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Decision

Matter of: Fluor Federal Solutions, LLC

File: B-410486.9

Date: January 18, 2017

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Anuj Vohra, Esq., Nooree Lee, Esq., and Justin Golart, 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

Protest challenging agency's evaluation of proposals is sustained where record shows that agency evaluated the protester's and awardee's proposals disparately in a manner that prejudiced the protester.

DECISION

Fluor Federal Solutions, LLC, of Greenville, South Carolina, protests 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. Fluor maintains that the agency misevaluated proposals and made an unreasonable source selection decision.

We sustain the protest.

BACKGROUND

This is our third occasion to consider the propriety of the Navy's actions in connection with this acquisition. In a prior decision, we sustained a protest filed by Fluor relating to the agency's evaluation of proposals and conduct of discussions in connection with this acquisition. CFS-KBR Marianas Support Services, LLC; Fluor Federal Solutions LLC, B-410486, et al., Jan. 2, 2015, 2015 CPD ¶ 22, aff'd, DZSP 21 LLC--Recon., B-410486.4, Jul. 22, 2015, 2015 CPD ¶ 238. We recommended that the agency reopen discussions with the offerors, solicit, obtain and evaluate revised proposals, and make a new source selection decision. CFS-KBR Marianas Support Services, LLC; Fluor Federal Solutions LLC, supra at 9-10.

The Navy implemented our recommended corrective action and again selected DZSP for contract award. Fluor filed a second protest challenging the agency's selection of DZSP in the wake of the agency's corrective action. After full development of the record in that case, we conducted an outcome prediction alternative dispute resolution (ADR) procedure at the request of the Navy. We advised the parties that the agency's evaluation of DZSP's proposed cost in the area of its exempt employee compensation (discussed in detail below) appeared to have overlooked certain significant features of DZSP's proposed costs. As a result, the GAO attorney advised that our Office likely would sustain the protest. The agency advised our Office that it intended to take corrective action to address the concerns we identified, and on that basis we dismissed Fluor's second protest as academic. B-410486.6, B-410486.7, Mar. 30, 2016 (unpublished decision).

After dismissal of Fluor's second protest, the agency engaged in limited discussions with the protester and DZSP and solicited, obtained and evaluated revised proposals. The agency again selected DZSP for award, and the current protest followed. We discuss the agency's actions in detail below.

We note at the outset that 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,

[1] In response to this latest protest, the agency submitted an abbreviated agency report (AR) because many of the documents pertinent to our consideration of the protest (for example, the RFP) were already in our records. Where necessary, this decision refers to documents already in our records as either the first agency report (filed in response to Fluor's first protest), or the second agency report (filed in response to Fluor's second protest). The Navy assigned sequential BATES numbers to portions of the record which we cite in our decision.

[2] The RFP stated that the agency would assign past performance examples relevancy ratings of 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.

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.

As we discussed with the parties during the ADR procedure, the record before us in the prior case showed that DZSP had proposed 113 exempt labor categories, and claimed that it was escalating the direct rates of compensation for these employees by [deleted] percent for each year of contract performance.[4] A careful examination of the record showed, however, that in addition to applying an escalation factor of [deleted] percent, DZSP also was applying what it termed a “decrement factor” of [deleted] percent to these same rates of compensation.[5] The net result of these calculations was that, rather than escalating its direct labor by [deleted] percent per year, DZSP actually was reducing the rates of compensation for these employees by [deleted] percent during each year of contract performance. The contemporaneous record showed that the agency failed to recognize this decrease in DZSP’s proposed compensation, and that its cost realism evaluation failed to take it into account.

The record further showed that Fluor had been found technically superior to DZSP under the non-cost evaluation factors. While both firms received the highest ratings (substantial confidence and outstanding) under the past performance, occupational safety, staffing and resources, and small business utilization factors, Fluor’s proposal received an outstanding rating under the technical approach factor, while

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[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 RFP required offerors to comply with the terms of a collective bargaining agreement (CBA). The employees at issue in connection with this aspect of the protest are “exempt” from the CBA.

