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Decision

Matter of: American Systems Corporation

File: B-417387; B-417387.2

Date: June 11, 2019

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Michael P. Giordano, Esq., Department of Justice, for the agency.

Michael P. Grogan, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee engaged in an impermissible bait and switch of its key personnel is denied where there is no evidence that awardee misrepresented the availability, or sought to replace, its key personnel.
 2. Protest is denied where the agency reasonably concluded that awardee's letters of intent provided reasonable assurance that the individuals would be available to perform on the contract.
 3. Protest challenging agency's evaluation of its proposal is denied where the agency's evaluation was reasonable and consistent with the terms of the solicitation.
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DECISION

American Systems Corporation (ASC), of Chantilly, Virginia, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to Ideal Innovations, Inc. (I3), of Arlington, Virginia, under request for proposals (RFP) No. PR-19-00001, issued by the Department of Justice, Federal Bureau of Investigation (FBI), for latent print support services in Quantico, Virginia, and Huntsville, Alabama. ASC argues that I3 should have been ineligible for award because it materially misrepresented the availability of certain key personnel, and failed to provide letters of intent for those personnel, as required by the RFP. The protester also challenges the evaluation of its proposal under the technical factors, as well as the best-value decision.

We deny the protest.

BACKGROUND

The RFP, issued on October 5, 2018, pursuant to the procedures in Federal Acquisition Regulation part 15, contemplated the award of a single IDIQ contract for latent print support services, with a 1-year base period and four 1-year option periods. Agency Report (AR), Tab 3, RFP at 2, 12, 68. The statement of work required the provision of various forensic and administrative services related to latent print support, including latent print examination services, evidence inventory and processing services, evidence preservation, and program management services. Id. at 4-8. The RFP provided that at least two task orders would be issued, on a combined labor hour and fixed-price basis, and that additional task orders could be awarded on a labor hour basis. Id. at 55.

The RFP advised that award would be made on a best-value tradeoff basis, utilizing the following factors: management, technical, past performance, and price. Id. at 68. The RFP further provided that the management and technical factors were equally important, but both were more important than past performance, and all three factors, when combined, were more important than price. Id. at 69. Moreover, the RFP provided that under the management and technical factors, the agency would assign proposals one of the following color/adjectival ratings: blue/superior, green/good, yellow/marginal, and red/unacceptable. Id.

The management factor comprised the following three subfactors: staffing, program management, and transition. Id. at 69-70. The staffing and program management subfactors were of equal importance, and, overall, more important than the transition subfactor. Id. at 69. As relevant to this protest, under the staffing subfactor, the RFP instructed offerors to provide a comprehensive staffing plan that included a strategy for the recruitment and retention of cleared resources--i.e., personnel with the appropriate security clearances; an offeror's plan was required to explain how it would fill positions, screen applications prior to placement, and ramp up for surge requirements. Id. at 59-60. Under the program management subfactor, offerors were to describe their "approach to managing their workforce" and to "provide descriptions of the management structure, processes, and procedures to be used to plan, monitor, and control operations." Id. at 60.

The technical factor comprised the following three subfactors, of equal importance: experience, casework management, and quality assurance plan. Id. at 71-72. At issue here, under the experience subfactor, offerors were to identify their organizational experience for previous work in forensic services, performed within the last five years, and submit resumes for certain key personnel. Id. at 60. Under the casework management subfactor, offerors were to demonstrate "approach to managing cases as they progress through the processing and examination line ensuring proper resource allocation, and identification and minimization of bottlenecks." Id. at 61. Under the quality assurance plan subfactor, offerors were to submit a plan explaining how they would provide "quality control of latent print processing and identification." Id.

