



KeyCite Yellow Flag - Negative Treatment

Distinguished by Matter of: McConnell Jones Lanier & Murphy, LLP, Comp.Gen., October 21, 2015

B- 410486 (Comp.Gen.), B- 410486.2, B- 410486.3, 2015 CPD P 22, 2015 WL 300733

COMPTROLLER GENERAL

Matter of: CFS-KBR Marianas Support Services, LLC; Fluor Federal Solutions LLC

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.

January 2, 2015

*1 Kenneth B. Weckstein, Esq., Pamela A. Reynolds, Esq., and Aidan J. Delgado, Esq., Brown Rudnick LLP, for CFS-KBR Marianas Support Services, LLC; and William A. Roberts III, Esq., Richard B. O'Keeffe, Jr., Esq., Samantha S. Lee, Esq., and George E. Petel, Esq., Wiley Rein LLP, for Fluor Federal Solutions, LLC, the protesters. Alan A. Pemberton, Esq., Nooree Lee, Esq., Stephanie Barclay, Esq., and Jeffrey Bozman, Esq., Covington & Burling, LLP, for DZSP 21 LLC, an intervenor. James J. Schubert, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's **cost** realism evaluation of proposals is sustained where record shows that agency's evaluation was based on the mechanical application of a government estimate that did not take into consideration each offeror's unique technical approach, and therefore was not consistent with the terms of the solicitation and applicable procurement statutes and regulations.
2. Protest alleging that agency engaged in misleading discussions is sustained where record shows that agency's discussions questions were based on the results of its underlying, irrational, evaluation of proposals.

DECISION

CFS-KBR Marianas Support Services, LLC, of Baton Rouge, Louisiana, and Fluor Federal Solutions, LLC, of Greenville, South Carolina, protest the award of a contract to DZSP 21 LLC, of Hagatna, Guam, 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. CFS maintains that the agency misevaluated proposals and failed to engage in meaningful discussions; Fluor maintains that the agency misevaluated proposals and engaged in misleading discussions.

We sustain Fluor's protest and dismiss CFS's protest as academic.

BACKGROUND

The RFP contemplates the award of a **cost** reimbursement-type contract for a 12-month base period, four 1-year option periods, and an additional three 1-year award option periods. RFP at BATES 5-11.¹ The RFP advised offerors that the agency would make award on a best-value basis, considering **cost** and several non-**cost** evaluation factors. The non-**cost** factors were as follows: past performance,² occupational safety, staffing and resources, technical approach, and small business utilization.³

RFP at BATES 99–108. For **cost** evaluation purposes, the RFP advised offerors that the agency would evaluate proposals for completeness, reasonableness, balance, and realism. *Id.* at BATES 98– 99. Finally, the RFP 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 98.

*2 The agency received eight proposals in response to the solicitation. Agency Report (AR) at 6.⁴ After performing an initial evaluation, the agency established a competitive range comprised of six concerns and engaged in discussions with those offerors. *Id.* After conducting discussions, the agency solicited and obtained final proposal revisions (FPRs), which the agency evaluated. On the basis of that evaluation, the agency assigned the protesters and awardee the following technical ratings and evaluated **costs**:

	Fluor	CFS	DZSP
	Substantial	Substantial	Substantial
Past Performance	Confidence	Confidence	Confidence
Occupational Safety	Outstanding	Outstanding	Outstanding
Staffing and Resources	Outstanding	Good	Outstanding
Technical Approach	Outstanding	Outstanding	Good
Small Business Utilization	Outstanding	Outstanding	Outstanding
Evaluated Cost	\$572,077,165	\$520,997,945 ⁵	\$532,284,994

*3 AR, exh. 24, Source Selection Authority Report, at BATES 5160–63. On the basis of these evaluation results, the agency made award to DZSP, finding that its proposal offered the best value to the government. After being advised of the agency's selection decision and requesting and receiving debriefings, CFS and Fluor filed protests in our Office.

