



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”), as for its post-award Bid Protest Complaint against Defendant United States of America, alleges as follows:

I. NATURE OF THE ACTION

1. This post-award bid protest is the latest chapter in the more than four-year odyssey — beginning with a solicitation issued in October 2013 — that is the Naval Facilities Engineering Command’s (“Navy” or “Agency”) procurement of a Base Operations Support (“BOS”) services contractor for the Joint Region Marianas (“JRM”) in Guam.¹

2. Prior to its most recent award, the Navy awarded the subject contract to DZSP *three separate times*: in September 2014, December 2015, and September 2016.

¹ The allegations in DZSP’s Complaint here are supported by citations to the protected Agency Report the Navy submitted in response to a previously filed protest by DZSP at the U.S. Government Accountability Office. Because the entirety of that Agency Report will be included in the Administrative Record to be filed by Defendant in response to this protest, DZSP has not appended to this Complaint the materials cited herein. DZSP will provide the cited documents to the Court upon request.

3. Each of those awards resulted from the Navy's determination that DZSP's proposal represented the best value to the Government, where DZSP and Fluor had submitted technical proposals that the Navy rated as essentially equal, and DZSP's proposal was lower priced.

4. But Fluor Federal Solutions, LLC ("Fluor") protested each award to DZSP at the U.S. Government Accountability Office ("GAO"). GAO either sustained, or predicted that it would sustain, each of those protests.

5. As a result, Fluor was able to revise its proposals to cut the nearly \$40 million gap between its and DZSP's initial proposal submissions to less than [REDACTED] in the proposals submitted after the second GAO protest.

6. Following GAO's decision sustaining Fluor's *third* protest, and nearly four years after the original solicitation was issued, the Navy gave up and, in an apparent attempt to avoid further delays to the procurement, awarded the contract to Fluor on September 21, 2017.

7. The Navy's award to Fluor is improper not just because it appears to have been reverse-engineered to appease GAO, but also because it is indefensible on its merits. The Navy's ostensible justification for that award is unreasonable in four respects.

Error Number One

8. The Navy fundamentally misunderstood — and misevaluated — Fluor's proposed staffing approach.

9. Fluor proposed to staff 95% of its collective bargaining-exempt workforce from DZSP's incumbent workforce, at rates lower what DZSP was paying them on its current contract, including between [REDACTED] less for several essential positions.

[REDACTED]

10. The Navy’s Technical Evaluation Team (“TET”) concluded that such rates were too low and “could cause problems with employee morale and lead to retention issues,” such that Fluor’s proposed retention plan would “be challenging at the salaries proposed.” AR, Report Tab ZK at 36.²

11. But without explanation, the Navy’s Cost Evaluation Team (“CET”) dismissed these concerns based upon its understanding that Fluor would, if necessary, [REDACTED] [REDACTED] to the Navy.

12. *Fluor proposed to do no such thing.* As a result, the Navy failed to consider the performance risk associated with Fluor’s low-proposed rates, and its inability to retain the incumbent workforce resulting therefrom.

Error Number Two

13. For the first time in the five-year history of this procurement, the Navy increased DZSP’s proposed labor pricing — by more than [REDACTED] — based upon newfound concerns about an aspect of DZSP’s proposed *technical* approach: DZSP’s plan to “green” (replace older incumbent employees with younger ones) a percentage of its exempt labor workforce in each year of the Guam BOS contract.

14. But the *CET* made that adjustment without ever consulting the *TET*. And the *TET* had previously found DZSP’s approach to be “very realistic.”

15. The *CET*’s [REDACTED] adjustment was not and cannot be reconciled with the *TET*’s conclusion.

² “AR, ___ Tab ___ at ___” refers to a specific folder, tab, and page number of the Agency Report documents the Navy produced in response to DZSP’s GAO protest.

16. The Navy's cost adjustment appears to have been driven entirely by a concern raised by GAO in its decision sustaining Fluor's third protest — that the TET had not fully understood DZSP's proposed exempt-labor-refreshment approach. But the Navy shut the TET out of the most recent evaluation, and simply bumped up DZSP's evaluated costs in an effort to address GAO's concern. The Navy conceded this point during DZSP's recent GAO protest. *See* Agency Response to DZSP GAO Protest at 8 (“[G]iven GAO's last decision . . . it is entirely appropriate that the Agency came to a different conclusion upon reevaluation.”). This was plainly improper.

17. As a result of the Navy's upward adjustment, for the first time in the five-year history of this procurement, DZSP's total evaluated price was higher than Fluor's. And, for the first time in the five-year history of this procurement, the Navy determined that Fluor's now (supposedly) lower-priced proposal represented the best-value to the Government.

Error Number Three

18. The Navy's award to Fluor is based upon specifications that were drafted in 2013, and that are now hopelessly outdated. When the Solicitation was issued, no one could have anticipated that performance on the new contract still would not have commenced more than four years later. And the situation on the ground at JRM Guam — and the attendant national security threats — have changed in ways the parties could not possibly have imagined when they submitted their proposals.³

³ *See, e.g.,* Dan Lamothe, *Air Force deployed B-2 stealth bombers to Guam as sensitive talks involving North Korea commenced*, WASHINGTON POST, Jan. 11, 2018, https://www.washingtonpost.com/news/checkpoint/wp/2018/01/11/air-force-deployed-b-2-stealth-bombers-to-guam-as-sensitive-talks-involving-north-korea-commenced/?utm_term=.4fc5ccbd089c.

[REDACTED]

19. DZSP — having served as the incumbent Guam BOS contractor since 2005 — can confirm that the Navy’s actual requirements at JRM BOS are far different than those outlined in the Solicitation. Indeed, the volume of assets DZSP currently supports is, in some cases, exponentially higher than contemplated by the Solicitation. But neither Fluor nor DZSP have been afforded an opportunity to revise their proposals to consider or address these changes. The last time either made a change to their proposal was in July of 2016, in response to two narrow discussion questions from the Navy related to specific staffing issues. The last time Fluor and DZSP submitted complete revised proposals was in the *summer of 2015*.

20. Given the passage of time and the changed circumstances in Guam, the most prudent course for the Navy is to issue a new solicitation for the Guam BOS contract that accurately reflects the current needs of JRM Guam, and to reasonably and fairly evaluate proposals submitted in response to that new solicitation.

Error Number Four

21. The Navy conducted a disparate evaluation by failing to normalize Fluor’s and DZSP’s inconsistent application of the Guam Gross Receipts Tax (“GRT”).

22. In its protest of the Navy’s second award to DZSP, Fluor argued that the Navy erred by not normalizing the tax rate each offeror applied (Fluor applied a [REDACTED] rate; DZSP applied a 4% rate). GAO indicated that it would sustain Fluor’s protest on this ground; the Navy took corrective action in response.

23. But the Navy then made a nearly identical mistake regarding the GRT, this time in Fluor’s favor — it failed to normalize the offerors’ application of the Guam Registered Apprenticeship Program (“GRAP”) credit applicable to the GRT.

24. Fluor applied that credit far more broadly than did DZSP. Had the Navy normalized the two offerors' GRAP credit approaches (as it did with the rate itself), DZSP's total-evaluated price would have been lower than Fluor's. It was inarguably unfair for Fluor to benefit from such agency normalization, but not DZSP.

25. DZSP was prejudiced by the Navy's actions here. Had the Navy conducted a fair and equal evaluation of DZSP's and Fluor's proposals, it would have determined the DZSP's proposal represented the best value to the Government — a conclusion the Navy had reached three times already, including once utilizing the exact same set of proposals.

26. In light of the errors identified above (and described in more detail herein), DZSP respectfully requests that the Court (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.

27. Counsel for DZSP has been in communications with counsel for the Department of Justice, Veronica Onyema, regarding a limitation on contract-transition activities as well as an expedited schedule for this protest in order to avoid the need for a preliminary injunction of performance on the disputed contract. 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 preliminary injunction at this time.

II. JURISDICTION

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

29. DZSP submitted a fully compliant proposal in response to the Solicitation, was selected as the winning bidder by the U.S. Department of the Navy *three separate times*, but following GAO's lack of deference to the Navy's award decisions, was ultimately eliminated in the final selection as the second-place offeror. DZSP therefore has standing to sue as an interested party pursuant to 28 U.S.C. § 1491(b).

III. THE PARTIES

30. DZSP 21 LLC is a corporation; its address is P.O. Box GH, Hagatna, Guam, 96932. DZSP submitted a timely and fully responsive proposal in response to the Solicitation. DZSP's proposal was not selected for award.

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

IV. RELEVANT BACKGROUND

A. The Guam Base Operations Support Contract

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

33. The Navy issued Solicitation No. N62742-13-R-1150 (the "Solicitation") for these services on October 16, 2013.

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

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

36. 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.

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

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

39. The period of performance included an 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.

40. 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.

41. 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.*

42. 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.

43. 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,

44. 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.*

45. 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 Repeated Awards to DZSP and Fluor’s Repeated GAO Protests

46. Prior to the Navy’s most recent award decision, this procurement had yielded three separate awards to DZSP, each of which Fluor protested at GAO.

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

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

48. 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

49. 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).

50. GAO denied the CFS-KBR Marianas Support Services, LLC protest in its entirety.



51. 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.

52. Regarding discussions, GAO took issue with the following question the Navy sent to Fluor and other offerors questioning the realism of their proposed staffing levels:

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

2015 CPD ¶ 22 at *5; *see also id.* ("The agency posed essentially identical discussion questions to DZSP and CFS.").

53. With this question, the Navy clarified that "it was not the intent of the agency to dictate the number of FTEs proposed, but to verify that the offeror had a methodology to accomplish the work with the number of FTEs proposed." *Id.*

54. In response, Fluor revised its proposed staffing levels to match the number of FTEs indicated in the Navy discussion question. These changes allowed Fluor to increase its technical rating under Factor C from Unacceptable to Outstanding.

55. Even though (1) the Navy's discussion question specifically stated that it was *not* dictating the number of FTEs necessary; and (2) the staffing-level change prompted by the discussion question resulted in a significant increase in Fluor's Factor C rating, GAO determined that the discussion question misled Fluor into increasing its staffing and consequently its pricing, and also determined that the Navy's resulting cost evaluation was unreasonable.

56. In response to GAO's decision, the Navy implemented corrective action and re-opened discussions with competitive range offerors in July 2015.



57. Fluor and DZSP both timely submitted revised proposals.

58. Both sharpened their pencils, and reduced their prices: Fluor sought to close the gap with DZSP, and DZSP sought to maintain its original and hard-won price advantage.

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

59. The Navy’s evaluation of these new proposals yielded the same result: An 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		

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

61. 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 Guam Receipts Tax (“GRT”) to each offeror’s proposal.

62. Regarding DZSP’s exempt labor rates, Fluor alleged that the Navy failed to reasonably consider the impact of DZSP’s proposed exempt labor pricing approach, which called for a annual decrement in exempt labor rates based on “greening” of the workforce (replacing of aging workers with younger ones), coupled with a increase in the rates for employees that remained in the workforce, resulting in a net decrement in DZSP’s exempt labor costs.

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63. In response to this allegation, the Navy submitted to GAO a declaration from the Navy's cost evaluator detailing that the exempt labor rates of DZSP and Fluor were in fact comparable.

64. Regarding the GRT, Fluor alleged that the Navy failed to recognize that Fluor and DZSP applied the Guam GRT in "irreconcilably different ways" because DZSP applied a 4% tax rate, *as directed by the Solicitation*, while Fluor applied a [REDACTED] tax rate based upon Fluor's interpretation of the Guam tax code, which was inconsistent with the Solicitation's directions.

65. Prior to its issuance of a decision, GAO held early outcome prediction, in which it indicated that it was likely to sustain the protest based upon the exempt labor rate and GRT protest allegations.

66. In response, the Navy announced that it would take corrective action in which it would (1) address how DZSP's decrease in exempt labor rates would affect technical review of Factor C, Staffing and Resources, (key personnel/management) over the life of the contract and the effect, if any, to cost realism for exempt labor; and (2) ensure a cost adjustment is applied to reflect consistent application of Guam Gross Receipts Tax to all offerors. *See* Email from Navy Counsel (Mar. 29, 2016). The Navy would then issue an amended Source Selection Decision. *Id.*

67. The Navy's announced corrective action was limited to Fluor and DZSP.

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

68. As part of its second corrective action, on June 17, 2016, the Navy sent Fluor a letter identifying two items for discussions. *See* AR, Tab Q, Fluor Disc. Ques. 160627 at pdf. p. 2.

[REDACTED]

69. First, the Navy instructed Fluor to adjust its GRT rate to match the 4% rate required by the Solicitation. *Id.* Fluor complied, resulting in a downward adjustment to its price of greater than [REDACTED].

70. Second, the Navy observed that Fluor proposed to hire 95% of exempt employees from the incumbent workforce, but reduced its exempt labor rates in 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.*

71. In response to the second item, Fluor stated that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] In other words, *Fluor proposed to replace any incumbent personnel that would not work at its reduced labor rates.*

72. Fluor further explained that [REDACTED]
[REDACTED]
[REDACTED] *Id.* at pdf. p. 3.

73. By way of this statement, Fluor promised only to [REDACTED]
[REDACTED]. Fluor did *not* promise to [REDACTED]
DZSP’s *incumbent* personnel.

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

74. The Navy also raised two discussions items with DZSP by way of a letter dated June 17, 2016. *See* AR, Tab P, DZSP Disc. Ques. 160624.

75. 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 pdf p. 2.

[REDACTED]

76. Second, the Navy instructed DZSP to remove the [REDACTED] annual decrement factor for exempt labor rates and propose a new approach. *Id.*

77. In response to the second item, DZSP proposed to hold exempt labor rates flat with no annual escalation or decrement factor. DZSP explained that it would “green” [REDACTED] of its incumbent workforce (replacing them with new hires) on a yearly basis, and 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 an overall [REDACTED] exempt-labor escalation rate. *Id.* at pdf pp. 2-3.

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

78. On July 22, 2016, the Navy’s TET evaluated Fluor’s and DZSP’s revised staffing proposals, and made a number of findings that are relevant to this protest. *See* AR, Reports Tab ZK.

79. Regarding Fluor’s revised staffing plan, the CET informed the TET that [REDACTED] [REDACTED] essential non-key Exempt personnel positions,” Fluor “proposed salaries between [REDACTED] less than what is being paid on the current DZSP contract.” AR, Reports Tab ZK at 34.

80. The TET concluded [REDACTED]
[REDACTED]
[REDACTED] and that Fluor’s proposal to hire 95% of its personnel from the existing incumbent workforce [REDACTED] *Id.* (Emphases added.)

81. As for DZSP’s workforce replenishment plan, the TET confirmed that it understood DZSP’s proposed approach, and considered it “very realistic”:

The TET advised the CET that because of the aging of the incumbent workforce, the proposed [REDACTED] workforce replenishment factor was very



realistic. The TET also advised that the [REDACTED] salary decrement factor for replacement employees was realistic if the new employees were hired at competitive salaries.

Id. at 12 (bolding in original; italics added).

82. These findings from the July 2016 evaluation 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

83. 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

84. Once again, Fluor protested the Navy’s award at GAO, *see* B-410486.9, 2017 CPD ¶ 334, this time challenging the realism of DZSP’s plan to hold its average exempt labor rates flat by “greening” portions of the workforce, and arguing that Fluor was disparately treated by the Navy’s technical evaluators who had found Fluor’s exempt labor staffing approach to be unrealistic.

85. Fluor challenged the realism of DZSP’s exempt labor rate approach despite the fact that, as the TET noted, Fluor had [REDACTED]. [REDACTED]. AR, Reports Tab ZK at 34. Indeed, Fluor’s proposed base-period labor rates were on [REDACTED].

[REDACTED] — than what DZSP currently pays its employees, meaning that Fluor would ask those employees to take an immediate and significant pay cut as part of a transition to [REDACTED] in [REDACTED] in which the TET concluded that Fluor’s plan to hire 95% of exempt personnel from the incumbent workforce “will be challenging to implement with the salaries proposed.” The Navy’s technical evaluators determined that for several essential positions, “[Fluor] proposed salaries [REDACTED] *han what is being paid on the current DZSP contract*” and that such low rates “could cause problems with employee morale and lead to retention issues if [Fluor] intends to offer employment to DZSP employees.” AR, Reports Tab ZK at 34.

87. On January 18, 2017, GAO sustained Fluor’s third protest.

88. 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, while (according to GAO) failing to undertake a similar consideration of DZSP’s proposed approach to “green” its exempt workforce. *See* B-410486.9, 2017 CPD ¶ 334. GAO also expressed a concern that the TET had not fully understood DZSP’s proposed approach to refreshing its workforce, despite the TET’s determination that DZSP’s approach was “very realistic.”

89. 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

90. In response to GAO’s January 2017 decision, the Navy conducted a re-evaluation of Fluor’s and DZSP’s proposals, without holding discussions or requesting proposal revisions.

91. On September 21, 2017, the Navy notified DZSP that it had awarded the contract to Fluor.

92. 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	\$495,891,094	1

93. The Navy's corrective action following GAO's decision sustaining Fluor's third protest was limited to the creation of two new evaluation documents: (1) a new Cost Evaluation Team Report, dated June 30, 2017 (AR, Reports Tab ZO); and (2) a new Source Selection decision document, dated July 14, 2017 (AR, Reports Tab ZP).

94. 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.*

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

96. 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 [REDACTED], and Fluor's price [REDACTED]. See AR, Reports Tab ZO at 3-4.

[REDACTED]

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

98. 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 [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 4. That is, the CET concluded that it could not accept the 0% escalation.

99. The CET thus concluded that “there is a substantial risk that DZSP would not achieve its proposed [REDACTED] *change in Exempt labor rates*’ over the life of the contract.” *Id.* at 6.

100. The CET reached this conclusion notwithstanding the fact that, as noted above, when the TET reviewed DZSP's revised staffing approach, it declared it “very realistic.” AR, Tab ZK at 12. (The CET solicited no input from the TET when upward adjusting DZSP's evaluated cost.)

101. Based on its conclusion, the CET increased DZSP's proposed price by an additional [REDACTED]. As a result of this adjustment, for this first time in the history of this procurement, DZSP's total evaluated price was higher than Fluor's.

102. The CET also dismissed the TET's concerns about *Fluor's* low exempt labor rates making it difficult to retain the incumbent workforce.

[REDACTED]

103. The CET did so based on a conclusion that Fluor [REDACTED]

[REDACTED] AR,
Reports Tab ZO at 10.

104. 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, Reports Tab ZP.

105. The SSDD contains no discussion of the TET's conclusion that DZSP's proposed staffing approach was "highly realistic," nor does it attempt to reconcile the different conclusions about the realism of the approach between the TET and the CET.

106. Fluor's and DZSP's non-cost ratings have not changed since Fluor's initial GAO protest in January 2015, and the two proposals have been rated essentially equal on those factors (both received "Significant Confidence" ratings for Past Performance, and overall "Outstanding" ratings for the remaining factors).

107. But, as noted above, as a result of the CET's most recent cost adjustments, for the first time in this procurement, DZSP's proposed costs were evaluated as higher than Fluor's.

108. As it has in each round of this procurement, the Navy awarded the contract to the lower-priced offeror, which was now Fluor. *See* AR, Reports Tab ZP at 24 ("DZSP's evaluated probable cost was [REDACTED], which is [REDACTED] than [Fluor's] evaluated probable cost of [REDACTED].").

[REDACTED]

C. The Navy’s Most Recent Evaluation Resulting In Award to Fluor Was Arbitrary, Capricious, and Unfair

1. The Navy Mistakenly Believed That Fluor Proposed to [REDACTED] to Retain DZSP’s Incumbent Personnel

109. As noted above, the Navy’s TET concluded that Fluor’s proposed exempt labor pricing would cause major problems with retaining incumbent employees. *See supra* ¶ 10.

110. The CET rejected the TET’s incumbent staff retention concerns based solely on the belief that Fluor [REDACTED]:

[REDACTED]

[REDACTED]

AR, Reports Tab ZO at 10 (emphasis added).

111. The SSA then accepted the CET’s interpretation of Fluor’s proposal as committing to [REDACTED] to hire incumbent personnel. AR, Reports Tab ZP at 20.

112. On that basis, the SSA (1) concluded that Fluor [REDACTED]
[REDACTED] (2) [REDACTED]
[REDACTED] and (3)
[REDACTED]. *Id.*

[REDACTED]

113. But in fact, Fluor made no commitment [REDACTED] if necessary to hire incumbent staff. To the contrary, Fluor specifically advised the Navy that, if incumbent personnel refuse to [REDACTED], it will simply recruit and hire non-incumbents.

114. The Navy's erroneous evaluation relies on this statement from Fluor's response to the Navy's discussion question: [REDACTED]

[REDACTED]

[REDACTED] AR, EN Tab Q at 4 (emphasis added).

115. But that statement includes [REDACTED] — indeed, it does not reference incumbent personnel at all. The quoted sentence merely reflects a commitment that if [REDACTED]

[REDACTED]

[REDACTED]

116. Making the Navy's error even more clear, Fluor confirms — in the very same discussion response — [REDACTED]: [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 3-4 (emphasis added).

117. In other words, [REDACTED]

[REDACTED]

[REDACTED]

118. Because Fluor made [REDACTED] [REDACTED] the CET and the SSA had no reasonable basis for rejecting the TET's proper concerns about Fluor's ability to retain the incumbent workforce.

[REDACTED]

119. The source selection decision is therefore fatally flawed and it cannot stand. *See Information Sciences Corp. v. United States*, 73 Fed. Cl. 70, 120 (2006) (explaining that the SSA must make an informed, rational and well-documented selection decision); *see also Nuclear Prod. Partners, LLC*, B-407948.9, Sept. 24, 2013, 2013 CPD ¶ 228 at 3 (explaining that GAO sustained the protest because the SSA had no basis for rejecting the underlying evaluation).

120. Nor can the Navy simply ignore the risks created by [REDACTED]
[REDACTED]
[REDACTED]—meaning that Fluor will not provide a workforce that is 95% incumbents, and performance will suffer.

121. The Navy was required to evaluate that risk. *See CRAssociates, Inc.*, 95 Fed. Cl. 357, 374 (2010) (noting that agency was required to consider impact of low wages, noting that low compensation for professional work, especially when wages lower than that paid by the incumbent may be indication that offeror will retain unqualified individuals); *see also* [REDACTED]
[REDACTED] . . .”).

122. Moreover, by failing to consider the inconsistency between Fluor’s technical approach (which promised to staff 95% of its exempt workforce from incumbents) and cost [REDACTED]
[REDACTED] conduct an adequate cost realism analysis. *See FAR 15.404-1(d)(1)* (“Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror’s proposed cost estimate to determine whether the estimated proposed costs are . . . consistent with the unique method of performance.”); *McConnell Jones Lanier & Murphy LLP v. U.S.*, 128 Fed. Cl. 218, 239 (2016).

[REDACTED]

123. Because the Navy erroneously believed that Fluor had committed to [REDACTED] [REDACTED] to retain incumbent personnel, it failed to assess the risk that [REDACTED] were too low to staff 95% of its exempt workforce from incumbents. And, in fact, the record shows they *are* too low: [REDACTED] [REDACTED] orce. AR, Reports Tab ZK at 36.

124. [REDACTED]
[REDACTED]

125. But more than that, the Navy should have recognized significant problem with Fluor's proposal: Fluor's proposed rates are unrealistic, and will cause immediate disruption to the incumbent workforce, with a resulting degradation in the performance of the contract.

126. The Navy therefore had to address the inherent risk associated with Fluor proposal by either (1) reducing Fluor's technical score for Factor C; or (2) increase Fluor's evaluated costs (as it did with DZSP). Having failed to do either, the Navy's evaluation of Fluor's proposal was arbitrary, capricious, and fundamentally flawed.

2. The Navy's Evaluation of DZSP's Proposed Exempt Labor Staffing Plan Was Arbitrary and Capricious Because It Simply Ignored The TET's Conclusion That DZSP's Plan Was "Very Realistic"

127. The Navy conducted a flawed evaluation of DZSP's proposed exempt labor staffing plan by simply rejecting, without explanation, the TET's conclusion that DZSP's plan was "very realistic." AR, Reports Tab ZK at 12-13.

128. The TET's evaluation considered the two salient features of DZSP's workforce replenishment plan: (1) the [REDACTED] annual refreshment rate; and (2) the [REDACTED] salary reduction for new employees hired to replace the old ones. As to the first, the TET explained that such a refreshment rate was possible because of the aging workforce in Guam. As to the second, the

TET explained that the viability of such approach was contingent upon the new hires being brought in at competitive salaries, and that DZSP was offering salaries “at the upper end of the current Guam market.” AR, Reports Tab ZK at 12-13. These were thoughtful, reasoned, and reasonable conclusions.

129. In sustaining Fluor’s third protest, GAO raised a concern about whether the TET had recognized the implications of that approach on employee retention, and whether the Navy had fairly and equally evaluated Fluor and DZSP regarding their ability to retain incumbent staff. *See Fluor Fed. Sol’ns, LLC*, B-410486.9, Jan. 18, 2017, slip op. at 9 (“[T]he record shows that the agency evaluated offerors disparately under the staffing and resources factor, criticizing Fluor’s proposed approach as possibly involving a risk . . . while at the same time failing to meaningfully consider whether a similar risk was raised by DZSP’s proposed approach[.]”).

130. Addressing that issue simply required the Navy to fairly evaluate the retention risk associated with each offeror’s proposed approach — a job squarely within the purview of the TET, not the CET.

131. Nonetheless, in response to the GAO decision, the Navy conducted only a cost/price analysis, using a new CET that was “selected based on expertise and experience in the field of cost and price analysis.” AR, Reports Tab ZO at 2. The Navy did not reassemble a team with technical or staffing expertise that could speak to actual performance on a BOS contract in Guam, or take any action to refresh or revisit the conclusions drawn by the TET in its July 22, 2016 memorandum.

132. The updated CET report reaches the exact opposite conclusion that the TET did about the realism of DZSP’s plan. But the CET never addresses the TET’s contrary conclusions, or explains why they were incorrect. Indeed, the updated CET report *does not address the TET*

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report at all. Nor does the updated CET report independently consider the demographics of Guam's incumbent workforce, their impact on DZSP's annual refreshment rate, or how DZSP's proposed salaries for its new hires compare to Guam market rates. Thus there is nothing in the Navy's post-corrective action evaluation record that can be read to identify or address — directly or indirectly — any purported errors in the TET's prior evaluation that serve as the Navy's ostensible basis for its rejection.

133. Instead, in declaring DZSP's workforce replenishment plan unrealistic, the updated CET report fixates entirely upon the fact that DZSP's ██████████ refreshment rate allegedly is inconsistent with DZSP's identified historical employee retention rate of 90%. *See, e.g.,* AR Reports Tab ZO at 5 ██████████ is not consistent with DZSP's . . . average retention rate of ██████████"); *id.* ("The historical data in the DZSP technical proposal indicates employees will be replaced at a much slower rate than estimated in DZSP's cost proposal.").

134. That supposed "inconsistency" does not support the CET's finding that DZSP's replenishment plan was unrealistic, for at least two reasons. *First*, any concern on this front should have led the TET to adjust its evaluation of DZSP's retention approach. It did not. *Second*, the *ability to retain* staff and the *intent to refresh* them are two different things. Thus DZSP's historical replacement rate of ██████████ has no bearing upon, and is not inconsistent with, DZSP's proposal to, in the future, *selectively turn over* ██████████ of its staff on a yearly basis. That proposed turnover rate is a conscious management decision that DZSP will carefully implement to maintain key knowledge and skills while appropriately greening its workforce.

135. The TET, unlike the CET, understood this when it conducted its evaluation of DZSP's proposed approach. *See* AR, Reports Tab ZK at 12 ("Based on DZSP's new

information, the TET also considered that DZSP's prior retention rates (e.g. retention rate of 95% in 2013) would not be applicable to future periods."). It was therefore perfectly possible, and reasonable, for the TET to conclude that DZSP will both achieve its replenishment plan, while also retaining key incumbent personnel and thereby maintaining important knowledge and skills.

136. In any event, regardless of the merits of the CET's conclusions regarding the purported lack of realism of DZSP's proposed labor refreshment approach, those conclusions do not address, and therefore in no way disturb, the contrary findings reached by the TET.

137. For this reason, the Navy's Source Selection Decision Document is similarly infirm. That document contains the conclusory statement from the Source Selection Authority ("SSA") that "[w]hile the [Source Selection Evaluation Board ("SSEB")] had found [DZSP's workforce replenishment plan] to be realistic and reasonable, the June 2017 CET's evaluation of this workforce replenishment plan determined that it was not realistic and required a probable cost adjustment. I also conclude that DZSP's FPR cost proposal was unrealistic." AR, Reports Tab ZP at 12.

138. That is plainly inadequate. Although the SSA declares that the TET was wrong and the CET was right, she did not, in fact, reconcile the inconsistency between the TET and the CET. Moreover, the SSA failed to document any reason for selecting the CET's conclusion, making it impossible to evaluate the reasonableness of her decision. *See Active Network, LLC v. United States*, 130 Fed. Cl. 421, 428 (2017) (Court cannot uphold an undocumented and unexplained SSA decision).

139. As a result, the Navy's evaluation record is left with two reports that are plainly contradictory, and that the Navy never reconciled prior to award. For this reason alone, the

[REDACTED]

Navy's award decision was flawed and cannot stand. *Cf. McConnell Jones Lanier & Murphy LLP v. Unites States*, 128 Fed. Cl. 218, 239 (2016) (holding that upward adjustment to offeror's costs was improper where proposal had received "very good" technical rating); *see also Information Ventures, Inc.*, B-297276.2, Mar. 1, 2006, 2006 CPD ¶ 45 at 5 (citing *Honeywell Tech. Solutions, Inc.*; *Wyle Labs, Inc.*, B-292354, Sep. 2, 2003, 2005 CPD ¶ 107 at 7-8) ("We conclude that the agency's evaluation of offerors' proposals was unreasonable because of the contradiction between the cost evaluation and the technical evaluation.").

140. The Navy's evaluation of DZSP's proposal was also disparate, and therefore for this reason as well, improper. *See Banknote Corp. of Am., Inc. v. United States*, 56 Fed.Cl. 377, 383 (2003), *aff'd* 365 F.3d 1345 (Fed.Cir.2004) (noting that agencies are obligated to "evaluat[e] proposals evenhandedly against common requirements and evaluation criteria").

141. The CET adjusted DZSP's proposed costs upwards based upon its (incorrect) conclusion that DZSP's workforce replenishment plan was inconsistent with its proposed technical approach. As DZSP explained in detail above, however, Fluor's proposed plan to staff its exempt workforce with 95% incumbents was clearly inconsistent with its plan to require those employees to take significant pay cuts. But the Navy made no effort to address this inconsistency, either by adjusting its costs, or revising its technical score. By ignoring that inconsistency, the Navy failed to evaluate Fluor's and DZSP's proposals evenhandedly.

3. Changed Circumstances at JRM Guam Have Rendered The Solicitation Outdated and Require the Navy to Conduct a New Procurement

142. In its role current Guam BOS contractor, upon which it has served by way of a series of bridge contracts issued beginning in 2014, DZSP has provided the support services at JRM Guam that otherwise would have been provided under the disputed contract here. Over the years since 2014, when it began performing on its bridge contracts, DZSP has seen a significant

increase in the assets that it is required to support under numerous different annexes relative to the quantities identified in the Solicitation (and against which Fluor and DZSP submitted their proposals). For example:

- At the port, DZSP saw a **622% increase** in vessel movements, berthing and mooring, crane lifts, and utilities hookup support services.
- Under Annex 0600, Port Operations, DZSP saw a **30% increase** in equipment and fender maintenance.
- Under Annex 0700, Ordnance, DZSP saw a **45% increase** in ordnance movements.
- Under Annex 1000, Materials Management at Andersen Air Force Base (“AAFB”), there was a **1,250% increase** in overall managed inventory and **1,214% increase** in mobility equipment management services.
- Under Annexes 1502, Facility Investment, and 1502A, AAFB Facility Investment, there was a **95% and 75% increase** in facility service calls and repairs, respectively.
- Under Annex 1602, High Voltage Power, there was a **96% increase** in work at the Naval Hospital Central Utility Plant, a **97% increase** in shore-to-ship electrical service, and a **256% increase** in total meter readings for AAFB and Naval Base Guam (“NBG”).
- Under Annex 1605, Wastewater, there was a **1,121% increase** in bilge oily water treatment systems’ receipt, discharge, processing, and maintenance.
- Under Annex 1700A, covering Base Support Vehicle Equipment at AAFB, there was a **224% increase** in personnel/cargo movement.
- There were 4,152 facility and utility assets turned over, following construction and installation, for maintenance and an additional 1,074 vehicles added that require preventive and corrective maintenance. As the BOS services contractor, DZSP was responsible for performing all additional and unanticipated operations, maintenance and repair inclusive of the above.

See Declaration of Wayne Cornell at ¶ 5. (A copy of Mr. Cornell’s declaration is attached hereto as Exhibit A.)

143. Some of the additional work involves large assets and new missions. For example, the U.S.S. Emory S. Land — the Navy’s second 650-foot submarine tender ship (the

[REDACTED]

U.S.S. Frank Cable is the other) — is now homeported in Guam and requires significant services to support its mission; this work was not contemplated by the 2013 Solicitation. *Id.* at ¶ 6.

144. Similarly, support for three Mark VI Patrol Boats, used by the Navy for infrastructure protection in foreign ports around the world, including lifting them out of the water for maintenance and/or contingency storm response, was not part of the 2013 RFP and will demand major mission support. *Id.*

145. Additional work DZSP currently performs on its bridge contract that was not contemplated by the Solicitation includes:

- Over 100 additional reports that need to be submitted outside of contractual deliverable requirements. Many new Contract Data Requirement List deliverables have been added and more are in progress.
- Additional work by AAFB Material Management, including semi-annual maintenance of three Pyro-chem Dry Chemical Systems; administration of 350 Improved Outer Tactical Vest mobility bags; material and equipment support for the Terminal High Altitude Area Defense detachment; manifesting functions for Navy passenger movements; and pick up of all outbound Navy mobility cargo.
- Maintenance of High Voltage Electrical Utilities for Submarine Squadron 15 (“CSS-15”), including 25 generators, 73 transformers, and switchgear.
- Additional fuel deliveries not contemplated by the solicitation, involving delivery of an average of 21,000 – 40,000 gallons of diesel fuel per month to 21 equipment units from commands such as Coastal Riverine Group ONE-Detachment Guam, Pacific Missile Range Facility-Detachment Guam, and CSS-15 submarines. The resources required for these efforts include four truck drivers and two additional 9,500 gallon tri-axle fuel tankers.

Id. at ¶ 7.

146. This new work required DZSP to obtain and commit a significant amount of additional resources to the BOS services bridge contract. Indeed, because of this additional, and recurring, work, DZSP has had to commit [REDACTED] to the contract. *Id.* at ¶ 8.

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147. This additional and recurring work has cost over ██████████ since 2014, the year the RFP was issued, and almost ██████████ since 2016, the year that DZSP and Fluor submitted their most-recent final proposal revisions. *Id.* at ¶ 9. In other words, the additional work that DZSP has performed on its bridge contract since 2014 represents almost ██████████ of Fluor's total evaluated price, with more than half of those costs incurred since 2016.

148. On these facts, the Navy should be required to re-compete the Guam BOS contract because “the agency's current requirements bear little relationship to the requirements that it solicited, and for which the offerors competed.” *System Studies & Simulation, Inc.*, B-409375.2, May 12, 2014, 2014 CPD ¶ 153 at 6; *see also id.* at 6 n.4 (“Where an agency's requirements change due to the passage of time occasioned by protest litigation, the agency is . . . required to afford offerors an opportunity to submit proposals responsive to the agency's revised requirements.”) (internal citation omitted). Significantly here, “[o]ne circumstance requiring the issuance of an amendment is a significant change in the government's quantity requirements.” *United Telephone Co. of the Northwest*, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7.

149. In light of the significant changes in the Navy's quantity requirements, Fluor's proposal bears little relationship to the Navy's current requirements. (The same holds true for DZSP's proposal.) But in the absence of a revision to the Solicitation by which offerors can address those actual requirements by way of a full-and-open competition, Fluor will be negotiating revised terms to its contract as a sole-source awardee, putting the Navy at a distinct disadvantage (and rendering the purported price advantage of Fluor's proposal as compared to DZSP's meaningless). Indeed, proceeding in this fashion would violate the Competition in Contracting Act's and FAR's mandates for full and open competition, and only add to the long list of improprieties that mar the Navy's award to Fluor.

150. Moreover, the tenor of the environment and the situation on the ground at JRM Guam has changed considerably. North Korea has made dramatic progress in its nuclear program over the last several years and even just the last few months. China has become increasingly aggressive in the Pacific region. In response to these growing threats, the U.S. has increased its military presence in Guam, deploying three stealth B-2 Spirit bombers to Guam in early January.⁴ In addition, the U.S. Marine Corps is pushing forward with a large-scale relocation to Guam, and is planning to move 4,100 Marines there starting in 2022.⁵ As tensions grow, operational readiness on Guam will become more significant and important to the U.S.'s strategic interests.

151. Given the lengthy period of time that has elapsed since the issuance of the Solicitation, the numerous new and recurring work the Navy is requiring of the BOS contractor that far exceed the Solicitation's contemplated quantities, and the changed environment on JRM Guam, the only prudent course of action here is for the Navy to revise the Solicitation so that Fluor and DZSP can fairly address the Navy's actual requirements.

4. The Navy Failed To Evaluate the Guam GRT on an Equal Basis

152. In calculating the Guam GRT component of their respective cost proposals, both Fluor and DZSP proposed to deduct from their Guam tax obligations an available tax credit under the Guam Registered Apprenticeship Program. The GRAP allows for a tax deduction for certain costs associated with employing apprentices in Guam. *See* 22 G.C.A. Bus. Regs. § 10108.

⁴ *See*, Lamothe, *supra* note 3.

⁵ *See* GAO-17-415, DOD Should Resolve Capability Deficiencies and Infrastructure Risks and Revise Cost Estimates, April 2017 at 1.

[REDACTED]

153. Fluor and DZSP did not apply the tax credit in the same manner, resulting in different effective tax rates.

154. While it is clear that the GRAP makes apprentice wages (and associated fringe costs) fully tax-deductible, what is less clear is what types of instructor costs are tax deductible.

155. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

156. [REDACTED]
“costs paid or incurred by a program participant to train an apprentice,” 22 G.C.A. Bus. Regs. § 10102(n), [REDACTED].

157. The Navy cost evaluators failed to recognize the difference in the tax credit approaches of DZSP and Fluor, or to reconcile them for purposes of its cost evaluation, despite having previously allowed Fluor to revise its proposal to ensure that it was applying the same rate as DZSP.

158. Applying either the Fluor approach ([REDACTED]) or the DZSP approach ([REDACTED]) uniformly would have eliminated the evaluated price difference between the two offerors. *See* DZSP GAO Protest (Oct. 3, 2017), Ex. G, Declaration of Ryan Byrd at ¶ 19.

159. By failing to normalize the application GRAP in its most recent evaluation, as it did the GRT in a previous round, the Navy conducted a disparate and improper evaluation of DZSP’s proposal. *Hunt Building Co., Ltd. v. United States*, 61 Fed. Cl. 243, 273 (2004); *see also*

[REDACTED]

CW Gov't Travel, Inc. v. United States, 110 Fed. Cl. 462, 490 (2013) (“It is well-established that a ‘contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria.’” (quoting *Banknote Corp. of Am., Inc.*, 56 Fed. Cl. at 383)).

D. DZSP’s GAO Protest

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

161. On January 10, 2018, GAO issued a protected decision denying DZSP’s protest in part and dismissing it in part.

162. The GAO decision, however,

163. *First*, DZSP explained in detail how the Navy had misunderstood Fluor’s proposal to suggest that Fluor [REDACTED] to retain DZSP’s incumbent personnel.

But of course it was.

164. The Navy’s most recent award decision turned *entirely* upon its determination that DZSP’s proposed staffing plan was unrealistic, and its upward adjustment to DZSP’s proposed pricing based upon that determination. If DZSP’s proposed staffing approach was unrealistic, however, then so too was Fluor’s which proposed to retain 95% of DZSP’s incumbent staff at rates far lower than DZSP was proposing to pay *non-incumbents*.

165. Had the Navy understood and properly considered this aspect of Fluor’s proposal, it would have had to account for the risk resulting therefrom, either by reducing Fluor’s technical scores, or adjusting upward Fluor’s proposed price, as it did for DZSP. But the Navy did neither.



166. Any sort of adjustment to Fluor’s technical scores or costs would have resulted in DZSP’s proposal being either (1) clearly higher-rated technically; or (2) lower priced. In either case, DZSP would have had a substantial chance of award. DZSP was therefore prejudiced: But for the Navy’s failure to fully understand Fluor’s proposed approach, DZSP likely would have once again been awarded the Guam BOS contract.

167. ***Second***,

168. In the face of that conflict, there was no basis for GAO to assess the reasonableness of the Navy’s award decision. *See Honeywell Tech. Solutions, Inc.*, B-292354, Sep. 2, 2003, 2005 CPD ¶ 107 at 6 (holding that in absence of reconciliation of differing conclusions between cost and technical evaluators, “we cannot find the agency’s evaluation of proposals to be reasonable”).

169. ***Third***, with regards to DZSP’s argument regarding the Navy’s failure to normalize the application of the GRAP credit,

170.

171.

[REDACTED]

COUNT I:

THE NAVY'S EVALUATION OF FLUOR'S PROPOSAL WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO CONSIDER THE RISK RESULTING FROM FLUOR'S LIKELY INABILITY TO RETAIN THE INCUMBENT WORKFORCE

172. DZSP incorporates by reference the allegations set forth in paragraphs 1-171 as if fully set forth herein.

173. As described above at paragraphs 109 through 126, the Navy unreasonably interpreted Fluor's proposed staffing plan. The Navy believed that Fluor [REDACTED]; in fact, Fluor's proposal made clear that Fluor would do no such thing.

174. As a result, the Navy failed to consider the serious performance risk resulting from Fluor's inability to retain the incumbent workforce. Had it done so, the Navy would have been required to either (1) downgrade its scoring of Fluor's technical proposal; or (2) increase Fluor's total evaluated costs (as it did with DZSP).

175. The Navy failed to do either. Because it misunderstood Fluor's proposal, and therefore did not consider the risk associated with it, the Navy's evaluation was arbitrary and capricious, and its award to Fluor cannot stand.

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



**COUNT II:
THE NAVY’S EVALUATION WAS ARBITRARY AND CAPRICIOUS BECAUSE THE
REJECTED THE TET’S CONCLUSION THAT DZSP’S WORKFORCE-
REPLENISHMENT PLAN WAS REALISTIC**

177. DZSP incorporates by reference the allegations set forth in paragraphs 1-176 as if fully set forth herein.

178. As described above at paragraphs 127 through 141, the CET unreasonably dismissed DZSP’s plan to “green” its exempt labor workforce as unrealistic, even though the TET — the body with expertise in how the contract is run and what its workforce requirements are — had specifically found DZSP’s proposal *realistic*.

179. The CET’s conclusion is unsupported and unreasonably, and cannot be reconciled with the TET’s expert conclusion.

180. The Navy used the CET’s unexplained rejection of the TET’s conclusion as a basis for improperly increasing DZSP’s total evaluated costs.

181. But for that increase, DZSP’s proposal would have been lower-priced, and the Navy would have concluded that DZSP’s proposal, not Fluor’s, represented the best value to the Government.

182. In other words, DZSP would have had a substantial chance of award—as proven by the Navy’s repeated selection of DZSP in three prior rounds of this procurement.

183. Therefore, the Navy’s evaluation of DZSP’s proposal was arbitrary and capricious, and cannot stand.



**COUNT III:
THE NAVY'S AWARD IS INFIRM BECAUSE THE NAVY'S REQUIREMENTS HAVE
CHANGED DUE TO THE PASSAGE OF TIME**

184. DZSP incorporates by reference the allegations set forth in paragraphs 1-183 as if fully set forth herein.

185. As described above at paragraphs 142 through 151, given the passage of time, the Navy's actual requirements at JRM Guam have changed materially since the Navy issued its Solicitation in 2013. As a result, the 2013 Solicitation — against which Fluor and DZSP prepared their proposals — no longer represents the Navy's true requirements.

186. The changes to the scope and volume of work are so significant that they affect how the offerors would perform and price the work. Had the Navy issued a properly updated Solicitation, there is a substantial chance that DZSP would have won the contract.

187. Given the material changes in the Navy's requirements, the award to Fluor was invalid, and the Navy should revise the Solicitation and conduct a new competition for the Guam BOS contract.

**COUNT IV:
THE NAVY'S AWARD IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO
EVALUATE THE GUAM GRT ON AN EQUAL BASIS**

188. DZSP incorporates by reference the allegations set forth in paragraphs 1-187 as if fully set forth herein.

189. As described above at paragraphs 152 through 159, the Navy failed to normalize Fluor's and DZSP's application of the GRAP credit to the Guam Receipts Tax, despite having previously normalized the application of the tax rate itself, to Fluor's benefit. DZSP would have benefitted from the normalization of the GRAP. The Navy failed to treat Fluor and DZSP fairly and equally, rendering the Navy's award to Fluor infirm.



THE EQUITIES WEIGH IN FAVOR OF A PERMANENT INJUNCTION

190. DZSP incorporates by reference the allegations set forth in paragraphs 1-189 as if fully set forth herein.

191. 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.

192. Without an injunction, DZSP would 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.

193. The Navy, meanwhile, would not be harmed by such an injunction. DZSP currently provides Guam BOS services on a bridge contract that runs through April 30, 2018. It can continue to do so during the pendency of this of this matter. Moreover, as DZSP has explained, the currently solicitation is entirely outdated, and the Navy should re-procure these services entirely, as opposed to commencing with a new contract that simply does not meet the Navy's needs or address the significant changes on the ground at JRM Guam.

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

195. Finally, the public interest weighs in favor of injunctive relief, because 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:

- 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 for all of the reasons set forth herein;
- Enjoin the Navy and Fluor from commencing performance on the contract pending the issuance of a revised solicitation that adequately reflects the Navy's actual requirements, followed by a new competition and source selection decision;
- Grant any such other relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted,

s/ Anuj Vohra
JASON A. CAREY
ANUJ VOHRA
NOOREE LEE
JOHN SORRENTI
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
Tel: 202.662.5362
Fax: 202.778.5362

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Counsel for DZSP 21 LLC