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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: SOS Interpreting, Ltd.

File: B-293026.4; B-293026.5

Date: August 25, 2004

Alison L. Doyle, Esq., and Jason N. Workmaster, Esq., McKenna Long & Aldridge, for the protester.

Robert M. Moore, Esq., and Kelly L. Hellmuth, Esq., Moore & Lee, for McNeil Technologies, Inc., an intervenor.

James Hicks, Esq., Department of Justice, for the agency.

Charles W. Morrow, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against price/technical tradeoff which led to reselection of offeror whose technical proposal, like the protester's, was rated highly satisfactory, but whose price was higher, is denied where agency reasonably determined that protester's lower prices were based on prices and wage rates significantly lower than those historically paid by the agency, so as to create a significant risk that the protester would be unable to recruit and retain the highly qualified linguists with security clearances which the agency required so as to conduct sensitive drug enforcement wiretaps.

DECISION

SOS Interpreting, Ltd. protests the Drug Enforcement Administration's (DEA) award of a contract to McNeil Technologies, Inc., under request for proposals (RFP) No. DEA-02-R-0001, for translation, transcription, interception, and monitoring support services. SOS challenges the evaluation of proposals undertaken by DEA after it reopened discussions in response to our decision, SOS Interpreting, Ltd., B-293026 et al., Jan. 30, 2004, 2004 CPD ¶ __, sustaining SOS's prior protest against an initial award to McNeil under this solicitation.

We deny the protest.

BACKGROUND

First Source Selection

The solicitation contemplated award of a fixed-price, indefinite-delivery/indefinite-quantity contract, for a base year with four 1-year option periods, to acquire a variety of language services and related clerical and information technology to support the DEA's New England Field Division. These services will assist the DEA with court-ordered (Title III) wiretaps in connection with ongoing criminal investigations, with consensual listening devices and other media, and with transcription of record material and translation of written documents.

Award under the initial solicitation was to be made to the offeror whose proposal offered the best value based on consideration of: (1) technical factors, including management (with subfactors for furnishing qualified personnel, recruiting and retention, and security plan), quality control plan, and transition plan factors; (2) past performance; and (3) cost/price. To evaluate past performance, the initial RFP stated that the agency would conduct a performance risk assessment based on the offeror's present and past performance as related to the probability of successfully accomplishing the proposed effort. Prices were solicited for various labor categories, in particular, linguists in various languages, for the base and option years, and were to be evaluated for realism and reasonableness. The RFP provided that the offeror's technical capability, which included past performance, was substantially more important than cost.

Six offerors, including McNeil and SOS, submitted proposals in response to the RFP. SOS's and McNeil's proposals were included in the competitive range along with two other proposals. After conducting detailed discussions, DEA requested final revised proposals.

Based upon its evaluation of the final revised proposals in the initial competition, DEA made award to McNeil as the best value on the basis of its low price. In this regard, in the initial competition, the technical evaluation panel (TEP) rated SOS's final revised proposal highly satisfactory with low risk overall and superior to McNeil's final revised proposal's rating of satisfactory with moderate risk overall.¹ The TEP assigned SOS's and McNeil's final revised proposals identical adjectival ratings under all of the factors and subfactors, except for the furnishing qualified personnel and security plan subfactors, and the quality control plan and transition plan factors, where SOS's proposal was rated outstanding and McNeil's proposal was rated highly satisfactory, which differences accounted for SOS's higher rating.

¹ The possible adjectival ratings were outstanding, highly satisfactory, satisfactory, marginal, and unsatisfactory. The possible risk ratings were low, moderate, and high.

However, the source selection authority (SSA) did not agree with the TEP's evaluation and instead determined that McNeil's and SOS's proposals were "technically/substantially equal." In her decision selecting McNeil for award, the SSA modified SOS's overall rating from highly satisfactory with low risk to satisfactory with a moderate risk in the source selection document; the SSA specifically lowered SOS's individual ratings under the furnishing qualified personnel and security plan subfactors and changed SOS's low risk rating to moderate risk because of performance problems experienced by SOS under prior similar contracts. The SSA also modified McNeil's rating from satisfactory with moderate risk to satisfactory with low risk.

When DEA then made award to McNeil, SOS protested to our Office, asserting that the agency's best-value decision was unsupported and inconsistent with the stated evaluation approach. In sustaining SOS's protest, we noted that while the SSA had discussed the evaluation of SOS's proposal under the personnel and security plan subfactors and the past performance factor, and the evaluation of McNeil's proposal under the personnel subfactor, documenting her rationale for adjusting the adjectival scores under these subfactors and factor, she did not discuss or acknowledge SOS's evaluated advantage under the other two technical evaluation factors, quality control plan and transition plan, where SOS's proposal was assigned "outstanding" ratings and McNeil's proposal received only "highly satisfactory" ratings. Because of SOS's proposal's evaluated superiority under those factors and the SSA's failure to consider this evaluated superiority in her source selection decision, we concluded that the SSA's statement that the proposals were technically substantially equal was not reasonably supported by the contemporaneous documentation.

SOS also questioned the propriety of the agency's past performance evaluation, including the SSA's decision to increase SOS's overall proposal risk rating to moderate risk because of past performance problems, including a termination for default. SOS argued that the agency had failed to properly take into account efforts made by SOS to address this problem and had failed to consider McNeil's performance problem under a prior similar DEA contract. Based upon our review of the record, however, we found no basis to question the agency's past performance evaluation. We noted in this regard that the record indicated that the SSA had considered all of the information submitted by the protester involving its past performance, including SOS's efforts to cure prior negative performance, in determining that SOS's past performance caused its proposal to be considered a moderate risk. As for SOS's argument that DEA had failed to consider allegedly similar performance problems in McNeil's past performance, we found that the record indicated that the SSA was aware of these alleged problems, which had occurred several years ago, but had concluded that the government contributed to them.

We recommended that DEA review the solicitation's evaluation scheme and amend it to reflect the agency's requirements, reopen discussions with all offerors whose

proposals were in the competitive range, obtain revised proposals, reevaluate the proposals, and make a new source selection with a proper price/technical tradeoff decision.

Second Source Selection

To implement our recommendation, DEA amended the RFP to make past performance a technical evaluation factor and to eliminate references to a past performance risk assessment. RFP § M.2. The RFP was also amended to provide with respect to the cost factor as follows: “The offeror’s proposed price/cost will be evaluated on the basis of price reasonableness and cost realism, if necessary. The Offeror’s business proposal will be evaluated to determine whether the cost/price is realistic in terms of the effort proposed and the price is fair and reasonable.” RFP § M.4.² DEA then requested revised proposals from all offerors in the competitive range, including SOS and McNeil, and established a new TEP to evaluate the revised proposals which it had received. Based upon the agency’s evaluation of the final revised proposals, SOS’s and McNeil’s proposals were included in the competitive range, while the other two offerors’ proposals were excluded from it.

Both SOS and McNeil were then asked to address a set of “clarification” questions concerning labor rates, compliance with the applicable wage rate, and compliance with Federal Acquisition Regulation (FAR) § 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment.³ A number of the questions posed to SOS related to how it would be able to retain and recruit linguists, given the labor rates it proposed. In this regard, DEA questioned whether SOS would be able to recruit and retain qualified linguists because [DELETED] any of the linguist positions over the term of the contract and had proposed to pay “exotic” language linguists (other than Arabic, Fuzhou Chinese, Jamaican Patois, Mandarin Chinese, and Vietnamese) [DELETED].⁴ Although the offerors were asked to respond to the clarification

² In addition, the RFP was amended to provide that the technical factors were “significantly” more important than price, rather than “substantially” more important as provided for in the initial competition. RFP § M.2.

³ FAR § 52.222-43, which was incorporated by reference into the RFP, provides for equitable adjustments to the contract price to account for new Department of Labor wage determinations, but requires the contractor to warrant that the contract prices do not include any allowance for any contingency to cover increased costs for which adjustment is provided under the clause.

⁴ The majority of the work under the contract required linguists fluent in Spanish. The record indicates that DEA considered the languages required by the contract other than Spanish, such as those cited above, to be exotic.

questions, they were advised that changes to their proposals would not be permitted unless they were notified in a separate response.

Based upon its evaluation of the final revised proposals under the reopened competition, DEA determined that McNeil's proposal represented the overall best value. The TEP assigned both SOS's and McNeil's revised proposals overall technical ratings of highly satisfactory. SOS's proposal was rated highly satisfactory under all factors and subfactors except under recruiting and retention, where it received an outstanding rating, and quality control plan, transition plan and past performance improvements, where it received satisfactory ratings. McNeil's proposal received highly satisfactory ratings under every factor and subfactor, except recruiting and retention, quality control plan and transition plan, where it received satisfactory ratings.

However, while McNeil's proposal was evaluated as low risk, SOS's proposal was determined to be low to moderate risk. In this regard, the source selection decision noted that SOS: (1) had been terminated for default within the last 3 years [DELETED]; (2) had received a cure notice on a DEA contract [DELETED]; and (3) had encountered problems in recruiting and retaining personnel for a DEA contract [DELETED]. Source Selection Decision (SSD) at 5-8.

According to the SSA, however, her "major concern" was with SOS's pricing. DEA Comments, July 19, 2004, Contracting Officer's Statement, at 2. In this regard, while the total price of SOS's revised proposal ([DELETED]) was lower than that of McNeil's proposal (\$40,808,198), DEA in its cost/price evaluation questioned the realism of DEA's proposed pricing. Specifically, DEA determined that SOS's:

low pricing for some of the exotic languages gave rise to concern regarding SOS's ability to recruit and retain qualified personnel in spite of presenting a highly satisfactory plan for recruitment retention. This poses undue risk to the Government in whether or not there will be constant employee turnover and additional cost to the Government in completing and paying for contractor background investigations.

Cost/Price Evaluation Analysis, SOS at 1. Likewise, the SSA stated in her source selection decision as follows:

The [SSA] also considers SOS pricing of the majority of the Foreign Linguists to represent a risk to the Government in that this offeror will have a difficult time recruiting and retaining highly qualified individuals to fulfill the agency's requirements at the rates proposed in the contract.

Id. at 8. Based on the above findings, the SSA determined that McNeil's proposal represented the best value and made award to the company for the second time on April 29, 2004. This protest followed.

DISCUSSION

SOS challenges the evaluation of proposals under both the technical and cost/price factors. In addition, SOS asserts that the agency's best-value decision was flawed because it did not adequately justify award to McNeil at a higher price.

We review challenges to an agency's evaluation only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 3. Based on our review of the record, including all of the protester's challenges to the evaluation and source selection, we find the agency's selection of McNeil as the best value offeror to be unobjectionable.

Technical Evaluation

Although SOS challenges several aspects of the technical evaluation, its protest furnishes no basis for concluding that its proposal warranted a higher overall technical rating. For example, SOS challenges its satisfactory rating for quality control plan on the basis that DEA improperly attributed two weaknesses to its proposal in this area. According to the protester, the agency lacked a reasonable basis for questioning whether SOS could achieve its proposed acceptable quality level and for concluding that there was no indication that there would be corporate oversight of problems identified during inspections. In addition, SOS, asserting that the agency's detailed clarification questions and the offerors' responses thereto in fact amounted to discussions, argues that if the agency considered these matters to be weaknesses in its quality control plan, it should have afforded it an opportunity to address these concerns by including them in the clarification questions.

However, as indicated in its technical evaluation rating plan, DEA assigned highly satisfactory evaluation ratings only where a proposal both met all minimum requirements and exceeded at least some of the requirements. McNeil's proposal, which had no evaluated weaknesses in this area, likewise received only a satisfactory rating for its quality control plan. SOS has not shown that its quality control plan, even absent these evaluated weaknesses, warranted a higher rating than McNeil's received. In these circumstances, we find no basis for concluding that the agency's actions in this regard prejudiced SOS's competitive position.

While SOS also challenges the evaluation of its past performance, the protester raises essentially the same objections as it did in the prior protest, and we again find that the record provides no basis to question the agency's evaluation in this regard. SOS does not dispute that one of its contracts was terminated for default

[DELETED] or that it had received a cure notice on a DEA contract [DELETED].⁵ While SOS does note that the TEP did not consider the weakness [DELETED] to be “significant” as to whether the contractor can adequately perform the required translation/transcription services, Source Selection Decision at 6, the protester fails to acknowledge that the TEP viewed SOS’s continuing problems in this regard as a matter of concern and that the panel noted on the consensus worksheet for the performance improvements subfactor of the past performance factor a “[l]ack of corporate oversight.” TEP Evaluation Worksheets, SOS, Performance Improvements. Further, while SOS asserts that it has undertaken corrective action since the termination for default, we find nothing unreasonable in the agency nevertheless determining that the breach of security leading to the default termination indicated an increased performance risk with respect to a contract for the support of sensitive drug enforcement wiretaps. Likewise, while SOS again asserts that DEA failed to consider problems in McNeil’s past performance, it has furnished no basis for questioning the agency’s determination not to downgrade McNeil’s past performance on account of problems to which the government had contributed.

SOS contends that the lower ratings its proposal received in several areas, such as for the transition plan and security plan, when compared to the prior evaluation, are evidence that the agency evaluated the proposal unreasonably. We disagree. We have long recognized that different evaluation panels can reasonably reach different conclusions regarding the quality of an offeror’s proposal, given the subjective judgment necessarily exercised by evaluators. Warvel Prods., Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 12. Based on our review of the record, we find no reason to question the agency’s evaluation of the relative merits of the technical proposals.

Price/Cost Evaluation

SOS challenges DEA’s determination that its pricing was unrealistic and posed a risk to the government. According to the protester, it was improper for the agency to consider cost realism here, where the solicitation contemplated award of a fixed-price contract. In any case, the protester argues, since it received an outstanding technical rating for its recruiting and retention plan, and proposed to pay its personnel at least the [DELETED], there was no basis for questioning its pricing.

Where, as here, an RFP contemplates the award of a fixed-price contract, a cost realism analysis generally is not required, absent a solicitation provision requiring such an analysis. Federal Acquisition Regulation § 15.404-1(d)(3); ACS State

⁵ Indeed, SOS concedes that a [DELETED] issue had also arisen with respect to a contract with DEA [DELETED]. SOS Comments, July 8, 2004, at 16.

Healthcare, LLC; PharmaCare Gov't Servs., Inc.; PGBA, LLC; Humana Military Healthcare Servs., Inc., B-292981 *et al.*, Jan. 9, 2004, 2004 CPD ¶ 57 at 16. Likewise, price realism is not ordinarily a consideration in fixed-price contracts, since the risk of performing the contract at the proposed price is borne by the contractor. However, an agency may decide to use price realism in the competition for a fixed-price contract, not to evaluate price, but to assess the risk of poor performance in an offeror's approach or to measure an offeror's understanding of the solicitation's technical requirements. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. The nature and extent of an agency's price realism analysis are matters within the agency's discretion, and our review of an agency's price realism evaluation is limited to determining whether it was reasonable and consistent with the solicitation's evaluation criteria. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 4.

Here, the RFP required offerors to include in their business proposals "a cost breakdown disclosing how the burdened labor rate had been developed," as well as "every element which constitutes its total price, such as direct labor, material, overhead, general and administrative expenses, PROFIT, and other categories such as fringe benefits." RFP § L.6.2. Offerors were specifically required to specify the basic wage rate and various types of fringe benefits for each labor category. Further, the RFP specifically provided that "[t]he offeror's proposed price/cost will be evaluated on the basis of price reasonableness and cost realism. The Offeror's business proposal will be evaluated to determine whether the cost/price is realistic in terms of the effort proposed." RFP § M.4. Thus, contrary to SOS's interpretation, the RFP provided for evaluation of the realism of both the offeror's prices to the government, as well as the direct labor rates upon which that pricing was based.

We find that the realism analysis was reasonable. Again, SOS proposed to pay "exotic" language linguists other than Arabic, Fuzhou Chinese, Jamaican Patois, Mandarin Chinese, and Vietnamese [DELETED], and the remaining exotic language linguists not much more ([DELETED]), which led DEA to conclude that SOS's pricing for exotic language linguists represented a risk that SOS would have difficulty in recruiting and retaining highly qualified individuals needed to fulfill the agency's requirements. Although SOS maintains that its lower pricing is sufficient because it is based on paying linguists [DELETED], the record indicates that SOS's exotic language linguist prices are significantly lower than the historical prices charged to the agency (as well as McNeil's prices), including those charged to the agency under a blanket purchase agreement under which SOS (among other companies) had been providing services. For example, while SOS's price per hour to the agency for Arabic linguists was [DELETED] (based on paying linguists a base pay rate of [DELETED]), McNeil's price to the agency was [DELETED] (based on a base pay rate of ([DELETED])), while the agency has previously paid under other contracts for these services between [DELETED] and [DELETED]. Likewise, while SOS's prices per hour to the agency for Mandarin and Cantonese Chinese were [DELETED] and [DELETED] respectively (based on base pay rates of [DELETED])

and [DELETED]), McNeil's price for both was [DELETED] (based on a base pay rate of [DELETED]), and the agency has previously paid between [DELETED] and [DELETED].⁶ Similarly, while SOS will charge the agency only [DELETED] per hour for Jamaican Patois linguists (based on a base pay rate of [DELETED]), McNeil's price was [DELETED] (based on a base pay rate of [DELETED]), and the agency has previously paid [DELETED]. Further, the agency reports that an increased demand for linguists by the Department of Homeland Security, National Security Agency and Federal Bureau of Investigation, and the hostilities in Iraq, have placed a premium on the services of qualified linguists who, like the linguists required by the agency, have a security clearance. In these circumstances, we find no basis to question DEA's determination that SOS's prices, which were significantly lower than the prices historically paid by the agency, indicated a significant risk that SOS would be unable to recruit and retain the required highly qualified linguists.

Best-Value Decision

SOS asserts that the agency's best-value determination was inadequate to justify award to McNeil at a higher price. In this regard, a source selection decision shall be documented, and the documentation shall include the rationale for any business judgments made or relied on by the SSA, including the benefits associated with additional costs. FAR § 15.308. An agency may select a higher priced, higher rated offeror where the decision is consistent with the evaluation criteria and the agency reasonably determines that the superiority of the higher priced offer outweighs the price difference. American Ordnance, LLC, B-292847 et al., Dec. 5, 2003, 2004 CPD ¶ 3 at 5.

Here, the record of the tradeoff analysis clearly evidences that the SSA considered the distinctions between the two proposals, both of which received highly satisfactory technical ratings, and determined that McNeil's proposal was more advantageous notwithstanding its higher price because of the significant risk associated with SOS's lower labor rates for exotic language linguists. While SOS disputes the agency's risk assessment, it has not shown the risk assessment, nor the resulting source selection, to be unreasonable.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁶ Although for Spanish linguists--the language for which DEA had the greatest requirement--SOS will charge the agency more per hour than McNeil ([DELETED] vs. [DELETED]), McNeil's base pay rate ([DELETED]) to its Spanish linguists was higher than SOS's ([DELETED]).