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Decision

Matter of: Department of the Army--Reconsideration

File: B-299317.4

Date: June 8, 2007

DECISION

The Department of the Army asks that we reconsider our decision in L-3 Communications Titan Corp., B-299317 et al., Mar. 29, 2007, 2007 CPD ¶ ____, in which we sustained L-3's protest of the award of a contract to Global Linguist Solutions, LLC (GLS) under request for proposals (RFP) No. W911W4-05-R-0001 to provide interpretation and translation services for the U.S. armed forces in Iraq.

We deny the reconsideration request.

The RFP provided for award of an indefinite-delivery indefinite-quantity contract for a 5-year period, during which individual task orders would be issued, and advised offerors that award would be based on the proposal offering the best value to the government considering the following evaluation factors: management, past performance, and cost. With regard to the most important factor, management, the solicitation identified the following subfactors: fill rate, experience, sustainment, staffing plan, transition plan and small business participation.

In our decision, we found unreasonable the Army's evaluation under the fill rate and experience subfactors, and that the evaluation scheme for transition plans did not support meaningful comparison and discrimination between competing proposals. In requesting reconsideration, the Army takes issue with our findings in all three respects.

Fill Rate Subfactor

The RFP identified the linguist staffing levels that would be required under the first task order ("task order 1"), and provided that various aspects of the offerors' proposals would be evaluated against the task order 1 requirements. For that task order, the solicitation required offerors to propose enough personnel to fill 7,217 full-time equivalent (FTE) linguist positions, and defined an FTE as follows: "an FTE year will consist of a total of 3,744 total productive hours (12 hours a day; 6 days a

week; 52 weeks a year).” Agency Report (AR), Tab 10, at 213. Accordingly, the ultimate requirement, pursuant to task order 1, was to provide enough linguist personnel to perform 27,020,448 productive hours (7,217 FTE x 3,744 productive hours). In this respect, since an FTE was based on productive hours, in order to provide that number of productive hours an offeror necessarily had to propose to hire more than 7,217 people, since additional personnel would be needed to accommodate situations where linguists were on medical leave, family leave, holiday, etc.

Section L of the solicitation directed offerors to “identify the number of Full-Time Equivalent (FTE) linguists proposed to satisfy the positional assignments specified in . . . Task Order 1,” and section M advised offerors that the agency would assess the probability that “the Offeror will have available the necessary (Quantity and skill type) of . . . linguists to successfully and timely perform the scope of work of [task order 1].” AR, Tab 10, at 213, 247.

In responding to the solicitation’s requirement to “identify the number of Full-Time Equivalent (FTE) linguists proposed to satisfy the positional assignments specified in . . . Task Order 1,” GLS stated in its proposal:

We estimate the number of Full Time Equivalent linguists necessary to fill post-transition Task Order (T.O.) 1 will be [deleted], with a total number of productive hours being [deleted] hrs/yr.

AR, Tab 35, at 1,662.

L-3’s proposal, in responding to this section L requirement, stated:

[T]o . . . meet 100% of Task Order 1 requirements in the future, we estimate that [deleted] Full Time Equivalents (FTEs) will be required.

AR, Tab 14, at 434.

In evaluating the proposals, the agency criticized L-3’s proposal of [deleted] “Full Time Equivalents,” on the basis that it would create a “shortfall” of linguists, stating:

L-3 . . . proposes a hire rate of [deleted] while at the same time recognizing a historic linguist non-availability rate of [deleted]. Therefore, there is a 1.1% shortfall built into the proposal that equates to a shortfall of approximately 70 linguists based on the Task Order 1 requirement of approximately 7,000.

AR, Tab 67, at 4,547.

Based on this evaluated weakness, the source selection authority (SSA) downgraded L-3’s proposal, specifically stating in the source selection decision that, “[a]s a result

of this weakness, I judged L-3 Titan's proposal to be second strongest in this [most heavily weighted] subfactor." Id.

