Comments & Second Supp. Protest at 3-9. ASRC alleges that the individuals identified in Arlluk’s quotation for the technical lead and TPOC positions--hereinafter referred to as Mr. A and Dr. B, respectively--are employees of the incumbent contractor, which is a sister company to ASRC. *Id.* at 3-6. As alleged by ASRC, those individuals signed exclusive letters of commitment with ASRC for this procurement. *Id.* at 4. In light of those letters, ASRC argues, Arlluk had no reasonable basis on which to include those individuals in its quotation as key personnel, and therefore misrepresented their availability if the agency were to select Arlluk for the BPA. *Id.* at 6-9.

For the reasons that follow, we sustain the protest.<sup>1</sup>

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<sup>1</sup> ASRC raises additional challenges to the agency’s evaluation of quotations and the resulting best-value tradeoff. Although our decision does not expressly address every

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. 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. *T3I Solutions, LLC*, B-418034, B-418034.2, Dec. 13, 2019, 2019 CPD ¶ 428 at 5; *Sev1Tech, Inc.*, B-416811, B-416811.2, Dec. 18, 2018, 2018 CPD ¶ 429 at 5. Our

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argument raised by the protester, we have reviewed them all and find that none provides a basis on which to sustain the protest.

For example, we previously dismissed as untimely the protester's challenges to the agency's evaluation of Arlluk's quotation under the approach to hypothetical projects and organizational experience and management factors. In this respect, the protester's allegations were untimely raised more than 10 days after its receipt of the agency's notice of award, which reasonably provided the basis for such allegations. See Electronic Protest Docketing System (Dkt.) No. 16, Notice of Resolution of Req. for Dismissal at 1-2; see also *ITility, L.L.C.*, B-415274.3, Apr. 2, 2018, 2018 CPD ¶ 134 at 5-6 (protest of award under FAR subpart 8.4 untimely where basis of protest was known through unsuccessful offeror notification).

Additionally, the protester contends that the agency unreasonably evaluated ASRC's proposal by failing to evaluate numerous additional strengths and unreasonably assessing a number of weaknesses. Where, as here, an agency conducts a formal competition for the establishment of a BPA, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes. *Vinculum Solutions, Inc.*, B-406760, B-406760.2, Aug. 22, 2012, 2012 CPD ¶ 249 at 6; *AINS, Inc.*, B-400760.2, B-400760.3, June 12, 2009, 2009 CPD ¶ 142 at 5. With respect to the strengths that ASRC alleges its quotation warranted but did not receive, the agency has adequately explained why it did not find that those aspects of ASRC's quotation exceeded requirements such that they merited the assignment of strengths. See AR, Tab 1.2, Supp. Statement of Technical Evaluation Panel (TEP) Chair at 10-11. We also discern no basis on which to conclude that the agency assigned weaknesses to ASRC's quotation in a manner that was unreasonable or inconsistent with the RFQ's stated evaluation criteria. Accordingly, we deny these aspects of the protest.

Because, as detailed below, we sustain ASRC's protest with respect to a material misrepresentation in Arlluk's quotation, the challenges to the agency's best-value tradeoff are academic, and we therefore do not consider them. See, e.g., *ISHPI Info. Techs., Inc.*, B-420718.2, B-420718.3, July 29, 2022, 2022 CPD ¶ 195 at 13-14 (sustaining protest of BPA establishment and dismissing academic protest grounds).

decisions frequently refer to such circumstances as a “bait and switch.” *Patricio, supra* at 4. 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. *Id.*; *IT Objects, LLC*, B-418012, B-418012.2, Jan. 2, 2020, 2020 CPD ¶ 2 at 5. These principles apply equally where, as here, an agency solicits quotations for the establishment of a BPA. See *Vinculum Solutions, supra* at 8.