As relevant to this protest, the RFP identified three positions as key personnel: program manager, latent print examiner, and senior latent print technician. Id. at 18, 71. The solicitation provided that key personnel were “considered to be essential to work performance” and that the awardee “shall not divert or otherwise replace any key personnel without the written consent of the [contracting officer].” Id. at 18. Moreover, under the experience subfactor, while offerors were required to submit resumes for all key personnel, the RFP also provided the following: “Letters of Intent must be provided for all Key Personnel who are not current employees of the Offeror.” Id. at 60.

The agency received timely proposals from three offerors, including ASC and I3. AR, Tab 1, Contracting Officer’s Statement (COS) at 2. The Technical Evaluation Team (TET) evaluated the proposals under the management and technical factors, identifying strengths, weaknesses, and risks associated with each factor and sub-factor, for each proposal. AR, Tab 7, TET Report, at 2. The following is a summary of the final ratings of the proposals of ASC and I3:

| | ASC | I3 |
|------------------------------------|-----------------|----------------|
| Factor 1 – Management | Green/Good | Blue/Superior |
| Factor 2 – Technical | Yellow/Marginal | Green/Good |
| Factor 3 – Past Performance | High | Significant |
| Factor 4 – Price | \$10,959,906.13 | \$9,366,053.95 |

AR, Tab 8, Source Selection Evaluation Board (SSEB) Report, at 1.

The evaluation record reflects that the agency assigned ASC’s proposal a rating of green/good under the management factor, due to the assessment of five strengths and three weaknesses.¹ AR, Tab 7, TET Report, at 5. The agency determined that ASC’s approach “adequately addressed the requirements for staffing, program management, and transition” and concluded that because ASC’s strengths outbalance its weaknesses, the “risk of unsuccessful performance is no worse than moderate.” Id. By contrast, the agency assigned I3’s proposal a rating of blue/superior under the management factor, due to the assessment of two significant strengths, six strengths, and two weaknesses. Id. at 24-25. The TET determined that I3’s “management approach was exceptional and effectively addressed the requirements for staffing, program management, and transition.” Id. at 24.

Under the technical factor, the agency assigned ASC’s proposal a rating of yellow/marginal, based upon the assignment of two strengths and five weaknesses, including one significant weakness. Id. at 9. The agency found that ASC’s weaknesses were not offset by their strengths and that the risk of unsuccessful performance was

¹ The agency provides that while a single documented weakness was erroneously counted as two weaknesses under the management factor, the error did not impact the assigned adjectival rating of green/good. COS at 8.

high. Id. With regard to I3's proposal, the agency assigned a green/good rating under the technical factor, finding five strengths and one weakness; the agency found that I3's approach was "effective in addressing the requirements for experience, casework management, and quality assurance." Id. at 29.

The SSEB reviewed the TET report, the past performance report, and the price evaluation report, and then completed its own assessment of the proposals. AR, Tab 8, SSEB Report at 1. The SSEB agreed with the evaluations and ratings, and found that I3's proposal represented the best value to the agency.² Id. at 13. The agency provided that its determination was predicated upon I3 having "the highest management and technical rating, a significant confidence rating, and the lowest proposed price." Id. While the SSEB noted that I3 received a lower rating than ASC under the past performance evaluation factor, "I3 is assessed as the highest rated proposal for the combined non-price factors due to the value presented from the advantages in I3[s] proposal." Id. The source selection authority agreed with the SSEB's recommendation and made award to I3 on February 27, 2019. Id. at 14; COS at 5.

On March 8, ASC requested and received a written debriefing from the agency. Protest at 13. ASC filed this protest on March 13.

DISCUSSION

The protester contends that the FBI should have found I3 ineligible for award because the awardee engaged in an impermissible bait and switch, by misrepresenting the availability of key personnel. Additionally, ASC contends that the agency failed to downgrade the awardee's proposal where I3 failed to provide letters of intent for certain key personnel. ASC next challenges the agency's evaluation of its own proposal, under the management and technical factors, arguing that the agency unreasonably assigned its proposal four weaknesses (including one significant weakness) and improperly assigned it a strength, rather than a significant strength, under the management factor.³

² Because I3 was both the highest-rated and lowest-priced offeror, the agency did not conduct a trade-off analysis. COS at 18.

³ In its protest, ASC also challenged the agency's assignment of a weakness to its proposal under the transition subfactor, the failure to assign a significant strength under the experience subfactor, the assignment of a weakness under experience subfactor, and the assignment of a weakness under the quality assurance plan subfactor. Protest at 17-20, 22-26. The agency provided a response to these protest arguments, but ASC did not respond to the agency's arguments in its comments on the agency report. Thus, we dismiss these allegations as abandoned. Medical Staffing Sols. USA, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3 ("Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to rebut the agency's argument in its comments, the protester fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable, and as a result, the protester abandons that assertion.").

Finally, ASC challenges the best-value determination. For the following reasons, we find no basis to sustain the protest.

Bait and Switch

ASC alleges that I3 misrepresented the availability of certain proposed key personnel--specifically, its latent print examiners--and that this misrepresentation had a material effect on the agency's evaluation. Protest at 26-29; Protester's Comments at 13-17. As evidence, the protester points to I3's recruiting advertisements, seeking latent print examiners in Quantico, Virginia and Huntsville, Alabama. Protest at 26-27. ASC also states that its proposed staff did not speak to I3 and that the protester is "not aware of any pool of [latent print examiner] trained individuals" with recent experience otherwise available in those areas. Id. at 27.

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 4 C.F.R. § 21.5(a); Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 14-15. 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. See Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 7-8. 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 that: (1) 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) the misrepresentation was relied on by the agency, and (3) the agency's reliance on the misrepresentation had a material effect on the evaluation results. DKW Commc'ns, Inc., B-414476, B-414476.2, June 23, 2017, 2017 CPD ¶ 206 at 9.

We find that ASC has not shown that I3 has engaged in an improper bait and switch, as the record does not show that I3 intended to replace any of its proposed key personnel, nor that it misrepresented the availability of those personnel. In this regard, the record reflects that I3 specifically identified 8 key personnel in its proposal; ASC has not presented any evidence to suggest that these individuals will not be furnished during the performance of the contract. To the contrary, the record reflects that the agency confirmed, following contract award, that I3's proposed key personnel were available to perform the contract. COS at 18.

To the extent that ASC argues that I3's job postings show that I3 intended to replace its personnel, we disagree. Our Office has recognized that a firm's recruiting efforts to augment its personnel resources do not, in themselves, present persuasive evidence of misrepresentation to constitute an improper bait and switch. See Target Media Mid Atl., Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 8-9. Here, I3's recruitment activities

are consistent with the firm's proposal, which provides that I3 would continue to actively recruit latent print professionals to [DELETED]. AR, Tab 5, I3's Proposal, at 7 ("The I3 Team recruiters are constantly recruiting for latent print professionals and [casework file assistants] CFAs to support our [Defense Forensics and Biometrics Agency] DFBA, [United States Postal Service] USPS, FBI, Forensic Mentorship Program, and [Naval Expeditionary Forensics and Biometrics] NEFB contracts."). We conclude that the protester has failed to sufficiently support its contention of an alleged bait and switch by the awardee.⁴

Letters of Intent

ASC next challenges the agency's evaluation of I3 under the management and technical factors. In this regard, ASC asserts that letters of intent provided by I3's proposed key personnel were "nothing more than letters of consideration." Protester's Comments at 4. As such, the protester contends that the agency could not have been reasonably assured that such key personnel were firmly committed to employment with I3, if it was awarded the contract. Protester's Supp. Comments at 2. Accordingly, ASC argues that the FBI should have deemed I3's proposal unacceptable, or should have at least downgraded I3's proposal under the transition and experience subfactors, the evaluation of which was based, in part, on I3's identified key personnel.⁵ Protester's Comments at 4-5.

