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Decision

Matter of: AVER, LLC

File: B-419244

Date: November 2, 2020

Tenley A. Carp, Esq., Micah Kanters, Esq., and Georgina Shepard, Esq., Arnall Golden Gregory LLP, for the protester.
Stephanie D. Wilson, Esq., and Terrence M. O'Connor, Esq., Berenzweig Leonard LLP, for IntePros Federal, Inc., the intervenor.
Christopher Radcliffe, Esq., Department of Justice, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee materially misrepresented the availability of an individual proposed for a key personnel position is dismissed where the argument relies on the existence and enforceability of a non-compete agreement, which is a private dispute that GAO does not review.

DECISION

AVER, LLC, a small business, of Washington, DC, challenges the issuance of a task order to IntePros Federal, Inc., also of Washington, DC, by the Department of Justice (DOJ), Justice Management Division, under request for proposals (RFP) No. 15JPSS20R0000048, which was issued for support of the agency's Executive Office for Immigration Review (EOIR). The protester argues that the awardee's proposal contained a material misrepresentation concerning the availability of an individual proposed for a key personnel position.

We dismiss the protest.

BACKGROUND

DOJ issued the solicitation on June 10, 2020, seeking proposals to provide information technology, enterprise architecture, and program management office services for EOIR.

RFP at 5.¹ The competition was limited to firms that hold indefinite-delivery, indefinite quantity (IDIQ) Chief Information Officer-Solutions and Partners 3 contracts, which were awarded by the National Institutes of Health. *Id.* at 4. The solicitation anticipated the award of a time-and-materials task order with a base period of 1 year and four 1-year options. *Id.* at 4, 33. As relevant here, the RFP required offerors to propose the following four key personnel positions: (1) program manager, (2) enterprise architect, (3) business process requirements analyst, and (4) quality assurance specialist. *Id.* at 29. Offerors were required to provide a resume for all proposed key personnel. *Id.* at 40.

DOJ advised AVER on September 8 that it had selected IntePros's proposal for award of a task order valued at \$38,671,003. Protest at 2; *id.*, exh B., Unsuccessful Offeror Notice, at 2. On September 16, AVER's proposed subcontractor Citizant, Inc.² received notice from one of its employees that she would be resigning from the company, effective September 30. Protest at 3, 9-10. This letter did not identify another employer for whom the individual intended to work. Protest, exh. D, Resignation Letter at 3. The protester states that on September 22, Citizant learned that this individual had accepted employment with iTech AG, which was a proposed subcontractor for IntePros, and that she would be serving as the program manager for the awardee. Protest at 9-11. The protester further states that Citizant terminated the individual's employment on September 22, based on what the firm states was a breach of the non-compete agreement between the individual and the company. *Id.* at 10. This protest followed.³

DISCUSSION

AVER argues that IntePros's proposal contained a material misrepresentation concerning the availability of its proposed program manager. Protest at 12-16. Specifically, the protester contends that the proposed individual was subject to a non-compete agreement with AVER's proposed subcontractor Citizant that prohibited her from working for IntePros's proposed subcontractor iTech. As a result of the non-compete agreement, the protester argues that IntePros could not have reasonably expected this individual to be available to perform on the contract, and that the alleged misrepresentation of her availability renders the awardee's proposal technically unacceptable. IntePros argues that the protester's allegations concerning the availability of the proposed program manager are predicated on the existence and enforceability of a non-compete agreement, and that our Office does not review such

¹ All references to the RFP are to amendment No. 3.

² Citizant was the contractor that provided "similar support" to the requirements of the RFP. Protest at 3 n.1.

³ This protest is within our jurisdiction to hear protests related to task and delivery orders placed under civilian agency multiple-award IDIQ contracts valued in excess of \$10 million. 41 U.S.C. § 4106(f)(1)(B).

matters.⁴ Req. for Dismissal at 2-3. For the reasons discussed below, we agree with IntePros and dismiss the protest.⁵

Whether personnel identified in a vendor's proposal, in fact, perform under the subsequent award is generally a matter of contract administration that our Office does not review. See 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 a vendor 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. *Ryan Assocs., Inc.*, B-274194 *et al.*, Nov. 26, 1996, 97-1 CPD ¶ 2 at 8.

AVER argues that IntePros proposed an individual for the program manager position that it knew or should have known that it could not provide. The protester states that the individual was "currently an employee of Citizant and not IntePros at the time of proposal [submission] and, critically, subject to a contract which prevented her from assuming the Program Manager position for a competitor, IntePros." Protest at 13-14. In this regard, the protester states that the individual and Citizant executed a "Non-Disclosure, Non-Solicit, Non-Compete and Non-Disparagement Agreement" that

⁴ On October 13, IntePros filed a request that our Office dismiss the protest. We provided AVER an opportunity to respond to the request; AVER filed its response on October 16.

