



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: Patricio Enterprises Inc.

File: B-412738; B-412738.2

Date: May 26, 2016

Paul F. Khoury, Esq., Tracye Winfrey Howard, Esq., and Moshe B. Broder, Esq., Wiley Rein LLP, for the protester.

David R. Warner, Esq., Wojciech Z. Kornacki, Esq., and Barbara S. Kinosky, Esq., Centre Law and Consulting, LLC, for Knowledge Capital Associates, the intervenor. Korvin S. Kraics, Esq., and Ian F. Rothfuss, Esq., United States Marine Corps, for the agency.

Jonathan L. Kang, Esq., and Cherie J. Owen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee's proposal contained material misrepresentations concerning the availability of personnel is sustained where the record shows that the proposal stated that the awardee had "signed" offer letters "in place" for certain proposed personnel despite never providing such letters to these individuals, and where the record shows that the misrepresentations had a material effect on the agency's evaluation of the awardee's proposal.

2. In light of the awardee's material misrepresentations concerning the availability of its proposed personnel, GAO recommends termination of the award and exclusion of the awardee from the competition.

DECISION

Patricio Enterprises Inc., of Stafford, Virginia, a service-disabled, veteran-owned small business (SDVOSB), protests the issuance of a task order to Knowledge Capital Associates (KCA), of Quantico, Virginia, also a SDVOSB, by the United States Marine Corps under request for proposals (RFP) No. N00024-15-R-3588, for logistics support services for the agency's Program Manager, Infantry Weapons Systems (PM IWS). The protester argues that the awardee's proposal contained material misrepresentations concerning the availability of its proposed personnel, and that the agency unreasonably evaluated the adequacy of the awardee's proposed staffing for certain tasks.

We sustain the protest.

BACKGROUND

On September 29, 2015, the VA issued the RFP, which sought proposals to provide lifecycle logistics support services, including acquisition support and financial management, for the Marine Corps Systems Command's PM IWS program at Quantico, Virginia. Performance Work Statement (PWS) at 4. The task order will provide support for five product management teams: (1) anti-armor systems, (2) individual combat equipment, (3) infantry weapons, (4) optics and nonlethal systems, and (5) reconnaissance and amphibious raids. Id. at 4-7. These services had been or were being provided under other task orders and contracts; Patricio and KCA were each incumbents for certain of these requirements. Contracting Officer's Statement/Agency Memorandum of Law (COS/MOL) at 1-2; Agency Report (AR), Tab 15, Source Selection Evaluation Board (SSEB) Report, at 3, 8. The competition was limited to vendors who held Navy Seaport-e Zone 2 multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts, and was set aside for SDVOSB firms. RFP at 2. The RFP anticipated the award of a fixed-price contract (with reimbursable other direct costs) with a base period of 1 year (including a 4-month phase-in period) and four 1-year options. Id. § B at 1-2.

The solicitation provided for the evaluation of proposals based on three factors: (1) management and staffing capability, (2) past performance, and (3) price. RFP § M at 1. The management and staffing capability factor had two equally-weighted subfactors: (1) management approach, and (2) staffing approach. Id. at 2. The past performance factor was to consider offerors' experience performing tasks similar in size, scope, and complexity. Id. at 3. The price evaluation was to consider whether offerors' proposed prices were fair, reasonable, complete, and balanced. Id. at 2-3. For purposes of award, the management and staffing capability factor was significantly more important than price, and price was significantly more important than past performance. Id. at 1.

The Corps received proposals from six offerors by the closing date of November 16. The Corps found that KCA's and Patricio's proposals each had one strength, and no weaknesses, significant weaknesses, or deficiencies. AR, Tab 15, SSEB Report, at 3, 8. As discussed in detail below, both offerors' strengths were assessed in connection with the staffing approach subfactor for the management and staffing capability factor, with regard to the transition requirements. Id. (citing RFP § M at 2; PWS at 10).

The final evaluation ratings for the offerors' proposals, as assigned by the SSEB, were as follows:¹

	KCA	Patricio	Offeror 3	Offeror 4
Management and Staffing Capability	Good	Good	Acceptable	Marginal
Past Performance	Satisfactory Confidence	Satisfactory Confidence	Satisfactory Confidence	Limited Confidence
Price	\$21,338,501	\$26,056,651	\$28,999,432	\$29,633,768

AR, Tab 18, Source Selection Decision Memorandum (SSDM), at 1.²

The source selection authority (SSA), who was also the contracting officer, reviewed the SSEB's evaluations and concurred with its findings. *Id.* The SSA noted that KCA's and Patricio's proposals received identical strengths under the management and staffing capability factor, and that both offerors received a satisfactory confidence rating under the past performance factor. *Id.* at 3. The SSA selected KCA's proposal for award, concluding that "[d]ue to the parity in non-price related factors, price becomes the determining factor and KCA's proposal is priced \$4.7M lower than [Patricio's]." *Id.* The Corps provided a debriefing to Patricio on February 5, 2016, and this protest followed.³

DISCUSSION

Patricio argues that KCA's proposal contained material misrepresentations concerning the availability of proposed personnel. Specifically, Patricio argues that

¹ For the management and staffing capability factor, the agency assigned proposals one of the following ratings: outstanding, good, acceptable, marginal, or unacceptable. RFP § M at 2. For the past performance factor, the agency assigned proposals one of the following ratings: substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown/neutral confidence. *Id.* at 3.

² Two additional offerors' proposals, one higher-priced and one lower-priced than Patricio's proposal, were rated unacceptable under the management and staffing capability factor and were not considered for award. AR, Tab 18, SSDM, at 1-2.

³ The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award ID/IQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

KCA's proposal identified [DELETED] individuals who were either Patricio employees or working under a subcontract or teaming arrangement with Patricio for its incumbent contract at the time of proposal submission, and the proposal contained misrepresentations regarding offers for employment to these individuals.⁴ The protester submitted declarations from these individuals stating that despite the representations in KCA's proposal that these individuals had been offered employment by KCA, the awardee had not, prior to the time proposals were submitted, contacted them regarding their availability or willingness to work for KCA on the PM IWS task order. Patricio argues that the material misrepresentations in KCA's proposal warrant termination of the award and elimination of the awardee from the competition. For the reasons discussed below, we agree with the Patricio's arguments and sustain the protest.⁵

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 Bid Protest Regulations, 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. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6. 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: (1) that 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) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. CACI Techs., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013

⁴ For ease of reference, and because the distinction between these categories is not relevant to the merits of the protest, these [DELETED] individuals are referred to herein as Patricio employees or personnel.

⁵ Patricio also argues that the Corps unreasonably evaluated KCA's proposed staffing levels for the solicitation's interactive visual guides requirements. Because we sustain the protest with regard to Patricio's allegations concerning KCA's proposed personnel, and because we recommend that KCA be eliminated from the competition, we need not address this argument. Additionally, the protester withdrew other arguments concerning the evaluation of its proposal, and the qualifications of an individual proposed by KCA for a key personnel position. Protester's Comments (Mar. 25, 2016) at 2 n.1.

CPD ¶ 283 at 5; ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 3, 10. An offeror may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good on its representation.⁶ ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 13. As discussed further below, our Office has held that a misrepresentation that materially influences the agency's evaluation may warrant disqualification of the offer. ACS Gov't Servs., Inc., supra, at 11.

As relevant to the staffing approach subfactor of the management and staffing capability evaluation factor, the RFP required offerors to “provide a detailed approach to staffing that meets the PWS requirements,” and to address the following regarding key personnel and other staff:

1) The proposed minimum labor qualifications for key personnel along with the rationale supporting the proposed qualifications. Key personnel are deemed essential to the performance of this effort and cannot be replaced without prior notice to the Government (see requirements of basic IDIQ Substitution of Team Members and Substitution of Personnel). Under this effort the Task Order Manager (TOM) is considered key. Offerors may propos[e] additional key personnel, which if accepted will also be subject to the replacement requirements.

2) The offeror's organizational structure (to include an organization chart) and its ability to efficiently interface with PM IWS personnel and other support contractors as appropriate. The Offeror shall complete the attached staffing matrix to address how the offeror proposes to support PM IWS at each Tier. At minimum, the matrix must address:

a) Proposed labor categories; and

b) Qualifications for the labor categories associated with each Tier and PWS task . . . [including junior, senior, journeyman, and subject matter expert (SME) categories].

RFP § L at 3.

⁶ This procurement was conducted as a competition among ID/IQ contract holders and, as such, was subject to the provisions of Federal Acquisition Regulation (FAR) part 16. We have held that the principles discussed herein regarding “bait and switch” allegations and material misrepresentations apply to FAR part 16 procurements. STG, Inc., B-411415, B-411415.2, July 22, 2015, 2015 CPD ¶ 240 (addressing “bait and switch” allegations in a FAR subpart 16.5 task order competition).

The solicitation advised offerors that the agency would evaluate proposals under the staffing approach subfactor of the management and staffing capability evaluation factor as follows:

[T]he Government will evaluate the capabilities, qualifications, and experience of each offeror's proposed key personnel as well as its proposed processes, resources, and organizational structure to adequately [] support the PWS tasks and interface with PM IWS personnel and other support contractors as appropriate.

The Government will also evaluate the Offeror's approach to providing staffing necessary to achieve full performance by month five and how well this approach articulates the detailed schedule of events, with associated timelines provided for each event, which is required for the Offeror to reach full capability to support all of Infantry Weapons Systems staff and Product Managers.

RFP § M at 2.

KCA's proposal emphasized that among the firm's "unmatched advantages" was its "Ability to Commence Work on Day One." AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 1. The awardee's proposal explained that KCA [DELETED], which will ensure success during transition, and that:

KCA is able to execute all tasks on day one without missing a beat, providing seamless support to PM IWS. Notably, we only require a [DELETED] week transition period, not 4 months as allowed by the solicitation, and guarantee that PM IWS will not encounter any gaps in support during the entire transition period.

Id. As discussed above, the work solicited here combines services provided under a number of existing task orders and contracts. KCA's proposal explained that the firm would be able to ensure transition from those existing contracts as follows: "As each of your existing support contract ends, the very next day we will have those positions 100% staffed." Id.

As relevant to Patricio's "bait and switch" allegations, KCA's proposal discussed offers to non-KCA personnel in three places in its proposal. Two areas of the awardee's proposal referred to "signed" contingent offers concerning personnel working on the other incumbent contracts providing support to the agency, and stated that these individuals would be available at the start of performance:

[DELETED]. We have signed contingent offers for select personnel from your other current Task Orders—specifically, those [DELETED]

that continue to demonstrate high levels of performance supporting PM IWS. All of these personnel will be available at the immediate start of the Task Order.

Id. at 2 (emphasis added).

To help ensure PM IWS' success, we will [DELETED]. Additionally, we have signed contingent employment offers for select non-KCA employees who currently deliver high levels of performance on your other existing Task Orders.

Id. at 16 (emphasis added).

A third reference in KCA's proposal explained that the contingent offers were "in place":

KCA's Approach to Reaching Full Staffing for Each PWS . . . We guarantee that PM IWS will not encounter any gaps in support during the entire transition period. As each of your existing support contracts end, the very next day we will have those positions 100% staffed. Our team will be ready to commence work on day one of the task order. Of the [DELETED] personnel that we have proposed to work on this task order, [DELETED] of them are our current employees and [DELETED] others currently support you on your other existing task orders, while [DELETED] are new hires. For personnel who are not current KCA employees, we have contingent employment offers in place. All personnel will be available at the immediate start of the Task Order.

Id. at 23 (emphasis added). KCA's proposal listed all [DELETED] of its proposed personnel by name in two places in its proposal: (1) a support team organizational chart, which detailed the assignments for all personnel; and (2) a transition staffing and schedule table, which listed start dates for all personnel. Id. at 17, 24.

With regard to key personnel, KCA listed an individual for the key TOM position, as required. Id. at 5. The awardee's proposal also stated the following regarding other key personnel positions: "Quality leadership and staffing is what produces highly effective contractor support teams and as evident by the experience, education, and qualifications of our personnel--specifically, our [DELETED] key personnel listed in Table 3." Id. at 16. Table 3 included as one of the [DELETED] identified key personnel positions a "[DELETED] SME [subject matter expert] [DELETED]." Id. at 17. As discussed below, the individual proposed by KCA for the [DELETED] SME position was a Patricio employee at the time of proposal submission.

The Corps assigned KCA's proposal a single strength, and no weaknesses or deficiencies. AR, Tab 15, SSEB Report, at 8. The strength related to the RFP's requirement to "provide staffing necessary to achieve full performance by month five," and to "minimize interruptions or delays to work in progress" throughout the 4-month transition period. Id. (citing RFP § M at 2; PWS at 10). The agency concluded that KCA's proposed approach to transition was a strength based on its ability to achieve the required transition, and that the "benefits include [that KCA is] 'the only company capable of delivering a [DELETED]-week transition period.'" Id. (citing AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 23).

Material Misrepresentation

First, we conclude that KCA either knowingly or negligently represented that it would provide Patricio personnel during performance, including an individual proposed for a key personnel position, without a reasonable basis for the representations. As discussed above, KCA's proposal identified all of the [DELETED] proposed personnel by name. AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 17, 24. The awardee's proposal stated that it would use [DELETED] of its own employees, as well as [DELETED] employees performing under the other incumbent contracts and task orders, and [DELETED] new hires. Id. at 23. With regard to the non-KCA personnel, the awardee stated that "[w]e have signed contingent offers," and "signed contingent employment offers." Id. at 2, 16. Further, the awardee's proposal stated: "For personnel who are not current KCA employees, we have contingent employment offers in place," and that "[a]ll personnel will be available at the immediate start of the Task Order." Id. at 23.

Patricio submitted declarations from [DELETED] Patricio employees named in the KCA's proposal, including the individual proposed by the awardee for the CBRN SME key position. Protester's Comments (Mar. 25, 2016), exh. 1. Each of the [DELETED] individuals stated that he or she had not been contacted by the awardee regarding potential employment for the PM IWS task order prior to the time for submission of proposals. Id.

KCA does not dispute the representations made in [DELETED] of the declarations submitted by the Patricio personnel.⁷ In response to the protest, KCA submitted declarations by its employees addressing their preparation of the awardee's proposal, including the decision to propose personnel for specific positions. KCA

⁷ With regard to the [DELETED] declaration submitted by a Patricio employee, the record contains contradictory information as to when this individual was first contacted by KCA. In light of the lack of dispute concerning the other [DELETED] declarations, we need not resolve the contradictions.

states that, prior to proposal submission, its employees had conversations with two Patricio employees, both of whom related names of other Patricio personnel they believed had the qualifications to perform under the PM IWS task order and would likely be willing to work for KCA in the event it was awarded the task order. Intervenor's Comments (Apr. 6, 2016), exh. 2, Decl. of KCA Employee (Apr. 6, 2016), at ¶¶ 4-8; exh. 3, Decl. of KCA Employee (Apr. 6, 2016), at ¶¶ 4-8. Of the [DELETED] Patricio personnel who submitted declarations, KCA states that the company spoke with one of those individuals prior to submission of its proposal regarding employment. Intervenor's Comments (Apr. 6, 2016), exh. 1, Decl. of KCA President (Apr. 6, 2016), at ¶ 8; exh. 4, Decl. of KCA Employee (Apr. 6, 2016), at ¶ 3. The other [DELETED] Patricio employees were identified and included in the awardee's proposal on the basis of: recommendations by the two Patricio employees, recommendations by other third parties, or personal knowledge of the KCA employees on the part of the Patricio employees. Id.

With regard to the individual proposed for the [DELETED] SME key position, KCA acknowledges that the company did not contact this person prior to submitting its proposal, and that the proposal's description of the individual's experience and qualifications was based on a review of the individual's publically-available LinkedIn account profile.⁸ AR, Tab 22, Decl. of KCA President (Mar. 16, 2016), at ¶ 11. A KCA employee states that he spoke with a Patricio employee who indicated that the individual proposed for the key position was "disgruntled" and would likely therefore be willing to work for KCA. Intervenor's Comments (Mar. 29, 2016), exh. 3, Decl. of KCA Employee (Mar. 9, 2016), at ¶ 7.

KCA's comments on the agency report explain that the references in its proposal to "signed contingent offers" meant that the company had prepared letters offering employment, which were signed by the president of KCA--not that the prospective personnel had signed the letters, agreed to the contingent offers, or were even aware of them. Intervenor's Comments (Mar. 29, 2016) at 7. KCA emphasizes in its comments on the agency report that the letters "were prepared prior to the submission of KCA's proposal of November 15, 2015." Intervenor's Comments (Apr. 4, 2016) at 1 (emphasis in original). For this reason, KCA argues that there was no intent to mislead or deceive, and thus no material misrepresentations regarding its proposed personnel. However, in response to questions from our Office, the awardee conceded that "[t]he letters were not circulated to the individuals in question as was originally intended." Intervenor's Comments (Apr. 6, 2016), exh. 11, Decl. of KCA President (Apr. 6, 2016), at ¶ 11.

⁸ LinkedIn is a social networking website for people in professional occupations, which is mainly used for professional networking. See www.linkedin.com (last accessed May 19, 2016).

In our view, the phrases “signed contingent offers” and “signed contingent employment offers” appear to be an attempt to mislead the agency about KCA’s readiness to perform. As used in the context of KCA’s proposal, these phrases strongly suggest that the awardee would be able to provide the named individuals at the start of performance. In particular, the following statements reflect a link between the availability of personnel and the ability to achieve the transition requirements: “[KCA is] the only company capable of delivering a [DELETED]-week transition period,” “[KCA] guarantee[s] that PM IWS will not encounter any gaps in support during the entire transition period,” and “[a]ll personnel will be available at the immediate start of the Task Order.” AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 23 (emphasis in original). Moreover, for all proposed personnel, including the Patricio employees, the awardee identified specific start dates. Id. at 24. We view these statements and representations as providing support for our conclusion that the phrase “signed contingent offers” was intended to reflect actual agreements with the named individuals, rather than offers signed by the company but not delivered to the individuals.

Nonetheless, even if we accept, arguendo, KCA’s contention that the two phrases above (“signed contingent offers,” and “signed contingent employment offers”) are not misleading, we think that KCA’s representation that it had “signed contingent offers in place” appears purposefully crafted to convey that there had been communication with the individuals in question. As discussed above, KCA acknowledges that it never provided to the Patricio employees the contingent offers that KCA’s proposal represented were “in place.” Intervenor’s Comments (Apr. 6, 2016), exh. 1, Decl. of KCA President (Apr. 6, 2016), at ¶ 11. On this record, we conclude that KCA’s proposal misrepresented the commitment of the non-KCA employees to work for the awardee, which in turn misrepresented the ability of the awardee to provide those individuals at the start of performance.

The Corps and KCA each argue that, regardless of the accuracy of the representations in the awardee’s proposal, the awardee fully intended to hire the Patricio personnel. COS/MOL at 12; Intervenor’s Comments (Mar. 29, 2016) at 4-6. The agency and awardee contend that the KCA’s intent to hire the Patricio personnel identified in the awardee’s proposal demonstrates that there was no misrepresentation.

As our Office has recognized, it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Invertix Corp., B-411329.2, July 8, 2015, 2015 CPD ¶ 197 at 6. Our Office has also held, however, that a good-faith intent to hire incumbent personnel does not absolve an offeror of responsibility for submitting a proposal that contains material misrepresentations regarding the availability of proposed personnel. See ManTech Advanced Sys. Int’l, Inc., supra, at 5 (misrepresentations regarding availability of proposed personnel was material even where the RFP did not require letters of commitment); ACS Gov’t Servs., Inc., supra, at 9-10 (awardee’s

misrepresentations may be material, even where they were not intentionally misleading). Thus, we conclude that regardless of KCA's intent to hire the individuals identified by name in its proposal, the proposal misrepresented the commitment of the non-KCA employees to work for the awardee.

Additionally, the record here demonstrates that KCA did not have a reasonable basis to represent that it would be able to provide these individuals at the start of performance. In support of its belief that the Patricio personnel would be available to perform the task order, and the awardee's intent to hire them, KCA submitted a declaration by its president concerning its approach to identifying personnel for its proposal. AR, Tab 22, Decl. of KCA President (Mar. 13, 2016).⁹ The company's president explained that KCA communicated in person or over the phone with prospective hires, received resumes from these individuals, and prepared offer letters. Id. at ¶¶ 8-9; Intervenor's Comments (Apr. 6, 2016), exh. 1, Decl. of KCA President (Apr. 6, 2016), at ¶¶ 4-9. The president's declaration included as enclosures resumes for 12 Patricio personnel. AR, Tab 22, Decl. of KCA President (Mar. 13, 2016), encls. 1-12.

We conclude that none of the information provided by KCA demonstrates that the company had a reasonable basis to represent in its proposal that Patricio's employees would be available to KCA. As discussed above, the contingent offers referenced in KCA's proposal were never provided to the Patricio personnel. As also discussed above, KCA does not dispute the statements in [DELETED] of the [DELETED] declarations submitted by Patricio personnel that the awardee did not, prior to submitting its proposal, contact these individuals regarding employment with KCA for the PM IWS task order. Further, with regard to the [DELETED] SME that KCA proposed for a key position, KCA acknowledges that it did not contact this individual prior to submitting its proposal. AR, Tab 22, Decl. of KCA President (Mar. 16, 2016), at ¶ 11.

⁹ This declaration was dated March 13, 2016, and was provided in the Corps' March 17 report responding to the protest. The Corps' response to the protest relies on the declaration for numerous assertions, including the following: "KCA's proposal also cites having signed contingent employment offers for select non-KCA employees who currently deliver high levels of performance on other existing task orders . . . KCA has communicated in person or over the phone with all Patricio employees that KCA proposed except for [the proposed [DELETED] SME] . . . KCA received at least 12 resumes from Patricio's incumbent personnel to verify their qualifications." COS/MOL at 7. The agency concluded that "[t]hese facts show that KCA had reasonable bases to expect that the personnel in its organizational chart would matriculate as proposed." Id. at 13.

Finally, with regard to the resumes provided by KCA as evidence of its intent to hire the Patricio personnel, none of the declarations provided by KCA state when the resumes were received. See id., at ¶ 9; Intervenor’s Comments (Mar. 29, 2016), exh. 1, Decl. of KCA Employee (Mar. 25, 2016), at ¶ 6; exh. 2, Decl. of KCA Employee (Mar. 29, 2016), at ¶ 9. In fact, although the declaration of KCA’s president included as enclosures resumes from 12 Patricio employees, 10 of these 12 individuals were among those who submitted declarations to our Office stating that they had not been contacted by KCA prior to the time for proposal submission. See Protester’s Comments (Mar. 25, 2016), exh. 1. Moreover, as relevant here, certain of the resumes indicate that they were provided to KCA after the November 16, 2015, proposal submission date. See AR, Tab 22, Decl. of KCA President, Encl. 4 at 1 (listing a position as December 2015-present); Encl. 9 at 1 (stating that “October 2013 - Present” was “2 years [and] 6 months” experience, which indicates a “present” date of March 2016.)

In sum, we conclude that the references in KCA’s proposal to “signed” contingent offers, and the statement that offers were “in place” to all non-KCA proposed personnel, were misrepresentations of the facts in light of the context of the proposal and the lack of contact with Patricio personnel regarding their availability or willingness to work for the awardee in connection with the PM IWS task order. We further conclude that these misrepresentations were material, especially in the context of KCA’s claims that having all of the individuals in place at the start of performance would benefit the transition effort.

Agency Reliance on Misrepresentations and Material Impact on the Evaluation

Next, we conclude that the Corps relied upon the misrepresentations in KCA’s proposal, and that they had a material impact on the evaluation. As discussed above, the Corps assigned one strength to KCA’s proposal, which related to the RFP’s requirement to provide “staffing necessary to achieve full performance by month five,” and to “minimize interruptions or delays to work in progress” throughout the 4-month transition period. AR, Tab 15, SSEB Report, at 8 (citing RFP § M at 2; PWS at 10). The agency concluded that KCA’s proposed approach to transition was a strength based on its ability to achieve transition, and that the “benefits include [that KCA is] ‘the only company capable of delivering a [DELETED]-week transition period.’” Id. (quoting AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 23).

The Corps and KCA argue that this strength did not specifically name or refer to the Patricio personnel listed in KCA’s proposal, and therefore any misrepresentations regarding these individuals could not have affected the evaluation. The Corps and KCA note that the solicitation did not require offerors to identify proposed personnel by name, aside from key personnel, nor were offerors required to provide resumes for proposed individuals or letters reflecting contingent offers. The agency and intervenor also contend that the strength was solely for KCA’s experience as an

incumbent for part of the work, and was not related to the personnel proposed by the company. For these reasons, the agency and intervenor argue that any misrepresentations in KCA's proposal had no effect on the evaluation and award decision. We find no merit to these arguments.

As discussed above, the RFP stated that “[t]he Offeror shall submit a transition plan that establishes full performance before the 5th month.” RFP § L at 3. The RFP further stated that the agency would evaluate an offeror's approach to “providing staffing necessary to achieve full performance by month five and how well this approach articulates the detailed schedule of events, with associated timelines provided for each event, which is required for the Offeror to reach full capability to support all of Infantry Weapons Systems staff and Product Managers.” RFP § M at 2. With regard to personnel, the RFP stated that “the Government will evaluate the capabilities, qualifications, and experience of each offeror's proposed key personnel as well as its proposed processes, resources, and organizational structure to adequately to support the PWS tasks and interface with PM IWS personnel and other support contractors as appropriate.” *Id.* Offerors were also required to provide an organizational chart that reflected their “organizational structure” and “ability to efficiently interface with PM IWS personnel and other support contractors as appropriate.” RFP § L at 2.

Although the RFP did not require offerors to name specific non-key personnel, or to discuss contingent offers, KCA's proposal clearly stated that its proposed technical approach was based, in part, on its ability to provide specific individuals at the start of performance. KCA's proposal emphasized that among the firm's “unmatched advantages” was its “Ability to Commence Work on Day One.” AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 1. KCA's proposal stated that the company would be capable of meeting and exceeding the transition requirement because its proposed personnel would be available at the start of performance. See AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 23 (“All personnel will be available at the immediate start of the Task Order.” (emphasis in original)). KCA also stated that “we only require a [DELETED] week transition period, not 4 months as allowed by the solicitation, and guarantee that PM IWS will not encounter any gaps in support during the entire transition period.” *Id.* The Corps concluded that the awardee's proposal merited a strength with regard to the ability to achieve full performance by week five based on the proposed transition schedule, quoting the proposal's representation that KCA is “. . . the only company capable of delivering a [DELETED]-week transition period.” AR, Tab 15, SSEB Report, at 8 (quoting AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 23).

With regard to the [DELETED] SME key personnel position, the Corps argues that, “from the Government's perspective,” the “Task Order Manager (TOM) was the only key personnel position.” COS/MOL at 4. As discussed above, however, the RFP did not state that the TOM was the only key position. Instead, the RFP explained

that offerors must “provide a detailed approach to staffing that meets the PWS requirements,” and explained that offerors were allowed to designate additional positions as key. RFP § L.3.1.2. For any such key personnel positions, the RFP stated that “[k]ey personnel are deemed essential to the performance of this effort and cannot be replaced without prior notice to the Government.” Id.

KCA’s proposal identified [DELETED] positions as key personnel, and stated the following regarding these positions: “Quality leadership is what produces highly effective contractor support teams and as evident by the experience, education, and qualifications of our Key Personnel listed in the Table 2.” AR, Tab 14, KCA Proposal, Vol. I (Management and Staffing), at 16. As relevant here, Table 2 included a position for “[DELETED] SME [DELETED],” and proposed a Patricio employee for that position. Id. at 17.

On this record, we conclude that the strength assigned to KCA’s proposal, as well as the overall acceptability of the proposal, was based at least in part on the awardee’s approach to providing personnel, including key personnel, who would be capable of performing the work, and would be available at the start of performance. We therefore conclude that the record shows that the Corps’ evaluation of KCA’s proposal relied upon and was materially affected by the misrepresentations in the awardee’s proposal.

Finally, based on this record, we also find that Patricio was prejudiced by KCA’s material misrepresentations and the effect it had on the Corps’ evaluation. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. See, e.g., SunGard Data Sys., Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 7-8. Here, the agency concluded there was “parity” between Patricio’s and KCA’s proposals under the non-price evaluation factors, and that price was therefore the “determining factor” in favor of award to KCA. AR, Tab 18, SSDM, at 3. The record shows that, with the elimination of KCA’s proposal, Patricio’s proposal was the lowest-priced and highest-rated under the non-price factors. Id. We therefore conclude that Patricio was prejudiced in this competition by KCA’s misrepresentations.¹⁰

¹⁰ Even if we were not to recommend that KCA’s proposal be eliminated from the competition, we would still conclude that Patricio was prejudiced by the awardee’s misrepresentations regarding its proposed personnel because they affected the single strength assigned to its proposal, which in turn provided the SSA’s basis for concluding that KCA’s and Patricio’s proposals were in “parity” regarding the management and staffing capability evaluation factor. AR, Tab 18, SSDM, at 3.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that KCA's proposal contained material misrepresentations concerning the availability of its proposed personnel. The record here shows that KCA's misrepresentations were relied upon by the agency and had a material effect on the evaluations because the single strength assigned to the awardee's proposal concerned its ability to meet the transition schedule, and because the awardee's proposal made clear that its ability to do so depended in part on its ability to provide all personnel identified in its proposal at the start of performance.

We also conclude that the appropriate remedy here is for the Corps to exclude KCA's proposal from the competition. Our Office has held that exclusion of an offeror from a competition is warranted where it made a material misrepresentation in its proposal and where the agency's reliance on the misrepresentation had a material effect on the evaluation results. See Johnson Controls Sec. Sys., B-296490, B-296490.2, Aug. 29, 2005, 2007 CPD ¶ 102 at 11-12 (sustaining protest and recommending exclusion of awardee from further consideration where the awardee made material misrepresentations regarding arrangements for its personnel to receive mandatory training and certifications prior to award); ACS Gov't Servs., Inc., supra, at 11 (sustaining protest and recommending exclusion of awardee from further consideration where the awardee made material misrepresentations regarding the employment agreements with proposed personnel); Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13 (sustaining a protest and recommending exclusion of awardee from further consideration based on the awardee's misrepresentation of the results of a survey of the availability of incumbent's personnel). See also Patriot Contract Servs.-- Advisory Opinion, B-294777.3, May 11, 2005, 2005 CPD ¶ 97 at 10 (advising United States District Court for the Northern District of California that, based on the awardee's material misrepresentations concerning the availability of proposed personnel, GAO would have likely sustained a protest that had been withdrawn and recommended that the agency terminate the contract and make award to the protester). As our Office has stated, where an offeror's material misrepresentation has a material effect on a competition, the integrity of the procurement system "demands no less" than the remedy of exclusion. ACS Gov't Servs., Inc., supra, at 11.

We therefore recommend that the Corps terminate KCA's contract. We further recommend that the agency exclude KCA from the competition and make a new award decision. Finally, we recommend that the agency reimburse Patricio the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). Patricio

should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of this decision.¹¹

The protest is sustained.

Susan A. Poling
General Counsel

¹¹ We also direct the agency's attention to Federal Acquisition Regulation § 33.102(b)(3), which permits an agency to require the awardee to reimburse the government's costs where a post-award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification--which would appear applicable here. See ACS Gov't Servs., Inc., supra, at 11 (advising contracting agency of this provision in a similar situation).