



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Orion Government Services, Inc.

File: B-422978; B-422978.2

Date: December 30, 2024

Jayna Marie Rust, Esq., and Scott Lane, Esq., Thompson Coburn LLP, for the protester. Robert J. Sneckenberg, Esq., Christian N. Curran, Esq., William B. O'Reilly, Esq., and Emily P. Golchini, Esq., Crowell & Moring LLP, for McCarthy Building Companies, Inc., the intervenor.

Stakely McConnell, Esq., Department of the Army, for the agency.

Samantha S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed where protester's proposal was technically unacceptable due to unavailability of proposed key personnel, and, as a result, protester is not an interested party to question the agency's evaluation or source selection decision.

DECISION

Orion Government Services, LLC, of Houston, Texas, protests the award of a contract to McCarthy Building Companies, Inc., of St. Louis, Missouri, under request for proposals (RFP) No. W912HY24R0008, issued by the Department of the Army, Corps of Engineers (Corps), for construction services in the Houston Ship Channel System. The protester challenges the agency's evaluation of proposals and resulting source selection decision.

We dismiss the protest because Orion is not an interested party.

BACKGROUND

On November 20, 2023, using the procedures of Federal Acquisition Regulation (FAR) part 15 and subpart 36.2, the agency issued the solicitation seeking proposals for construction services for the Port of Houston in the Houston Ship Channel. Agency

Report (AR), Exh. 3, RFP at 5.¹ The primary objective of the services is to widen the Barbour's Cut navigation channel, modify the channel entrance, and perform advanced maintenance for the flare (*i.e.*, the place where the channel joins other bodies of water). *Id.*

The solicitation contemplated award of a fixed-price contract with a "maximum allowed contract duration of 1,091 days" on a best-value tradeoff basis, considering the following factors: (1) construction execution approach; (2) organization/management team (management); (3) past performance; (4) small business participation; and (5) price. RFP at 66, 77. The non-price factors were listed in descending order of importance, and all non-price factors, when combined, were significantly more important than price. *Id.* at 70. Offerors with a rating of unacceptable for any individual factor would not be considered for award. *Id.* at 66.

Relevant here, the solicitation established five key personnel positions, and required offerors to "provide resumes" with "adequate details to show depth and breadth of experience" for individuals proposed for those positions. AR, Exh. 5, RFP amend. 2 at 3. The RFP provided that, with respect to "key personnel proposed for this requirement, the contractor shall obtain the Contracting Officer's written consent before making any substitution for these specific individuals designated as key personnel." *Id.* The agency intended to make award without holding discussions, but reserved the right to conduct discussions if deemed necessary by the source selection authority or contracting officer. RFP at 67.

The agency received four proposals, including those submitted by Orion and McCarthy, by the January 26, 2024, deadline for submission. Contracting Officer's Statement (COS) at 2. In March, the Corps established a competitive range of all four proposals and opened discussions. AR, Exh. 21, Source Selection Decision Document (SSDD) at 6; AR, Exh. 13, Orion Discussions Letter at 1. In April, the agency closed discussions with the offerors. See AR, Exh. 24, Close of Discussions Letter to Orion.

After completing evaluation of proposals, the agency summarized the evaluation of McCarthy, Orion, and the third relevant offeror as follows:²

¹ Citations to the record refer to the documents' Adobe PDF pagination. The agency amended the RFP six times; unless otherwise noted, references to the RFP are to the full RFP submitted as AR Exhibit 3.

² Except for past performance, the non-price factors would be evaluated using the following adjectival ratings: outstanding, good, acceptable, marginal, and unacceptable. RFP at 75. Past performance would be evaluated and assigned one of the following confidence ratings: substantial, satisfactory, neutral, limited, or no confidence. *Id.* at 85. Each of the technical factors would also be assigned a risk rating in conjunction with the adjectival rating. The risk ratings are not relevant to the discussion and, for simplicity, will not be identified in the table below.

	McCarthy	Orion	Offeror C
Construction Execution Approach	Outstanding	Good	Acceptable
Management	Outstanding	Outstanding	Outstanding
Past Performance	Substantial Confidence	Satisfactory Confidence	Neutral Confidence
Small Business Participation	Good	Acceptable	Good
Price	\$181,551,864	\$149,996,515	\$172,015,224

AR, Exh. 21, SSDD at 29. The Corps selected McCarthy’s proposal as offering the best value, and on July 24, awarded the contract to McCarthy. COS at 2. After receiving notification of the award decision and a debriefing, Orion filed this protest with our Office.