As shown in the agency report, both ASRC and Arlluk included in their quotations Mr. A and Dr. B as their technical lead and TPOC, respectively. AR, Tab 3.2, ASRC Quotation Vol. I at 63-68; AR, Tab 4.2, Arlluk Quotation Vol. I at 35-38. ASRC’s quotation stated that those individuals had signed “exclusive Letters of Commitment” with ASRC, and that no other company was authorized to use the résumés or names of those key personnel in their quotations. AR, Tab 3.2, ASRC Quotation Vol. I at 63. ASRC’s quotation also included copies of letters signed by Mr. A and Dr. B on July 12, 2022--approximately two weeks prior to the RFQ’s July 25 response date--stating in relevant part as follows:

By signing this Letter of Commitment, I authorize [ASRC] to include my name, resume, and/or other information about me in the above stated proposal [for the DNTP BPA]. By signing this Letter of Commitment, I certify that (1) the information about me in the above stated proposal is timely and accurate, and (2) ***I am exclusively committed to this effort with [ASRC] as the Prime Contractor. No other company is authorized to use my resume in their proposal.***

*Id.* at A-73, A-75.

Like ASRC’s quotation, Arlluk’s quotation included statements of qualifications, competencies, experience, education, certifications, and training for Mr. A and Dr. B. AR, Tab 4.2, Arlluk Quotation Vol. I at 35-38. Unlike ASRC’s quotation, Arlluk’s quotation contained no letters of commitment from those individuals,<sup>2</sup> but stated that “[w]e have contingent offers for . . . critical incumbent leaders and proposed them as key personnel.” *Id.* at 32.

Following submission of the agency report, we requested additional information regarding the consent of Mr. A and Dr. B to be included in Arlluk’s quotation, as well as whether those individuals had received or accepted contingent offers from Arlluk, or otherwise indicated their willingness to accept employment by Arlluk, prior to the submission of Arlluk’s quotation. See Dkt. No. 27, Notice to the Parties, Oct. 27, 2022.

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<sup>2</sup> The RFQ did not require letters of commitment for individuals submitted under the personnel technical capabilities and qualifications factor. See RFQ amend. 1 at 22.

In response, Arlluk provided copies of email correspondence between Arlluk and both Mr. A and Dr. B. See Dkt. No. 28, Arlluk Response, Nov. 3, 2022, exh. A. As detailed in the correspondence, Arlluk provided Mr. A with a contingent offer of employment on June 14, 2021, which Mr. A accepted the next day. *Id.* at 9-10. Similarly, Arlluk provided Dr. B with a contingent offer of employment on June 14, 2021, which Dr. B also accepted the next day. *Id.* at 2-5.

The correspondence further showed that on July 5, 2022--over a year later, and 20 days prior to the RFQ's response date--Arlluk contacted Mr. A to update his offer letter. *Id.* at 8-9. Following an apparent telephone conversation, Arlluk provided Mr. A an updated contingent offer on July 5, which Mr. A accepted on July 8. *Id.* at 6-8, 11-12. Mr. A also provided Arlluk with an updated résumé on July 6. *Id.* at 6-7. Additionally, at Arlluk's request, Mr. A provided Arlluk with telephone contact information for Dr. B on July 6. *Id.* at 7.

In contrast to the July 2022 correspondence regarding an updated contingent offer to Mr. A, Arlluk's submission was silent with respect to any communications between Arlluk and Dr. B between June 2021 and July 2022. In response to our request for further information, the protester represented that Dr. B had stated that Arlluk had reached out to her in July 2022 regarding employment, and that Dr. B had rejected that offer. See Dkt. No. 29, ASRC Response, Nov. 3, 2022 at 1-2. The protester stated that it provided no supporting evidence, such as a sworn declaration or copies of correspondence, because Dr. B had stated a desire not to be involved in a legal dispute. *Id.* at 2. We requested further information from the parties regarding any correspondence between Arlluk and Dr. B discussing any offer of employment related to the procurement between June 16, 2021, and the July 25, 2022, RFQ response date. Dkt. No. 30, Notice to the Parties, Nov. 7, 2022.

ASRC then submitted copies of email correspondence between Arlluk and Dr. B. See Dkt. No. 32, ASRC Response, Nov. 8, 2022, exh. A. That correspondence reflected that Arlluk had contacted Dr. B via email on July 5, 2022, to follow up regarding the DNTP procurement, and sought to arrange a telephone call. *Id.* at 2. There appeared to be no response until July 12, when Dr. B responded to Arlluk as follows:

I just signed a mandatory document with ASRC this morning that "I am exclusively committed to this effort with [ASRC] as the Prime Contractor. No other company is authorized to use my resume in their proposal."

