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Decision

Matter of: CACI Technologies, Inc.

File: B-408858; B-408858.2

Date: December 5, 2013

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Major Brent A. Cotton, Max D. Houtz, Esq., and Gregory A. Moritz, Esq., Defense Intelligence Agency, for the agency.

Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal contained an impermissible bait and switch of its key personnel is denied where there is no evidence that the awardee made a material misrepresentation in its proposal with respect to its key personnel.
 2. Protest challenging evaluation of awardee's technical proposal is denied where the record shows that the agency reasonably evaluated the proposal in accordance with the stated evaluation criteria.
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DECISION

CACI Technologies, Inc., of Chantilly, Virginia, protests the award of a task order to Mission Essential Personnel (MEP), of Columbus, Ohio, by the Defense Intelligence Agency (DIA) under task order request (TOR) No. HHM402-13-R-0064 for classification review and declassification support services under the agency's habeas corpus support contract. CACI argues that MEP materially misrepresented the key personnel that would perform on the task order, and that the agency improperly departed from the TOR's evaluation scheme in evaluating MEP's proposal.

We deny the protest.

BACKGROUND

The TOR was issued under the agency's Solutions for Intelligence Analysis II multiple-award, indefinite-delivery/indefinite-quantity contract, under which both MEP and CACI are contract holders. Under the TOR, DIA seeks to contract for All Source (Counter Terrorism) Analysts to support the Department of Defense (DOD) Office of General Counsel, the Office of Military Commissions, and the Department of Justice (DOJ) in current and future litigation by providing subject matter experts to assess and perform security classification/declassification reviews on documents pertaining to detainees presently or formerly held at Guantanamo Bay, Cuba. Agency Report (AR), Exh. 4.2, Performance Work Statement (PWS), at 1-2.¹

The PWS sets forth various requirements including analysis and coordination of security classification and declassification reviews, support of DOD records management and archival responsibilities, progress reviews and other defined deliverables, generation of a Project Management Plan (PMP),² and an optional surge requirement. Id. at 2-4. The contractor is required to provide 78 non-key personnel, comprised of 74 All Source (Counter Terrorism) Analysts, two analysts to perform records management and two analysts to perform catalog management, as well as 12 key personnel specified by position in the TOR. Id. at 8-10.

The PWS delineates personnel qualification requirements for non-key and key personnel. Personnel qualifications are divided into three categories: (1) junior level, (2) mid-level, and (3) senior level. There are minimum qualifications and desired qualifications for each category. Id. at 10-11. Eleven of the 12 key personnel are designated as senior level positions, and one is designated as a mid-level position. Id. With respect to the specified key personnel, contractors were to submit resumes of qualified individuals to the government for review to ensure proposed personnel meet minimum contract requirements. Id. at 8. Contractors are also required to "ensure that the key personnel they propose are qualified and available to work on the actual procurement." Id. The PWS states that "[f]ailure to provide key personnel resumes or evidence of the availability to perform on the actual procurement may result in non-exercise of options or disqualification for future contract awards." Id.

¹ The PWS describes a DOD requirement to support the DOJ in ongoing habeas hearings and related appeals, as well as a requirement for similar support to meet the litigation needs of the Office of Military Commissions. AR, Exh. 4.2, PWS, at 1.

² The PMP is a collaborative plan between the contractor and the government that sets forth a detailed work plan to include specific tasks, assignments, schedule, planned labor hours and funding expenditure charts. Id. at 4. The plan is a specified deliverable required within 15 calendar days of task order award. Id.

Award of the task order was to be made to the best overall offer considering price and two non-price factors: technical/management capability, and small business participation plan. TOR § M at 1. When combined, the two non-price factors were to be considered significantly more important than price; the technical/management capability factor was to be the more important non-price factor. Id. The purpose of the technical/management capability factor was to evaluate technical merit and risk associated with the proposed approach. Id. at 2.