FLUOR PROTEST

Fluor's protest centers principally on the agency's initial **cost** realism evaluation and the effect that it had on the contents of the agency's discussions with the firm. Fluor essentially argues that, because the agency's initial evaluation was irrational, it led the agency to engage in misleading discussions with the protester which led, in turn, to Fluor adding unnecessary personnel to its proposal and, ultimately, to proposing a **cost** that made it uncompetitive. Secondly, Fluor maintains that the agency's **cost** realism evaluation after the agency engaged in discussions also was unreasonable. We have considered all of Fluor's allegations and sustain its protest for the reasons discussed below.

Initial **Cost** Realism Evaluation

Fluor asserts that, in its initial evaluation of proposals, the agency never performed a meaningful **cost** realism evaluation in connection with the offerors' proposed staffing. According to Fluor, the agency mechanically applied a government estimate in evaluating the sufficiency of the offerors' proposed staffing. Fluor argues that the agency's actions were improper because any meaningful **cost** realism evaluation is required to take into consideration the offerors' respective technical approaches to accomplishing the requirements.

We sustain this aspect of Fluor's protest. 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; *Metro Machine Corp.*, B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶112 at 9; Federal Acquisition Regulation (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.

*4 In addition to these broad considerations, while an agency can utilize a reasonably derived estimate of labor hours based on the government's experience as an objective standard to measure the realism of proposed **costs**, an agency may not mechanically apply its own estimates for labor hours or **costs**-effectively normalizing **cost** elements of an offeror's proposal to government estimates-without considering the offeror's unique technical approach. See, e.g., *Information Ventures, Inc.*, B-297276.2 *et al.*, Mar. 1, 2006, 2006 CPD ¶45 at 9 (sustaining protest where agency normalized offerors' proposed labor hours to government estimated levels under its **cost** realism analysis without considering offerors' technical approach); *Honeywell Tech. Solutions, Inc.; Wyle Labs., Inc.*, B-292354, B-292388, Sept. 2, 2003, 2005 CPD ¶107 at 12 (sustaining challenge to agency's **cost** realism evaluation where the agency mechanically adjusted offerors' staffing levels to government estimates); *The Jonathan Corp.; Metro Mach. Corp.*, B-251698.3, B-251698.4, May 17, 1993, 93-2 CPD ¶174 at 10-11 (sustaining protest where agency's **cost** realism evaluation failed to consider each offeror's individualized technical approach and instead mechanically adjusted proposed labor hours and material **costs** to government estimates).

The record here shows that, in evaluating the offerors' initial proposals, the agency mechanically applied a government estimate to evaluate the sufficiency of the offerors' proposed staffing. In particular, the record shows that the agency evaluated all proposals against an undisclosed government estimate of the number of full time equivalent staff (FTE) that the agency considered sufficient to perform the requirements.

The RFP divided the work to be performed into a number of discrete task areas, which the RFP referred to as annexes. RFP at BATES 4; see also, AR, exhs. 1a-1o, RFP workload projections. The record shows that the agency established a specific number of FTEs that it thought were necessary to perform the requirement for each annex. AR, exh. 3, FTE and Equipment Analysis for DZSP; exh. 3a, FTE and Equipment Analysis for CFS; exh. 3b, FTE and Equipment Analysis for Fluor.⁶ In each instance where a proposal offered [deleted] or more FTEs less than the agency had identified as necessary for any given annex, the agency evaluators described the offeror's proposed staffing as unrealistic and insufficient to perform in the annex identified. *Id.*

In performing this evaluation, the agency concluded that Fluor's proposed staffing was insufficient by [deleted] FTEs. AR, exh. 3b FTE and Equipment analysis for Fluor. In a similar vein, the agency concluded that CFS's proposed staffing was insufficient by [deleted] FTEs, AR, exh. 3a, FTE and Equipment analysis for CFS, and that DZSP's proposed staffing was insufficient by [deleted] FTEs, AR, exh. 3, FTE and Equipment Analysis for DZSP.⁷ These conclusions were reached by the agency's technical evaluation team (TET). When this information was provided to the agency's **cost** evaluators, they used the information to make upward **cost** realism evaluation adjustments to the offerors' proposed **costs**. AR, exh. 4, Initial **Cost** Evaluation Report, at BATES 4340.

