



IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

DZSP 21, LLC

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff DZSP 21, LLC (“DZSP”), for its post-award Bid Protest Complaint against Defendant, the United States of America, alleges as follows:

I. NATURE OF THE ACTION

1. On March 22, 2018, the Court ruled that the Naval Facilities Engineering Command’s (“Navy” or “Agency”) September 2017 award of a contract in Guam, for a Base Operations Support (“BOS”) services for the Joint Region Marianas (“JRM”), to Fluor Federal Solutions, LLC (“Fluor”) was arbitrary and capricious.

2. The Court’s March 22 decision examined the Navy’s first award of the contract to Fluor in this procurement, which dates back to 2013. The Navy previously had awarded the contract to DZSP three times, but each time Fluor protested and the U.S. Government Accountability Office (“GAO”) concluded that the award was flawed in some way.

3. The Court’s ruling identified a series of errors in the Navy’s evaluation and award decision.



4. In response, the Navy engaged in a lightning round of corrective action—resulting in a new award to Fluor just 43 days after the Court issued its decision. Rather than meaningfully address the Court’s findings, the Navy’s corrective action was designed to be as limited and narrow as possible.

5. The Navy’s narrow corrective action and new award decision is inadequate, arbitrary, and capricious for three key reasons:

- a. First, the Court concluded that the prior award to Fluor was arbitrary and capricious because the Navy’s evaluation considered some, but not all, of the changes on Guam affecting proposals since the subject solicitation was issued in 2013. The Navy’s response to that problem was to ignore *all* of the changes in Guam during its corrective action. That makes no sense.
- b. Second, although the Court found the Navy’s underlying technical and cost evaluations were flawed and directed the Navy to conduct a “new evaluation,” the Navy did not reconvene its Technical Evaluation Team (“TET”), utilized the Cost Evaluation Team (“CET”) only in a limited consulting capacity, failed to issue new technical and cost evaluations, and engaged with no Navy personnel on Guam as part of the reconsideration of proposals. Instead, the Navy simply had the Source Selection Authority (“SSA”) redo her Source Selection Decision, meaning that the decision once again rests on the same underlying evaluations that the Court found to be flawed. That makes no sense, and is plainly inconsistent with the Court’s direction.
- c. Third, the Navy’s corrective action effectively reversed the “corrective action” it took after GAO’s January 2017 decision overturned the most recent award to

[REDACTED]

DZSP. As a result of that reversal, the evaluation results are now *more favorable* to DZSP than it was the last time the Navy awarded it the contract, in September 2016. Yet this time, Navy made award to Fluor. That makes no sense, and the Navy has provided no explanation for it.

6. Each of these flaws is discussed in more detail below.

The Court's March 22 Decision

7. In its decision, the Court expressed concern about the Navy's failure to update the solicitation's requirements at any time since it was first issued in 2013 to reflect Navy's current, actual needs. The Court noted that documents DZSP submitted related to its performance on a series of bridge contracts "paint[ed] a startling picture" about the Navy's current needs, and recognized that "[t]he circumstances in Guam have undoubtedly changed."

8. Although the Court decided not to direct the Navy to amend the 2013 solicitation to reflect its current, actual needs, it nonetheless found that the Navy had erred by utilizing data from DZSP's bridge contracts to increase DZSP's proposed rates for certain exempt labor positions, without (1) accounting for any other changes aside from the changes in rates; or (2) undertaking a comparable analysis for Fluor's proposal.

9. The Court also expressed concern that the Navy decided to increase DZSP's proposed labor rates based on concerns that GAO raised about the Navy's prior evaluation of DZSP's *technical* approach, but did so without seeking any input from the TET. The Navy's technical evaluators had previously determined that DZSP's proposal to "green" the workforce was realistic and achievable, but in the wake of the GAO decision, cost evaluators sitting in Hawaii summarily rejected that conclusion, without any consultation with the Navy's Guam-based technical evaluators.

[REDACTED]

10. The Court also concluded that the Navy had erred in its evaluation of Fluor's exempt labor approach. The Navy credited Fluor for proposing to retain DZSP's incumbent workforce, despite concerns raised by the Navy's technical evaluators that the rates Fluor was proposing — between [REDACTED] than what DZSP was paying on its current contract — were too low. The Navy dismissed those concerns based upon GAO's erroneous conclusion — which the Navy adopted — [REDACTED]

[REDACTED] As the Court correctly noted, Fluor never made any such promise. The Court therefore found that the Navy would have to re-evaluate Fluor, and “either have to assess Fluor a weakness or at least omit a strength.”

11. As a result of these errors, the Court enjoined the Navy's award to Fluor, and ordered it to “perform a new evaluation of DZSP's and Fluor's proposals or conduct an entirely new solicitation, whichever it chooses.”

The Navy's Corrective Action

12. In response to the Court's decision, on April 27, 2018, the Navy awarded DZSP a 10-month bridge contract. As a result, DZSP will provide the Navy with the BOS services that are the subject of this dispute through February 28, 2019, leaving the Navy with ample time to conduct a meaningful reevaluation of Fluor's and DZSP's proposal, or issue a revised solicitation consistent with the Court's direction.

13. The Navy did neither.

14. Instead, on May 4, 2018 — a mere 43 days after the Court's ruling — the Navy notified DZSP via letter that it had completed its reevaluation, and had once again made award to Fluor. (A copy of the Navy's May 4, 2018 Notice of Award Letter is attached hereto as Exhibit A.)

[REDACTED]

15. The Navy's award letter states that the Navy concluded Fluor's proposal represented the best value to the government, despite the fact that the Fluor's total evaluated price was more than [REDACTED] than DZSP's. The letter explains that the Navy adjusted Fluor's price [REDACTED] by [REDACTED], and made no adjustments to DZSP's proposed price.¹

16. The Navy's new award to Fluor is the first time in the five-year history of this hotly-contested competition that it has made award to other than the lowest-price offeror. In the previous iterations of this procurement, when the Navy faced the choice of selecting the higher-rated or the lower-priced offeror, it concluded that the difference in the technical proposals was sufficiently slight that price was determinative, and made award to the lower-priced offeror.

17. The Navy provided DZSP with a telephonic debriefing on May 9, 2018, and written responses to additional debriefing questions on May 16, 2018. (A copy of the Navy's written responses to DZSP's supplemental debriefing questions are attached hereto as Exhibit B.)

18. In those debriefings, the Navy explained that its re-evaluation of proposals in response to the Court's March 22 decision had been conducted entirely by the SSA. The Navy did not reconvene the TET or the CET, nor did it issue new technical or cost evaluation reports. The Navy further confirmed that the SSA did not consult with any member of the TET, nor any Navy personnel in Guam as part of her re-evaluation of either Fluor's or DZSP's non-cost proposals. As for her cost evaluation, the Navy explained that the SSA "consult[ed] with a member of the [CET]." But at least with regards to DZSP's proposal, the Navy explained that the SSA relied entirely upon the cost analysis the CET conducted *in 2016*.

¹ Per the award letter, Fluor's proposed price was [REDACTED]; its total evaluated price was [REDACTED]. DZSP's total evaluated price was [REDACTED].



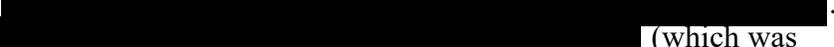
19. The Navy also stated during the debriefing that, during its most recent evaluation, it did not rely upon data from DZSP's bridge contracts at all — even though those contracts detail the significant changes in Guam since the issuance of the 2013 solicitation.

20. The Navy informed DZSP that its non-cost ratings had not changed from its prior evaluation — it received an overall non-cost rating of “Outstanding” for the technical factors and “Substantial Confidence” for past performance — and that its scores on each of the individual non-cost factors remained unchanged as well.

21. Thus, it appears that the Navy's non-cost evaluation of DZSP is now, once again, *identical* to the non-cost evaluation that led the Navy to award this contract to DZSP in September 2016 (the third and most recent award to DZSP).²

22. Similarly, on the cost side of the equation, DZSP's evaluated price is now identical to its evaluated price in September 2016.

23. As for Fluor's proposal, the Navy provided DZSP with no information about its reevaluation of Fluor's proposal, other than to state that Fluor's proposal had received an “Outstanding” rating overall on the technical factors and “Substantial Confidence” for past performance³ — the same ratings that DZSP received. The Navy did not explain how it addressed its prior evaluation error, but assuming that it intended to comply with the Court's order, presumably the Navy 


² During DZSP's debriefing, the 
 that it had awarded to DZSP as part of its July 2017 decision to award the contract to Fluor. But in September 2016,  (which was not reconvened for the July 2017 evaluation).

³ The Navy did not provide DZSP with Fluor's individual non-cost factor ratings (despite having provided this information about the awardee in each prior debriefing in this procurement).

24. Thus it appears that the Navy's non-cost evaluation of Fluor is now *worse* than the evaluation that led the agency to make its third award to DZSP in September 2016.

25. And on the cost side of the equation, Fluor's evaluated cost is now [REDACTED] than it was in September 2016 ([REDACTED] versus [REDACTED]).

26. In short, when comparing the present evaluation to the evaluation that led to the third award to DZSP, DZSP has both (1) closed the already small advantage that Fluor had in the non-cost evaluation; and (2) also expanded the advantage that DZSP already had in the cost evaluation.

27. Thus, DZSP is now in an even stronger position than it was the last time the Navy selected it for award. Yet, this time, the Navy inexplicably made award to Fluor instead.

28. Both the Navy's notice of award and subsequent debriefing reveal that the Navy failed to meaningfully address the evaluation errors the Court identified, and simply pushed out another award to Fluor as fast as possible.

DZSP's Protest Claims

29. All of the above confirms that the Navy committed no less than three critical errors in its post-corrective-action analysis of Fluor's and DZSP's proposals.

30. ***First***, the Navy's re-evaluation of both Fluor's and DZSP's proposals was arbitrary and capricious because the Navy apparently failed to give any consideration whatsoever to the current circumstances in Guam — which, as the Court noted in its March 22 decision, “have undoubtedly changed markedly” since the solicitation was issued.

31. Thus, it was incumbent upon the Navy to consider whether the requirements identified in the 2013 Solicitation, as well as the proposals submitted in response thereto, still addressed the Navy's current, actual needs.



32. Regardless of whether the Navy decided to update the solicitation, it had to conduct an evaluation that reasonably accounted for the effect of changed circumstances on the offerors' proposals.

33. In particular, the Navy had to consider changed circumstances when evaluating the realism of each offeror's proposed pricing. During its prior evaluation, the Navy relied upon data from DZSP's bridge contracts to assess the realism of, and then increase, DZSP's proposed labor rates. Though the Court ultimately concluded that the adjustment was improper, it did not fault the Navy for attempting to consider current market conditions.

34. To the contrary, the Court criticized the Navy for *not doing enough* with the bridge contract data. Specifically, the Court criticized the Navy (1) for not "undertak[ing] an analysis of DZSP's *new* hires under the bridge contracts to meet the military's increased needs on Guam"; and (2) for not undertaking the same analysis for Fluor's proposal.

35. By jettisoning any consideration and application of DZSP's bridge contract data on a uniform basis to both Fluor's and DZSP's cost proposals, the Navy has failed to consider whether those proposals provide a realistic estimate of the costs the Government should expect to incur. And by failing to analyze Fluor's and DZSP's proposals against current market conditions, the Navy conducted a cost realism analysis that was arbitrary, capricious, and unreasonable.

36. *Second*, the Navy simply failed to comply with the Court's direction that it "perform a new evaluation of DZSP's and Fluor's proposals." Despite the fact that the Court flagged multiple errors in the Navy's prior technical evaluation — most notably where the Navy  that it would not be able to retain

— *the Navy did not conduct a new technical evaluation, or even consult with the Guam-based TET.*

37. Assuming that the SSA (acting without assistance from the TET) [REDACTED] [REDACTED] is insufficient to address the Court’s well-founded concerns.

38. Indeed, Fluor’s [REDACTED] [REDACTED] for this critical DoD contract which is, at bottom, a service contract. As part of a reasonable re-evaluation, the TET would have considered *how* Fluor’s [REDACTED] would impact the other aspects of its proposal to determine if that proposal was still worthy of the strong technical ratings it had previously received.

39. The SSA, who is not Guam BOS technical expert, was not positioned to undertake this analysis in the first instance. At best, the SSA made a *post-hoc*, mechanical adjustment of certain strengths assigned to Fluor’s proposal. Such an adjustment cannot reasonably be characterized as a meaningful “new evaluation.”

40. Moreover, the SSA’s determination that Fluor’s proposal was still entitled to an “Outstanding” rating overall notwithstanding [REDACTED] — thereby introducing significant risk into Fluor’s ability to adequately perform the contract — was plainly unreasonable.

41. *Third*, the Navy’s best-value decision is arbitrary and capricious because it contradicts, without rational basis, the best-value decision the Navy made in 2016. That 2016

⁴ If the SSA [REDACTED], the Navy’s new award decision is plainly in violation of the Court’s express instruction.

[REDACTED]

evaluation resulted in an award to DZSP and was only overturned by GAO's January 2017 decision, which sustained Fluor's third protest based upon GAO's mistaken belief that [REDACTED]

42. That GAO decision considered the Navy's September 2016 award to DZSP. That award was based upon the revised proposals Fluor and DZSP submitted in June 2016. At that time, the Navy rated both proposals as "Outstanding" overall on the technical factors and "Substantial Confidence" on past performance. And while the Navy concluded that Fluor's proposal had a slight technical advantage, Fluor's proposed price was also [REDACTED] than DZSP's. The Navy determined that Fluor's [REDACTED] was not justified, and that DZSP's proposal represented the best value to the Government, because of DZSP's "sound technical approach . . . [demonstrating] that it can successfully perform the work required in the PWS."

43. As a result of the Navy's most recent corrective action, DZSP and Fluor are in nearly the same position as they were in September 2016, except that DZSP's standing has *improved* from both a cost and technical perspective. The Navy's corrective action considered the exact same June 2016 proposals that resulted in the September 2016 award decision. This time, Fluor's [REDACTED] than it was in September 2016. And if the Navy complied with the Court's March 2018 decision, the overall technical ratings between Fluor and DZSP are even closer than they were in September 2016, because the Navy should have [REDACTED], and likely also assigned a weakness to Fluor's proposal.



44. On these facts, there is no reasonable basis by which the Navy could conclude that Fluor’s proposal represented the best value to the Government, when it reached the *exact opposite* conclusion in September 2016, under circumstances less favorable to DZSP.

45. The only difference between the September 2016 best-value determination and current one is GAO’s erroneous January 2017 decision, which prompted the Navy to award the contract to Fluor, after three prior award decisions to DZSP. But because that GAO decision was so fundamentally flawed (as confirmed by this Court’s March 22 decision), Fluor never should have received the contract award in the first place.

46. Moreover, under these circumstances — in which Fluor and DZSP’s non-cost proposals are essentially equal, and DZSP’s evaluated price is lower than Fluor’s — the Navy’s award to Fluor appears to be in direct tension with the plain language of the Solicitation’s best-value selection process. Although the Solicitation contemplated the possibility of an award being made to other than the lowest-price offeror, it also directed that the non-cost evaluation factors, “when combined[,] *are approximately equal to cost.*” AR, Tab 8a at 343 (emphasis added).

47. Because the cost and non-cost factors were weighted equally, and DZSP and Fluor were rated as essentially equal technically, there is no reasonable basis for the Navy to have awarded the contract to Fluor, the higher-priced offeror. Indeed, it is presumably because of the Solicitation’s equal weighting of the cost and non-cost factors that the Navy, in every prior round of this procurement, has awarded the contract to the lower-priced offeror. Its failure to do so here was arbitrary and capricious.

48. In the end, the Navy’s most recent decision appears to be the direct result of the Navy taking the path of least resistance — a re-award to the current contract holder (the Navy



never terminated Fluor's contract after the Court's March 22 decision). But again, Fluor should never have been awarded the contract in 2017. It cannot and should not be allowed to continue to benefit from GAO's error, or the Navy's rushed, bare-bones, and unreasonable corrective actions, first in response to GAO and now in response to this Court.

49. The Navy's actions prejudiced DZSP. Had the Navy conducted a fair and equal evaluation of DZSP's and Fluor's proposals that was consistent with the Court's ruling, it would have determined that DZSP's proposal represented the best value to the Government, just as it did in September 2016.

50. DZSP respectfully requests that the Court again (a) declare that the Navy's award of the Guam BOS contract was arbitrary, unreasonable, or otherwise an abuse of discretion; (b) issue a permanent injunction preventing Fluor from performing on the contract pending a fair and reasonable re-evaluation by the Navy or, alternatively, the issuance of a new solicitation that accurately reflects the current needs at JRM Guam.

51. Counsel for DZSP has been in communications with counsel for the Department of Justice, Veronica Onyema, about a potential stay of performance of the awarded contract and an expedited schedule for this protest in order to avoid the need for a temporary restraining order or preliminary injunction. Undersigned counsel and Ms. Onyema intend to continue those discussions following the filing of this complaint, and hope to reach agreement prior to the Court's Initial Status Conference. In light of these ongoing discussions, DZSP does not seek a temporary restraining order or a preliminary injunction at this time.

II. JURISDICTION

52. This Court has jurisdiction over this bid protest action pursuant to 28 U.S.C. § 1491(b).



53. DZSP submitted a fully compliant proposal in response to the Solicitation and was selected as the winning bidder by the U.S. Department of the Navy three separate times in September 2014, December 2015, and September 2016. Following GAO's erroneous January 2017 decision sustaining Fluor's third protest, DZSP was eliminated in the final selection as the second-place offeror by an award to Fluor on September 21, 2017. That September 2017 award was the subject of the prior successful protest before this Court. *See* 1:18-cv-00086. The May 4, 2018 award decision that is the subject of this protest followed the prior protest before this Court and was based on the same set of proposals. Accordingly, DZSP has standing to sue as an interested party pursuant to 28 U.S.C. § 1491(b).

III. THE PARTIES

54. DZSP 21, LLC's address is P.O. Box GH, Hagnatna, Guam, 9632. DZSP submitted a timely and fully responsive proposal in response to the Solicitation. DZSP's proposal was not selected for award in the most recent round of evaluations.

55. Defendant is the United States of America, acting by and through the Navy.

IV. RELEVANT BACKGROUND

A. The Guam Base Operations Support Contract

56. The Navy is procuring base operations support services for the JRM. The JRM, located in Guam, is comprised of various military installations, including Andersen Air Force Base and Naval Base Guam.

57. The Navy issued Solicitation No. N62742-13-R-1150 (the "Solicitation") for these services on October 16, 2013. *See* AR, Tab 8a at 247.



58. The scope of work for BOS services is broad and encompasses facility operations and maintenance support for the entirety of the JRM, and identifies 254 separate government clients to be supported by this contract.

59. DZSP is the incumbent contractor performing BOS services in Guam and has been performing since 2005.

60. The Solicitation's Performance Work Statement is laid out in eighteen separate annexes:

- Annex 0100000, General Information
- Annex 0200000, Management and Administration
- Annex 0600000, Port Operations
- Annex 0700000, Ordnance
- Annex 1000000, Supply Material Management
- Annex 1501000, Facility Management
- Annex 1502000, Facility Investment
- Annex 150200A, Facility Investment Andersen Air Force Base (AAFB)
- Annex 1602000, Electrical
- Annex 1604000, Wastewater
- Annex 1605000, Steam
- Annex 1606000, Water
- Annex 1700000, Base Support Vehicles Equipment
- Annex 170000A, Base Support Vehicles Equipment (AAFB)
- Annex 1800000, Environmental

See Solicitation § C.

61. The Solicitation's original scope of work remains unchanged since its issuance over four years ago.

62. The Solicitation contemplated the award of a single cost-plus-award fee/award option contract. *See Solicitation § A.2.*

63. The period of performance included a 12-month base period (including four months for mobilization), four 12-month option periods, and a potential for three additional 12-month award option periods, for a total potential period of performance of eight years. *See*



Solicitation § F.1. The Solicitation originally contemplated base-year performance to commence on August 31, 2014.

64. The Solicitation called for award to the proposal offering the best value to the government, considering cost and five non-cost evaluation factors:

- Factor A Past Performance
- Factor B Occupational Safety
- Factor C Staffing and Resources
- Factor D Technical Approach
- Factor E Small Business Utilization

Solicitation § M.1.A.

65. The Solicitation directed that Factors B - E, when combined, were of equal importance to Factor A, with the subfactors within each of the factors being of equal importance. *See* Solicitation § M.1.A. An offeror's evaluated cost was of equal importance to the non-cost factors. *Id.*

66. For Factor C, Staffing and Resources, offerors were required to submit a Staffing and Resources Plan identifying the workforce and other resources for each Annex and Sub-Annex of the Performance Work Statement, and to describe their approach to recruiting and retaining a qualified workforce and key personnel/managers. *See* Solicitation § M.1, Factor C.

67. The Staffing and Resources Plan would be evaluated "on the clarity and reasonableness of the staffing approach to accomplishing the complexity and magnitude of service requirements" Solicitation § M.1,

68. The Solicitation stated that the Navy would evaluate cost based upon "the total of (i) Estimated Cost plus Award Fee (Mobilization/Demobilization/Base/All Option Periods/All Award Option Periods) and (ii) Extension of Services (6 months Estimated Cost plus Award Fee)." Solicitation § M.1.C. The Solicitation explained that cost proposals would not be

assigned an adjectival rating, but instead would be evaluated for completeness, cost reasonableness, and cost realism. *Id.*

69. The Solicitation explained that the Navy’s cost realism analysis would consider “the cost information provided in support of the offered costs to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; are consistent with the various elements of the Offerors technical proposal; and are neither excessive nor insufficient for the effort to be accomplished.” Solicitation § M.1.C.

B. The Navy’s Prior Award Decisions, and Subsequent GAO Protests

70. Beginning in 2014, this procurement yielded three separate awards to DZSP, each of which Fluor protested at GAO. After the third protest, which resulted in the erroneous January 2017 decision discussed above and in the Court’s March 2018 decision, the Navy flipped the award to Fluor.

1. September 2014 - The Navy’s First Award to DZSP, and Fluor’s First Protest

71. The Navy first awarded the contract to DZSP in September 2014.

72. The Navy assessed the following evaluated cost and adjectival ratings for DZSP and Fluor.

Offeror	Factor A	Overall Factors B-E	Factor B	Factor C	Factor D	Factor E	Evaluated Price	Best Value Ranking
DZSP	Substantial Confidence	O	O	O	G	O	\$532,284,944	1
Fluor	Substantial Confidence	O	O	O	O	O	\$572,077,165	3

73. This initial award resulted in GAO bid protests by Fluor and CFS-KBR Marianas Support Services, LLC. *See* B-410486, 410486.2, 410486.3 (Jan. 2, 2015).

74. GAO sustained Fluor's protest based upon what GAO characterized as a flawed cost realism evaluation in connection with the Navy's staffing evaluation, and misleading discussions in connection with the staffing realism evaluation.

75. Following that decision, the Navy implemented corrective action and re-opened discussions with competitive range offerors in July 2015. Six competitive range offerors, including Fluor and DZSP, were allowed to resubmit final revised proposals (including revised pricing).

76. Fluor and DZSP both timely submitted revised proposals.

2. December 2015 - The Navy's Second Award to DZSP, Fluor's Second GAO Protest, and the Navy's Corrective Action

77. The Navy's evaluation of these new proposals yielded the same result: award to DZSP in December 2015. DZSP and Fluor were evaluated as follows:

Offeror	Factor A	Overall Factors B-E	Factor B	Factor C	Factor D	Factor E	Evaluated Price	Best Value Ranking
DZSP	Substantial Confidence	O	O	O	G	O	\$488,336,276	1
Fluor	Substantial Confidence	O	O	O	O	O	\$ [REDACTED]	█

78. Fluor filed its second GAO protest on December 21, 2015. *See* B-410486.6.

79. Fluor's second protest raised a variety of allegations, but turned on two issues: (1) the Navy's alleged failure to consider the realism of DZSP's proposed exempt labor rates; and (2) the Navy's alleged failure to normalize the application of the GRT to each offeror's proposal.

[REDACTED]

Prior to its issuance of a decision, GAO held early outcome prediction, in which it indicated that it was likely to sustain the protest in response to these allegations.

80. In response to this, the Navy announced that it would take corrective action to address GAO's concerns. That corrective action was limited to Fluor and DZSP.

a) The Navy's Discussions with Fluor (June-July 2016)

81. On June 17, 2016, the Navy sent Fluor a letter identifying two items for discussions. *See* AR, Tab 90 at 13747. First, the Navy directed Fluor to adjust its GRT rate downward, resulting in a reduction in Fluor's price of greater than [REDACTED]. *See* AR, Tab 92 at 13750. Second, the Navy observed that Fluor proposed to hire 95% of exempt employees from the incumbent workforce, but reduced its exempt labor rates between its 2014 and 2015 proposals. The Navy asked Fluor to address how it intended to source its proposed labor force "[s]hould the incumbent workforce not agree to work for you at the reduced rates." *Id.* at 13750.

82. In response to the second item, Fluor stated that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In other words, Fluor proposed to replace any incumbent personnel that would not work at its reduced labor rates.

b) The Navy's Discussions with DZSP (June-July 2016)

83. The Navy also raised two discussions items with DZSP by way of a letter dated June 17, 2016. *See* AR, Tab 91 at 13747.

[REDACTED]

84. First, the Navy instructed DZSP to eliminate a one-time [REDACTED] salary reduction for specific key labor positions. DZSP complied with this instruction. *Id.* at 13748. Second, the Navy instructed DZSP to remove the [REDACTED] annual decrement factor for exempt labor rates and propose a new approach. *Id.* at 13747.

85. In response to the second item, DZSP proposed to hold exempt labor rates flat with no annual escalation or decrement factor by “greening” [REDACTED] of its incumbent workforce (replacing them with new hires) on a yearly basis. DZSP explained that its new hires would be retained at a salary [REDACTED] of that being paid to the incumbent staff being replaced, the remaining employees on staff would have their salaries increased by [REDACTED], and the net effect of these two actions would result in a [REDACTED] escalation rate. *Id.*

c) The TET’s Evaluation of Fluor’s and DZSP’s July 2016 Proposal Revisions

86. On July 22, 2016, the Navy’s TET evaluated Fluor’s and DZSP’s revised staffing proposals. *See* AR, Tab 106 at 13973.

87. Regarding Fluor’s revised staffing plan, the CET informed the TET that [REDACTED]
[REDACTED]
[REDACTED] AR, Tab 106 at 14008. The TET concluded “[REDACTED]”
[REDACTED] and that Fluor’s proposal to hire 95% of its personnel from the existing incumbent workforce [REDACTED]
[REDACTED] *Id.*

88. As for DZSP’s workforce replenishment plan, the TET confirmed that it understood DZSP’s proposed approach, and considered it “very realistic.” *Id.* at 13986.

89. These were the last conclusions the TET would have an opportunity to draw about either Fluor's or DZSP's proposal as part of this procurement.

3. September 2016 - The Navy Awards the Contract to DZSP Again, Fluor Protests, GAO Sustains

90. In September 2016, based in part upon the TET's findings above, the Navy again awarded the contract to DZSP over Fluor, with evaluation results as follows:

Offeror	Factor A	Overall Factors B-E	Factor B	Factor C	Factor D	Factor E	Evaluated Price	Best Value Ranking
DZSP	Substantial Confidence	O	O	O	G	O	\$491,894,166	1
Fluor	Substantial Confidence	O	O	O	O	O	\$494,519,656	2

91. In other words, the Navy awarded the contract to DZSP despite Fluor's slight technical advantage, due to DZSP's \$2,625,490 cost advantage.

92. Once again, Fluor protested the Navy's award at GAO, *see* B-410486.9, 2017 CPD ¶ 334, challenging the realism of DZSP's proposed "greening" approach, as well as the Navy's evaluation of its own technical proposal.

93. On January 18, 2017, GAO sustained Fluor's third protest. GAO determined that the Navy's *technical evaluators* had conducted an unequal evaluation by questioning Fluor's ability to recruit and retain the incumbent employees in light of Fluor's significantly lower proposed exempt labor rates, but had failed to undertake a similar consideration of DZSP's proposed approach to "green" its exempt workforce. *See* B-410486.9, 2017 CPD ¶ 334. GAO also found that the [REDACTED]

[REDACTED] Again, Fluor did not propose to do this.) GAO also expressed a concern that the TET had not fully understood

DZSP's proposed approach to refreshing its workforce notwithstanding the TET's determination that DZSP's approach was "very realistic."

94. Accordingly, GAO recommended that the Navy re-evaluate Fluor's and DZSP's proposals consistent with GAO's findings.

4. September 2017 - The Navy's Third Corrective Action, Re-Evaluation of Proposals, and Award to Fluor

95. In response to GAO's January 2017 decision, the Navy conducted a re-evaluation of Fluor's and DZSP's proposals, without requesting proposal revisions.

96. On September 21, 2017, the Navy notified DZSP that, for the first time in this procurement, it had awarded the contract to Fluor.

97. DZSP requested and received a required debriefing on September 28, 2017, providing the following evaluation findings:

Offeror	Factor A	Overall Factors B-E	Factor B	Factor C	Factor D	Factor E	Proposed / Evaluated Cost	Best Value Ranking
DZSP	Substantial Confidence	O	O	O	G	O	[REDACTED]	2
Fluor	Substantial Confidence	O	O	O	O	O	[REDACTED] \$495,891,094	1

98. This was the first and only round of evaluation in this procurement in which Fluor's evaluated costs were lower than DZSP's.

99. The Navy's corrective action following GAO's decision sustaining Fluor's third protest involved the creation of two new evaluation documents: a new CET Report, dated June 30, 2017 (AR, Tab 192), and a new Source Selection decision document, dated July 14, 2017 (AR, Tab 193).



100. Notably, despite GAO raising specific concerns about the propriety of the Navy's technical evaluation, and sustaining Fluor's third protest based upon these concerns, the Navy did not update its technical evaluation of each proposal. In fact, the Navy did not re-assemble the TET at all.

101. Instead, the Navy's re-evaluation was undertaken entirely by the CET, which made adjustments to both Fluor's and DZSP's proposed pricing.

102. First, to account for the passage of time since the initial Solicitation was issued, the Navy re-calculated each offeror's proposed price to account for an anticipated performance start date of September 1, 2017. (The Solicitation originally contemplated a performance start date more than three years earlier — August 1, 2014.) This adjustment increased DZSP's price by [REDACTED], and Fluor's price by [REDACTED]. See AR, Tab 192 at 26972-26975.

103. The Navy made no other adjustments to Fluor's proposal.

104. To DZSP's proposal, the Navy made one additional significant upward adjustment. The CET concluded that DZSP's revised approach to its exempt labor — in which it would turn over its incumbent workforce at a rate of [REDACTED] each year, replace those personnel with new ones at [REDACTED] of the original salary, and increase the salary of the remaining workforce by [REDACTED] resulting in a net [REDACTED] escalation — was “unrealistic” because it was not, according to the CET, “adequately supported” and was “not consistent with the offeror's technical proposal/historical data.” *Id.* at 26971. That is, the CET concluded that it could not accept the [REDACTED] escalation.

105. The CET buttressed its conclusion regarding the realism of DZSP's [REDACTED] net-escalation rate by looking at the exempt labor rates on two bridge contracts, the first of which was issued in 2015, both of which contained average hourly rates higher than those in DZSP's

[REDACTED]

proposal. As a result, the CET concluded that “the most logical approach to quantify the risk of increased Exempt labor costs is to apply an escalation factor to the proposed Exempt labor rates, at the start of each performance period.” AR, Tab 192 at 26975.

106. Applying an escalation rate derived from Consumer Price Index data, the Navy

[REDACTED] by an additional [REDACTED].

107. The CET also dismissed the TET’s concerns about Fluor’s low exempt labor rates making it difficult to retain the incumbent workforce, concluding that “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] AR, Tab 192 at 26978.

108. The Navy’s July 14, 2017 Source Selection Decision Document (“SSDD”), signed by Vice Commander M.C. La Duca, adopted the CET’s revised analysis in its entirety, including, as is relevant here, the conclusion that DZSP’s proposed plan to turn over its exempt labor force was unrealistic and required an upward adjustment. *See generally* AR, Tab 193. The SSDD contains [REDACTED]

[REDACTED]

[REDACTED].

109. As it had in every earlier round of this procurement, the Navy awarded the contract to the lower-priced offeror, which was now Fluor. *See* AR, Tab 193 at 27007 (“DZSP’s evaluated probable cost was [REDACTED], which is [REDACTED] than [Fluor’s] evaluated probable cost of [REDACTED]4.”).



C. DZSP’s GAO Protest

110. On October 3, 2017, DZSP filed a protest at GAO challenging the Navy’s award of the Guam BOS contract to Fluor.

111. On January 10, 2018, GAO issued a protected decision denying DZSP’s protest in part and dismissing it in part. *See* AR, Tab 213.

D. DZSP’s Prior Protest Before This Court, and the Court’s March 22, 2018 Decision

112. On January 17, 2018, DZSP filed a bid protest before this Court challenging the Navy’s September 21, 2017 award to Fluor.

113. DZSP’s protest raised four allegations: (1) that the Navy was required to revise the Solicitation due to the passage of time and the changing circumstances and needs in Guam; (2) that the Navy had misunderstood Fluor’s proposed approach to retaining DZSP’s incumbent workforce; (3) that the Navy had improperly adjusted DZSP’s proposed costs upwards; and (4) that the Navy had disparately applied a credit to the Guam Gross Receipts Tax.

114. As to the first allegation, regarding changed circumstances, the Court agreed that the changes DZSP had identified were “startling,” and that “[t]he military assets based on Guam . . . have very significantly expanded over the years,” but concluded that the Court did not have the authority to direct the Navy to revise the Solicitation.

115. As to the second allegation, the Court agreed that the Navy had misevaluated Fluor’s proposal by crediting it for something — exceeding its low-proposed exempt labor rates to retain DZSP’s incumbent workforce at no additional cost to the Navy — that Fluor simply never proposed to do. In other words, the Court rejected the Navy’s *technical* evaluation of Fluor’s proposal and specifically the assessment of the *technical* strength to Fluor for its ability



to retain incumbent personnel. *Id.* at 11 (“[T]here is no evidence in the record to support the Navy’s understanding of Fluor’s proposal....”).

116. As to the third allegation, the Court concluded that the Navy’s upward adjustment of DZSP’s proposed exempt labor rates was arbitrary and capricious, both because it was based upon the cost evaluators’ determination of a risk in DZSP’s technical proposal, made without any input from the TET (the Court specifically noted that the Navy did not consider the demographics of DZSP’s incumbent workforce and new hires, issues squarely within the purview of the TET), and because the Navy had failed to conduct a similar analysis of Fluor’s proposal.

117. The Court did not address the question of the Navy’s application of the Guam Gross Receipts Tax, finding that it was “minutiae of the procurement process” to which the Navy was entitled to deference.

118. As a result of the grounds upon which it agreed that the Navy had erred, the Court directed that the prior award to Fluor was set aside, and enjoined the Navy “to perform a new evaluation of DZSP’s and Fluor’s proposals or to conduct an entirely new solicitation, whichever it chooses.”

E. DZSP’s April 27, 2018 Bridge Contract

119. On April 27, 2018, the Navy awarded DZSP Contract No. N62742-18-C-1110, a follow-on bridge contract to the current bridge contract by which DZSP provides the Navy with Guam Base Operations Support Services that are to be provided under the challenged award at issue here. (A copy of Contract No. N62742-18-C-1110 is attached hereto as Exhibit C.)

120. The period of performance on DZSP’s new bridge contract runs from May 1, 2018 through February 28, 2019.

[REDACTED]

121. The estimated cost of DZSP’s new bridge contract is [REDACTED]. Of that amount, [REDACTED] already has been funded by the Navy.

F. May 2018 Award to Fluor and Debriefing

122. On May 4, 2018, less than two months after the Court’s ruling, the Navy informed DZSP that corrective action was complete and award had been made to Fluor.

123. The Navy held a telephonic debriefing on May 9, 2018, in which it provided the following rating and evaluated cost information:

Offeror	Factor A	Overall Factors B-E	Factor B	Factor C	Factor D	Factor E	Proposed / Evaluated Cost	Best Value Ranking
DZSP	Substantial Confidence	O	O	O	G	O	[REDACTED] \$491,894,166	2
Fluor	Substantial Confidence	O	Not provided	Not provided	Not provided	Not provided	[REDACTED]	1

124. All of the non-cost adjectival ratings disclosed during the debriefing were unchanged from prior rounds of evaluation.

125. During the debriefing, the Navy explained that the TET had not been reconvened, nor had it been consulted, as part of the Navy’s post-corrective-action analysis. Instead, that analysis was conducted entirely by the SSA. For Factors A, B, D, and E, the Navy stated there was no change from the 2017 evaluation.

126. For Factor C, Staffing and Resources, [REDACTED], related to its proposed intent to retain [REDACTED] of its incumbent workforce on the new contract.

127. During the debriefing, the Navy also discussed the Cost evaluation of DZSP’s proposal and stated that no upward cost adjustment had been made. The evaluated cost for

[REDACTED]

DZSP's proposal was the same as the proposed cost: [REDACTED] The Navy explained that the SSA's determination that DZSP's proposed costs were realistic was based upon her review of the CET's 2016 report, and that the CET had not been reassembled as part of the Navy's corrective action.

128. The Navy also stated that the data from DZSP's bridge contracts had not been utilized as part of the corrective action.

129. The Navy refused to provide DZSP with any information about the Navy's re-evaluation of Fluor's proposal beyond its overall technical rating and proposed and evaluated pricing.

130. In compliance with the extended debriefing program, the debriefing was held open while DZSP was provided two business days to submit follow-up questions. DZSP timely submitted questions to the Navy on May 11, 2018.

131. The Navy responded to DZSP's debriefing questions on May 16, 2018. In response to those questions, the Navy confirmed that it did not issue a new TET or CET report as part of its re-evaluation. Instead, the Navy confirmed that the re-evaluation was conducted entirely by the SSA, who did not consult with anyone in Guam, nor any member of the TET, and apparently consulted with only a single member of the CET, before making her new award decision.

COUNT I:

THE NAVY’S PURPORTED RE-EVALUATION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO CONSIDER THE CHANGING CONDITIONS IN GUAM AS PART OF ITS EVALUATION OF THE REALISM OF EACH OFFERORS’ PROPOSED PRICING

132. DZSP incorporates by reference the allegations set forth in paragraphs 1-131 as if fully set forth herein.

133. The Navy’s re-evaluation of both Fluor’s and DZSP’s proposals was arbitrary and capricious because the Navy apparently failed to give any consideration whatsoever to the current circumstances in Guam — which, as the Court noted in its March 22 decision, “have undoubtedly changed markedly” since the solicitation was issued.

134. It was incumbent upon the Navy to consider whether the requirements identified in the 2013 Solicitation, as well as the proposals submitted in response thereto, still addressed the Navy’s current, actual needs.

135. In particular, the Navy had to consider those changed circumstances when evaluating the realism of each offeror’s proposed pricing. During its prior evaluation, the Navy relied upon data from DZSP’s bridge contracts to assess the realism of, and then increase, DZSP’s proposed labor rates. Though the Court ultimately concluded that the adjustment was improper, it did not fault the Navy for attempting to consider current market conditions.

136. To the contrary, the Court criticized the Navy for *not doing enough* with the bridge contract data. Specifically, the Court criticized the Navy (1) for not “undertak[ing] an analysis of DZSP’s *new* hires under the bridge contracts to meet the military’s increased needs on Guam”; and (2) for not undertaking the same analysis for Fluor’s proposal.

137. By jettisoning any consideration and application of DZSP’s bridge contract data on a uniform basis to both Fluor’s and DZSP’s cost proposals, the Navy has failed to consider

[REDACTED]

whether those proposals provide a realistic estimate of the costs the Government should expect to incur. By failing to analyze Fluor's and DZSP's proposals against current market conditions, the Navy conducted a cost realism analysis that was arbitrary, capricious, and unreasonable.

COUNT II:

THE NAVY'S EVALUATION OF FLUOR'S PROPOSAL WAS ARBITRARY AND CAPRICIOUS BECAUSE THE NAVY FAILED TO RATIONALLY ASSESS THE IMPACT OF FLUOR'S INABILITY TO RETAIN INCUMBENT PERSONNEL

138. DZSP incorporates by reference the allegations set forth in paragraphs 1-137 as if fully set forth herein.

139. The Navy failed to comply with the Court's direction that it "perform a new evaluation of DZSP's and Fluor's proposals." Despite the fact that the Court flagged multiple errors in the Navy's prior technical evaluation — [REDACTED] — *the Navy did not conduct a new technical evaluation, or even consult with the Guam-based TET (or anyone in Guam for that matter).*

140. The Navy's failure to do so renders any reconsideration it gave to Fluor's exempt labor staffing approach plainly inadequate. The Navy refused to provide DZSP with any information about that reconsideration during its debriefing, and based upon Fluor's unchanged overall technical rating, it is unclear whether the Navy reconsidered Fluor's scores under the Staffing factor *at all*.

141. Even assuming, for the sake of argument, that the SSA (acting without guidance from the TET) [REDACTED], that is insufficient to address the Court's well-founded concerns.

[REDACTED]

142. Indeed, Fluor's [REDACTED] will impact many aspects of Fluor's staffing plan and overall technical approach for this critical DoD contract which is, at bottom, a service contract. As part of a reasonable re-evaluation, the TET would have considered *how* Fluor's [REDACTED] would impact the other aspects of its proposal to determine if that proposal was still worthy of the strong technical ratings it had previously received.

143. The SSA, who is not a Guam BOS technical expert, was not positioned to undertake this analysis in the first instance. At best, the SSA made a *post-hoc*, mechanical adjustment of certain [REDACTED] assigned to Fluor's proposal. Such an adjustment cannot reasonably be characterized as a meaningful "new evaluation."

144. Fluor's [REDACTED] will impact many aspects of Fluor's staffing plan and overall technical approach. Indeed, [REDACTED] [REDACTED] See AR, Tab 149, Vol. II, Factor C. Fluor proposed to hire [REDACTED] of the workforce from incumbents, *id.* at 22285, and [REDACTED] [REDACTED]. *Id.* at 22287. In addition, [REDACTED] [REDACTED] [REDACTED]. See *e.g.* AR, Tab 147 Tech. Vol. at 20352.

145. The prior non-cost evaluation factor and subfactor ratings (including the supporting strengths and weaknesses under each factor) were based upon the [REDACTED] [REDACTED]. The Navy was required to rationally assess the full evaluation impact of correcting this mistaken

[REDACTED]

understanding, and based on the Navy's failure to even reassemble the TET, it is clear that it failed to do so.

146. Had the Navy once again assembled the TET to consider the impact of Fluor's [REDACTED], there is no reasonable basis upon which Fluor's proposal could have received an overall rating of "Outstanding" for the non-cost factors.

147. But for the Navy's error, there is a substantial chance that DZSP would have received the award.

COUNT III:

THE NAVY'S BEST VALUE ANALYSIS WAS ARBITRARY AND CAPRICIOUS BECAUSE THE NAVY REVERSED ITS PRIOR TRADEOFF ANALYSIS WITHOUT RATIONAL BASIS

148. DZSP incorporates by reference the allegations set forth in paragraphs 1-147 as if fully set forth herein.

149. The Navy's corrective action following the Court's March 22 decision involved re-evaluation of the exact same proposals the Navy considered in July 2016, following Fluor's and DZSP's submission of Final Proposal Revisions one month earlier.

150. In its 2016 evaluation, the Navy awarded the contract to DZSP as the best-value offeror. Fluor and DZSP both received overall technical ratings of "Outstanding." Although the Navy concluded that Fluor submitted a slightly better technical proposal overall notwithstanding those equivalent ratings, the Navy determined that Fluor's [REDACTED] cost premium was not justified.

151. As a result of the Navy's most recent corrective action, DZSP and Fluor are in nearly the same position as they were in September 2016, except that DZSP's standing has *improved* from both a cost and technical perspective. The Navy's corrective action considered

██████████

the exact same June 2016 proposals that resulted in the September 2016 award decision. This time, Fluor's price premium — ██████████ — is greater than it was in September 2016. And if the Navy complied with the Court's March 2018 decision, the overall technical ratings between Fluor and DZSP are even closer than they were in September 2016, because the Navy should have removed the strength Fluor originally received for incumbent retention, and likely also assigned a weakness to Fluor's proposal.

152. On these facts, there is no reasonable basis by which the Navy could conclude that Fluor's proposal represented the best value to the Government, when it reached the *exact opposite* conclusion in September 2016, under circumstances less favorable to DZSP.

153. The Navy did not produce a new TET report or even reconvene the TET, meaning that there were no revised technical findings to alter the best-value analysis. The last TET report was issued in support of the 2016 evaluation. Yet despite an almost two-fold increase in evaluated cost premium and even closer technical evaluation ratings, the Navy flipped that best-value determination in Fluor's favor. Where an agency reaches a different decision based upon the same facts, its obligation to explain that decision is particularly high. The Navy has not and cannot produce a rational basis for this reversal.

154. Moreover, under these circumstances — in which Fluor and DZSP's non-cost proposals are essentially equal, and DZSP's evaluated price is lower than Fluor's — the Navy's award to Fluor appears to be in direct tension with the plain language of the Solicitation's best-value selection process. Although the Solicitation contemplated the possibility of an award being made to other than the lowest-price offeror, it also directed that the non-cost evaluation factors, "when combined[,] *are approximately equal to cost.*" AR, Tab 8a at 343 (emphasis added).



155. Because the cost and non-cost factors were weighted equally, and DZSP and Fluor were rated as essentially equal technically, there is no reasonable basis for the Navy to have awarded the contract to Fluor, the higher-priced offeror. Indeed, it is presumably because of the Solicitation's equal weighting of the cost and non-cost factors that the Navy, *in every prior round of this procurement*, has awarded the contract to the lower-priced offeror. Its failure to do so here was arbitrary and capricious.

156. But for the Navy's error, there is a substantial chance that DZSP would have received the award.

THE EQUITIES WEIGH IN FAVOR OF A PERMANENT INJUNCTION

157. DZSP incorporates by reference the allegations set forth in paragraphs 1-155 as if fully set forth herein.

158. Given the irrationality of the Navy's award decision and the harm to DZSP resulting therefrom, permanent injunctive relief enjoining the Navy from allowing performance on the awarded contract is appropriate.

159. Without an injunction, DZSP will be irreparably harmed because it would lose the ability to compete for the contract based upon a fair and equal evaluation of offeror proposals that was rational and consistent with the Solicitation's express evaluation terms.

160. The Navy, meanwhile, will not be harmed by such an injunction. DZSP currently provides Guam BOS services on a bridge contract that runs through February 28, 2019. It can continue to do so during the pendency of this of this matter, as well as any reasonable, rational corrective action the Navy may take — be it a re-evaluation of proposals or the issuance of a new solicitation.



161. Similarly, Fluor will not be harmed by the imposition of an injunction because it has no right to begin performance on an invalid and irrationally awarded contract.

162. Finally, the public interest weighs in favor of injunctive relief. Government procurements should be administered in a fair and rational process, resulting in award decisions consistent with Solicitation requirements and procurement law and regulations. The Navy's procurement was not so administered, rendering its award to Fluor arbitrary and capricious.

PRAYER FOR RELIEF

For all of the reasons identified above, DZSP requests that this Court grant the following relief:

1. Declare the Navy's award of the contract to Fluor to be arbitrary, capricious, or otherwise an abuse of discretion, and not in accordance with procurement law and policy;
2. Enjoin the Navy and Fluor from commencing performance on the contract pending a re-evaluation;
3. Direct the Navy to conduct an actual re-evaluation or revised proposals submitted by Fluor and DZSP, updated to reflect the significant passage of time since the issuance of the Solicitation; and
4. Grant any such other relief as this Court deems just and appropriate under the circumstances.

FILED UNDER SEAL

Respectfully submitted,

s/ Anuj Vohra
ANUJ VOHRA
Crowell & Moring LLP
1001 Pennsylvania Ave. N.W
Washington, D.C. 20004
Tel: (202) 624-2502
Fax: (202) 628-5116

JASON A. CAREY
NOOREE LEE
JOHN R. SORRENTI
ALEXIS DYSCHKANT
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
Tel: (202) 662-5186
Fax: (202) 778-5186

Counsel for DZSP 21 LLC

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