



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: DZSP 21 LLC--Reconsideration

File: B-410486.4

Date: July 22, 2015

Alan A. Pemberton, Esq., Robert Nichols, Esq., Nooree Lee, Esq., Stephanie Barclay, Esq., Jeffrey Bozman, Esq., and Anuj Vohra, Esq., Covington & Burling, LLP, for the protester.

William A. Roberts III, Esq., Paul F. Khoury, Esq., Richard B. O’Keeffe, Jr., Esq., Samantha S. Lee, Esq., and George E. Petel, Esq., Wiley Rein LLP, for Fluor Federal Solutions, LLC, an intervenor.

James J. Schubert, Esq., Department of the Navy, for the agency.

Louis A. Chiarella, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where the protester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.

DECISION

DZSP 21 LLC, of Hagatna, Guam, requests reconsideration of our January 2, 2015, decision sustaining the protest of Fluor Federal Solutions, LLC, of Greenville, South Carolina, regarding the award of a contract to DZSP under request for proposals (RFP) No. N62742-13-R-1150, issued by the Department of the Navy for base operations support services for the Joint Region Marianas on the island of Guam.¹ DZSP argues that our decision was wrong as a matter of law and fact.

We deny the request.

¹ The Navy subsequently expressed its support for DZSP’s request for reconsideration.

BACKGROUND

The RFP contemplated the award of a cost reimbursement-type contract for a 12-month base period with four 1-year options and an additional three 1-year award options. RFP at BATES 0005-11.² In general terms the contractor was required to perform a variety of facility operations and maintenance services in accordance with the solicitation's performance work statement, which was organized by task area or "annex" (e.g., facility management, port operations).³ RFP at BATES 0014. The RFP established that contract award would be made on a best-value basis, based on six evaluation factors: past performance; occupational safety; staffing and resources; technical approach; small business utilization; and cost. Id. at BATES 0098-108. The RFP also stated that past performance was approximately equal in importance to the other four non-cost evaluation factors combined, and that all five non-cost factors, when combined, were approximately equal in importance to cost. Id. at BATES 0098.

Eight offerors, including DZSP and Fluor, submitted proposals by the closing date. A Navy technical evaluation team (TET) evaluated offerors' non-cost proposals using various adjectival rating schemes that were set forth in the solicitation: outstanding, good, acceptable, marginal, or unacceptable; and with regard to past performance, substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence. Id. at BATES 0108. The solicitation also established that offerors' cost proposals were not to be rated, but evaluated for completeness, reasonableness, and realism. Id. at BATES 0098-99.

The Navy's initial evaluation of the DZSP and Fluor proposals was as follows:

² The Navy assigned the record sequential BATES numbers which we use in our decision.

³ The RFP provided offerors with the agency's workload projections for each annex. Agency Report (AR), Tab 1a-1o, RFP Workload Projections.

	DZSP	Fluor
Past Performance	Substantial Confidence	Substantial Confidence
Occupational Safety	Outstanding	Outstanding
Staffing and Resources	Unacceptable	Unacceptable
Technical Approach	Acceptable	Outstanding
Small Business Utilization	Outstanding	Good
Proposed Cost	\$499,421,018	\$546,518,893
Evaluated Cost	\$555,823,000	\$617,439,000

AR, Tab 7, Source Selection Advisory Council Report, Feb. 14, 2014, at BATES 4592-93.

With regard to the staffing and resources factor, the agency was to evaluate proposals for the “adequacy to support proposed processes and methodologies,” including the “reasonableness of the staffing approach to accomplishing the complexity and magnitude of [the] service requirements.” RFP at BATES 0104.

The record shows that, in evaluating the offerors’ initial proposals, the TET utilized a government estimate to evaluate the adequacy of offerors’ proposed staffing. In particular, the record shows that the evaluators assessed all proposals against a government estimate of the number of full time equivalents (FTE) that the agency thought necessary to perform the requirements for each annex, which together totaled [DELETED] FTEs. AR, Tab 3b, FTE and Equipment Analysis for Fluor (Initial); Tab 3, FTE and Equipment Analysis for DZSP (Initial). The Navy estimate of FTEs for each annex was based on historic workload requirements.⁴

For example, for Annex 1700A (Base Support Vehicles Equipment, Andersen Air Force Base), Fluor proposed [DELETED] FTEs in comparison to the government estimate of [DELETED] FTEs, which the TET deemed insufficient.⁵ AR, Tab 3b, Fluor FTE and Equipment Analysis (Initial), at BATES SF0002. Overall, the agency evaluators considered Fluor’s initial staffing to be insufficient by [DELETED] FTEs.⁶

⁴ The TET performed a similar analysis of offerors’ proposed equipment (e.g., mobile cranes, tractors) to government estimates.

⁵ The TET also noted, as part of its evaluation here, “[w]hat new technologies or methods of operation [does offeror] plan to incorporate in order to accomplish the PWS requirements?” Id.

⁶ Similarly, the TET concluded that DZSP’s proposed staffing was insufficient by [DELETED] FTEs. AR, Tab 3, FTE and Equipment Analysis for DZSP (Initial), at BATES 4280.

Id. The TET also concluded that Fluor's insufficient staffing represented a weakness under the staffing and resources factor. AR, Tab 5, TET Report, Feb. 11, 2014, at BATES 4495 ("Proposal's staffing appears inadequate in five annexes ([DELETED]), increasing risk of unsuccessful contract performance").⁷

When the TET's staffing findings were provided to the agency's cost evaluators, they in turn used the information to make corresponding upward cost realism evaluation adjustments to the offerors' cost proposals. AR, Tab 4, Cost Evaluation Team (CET) Report, Feb. 14, 2014, at BATES 4302-05, 4340-42.

The Navy thereafter established a competitive range comprised of six offerors, including Fluor and DZSP, and held written discussions. Relevant to the protest here, the Navy's discussions with Fluor included questions--under both the staffing and resources factor and the cost factor--related to the perceived staffing insufficiency. Specifically, the agency informed Fluor that "[p]roposal appears to contain inadequate labor. Please explain how all requirements will be accomplished with the included number of employees," and "[t]he TET's realism review determined your proposed staffing level was not sufficient by [DELETED] FTEs in Annexes [DELETED]. Please review and revise accordingly."⁸ AR, Tab 9b, Agency Discussions with Fluor, Feb. 26, 2014, at BATES SF0035, SF0083. The record reflects that identically-worded discussion questions were also posed to other offerors regarding staffing insufficiencies. See AR, Tab 30b, Agency Discussions with DZSP, Feb. 26, 2014, at BATES SF0149. In response to the agency's discussions, Fluor subsequently increased its staffing by a total of [DELETED] FTEs.⁹ AR, Tab 14b, FTE and Equipment Analysis for Fluor (Revised), at BATES SF0099-0114; Tab 14, CET Report, Apr. 16, 2014, at BATES 4766.

⁷ The unacceptable rating assigned to Fluor's initial staffing and resources proposal was not based solely on the staffing weakness. The TET also identified a second weakness (failure to demonstrate a reasonable allocation of equipment), a significant weakness (complete subcontracting of crane services), and a deficiency (key personnel do not meet qualification requirements). AR, Tab 5, TET Report, Feb. 11, 2014, at BATES 4495-96.

⁸ The Navy subsequently clarified the second discussion question here and stated, "[t]he intent of the question was not to dictate a number of FTEs but instead to verify that your firm has a methodology to accomplish the PWS requirements with the proposed FTE." Fluor immediately acknowledged the agency's email and did not request further clarification. Fluor Protest, Sept. 29, 2014, Exh. 1, Fluor Email to Navy, Mar. 6, 2014.

⁹ Fluor increased its staffing in the five annexes where the Navy identified insufficiencies, as well as one annex that was not the subject of the above discussion questions. See AR, Tab 9b, Agency Discussions with Fluor, Feb. 26, (continued...)

The agency thereafter completed its evaluation of offerors' revised proposals. The TET found that Fluor's revised staffing was sufficient to perform the work requirements for all annexes, and removed the weakness initially assigned to the offeror's staffing and resources proposal.¹⁰ Similarly, the cost evaluation team made no cost realism adjustments to Fluor's revised proposal associated with the offeror's revised staffing levels.

The Navy subsequently obtained offerors' final proposal revisions (FPR), which were evaluated as follows:

	DZSP	Fluor
Past Performance	Substantial Confidence	Substantial Confidence
Occupational Safety	Outstanding	Outstanding
Staffing and Resources	Outstanding	Outstanding
Technical Approach	Good	Outstanding
Small Business Utilization	Outstanding	Outstanding
Proposed Cost	\$532,284,994	\$572,077,165
Evaluated Cost	\$532,284,994	\$572,077,165

AR, Tab 24, Source Selection Authority Report, at BATES 5160-63. Fluor's staffing levels remained unchanged between its revised proposal and FPR. AR, Tab 2b, Fluor FPR, Vol. II, Technical Proposal, at 3-68; Tab 21, CET Report, July 8, 2014, at BATES 5120.

On the basis of its evaluation results, the Navy made award to DZSP, finding that its proposal represented the best value overall to the agency. After being advised of the agency's award decision and receiving a debriefing, Fluor filed its protest with our Office.

