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**Comptroller General
of the United States**

**United States Government Accountability Office
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Decision

Matter of: XYZ Corporation

File: B-413243.2

Date: October 18, 2016

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Emma K. Dinan, Esq., and Kara L. Daniels, Esq., Arnold & Porter LLP, for ABC Corporation, the intervenor.

Cristina Almodovar, Esq., and Arthur L. Passar, Esq., Central Intelligence Agency, for the agency.

K. Nicole Willems, Esq., and Kenneth E. Patton, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of corrective action is denied where the agency's decision to reopen discussions, solicit new final proposals, reevaluate offers, and make a new source selection decision is appropriate to resolve evaluation errors identified by the agency.

DECISION

XYZ Corporation protests the corrective action being taken by the Central Intelligence Agency, under request for proposals (RFP) No. B15-2014295G001 for security services. XYZ argues that the agency's refusal to disqualify ABC from the competition results in a failure to address the errors identified by the agency.¹

We deny the protest.

¹ XYZ Corp. and ABC Corp. are fictitious names. Due to the sensitive nature of the procurement, the actual names of the parties are not disclosed.

BACKGROUND

The RFP, which the agency released on June 4, 2015, contemplated award to the contractor who could perform “in a manner most advantageous to the [g]overnment, cost/price and other items considered.”² Initial Protest at 4. The solicitation identified the items to be considered, and advised offerors that, as relevant here, the agency would evaluate each offeror’s technical/management approach, including information related to personnel qualifications and availability. Id. at 5. Specifically, the RFP provided for an evaluation of the extent to which proposed personnel (key and non-key) had the skill, experience, and other qualifications appropriate for the work described in the statement of work. Id. In this regard, offerors were required to “submit information on the [proposed program manager’s (PPM’s)] capabilities, educational background, current clearances, experience, qualifications and any other relevant information,” and to submit resumes for all key personnel candidates, including the PPM. Protester’s Comments at 10-11.

Initial proposals were due on June 19. Contracting Officer’s (CO) Statement, at 1. After evaluating initial proposals, the agency established a competitive range, which included XYZ and ABC, and conducted discussions, which were completed on March 14, 2016. Id. The agency received final proposal revisions on March 28. Id. On May 16, the agency notified the protester that it had not been chosen for award. Initial Protest at 9. The agency provided XYZ an oral debriefing on June 2, and the protester filed a protest with our office on June 7. Id. In its protest, XYZ argued that ABC had misrepresented the availability of its PPM, and requested that ABC be disqualified from the competition. XYZ also challenged the agency’s evaluation of price.³

Subsequent to the filing of XYZ’s protest, the agency advised our Office that it intended to take corrective action. Notice of Corrective Action, July 1, 2016, at 1. Specifically, the agency represented that it would rescind the award to ABC; reopen discussions with both ABC and XYZ; solicit new final proposal revisions; reevaluate the technical/management (including personnel qualifications and availability), past performance, and pricing elements of both offerors’ proposals; and make a new award decision. Id. The agency also indicated that it would assign several new evaluators to the evaluation teams, including a new CO and contracting officer’s technical representative. Id. at 2.

² In this paragraph, we cite to the protester’s unclassified pleadings rather than the solicitation, because the contents of the solicitation are not in dispute, and portions of the solicitation are classified.

³ The value of the initial award here was \$297.6 million. Agency Report (AR) at 1.

In its corrective action notice, the agency noted that it had identified errors in its evaluation of price realism, past performance, and performance risk, and also conceded that the evaluation was flawed due to the alleged misrepresentation of the availability of ABC's PPM. Id. at 1. The agency explained that, as a result of its internal investigation, it determined that agency acquisition officials involved with the competition were aware of the potential unavailability of the PPM. As a result, the agency explained, it could not "convincingly conclude" that ABC intended to deceive the agency, and determined that disqualification was not appropriate. Notice of Corrective Action, July 1, 2016, at 2. Id.

On July 12, in light of the agency's intended corrective action, we dismissed XYZ's protest as academic. XYZ Corporation, B-413243, July 12, 2016 (unpublished decision). This protest followed.

DISCUSSION

XYZ argues that the agency should disqualify ABC from the competition because ABC's misrepresentation had a material effect on the evaluation. In this regard, the protester argues that the only appropriate remedy in this case is disqualification. Comments at 25. According to the agency, however, the decision not to disqualify ABC was reasonable and within the sound discretion afforded agencies when fashioning corrective action. For the reasons set forth below, we have no basis to sustain the protest.

Agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure a fair and impartial competition. Sealift, Inc., B-412041.2, Dec. 30, 2015, 2016 CPD ¶ 9, at 3. The details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id. at 4. Moreover, our review is generally limited to whether the agency's corrective action is appropriate to remedy the flaw which the agency believes exists in its procurement process, not whether the agency's corrective action remedies the flaws alleged in an earlier protest where, as here, no decision on the merits was issued by our Office. Id.

In its initial protest, XYZ alleged that ABC knew that its PPM planned to retire before commencement of the contract, and consequently misrepresented the PPM's availability in its final proposal revision. In support of its allegation, XYZ provided a copy of an independent contractor agreement (ICA) between ABC and the PPM, executed on March 8--prior to the agency's request for final proposal revisions. AR, Tab 4, Ex. A, ICA. The ICA was contingent upon the PPM's retirement from full-time employment, which was anticipated to occur no later than the award of the

contract to ABC. The ICA also changed the PPM's role from program manager to consultant and advisor.⁴

The agency conducted an inquiry into the protester's allegation, seeking, among other things, information regarding the ICA. During the investigation, ABC explained that it had known that the PPM's retirement was possible since the fall of 2015, and had entered into the ICA as a contingency plan in the event the PPM decided to retire. AR, Tab 4, ABC Response at 1. ABC asserted that the PPM would have been available for the first six months of the contract, although his status with the company would have changed from full-time employee to independent contractor. Id. ABC also noted the possibility that the ICA could have been extended beyond the six month period upon mutual agreement of the parties. Id. According to ABC, it did not misrepresent the availability of the PPM because, up until the PPM's retirement announcement on May 26, 2016, ABC expected that the PPM would be available.⁵ Id.

As a result of the investigation, the agency concluded that ABC had a duty to apprise the agency of the ICA arrangement and changes in the PPM's status, and the apparent change in his role, "before award, and indeed before final proposal submissions." AR at 3. The agency also concluded that ABC's misrepresentation regarding the PPM's availability had a material effect on the evaluation, noting that the agency assigned ABC a significant strength for proposing the PPM who was the project manager on the current contract. AR at 7.

The investigation also revealed, however, that the CO, members of the technical evaluation team, and the source selection official (SSO) were aware that the PPM had plans to retire.⁶ Id. at 3. According to the agency, in some instances, the officials' "understanding was simply that the [PPM] would retire at some undetermined point in the future; in at least one instance, the understanding was that [the PPM] would retire at the end of the predecessor contract." Id. at 3. Their knowledge was attained through casual conversations with the PPM and information from the contracting officer's technical representative.⁷ Id. at 4. Based

⁴ The ICA indicated that the term of services was to be a period of six months following retirement from full time employment, which was to occur on the earlier of April 30, 2016 and award of the contract. AR, Tab 4, Ex. A, ICA at 8.

⁵ The PPM retired from ABC on May 27, and declined to continue working for ABC as an independent contractor, pursuant to the ICA. AR, Tab 4, ABC Response at 1.

⁶ The SSO served as the technical advisor to the source selection authority (SSA).

⁷ In its notice of corrective action, the agency indicated that the CO was aware of the PPM's planned retirement, although she assumed that he would be available for the initial period of performance. Notice of Corrective Action at 2. Further, the agency noted that the contracting officer's technical representative on the previous

on its findings in this regard, the agency ultimately concluded that the PPM's disclosures to officials involved in the acquisition undercut the agency's ability to find that ABC intended to deceive the agency. Notice of Corrective Action, July 1, 2016, at 2.