In response, the agency argues that it properly evaluated I3's letters of intent in a manner consistent with the RFP. AR, Tab 10, Supp. COS at 3-4. The FBI notes that the terms of the RFP did not require a specific format for the letters of intent, nor did it require offerors to provide binding employment contracts with proposed personnel. Id. at 3. As such, the agency reviewed the letters of intent and determined that they were "sufficient to show intent and commitment" and confirmed that the individuals were willing and available to support I3 on the contract. Id. at 4.

⁴ The protester also argues that because the letters of intent for I3's key personnel were insufficiently committal, the awardee misled the agency as to their availability. Protester's Comments at 14. As we explain, below, we find that the letters of intent supplied by I3 were sufficient under the terms of the RFP; in this manner, we conclude that I3 did not misrepresent the availability of its key personnel.

⁵ In its supplemental protest, ASC also argued that the agency's evaluation was flawed because I3 only provided 7 letters of intent for its 8 key personnel. Supp. Protest at 3-4. The agency stated that it inadvertently did not provide the eighth letter of intent for I3's key personnel in the agency report, but provided this letter in its supplemental agency report. Agency Response to Protester's Supplemental Request for Documents, April 24, 2019, at 1-2. ASC withdrew this protest ground following the agency's filing of this letter. Protester's Supp. Comments at 1, n.1.

As noted above, concerning letters of intent, the RFP stated only that, "Letters of Intent must be provided for all Key Personnel who are not current employees of the Offeror." RFP at 60. The letters of intent furnished by I3 provided the following:

By signing this letter of intent, I give Ideal Innovations Inc. consent to Submit my resume for the position of Latent Print Examiner in support of the FBI Latent Print Support Services contract. I intend to consider employment from Ideal Innovations, Inc. contingent upon contract award for this contract. I understand that details concerning the terms of employment and compensation will be provided later under separate cover in the form of an official employment offer letter. I understand that my start date will be determined in conjunction with the award of the contract. I also understand that I will be eligible for all group benefits offered by Ideal Innovations Inc.

AR, Tab 5, I3's Proposal, at vi.

On this record, we find that the agency reasonably concluded that the letters of intent supplied by I3 satisfied the requirements of the RFP. While ASC construes the phrase "intend to consider employment" in the letters of intent as "tentative and unreliable," the agency concluded otherwise, and found that the letters did provide the necessary assurances that those individuals would be available to I3, if it was awarded the contract. Protester's Supp. Comments at 2; Supp. COS at 4. We find this reading unobjectionable.

While we agree with ASC's assertion that the letters of intent for I3's key personnel could have expressed a stronger commitment to join I3 following award, the RFP did not require a specific commitment. Instead, the RFP's provision regarding letters of intent requires that the agency be reasonably assured that an offeror's proposed employees would be able to perform on the contract. See Development Alternatives, Inc., B-217010, Feb. 12, 1985, 85-1 CPD ¶ 188 at 2; Management Servs., Inc., B-184606, Feb. 5, 1976, 76-1 CPD ¶ 74. Further, to the extent the protester disagrees with the lack of specificity concerning compensation and terms of employment, we note that the solicitation here did not require binding bilateral employment agreements, but rather, only letters that showed intent on the part of the signatory to work for the offeror; in our view, the agency reasonably concluded that the letters submitted by I3 met this requirement. See USATREX Int'l, Inc., B-275592, B-275592.2, Mar. 6, 1997, 98-1 CPD ¶ 99 at 9, n.6 (letters of commitment that demonstrate employee's intent to work for offeror are sufficient even though they did not amount to binding employment contracts, where solicitation did not require binding bilateral employment agreements); Laser Power Techs., Inc., B-233369, B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 at 14 (providing that agency could accept letters as satisfying the solicitation's requirements, where individuals agreed to "negotiate in good faith" if offeror received award, and

where solicitation does not define what type of firm commitment is required for key personnel.).⁶ This protest ground is denied.

ASC's Evaluation under the Management and Technical Factors

ASC challenges the agency's evaluation of its own proposal under the management and technical factors. Under the management factor, the protester argues that the agency unreasonably assigned its proposal two undeserved weaknesses under the staffing and program management subfactors. Under the technical factor, ASC contends that the FBI unreasonably failed to assign its proposal a significant strength under the experience subfactor, and unreasonably assigned two weaknesses (one of them a significant weakness) under the casework management and quality assurance plan subfactors. While we do not address every argument the protester has raised, we have reviewed them all and find that none provides a basis to sustain the protest.⁷

In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Gulf Coast Petroleum Reserve Operations, LLC, B-409004.2 et al., Jan. 24, 2014, 2014 CPD ¶ 41 at 8. The evaluation of proposals is primarily a matter within the agency's discretion, since the agency is responsible for defining its needs and identifying the best method for accommodating them. International Preparedness Assocs. Inc., B-415416.3, Dec. 27, 2017, 2017 CPD ¶ 391 at 4. A protester's disagreement with the agency's judgments, without more, is not sufficient to render the evaluation unreasonable. Armedia, LLC, B-415525 et al., Jan. 10, 2018, 2018 CPD ¶ 26 at 4.

⁶ While ASC attacks the agency's reliance on several of our Office's decisions addressing letters of intent, the protester fails to point to any factually analogous decisions that would support its view.

⁷ For example, ASC argues that it was unreasonably assigned a significant weakness under the casework management subfactor because its proposal did "not provide an adequate, proactive approach to managing cases with proper resource allocation or the identification and minimization of bottlenecks." Protest at 23-24; AR Tab 7, TET Report, at 11. In this regard, the protester contends that the agency unreasonably assumed only task orders 1 and 2 would be performed, and unreasonably overlooked portions of its proposal that explained its approach. Protest at 23; Protester's Comments at 11-12. However, our review of the record shows that the agency reasonably determined that ASC's proposal failed to demonstrate how, specifically, it would identify and address backlogs, and how ASC planned to manage multiple competing priorities, as required under the RFP. See RFP at 71. In addition, it was reasonable for the agency to require an offeror's proposal to address how it would satisfy both task orders 1 and 2, specifically, as well as possible future task orders, should they arise.

As one example, the protester alleges that the agency unreasonably assigned it a weakness, under the staffing subfactor, for failing to demonstrate an effective method to screen technical candidates. Protest at 15. In part, the agency found that while ASC's screening method would check for base-level requirements and qualifications, ASC's screening method "does not appear to involve an interview or communication on a technical level." AR, Tab 7, TET Report, at 7. The RFP instructed offerors to provide a staffing plan that addressed "the method of screening applicants prior to placement on the contract. . . ." RFP at 60. The agency would then evaluate whether a proposal included an "effective method to screening technical candidates (Latent Print Examiners and Latent Print Technicians) prior to placement. . . ." Id. at 70.

ASC argues that the agency failed to recognize that its proposal specifically identified that its [DELETED] would not only identify and qualify candidates, but also interview them. Protest at 15; Protester's Comments at 8-9; AR, Tab 6, ASC's Proposal, at 4. Moreover, ASC argues that its proposal specifically provided that ASC would "evaluate technical candidates for education and/or experience, [and] assess their technical knowledge with the assistance of current contract staff . . ." AR, Tab 6, ASC's Proposal, at 6.

The agency argues that because ASC's [DELETED] was not listed as a technical expert, the agency was concerned with ASC's ability to properly screen technical candidates. COS at 6. Moreover, while the proposal indicated that ASC would assess applicants' technical knowledge with current staff, ASC failed to outline how it will assess candidates' knowledge with the current staff or what standards it would use during that assessment. Id.

Here, we find the agency's conclusions unobjectionable and supported by the record. The agency, in assigning this weakness, was concerned about adequate technical screening due to the lengthy training required for technical candidates. AR Tab 7, TET Report, at 7. In this regard, the agency stated that without adequate technical screening, "there is a risk that the individual will fail out of the training program resulting in further impacts to resources and operations." Id. Here, the agency concluded that ASC's proposal did not provide a sufficiently "thorough and effective method" because it did not properly explain how it would screen candidates on a technical level, such as by interview or other communication on a technical level. Id. While the protester argues that its [DELETED] would interview and qualify candidates, the proposal does not explain how ASC would actually screen technical candidates. Our Office has recognized that it is an offeror's responsibility to prepare an adequately written proposal for the agency to evaluate. Dorado Servs., Inc., B-402244, Feb. 19, 2010, 2010 CPD ¶ 71 at 4. In short, the agency's conclusion that ASC failed to adequately describe its screening process for technical candidates is reasonable.

As another representative example, ASC argues that it should have received a significant strength--rather than just a strength--under the experience subfactor for its

ability to scale resources to meet mission needs.⁸ Protest at 20-21; Protester's Comments at 10-11. ASC argues that given the solicitation's emphasis on scalability as an IDIQ contract, it was unreasonable for the FBI "not to recognize the full benefits of [ASC's] scalability" and award its approach a significant strength. Protest at 20. As evidence, ASC points out that its scaling approach was also used on the incumbent contract to successfully complete a large backlog of print processing. *Id.*; Tab 6, ASC's Proposal, at 4. The protester contends that given the unpredictability in processing, and, as the agency notes, that mission needs can change over the life of a contract, it was unreasonable not to award the proposal a significant strength for ASC's ability to appropriately scale the workforce. Protester's Comments at 10-11.

In response, the agency argues that it properly assigned ASC's proposal a strength under the experience subfactor for its "diversity in scaling contracts appropriately to meet the mission needs." AR Tab 7, TET Report, at 10. This approach, however, did not warrant a significant strength because, in the agency's view, the proposal did not exceed the solicitation's requirements to the level of earning significant strength. COS at 11. In this regard, the agency provides that ASC was required to scale its resources under the incumbent contract to reduce a significant backlog, but given ASC's success, the projected workload for this contract would likely not require the same type of scaling. *Id.* Given the reduced likelihood of necessary scaling, the agency did not find that this aspect of ASC's proposal warranted a significant strength. *Id.*

Based on our review, we find reasonable the agency's assignment of a strength, rather than a significant strength. The RFP required offerors to "address how [their] previous experience will translate to successful management and operations of the requirements" of this contract. RFP at 60. The agency would then evaluate offerors on the amount and quality of its experience in performing similar work. *Id.* at 71. ASC's proposal demonstrated its ability, on the incumbent contract, to scale up and down to accommodate the needs of the agency. *See* AR, Tab 6, ASC's Proposal, at 13-14. However, the agency believed that because the prospective contractor would not need to rely on scaling to the same extent as ASC did on the incumbent contract, the benefits of ASC's proposal did not warrant the assignment of a significant strength; we find this conclusion to be within the range of an agency's reasonable discretion. ASC's subjective disagreement, without more, does not provide any basis to conclude that the agency's evaluation was unreasonable. *See SOS Interpreting, Ltd.*, B-287505, June 12, 2001, 2001 CPD ¶ 104 at 10; *Ritchie Sawyer Corp.*, B-281241.2, Jan. 25, 1999, 99-1 CPD ¶ 21 at 4-5.

⁸ ASC also argues that its approach, which emphasized its ability to scale, should have warranted a significant strength under the casework management subfactor. Protest at 20-21; Protester's Comments at 10-11. However, on this record, we have no basis to question the agency's evaluation.

Finally, ASC argues that the FBI's evaluation errors rendered the best-value decision unreasonable. Protest at 29; Protester's Comments at 5-7, 17. Because we find no reason to object to the agency's evaluation, we have no basis to conclude that the agency's best-value decision was unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel