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Decision

Matter of: IT Objects, LLC

File: B-418012; B-418012.2

Date: January 2, 2020

John R. Tolle, Esq., and H. Todd Whay, Esq., Baker, Cronogue, Tolle & Werfel, LLP, for the protester.

Ryan C. Bradel, Esq., and Miles McCann, Esq., Ward & Berry PLLC, for Ahtna RDI JV, LLC, the intervenor.

James Rhodes, Esq., Department of Commerce, for the agency.

Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's award decision is sustained where the awardee's proposal did not provide a letter of commitment for an individual proposed for a key personnel position, as required by the solicitation, and thus failed to satisfy a material solicitation requirement.

DECISION

IT Objects, LLC (ITO), a small business concern located in Herndon, Virginia, protests the award of a contract to Ahtna RDI, JV, LLC (ARJV), a small business located in Anchorage, Alaska, under request for proposals (RFP) No. 1305M319RNFFS0008, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for information technology services including software development and systems administration, for the Alaska Region of the National Marine Fisheries Service (NMFS). The protester alleges that the awardee materially misrepresented the availability of key personnel in its proposal. The protester also argues that the awardee's proposal failed to comply with the solicitation's requirements, and that the agency's evaluation of proposals was unreasonable and inconsistent with the terms of the solicitation.

We sustain the protest.

BACKGROUND

The agency issued the solicitation on May 23, 2019, as a set-aside for participants in the Small Business Administration's 8(a) Business Development Program. RFP at 1; Contracting Officer's Statement (COS) at 2.¹ The solicitation used acquisition procedures under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, in conjunction with FAR part 15, Contracting by Negotiation. RFP at 37; COS at 2. The successful offeror will program new and existing electronic reporting systems, develop fisheries management applications, and provide associated technical support for NMFS's four major programs.² RFP at 43-44. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract, with the potential for labor hour or fixed-price type orders and an ordering period of three years. Id. at 18, 72.

The solicitation provided for award on a best-value tradeoff basis, with non-price evaluation factors (technical capability, staffing and management plan, and past performance) significantly more important than price. Id. at 69. Among the non-price factors, technical capability and staffing and management plan were approximately equal, and together, they were more important than past performance. Id.

The RFP instructed that proposals were expected to conform to solicitation provisions, and that, at a minimum, technical proposals were to address the requirements set forth in the non-price factors. Id. at 66-67. As relevant here, under the staffing and management plan factor, offerors were to propose key personnel with resumes demonstrating experience related to the activities of the performance work statement and letters of commitment. Id. at 68. The designated key personnel were termed: (1) Project Manager 5; (2) Programmer Analyst 5; and (3) Systems Administrator 5. Id. at 23. The RFP provided that "[t]he contractor shall obtain the consent of the Contracting Officer prior to making key personnel substitutions." Id. The solicitation reserved to the agency the right to award the contract without discussions. Id. at 73.

Prior to the June 9 RFP closing deadline, NOAA received five proposals, including offers from ITO and ARJV. COS at 6. After evaluating the proposals, the agency assigned the following ratings:

¹ Although the solicitation was amended twice, amendment 0001 is the latest full version of the solicitation. COS at 2 n.1. References herein are to this document.

² The four major NMFS programs are: (1) the Interagency Electronic Reporting System; (2) the Catch Accounting System; (3) the halibut and sablefish Individual Fishery Quota Program; and (4) the ShoreZone Mapping System. RFP at 43-44.

OFFEROR	ARJV	ITO
Technical Capability	Above Average	Above Average
Staffing and Management Plan ³	Outstanding	Above Average
Past Performance ⁴	Outstanding	Acceptable
Overall Rating	Outstanding	Above Average
Evaluated Price	\$8,153,225	\$7,064,142

Agency Report (AR), Tab 37, Award Memorandum, at 20.

On the basis of the evaluation results, the agency determined that ARJV's technical superiority warranted its higher price, and that its proposal thus represented the best value to the government. NOAA made award to ARJV on September 13. *Id.* at 22; AR, Tab 38, Notice of Award. After requesting and receiving a debriefing, ITO protested to our office. COS at 18-19.

DISCUSSION

ITO alleges that ARJV made a material misrepresentation in its proposal by offering an individual as one of its key personnel who was not available. Protest at 7-8; Comments & Suppl. Protest at 2-8. The protester also argues ARJV's proposal failed to comply with the solicitation's requirements and should have been deemed unacceptable because it did not include a letter of commitment for this individual. Comments & Suppl. Protest at 9; Protester's Suppl. Comments at 10. The protester further contends that NOAA did not reasonably evaluate its and ARJV's proposals under all three non-price factors, and, therefore, NOAA's award decision was unreasonable. Protest 8-13; Comments & Suppl. Protest at 9-16; Protester's Suppl. Comments at 9-12.

For the reasons below, on this record, we do not find that ARJV made a material misrepresentation about its key personnel. We do find, however, that since the proposal did not include a letter of commitment from this individual, ARJV's proposal failed to comply with a material solicitation requirement, and the award was improper. We sustain the protest on this basis.⁵

³ The technical capability and staffing and management plan factors were rated either outstanding, above average, satisfactory, marginal, or unsatisfactory. AR, Tab 33, Source Evaluation Board (SEB) Memorandum, at 3.

⁴ The past performance factor was evaluated using slightly different ratings: outstanding, acceptable, marginal, unacceptable, or neutral. AR, Tab 33, SEB Memorandum, at 4.

⁵ While we do not address all of the protester's arguments in detail in our decision, we have considered all of them and with the exception of the foregoing, we find no basis to sustain the protest.

Material Misrepresentation

The record here shows that Ahtna Global, LLC (AG), one of the joint venture partners in ARJV, executed a teaming agreement in March 2019 with a company owned by the individual proposed by ARJV for the key position of Systems Administrator 5/Database Administrator 5 (hereinafter, the SA 5 position). A copy of the teaming agreement was included in ARJV's proposal. AR, Tab 14, ARJV Technical Proposal, at 46-60.⁶ On June 6, prior to the deadline for proposals, however, the individual offered for the SA 5 position informed AG that he no longer wanted to be part of the proposal team. He also sent an email stating "neither [his company] nor [he] would participate in the newly composed Ahtna RDI Joint Venture." Comments & Suppl. Protest exh. A at 1, 4.

In response, AG's legal counsel informed the individual that his email was insufficient to terminate the teaming agreement and instructed him to submit a revised resume. Intervenor's Suppl. Comments, exh. 2 at 1. AG's president also contacted the individual, and, according to AG's president, the individual advised that "he would consider working on the contract with whichever team won the procurement competition." Intervenor's Suppl. Comments at 3. After the phone call, AG's president sent the individual an email seeking confirmation that he would not join another proposal team as a condition of releasing him from the teaming agreement.⁷ Id. The individual did not respond to either email and did not submit a revised resume.

ARJV proposed this individual as a key person for the SA 5 position and included his resume in its proposal. AR, Tab 14, ARJV Technical Proposal, at 77. A letter of commitment from the individual proposed for the SA 5 position was not included in ARJV's proposal. ARJV maintains that because the company owned by the individual proposed for the SA 5 position did not terminate the teaming agreement, and because the individual told AG's president he would consider working on the contract with whatever team won the award, it was reasonable for ARJV to identify this individual in its proposal. Intervenor's Suppl. Comments at 2-4; Intervenor's Suppl. Comments exh. 1 at 2-3.

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 18-20. Nonetheless, our Office will consider allegations that an offeror proposed

⁶ Documents in the agency report were not numbered consecutively and so page numbers cited here refer to the page of the .pdf file.

⁷ It is not our role to resolve the status of the teaming agreement between the company owned by this individual and AG. PRB Assocs., Inc., B-277994; B-277994.2, Dec. 18, 1997, 98-1 CPD ¶ 13 at 7 (finding that "an allegation that a teaming agreement has been breached is a dispute between private parties.").

personnel that it did not have a reasonable basis to expect to provide during performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 7. 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. Insight Tech. Sols., Inc., B-417388; B-417388.2, June 19, 2019, 2019 CPD ¶ 239 at 5; CACI Techs., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 at 4-5.

While we have concluded that an offeror may not represent the commitment of key personnel based only on a hope or belief that the offeror will ultimately be able to make good on its representation, ManTech Advanced Sys. Int’l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 5, ARJV’s proposal does not represent that it has received any particular commitment from the individual proposed for the SA 5 position. ARJV’s proposal names personnel for each key position, including the SA 5 position, and indicates that it intends to perform the effort with those individuals. Although the RFP requires letters of commitment from all proposed key personnel, and although the proposal included letters of commitment for all of the other personnel proposed as key, ARJV does not include a letter of commitment from the individual proposed for the SA 5 position. The proposal, when read as whole, represents that all of the proposed key personnel, other than the individual proposed for the SA 5 position, have committed to perform this effort for ARJV.

In short, there is no evidence in the record that ARJV made any specific representation concerning a commitment to perform by the individual proposed for the SA 5 position, even though the RFP required such a commitment. Furthermore, while this situation presents a close call, ARJV appears to have had a reasonable basis to conclude that the individual proposed for the SA 5 position would serve in the position if ARJV was awarded the contract.⁸ On these facts, we will not find that ARJV’s proposal contained a material misrepresentation.

⁸ We note, however, that in its proposal, ITO submitted a signed letter of commitment from the same individual, which stated that he was providing permission to submit his resume “exclusively for the IT Objects Team use on the above referenced proposal,” and that “[a]ny other company using my resume for this proposal is not authorized.” AR, Tab 18, ITO Technical Proposal, at 76. In addition, as part of the protest proceedings before our Office, this individual furnished a declaration indicating that he is not willing to work for ARJV because of his exclusive letter of commitment with ITO. Protester Suppl. Comments exh. A at 1. There is no evidence in the record that ARJV was aware of the letter of commitment included in ITO’s proposal.

Technically Unacceptable Proposal

The protester further argues that ARJV's proposal failed to comply with a material solicitation requirement because it did not include a required letter of commitment from the individual proposed for the SA 5 position. We agree.

The record here shows that the RFP was unequivocal about the importance placed on key personnel. Offerors were required to provide both resumes and letters of commitment for proposed key personnel. RFP at 68. Furthermore, the RFP advised offerors that substitutions for key personnel could not be made without the prior consent of the government. Id. at 23.

It is a fundamental principle that an agency must evaluate proposals consistent with the terms of the solicitation and, while the evaluation of offerors' proposals generally is a matter within the procuring agency's discretion, our Office will question an agency's evaluation where it is unreasonable, inconsistent with the solicitation's stated evaluation criteria, or undocumented. Exelis Sys. Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 at 5. In negotiated procurements, a proposal failing to conform to the material requirements and conditions of the solicitation should be considered unacceptable. DataSource, Inc., B-412468, Feb. 16, 2016, 2016 CPD ¶ 59 at 3; Special Operations Grp., Inc., B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 4. Generally, a requirement for letters of commitment from key personnel constitutes a material solicitation requirement. DataSource, Inc., supra; Special Operations Grp., Inc., supra, at 5.

Despite the fact that the solicitation only identifies three key positions, ARJV submitted nine resumes: one each for Program Manager; Administrative Project Manager; Business Manager; Contracts Manager; Project Controls Manager; and the SA 5 position; and three for Sr. Programmer/Analyst (Programmer 5). AR, Tab 14, ARJV Technical Proposal attach. B. ARJV also provided nine letters of commitment; however, two of the letters were from one individual for two different positions. AR, Tab 14, ARJV Technical Proposal attach. C. No letter of commitment was provided from the individual proposed for the SA 5 position.

The agency now acknowledges that ARJV's proposal did not include a letter of commitment for the SA 5 position. In its supplemental agency report, however, the agency argues that ARJV's proposal includes the teaming agreement between AG and the company owned by the individual proposed for the SA 5 position. Although there is no contemporaneous evidence in the record for this view, the agency now argues--in its supplemental response--that it views the teaming agreement as a reasonable substitute for a letter of commitment. Suppl. MOL at 8-9. We see no support for this contention.

First, the record contains no evidence that at the time of its evaluation and award decision, the agency considered the teaming agreement as a substitute for a letter of commitment. Not only is the contemporaneous record devoid of any reference to the

teaming agreement as a substitute for a letter of commitment, but, indeed, it appears that at the time of evaluation and award decision, the agency did not recognize that ARJV's proposal failed to include a letter of commitment from the individual proposed for the SA 5 position. In this regard, the evaluators noted, as part of one of their findings of significant strength pertaining to ARJV's proposal, that the proposal included "commitment letters for all key personnel." AR, Tab 33, SEB Memorandum, at 10. Likewise, in her award decision, the contracting officer made reference to "the fact that [ARJV] provided letters of commitment for all key personnel." AR, Tab 37, Award Memorandum, at 21.

Second, there is nothing in the teaming agreement that identifies any particular employee for a key personnel position. Rather, the teaming agreement provides that the company owned by the individual proposed for the SA 5 position will serve as a subcontractor, and "will be responsible for primarily technical tasks described in the preliminary Performance Work Statement for IT Support to NMFS Alaska Region." AR, Tab 14, ARJV Technical Proposal, at 56.

Because ARJV's proposal failed to comply with the material solicitation requirements for a letter of commitment for each key position; because the record provides no support for the contention that, at the time of its evaluation and award decision, the agency concluded that the teaming agreement between AG and the company owned by the individual proposed for the SA 5 position would serve as a reasonable substitute for the necessary letter; and because there is no evidence of any commitment for a key position in the teaming agreement, we sustain the protest.

RECOMMENDATION

For the reasons discussed above, we conclude that NOAA's evaluation of the awardee's technical proposal was unreasonable. We further conclude that ITO was prejudiced by this evaluation. We recommend that NOAA conduct and document a new evaluation of the awardee's proposal and prepare a new source selection decision, or take such other steps permitted by the applicable procurement laws and regulations. We also find that ITO is entitled to recover its reasonable costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). ITO's certified claims for costs, detailing the time expended and costs incurred, must be submitted to NOAA within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel