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Decision

Matter of: SOS Interpreting, LTD.

File: B-293026; B-293026.2; B-293026.3

Date: January 20, 2004

Alison L. Doyle, Esq., and Dana B. Pashkoff, Esq., McKenna Long & Aldridge, for the protester.

Robert M. Moore, Esq., and Kristen A. Bennett, Esq., Moore & Lee, for McNeil Technologies, Inc., an intervenor.

Sandra M. DeBalzo, Esq., and J. Michael Sawyers, Esq., Department of Justice, for the agency.

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

DIGEST

1. Source selection decision selecting lower-priced proposal as the best-value under a solicitation containing an evaluation scheme that attached greater weight to technical merit was not reasonably based, where the lower-level evaluators found and documented that the protester's higher-priced proposal was technically superior, and the source selection authority determined the proposals were technically equal and made award based on the low-priced proposal, without considering the areas where the protester's proposal was found technically superior.

2. Agency should not consider protester's earlier agency-level protest in evaluating its proposal in the absence of some evidence of abuse of the bid protest process by the protester.

3. Under procurement for translation services covered by the Service Contract Act (SCA) that required proposals to include realistic prices for option years that allowed for any increases that may affect price, agency did not evaluate proposal prices on an equal basis to account for the real costs to the government, where the awardee's proposed prices for Spanish linguists did not escalate for the option years and its proposal evidenced the intention of obtaining contract price increases if SCA wage determinations increased the awardee's salary or benefit obligations for Spanish linguists, and the other offerors' proposals (and even the awardee's proposal for positions other than Spanish linguists) included escalating prices for the option years that apparently accounted for possible SCA increases.

DECISION

SOS Interpreting, LTD. protests the award of a contract to McNeil Technologies, Inc. under request for proposals (RFP) No. DEA-02-R-0001, issued by the Drug Enforcement Administration (DEA), Department of Justice, for translation, transcription, interpreting, interception, and monitoring support services.

We sustain the protests.

The RFP, issued May 24, 2002, was to acquire a variety of language services with related clerical and information technology services to support DEA's New England Field Division under a fixed-price, indefinite-delivery/indefinite-quantity contract for a base year with four 1-year option periods. The services were to assist the DEA with court-ordered (Title III) wiretaps in connection with ongoing criminal investigations, with consensual listening devices and other media, and with transcription of recorded material and translation of written documents.

The RFP provided for award on a best-value basis considering technical evaluation factors, past performance, and cost/price. The technical evaluation factors, listed in descending order of importance, were: management plan, quality control plan, and transition plan. Under the management plan factor, three subfactors--furnishing qualified personnel, recruiting and retention, and security plan--were identified; however, the relative weight of these subfactors was not disclosed. RFP § M.2.1. The RFP stated that the combined weight of the technical evaluation factors was more important than cost/price. RFP § M.2.2. The relative weight of the past performance factor was not disclosed in the RFP, although the RFP stated "the Offeror's technical capability [which includes past performance] is substantially more important than cost."¹ RFP § M.4.3. The RFP also noted, "[a]ward will not necessarily be made to the proposal with the lowest price or highest technical score." RFP § M.2.3. To evaluate past performance, the RFP stated that the agency would conduct "a performance risk assessment based on the offeror's present and past performance as related to the probability of successfully accomplishing the proposed effort." RFP § M.3. Prices were solicited for various labor categories, in

¹ Since we otherwise sustain the protest and recommend that discussions be conducted and revised proposals be submitted, the agency should take this opportunity to disclose the relative weight of past performance and the subfactors included in the management plan factor to the competitive range offerors. See 41 U.S.C. § 253a(b) (2000) (solicitation is required to disclose the relative importance of all significant factors and subfactors).

particular, linguists in various languages, for the base and option years, and were to be evaluated for realism and reasonableness.²

Six offerors, including McNeil and SOS, submitted proposals in response to the RFP. A technical evaluation panel (TEP) rated the proposals under the technical and past performance factors based on an adjectival rating scale.³ The TEP also assigned an overall proposal risk rating to each proposal.⁴