[5] Throughout this acquisition and the protests, the parties have used the term “decrement factor” to denote DZSP’s proposal to reduce the exempt employees’ compensation below the hourly rates included in the DZSP proposal. The “decrement factors” discussed in this decision are typically expressed as a percentage of the proposed hourly rates. Thus, for example, the [deleted] percent reduction in the hourly rates of compensation previously proposed by DZSP each year is expressed in the record as a [deleted] percent “decrement factor,” meaning that DZSP proposed to pay [deleted] percent of the proposed hourly wage rate in a subsequent year.

DZSP's proposal was assigned a rating of good under that factor. Second AR, exh. 30, Source Selection Decision Document (SSDD) at BATES 4920.

The agency's selection of DZSP's lower-rated proposal was based on its conclusion that it represented a savings of approximately $6.9 million over the life of the contract. However, we concluded, based on the error associated with the agency's failure to recognize DZSP's decrease in its exempt employee compensation, that this apparent cost savings was largely non-existent. A calculation that applied a [deleted] percent escalation factor to DZSP's exempt labor (rather than a [deleted] percent decrease) resulted in the proposal being lower in cost by approximately $[deleted], rather than the $6.9 million figure used by the agency in its source selection decision. We therefore concluded that the agency's source selection decision was not reasonable.

Subsequently, the agency elected to allow Fluor and DZSP to make limited revisions to their proposals. DZSP was afforded an opportunity to revise its proposal in connection with its proposed rates of compensation for its exempt employees.[6] Fluor was afforded an opportunity to revise its proposal in connection with how it calculated a gross receipts tax to be applied to its proposed cost and fee, and also was asked to explain how it intended to staff the contract if its principal approach--retention of 95 percent of the incumbent staff--was unsuccessful.

Both firms revised their proposals and the agency reevaluated them on the basis of those revisions. The agency made no changes to the adjectival ratings assigned to the offerors' non-cost proposals (Fluor was again found superior under the technical approach factor). Both firms revised their proposed costs: Fluor proposed a total cost of $494,519,656, and DZSP proposed a total cost of $491,894,166. AR, exh. 27, SSDD, at 3. The agency made no adjustments to either firm's proposed cost for purposes of evaluating realism. On the basis of these evaluation results, the agency again made award to DZSP, concluding that, although Fluor's proposal was technically superior, it did not merit the approximately $2.6 million cost premium

[6] In addition to the across-the-board de-escalation of the rates of compensation for its exempt employees discussed above, the record of the agency's last source selection also showed that, for certain of its proposed key employees (who also were exempt employees), DZSP proposed to reduce their compensation by [deleted] percent at the start of the contract, and that these individuals would have their compensation reduced by approximately [deleted] percent by the end of contract performance. Second AR, DZSP Cost Proposal, Appendix H at 1. DZSP was provided a discussion question specifically relating to these individuals, along with a discussion question relating more generally to its proposed across-the-board de-escalation of their compensation for exempt employees. AR, exh. 6, Discussion Letter to DZSP.

associated with award to Fluor. After being advised of the agency's source selection and requesting and receiving a debriefing, Fluor filed the instant protest.

PROTEST

The focus of Fluor's latest protest centers on a change in the proposed approach to managing and compensating its exempt personnel that DZSP introduced in response to the agency's latest round of discussions. As noted, the agency provided DZSP a discussion question relating to the fact that, in its earlier proposal, it had offered to reduce its exempt employees' compensation by a net factor of [deleted] percent during each year of contract performance. The agency advised DZSP that such an approach was not considered by the government to be reasonable or realistic because it implied that every exempt position would be replaced with a new hire at a lower rate of compensation for each year of contract performance. The agency's discussion question provided, in pertinent part, as follows:

> You state "In addition, DZSP 21 is assuming replacement of the Exempt positions at various times during the contract." The Govt's review of your Exempt Labor rates (Excel file "Source Data", worksheet "Exempt DL") used to price your labor/fringe costs disclosed that you applied a [deleted]% escalation factor and a [deleted]% decrement factor each contract period. The result is that labor rates for all Exempt labor categories are reduced each contract period. The Govt. does not consider use of a [deleted]% decrement factor every period to be a reasonable/realistic approach because it implies that every Exempt position would be replaced with a new hire at a lower rate each contract period. Please eliminate the holistic method represented by the [deleted]% decrement factor and address, at a minimum, the specific exempt labor categories that you propose to be replaced with a new hire, when you anticipate the replacement will occur, and the new hire replacement rate.
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> * * * *
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> In addition, please explain your plan for workforce replenishment based upon particular exempt labor categories as you deem appropriate to justify your reduced exempt labor cost over the life of the contract.

