

Decision

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Matter of: CDIC, Inc.

File: B-419254; B-419254.2

Date: January 11, 2021

Jonathan T. Cain, Esq., and Justin Nahama, Esq., Fisher Broyles, LLP, for the protester.

Jonathan D. Perrone, Esq., Whitcomb Selinsky, P.C., for Council Rock Consulting, Inc., the intervenor.

Anthony E. Marrone, Esq., and Kevin Misener, Esq., Department of Health and Human Services, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest asserting that agency did not reasonably adjust the awardee's indirect costs as part of its cost realism evaluation is denied where agency reasonably adjusted the costs using the audited rates of a contractor performing similar work.
 2. Protest asserting that awardee engaged in a "bait and switch" of proposed key personnel is denied where the protester has not shown that the awardee did not reasonably expect to provide the proposed personnel.
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DECISION

CDIC, Inc., a small business located in Fort Worth, Texas, protests the award of a contract to Council Rock Consulting, Inc., a small business located in North Bethesda, Maryland, pursuant to request for proposals (RFP) No. 75N93019R00022, issued by the Department of Health and Human Services (HHS) for administrative services in support of the National Institutes of Health's (NIH) National Biosafety and Biocontainment Training Program (NBBTP). The protester contends the agency conducted an unreasonable cost realism evaluation and also asserts that Council Rock engaged in a "bait and switch" with respect to several key personnel, including a former government official who was barred from performing on the contract.

We deny the protest.

BACKGROUND

On December 11, 2019, the agency issued the solicitation, as a small business set-aside, seeking services, personnel, and resources to oversee, manage, and improve the components of the NBBTP Intramural Research Training Award, a 2-year biosafety fellowship. Agency Report (AR), Tab 3.1, RFP at 4. The RFP anticipated the award of a cost-reimbursement, fixed-fee contract with a 5-month base period and four 12-month option periods. *Id.* at 14.

The solicitation contemplated that award would be based on a best-value tradeoff considering the following factors, in descending order of importance: technical, cost, and past performance. *Id.* at 80. The RFP provided that the technical and past performance evaluation factors, when combined, were more important than cost. *Id.* The technical factor were comprised of four criteria: corporate experience (weighted 40 percent), project management and execution plan (weighted 30 percent), key personnel and other personnel qualifications (weighted 20 percent), and quality control plan (weighted 10 percent). *Id.* at 81.

For the cost factor, the RFP anticipated that the agency would evaluate reasonableness and realism, with the realism analysis to be conducted in accordance with Federal Acquisition Regulation (FAR) 15.404-1(d). *Id.* at 80. The cost realism evaluation would determine whether the cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. *Id.*

Both CDIC, the incumbent contractor, and Council Rock submitted proposals in response to the solicitation. Following discussions with both offerors, the agency evaluated the proposals as follows:

	CDIC	Council Rock
Technical Score (Out of 100)	80	80
Past Performance (Range of Rating)	Satisfactory to Exceptional	Satisfactory to Exceptional
Total Proposed Cost	\$3,969,845	\$2,447,856
Total Probable Cost	\$3,871,083	\$3,175,051

AR, Tab 9.1, Source Selection Decision Document (SSDD) at 3-4.

As part of its cost realism evaluation, the agency upwardly adjusted Council Rock's overhead and general and administrative (G&A) costs. AR, Tab 8.1, Cost Evaluation

Report at 4-5. The agency's cost evaluators reviewed Council Rock's explanation for its proposed indirect rates, which was that the rates were based on Council Rock's historical rates. Supp. Contracting Officer's Statement (COS) at 3. The agency ultimately was not satisfied with this explanation and upwardly adjusted Council Rock's probable costs of performance using the G&A and overhead rates found in a negotiated rate agreement between NIH and another contractor, whom we will label Contractor X for purposes of this decision. *Id.* The agency selected this contractor because it was a small business that "provide[s] similar consulting and management services [to those] needed for this requirement." AR, Tab 8.1, Cost Evaluation Report at 2.

Based on the agency's evaluation, the source selection official determined that Council Rock was both less expensive than CDIC and superior under the non-cost factors since Council Rock received higher individual past performance ratings. AR, Tab 9.1, SSDD at 18.

On September 25, 2020, HHS notified CDIC of the award of the contract to Council Rock. This protest followed.

DISCUSSION

The protester argues that the agency's cost realism evaluation was unreasonable and also that Council Rock engaged in an impermissible bait and switch by proposing key personnel that it did not reasonably expect to perform on the contract. With respect to the cost realism evaluation, the protester asserts that Council Rock proposed unrealistic overhead and G&A rates and that the agency's upward adjustment of those costs was insufficient. With respect to the awardee's proposal of key personnel, the protester contends that the awardee failed to demonstrate an adequate level of commitment from the proposed personnel. In addition, the protester contends that Council Rock proposed a former government official who was subject to a permanent employment bar and was therefore ineligible to perform on the contract.