DISCUSSION

Orion challenges multiple elements of the agency’s evaluation of its own proposal and the proposal of the awardee under the construction execution approach, past performance, and price factors. Comments & Supp. Protest at 3-17. Additionally, Orion contends that these alleged errors undermined the best value decision. *Id.* at 17-18.

After submission of the agency report, the intervenor filed comments along with a request for dismissal of the protest. McCarthy argues that the protester’s proposal is technically unacceptable and cannot form the basis for an award because Orion knew that one of its proposed key personnel became unavailable after proposals were submitted, but prior to the agency making award. Intervenor’s Comments and Req. for Dismissal at 15-17. For the reasons explained below, we find that dismissal is appropriate here.

Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. 31 U.S.C. §§ 3551-3557. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). In a post-award context, we have generally found that a protester is an interested party to challenge an agency’s evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *CACI, Inc.-Fed.*, B-419499, Mar. 16, 2021, 2021 CPD ¶ 125 at 5. A protester is therefore not an interested party if it would not be eligible to receive a contract award were its protest to be sustained. *Win Aviation, Inc.*, B-422037, B-422037.2, Dec. 21, 2023, 2024 CPD ¶ 12 at 6.

In a negotiated procurement, as is the case here, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. *PAE Applied Techs., LLC*, B-419133, Nov. 4, 2020, 2020 CPD ¶ 363 at 4. When, as here, a solicitation requires resumes for--or otherwise

requires the identification of--key personnel, the resumes form a material requirement of the solicitation. *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 4. Offerors are obligated to advise agencies of changes in proposed resources to satisfy material requirements, even after submission of proposals, including if an individual proposed for a key personnel position is no longer available. *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 3 n.2. When an agency is notified of the withdrawal of a key person from a proposal, the agency cannot proceed with award to that proposal. *Id.* Instead, the agency has two options: either reject the proposal as technically unacceptable for failing to meet a material requirement, or open discussions with all remaining offerors to permit proposal revisions. *Id.*

Here, under the management factor, the solicitation required offerors to propose individuals for five positions, including, as relevant here, the Site Safety and Health Officer (SSHO). AR, Exh. 5, RFP amend. 2 at 3. The solicitation's statement of work identifies the SSHO's duties for dredging and non-dredging project sites, and defines the position as "a full-time, dedicated position, who must report to a senior project (or corporate) official" and "may not have other collateral duties and cannot be a subcontracted employee." RFP at 277-81. The statement of work is explicit that, if the SSHO is dismissed for performance reasons, "project work will be stopped and will not be allowed to resume until a suitable replacement is approved and the [relevant] duties are again being effectively carried out." *Id.* at 281.

Offerors were required to "provide resumes" for the identified key personnel, including the SSHO. AR, Exh. 5, RFP amend. 2 at 3. The RFP provided a specific evaluation standard:

The credentials of the proposed SSHO will be evaluated to ensure they have at least 10 years of safety work of a progressive nature, with at least ten (10) years of experience on similar projects. Additional experience may be considered a strength. Multiple SSHOs may be considered a significant strength.

Id. at 4.

Orion proposed two individuals for SSHO, explaining how they would divide responsibilities: "As safety is of paramount importance to this project, we have assigned two Site Safety and Health Officers (SSHOs) to this project - one dedicated to overseeing the [DELETED] work and another for the [DELETED] work." AR, Exh. 9, Orion Proposal at 57. Orion elaborated that M, the "SSHO for [DELETED]" had 12 years of experience and would "oversee that field safety programs and policies are in place for the [DELETED] work that promote a safe work environment and comply with state and federal regulatory guidelines." *Id.* On the other hand, P, the "SSHO for [DELETED]" had 15 years of experience and would "oversee all safety operations for the [DELETED] work." *Id.* Orion featured both individuals in its organizational chart, each labeled as "Key Staff," and submitted M's and P's resumes. *Id.* at 59, 62-64. The

resumes for M and P reflected that both were then employed by Orion; consistent with the solicitation's requirements for SSHOs, both were proposed to serve as Orion employees reporting to senior corporate officials. *Id.*

Based, in part, on the proposed key personnel, the Corps found Orion's management approach merited a rating of outstanding. AR, Exh. 19, Source Selection Evaluation Board (SSEB) Report at 19-21. Specifically, the evaluators credited Orion for "appointing two (2) SSHOs to this project," noting that the "SSHO overseeing the [DELETED] work ha[s] 12 years of experience and the one overseeing the [DELETED] work ha[s] 15 years," and concluding that this was "considered a Significant Strength." *Id.* at 20; *see also* Exh. 21, Source Selection Decision Document at 10.

Citing "public information," the intervenor asserts that M "left Orion in July 2024, before the award of the instant procurement," on July 24 such that Orion knew--but failed to inform the agency--that M "became unavailable" to perform his proposed role as a full-time SSHO employed directly by Orion "during the pendency of the procurement." Intervenor Comments & Req. for Dismissal at 15-16. The agency joins the intervenor's request for dismissal, asserting that Orion is not an interested party because the protester would not be eligible for award even if its protest were sustained because its proposal was rendered unacceptable by M's pre-award unavailability. Supp. Memorandum of Law (MOL) at 17-19.

Our Office directed Orion to respond to the intervenor's request for dismissal. Electronic Protest Docketing System No. 24 (establishing the deadline for protester's supplemental comments, which were to include "a response to the intervenor's request for dismissal"). In its response, Orion does not dispute the assertion that the firm knew that M was unavailable prior to the agency's award of this contract. *See* Supp. Comments at 14. To the contrary, Orion essentially concedes the assertions, premising its response on why Orion is an interested party "[e]ven assuming" that the firm knew before award that M was no longer available as proposed.³ *Id.*

Orion first argues that the firm's proposal remained acceptable despite Orion's knowledge of M's unavailability because the solicitation "identified the need for *one*" SSHO, and Orion proposed two individuals for SSHO. *Id.* Therefore, according to the protester, "[e]ven assuming that [M], one of those SSHOs, is no longer employed by Orion, neither McCarthy nor the Agency have asserted that the remaining SSHO fails to meet the Solicitation's requirement" such that Orion's proposal remains acceptable "despite [M's] alleged departure." *Id.* at 14-15.

³ Indeed, Orion also asserts that, if its protest were sustained and our Office recommended that the agency reevaluate proposals, "the Agency may choose to re-evaluate Orion's proposal based on an assumption that [M] is now unavailable, or if the Agency chooses to re-open discussions, it may permit Orion to address any purported change in [M's] availability." Supp. Comments at 14 n.3. This proposition follows the options sets forth for the agency upon notification by an offeror of the withdrawal of a key person. *Chenega Healthcare Servs., LLC, supra* at 3 n.2.

With respect to key personnel, the solicitation required offerors to propose individuals for five identified key personnel positions, including SSHO.⁴ AR, Exh. 5, RFP amend. 2 at 3. As our Office has explained, the obligation to notify the agency of a change in proposed staffing and resources applies to departure of key personnel, regardless of whether the proposed key personnel were explicitly required by the solicitation or were otherwise identified as key personnel by an offeror. See *Patricio Enters. Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 13-14. Where a solicitation specifically requires that offerors identify and offer the resume for key personnel positions and indicate that this information will be considered in the evaluation, the obligation applies for each individual for whom a resume is submitted. See *IPKeys Techs., LLC*, B-416873.2, B-416873.3, Apr. 5, 2019, 2019 CPD ¶ 138 at 7.

Here, Orion elected to satisfy the solicitation's SSHO requirement by proposing two individuals to satisfy the requirements of the position, with each individual performing separate and distinct duties. M was devoted to [DELETED] work and P was devoted to [DELETED]. AR, Exh. 9, Orion Proposal at 57. Orion identified both individuals as key personnel, and submitted resumes for both. *Id.* at 59, 62-64. And the agency evaluated Orion's approach accordingly, assigning Orion a strength based on the proposal that M and P would fill the SSHO position together. AR, Exh. 19, SSEB Report at 19-21. The resume for M was therefore material to the proposal's satisfaction of the SSHO requirement, such that his known unavailability rendered Orion's current proposal unacceptable. See *General Revenue Corp. et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 CPD ¶ 106 (sustaining protest based on unavailability of key personnel where "the protesters self-identified these individuals as key personnel and presented them as important parts of their management approaches"). Thus, Orion's proposal is not saved by the fact that it knew just one, rather than both, of its proposed personnel for the SSHO position became unavailable prior to award.

Orion separately argues that "neither McCarthy nor the Agency has pointed to a single case similar to the facts here"--that is, "where the GAO determined that a protester was deemed to not be an interested party where one of its key personnel was alleged to have ceased employment with the company." Supp. Comments at 14. In other words, Orion argues that we should not apply the same analysis to Orion's circumstances because it is a protester rather than an awardee. We disagree.

There is nothing in our decisions that suggests that the obligation with respect to material requirements such as key personnel applies to awardees only. To the contrary, we have previously considered arguments that protesters are not interested parties to maintain a protest because of the unavailability of key personnel. For example, in *Tiya Support Services, LLC*, B-421538.3, May 24, 2024, 2024 CPD ¶ 134 at 4, we analyzed the agency's request for dismissal asserting that the protester "would not be next in line for award due to the unavailability of a proposed key person,

⁴ The other identified key positions were project manager, construction superintendent, construction quality control manager, and project scheduler.

rendering Tiya's proposal ineligible for award." In *Tiya*, we found the protester to be an interested party, not because a different standard applied, but because the protester submitted a declaration from the key person in question confirming continued availability. *Id.* at 5-6. Under those circumstances, we explained "we do not find that the protester's proposal became ineligible for award due to the unavailability of a proposed key person." *Id.* at 6. In another example, we analyzed allegations that key personnel of both the protester and the awardee had become unavailable. *DZSP 21, LLC*, B-410486.10, Jan. 10, 2018, 2018 CPD ¶ 155 at 10-12. There, we found no basis to conclude that either offeror had "actual knowledge" of any proposed key employee's unavailability before award where both parties "produced evidence" in the form of correspondence with employees about continued availability and declarations from corporate executives about the company's knowledge and understanding. *Id.*

Here, Orion does not contest that it knew M became unavailable prior to award and Orion has not indicated that it reasonably understood M remained available despite his departure from Orion's employment. Thus, we have no basis to deviate from our decisions requiring offerors to notify the agency of a change in the availability of key personnel. Where, as here, the record reflects that the protester's proposal was unacceptable, the protester does not qualify as an interested party to challenge other aspects of the agency's evaluation and award decision. See *Amentum Parsons Logistics Servs. LLC*, B-422697.3 *et al.*, Oct. 4, 2024, 2024 CPD ¶ 237 at 6 (dismissing protest where protester was not an interested party to challenge the agency's evaluation and source selection decision).

Finally, as noted above, Orion maintains that is an interested party based on speculation on what the agency could do in response to Orion's protest. Orion's protest challenges the agency's evaluation of proposals as well as the award decision, and requests that the Corps "be directed to re-evaluate proposals in accordance with the Solicitation and applicable law." See Comments & Supp. Protest at 18. According to the protester, if the protest were sustained, and GAO recommends reevaluation of proposals, the agency "may choose to re-open discussions," and "permit Orion to address any purported change in [M's] availability." Supp. Comments at 14 n.3. An agency, however, has significant discretion to re-open, or leave closed, discussions with offerors; in our view, Orion's speculation that the agency may re-open discussions is too tenuous a basis to show the direct economic interest required to maintain a protest. *Tyonek Worldwide Servs., Inc.--Recon.*, B-409326.6, May 15, 2014, 2014 CPD ¶ 156 at 3 (explaining that speculation about the possibility that the agency might decide to conduct discussions with the protester "is too tenuous to show the direct economic interest required to be considered an interested party.")

In fact, the Corps represents that "even if Orion's protest were successful" in its protest arguments challenging the evaluation of Orion's and McCarthy's proposals, McCarthy and "at least one eligible offeror [Offeror C] would remain in the competition," such that the Corps would "retain discretion to award without re-opening discussions." See Supp. MOL at 18. According to the Corps, if the agency were to take the action that Orion's protest specifically requests, and reevaluate Orion's existing proposal the agency would

be obligated to reject the proposal as unacceptable, for the reasons discussed. *Id.* at 17-18; *Chenega Healthcare Servs., LLC, supra* at 3 n.2. We agree.

As we have explained, for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a). An unacceptable proposal cannot form the basis of award. *Alpine Cos. Inc., B-419831 et al.*, June 8, 2021, 2021 CPD ¶ 227 at 4. Even if Orion were to prevail on all of its protest arguments challenging the evaluation of its proposal, as well as the awardee's proposal, the protester would not be next in line for award because: (i) Orion's proposal would be technically unacceptable and ineligible for award; (ii) the agency would be under no obligation to open discussions to allow Orion to revise its proposal; and (iii) two acceptable firms would be in line for the award (while Orion asserts that McCarthy should have been evaluated less favorably, it does not argue that McCarthy should have been excluded as unacceptable, and the agency received a technically acceptable proposal from another offeror). Accordingly, Orion is not an interested party for purposes of questioning the agency's evaluation of proposals and resulting source selection decision. See *Cask Techs., LLC, B-422437.2*, June 20, 2024, 2024 CPD ¶ 146 at 6 (dismissing protest because protester was not an interested party following departure of proposed key personnel).

Edda Emmanuelli Perez
General Counsel