Good luck with the proposal[.]

*Id.* at 1-2. The Arlluk executive who had contacted Dr. B on July 5 provided a sworn declaration stating, in part, that he did not recall having any discussions with Dr. B after receiving the July 12 response and before the submission of Arlluk's quotation. Dkt. No. 34, Arlluk Response, Nov. 9, 2022, decl. of Arlluk executive ¶ 5.

## Misrepresentation

On the record before us, we conclude that the protester has not shown that Arlluk's quotation contained a misrepresentation with respect to the availability of Mr. A, as Arlluk had a reasonable basis to expect to furnish Mr. A during performance. As discussed above, the record shows that Mr. A accepted a contingent offer of employment from Arlluk in June 2021. The record further shows that Arlluk contacted Mr. A again in July 2022 and provided Mr. A with an updated contingent offer, which Mr. A accepted on July 8. Additionally, Mr. A provided Arlluk with a résumé on July 6. In short, the correspondence between Arlluk and Mr. A shows that Mr. A consented to the inclusion of his name and qualifications in Arlluk's quotation, and furthermore that Mr. A was willing to accept employment with Arlluk if it was selected by the agency. In these circumstances, we find no basis to conclude that Arlluk misrepresented the availability of Mr. A to the agency if Arlluk was selected for the BPA.<sup>3</sup> See *Vinculum Solutions, supra* at 8 (individuals consented to inclusion of their names in quotation and committed to employment if firm selected for BPA); see also *Resource Consultants, Inc.*, B-250241, B-250241.2, Jan. 11, 1993, 93-1 CPD ¶ 27 at 3-4 (awardee provided résumés and certifications showing contingent hires were willing to work for awardee at specified rates, and confirmed availability prior to final proposal submission).

In contrast, the record shows that Arlluk did not have a reasonable basis on which to expect it would furnish Dr. B during contract performance. While the record shows that Dr. B, like Mr. A, accepted a contingent offer of employment from Arlluk in June 2021, it further shows that Dr. B not only declined to confirm her prior acceptance, but in fact communicated her refusal to allow Arlluk to include her name and qualifications as part of the awardee's quotation. Specifically, as set forth above, Dr. B notified Arlluk prior to quotation submission that she had signed a document with ASRC stating that she was "exclusively committed to [the DNTP] effort with [ASRC] as the Prime Contractor[,]" and further that "[n]o other company is authorized to use my resume in their proposal." The plain indication of Dr. B's response was that Dr. B did not consent to Arlluk's inclusion of her résumé as part of Arlluk's quotation.<sup>4</sup> And while, as Arlluk points out, this response

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<sup>3</sup> ASRC argues that because it included the letters of commitment in its quotation, the agency was aware that Mr. A was unavailable to Arlluk and therefore should not have considered Mr. A's qualifications in evaluating Arlluk's quotation. See Supp. Comments at 6. Our Office, however, will not review a protester's allegation that the awardee may violate a non-compete agreement, as it concerns a private dispute that does not involve government action. *AVER, LLC*, B-419244, Nov. 2, 2020, 2020 CPD ¶ 360 at 4.

<sup>4</sup> Arlluk's comments concede that Arlluk's quotation included résumés for Mr. A and Dr. B. See Intervenor Comments at 3 n.1 ("However, Arlluk's proposal clearly included the resumes for the candidates it submitted for the Technical Point of Contact and Technical Lead positions."); Intervenor Supp. Comments at 2 ("Arlluk's including their resumes in the Arlluk quote does not mean Arlluk misrepresented their ability to perform the work should Arlluk receive a task order award under the BPA."), 3 ("Furthermore, ASRC cannot show it was prejudiced by Arlluk's use of the resumes of these two

did not include an express repudiation of the contingent offer that Dr. B accepted in June 2021, Dr. B did state that she was “exclusively committed” to ASRC, indicating that Dr. B was not willing to accept employment with Arlluk. Coupled with the refusal to discuss the procurement with Arlluk, Dr. B’s email response provides a clear statement of intention not to be involved in Arlluk’s efforts to secure the BPA.

In this regard, the facts in *Aerospace Design & Fabrication, Inc., B-278896.2 et al.*, May 4, 1998, 98-1 CPD ¶ 139, are instructive. At issue there were representations by the awardee regarding the nature of the commitment it received from three incumbent personnel. 98-1 CPD ¶ 139 at 5. The awardee’s proposal identified those individuals in its proposal, and further stated that it had “received [their] commitment to become a member of the [awardee’s] team upon contract award.” *Id.* Of particular relevance here, hearing testimony demonstrated that one of the individuals expressly denied the awardee’s request to provide information for use in its proposal, and also refused to grant the awardee permission to identify him in its proposal. *Id.* at 6. The individual testified that he told a representative of the awardee that he was exclusively committed to another offeror, and that the awardee could not use his name or résumé in its proposal. *Id.* He further testified that when the awardee’s representative asked if he would consider working for the awardee if it won the contract, he stated that “he would consider it.” *Id.*

In light of this record, our Office concluded that the awardee had misrepresented that it had received a commitment from the individual. *Id.* at 7. The record showed that the individual had expressly refused permission to include him in the awardee’s proposal, and that “[a]t best, after [the individual] refused to respond to several entreaties, he agreed to ‘consider’ working for [the awardee] in the event it prevailed in the competition.” *Id.* Because these facts could not be reconciled with the awardee’s representation in its proposal that it had secured a commitment from the individual to join the awardee, we concluded that the awardee had misrepresented the level of commitment in its proposal. *Id.* at 7-8.

Similar to the awardee in *Aerospace Design*, Arlluk’s quotation represented that Arlluk had secured a commitment from Dr. B, among others, to join Arlluk if it were selected

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individuals in the Arlluk quote.”). In responding to our request for further information, however, Arlluk subsequently suggested that it did not include résumés for Mr. A and Dr. B in its quotation, but rather only “demonstrated the qualifications and experience of these individuals in a resume *format*[.]” Dkt. No. 28, Arlluk Response, Nov. 3, 2022 at 2.

Arlluk’s later position raises a distinction without a difference in light of the substantive information contained in Arlluk’s quotation. In this regard, the record is clear that Dr. B’s July 2022 communication specifically indicated that her participation in the procurement was exclusively as part of ASRC’s quotation and that no other firm, including Arlluk, had authorization to include her information as part of its quotation.



for the BPA, stating that “[w]e have contingent offers for . . . critical incumbent leaders and proposed them as key personnel.” Like the individual in *Aerospace Design*, Dr. B also refused to grant Arlluk permission to include her information in Arlluk’s quotation, and indicated that she was exclusively committed to another firm, *i.e.*, ASRC.

Additionally, just as the individual in *Aerospace Design* “refused to respond to several entreaties,” Dr. B refused to respond to Arlluk’s July 5 email.<sup>5</sup> As discussed above, Dr. B’s July 12 response voiced a clear intention not to be involved in Arlluk’s efforts to secure the BPA. At best, then, as in *Aerospace Design*, the record here shows that Arlluk had Dr. B’s equivocal consideration of future employment in light of the June 2021 contingent offer acceptance and the subsequent indication shortly before the RFQ’s response date that Dr. B was exclusively committed to ASRC. Thus, the facts here track closely with those in *Aerospace Design* that led us to conclude that the awardee’s proposal included a misrepresentation regarding the availability of key personnel.

In addressing Dr. B’s July 12 response, Arlluk argues that it “read between the lines,” contending that the term “mandatory” indicated that Dr. B “made the commitment to ASRC under duress and did not, in fact, mean what the statement reflects.” Dkt. No. 34, Arlluk Response, Nov. 9, 2022 at 3. Arlluk’s inference runs counter to the plain language of Dr. B’s response, and even if Arlluk believed it ultimately would be able to hire Dr. B, such a belief does not provide a reasonable basis to include Dr. B in Arlluk’s quotation. See *Patricio, supra* at 5 (“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.”); *Sev1Tech, supra* at 5 (same); *T3I Solutions, supra* at 6 (same).