Additionally, the agency determined that the information known by these agency officials should have raised questions about the reliability of ABC's representations regarding the PPM's availability. AR, at 4. In this regard, the agency explains that the officials did not realize that they should have taken such information into account during their evaluation of ABC's final proposal revision, and did not realize that they should have provided the information to the SSA for her consideration as part of her selection decision.⁸ Id. Based on the circumstances described above, the agency concluded that corrective action was needed to address the flaws in the evaluation due to ABC's misrepresentation, as well as other flaws identified by the agency. The agency determined, however, that disqualification of ABC was not appropriate given the facts of this case.

While the protester challenges the agency's corrective action arguing that disqualification of ABC is the only appropriate remedy in this case, our prior decisions indicate otherwise. In some circumstances, we have recommended that an offeror be excluded from competition as the result of a misrepresentation. See Patricio Enterprises, Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 15 (sustaining protest and recommending exclusion of awardee from competition where the awardee made material misrepresentations that the awardee had signed offer letters in place for certain proposed personnel despite never having provided such letters to those individuals); ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 11 (sustaining protest and recommending exclusion of awardee's proposal from further consideration where the awardee made material misrepresentations regarding employment agreements with proposed personnel); Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13 (sustaining protest and recommending exclusion of awardee's proposal from further consideration

(...continued)

contract, who chaired the technical evaluation team during this acquisition, conceded that he was aware, based on conversations with the PPM, that the PPM was planning to retire at the end of the predecessor contract. Id. Finally, according to the agency, the SSO, who served as the senior technical advisor to the SSA, also acknowledged that he was aware that it was likely the PPM would be changing roles soon and supporting the program as a consultant, based on conversations with the contracting officer's technical representative. Id.

⁸ The SSA had no knowledge that ABC's PPM would be unavailable to perform the instant contract. AR, Tab 7, SSA's Statement, at 1.

based on the awardee's misrepresentation of the results of a survey of the availability of incumbent's personnel).

In other circumstances, however, we have not recommended disqualification. 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 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 & Fab., Inc., B-278896.2, et al., May 4, 1998, 98-1 CPD ¶ 139 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, Inc., supra.).⁹ In sum, the mere fact that the agency identified a misrepresentation that it believes had a material influence on the agency's evaluation of proposals does not obligate the agency to disqualify ABC.

Here, the agency investigated the misrepresentation alleged by the protester; considered the facts; concluded that ABC made a misrepresentation that had a material effect on the evaluation; and considered that the PPM had discussed his possible retirement with agency officials involved in the evaluation of proposals.

⁹ Our recommendations in misrepresentation cases have differed as a result of the unique facts of each case. Unsurprisingly, the facts related to the misrepresentation identified by the agency here are also unique, and distinguish this case from the situations described in the decisions discussed above. For example, in this case, the misrepresentation involved a PPM who was employed by ABC as the program manager for the incumbent contract at the time proposals were submitted. This situation differs from cases like Patricio Enterprises, Inc., supra. and ACS Gov't Servs., Inc. supra., which involved misrepresentations related to potential employees who were not employed by the offeror at the time proposals were submitted. In addition, here, the PPM provided information directly to agency acquisition officials regarding his possible retirement, and agency officials neglected to consider that information during the evaluation.

The agency reasonably concluded that the evaluation was flawed as a result of, among other things, the evaluators' failure to consider the possibility of the PPM's retirement. AR at 4. As a result, the agency committed to take corrective action that, in its view, would remedy the flaws in its original source selection, and allow the offerors, including ABC, a fair opportunity to compete. Notice of Corrective Action at 2.

As previously discussed, the details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Sealift, Inc., supra. Moreover, our review is generally limited to whether the agency's corrective action is appropriate to remedy the flaw which the agency believes exists in its procurement process. Id.

Here, we find no basis to conclude that the agency's corrective action was inadequate. While XYZ would undoubtedly prefer that ABC be disqualified from further competition, narrowing the pool of competitors vying for the award, XYZ's argument that disqualification is the only appropriate remedy in this case is inconsistent with our prior decisions, and fails to recognize the discretion afforded agencies when fashioning corrective action to remedy concerns identified in the procurement process.

The protest is denied.

Susan A. Poling
General Counsel