In contrast, the agency performed no quantitative analysis regarding whether GLS's proposal, in offering [deleted] "Full Time Equivalent linguists," would provide the number of linguists needed for [deleted] productive linguist hours. Accordingly, we sustained the protest, stating (at 9):

Absent the agency's consideration of this issue, reasonably documented and rationally supported by credible data, we are unable to conclude that the agency reasonably evaluated L-3's proposal of [deleted] linguists as being more likely to create a shortfall against the required fill rate than GLS's proposal of [deleted] linguists.

In requesting reconsideration, the agency asserts that GLS's proposal to provide [deleted] "Full Time Equivalent linguists" was materially different from L-3's proposal to provide [deleted] "Full Time Equivalents." In short, the agency asserts that, in proposing [deleted] "Full Time Equivalent linguists," GLS was actually proposing to provide a greater number of productive hours than the [deleted] required by task order 1. See Recon. Request at 2-4. The record is to the contrary.

First, as we noted above, and in our initial decision, GLS's proposal expressly stated:

We estimate the number of Full Time Equivalent linguists necessary to fill post-transition Task Order (T.O.) 1 will be [deleted], **with a total number of productive hours being** [deleted] **hrs/yr.** [Emphasis added.]

AR, Tab 35, at 1,662.

Further, as we noted in our decision, the agency's contemporaneous evaluation record expressly refers to GLS's proposal of [deleted] "Full Time Equivalent linguists" as reflecting "extra people being used to fill unexpected absences." AR, Tab 64, at 4,379. The evaluation record further states: "The hours in the [GLS] cost proposal, annually, are [deleted] **to cover transit and absence.**" Id. (Emphasis added.) Finally, GLS's cost proposal explains that its proposal of [deleted] FTEs more than the task order 1 requirement of 7,217 FTEs [deleted] reflected the fact that GLS proposed to provide [deleted], stating "[these linguists will] have [deleted] leave and holidays that will require **backfill personnel to support the mission while the individual linguist is away.**"¹ AR, Tab 64, at 3,290 (emphasis added).

¹ [Deleted].

In sum, as we stated in our initial decision, it is clear that GLS's proposal to provide an additional [deleted] "Full Time Equivalent linguists" constituted a proposal to account for [deleted] non-productive time--just as L-3's proposal, offering to provide an additional [deleted] "Full Time Equivalent" [deleted] constituted a proposal to account for [deleted] non-productive time. Accordingly, there is no merit in the agency's assertion that GLS's proposal to provide [deleted] "Full Time Equivalent linguists" reflected an offer to perform a greater number of productive hours than the solicitation required. Based on this record, we affirm our decision that the agency's evaluation of the offerors' proposals regarding the fill rate requirements was not reasonable.

In any event, even if the record supported the Army's reconsideration argument, the agency's evaluation of GLS's proposal would fail to reflect a reasonable application of the solicitation's stated evaluation factors.

As discussed above, section M of the solicitation, under the heading "fill rate," advised offerors that the agency would assess whether an offeror "will have available the necessary (Quantity . . .) of . . . linguists to successfully and timely perform the [task order 1] scope of work"--that is, to fill 7,217 FTE positions, or perform 27,020,448 productive linguist hours. AR, Tab 10, at 213, 247. In light of the solicitation's definition of an FTE as 3,744 productive hours per year, along with the accepted fact that in order to get 7,217 FTEs, the contractor needs to hire more than 7,217 people, it was clearly necessary for the agency to consider the number of linguists that each offeror intended to provide, and the amount of actual productive time reasonably expected from each linguist--or, conversely, the amount of time a linguist would be expected to be in a non-productive status. While the agency performed precisely that quantitative analysis regarding L-3's proposal--and, as noted above, concluded based on the agency's projection of an [deleted] "non-availability rate," that L-3's proposal of [deleted] FTEs would create a "shortfall,"--the agency performed no similar analysis regarding GLS's proposal.² As we noted in our decision, absent such analysis the record simply cannot support as reasonable the agency's conclusion that L-3's proposal was more likely to create a shortfall against the fill rate requirements than was GLS's.

