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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Water Services, Inc.

File: B-295376

Date: February 8, 2005

Sheila C. Stark, Esq., and Thomas C. Wheeler, Esq., DLA Piper Rudnick Gray Cary US LLP, for the protester.
Kenneth A. Martin, Esq., Martin & Associates, for Hardin County Water District #1, an intervenor.
Danica S. Irvine, Esq., Defense Logistics Agency, for the agency.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging agency improperly assumed that regulated offerors presented lower risk than non-regulated offerors in its evaluation of proposals for privatization of wastewater and storm water utility systems is denied where the solicitation provided that proposals would be evaluated based on the degree to which long-term price and service stability were enhanced as a result of regulation by an independent federal, state, or local regulatory authority with jurisdiction over the applicable utility service, and where the record shows that the agency reasonably concluded that regulated utility offeror presented low risk under evaluation subfactor relating to long-term price and service stability.

2. Agency's determination that the awardee's prices for wastewater and storm water utility services were fair and reasonable, that the work could be performed at the prices proposed, and that the awardee's proposal represented low risk for price realism was reasonable where the agency based its conclusion on extensive consideration of the awardee's pricing strategy, the elements of its pricing, and the detailed breakdowns of its price structure, as well as the agency's comparison of the awardee's price with the government's cost estimate and the agency's consideration of the awardee's status as a regulated entity.

3. Offeror's proposal for wastewater and storm water utility services was not rendered unacceptable where it proposed rates that were contingent upon approval by an independent regulatory body after contract award.

DECISION

American Water Services, Inc. (AWS) protests the award of a contract to Hardin County Water District #1 by the Defense Energy Support Center (DESC) under request for proposals (RFP) No. SP0600-01-R-0121 for the privatization of the wastewater and storm water utility systems at Fort Knox Army Installation in Kentucky. AWS argues that the agency applied unstated criteria in its evaluation of proposals, the agency's price realism analysis was improper, and that Hardin was not eligible for award because it submitted a "qualified" offer.

We deny the protest.

BACKGROUND

DESC issued the subject solicitation on April 9, 2001 for the privatization of the Army's wastewater and storm water systems located on the Fort Knox Army Installation in Kentucky.[1] The authority to convey these utility systems is provided by 10 U.S.C. § 2688 (2000), which authorizes agencies to privatize, or convey, a utility system so long as it is in the long-term economic interest of the government. In this instance, the Army's privatization effort contemplated the sale of the wastewater and storm water infrastructure and the concomitant acquisition from the purchaser of the services associated with the operation, maintenance, repair and upgrade of the systems for a period of 50 years. Purchase of a commodity (i.e., water) was expressly not included in the solicitation. RFP § C.2.1.

In essence, the RFP was a performance-based solicitation. Since the ultimate awardee was to assume ownership of the utility systems, the solicitation did not provide for required capital improvements, upgrades, renewals, or replacements for the wastewater or storm water infrastructure. Rather, the solicitation essentially catalogued the scope and condition of the infrastructure maintained by the government and required offerors to propose their plans for addressing the needs of the system over the 50-year life of the contract.

Under the solicitation, award was to be made to the offeror whose proposal represented the best value to the government based on five evaluation factors: (1) technical capability, including five subfactors of varying importance (service interruption/contingency plan, operations and maintenance plan and quality management plan, capital upgrades and renewals and replacements plan, operational transition plan, and financial strength); (2) past performance; (3) risk, including three subfactors of equal importance (performance, assurance of long-term price and service stability, and price realism); (4) socioeconomic plan; and (5) price. The RFP

[1] DESC is a field activity of the Defense Logistics Agency and enters into utility privatization contracts on behalf of the Army and Air Force installations. Contracting Officer's (CO) Report at 2.

stated that technical capability, past performance, and risk were of equal importance, the socioeconomic factor was least important, and when combined, these four factors were significantly more important than price.

As it relates to the subject protest, under the second subfactor of the risk factor, assurance of long-term price and service stability, the solicitation stated:

> Proposals will be evaluated on the degree to which it [sic] long-term price and service stability are enhanced as a result of regulation by an independent federal, state, or local regulatory authority with jurisdiction over the applicable utility service.

