

GAO SUSTAINS PROTEST WHERE AWARDEE'S PROPOSAL ALLEGEDLY MISREPRESENTED AVAILABILITY OF KEY PERSON

By Ross Crown on 03/22/2023
Posted in Government Contracts



The Government Accountability Office recently returned to the subject of the unavailability of key personnel listed in contract proposals. *ASRC Federal Data Solutions*, B-421008, December 2, 2022, 2022 CPD ¶ 294, is a bid protest where the awardee of the contract was found to have misrepresented its capacity to furnish a key person identified in its proposal. The GAO sustained the protest, determining that the key person had withdrawn her acceptance of a contingent offer of employment from the awardee, the agency relied on that misrepresentation, and the misrepresentation had a material effect on evaluation of the proposals.

Nature of Protest

The Department of Health and Human Services issued a Request for Quotations under the General Services Administration's Federal Supply Schedule procedures. The RFQ sought quotations from small business vendors holding schedule 70 contracts for IT professional services and health IT services.

Selection was to be made on a best-value tradeoff basis utilizing four evaluation factors: (1) approach to hypothetical projects; (2) organizational experience and management; (3) personnel technical capabilities and qualifications; and (4) price. The non-price factors were equally important to each other, and when combined, were significantly more important than price.

To address the factor for personnel technical capabilities and qualifications, vendors were to submit information detailing the experience, qualifications, accomplishments, and abilities for three labor categories deemed by the agency to be critical to the success of the contract requirements, including the Technical Point of Contact (TPOC).

Both ASRC and Arlluk Technology Solutions, LLC submitted quotations to the agency. Following evaluation, the agency notified ASRC that it had not been selected and identified Arlluk as the selected vendor.

ASRC protested the award alleging, among other things, that the winning quotation contained material misrepresentations concerning the availability of the proposed TPOC — referred to by the GAO as “Dr. B.” Dr. B was an employee of the incumbent contractor, which was an affiliate of ASRC. The protester maintained that Dr. B signed an exclusive letter of commitment with ASRC for this procurement. In light of that letter, ASRC argued that Arlluk had no

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reasonable basis for including Dr. B in its quotation as a key person.

Bait and Switch Test

In analyzing the protest, the GAO first noted it will consider allegations that in order to obtain a more favorable evaluation, an offeror proposed personnel it did not have a reasonable basis to expect to deliver. Such a material misrepresentation has an

adverse effect on the integrity of the competitive procurement system. These situations are frequently referred to as a “bait and switch.” To establish an impermissible bait and switch, the GAO recited that 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 upon by the agency; and (3) the agency’s reliance on the misrepresentation had a material effect on the evaluation results.

Findings of Fact

According to the GAO, both Arlluk and ASRC included Dr. B in their proposals as the TPOC. Arlluk’s quotation contained no letter of commitment from Dr. B but stated as to certain key personnel, including Dr. B, that “[w]e have contingent offers

for ... critical incumbent leaders and proposed them as key personnel.” The record showed that Arlluk provided Dr. B with a contingent offer of employment, which Dr.

B accepted. Over a year later, and 20 days prior to deadline for responding to the RFQ, Arlluk contacted Dr. B to follow-up regarding the procurement. Dr. B replied to Arlluk saying that she had just become “exclusively committed” to ASRC as the prime contractor and that “[n]o other company is authorized to use my resume in their proposal.”

In reviewing these facts, the GAO determined that Arlluk did not have a reasonable basis for expecting it would furnish Dr. B during contract performance. While the correspondence showed that Dr. B accepted a contingent offer of employment from Arlluk, it further showed that Dr. B not only declined to confirm her prior acceptance, but also communicated her refusal to allow Arlluk to include her name and qualifications as part of its quotation.

Misrepresentation by Awardee

In considering the protest, the GAO recognized that it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. The GAO also observed however, that a good faith intent to hire incumbent personnel does not excuse an offeror from the obligation to submit a quotation containing accurate representations regarding the availability of proposed personnel. Thus, the GAO concluded that regardless of

Arlluk’s intention to hire Dr. B, its quotation misrepresented her commitment to work for Arlluk if the agency selected the company for award.

Reliance by Agency

The GAO next considered if the agency relied upon the misrepresentation in Arlluk’s quotation regarding the availability of Dr. B, and if so, whether that reliance had a material effect on the evaluation. It found that in keeping with the RFQ’s

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evaluation scheme, the agency assigned Arlluk a strength for Dr. B's qualifications and experience. That strength contributed to the agency's determinations that Arlluk's quotation both was technically superior to the ASRC quotation and warranted the associated price premium. The GAO therefore concluded that the agency's evaluation of Arlluk's quotation relied upon the misrepresentation concerning Dr. B, and that this reliance had a material effect on the evaluation.

Prejudice to Protester

The GAO concluded its analysis by noting that competitive prejudice is an essential element of a viable protest. 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 the protest will be denied. Doubts regarding prejudice are resolved in favor of the protester.

Here, the GAO found that ASRC was indeed prejudiced by Arlluk's material misrepresentation with respect to Dr. B and the effect it had on the agency's evaluation. The agency concluded that Arlluk's quotation was superior to that of ASRC under the factor for personnel technical capabilities and qualifications.

This evaluation was based in part on the strength assigned to Arlluk's quotation for Dr. B's qualifications, abilities, and experience. Moreover, the agency's finding that Arlluk's quotation was technically superior led the agency to conclude that Arlluk's quotation merited the associated price premium, and to select Arlluk for award.

GAO Recommendation

Because it concluded that (1) Arlluk made a material misrepresentation in its quotation, (2) the agency relied on the misrepresentation, and (3) the misrepresentation had a material effect on the evaluation, the GAO sustained the protest and recommended that the agency terminate Arlluk's contract. The GAO further recommended that the agency exclude Arlluk from the competition and make a new selection decision. Finally, it recommended the agency reimburse ASRC for the costs of filing and pursuing its protest, including reasonable attorneys' fees.

Lesson to be Learned

Based on the GAO's findings of fact, it appears that Arlluk was blindsided by Dr. B's withdrawal of her acceptance of the contingent offer of employment just 20 days before quotations were due to the agency. The lesson here is that contractors should stay in regular contact with their key personnel, especially if these individuals also have relationships with competitors. Contractors need to be confident that their key personnel remain committed to their proposals before responding to solicitations and prepared to replace them quickly if necessary.

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