Both McNeil's and SOS's initial proposals received overall ratings of "highly satisfactory" with low risk. The TEP's ratings under each factor and subfactor were supported by detailed narratives. According to the initial consensus evaluation report, these proposals received identical "outstanding" ratings for the management plan factor with "highly satisfactory" ratings for each of the three subfactors of that factor.⁵ Initial Consensus Evaluation, McNeil's Evaluation, at 4-7; Initial Consensus Evaluation, SOS's Evaluation, at 4-7. SOS's proposal received "outstanding" ratings

² The RFP instructed that the "estimated prices for the option periods shall be a realistic price allowing for any increases which may affect prices (i.e., cost of living . . .)" and cautioned that "any significant inconsistency, if unexplained, raises fundamental issues of the offeror's understanding of the nature and scope of work required, and may be grounds for rejection of the proposal." RFP § L.6.2.b.

³ The possible adjectival ratings were "outstanding," "highly satisfactory," "satisfactory," "marginal," and "unsatisfactory."

⁴ The possible risk ratings were low, moderate, and high.

⁵ The record contains no explanation for the anomaly of an overall "outstanding" rating for the management factor, where each of the subfactors was rated "highly satisfactory," although we note that the management factor ratings were supported by narratives separate from the narratives provided for the subfactors. These proposals also received "outstanding" ratings for the management factor in the final TEP evaluation, notwithstanding the general lowering of the subfactor ratings.

Also, as noted above, according to the initial consensus evaluation report, SOS's initial proposal received a "highly satisfactory" rating for the personnel subfactor. However, the record indicates that this "highly satisfactory" rating may have been a clerical error and an "outstanding" rating may have been intended for this subfactor. This is suggested by the TEP's final evaluation report, which stated that it was lowering SOS's proposal's rating from the "outstanding" rating it received for its initial proposal under this subfactor to "highly satisfactory." Agency Report, Tab 7, Final TEP Report, at 15. This is also suggested by the individual TEP evaluators' rating sheets for this subfactor, each of which reflects an "outstanding" rating for SOS's proposal, supported by detailed narratives. Agency Report, Tab 9, Initial Evaluator's Worksheets, at 5.

and McNeil's proposal "highly satisfactory" ratings for the quality control plan and transition plan factors, and both offerors received "highly satisfactory" past performance ratings.

SOS's and McNeil's proposals were included in the competitive range along with two other proposals. No deficiencies were identified in either proposal, although several weaknesses were found. The DEA conducted detailed discussions tailored to each proposal included in the competitive range. Among the questions/clarifications posed to SOS during discussions were requests for it to identify the background and approach to staffing the proposed telecommunications specialist and to explain its "drug testing [policy] as a part of the security procedures." Agency Report, SOS's Final Proposal Revisions, at 4-5. Included among the questions/clarifications addressed to McNeil was, "Will the offeror be able to recruit and retain qualified personnel for Spanish [linguists] based on the rate(s) proposed for this labor category?" Agency Report, McNeil's Final Proposal Revisions, at 10. In addition, since the DEA had doubts concerning whether the offerors could provide a sufficient number of qualified interpreters to meet the agency's need to certify transcripts for court in a timely manner,⁶ both McNeil and SOS were asked, "How will the offeror provide for qualified state/court certified personnel for review/certification?" Agency Report, McNeil's Final Proposal Revision at 7; SOS's Final Proposal Revision, at 1.

Following the receipt of final revised proposals, the TEP reevaluated the proposals, which it documented in the final consensus evaluation report and the final TEP report. The final consensus evaluation report contains detailed narratives supporting each factor and subfactor rating. The final TEP report discusses the evaluation of the factors and subfactors where discussions were conducted; this report explains how the offerors' responses affected the ratings and justifies the ratings under these factors and subfactors. See Agency Report, Tab 7, Final TEP Report; Tab 8, Final Consensus Evaluation Report.