RFP § M.3.

The solicitation also stated, under the third risk subfactor, price realism, that realism would be based on an evaluation of the information provided in support of the offered price "to determine if the prices reflect a clear understanding of the requirements; are consistent with the various elements of the offeror's technical proposal; are not unbalanced; and are neither excessive nor insufficient for the effort to be accomplished." RFP § M.3.

With regard to price, the RFP contemplated the possibility that both regulated utilities and non-regulated entities would submit offers and included different instructions for the submission of price proposals depending upon an offeror's status. As a general matter, non-regulated offerors were required to submit their prices using schedule B-1 and various associated schedules. These schedules essentially captured four separate cost components: (1) operation and maintenance (O&M); (2) renewals and replacements (R&R); (3) initial capital improvement (ICI) and (4) the offeror's purchase price for the utility systems.

For the O&M component, offerors were required to "provide detailed pricing data for all labor (direct and indirect), materials and procurement costs, insurance, equipment, general and administrative, overhead costs, and any other cost identified by the offeror." RFP § L.7.5. Under the R&R component, offerors were required to establish a 50-year schedule for renewal and replacement of major system components. ICI consisted of repairs, replacement, and improvement activities "required to bring the utility system, as purchased, up to legally applicable regulatory standards or the standards typically maintained by the Contractor . . . ." RFP § C.11.2.1. The RFP provided that the offeror's purchase price would serve as a credit against the service charges and that the credit would be recovered over a set number of months as proposed by the offeror. The RFP further provided that during the contract administration phase, prices were subject to redetermination every 3 years after an initial period of performance. RFP § B.7, Federal Acquisition Regulation (FAR) Clause 52.216-5, Price Redetermination - Prospective (Oct. 1997).

The RFP also contemplated the submission of "alternate" price proposals by regulated entities and anticipated that they would propose "established or special tariff(s), schedule(s) and rate(s)." RFP § B.6.1. These offerors were to submit their prices using schedule B-2 and were required to provide "an explanation of each tariff, how each tariff will be applied, the locations to which each tariff applies, and the rationale for applying each tariff." RFP § L.7.5 at 74. As with non-regulated offerors, the RFP provided that the regulated offerors were to separately submit their prices for ICI and that the purchase price for the wastewater and storm water systems would be credited towards the government's payments on a monthly basis for the utility services provided. RFP § C. However, unlike offerors using schedule B-1, regulated offerors were not required to separately set forth their O&M or R&R pricing as these cost components were presumably captured in the proposed tariff rate. RFP amend. 2, Question 12, at 4. The RFP further provided that during contract administration, changes to a tariff rate would be made in accordance with FAR Clause 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services (Feb. 1995), which sets forth the procedures for price adjustments through the life of the contract. RFP § G.3.2 Schedule B-2.

Three offerors, including AWS and Hardin, submitted proposals in response to the RFP.[2] AWS submitted its price using schedule B-1 and Hardin submitted its proposal as a regulated entity using schedule B-2. In its proposal, Hardin represented that it "is a political subdivision of Hardin County, charged with providing water service to the northern part of the county surrounding Fort Knox" and further indicated that its "rates to Fort Knox will be regulated by the Kentucky Public Service Commission (PSC). This agency acts on behalf of utility customers to protect their rights." Hardin's Proposal at FPR-V-I-ES-2. Throughout its proposal, Hardin highlighted the fact that it was regulated by the PSC. For example, with regard to its O&M plan, Hardin's proposal stated:

> The District, for example, is a regulated utility and its operations and finances are monitored by the [PSC] in addition to the Kentucky Division of Water (DOW). The PSC will even look at the District finances to assure that funds are being properly spent and funds are being set aside for renewals and replacements.

Hardin's Final Proposal, at V-I-2-36. See also Hardin's Final Proposal, at FPR-V-IV-2-8, 9 (outlining 15 protections afforded the government by PSC regulation in connection with receiving service from Hardin).

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[2] The agency's evaluation of the third offeror is not relevant to our decision in this case.

After its initial evaluation of proposals, the agency held extensive discussions with the offerors and during the course of these discussions the agency raised numerous issues regarding the price aspects of Hardin's proposal. AR, Tab 9, Technical Consensus Report, at 90-113. As it relates to this case, Hardin's initial proposal included a unit price of [deleted] per 1,000 gallons of water for the wastewater service and the agency raised numerous questions about this rate during the course of negotiations. One question concerned whether the rate had to be approved by the PSC or whether the rate was already "official." In response, Hardin explained that the rate had not been approved by the PSC and that Hardin could not submit the rate for approval until it had executed a contract with the government. According to Hardin, however, based on the past practices and policies of the PSC, a contract executed in good faith would be approved. Hardin added that it had discussed its proposal and rate with the PSC, that it was confident the rate would be approved, and that it planned to keep the PSC advised as to the progression of its negotiations with the agency. AR, Tab 9, Technical Consensus Report, at 92.

As a result of its negotiations with the agency, Hardin changed its unit pricing structure (the [deleted] per 1,000 gallons rate) for wastewater to a fixed monthly charge of $234,329. Hardin made the change in an effort to address the agency's stated concerns about cost variability resulting from varying flow rates of the water system. Hardin's Final Proposal, at FPR-V-IV-2-6, 7; AR, Tab 13, Cost Realism Final Report, at 3. Hardin's storm water charge remained a fixed rate at $34,505 per month and in its final proposal Hardin guaranteed the monthly and annual prices for the first 3 years of performance. Hardin's Final Proposal, at FPR-V-IV-2-10.

During discussions the agency also raised several questions about the cost elements of Hardin's prices. More specifically, the agency informed Hardin that its R&R costs appeared low. AR, Tab 9, Technical Consensus Report, at 72. In response, Hardin provided an extensive explanation of its R&R plan, indicating, in part, that it did not provide for R&R in areas where Fort Knox planned to redevelop base housing since all the utilities were to be replaced by the military. Id. at 73; Hardin's Proposal at AT-23-1, 2. Hardin further indicated that its R&R plan budgeted for replacing 6,658 linear feet (LF) and rehabilitating an additional 6,658 LF of line per year. Id. The total annual budget for Hardin's R&R plan was [deleted], which included $1,127,475 for replacing 6,658 LF and rehabilitating 6,658 LF of line per year. Hardin's proposal provided the most extensive R&R plan of the three offerors, addressing a total of 758,500 LF of line. AR, Tab 2, Burns & McDonnell Report,[3] at III-4.

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[3] The agency contracted with the firm Burns & McDonnell to prepare an independent government estimate and to provide a report concerning the costs and benefits associated with privatization of the wastewater and storm water systems. The final report included a comparative analysis of the proposals received by the agency.

With regard to other cost issues, the agency asked Hardin to provide a more detailed breakdown of its storm water charge, to explain its proposed cost for providing "radio telemetry," and detail the services included under its price for Geographic Information System (GIS) mapping of the sewer and storm water systems, as well as various other price-related issues. As a result, Hardin's final price proposal included a detailed breakdown of its R&R budget, ICI, and O&M costs for each of the two systems.

Hardin's detailed ICI cost breakdown totaled $1,415,876 (this total cost was spread over a 2-year period) and included, among other items, a permit transfer cost of $30,000, GIS mapping of the water systems for $166,000, repairing 336 manholes at a cost of $244,400, and sewer line repairs at a cost of $200,000. Similarly, the breakdown of the annual O&M budget proposed by Hardin included line item prices for costs such as "salaries and benefits," "vehicle costs," "laboratory and industrial pretreatment program," "chemicals," and "business costs."[4] Hardin's Final Proposal, at FPR-V-IV-2-7.