*5 The record thus shows that the agency's initial evaluation was based on a mechanical application of the government estimate to the proposals that did not consider the offerors' varying technical approaches. In the absence of a cogent explanation for the Navy's actions, such a mechanical application of the government estimate in the evaluation of proposals is unreasonable. We therefore sustain this aspect of Fluor's protest.

Misleading Discussions

Fluor argues that the mechanical application of the government's estimate discussed above led the agency to pose misleading discussion questions to the firm regarding the sufficiency of its proposed staffing. The protester maintains that it initially proposed staffing that it considered sufficient to perform the contract in light of its proposed technical approach. Fluor argues

that, when it attempted to respond to the agency's concerns during the discussions that were based on the agency's mechanical application of the government estimate, it effectively priced itself out of the competition.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, discussions must identify deficiencies and significant weaknesses in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. *PAI Corp.*, B-298349, Aug. 18, 2006, 2006 CPD ¶124 at 8; *Spherix, Inc.*, B- 294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶3 at 13. An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. *Metro Mach. Corp.*, B-281872 *et al.*, Apr. 22, 1999, 99-1 CPD ¶101 at 6.

Here, the record shows that the agency asked each offeror a specific question that identified precisely the number of FTEs by which the agency considered the proposal deficient, as well as the annexes where the agency considered the deficiencies existed. For example, in the case of Fluor, the agency posed the following discussion question:

The TET evaluated whether proposed FTEs (quantity and labor mix) are realistic: (i) reflected a clear understanding of the requirements; and (ii) were neither excessive nor insufficient for the effort to be accomplished. The TET's realism review determined your proposed staffing level was not sufficient by [deleted] FTEs in Annexes [deleted]. Please review and revise accordingly.

Fluor Agency Supplemental Report, exh. 9b at BATES 83. The agency posed essentially identical discussion questions to DZSP and CFS. *Id.*, exh. 30b, at BATES 149; CFS Supplemental Report, exh. 26a, at BATES 100. For all three offerors, the agency subsequently issued a clarification to these questions, stating that it was not the intent of the agency to dictate the number of FTEs proposed, but to verify that the offeror had a methodology to accomplish the work with the number of FTEs proposed. Fluor Letter of Protest, exh. 1, at unnumbered page 17; Fluor Supplemental Report, exh. 31b, at BATES 150 (Clarification for DZSP); CFS Supplemental Report, exh. 26a at BATES 100 (clarification for CFS). Nonetheless, the agency did not retract its original discussion questions.

*6 The record shows that Fluor revised its proposal to add [deleted] FTEs, precisely the number identified by the agency as lacking in its initial proposal. Fluor FPR, Tech. Volume, at 3-68. The record also shows that this upward adjustment in staffing on the part of Fluor led it to propose the [deleted], AR, exh. 21, Final **Cost** Evaluation Team Report, at BATES 5120, as well as the [deleted] evaluated **cost** among the competitive range offerors. *Id.* at BATES 5044. Ultimately, Fluor's high evaluated **cost** led the agency not to select it for award, even though its proposal had been ranked first from a non-**cost** standpoint. AR, exh. 24, Source Selection Decision, at BATES 5174.

On this record, we conclude that the agency's discussion question relating to the adequacy of Fluor's proposed staffing led it to increase its staffing to a degree that, ultimately, led its proposal to be noncompetitive. Because the record shows that Fluor's revised staffing was raised in direct response to the agency's discussion question, we conclude that the firm was misled to its competitive prejudice. We therefore sustain this aspect of Fluor's protest.

Evaluation of Revised Proposals

As a final matter, Fluor maintains that the agency essentially abandoned the original staffing estimates that it used to evaluate the offerors' initial proposals, thereby demonstrating the arbitrary nature of the original evaluation. Fluor maintains that the agency's final evaluation confirms that its initial evaluation bore no relationship to the offerors' unique technical approaches, and also demonstrates that the agency's evaluation of revised proposals failed to meaningfully evaluate the offerors' proposals for realism purposes.