SOS's final revised proposal received the highest rating of the four proposals remaining in the competition with an overall rating of "highly satisfactory," with low risk. The TEP noted that SOS's final revised proposal reflected a deficiency under the furnishing qualified personnel subfactor because "SOS did not provide names or resumes for Linguists [representing at least four languages] who applied for work with SOS and who are already State/Federal court certified." Agency Report, Tab 8, Final Consensus Evaluation, SOS's Evaluation, at 6. As a result, the TEP stated that it lowered the SOS's proposal's rating from "outstanding" to "highly satisfactory" under this subfactor because SOS had "not adequately demonstrated how [it] will provide state-certified personnel for review/certification in all the required

⁶ Section C.5.2 of the RFP imposed "stringent time constraints" on providing personnel in response to task orders under the contract.

languages.”⁷ Id.; Agency Report, Tab 7, Final TEP Report, at 14. However, the TEP increased SOS’s proposal’s rating under the security plan subfactor from “highly satisfactory” to “outstanding” because SOS proposed [DELETED]. SOS’s proposal was still rated “outstanding” under the quality control plan and transition plan factors, and had “highly satisfactory” past performance. SOS’s price was [DELETED].

In contrast, McNeil’s final revised proposal received an overall technical rating of “satisfactory” with moderate risk. The TEP lowered McNeil’s proposal’s overall rating from its initial proposal’s rating of “highly satisfactory” with low risk because the TEP found McNeil’s final revised proposal reflected a deficiency under the personnel subfactor. This deficiency was that McNeil “has not demonstrated by what means [it] will locate federal/state court certified Linguists for the New England contract.” Agency Report, Tab 8, Final Consensus Evaluation, McNeil’s Evaluation, at 5. The TEP found in relation to this deficiency that McNeil had provided documentation for only two linguists, who were federal/state court certified in Spanish and Jamaican Patois, and that its other proposed linguists did not show federal/state certifications. Thus, McNeil’s proposal’s rating was lowered to “satisfactory” under the personnel subfactor and its overall risk was rated moderate. The other factor and subfactor ratings for McNeil’s proposal did not change in the final evaluation. McNeil’s proposed price was the lowest at \$40,302,240.⁸

As noted above, the TEP rated SOS’s final revised proposal as “highly satisfactory” with low risk and superior to McNeil’s final revised proposal rating of “satisfactory” with moderate risk. The TEP assigned SOS’s and McNeil’s final revised proposals identical adjectival ratings under all of the factors and subfactors, except for the personnel and security plan subfactors, and the quality control plan and transition plan factors, where SOS’s proposal was rated “outstanding” and McNeil’s proposal was rated “highly satisfactory,” which differences accounted for SOS’s higher rating. The TEP provided narratives supporting the proposals’ ratings under these factors and subfactors. For example, the reason that SOS’s final revised proposal was rated higher than McNeil’s final revised proposal under the personnel subfactor was that the TEP found that McNeil had not demonstrated how it would locate qualified linguists in the New England area and SOS’s proposal had done so. Based on these evaluation results, the TEP found that SOS

⁷ As indicated above, the initial evaluation documentation indicates that SOS’s proposal received a “highly satisfactory” rating for this subfactor, but that this might well have been a clerical error.

⁸ The other competitive range proposals offered higher prices than McNeil and SOS, and received overall technical ratings of “satisfactory” with moderate risk.

has demonstrated the best overall proven track record with respect to translation, transcription, interpreting and monitoring support services [and that] SOS is currently deployed at the New England Field Division and continues to provide excellent translation, transcription, interpreting and monitoring support services.

Agency Report, Tab 7, TEP Final Report, at 17.

In her source selection document, the SSA did not agree with the TEP's evaluation and determined that competitive range offerors' proposals, including McNeil's and SOS's, were "technically/substantially equal" and selected McNeil for award based on its low price. Agency Report, Tab 11, Source Selection Decision, at 17.