AR, exh. 6, Discussion Letter to DZSP at BATES 253.

In response to the agency's discussion question, DZSP essentially introduced an entirely new approach to how it would manage and compensate its exempt employees. It explained that it would use an [deleted] percent workforce "replacement" rate during each year of the contract; that it would pay the new, incoming employees at a rate of [deleted] percent of the rate of compensation it was paying its incumbent workers; that this would yield a uniform [deleted] percent "decrement factor" spread evenly over all of the exempt employees; and that DZSP would continue to use a [deleted] percent escalation rate during each year of contract performance, thereby allowing it to propose [deleted] hourly rates of compensation for its exempt employees over the life of the contract.[7] AR, exh. 8, DZSP Discussion Response at BATES 258.

In effect, DZSP's new approach was that it would replace incumbent workers at a rate of [deleted] percent of its exempt workforce per year and hire new, lower paid, employees in their place. These new employees would be paid [deleted] percent of the hourly rates identified in DZSP's proposal. The employees that were not replaced in a particular contract year would be given a [deleted] percent escalation to their hourly rates of compensation (until such time as they were replaced), and this would result in [deleted] hourly rates of compensation that would [deleted] over the life of the contract.

Fluor raises various challenges to the agency's evaluation of DZSP's proposed approach to maintaining [deleted] wage rates for its exempt employees. Among other arguments, Fluor alleges that the agency engaged in disparate treatment in connection with evaluating its proposal and DZSP's proposal in the area of staff recruitment and retention.

For the reasons discussed below, we agree with the protester that the agency evaluated the two proposals disparately in connection with the question of recruitment and retention of staff. It is axiomatic that agencies are required to evaluate proposals on a common basis and in accordance with the terms of the RFP; agencies may not properly engage in disparate treatment of offerors in the evaluation of proposals. Alutiiq Pacific, LLC, B-409584, B-409584.2, June 18, 2014, 2014 CPD ¶ 196 at 10.

Under the express terms of the RFP, the agency was required to evaluate the adequacy of the offerors' staffing approach as it related to the recruitment and retention of staff. The RFP provided, in pertinent part, as follows:

> The Offeror's staffing and Resource plan will be evaluated for adequacy to support proposed processes and methodologies, including:

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[7] DZSP's response to the discussion question states that it would achieve this replacement rate through "retirements and other attrition." AR, exh. 8, DZSP Discussion Response at BATES 258.

> a) Offeror's ability to recruit and retain qualified local workforce and key personnel/ managers.

RFP at BATES 104.

The record shows that Fluor's staffing approach for exempt employees involved recruitment of 95 percent of the incumbent staff. AR, exh. 9, at BATES 261. Fluor represented to the agency that it was confident in its ability to do this based on the wage rates it was proposing. Of significance, Fluor specifically represented that, in the event it was unable to attract the incumbent staff with the rates of compensation it was proposing, it would [deleted]. Fluor stated:

> We will be able to properly resource the Guam BOS [base operations services] project and achieve our objective of hiring 95% of our [exempt employee] staff from incumbent personnel, based on our staffing and compensation approach described below. <u>[deleted].</u>

<u>Id.</u> (emphasis supplied). In effect, therefore, Fluor proposed to [deleted] for exempt employees.

Notwithstanding this representation in the Fluor proposal, the record shows that the agency's evaluators and source selection authority expressed a concern that Fluor would be unable to recruit the incumbent exempt employees at the wage rates it had proposed. In this connection, the record shows that the agency's technical evaluators questioned Fluor's ability to recruit the incumbent exempt staff based on the wage rates it had proposed, and suggested that Fluor's approach could result in employee morale and retention issues. AR, exh. 23 at BATES 518. The agency's cost evaluators echoed these same concerns. AR, exh. 22, at BATES 428-429. In effect, the evaluators questioned Fluor's ability to meet its goal of 95 percent retention of incumbent employees.