The agency presents two arguments bearing on Arlluk’s representation regarding key personnel. First, the agency argues that the matter is a private dispute between ASRC and Arlluk regarding the violation of a non-compete agreement. See Supp. Memorandum of Law (MOL) at 2-3. Second, the agency argues that there is no evidence that Arlluk was aware of the letters of commitment, and further that the agency reasonably believed that Arlluk had discussions with Mr. A and Dr. B, and that they had provided their résumés to Arlluk. *Id.* at 3-5.

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<sup>5</sup> As discussed above, the record also shows that Mr. A provided Arlluk with telephone contact information for Dr. B on July 6, 2022. Dkt. No. 28, Arlluk Response, Nov. 3, 2022, exh. A at 7. While ASRC represents that Dr. B refused a telephone call from an Arlluk representative following receipt of the July 5 email, see Dkt. No. 32, ASRC Response, Nov. 8, 2022, there are no contemporaneous documents or declarations that directly support that representation, and the declaration provided by Arlluk states only that the declarant did not recall having any discussions with Dr. B after receiving the July 12 response and before the submission of Arlluk’s quotation, see Dkt. No. 34, Arlluk Response, Nov. 9, 2022, decl. of Arlluk executive ¶ 5.

As discussed above, with respect to Mr. A--who authorized Arlluk to use his name and qualifications in its quotation and accepted a contingent offer of employment shortly before Arlluk submitted its quotation--we conclude that ASRC's protest concerns a private dispute between ASRC and Arlluk as the agency contends. With respect to Dr. B, however, the agency's private dispute argument is inapposite. The matter does not concern the legal effect and enforceability of Dr. B's letter of commitment, but rather whether Arlluk had a reasonable basis to include her résumé in its quotation.

With respect to the agency's second argument--that Arlluk was unaware of the letters of commitment--the agency's response does not address this apparent discrepancy as the agency submitted its brief before record supplementation demonstrated that, prior to submitting its quotation, Arlluk was, in fact, aware of Dr. B's letter of commitment and refusal to engage with Arlluk regarding its contingent offer of employment. Consequently, on these facts, we conclude that Arlluk had no reasonable basis to include Dr. B in its quotation and to state that it had a contingent offer for Dr. B.

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. Our Office also has recognized, however, that a good-faith intent to hire incumbent personnel does not absolve an offeror of responsibility for submitting a proposal that contains material misrepresentations regarding the availability of proposed personnel. See *ManTech Advanced Sys. Int'l, Inc.*, B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5 (misrepresentations regarding availability of proposed personnel were material even where the RFP did not require letters of commitment); *ACS Gov't Servs., Inc.*, B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 9-10 (awardee's misrepresentations may be material, even where they were not intentionally misleading). Thus, we conclude that regardless of Arlluk's intention to hire Dr. B, its quotation misrepresented the commitment of Dr. B to work for Arlluk if the agency selected Arlluk for the BPA.

#### Agency Reliance and Material Effect

Next, we conclude that the agency relied upon the misrepresentation in Arlluk's quotation regarding the availability of Dr. B, and that it had a material effect on the evaluation. As discussed above, the RFQ expressly provided that the agency's evaluation would consider the technical experience, qualifications, accomplishments, and abilities of the TPOC, among other key positions. In keeping with the RFQ's evaluation scheme, the Technical Evaluation Report reflects that the agency assigned Arlluk's quotation a strength for Dr. B's qualifications and experience. See AR, Tab 5.1, Technical Evaluation Report at 7-8. The source selection authority noted the "strong qualifications" and "extensive experience" of Arlluk's key personnel--including Dr. B as the TPOC--and noted ASRC's lesser rating under the personnel technical capabilities

and qualifications factor<sup>6</sup> in conducting the tradeoff. See AR, Tab 6.1, Source Selection Determination at 15-16. Based on the RFQ's statement that the non-price factors, when combined, were significantly more important than price, the source selection authority found that there were "substantial technical differences between" ASRC and Arlluk, and that "[t]he comprehensive technical strengths of [Arlluk's quotation] warrant the \$5.8M (or 18.5%) price premium." *Id.* at 16.