We sustain this aspect of Fluor's protest. The record shows that both of the protester's proposals, as well as the awardee's proposal, received unacceptable ratings under the staffing and resources evaluation factor based on, among other considerations,

their respective proposed staffing, which the agency considered inadequate. AR, exh. 5, Initial Technical Evaluation Report, at BATES 4423, 4434, 4455, 4495. As discussed above, Fluor responded to the agency's discussion question by offering precisely the additional number of FTEs identified by the agency. The agency evaluated Fluor's revised staffing and assigned its proposal an outstanding rating under the staffing and resources factor. AR, exh. 20, Final Technical Evaluation Report, at BATES 4900, 4964.

In contrast, the record also shows that both CFS and DZSP proposed some additional staff, but not the number of FTEs identified by the agency. In the case of DZSP, although the agency represented during discussions that its staffing was low by [deleted] FTEs, in response to the agency's discussions question, DZSP added only [deleted] FTEs. AR, exh. 21, Final **Cost** Evaluation Team Report, at BATES 5120. In the case of CFS, although the agency advised the firm that its staffing was low by [deleted] FTEs, the firm added only [deleted] additional FTEs. *Id.*

*7 Notwithstanding the fact that neither firm offered additional staffing commensurate with the agency's initial evaluation and discussion questions, the evaluators nonetheless assigned DZSP an outstanding rating for its proposed staffing and resources, and assigned the CFS proposal a good rating for its proposed staffing and resources (as noted, both proposals originally had been rated unacceptable under this evaluation factor). AR, exh. 20, Final Technical Evaluation Report, at BATES 4900, 4911, 4930.

The agency's technical evaluators articulated no reasoned analysis for why, despite the fact that these firms did not propose the staffing initially identified by the agency as inadequate, the firms nonetheless merited these better ratings. *Id.* at BATES 4911–12, 4930–31. In effect, the agency's evaluators appear to have abandoned the initial government estimates, as well as their evaluation findings based upon those estimates. In addition, since the evaluators did not explain why they considered the offerors' revised staffing adequate in light of their respective technical approaches, we have no basis to find the agency's reevaluation of proposals reasonable.⁸ In this connection, agencies are required to adequately document their evaluation results in order to facilitate our examination of the record; 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. *Computer Sciences Corp., et al., B-408694.7 et al., Nov. 3, 2014, 2014 CPD ¶331 at 11.* We therefore sustain this aspect of Fluor's protest.

CFS PROTEST

CFS's protest challenges various aspects of the agency's technical evaluation of proposals, as well as the agency's evaluation of **cost** proposals relating to the [deleted]. In addition, CFS maintains that the agency did not engage in meaningful discussions with it in connection with one weakness identified by the agency in its proposal.

We have carefully considered all of CFS's allegations and find no basis to sustain the firm's protest. We find no merit to its allegations concerning the agency's evaluation of technical proposals, and we also find no merit to its allegation concerning the agency's alleged failure to engage in meaningful discussions with CFS. In addition, while CFS arguably may be correct concerning the agency's evaluation of **cost** proposals in the area of the offerors' proposed [deleted], we are not persuaded that CFS was prejudiced by the agency's evaluation in that area, and therefore find no merit to that aspect of its protest.

In the final analysis, CFS did not advance any of the overarching allegations, discussed above, relating to the agency's **cost** evaluation that form the basis of our decision to sustain Fluor's protest. CFS also did not allege that it was misled by the agency's discussions with it concerning the adequacy of its proposed staffing. (In fact, as noted above, although CFS was advised during discussions that it had proposed [deleted] FTEs less than the agency thought were necessary, the record shows that it added only [deleted] FTEs in its FPR. The record therefore clearly shows that, unlike Fluor, CFS was not misled to its competitive prejudice by the agency's discussions in this area.) In light of the foregoing considerations, we deny CFS's protest.