² The agency asserts that it considered GLS's proposed recruiting processes, and that its consideration of these matters adequately met its obligations to evaluate whether GLS will provide the necessary quantity of linguists to perform the contract. Nothing in the agency's consideration of GLS's recruiting processes, however, addressed the quantity of linguists that GLS would provide, or whether that quantity would be sufficient to perform the contract requirements.

Experience Subfactor

In discussing the agency's evaluation under the second most important management subfactor, experience, we noted that section M of the solicitation provided for an assessment regarding the "extent of [the offerors'] experience," and provided:

Proposals will be evaluated as more advantageous the greater the extent to which recent experience reflects the following scope of work requirements;

(a) Interpreters and Translators speaking the required SCRL [specific contract required languages].

(b) Recruiting, Hiring and Retaining of quantities of personnel similar to Task Order 1.

(c) Managing personnel in an environment similar to the Task Order 1.

AR, Tab 10, at 247.

At the hearing in our Office on L-3's protest, the SSA acknowledged that the extent of L-3's experience with regard to the first requirement was greater than that of GLS.³

³ Specifically, the following colloquy took place between protester's counsel and the SSA:

- Q. Okay lets take the first of the three [scope of work requirements,] subfactor A.
A. Right.
Q. It's experience in interpreters and translators speaking the required SCRL; right? So that's experience in providing linguists; right?
A. That's correct.
Q. Okay. Now, you graded L-3 and GLS as equal with respect to that; correct?
A. Yes.
Q. Okay. Could I ask you to look at the sentence that immediately precedes the three subfactors there, the sentence that says "proposals will be evaluated as more advantageous the greater the extent to which recent experience reflects the following scope of work requirements."
A. Right.
Q. The L-3 recent experience reflects the scope of work of providing linguists to a much greater degree than the GLS recent experience does; correct?
A. The quantity of linguists under – that the incumbent is providing right now is higher than that of the competitor, that's correct.

(continued...)

With regard to the second, the agency's evaluation record identified as a "Strength" in L-3's proposal: "Corporate and Key personnel experience in large scale (>[deleted])."⁴ AR, Tab 86, at 5,549. In the same document, discussing the experience rating for GLS's proposal, the agency noted the following "Strength": "Corporate experience in large scale (>[deleted] personnel) deployments in partner firms." *Id.* at 5,548.

Despite the solicitation's provision stating that "[p]roposals will be evaluated as more advantageous the greater the extent to which recent experience reflects the . . . scope of work requirements," along with the fact that L-3's experience with regard to two of the three scope of work requirements was nearly identical to the requirements at issue, while GLS's was not, the agency evaluated GLS's and L-3's proposal as equal under the experience subfactor.

In discussing this matter at the hearing, the SSA testified that he recognized that the scope of work involved more than 7,000 personnel, and that the solicitation provided that proposals would be evaluated "as more advantageous the greater the extent to which recent experience reflects the . . . scope of work requirements." He indicated, however, that the evaluation of the two proposals as equal for this factor was reasonable because, "in [his] judgment, there was a threshold of sufficiency," elaborating that "I thought, I judged, [deleted] was . . . an adequate threshold for experience." Tr. at 152-52.

We found that the evaluation of the two proposals as equal under the experience subfactor reflected an impermissible deviation from the solicitation's express provision that proposals would be rated as "more advantageous" the greater the extent to which an offeror's recent experience reflected the solicitation's stated requirements. In our view, the agency effectively applied a materially different evaluation criterion, replacing the required assessment with what was essentially the SSA's pass/fail assessment of whether an offeror's experience passed a "threshold of sufficiency."

In requesting reconsideration, the agency asserts that our reliance on the SSA's responses to GAO's questions was inappropriate; the agency references other portions of testimony which, it maintains, refute the SSA's testimony regarding a "threshold of sufficiency" and reflect a reasoned and reasonable judgment that the firms' proposals were equal under the experience subfactor.

(...continued)

Q. Right. It's a greater extent?

A. It's a higher number, yeah, you could use "greater extent."

Tr. at 142-43.

⁴ As noted above, task order 1 contemplates hiring over 7,000 personnel.

We see no basis to reconsider our conclusion. Our view that the evaluation under the experience subfactor was unreasonable was derived from section M's advice that there would be a comparative assessment of the offerors' experience; the RFP language that proposals would be evaluated "as more advantageous the greater the extent to which recent experience reflects the following scope of work requirements"; the listing, immediately after that language, of three such specific requirements; and the fact that the agency's evaluation itself expressly referred to the scope of work in terms of the number of people to be deployed, yet made no distinction between the offerors in that regard. Indeed, in a testimony excerpt on which the agency's reconsideration request relies, the SSA, in explaining why GLS's experience with deployments of [deleted] was evaluated as equivalent to L-3's experience with [deleted], stated that he viewed the solicitation's evaluation criteria as merely establishing a requirement for experience with "large numbers" of personnel, testifying that "GLS and its component parts had -- has experience in providing large numbers of people. [Deleted] people is large numbers to me." Tr. at 45. We simply cannot see how an assessment of proposals against this RFP's scope of work can reasonably lead to assigning an offeror whose experience directly correlates to such scope the same rating as an offeror with experience in deployments [deleted] simply because both experiences are with "large numbers of people." The agency's reconsideration request on this issue, while evidencing the agency's disagreement with our conclusion that the SSA did not apply the solicitation's stated evaluation factors with regard to experience, does not establish that it was based on any error of fact or law.⁵

Transition Subfactor

The solicitation established a 90-day transition period and required that, at the end of this period, the awardee had to be performing at the full task order 1 level. L-3, as the incumbent contractor, proposed to provide [deleted]; in contrast, GLS proposed what the cost evaluation team (CET) described as [deleted]. Tr. at 613. Specifically, GLS [deleted]. Consistent with the materially different levels of effort being offered, GLS's evaluated cost for the transition period was [deleted], and L-3's evaluated cost for the transition period was [deleted]. AR. Tab 66, at 4,461.

⁵ The agency also suggests that its evaluation of experience should be considered reasonable on the basis that the resumes of various GLS key personnel indicated experience with managing people who, when added together, aggregate to more than [deleted] people. However, the resumes on which the agency relies reflect experience managing the same people. Applying the agency's theory, an offeror with 7 key personnel, each of whom had experience managing the same 1,000 people would properly be credited with experience managing 7,000 people. The agency's argument regarding the aggregated experience of GLS's key personnel is without merit, and provides no basis for reconsideration of our decision.

We noted that the government's actual requirements for linguists during the transition period were not expected to differ in any material way from the task order 1 requirements. GLS's proposal to provide [deleted] linguist hours during the transition period thus would result in increased costs to the government outside of the contract, in order to [deleted]. In contrast, L-3's proposal of a [deleted] during the transition period resulted in less costs the government would incur outside of the contract, because [deleted]. In short, the offerors' different approaches to transition—which had a material effect on their respective evaluated costs—would have little effect on the costs the government will actually incur for the required linguistic services during the transition period.⁶

In our decision, we noted that GLS's approach to performance during the transition period was "different" from L-3's only in that GLS [deleted], and that the agency had not identified any aspect of GLS's approach that was otherwise beneficial to the government. We concluded that where, as here, the agency had placed significant importance on the offerors' capabilities to successfully provide 100% of the required linguists during the contract performance period, an evaluation scheme that effectively penalized one offeror for proposing to provide the required linguists [deleted] and, conversely, effectively rewarded a competing offeror for proposing [deleted]—particularly when the costs associated with [deleted] accrue to the government—did not appear to be rational or reasonable. Accordingly, we stated that the evaluation scheme failed to comply with the requirement in Federal Acquisition Regulation § 15.304(b) that evaluation factors support meaningful comparison and discrimination between competing proposals.

In requesting reconsideration, the Army points out that since the RFP provided for a transition period, and stated that "the most probable cost to the Government to perform" task order 1 would be evaluated, the agency was compelled by the solicitation's terms to include both offerors' transition costs in the evaluation. The agency further argues that it would have been improper to consider costs outside of the contract since the RFP did not provide for such consideration; the Army argues: "There is no good cause, legal support, or precedent for the GAO to step in and prohibit the evaluation of transition costs, or, alternatively, mandate what costs outside the procurement must be evaluated." Recon. Request at 16. The agency further notes that even though L-3, [deleted]. Id. at 16-17.⁷

⁶ At the GAO hearing, the CET chair acknowledged that, during the source selection process, the agency evaluators recognized that the [deleted] evaluated cost associated with GLS's proposed transition efforts failed to reflect the actual cost to the government, but concluded that "given the way the RFP was structured, we had no way of dealing with that particular issue." Tr. at 640-43.

⁷ The Army also maintains that it was unfair of our Office to address the transition cost issue because L-3's protest never properly and timely raised it. L-3 plainly raised
(continued...)

In our decision, we determined that in order to remedy the Army's failure to properly evaluate the proposals under the solicitation's fill rate and experience subfactors, discussions needed to be reopened, revised proposals submitted, and a new selection decision made. With respect to transition costs, the evaluation record evidenced the importance that the Army placed on an offeror providing all required linguists throughout the contract period; the agency's need for linguists existed, and would need to be paid for by the government, during the transition period; and the agency evaluators themselves realized that GLS's proposed transition efforts did not reflect the government's actual costs, but concluded that there was no way of dealing with that anomaly as the RFP was structured. See n.5, supra. Our decision should not be read to "prohibit the evaluation of transition costs, or, alternatively, mandate what costs outside the procurement must be evaluated" (in the words of the Army's reconsideration request)--we simply intended to point out that what the Army did in this case did not make sense. Indeed, in addressing transition costs in the context of our recommendation, we were expressly mindful of the Army's view that it had to evaluate transition costs under this RFP, and could not use extra-procurement costs in evaluating the proposals--we stated (at 14), "it appears the terms of the solicitation . . . are perceived by the agency as precluding a reasonable evaluation of proposals" Our point was that in remedying the procurement, the agency should address that perception, and thereby ensure a meaningful cost evaluation--in our view, it would make little sense for the Army to reopen, reevaluate, and re-select while leaving in place an evaluation scheme that failed to do so. That remains our position.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains errors of fact or law that warrants

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the issue. See Protest at 36 ("[the] incremental costs to GLS of ramping up to get to where L-3 already is necessarily would be - - if properly evaluated for cost realism - in excess of [deleted]."); Supplemental Protest at 94 (under the heading "The Army Failed Even to Evaluate the Basis for GLS's [deleted] Transition Cost Advantage": "[The] wide disparities in proposed [deleted] cried out for a realism analysis to ascertain why such a [deleted] difference in proposed [deleted] exists."); Comments on Supplemental Protest at 36 ("The Army's evaluation is flawed also because it failed to appreciate the cost implications of L-3's and GLS's different transition approaches, resulting in a [deleted] but illusory cost difference between L-3's and GLS's costs during the transition period."). As to the matter's timeliness, as we stated in our decision we do not have to resolve that issue in light of our conclusions regarding the fill rate and experience subfactors.

reversal or modification of our decision. 4 C.F.R. 21.14(a)(2007). As discussed above, the agency's reconsideration request fails to make that showing.

The request for reconsideration is denied.

Gary L. Kepplinger
General Counsel