

BAIT AND SWITCH REDUX-EVEN WITHOUT REQUIRED COMMITMENT LETTERS

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This blog has frequently explained an occasional protest-winning situation where an offeror engages in “bait and switch” in its proposal. Recently, the Government Accountability Office (“GAO”) sustained a protest where an offeror engaged in bait and switch on personnel in its offer, even though the solicitation did not require letters of commitment from the individuals offered. *T3I Solutions, LLC*, B-418034, Dec. 13, 2019.

T3I involved an Air Force solicitation for courseware and training services of operators of intercontinental ballistic missiles (“ICBMs”). The solicitation required offerors to submit a manning level and personnel mix plan for all workload, including all instructors, developers and any other required positions. Qualifications of personnel were required to meet the solicitation’s requirements and were evaluated on a pass/fail basis. Award was made on a best value basis to Darton Innovative Technologies, but T3I protested that the awardee’s proposal contained material misrepresentations concerning its proposed personnel. T3I asserted that Darton proposed an incumbent employee to serve as the sole operator instructor when it had never contacted this individual prior to submitting its proposal and did not obtain permission to use the qualifications of this person. Accordingly, Darton did not have a reasonable expectation that this individual would be available for contract performance.

The GAO analyzed the protest under its “bait and switch” analysis, which considers allegations that an offeror has 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. Such a material misrepresentation had an adverse effect on the integrity of the competitive procurement. 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) the agency’s reliance on that misrepresentation had a material effect on the results of the evaluation.

GAO concluded that Darton did not have reasonable basis to furnish the operator instructor during contract performance. Darton had based its proposed personnel plan on incumbent employees, including the operator instructor, stating that “the mix of incumbent employees [] will continue employment.” The operator instructor was identified by name, and Dalton stated that the person brought the expertise and know-how to conduct the necessary training. However, the operator instructor stated in a Declaration that he had not been contacted by Darton, nor held any discussions regarding potential employment prior to the time for submission of the proposals.

GAO noted that even though there might be a reasonable basis that incumbent personnel may be available upon award to another contractor, “speculation cannot reasonably support the inclusion of [] such individuals in [another contractor’s] proposal. An offeror may not represent commitment of incumbent employees based only on a hope or belief that the offeror will be able to make good on its representation. Finally, the misrepresentation of Darton was material

because the agency relied on Darton's use of this individual to meet a minimum pass/fail requirement.

Finally, the GAO rejected the agency and Darton's assertion that there was no misrepresentation because the solicitation did not require offerors to provide commitment letters or representations from employees that it planned to use to staff these efforts. GAO noted that the issue was simply what the solicitation required, and what Darton chose to propose to meet the requirements. GAO noted that "bait and switch" is possible ever where a solicitation does not require letters of commitment, and further, that Darton's proposal, on its face, stated that the offeror had considered the mix of incumbent employees who would continue employment in the follow-on effort.

The GAO sustained the protest and recommended a reevaluation of Darton's proposal, considering the misrepresentations, followed by a new selection decision.

Takeaway. Do not commit incumbent employees to work upon award if you have not spoken to those employees and received some indication (a letter of commitment, or other indication) that they will come to work for you if you receive award. Only list employees based on solid evidence that they are likely to come to work for you.

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