On this record, we conclude that the strength assigned to Arlluk's quotation for its TPOC was based on Arlluk's inclusion of Dr. B in its quotation, as well as its representation that Arlluk had a contingent offer of employment with Dr. B. Moreover, that strength contributed to the agency's determinations that Arlluk's quotation both was technically superior to ASRC's and warranted the associated 18.5% price premium. We therefore conclude that the record shows that the agency's evaluation of Arlluk's quotation relied upon the misrepresentation with respect to Dr. B, and that the agency's reliance had a material effect on the evaluation results.<sup>7</sup>

Finally, based on this record, we also find that ASRC was prejudiced by Arlluk's material misrepresentation with respect to Dr. B and the effect it had on the agency's evaluation. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. See, e.g., *Mayvin, Inc.*, B-419301.6, B-419301.7, June 29, 2021, 2021 CPD ¶ 249 at 8. We resolve doubts regarding prejudice in favor of the protester; a reasonable possibility of prejudice is sufficient to sustain a protest. *Meridian Knowledge Solutions, LLC*, B-420150 *et al.*, Dec. 13, 2021, 2021 CPD ¶ 388 at 7.

Here, the agency concluded that Arlluk's quotation was superior to ASRC's under the personnel technical capabilities and qualifications factor based in part on the strength assigned to Arlluk's quotation for Dr. B's qualifications, abilities, and experience. Moreover, given that the agency evaluated only three key personnel positions under that factor, it is clear that the merits of Arlluk's TPOC bore a substantial importance in the agency's personnel technical capabilities and qualifications factor evaluation. Additionally, the agency's finding that Arlluk's quotation was technically superior led the agency to conclude that Arlluk's quotation merited the associated price premium, and to select Arlluk for the BPA. We therefore conclude that ASRC was prejudiced in this competition by Arlluk's misrepresentation with respect to Dr. B.

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<sup>6</sup> While the quotations of ASRC and Arlluk both named Mr. A and Dr. B as the technical lead and TPOC, respectively, the agency evaluated ASRC's curation lead less favorably than Arlluk's candidate. See AR, Tab 5.1, Technical Evaluation Report at 8, 17; AR, Tab 6.1, Source Selection Determination at 15-16.

<sup>7</sup> The agency did not raise any arguments addressing the agency's reliance on, or the material effect of, Arlluk's misrepresentation. See Supp. MOL at 2-5.

## CONCLUSION

For the reasons discussed above, we conclude that Arlluk's quotation contained a material misrepresentation concerning the availability of Dr. B, a key person. The record here shows that the agency relied upon Arlluk's misrepresentations, and that those misrepresentations had a material effect on the evaluations.

We also conclude that the appropriate remedy here is for the agency to exclude Arlluk's quotation from the competition.

Our Office has explained that exclusion from a competition is warranted where an offeror made a material misrepresentation in its proposal and where the agency's reliance on the misrepresentation had a material effect on the evaluation results. See *Patricio, supra* at 15 (sustaining protest and recommending exclusion of awardee from further consideration where the awardee made material misrepresentations regarding availability of proposed personnel); *ACS Gov't Servs., supra* at 11 (sustaining protest and recommending exclusion of awardee from further consideration where the awardee made material misrepresentations regarding the employment agreements with proposed personnel); *Informatics, Inc.*, B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13 (sustaining a protest and recommending exclusion of awardee from further consideration based on the awardee's misrepresentation of the results of a survey of the availability of incumbent's personnel). See also *Patriot Contract Servs.--Advisory Opinion*, B-294777.3, May 11, 2005, 2005 CPD ¶ 97 at 10 (advising United States District Court for the Northern District of California that, based on the awardee's material misrepresentations concerning the availability of proposed personnel, GAO likely would have sustained a protest that had been withdrawn and recommended that the agency terminate the contract and make award to the protester). As our Office has stated, where an offeror's material misrepresentation has a material effect on a competition, the integrity of the procurement system "demands no less" than the remedy of exclusion. *ACS Gov't Servs., supra* at 11.