RECOMMENDATION

*8 In light of our discussion above, we sustain Fluor's protest. We recommend that the agency reevaluate proposals in a manner consistent with our discussion above.⁹ After performing its reevaluation, we further recommend that the agency afford the competitive range offerors meaningful discussions based on its reevaluation of proposals. After engaging in discussions, we recommend that the agency solicit, obtain, and evaluate revised proposals and make a new source selection decision based on that reevaluation.¹⁰ Finally, we recommend that the agency reimburse Fluor the reasonable **costs** of filing and pursuing its protest, including reasonable attorneys' fees.¹¹ 4 C.F.R. §21.8(d) (2014). The protester's certified claim for **costs**, detailing the time expanded and **costs** incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel

Footnotes

- 5 In its final evaluation of **cost** proposals, the agency made an upward adjustment to the CFS proposal of approximately \$[deleted] to account for **costs** associated with the [deleted]. AR, exh. 24, Source Selection Authority Report, at BATES 5162. CFS challenges this upward adjustment to its evaluated **cost**, but otherwise does not raise any of the **cost** evaluation challenges advanced by Fluor, which are discussed below.
- 1 The Navy assigned the record sequential BATES numbers which we use in our decision.
- 2 The RFP stated that the agency would assign past performance examples relevancy ratings of either very relevant, relevant, somewhat relevant or not relevant, and would assign each offeror's past performance a confidence rating of substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown confidence. RFP at BATES 108–109.
- 3 The RFP stated that the agency would assign adjectival ratings to the remaining non-**cost** evaluation factors of outstanding, good, acceptable, marginal or unacceptable. RFP at BATES 108.
- 4 The agency prepared a combined legal memorandum/contracting officer's statement addressing both protests, which we refer to as the AR.
- 6 The record includes what appear to be two different government estimates. The exhibits cited above are template evaluation documents that include a specific number of FTEs for each of the annexes. When added together, these template evaluation documents specify [deleted] FTEs. AR, exh. 3, FTE and Equipment Analysis for DZSP; exh. 3a, FTE and Equipment Analysis for CFS; exh. 3b, FTE and Equipment Analysis for Fluor. Elsewhere, the record includes a government estimate that was calculated using [deleted] FTEs (with a specific-different-number of FTEs for each annex). *See e.g.*, AR, exh. 21, **Cost** Evaluation Team Final Report, at BATES 5120. The record includes no explanation of the underlying basis for the first of the two government estimates, and there is nothing in the record that attempts to reconcile the two estimates. The agency expressly abandoned its use of the second government estimate of [deleted] FTEs. *Id.* at BATES 5123. As discussed below, the agency also appears to have abandoned the other government estimate of [deleted] FTEs in its **cost** evaluation performed after receipt of revised proposals.
- 7 For reasons unexplained in the record, the agency did not evaluate the realism of the offerors' proposed staffing where it exceeded the government estimate. For example, in the case of Fluor, it proposed [deleted] more FTEs than were identified by the agency as necessary for annexes [deleted]. AR, exh. 3b, FTE and Equipment Analysis for Fluor. The agency's evaluation of Fluor's staffing makes no mention of these apparent staffing excesses compared to the government estimate for these annexes. While rote application of the government estimate in the evaluation of the offerors' overstaffing also would have been improperly mechanical, the agency's unexplained and inconsistent application of the government estimate further highlights the underlying irrationality of its evaluation.
- 8 In their revised technical evaluation report, the evaluators stated, without elaboration, that each firm's proposed staffing was adequate in light of their technical approach. AR, exh. 13, Revised Technical Evaluation Report, at 4648–49, 4665, 4698. However, there is no critical analysis or description of the offerors' proposed staffing or unique technical approaches that led to these conclusory findings.
- 9 The agency may wish to consider CFS's allegation concerning the agency's evaluation of **cost** proposals in the area of [deleted] during its reevaluation of proposals.
- 10 Notwithstanding our conclusions regarding the merits of CFS's protest, we point out that the firm will, in fact, benefit from our recommended corrective action because it will be afforded an opportunity to participate in any reopened competition.
- 11 Because we find no merit to CFS's protest, we decline to recommend that it be reimbursed the **costs** associated with filing and pursuing its protest.

B- 410486 (Comp.Gen.), B- 410486.2, B- 410486.3, 2015 CPD P 22, 2015 WL 300733

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.