We have reviewed each argument raised by the protester and, while we do not address every argument, we find no basis to sustain the protest.

Cost Realism Evaluation

The protester challenges the rates used by HHS to adjust Council Rock's overhead and G&A costs. In this regard, HHS used indirect rates from a negotiated agreement with Contractor X as the basis for the cost adjustment. Supp. COS at 1. Contractor X is a small business with an audited, negotiated rate agreement in place with NIH. *Id.* Use of these rates resulted in the following adjustments to Council Rock's G&A and overhead rates:

	Original Proposal (Base Plus All Options)	Probable Cost (Base Plus All Options)
Overhead	[DELETED]	[DELETED]
G&A	[DELETED]	[DELETED]
Total	[DELETED]	[DELETED]

AR, Tab 8, Cost Realism Report at 4-5.

The protester argues that the use of Contractor X's rates as the basis for the adjustment was unreasonable because these rates were last audited in 2011 and thus are outdated. CDIC also asserts that using the 2011 rates was arbitrary since HHS could have instead used Contractor X's 2010 rates, which were significantly higher. The protester further asserts that Contractor X does not provide the biocontainment specialist recruitment and training services required by this solicitation or anything remotely similar. In light of these dissimilarities, CDIC contends that the rates do not provide a basis for projecting the costs that Council Rock will incur on this effort and that the agency's use of these rates was unreasonable.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. *Metro Machine Corp.*, B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 6. As a result, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. FAR 15.305(a)(1), 15.404-1(d)(1), (2); *The Futures Group Int'l*, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3.

Based on the results of the cost realism analysis, an offeror's proposed costs should be adjusted when appropriate. FAR 15.404-1(d)(2)(ii). An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide a measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal are reasonable and realistic in view of the cost information reasonably available to the agency at the time of its evaluation--including the information provided by the offeror in its proposal. *See Metro Mach. Corp., supra*. We review an agency's judgment in this area only to see that the agency's cost realism evaluation was reasonably based and adequately documented. *Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 26.

Here, we find the agency's use of Contractor X's overhead and G&A rates as a basis for adjustment to be unobjectionable in light of the lack of other cost information available to the agency.¹ In this regard, we note that the agency selected Contractor X after searching the NIH-negotiated rate agreement database for negotiated rate agreements of companies in Maryland (which also happens to be where Council Rock is located), "as those agreements would capture likely agency-specific indirect costs bases while also accounting for the place of performance." Supp. COS at 2. While the agency expressly recognized that overhead rates vary between companies, it selected Contractor X because it was a small business that "provide[s] similar consulting and management services [to those] needed for this requirement." AR, Tab 8.1, Cost Evaluation Report at 2. The agency noted that, in addition to Contractor X, this search yielded several poor matches, *i.e.*, companies that did biotech or research-type work, rather than the required work of the statement of work, which consists mainly of program management, program support and evaluations, travel/conference/training support, and website maintenance. Supp. COS at 2. HHS also reviewed Contractor X's website and confirmed that Contractor X provides program evaluation and support, conference management and website maintenance services. *Id.* at 3.

While the protester argues that Contractor X does not provide the exact type of specialist recruitment and training services required by the scope of work here, the protester has not demonstrated that the agency had such information reasonably available to it. We note that, to HHS's knowledge, neither CDC nor Council Rock had a negotiated rate agreement with any government agency. *Id.* at 1. The agency requested and received historical rate information from Council Rock, but was not satisfied that those rates (which were far lower than Contractor X's rates) were realistic. In view of the information available to the agency, we find HHS's use of Contractor X's 2011 rate information to be reasonable.²

¹ We also note that the protester has not demonstrated competitive prejudice. See *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (competitive prejudice is necessary before we will sustain a protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest, even if deficiencies in the procurement process are found). In this respect, the protester has not demonstrated that further upward adjustments to Council Rock's indirect costs would have led to Council Rock's proposal being assessed as the more expensive one. Since Council Rock's proposal was both less expensive, and superior in the non-price factors, to CDIC's proposal, we find that the protester has not demonstrated that it would have a reasonable chance of award but for the agency's alleged error.

² While the protester argues that the agency should have used Contractor X's 2010 rates, instead of its 2011 rates, the 2011 rates were the operative rates that remained in place through 2019. Supp. COS at 3. We find the agency's use of these rates to be reasonable.

Bait and Switch

The protester contends that Council Rock engaged in an impermissible “bait and switch” by proposing scientific advisory board members that it did not expect to provide during contract performance. Comments & Supp. Protest at 2. In support of this argument, the protester contends that Council Rock submitted misleading and inadequate letters of commitment for four proposed board members. Additionally, CDIC asserts that Council Rock proposed a former government official who was ineligible due to the permanent post-employment prohibition found at 18 U.S.C. § 207. We address these arguments in turn.

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.