Under the technical/management capability factor, proposals were to be differentiated based upon how well each described: (1) the offeror's substantial depth and breadth of experience, knowledge and capability in performing work similar to that described in the PWS, and (2) the offeror's proposed progression plan to accomplish the tasks specified in the PWS. Id. at 2-3. With respect to its assessment of the proposed progression plan, the government was to examine with particularity the offeror's approach to uninterrupted delivery of services, availability of proposed staffing mix, and transition risks, including mitigation of the potential for proposed individuals not being available. Id. at 3.

Eight proposals were received in response to the TOR, including proposals from the incumbent contractor, CACI, and MEP. AR, Exh. 9, Source Selection Decision Document (SSDD) at 1. Discussions were held with all eight offerors and revised proposals were submitted. The source selection evaluation team (SSET) results for CACI and MEP are as follows:

	CACI	MEP
Technical Evaluation	Outstanding	Good
Small Business Evaluation	Good	Good
Price (including surge)	\$86,519,272.00	\$79,123,624.00

AR, Exh. 9, SSDD at 2. The Source Selection Authority (SSA) disagreed with the SSET's assessment of MEP's proposal in connection with the technical evaluation. As a result, and for reasons discussed in more detail below, the SSA upgraded MEP's technical evaluation rating to outstanding. Id. at 3-4. After a comparison of the specific merits of the various proposals, the SSA found that the technical merits of CACI's proposal did not warrant paying a price premium of \$7,395,648.00 over MEP's proposed price. Id. at 4-5. Based on this assessment, the SSA determined that award to MEP represented the best value to the government. Id. at 11. This protest followed.

DISCUSSION

CACI argues that MEP materially misrepresented the key personnel that would perform on the task order, resulting in an improperly high technical rating. CACI also argues that the agency improperly departed from the TOR's evaluation scheme in evaluating MEP's proposal, and improperly relaxed a material requirement for MEP, resulting in unequal treatment. We deny both aspects of the protest for the reasons discussed below.³

Bait and Switch

CACI argues that MEP's proposal included a "bait and switch" scheme regarding key personnel, resulting in an improperly high technical rating. In support of its position, CACI proffers declarations from five CACI employees detailing efforts by MEP to recruit each of these individuals to fill key personnel positions on the protested task order. CACI argues that MEP's aggressive pursuit of CACI's employees immediately after contract award shows that MEP either knowingly or negligently represented that it would rely on key personnel it did not expect to furnish during contract performance. CACI argues that DIA relied on MEP's misrepresentation in conducting its evaluation and MEP's misrepresentation had a material effect upon the competition.

Whether key personnel submitted in an offeror's proposal, in fact, perform under the contract is generally a matter of contract administration not subject to our review. Future-Tec Management Systems, Inc.; Computer & Hi-Tech Management, Inc., B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 14-15; see also RGI, Inc., B-243387.2, B-243387.3, Dec. 23, 1991, 91-2 CPD ¶ 572 at 3 (the fact that an offeror, after award, provides substitute personnel does not make the award improper). However, we will consider allegations that an offeror proposed key personnel that it does not expect to use during contract performance in order to obtain a more favorable evaluation, as such 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 6. Our decisions refer to such circumstances as a "bait and switch." Id.

In order to establish an impermissible "bait and switch," a protester must show: (1) that an offeror either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance, (2) that 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. Data Management Servs. JV, B-299702, B-299702.2, Jul. 24, 2007, 2007 CPD

³ This protest falls within our jurisdiction to hear protests related to the issuance of task orders valued in excess of \$10 million. 10 U.S.C. § 2304c (e)(1)(B).

¶ 139 at 8; see also ACS Government Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 3 (misrepresentation is material where the agency relied upon it and it likely had a significant impact upon the evaluation).

As a threshold matter, DIA asks that we dismiss this protest ground, arguing that CACI's protest failed to state a "bait and switch" as a matter of law. According to DIA, CACI's protest does not satisfy this Office's standard for review as it did not allege MEP sought to substitute its proposed key personnel with individuals of inferior qualifications, a necessary element to show a material misrepresentation. Motion to Dismiss at 3. We declined to dismiss the protest on this basis.

Our Bid Protest Regulations require that protests include a detailed statement of the legal and factual grounds of protest and that the grounds be legally sufficient. Systems Dynamics International, Inc.--Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251 at 3; see also 4 C.F.R. § 21.1(c)(4) & (f) (2013). This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. Id. Protests which fail to clearly state legally sufficient grounds of protest shall be dismissed. 4 C.F.R. § 21.5(f).

One of the proofs required to establish a "bait and switch" is that the agency's reliance on the misrepresentation had a material effect on the evaluation results. Data Management Servs. JV, supra, at 8. While we agree with DIA that it would be difficult to prevail on the merits where the switch is to equally or more qualified personnel, and qualifications were the only consideration,⁴ we do not read CACI's protest to solely allege such a circumstance.⁵ Rather, we read the protest to argue that MEP's alleged misrepresentation as to the availability of its key personnel resulted in a material effect on the evaluation. Protest at 17-18. CACI proffers the declarations from its personnel not only to show that MEP intended to offer CACI personnel employment, but also to support its position that MEP's key personnel were not, in fact, available. Id. Consequently, we read CACI's protest to argue that,

⁴ We have previously held that, even where an intent to switch is proven, substitution of equally or more qualified personnel than the ones designated in a quotation could not have had a material effect on the evaluation results. See e.g., AT&T Government Solutions, Inc., B-406926 et al., Oct. 2, 2012, 2013 CPD ¶ 88 at 12; Data Management Servs. JV, supra, at 8.

⁵ CACI does argue that MEP knew its proposed key personnel were unavailable, and used them as place holders until it could recruit CACI's incumbent personnel. Protest at 18.

had DIA known that MEP's key personnel were not available, its evaluation would not have been as favorable.⁶ Id.

A review of the TOR shows that availability of key personnel was a consideration in the solicitation. For example, the PWS required offerors to ensure that key personnel are available to work on the actual procurement. AR, Exh. 4.2, PWS, at 8. Further, in response to a question asked about submission of resumes, the agency responded, "[o]nly key personnel resumes are required at the time of proposal. Those key personnel are expected to be the actual people to arrive if awarded." AR, Exh. 4.3, Question & Answer (Q&A), at 3. Moreover, the solicitation warned of possible adverse contract actions should evidence of the availability of key personnel to perform on the actual procurement not be provided.⁷ AR, Exh. 4.2, PWS, at 8. Finally, staffing considerations, including availability of proposed staffing mix and mitigation of transition risk associated with proposed personnel not being available were to be part of the evaluation. TOR § M at 3.

Thus, where, as here, availability of key personnel is a consideration in the solicitation, a misrepresentation as to the availability of such personnel could serve as a basis to sustain a protest, even where the contractor hires equally or more qualified personnel after award. The key issue here is not the qualifications of the personnel who ultimately perform on the contract, but the impact of an offeror's misrepresentation on the evaluation.⁸ There is no evidence that incumbent

⁶ As CACI argues, "MEP surely would not have been rated Outstanding had its proposal stated that 5 of its 12 Key Personnel positions would not be filled by the individuals identified in MEP's proposal but would be filled by efforts to recruit incumbent CACI personnel, in some instances at lower salaries, in the hope that they would accept the positions." Opposition to Motion to Dismiss at 3.

⁷ According to the TOR, the repercussion for failing to submit evidence of availability was the possibility of "non-exercise of options or disqualification for future contract awards." AR, Exh. 4.2, PWS, at 8. MEP's base contract apparently treated approval of key personnel as a matter of contract administration. MEP base contract at 28, 71-72. Divergently, while the TOR required non-key personnel resumes after award (like the base contract), it was silent on when key personnel resumes were required. AR, Exh. 4.2, PWS, at 8. The Q&A required resumes at the time of proposal, and thus the TOR can be reasonably read to require evaluation of key personnel qualifications as a function of proposal evaluation.

⁸ Our holdings in AT&T Government Solutions, Inc., supra, at 12, and Data Management Servs. JV, supra, at 8, are not inconsistent with this result. In both decisions we postulated that even if intent to switch were proven, there could be no material effect on the evaluation if the switch was to equally or better qualified personnel. In those matters, the availability of key personnel was not at issue; only the qualifications of the substituted personnel.

personnel were available to MEP at the time it submitted its proposal. Thus, if the firm had represented that it intended to hire incumbent personnel as its key personnel, there is at least some likelihood that it would not have met the solicitation's requirement to show evidence of their availability. Such a circumstance could have resulted in a downgrade under the stated evaluation scheme. Consequently, we found that CACI met its burden of pleading to satisfy this Office's threshold standard for review on the merits.

Turning to the merits, however, we find that CACI has not shown that MEP engaged in a bait and switch. CACI has presented no evidence that MEP's proposal misrepresented the key personnel it intended to provide for contract performance. MEP's technical proposal states that it "has obtained commitments from our Habeas Corpus on-site PM . . . and 11 other key personnel to join our team upon award." AR, Exh. 6.1 MEP Proposal, at 14. Further, MEP's proposal indicates that it maintains an on-going dialogue with the key personnel to ensure they are mission ready and available. Id. Finally, MEP's proposal includes resumes and letters of commitment for each of the required key personnel positions. AR, Exh. 6.1.1, MEP Proposal at Appendix A. CACI has presented no evidence challenging the veracity of MEP's proposal statements, particularly with respect to its intentions in proposing its key personnel. There is also no evidence that the key personnel were unavailable to perform on the contract at the time MEP submitted its proposal.

CACI argues that the letters of commitment MEP received from its proposed key personnel and submitted with its proposal were not commitments. CACI points out that none of the letters, save one, have any agreement on salary. Consequently, CACI characterizes MEP's letters as nothing more than promises to negotiate after award. However, we read nothing in the solicitation's terms that requires an offeror to provide evidence of salary agreements with its key personnel in its proposal. While the TOR sets forth an expectation that the proposed key personnel would actually work on the resultant contract and requires evidence of availability, we see no reason why the letters of commitment submitted by MEP do not reasonably satisfy that requirement.

CACI next argues that MEP misrepresented its on-going contact with key personnel to ensure their availability to perform on the contract. CACI points to MEP's efforts to recruit incumbent personnel immediately after contract award, inferring that MEP knew or should have known that its key personnel were not available prior to contract award. CACI asserts that MEP's failure to maintain an on-going dialogue with its key personnel to ensure their availability "was a negligent or reckless misrepresentation that provided false assurances to the Agency about the availability of the Key Personnel identified in its proposal. . ." Comments at 7. However, CACI has presented no evidence that MEP had any indication that its proposed key personnel were not available prior to award. CACI's unsupported assertion amounts to mere speculation and does not provide an adequate basis to

sustain a protest. Science Applications International Corp., B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

CACI has simply not shown that MEP's proposal made a misrepresentation regarding its proposed key personnel. The only evidence proffered by CACI--declarations of its personnel detailing MEP's post-award recruitment efforts--does not mandate the conclusion that MEP made a misrepresentation. Further, the mere fact that MEP recruited incumbent personnel after award does not establish that the proposed personnel were, or are, unavailable to perform the contract work. AT&T Government Solutions, Inc., supra, at 12. It is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Id. As there has been no showing by CACI of a material misrepresentation by MEP concerning its proposed key personnel, we deny this protest ground.⁹

Optional Surge Requirement

CACI next challenges DIA's evaluation of MEP's proposal with respect to its response to the optional surge requirement. This requirement calls for the contractor to provide 80 additional All Source (Counter Terrorism) Analysts as part of surge capability to perform the basic requirements. AR, Exh. 4.2, PWS, at 4. CACI argues that the SSA departed from the solicitation's evaluation scheme when she raised MEP's technical rating from good to outstanding by eliminating the importance of personnel availability as stated in the solicitation. In a similar vein, CACI argues that the SSA improperly relaxed a material requirement of the solicitation for MEP as it relates to personnel availability, resulting in prejudicially unequal treatment to CACI.