There are other circumstances, however, where we have not recommended exclusion. 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. See *T3I Solutions, supra* at 7 (sustaining protest but not recommending exclusion of awardee from competition because the misrepresentation was less egregious than that in *Patricio, supra*); *Sev1Tech, supra* at 7 (sustaining protest but not recommending exclusion of awardee from competition); *Johnson Controls Sec. Sys.*, B-296490, B-296490.2, Aug. 29, 2005, 2007 CPD ¶ 102 at 11-12 (sustaining protest but not recommending exclusion of awardee from the competition where the awardee made material misrepresentations regarding arrangements for its personnel to receive mandatory training and certifications prior to award); *CourtSmart Digital Sys., Inc.*, B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79 at 6, 13-14 (sustaining protest but not recommending exclusion of awardee from competition where the record did not clearly indicate that the awardee's misrepresentation that a proposed item was on the

federal supply schedule was intentional); *Aerospace Design, supra* at 19 (sustaining protest where the awardee misrepresented the availability of its key personnel and had not obtained a commitment from the proposed individuals as it claimed, but not recommending disqualification of the awardee because the misrepresentation lacked the same level of disregard for the truth that GAO had found in *Informatics, supra*).

As we have noted, our recommendations in misrepresentation cases have differed as a result of the unique facts of each case. *XYZ Corp.*, B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296 at 6 n.9. Here, the facts distinguish this protest from those where we have sustained a protest alleging a material misrepresentation but did not recommend exclusion. For example, in *T3I Solutions*, the solicitation provided that the non-price factors--mission capability and past performance--when combined, were approximately equal in importance to price. See *T3I Solutions, supra* at 2. The awardee's proposal was lower-rated than the protester's, and also was lower-priced by approximately 43.6 percent. See *id.* at 3. Thus, the technical merits of the awardee's proposal--including the material misrepresentations in the awardee's proposal--were less significant to the agency's evaluation than here, where the non-price factors, when combined, were significantly more important than price and where the price premium associated with Arlluk's quotation was comparatively smaller.

The facts in *Sev1Tech* also are distinguishable. There, the solicitation required offerors to submit résumés for 26 positions, six of which were identified as key. See *Sev1Tech, supra* at 2. The awardee submitted names and résumés for 10 incumbent staff, misrepresenting that it had contacted and negotiated contingent offers of employment with those individuals. See *id.* at 5-6. Unlike the protest at hand, however, there was no indication that any of those individuals were key personnel. Furthermore, the awardee in *Sev1Tech* stated that it had inadvertently included the statement regarding contingent offers in its proposal as the result of a clerical error in drafting its proposal. See *id.* at 6. This bears on the intentionality of the awardee's misrepresentation, and stands in contrast to the facts here, which do not show that Arlluk's representation regarding contingent offers was inadvertent or otherwise unintentional.

Lastly, key to our recommendation in *Aerospace Design* was that the impacts on the competition of the awardee's misrepresentations regarding the availability of key personnel "were compounded by agency actions during the evaluation." *Aerospace Design, supra* at 19. Specifically, while the awardee's proposal had stated only that the awardee had "received [the individuals'] commitment to become a member of the [awardee's] team upon contract award[,]" see *id.* at 5, the agency's evaluation overstated the nature of the proposal's representation, stating that "[s]igned commitments were obtained from all key personnel proposed[,]" see *id.* at 9. Thus, we concluded, the agency's evaluation error compounded the effect of the proposal's misrepresentation and we did not recommend the disqualification of the awardee. See *id.* at 8-10, 19. In this case we have no such compounding evaluation error by the agency; the significance and responsibility of the misrepresentation to the evaluation here therefore is comparatively greater than in *Aerospace Design*. Therefore, we recommend that Arlluk be excluded from the competition.

## RECOMMENDATION

Consequently, because we conclude that Arlluk made a material misrepresentation in its quotation, and the agency's reliance on the misrepresentation had a material effect on the evaluation results, we recommend that the agency terminate Arlluk's BPA. We further recommend that the agency exclude Arlluk from the competition and make a new selection decision. Finally, we recommend that the agency reimburse ASRC the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claims for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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General Counsel