AWS's proposed privatization solution and pricing differed from that of Hardin. AWS proposed the least extensive plan for replacing and repairing system lines, addressing only 422,000 LF. AR, Tab 2, Burns & McDonnel Report, at III-4. In addition, AWS included the cost for replacing and repairing a significant portion of the system lines as part of its ICI plan over a 5-year period and, as a consequence, AWS's total ICI cost was [deleted], significantly higher than the ICI cost proposed by Hardin, which, as noted above, was $1,415,876 covering a 2-year period. In addition, AWS's ICI price included "transition" costs [deleted] for personnel/human resources expenses, vehicle purchases, and tools and equipment purchases. AWS Proposal, Vol. IV-Price Proposal, at 1, 5-6.

Final proposal revisions were submitted on August 30, 2004. Based on the agency's evaluation of the final proposals, AWS and Hardin received the following evaluation ratings:

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[4] Hardin's various O&M costs include references to required equipment. See Hardin's Final Proposal, at FPR-V-IV-2-16. Initially, Hardin included its costs for tools, safety equipment, and other similar items under its ICI pricing. At the agency's request, however, Hardin instead included these items under its O&M pricing. Hardin's Final Proposal, at FPR-V-I-ES-2.

	AWS	HARDIN
OVERALL TECHNICAL CAPABILITY	ACCEPTABLE	ACCEPTABLE
Service Interruption/Contingency Plan	Acceptable	Acceptable
Q&M/Quality Management Plan	Acceptable	Acceptable
Capital Upgrades and R&R Plan	Acceptable	Acceptable
Operational Transition Plan	Acceptable	Acceptable
Financial Strength	Acceptable	Acceptable
OVERALL RISK	LOW	LOW
Performance	Low	Low
Assurance of Long-Term Price & Service Stability	Moderate[5]	Low
Price Realism	Low	Low
PAST PERFORMANCE	VERY GOOD/ SIGNIFICANT CONFIDENCE	EXCELLENT/ HIGH CONFIDENCE
SOCIOECONOMIC	GOOD	EXCELLENT
PRICE	$108,020,091	$73,764,920

With regard to the agency's evaluation of proposals, two of the subfactors under the risk factor are relevant to the subject protest, specifically, assurance of long-term price and service stability, and price realism. In its evaluation of Hardin's proposal under the long-term price and service stability subfactor, the evaluators noted that Hardin was regulated by the Kentucky PSC and concluded that Hardin's proposal represented a low risk. With regard to Hardin's regulatory status, the agency stated:

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[5] There is some question in the record as to whether the agency's technical evaluators scored AWS as "low" or "moderate" under the assurance of long-term price and service stability subfactor. In several places in the record, AWS appears to have received a score of "low" from the technical evaluators. See AR, Tab 9, Technical Consensus Report, at 7 and 135. In addition, a debriefing document provided to AWS reflected a rating of "low" for this subfactor. AR, Tab 12, Debriefing of AWS, at 2. On the other hand, the source selection authority, without making reference to the technical evaluator ratings, rated AWS as presenting "moderate" risk under this subfactor. AR, Tab 10, Source Selection Decision, at 3. According to the agency, the rating of "low" reflected in the debriefing document provided to AWS was a typographical error. As more fully discussed below, we need not resolve the question of AWS's rating under this subfactor as any alleged error in this area did not prejudice AWS.

> Regulation of utility services is seen as an enhancement to price and service stability. A utility provider generally has a monopoly on a service area, and regulation provides a means to represent the consumer[']s interest in setting appropriate rates and quality of service. Regulation by an independent authority provides the greatest representation for the consumer, whereas non-independent authorities provide some representation for the consumer but also represent the interests of the utility service provider. For the purposes of utility privatization, the Government is selling the utility distribution or collection system to a single entity. This in effect is creating a monopoly for that entity in providing service. Therefore the degree of regulation has an impact on the level of risk associated with long term price and service stability.

AR, Tab 9, Technical Evaluation Consensus Report, at 89.

The source selection authority reiterated the evaluator's conclusion that Hardin's status as a regulated entity presented its proposal with a low risk under this subfactor and stated:

> The PSC is a State agency designated to protect and assure customers they are receiving quality services at a fair price. It will have jurisdiction over the rates charged and the services offered by Hardin County throughout the contract term. Accordingly regulation by the PSC provides reasonable assurance of price and service stability.

AR, Tab 10, Source Selection Decision Document, at 4.

With regard to AWS, the source selection authority further concluded that because its prices were redeterminable and AWS was not subject to an independent regulatory authority, AWS's proposal presented a moderate risk under this subfactor. Id.

In evaluating Hardin's proposal under the price realism subfactor, the technical evaluators concluded that Hardin presented low risk. AR, Tab 9, Technical Evaluation Consensus Report, at 90. The agency documented its price realism evaluation for Hardin in a final report, which compared Hardin's price with the government's cost estimate and cited excerpts of the various pricing concerns raised by the government during its discussions with Hardin and Hardin's responses to those concerns and noted that Hardin's responses were satisfactory. See AR, Tab 13, Cost Realism Final Report; see also AR, Tab 9, Technical Evaluation Consensus Report, at 90-114 (documenting the agency's pricing concerns and Hardin's responses).

Based, in part, on the responses provided by Hardin, and "the tariff approval process enforced by the PSC," the report concluded that Hardin's prices "reflect a clear understanding of the requirements, are neither excessive nor insufficient for the effort to be accomplished, and are consistent with the elements of Hardin County's proposal." Id. at 9. The source selection authority agreed with the report's assessment and expressly stated that Hardin's rates were effectively guaranteed to be fair and realistic by virtue of their being monitored and subject to review by the PSC. AR, Tab 10, Source Selection Decision Document, at 4-7.

While it found both proposals to be overall technically acceptable, the source selection authority concluded that Hardin's offer was more advantageous given that AWS was lower rated under the past performance and socioeconomic factors and Hardin's price was substantially lower and presented less risk given that Hardin's rates were regulated. AR, Tab 10, Source Selection Decision Document, at 6. Upon being notified of the agency's award decision, AWS filed this protest with our Office.

Subsequent to the filing of this protest, Hardin submitted its contract for privatization of the Fort Knox wastewater and storm water systems to the Kentucky PSC for approval. The contract expressly provided that if Hardin failed to obtain PSC approval, the contract could be terminated without cost to either party. AR, Tab 15, Preamble to Hardin Contract. Upon its review of the contract, the PSC issued a ruling approving Hardin's acquisition of the Fort Knox wastewater system, indicating that Hardin's operation of the system would be subject to the commission's jurisdiction and approving Hardin's proposed rates for wastewater service as reasonable. Protester's Comments, encl. 2, Kentucky PSC Ruling, ¶¶ 17, 19, at 10. The PSC, however, further concluded that it did not have jurisdiction over Hardin's provision of storm water services and that Hardin did not require approval of the proposed storm water service rate. The PSC's ruling also raised "concerns" about Hardin's legal authority to provide storm water services--advising Hardin to "carefully review its legal authority to provide such service" and if necessary petition the state legislature for revisions to applicable laws. Id. ¶ 18, n.9, at 10.

DISCUSSION

AWS challenges the agency's evaluation of proposals under the subfactor relating to long-term price and service stability and contends that the agency's price realism analysis was flawed. AWS also argues that Hardin's proposal was not eligible for award because it was conditioned upon approval by the Kentucky PSC.

We review challenges to an agency's evaluation only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. American States Utilities Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 4. Here, as explained below, we see no basis to question the agency's evaluation.

Assurance of Long-Term Price and Service Stability

AWS asserts that the agency failed to evaluate proposals in accordance with the terms of the RFP under the subfactor relating to assurance of long-term price and service stability. According to AWS, instead of considering the degree to which an offeror's status as a regulated utility may have enhanced its price and service stability as required by the RFP, the agency improperly assumed that regulated offerors represented a lower risk. Protester's Comments at 2. AWS argues that this assumption led to an undisclosed evaluation methodology whereby only regulated offerors could receive a "low" risk rating, and unregulated offerors could do no better than a "moderate" rating.