With respect to the four personnel for whom Council Rock allegedly provided misleading and inadequate letters of commitment, we find that the letters of commitment submitted by the awardee for these personnel supported the awardee’s expectation that the proposed individuals would continue to work on the board should Council Rock be awarded the contract. In this respect, the letters invited the personnel to continue as scientific advisory board members should Council Rock be awarded the contract and asked them to sign the letter to “submit your intent to accept the position and begin working with Council Rock Consulting (CRC) upon contract award.” See AR, Tab 5.16, Council Rock Tech. Proposal at GAO Pages 79-82. While the protester challenges these letters as deceiving or “boilerplate,” Comments & Supp. Protest at 3, we see no basis to discount them or to question Council Rock’s reliance on them.

The protester also argues that Council Rock engaged in a bait and switch by proposing an ineligible former government official to serve on the scientific advisory board and as a program consultant on the contract. In this respect, the proposed individual was formerly the director of NIH’s Division of Occupational Health and Safety and served as

the director of the NBBTP program since its inception in 2005. Supp. COS at 3. In that role, the individual provided overall direction to the program and served as the final authority on major decisions relating to the program curriculum, individual development plan issues, and monitoring the progression of fellows through the 2-year program. *Id.* The individual was involved in the interview and selection of candidates for the fellowship program each year and approved developmental assignments for senior fellows. *Id.* The individual retired from NIH in May 2018 and therefore was not involved in the issuance of the instant solicitation or in the evaluation of proposals.³ *Id.* at 4.

The protester argues that 18 U.S.C. § 207, and a related NIH ethics policy implementing that statute,⁴ bar the former official from performing on this contract in the manner proposed by Council Rock. As relevant to this argument, 18 U.S.C. § 207(a)(1) prohibits a former officer or employee of an executive branch agency from knowingly making, with the intent to influence, any communication to, or appearance before, the government on behalf of any other person in connection with a particular matter: (1) in which the government has a direct and substantial interest, (2) in which the former official participated personally and substantially as an officer or employee, and (3) which involved a specific party or specific parties at the time of such participation. The protester contends that as a member of the scientific advisory board, the former official would be required to communicate with NBBTP agency personnel and make appearances before NIH on behalf of Council Rock. CDIC contends that Council Rock engaged in an impermissible bait and switch because the awardee did not have a reasonable expectation of providing the former official on this contract due to her alleged ineligibility.⁵

We note that 18 U.S.C. § 207 is a criminal statute, and the interpretation and enforcement of criminal statutes is a matter for the Department of Justice, not our Office. *Obsidian Sols. Grp., LLC*, B-417134, B-417134.2, Mar. 1, 2019, 2019 CPD ¶ 156 at 4 n.3. Because we do not have the authority to interpret or enforce the statute, we do not have a basis to conclude that the former official's proposed role on the contract runs afoul of the statute. As a consequence, we are unable to conclude that Council Rock lacked a reasonable expectation that the former official would be eligible for the role proposed for that official, *i.e.*, as a program consultant advising Council Rock's program director and as a member of the scientific advisory board.

³ Due to concerns about an appearance of a potential conflict of interest, the contracting officer removed members of the technical evaluation panel that had previously worked for the former government official. Supp. COS at 4.

⁴ See <https://ethics.od.nih.gov/topics/cc-pe.html> (last visited December 30, 2020).

⁵ The contracting officer investigated this issue and did not see a basis for this argument, but made a referral to HHS's Office of the Inspector General to further address the issue "since an alleged violation of 18 U.S.C. § 207(a)(1) involves a criminal matter." Supp. COS at 4. In the short time since this referral (which was made after the protester first raised this argument, in its supplemental protest), no further updates have occurred.

For example, we are unable to conclude that serving on the scientific advisory board would constitute the type of representation prohibited by 18 U.S.C. § 207, especially as the scientific advisory board is an advisory body to the contractor, not the government, which provides educational guidance and oversight of the NBBTP. See AR, Tab 3.3, Statement of Work at 2-4. Thus, board members do not represent Council Rock's interests in the same manner as a business capture manager might represent the interests of his employer, for instance. Nor can we conclude that communications made while serving on the scientific advisory board would be prohibited under the statute, or that they would not qualify for an applicable exception, such as the exception at 18 U.S.C. § 207(j)(5) for furnishing scientific and technological information. Finally, we cannot conclude that the former official's role overseeing the NBBTP program would constitute a "particular matter," as envisioned by the statute, particularly as the former official had no role in the drafting of the solicitation at issue or evaluating the responses to the solicitation. *C.f., CACI, Inc. vs. United States*, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (finding that a follow-on contract was not the same "particular matter," under 18 U.S.C. § 207, as a predecessor solicitation that the former official in question had participated on as chief of an agency's subdivision).

Without being able to interpret 18 U.S.C. § 207 and decide these questions, we have no basis to conclude that Council Rock lacked a reasonable expectation that it would be able to provide the former government official at issue. Accordingly, we are not persuaded that Council Rock engaged in an impermissible bait and switch.

The protest is denied.

Thomas H. Armstrong
General Counsel