

COFC Reiterates Risks for Contractors Regarding Availability of Key Personnel

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A recent decision by the U.S. Court of Federal Claims (COFC) demonstrates the need for contractors to carefully review the availability of proposed key personnel before submitting final proposal revisions (FPRs). In *NetCentrics Corp. v. United States*, No. 19-839C (Sept. 6, 2019), the COFC held that the U.S. Department of Defense Washington Headquarters Services (WHS or the Agency) acted within its discretion when it rescinded NetCentrics' contract award and disqualified the company from the procurement upon discovering that NetCentrics had misrepresented the employment status and availability of its proposed Deputy Program Manager (DPM) in its FPR. The court was not swayed by NetCentrics' claim that the misrepresentation was inadvertent—it held that disqualification is reasonable if a misrepresentation is material, regardless of whether the contractor intended to actually deceive the agency.

In *NetCentrics*, offerors were required to submit resumes for key personnel, including the DPM. The solicitation warned that "an offer can be rejected if it does not have a firm commitment from the persons that are listed in the proposal" as key personnel. NetCentrics proposed for its DPM a then-current employee who was working on the incumbent contract, and committed that its incumbent client delivery team would continue on the new contract for at least one year. NetCentrics stated that its proposed key personnel, including the proposed DPM, were immediately available to perform on the contract.

The proposed DPM left the company approximately two weeks before the Agency opened discussions with NetCentrics. The Agency did not raise any issues regarding NetCentrics' key personnel during discussions, and NetCentrics did not make any changes in its FPR

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related to the proposed DPM or his availability to begin work immediately after award for at least the one year thereafter. In performing its incumbent contract, however, NetCentrics had notified the contracting officer and customer personnel for the incumbent contract of the proposed DPM's departure.

WHS awarded the contract to NetCentrics on January 31, 2019. NetCentrics received at least two strengths regarding its proposed key personnel, and the source selection decision highlighted NetCentrics' use of incumbent personnel as an advantage of the proposal that the Agency expected to mitigate performance risk. Following a protest at the Government Accountability Office (GAO), the contracting officer sought documentation from NetCentrics confirming that the proposed DPM had committed to work on the contract—either before NetCentrics submitted its FPR or before contract award. NetCentrics responded that it intended at the time of its FPR submission to rehire the proposed DPM, and that in February 2019 (after the award) the proposed DPM had expressed strong interest in returning to NetCentrics.

Based on that response, the Agency determined that NetCentrics' December 2018 FPR contained material misrepresentations regarding the proposed DPM's immediate availability to perform the contract and his continued availability for the first year of the contract. As a result, it rescinded the award to NetCentrics, reopened the procurement, and disqualified NetCentrics from the competition. NetCentrics protested the Agency's decision to GAO and, after GAO denied the protest, to the COFC. Because the proposal had misrepresented the proposed DPM's availability, and the Agency had relied on those statements in awarding the contract to NetCentrics, the court held the Agency's decision was reasonable. The decision explained that "offerors have an 'obligation to ascertain the continuing availability of key personnel' before submitting FPRs," even if an agency does not raise key personnel issues during discussions with the offeror.

The COFC's decision in *NetCentrics* is consistent with GAO's approach regarding the unavailability of key personnel. In *Paradigm Technologies, Inc.*, B-409221.2, Aug. 1, 2014, 2014 CPD ¶ 257, GAO addressed a similar fact pattern. There, a proposed key personnel of the awardee left the company after the company had submitted its FPR, but before contract award. After the agency learned the proposed key personnel was no longer available to work on the contract, it reevaluated the FPRs and assigned the awardee a weakness for the relevant evaluation factor, but subsequently reaffirmed its award to the same offeror. GAO concluded that this decision was irrational because the awardee's revised proposal no longer satisfied the solicitation's key personnel requirements. In such a situation, GAO said, the agency "should have either rejected [the awardee's] proposal as technically unacceptable for failing to meet a material requirement or reopened discussions to permit the firm to correct this deficiency." Likewise, in *URS Federal Services, Inc.*, B-413034, July 25, 2016, 2016 CPD ¶ 209, GAO dismissed a protest by an unsuccessful offeror who had been rated "Unacceptable" where one of its proposed key personnel had resigned after proposals were submitted.

The COFC's decision in *NetCentrics* and GAO's trend of similar outcomes offer two significant lessons for government contractors. First, they highlight the importance of carefully reviewing key personnel identified in an initial proposal and confirming that they remain available for their proposed roles before including them in the FPR, even if the availability of key personnel was not raised in discussions by the agency. Otherwise, a contractor could be excluded from the competition or exposed to litigation risk due to an inadvertent (but material) misrepresentation.

Second, and relatedly, if an offeror proposes a current employee as a key personnel but that individual is no longer employed by the company following the initial and/or final proposal submission, the offeror must have at least “reasonable grounds to believe it could make [that] individual immediately available to work.” As the COFC noted in *NetCentrics*, however, “the existence of reasonable grounds in any particular case is very fact specific.”

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