⁵ AVER raises other collateral issues. Although we do not address all of them, we find that none provides a basis for our Office to review the protest. For example, the RFP stated that "[i]f an individual proposed is not presently an employee of your firm, the resume must be accompanied by a signed letter of commitment to join the firm should you be awarded the task order." RFP at 41. IntePros's request to dismiss the protest included parts of its proposal, including the letter of commitment provided by the individual proposed as its program manager, who is the subject of AVER's arguments. Req. for Dismissal, exh. 1, IntePros Proposal Excerpts at 4.

In its response to the request for dismissal, the protester argues that the letter was defective because it did not specify terms of employment or a start date; the letter was addressed to the contracting officer and signed by the prospective employer, rather than addressed to the employer itself; the date for the signatures was typed rather than hand-signed; and the commitment of employment was contingent on award to "iTech AG, a member of the IntePros Federal Team" rather than award to IntePros. Response to Req. for Dismissal at 5-6. The protester does not show that any of these alleged omissions concerned information that was required by the terms of the RFP or that the information provided was inconsistent with the requirement to provide a "signed letter of commitment." We therefore find that the protester's argument fails to state a valid basis of protest. See 4 C.F.R. § 21.5(f) (protests that fail to clearly state legally sufficient grounds of protest will be dismissed).

precluded her from serving as the program manager for IntePros. *Id.* at 4; *id.* exh. F, Non-Disclosure, Non-Solicit, Non-Compete and Non-Disparagement Agreement. For these reasons, AVER argues that “IntePros could not have reasonably expected to provide [the individual] on Day 1 of the Contract when she was legally prohibited from becoming an employee of IntePros or its subcontractors.” Protest at 14.

AVER’s arguments rely on what the protester contends are contractual obligations between the individual and the protester’s proposed subcontractor that prohibited the individual from working for IntePros’s proposed subcontractor, iTech. We find that these arguments concern disputes between private parties that our Office does not review. Our Office generally does not review disputes between private parties that do not involve the procuring agency. See *Ellwood Nat’l Forge Co.*, B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 3-4. As relevant here, our Office has explained that we will not review a protester’s allegation that the awardee will violate a non-compete agreement, as it concerns a private dispute that does not involve government action. *RELYANT Global, LLC*, B-413741, Nov. 21, 2016, 2016 CPD ¶ 338 at 6; *Hendry Corp.*, B-400224.2, Aug. 25, 2008, 2008 CPD ¶ 164 at 3.

AVER states that it does not request that our Office enforce the terms of the non-compete agreement, or that the award is improper based solely on the agreement. Response to Req. for Dismissal, at 2. Instead, the protester argues that

the existence of [the] Non-Compete is simply a material fact that supports the proper ground for protest that IntePros failed to comply with the material requirements of the Solicitation to bid a Program Manager who would be available on Day 1 of contract performance due to the nature of [the individual’s] employment with Citizant.

Id.

We conclude that the enforceability of the non-compete agreement is inseparable from the issue of whether the awardee had a reasonable basis to propose the individual. The protester’s argument that the awardee did not have a reasonable basis to propose the individual for the program manager position depends on a presumption that the non-compete agreement is enforceable and will prevent her employment with iTech. As the protester contends: “[D]ue to [the individual’s] Non-Compete Agreement with Citizant, it was impossible for IntePros to prove her availability – she quite literally was not available.” Protest at 14.

Even if IntePros knew of the existence of the non-compete agreement, the awardee’s ability to provide the individual for performance of the task order would only be affected if the agreement was enforceable.⁶ In other words, a non-compete agreement would

⁶ AVER does not specifically allege or otherwise establish that IntePros knew of the existence of the non-compete agreement, and the available record provided in the

need to be enforced by a court or forum with the power to prohibit iTech from employing the individual, thereby precluding IntePros from providing her to perform on the task order. Because our Office does not review private disputes such as the enforceability of non-compete agreements, we cannot consider whether a non-compete agreement renders the awardee's proposal unacceptable here.

In sum, we find that the protester's arguments concerning the awardee's proposal of the individual for the program manager position are inextricably dependent on the protester's arguments concerning the non-compete agreement.⁷ We find that this matter concerns a private dispute between the parties that our Office does not review.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

briefing does not address this matter. Similarly, the protester does not allege that the agency was aware of the non-compete agreement.

⁷ AVER also notes that the individual was still employed by Citizant on September 16 and was terminated on September 22. The protester argues that the awardee did not have a reasonable basis to propose the individual as the program manager, because "but for Citizant accelerating her last day to September 22, 2020, IntePros would not have had a Program Manager on the first day of the contract." Protest at 15. These dates do not establish that the awardee could not have reasonably proposed the individual for the program manager position, as they concern actions by the individual after the award of the task order to end her employment with Citizant and begin her new employment with iTech. This is a matter of contract administration that our Office does not review. See 4 C.F.R. § 21.5(a); *Patricio Enters. Inc., supra*.