Specifically, the SSA did not agree with the TEP's overall technical and risk rating of SOS's proposal as "highly satisfactory" with low risk, and modified the rating to "satisfactory" with moderate risk. *Id.* at 15. In the source selection document, the SSA stated that SOS's proposal should have received a satisfactory rating for the personnel subfactor, inasmuch as she believed that the TEP apparently intended to downgrade SOS's proposal to a "satisfactory" rating, rather than the "highly satisfactory" rating it stated under this subfactor, based on the SSA's understanding that SOS's proposal's initial rating under this subfactor had been "highly satisfactory" rather than "outstanding."⁹ *Id.* Next, the SSA concluded that SOS's [DELETED] did not warrant increasing SOS's rating under the security plan subfactor because other proposals with similar [DELETED] did not receive such high ratings under this subfactor and because, prior to receipt of proposals, SOS protested to the agency certain provisions relating to the security process, which the SSA found "seem[ed] to contradict" SOS's commitment in its security plan to the security provisions that were protested. *Id.* at 15-16. Last, the SSA disagreed with the low risk assigned by the TEP to SOS's proposal and concluded that a moderate risk rating was warranted because of SOS's performance problems under prior similar contracts. *Id.* at 15-16. The SSA addressed none of the other areas where SOS's proposal was rated superior to McNeil's proposal.

The SSA also did not agree with the TEP's overall moderate risk rating of McNeil's proposal, which was based on the evaluated deficiency found in McNeil's proposal under the personnel subfactor, and found that McNeil's proposal's overall rating

⁹ The source selection decision also contains narrative concerning SOS's discussion responses related to this subfactor, including SOS's failure to identify individuals who were already federal/state certified (which was the reason the TEP lowered SOS's proposal rating under this subfactor) and its response to the telecommunications specialist questions, but does not explain why these responses support any particular rating for this subfactor. Agency Report, Tab 11, Source Selection Decision, at 14.

should be “satisfactory” with low risk. In this regard, the SSA found, based on her review, that McNeil had “identified personnel that met the Federal/State certified court interpreter requirements” and has sufficient resources to fulfill these requirements. Id. at 11-12.

Award was made to McNeil on September 26. This protest followed.

SOS challenges the reasonableness of, and lack of support for, the agency’s best-value decision, and argues that the SSA improperly converted the procurement to one based on low cost among technically acceptable proposals by normalizing the adjectival ratings, despite the technical distinctions between SOS’s and McNeil’s proposals.

In a negotiated procurement, contracting officials have broad discretion in determining the manner and extent to which they will make use of technical and cost results. See Preferred Sys. Solutions, Inc., B-292322 et al., Aug. 25, 2003, 2003 CPD ¶ 166 at 6. Federal Acquisition Regulation (FAR) § 15.308 states:

The [SSA’s] decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA’s independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

An agency which fails to adequately document its source selection decision bears the risk that our Office may be unable to determine whether the decision was proper. While source selection officials may reasonably disagree with evaluation ratings and results of lower-level evaluators, they are nonetheless bound by the fundamental requirement that their own independent judgments be reasonable, consistent with the stated evaluation factors and adequately documented. Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6.

Moreover, the propriety of a cost/technical tradeoff turns not on the difference in technical score, per se, but on whether the contracting agency’s judgment concerning the significance of that difference was reasonable in light of the solicitation’s evaluation scheme. Where cost is secondary to technical considerations under a solicitation’s evaluation scheme, as here, the selection of a lower-priced proposal over a proposal with a higher technical rating requires an adequate justification, i.e., one showing the agency reasonably concluded that notwithstanding the point or adjectival differential between the two proposals, they

were essentially equal in technical merit, or that the differential in the evaluation ratings between the proposals was not worth the cost premium associated with selection of the higher technically rated proposal. Where there is inadequate supporting rationale in the record for a decision to select a lower-priced proposal with a lower technical ranking, notwithstanding a solicitation's emphasis on technical factors, we cannot conclude that the agency had a reasonable basis for its decision. Preferred Sys. Solutions, Inc., *supra*, at 7; MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 at 5.

As noted above, the rationale stated in the source selection decision for selecting McNeil's proposal as the best value was the SSA's conclusion that all of the competitive range proposals were technically substantially equal. In making this decision, the SSA discussed certain aspects of the proposals, in particular the evaluation of SOS's proposal under the personnel and security plan subfactors and the past performance factor, and the evaluation of McNeil's proposal under the personnel subfactor. Although the SSA's analysis documents the rationale for adjusting the adjectival scores under these subfactors and factor, she does not discuss or acknowledge SOS's evaluated advantage under the other two technical evaluation factors, quality control plan and transition plan, where SOS's proposal was assigned "outstanding" ratings and McNeil's proposal received only "highly satisfactory" ratings. The record shows that the TEP provided detailed reasons for the proposals' respective ratings under these subfactors.¹⁰ Agency Report, Tab 8, Final Consensus Evaluation, McNeil's Evaluation, at 10, 15; Final Consensus Evaluation, SOS's Evaluation, at 10, 15; Initial Consensus Evaluation, McNeil's Evaluation, at 8, 12; Initial Consensus Evaluation, SOS's Evaluation at 8, 12. Because of SOS's proposal's documented superiority under these factors and the SSA's failure to consider this evaluated superiority in her source selection decision, the SSA's statement that the proposals were technically substantially equal is not reasonably supported by the contemporaneous documentation.

A hearing was convened at our Office to address "whether the [agency] had a reasonable basis for its source selection decision, particularly the various adjustments made to [the evaluation of SOS's and McNeil's proposals]." At this hearing, the SSA did not offer any additional reasons to supplement the incomplete analysis reflected in the source selection document. While the SSA testified that she thought the TEP's evaluation documentation did not support the ratings assigned SOS's proposal under the factors and subfactors, Hearing Transcript (Tr.) at 23-25, 38, she only elaborated on the areas where she had already disagreed with the TEP's ratings, that is, under the personnel and security plan subfactors, and the past performance factor. The SSA also testified that she did not make a comparative assessment of the proposals under each evaluation factor, as required by FAR

¹⁰ For example, SOS proposed a [DELETED], considerably faster than McNeil's 90-day transition period.

§ 15.308. Tr. at 58. Thus, we find that the SSA's relatively conclusory statements at the hearing fall short of the requirement to justify a source selection decision, where, as here, there are documented qualitative technical distinctions between two competing proposals. See Preferred Sys. Solutions, Inc., *supra*, at 7; Johnson Controls World Servs., Inc., *supra*, at 9.

At the hearing, the SSA also essentially repudiated her finding that McNeil's and SOS's proposals were substantially technically equal, and testified that she considered both the proposals to be technically acceptable, rather than technically equal, and that in reviewing the two proposals "[she] did not see anything that was basically that superior to warrant paying [DELETED] extra in costs."¹¹ Tr. at 63-64. In our view, the inadequately supported source selection decision and testimony of the SSA suggest that the agency may have improperly converted the source selection to one based upon technical acceptability and low price, instead of one that emphasized relative technical superiority, as was contemplated by the RFP's evaluation scheme here. An agency does not have the discretion to announce in the solicitation that it will use one evaluation plan, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in evaluating proposals and making its award decision, or inform all offerors of any significant changes made in the evaluation scheme. See Preferred Sys. Solutions, Inc., *supra*, at 10.

Because the source selection decision was not reasonable or consistent with the solicitation's best-value evaluation scheme, we sustain the protest. Before turning to the recommendation, we need to address certain other issues pertaining to the proposal evaluation and source selection decision.

For example, SOS questions the propriety of the agency's past performance evaluation, including the SSA's decision to increase SOS's overall proposal risk rating to moderate risk because of a past performance problem. SOS argues that the agency failed to properly take into account efforts made by SOS to address this problem. SOS also argues that DEA failed to similarly consider McNeil's past performance problems.

Based on our review of the record, including the hearing testimony, we find no basis to question the agency's past performance evaluation. While SOS claimed that DEA ignored information that it submitted to address negative past performance

¹¹ Consistent with this testimony, the SSA also testified that based on her review of the proposals and evaluation reports, she "made a determination as to whom [she] thought was basically capable of award." Tr. at 26. The SSA also testified that because she had an "acceptable offer" from McNeil "whose proposal is almost [DELETED] less than" SOS's proposal, "it only makes sense" to make award based on McNeil's proposal. Tr. at 35-36.

concerns, the SSA testified that she considered all of the information submitted by the protester involving its past performance, including SOS's efforts to cure prior negative performance, in determining that SOS's past performance caused its proposal to be considered a moderate risk. See Tr. at 56. An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. Maytag Aircraft Corp., B-287589, July 5, 2001, 2001 CPD ¶ 121 at 7. Although SOS argues that DEA failed to consider allegedly similar performance problems in McNeil's past performance, the SSA testified that she was aware of the alleged problems, which occurred several years ago, but thought that the government contributed to these problems. See Tr. at 69.

SOS's protests that the agency's use of an overall risk rating constituted an improper unstated evaluation factor. We disagree. As a general rule, evaluating risk with respect to an offeror's proposal and technical approach, even though risk is not specifically stated as an evaluation factor, is not improper because considering risk is inherent in the evaluation of technical proposals. Communications Int'l, Inc., B-246067, Feb. 18, 1992, 92-1 CPD ¶ 194 at 6. Here, however, we are uncertain how the risk ratings affected, or should have affected, the source selection decision, given that this decision was ultimately based entirely on price (among acceptable proposals) and the RFP did not state how risk would be considered in the evaluation. In our view, the agency would be well advised to review the propriety and use of this overall risk rating before making the new source selection decision recommended below.

SOS also protested the evaluation of the proposals under the personnel subfactor. While we do not agree with SOS that its proposal could not be reasonably downgraded because it did not provide sufficient names and/or resumes in the various language categories, the record does not evidence that SOS's and McNeil's proposals should be rated equally under this subfactor. This is so primarily because it appears that the SSA may have misapprehended the TEP's evaluation and rating of SOS's proposal under this subfactor, given the confusion (described above) as to whether SOS's proposal's initial rating was "outstanding" and should be lowered to "highly satisfactory" or whether it was "highly satisfactory" and should be lowered to "satisfactory."¹²

As to the security subfactor, we have no reason to find unreasonable the agency's judgment that SOS's proposal should not be rated "outstanding" because of its [DELETED], given that other proposals offering such a [DELETED] were not given the same consideration. Nevertheless, we are concerned about the source selection document's references to an agency-level protest filed by SOS concerning provisions

¹² The record indicates that the SSA did not discuss this problem with the TEP before making her source selection decision. See Tr. at 52-53.

that relate to the security plan. That is, although the SSA acknowledged that SOS had not taken exception to the protested requirements in its proposal, she nevertheless expressed concern regarding SOS's security plan solely because of its agency-level bid protest of these requirements. Since SOS had the right to file protests of solicitation terms with which it disagreed, FAR § 33.103, we question the propriety of the SSA's considering SOS's protest in evaluating its proposal under this RFP, in the absence of some evidence of abuse of the bid protest process. See Nova Group, Inc., B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56 at 6.

Finally, SOS complains about the evaluation of McNeil's price. As noted by the protester, the prices in McNeil's final revised proposal for Spanish linguists in contract line item Nos. 0005 and 0005A (which constituted a majority of the work required by the contract) failed to include escalation for the option years. However, the section L.6.2.b of the RFP (quoted above) required offerors to propose realistic prices that allowed for increases, for things such as cost of living, in the option years, and the record shows that all of the initial proposals, including McNeil's, provided escalating prices for each labor category in the option years.

In response to the agency's discussion question expressing concern about McNeil's low rates for the Spanish linguist labor category (which were escalated over the option years) in its initial proposal, McNeil changed its pricing for this category and no longer escalated these rates over the option years,¹³ and explained these changes as follows:

McNeil has reviewed our proposed rates for the Spanish linguists . . . and has increased the direct hourly rate (i.e., the rate paid to the linguists) from [DELETED]. This is a rate that is [DELETED]. When SCA changes are made, McNeil will make the appropriate labor cost changes. Our experience on DEA projects in San Diego and on [Blanket Purchase Agreements] in New England demonstrates that [DELETED] enables us to recruit and retain highly qualified Spanish linguists.

Agency Report, McNeil's Final Revised Proposal, at 10.

The record indicates that for its Spanish linguist prices, McNeil has not followed the RFP's proposal instructions by accounting in its proposed price for "any increases," as was contemplated by the RFP. Rather, it appears that its Spanish linguist prices were premised upon receiving equitable adjustments to its contract price if an SCA wage determination were issued that increased its salary or benefit obligations for

¹³ However, McNeil's proposal continued to escalate its other rates over the option years.

Spanish linguists.¹⁴ That is, while it appears that the proposals that followed the proposal instructions may have accounted for possible SCA increases in their escalated prices for the option years, it appears that McNeil did not do so for the Spanish linguists, but retained the right to obtain an increase in its contract price in such circumstances.¹⁵

Therefore, it appears that the proposal prices may not have been compared on an equal basis to account for the real cost to the government of accepting a particular proposal for award because some proposals apparently took into account possible SCA increases, while, for the Spanish linguist line items, McNeil's did not. An agency, at a minimum, is required to evaluate offerors on an equal basis and in a manner such that the total cost to the government for the required services can be meaningfully assessed. See Symlicity Corp. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 7; Lockheed Aeronautical Sys. Co., B-252235.2, Aug. 4, 1993, 93-2 CPD ¶ 80 at 7 ("apples and oranges" cost evaluation is "inherently improper"). According to the protester, if McNeil had included escalation in its Spanish linguist prices at the same escalation rates it used for its other prices, its total evaluated price would have been almost \$1.5 million higher. Given the possible impact of this discrepancy in McNeil's proposal on the competition, this matter should be resolved with McNeil during discussions.

We recommend that the DEA review the solicitation's evaluation scheme and amend it to reflect the agency's requirements,¹⁶ reopen discussions with all offerors whose

¹⁴ FAR § 52.222-43, Fair Labor Standards Act and Service Contract Act--Price Adjustment, which was incorporated by reference into the RFP, see RFP § I.1, provides for equitable adjustments to the contract price, where the contractor warrants that the contract prices do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

¹⁵ We note that McNeil has not maintained that its fixed price for Spanish linguists already accounts for possible SCA adjustments. While the SSA testified that offerors would always get equitable adjustments for SCA increases so she was not concerned about McNeil's failure to escalate its prices, Tr. at 66-67, this does not account for the proposal instructions that required prices to be realistic "allowing for any increases that affect prices," or that offerors with prices that accounted for the contingency covering SCA wage increases would not receive an equitable adjustment under FAR § 52.222-43.

¹⁶ As noted above, the agency should disclose the relative weight of the evaluation factors and subfactors, and decide whether award should be based upon a comparative assessment of the proposals and price/technical tradeoff, or be based upon the low priced, technically acceptable proposal.

proposals were in the competitive range,¹⁷ obtain revised proposals, reevaluate the proposals, and make a new source selection with a proper price/technical tradeoff decision. If McNeil is not the successful offeror, its contract should be terminated and a new award made. We also recommend that the agency reimburse SOS the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.8(d)(1) (2004). SOS's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Anthony H. Gamboa
General Counsel

¹⁷ Discussions would be needed to resolve the discrepancy in McNeil's proposal regarding its prices for Spanish linguists. In such a case, discussions are required with all competitive range offerors. See FAR § 15.306(d)(3).