In its protest, Fluor argued the agency's initial cost realism analysis was unreasonable with regard to offerors' proposed staffing. Fluor also alleged that the initial evaluation resulted in the agency engaging in misleading discussions, "which caused Fluor to price itself out of the competition." Fluor Protest, Sept. 29, 2014,

(...continued)

2014, at BATES SF0029-32. Other offerors responded differently to the agency's discussions regarding staffing insufficiencies.

¹⁰ Because Fluor's revised proposal adequately addressed all the identified staffing and resources shortcomings, the TET then assigned Fluor a rating of outstanding under this factor. AR, Tab 13, TET Report, Apr. 11, 2014, at BATES 4698.

at 12. Fluor maintained that the agency's cost realism evaluation of offerors' FPRs also was unreasonable. Id. at 15-19.

In our decision we sustained Fluor's protest because we found that the agency's cost realism evaluation of Fluor's initial proposal was unreasonable, leading the agency to mislead Fluor in discussions. CFS-KBR Marianas Support Servs., LLC; Fluor Fed. Solutions LLC, B-401486 et al., Jan 2, 2015, 2015 CPD ¶ 22 at 6-7. We also sustained the protest because the agency's cost realism evaluation of offerors' final proposals was unreasonable, that is, not adequately documented to permit review. Id. at 7-8.

DISCUSSION

DZSP requests that we reconsider our decision in various regards. First, DZSP argues that our determination that Fluor was misled by the agency's discussions was in error. DZSP also contends that in finding the final cost realism evaluation to be unreasonable, GAO failed to ask whether Fluor had established that it was prejudiced. Lastly, DZSP contends that GAO improperly sustained a protest ground on the technical evaluation and the Navy and DZSP did not have an opportunity to respond.

Misleading Discussions

DZSP argues that our determination that Fluor was misled by the agency's discussions was in error. DZSP contends that the determination of whether discussions were misleading should not be based on the subjective reaction of the offeror, who made an independent business judgment as to how to respond to the discussions.

DZSP, in essence, repeats arguments it made previously and expresses disagreement with our decision. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98 2 CPD ¶ 12 at 4.

That said, we view DZSP's arguments in this area to suggest that where an agency is mistaken in the information it conveys to offerors during discussions, but conveys the information in good faith, the agency has not conducted misleading discussions. We disagree. Discussions must be meaningful. As a result, an agency may not mislead an offeror--even in good faith--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. See MCT JV, B-311245.2,

B-311245.4, May 16, 2008, 2008 CPD ¶ 121 at 15-16; Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

Final Cost Realism Evaluation Prejudice

DZSP also contends that in finding the final cost realism evaluation to be unreasonable, GAO failed to ask whether Fluor had established prejudice (DZSP does not, however, request reconsideration of our determination that the agency's cost realism evaluation of offerors' FPRs was unreasonable). DZSP points to the fact that the agency made no cost realism adjustments to Fluor's FPR, and that Fluor's proposed cost was its evaluated cost. DZSP also points to the fact that our decision does not address how Fluor was prejudiced by the agency's evaluation.

In our prior decision, we found the agency's final cost realism evaluation to be unreasonable with regard to offerors' staffing levels. As a preliminary matter, we found that the agency's reliance on staffing levels alone to be unduly mechanical in nature. We also concluded that the agency's evaluation was unreasonable because it was not adequately documented to permit our review. Where, due to a lack of documentation, we are unable to understand the agency's evaluation conclusions, we will sustain a protest challenging the agency's evaluation.

Although not stated in the prior decision, we find that Fluor was prejudiced by the unreasonable cost realism evaluation here. 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 our Office will not sustain the protest. Swets Info. Servs., B-410078, Oct. 20, 2014, 2014 CPD ¶ 311 at 14; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13; FAR § 16.301. As a consequence, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's unique technical approach, assuming reasonable economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1), (2); The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3.

As detailed in our prior decision, because it was not adequately documented, we found the agency's final cost realism evaluation of all offerors--and not just Fluor--to

be unreasonable. As the final evaluated costs of all offerors are essentially unknown, we find that Fluor has sufficiently demonstrated prejudice.¹¹

The request is denied.

Susan A. Poling
General Counsel

¹¹ Lastly, DZSP argues that GAO improperly sustained a protest ground on the technical evaluation, where the agency and DZSP never had an opportunity to respond. DZSP Request for Reconsideration, Jan. 12, 2015, at 10. DZSP misunderstands our decision here: Fluor did not challenge the agency's technical evaluation, and our decision did not sustain a protest ground on any aspect of the agency's technical evaluation.