DIA responds that the optional surge requirement is a future capability, and not an immediate staffing capability as required for the key and non-key personnel. According to the agency, while the PWS required key and non-key personnel to be identified and placed on contract within a specified time after award, such a condition was not placed on the optional surge requirement. As evidence of its position, DIA points to the solicitation requirement that offerors identify how they will acquire and deliver the additional analysts to support the surge capability in the

⁹ A likely explanation for MEP's recruitment efforts focused at incumbent personnel is that such recruitment is exactly what MEP stated it would do in its proposal. While maintaining that it had secured commitments from its 12 key personnel, MEP's proposal also states, "[d]uring the transition period, Team MEP will make offers of employment to those incumbent employees the Government identifies as high performers." AR, Exh. 6.1, MEP Proposal, at 14. Thus, MEP's recruitment of CACI's incumbent personnel was an expressed representation in MEP's proposal.

PMP, which was a deliverable 15 days after contract award. AR, Exh. 4.2, PWS, at 4. We find the agency's position reasonable.

The record shows that, during the course of the initial evaluation, the SSET identified the following weakness and discussion topic for MEP's proposal under the technical/management capability factor:

Weakness: MEP did not adequately provide specific details on how to implement the optional surge – PWS 4.0 – requirement or how they would recruit the additional 80 all-source CT analysts. (Proposal pg. 20)

Discussion: This is MEP's opportunity to provide specific details on how MEP will implement the optional surge requirement identified in the PWS, Section 4.0, or how MEP will recruit an additional 80 all-source CT analysts to support.

AR, Exh. 6.2, MEP Discussion (Technical-Management Proposal). MEP provided a response to this question detailing its extensive experience with recruitment of personnel, maintaining an internal [DELETED], managing similar surge requirements on other contracts, identification of a [DELETED] to manage the surge requirement, and the ability to shift work from other contracts being de-scoped over the next 12-18 months. AR, Exh. 6.3, MEP Discussion Response. The SSET conducted a final technical evaluation noting that MEP provided additional details with respect to how it would meet the optional surge requirement. AR, Exh. 7, SSET Technical Evaluation, at 5-6. However, the SSET noted that MEP's response did not address how it would meet the surge requirement if the personnel it identified to be de-scoped from other contracts were unavailable. Id. at 6. Consequently, the SSET did not change MEP's overall rating of technical capability. Id.

In rendering her award decision, the SSA disagreed with the SSET's assessment of a weakness against MEP. The SSA found that the weakness identified by the SSET "is clearly offset by the stated strengths and is easily correctable with minimal Government oversight." AR, Exh. 9, SSDD, at 3. Further, the SSA stated that MEP's identification of a "[DELETED] to assist the project manager with the transition issues . . . addresses the SSET's concern of the optional surge mitigation plan, along with the timeline and pool of analysts MEP identified in the event the surge was exercised." Id. In consideration of the SSET's findings and comparing MEP's proposed surge solution to that of CACI's, the SSA decided to remove the weakness assessed by the SSET and raise MEP's technical rating from good to outstanding. Id.

The solicitation required offerors to be evaluated based on their proposed progression plan to accomplish tasks specified in the PWS, including demonstration of processes, actions and coordination required to perform the optional surge

requirement. TOR § M at 3. A reasonable reading of the solicitation does not lead to the conclusion that MEP was required to demonstrate that it had personnel available to meet the optional surge requirement, as the specifics of how it would acquire and deliver additional analysts in response to the surge requirement were details left to the parties after contract award. AR, Exh. 4.2, PWS, at 4. Further, we do not understand the SSET to have assigned a weakness to MEP for failing to demonstrate that it had personnel available to staff the optional surge as CACI alleges. We find that, instead, that the SSET expressed a concern about MEP's ability to recruit such personnel in accordance with its identified process.

Since we find that the solicitation did not require evidence of personnel availability with respect to the optional surge requirement, we conclude that the SSA did not improperly diverge from the evaluation scheme, and did not relax a solicitation requirement in favor of MEP. Our review of MEP's proposal, including its discussion response, along with the SSA's rationale overriding the SSET, leads us to conclude that the SSA's decision was reasonable. We find supported the SSA's assessment that MEP's proposed [DELETED], identified timeline and identified pool of analysts from which to recruit (outside of those identified on the de-scoped contract) adequately addressed the weakness assigned by the SSET.

The protest is denied.

Susan A. Poling
General Counsel