In contrast, the evaluators did not give meaningful consideration to similar implications of DZSP's proposed approach described above, or how it would impact the firm's retention of employees, as required by the RFP. In this connection, the evaluators gave no consideration to the fact that DZSP expressly proposed to replace its incumbent staff at a rate of [deleted] percent per year for each year of the 8-year potential life of this contract. Given this rate of replacement, DZSP essentially will replace [deleted] percent of its incumbent exempt staff during approximately the first [deleted] years of contract performance, and replace almost [deleted] of the newly-hired exempt employees during the remaining [deleted] years of contract performance. The agency technical evaluators confined their observations to consideration of whether or not it was realistic for DZSP to replace its existing, incumbent exempt employees, and concluded that it was "very realistic" for DZSP to do so because approximately [deleted] percent of DZSP's overall workforce was comprised of an aging population. AR, exh. 23, at BATES 496-497.

In addition, the technical evaluators observed only that DZSP's claimed 95 percent retention rate for its exempt employees would "not be applicable" to future contract periods, but did not criticize the firm's proposal for this reason. Id. The cost evaluators, for their part, did not give consideration to DZSP's proposed plan to replace its exempt workforce, and instead confined their observations to whether or not DZSP's proposed rates of compensation were reasonable and realistic. AR, exh. 22, at BATES 422-423.

In addition to these inconsistencies, the agency's source selection authority (SSA) specifically found the DZSP proposal superior to the Fluor proposal in the area of employee retention and used that as a discriminator for making her selection decision. In fact, she apparently was unaware of DZSPs' proposed approach of essentially replacing its exempt workforce more than once over the life of the contract. The SSA found as follows:

> In its July 2016 FPRs [final proposal revision], DZSP eliminated the Exempt labor rate reduction for each contract period, and adjusted the Base Year rates for the [deleted] Exempt employees to the same levels as current incumbent salaries.[8] DZSP also provided an explanation of its basis for capturing workforce turnover in its yearly exempt labor rates. DZSP's revised exempt labor rates were compared to Guam fair market value for Key Personnel, Non-Key managers, supervisors, and engineers, and determined the rates reasonable and realistic. Therefore, the concern has been removed. FFS [Fluor Federal Solutions] also provided a detailed staffing plan using a Guam BOS [base operations services], annex specific efficiency factor. FFS proposed to hire 95% of its workforce from individuals currently employed by DZSP but at lower rates than DZSP is currently paying and in some cases, significantly lower than DZSP's rates. FFS may have challenges in meeting this 95% goal due to the proposed reduced salaries but also indicated FFS has described effective corporate resourcing as an alternative to acquiring personnel. <u>While both proposals received Outstanding ratings for Factor C [staffing and resources], I conclude DZSP provides slightly more value because FFS' initiative to recruit the experienced incumbent workers at lower salaries imposes some risk of loss of a portion of that workforce's experience.</u>

AR, exh. 27, SSA Decision, at BATES 565 (emphasis supplied).

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[8] As noted above, the record during the last protest showed that DZSP had reduced the salaries of certain of its key employees at the start of the contract. These employees are a small portion of the total number of exempt employees.

In sum, the record shows that the agency evaluated the offerors disparately under the staffing and resources factor, criticizing Fluor's proposed approach as possibly involving a risk that it would not be able to recruit the incumbent workforce, while at the same time failing to meaningfully consider whether a similar risk was raised by DZSP's proposed approach of repeatedly replacing its exempt employee workforce over the life of the contract. In light of these considerations, we sustain Fluor's protest.[9]

RECOMMENDATION

We recommend that the agency reevaluate proposals in a manner that is consistent with this decision and make a new source selection decision after performing that reevaluation. Should the agency conclude that DZSP is no longer in line for award, we further recommend that the agency terminate DZSP's contract for the convenience of the government, and make award to Fluor, if otherwise proper. In addition, we recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claims for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

[9] Fluor also challenged the propriety of the agency's cost realism for reasons relating to DZSP's proposed approach, and also argued that DZSP had failed to respond to the agency's discussion questions adequately. We have considered these remaining allegations and have no basis to object to the agency's actions for the reasons advanced by Fluor.