Based upon our review of the record, we find that the agency's evaluation of Hardin's proposal was both reasonable and consistent with the solicitation provisions regarding evaluation of proposals in this area. The RFP stated that proposals would be evaluated "on the degree to which it [sic] long-term price and service stability are enhanced as a result of regulation by an independent federal, state, or local regulatory authority with jurisdiction over the applicable utility service." RFP § M.3. In evaluating Hardin's proposal, the agency expressly noted the price and service advantages afforded by Hardin's regulation by the PSC. Specifically, agency evaluators considered the fact that by virtue of privatization, the agency would essentially be granting a particular contractor a monopoly over the utility systems--effectively eliminating any future competition for service of the utilities. In this regard, the agency concluded that regulation of Hardin by the PSC offset the concerns stemming from the contractor being a monopoly because Hardin would be prohibited from seeking future price increases that were unreasonable or unfair. In the agency's view, this served to enhance the stability of Hardin's price over the long term. AWS's proposal, on the other hand, which provided for price renegotiation every 3 years, simply did not afford any comparable protections. The agency also noted that the quality of Hardin's service would be overseen by the PSC, thus providing the agency with further assurance of Hardin's long-term service stability. In our view, this analysis and evaluation demonstrate that the agency specifically considered how PSC regulation of Hardin was advantageous from a long-term price and service standpoint and provided a rational basis for assigning Hardin a rating of low risk under this subfactor.[6]

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[6] To the extent AWS also argues that it too should have received a low risk rating instead of a rating of moderate under this subfactor, we need not address this issue since the record shows that AWS suffered no prejudice as a result of any alleged error in this area. As explained above, both offerors received an overall rating of "low" under the risk factor, and we see no basis to question either Hardin's low risk rating under the subfactor challenged by AWS, or its overall low risk rating. With regard to AWS's risk rating, even if the "moderate" rating it received under the stability subfactor was erroneous, it would have no effect on AWS's overall risk

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AWS also argues that Hardin's rating of "low" risk under this subfactor improperly was based upon the agency's erroneous assumptions about PSC regulation of Hardin's prices. Principally, AWS points to the fact that the PSC has expressly found that it does not have jurisdiction over Hardin's storm water pricing. Because Hardin's storm water rate was not actually subject to PSC regulation, Hardin's rating of "low" risk as a result of its regulated status was thus, in the protester's view, improper.[7] In addition, AWS challenges the evaluation for failing to adequately question the guarantee in Hardin's proposal that its prices would be fixed for the first 3 years. This guarantee, as AWS emphasizes, has been expressly rejected by the PSC, which has ruled that it retains the authority to adjust or modify the rates proposed by Hardin during the first 3 years of the contract if they are found to be "unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of [state law]." Protester's Comments, encl. 2, Kentucky PSC Ruling, ¶ 20 at 10.

In addressing this issue, it is significant to recognize that the PSC ruling, upon which AWS bases its argument that the agency's evaluation was unreasonable, was not issued until after the agency had completed its evaluation and made award to Hardin. The protester suggests that despite the representations made by Hardin in its proposal regarding its prices being subject to PSC authority, the agency should have, nonetheless, anticipated the concerns raised by the PSC ruling and accounted for these risks as part of its evaluation of Hardin's proposal. The protester, however, does not explain why the agency should have anticipated these issues as part of its evaluation in advance of the PSC's ruling.

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rating, which already was the best rating available. Given the offerors' equal risk ratings (and equal ratings under the technical capability factor), together with Hardin's superior ratings under the other two evaluation factors (past performance and socioeconomic factors), as well as Hardin's substantially lower price, there is no reasonable possibility that a change in AWS's risk rating under the stability subfactor would have affected the award decision. Prejudice is an essential element of every viable protest, and where none is shown or otherwise apparent, we will not sustain a protest, even if the agency's actions may arguably have been improper. <u>Citrus College</u>; <u>KEI Pearson, Inc.</u>, B-293543 <u>et al.</u> , Apr. 9, 2004, 2004 CPD ¶104 at 7.

[7] AWS also contends that it was improper for Hardin to have submitted its storm water pricing using schedule B-2, because, based on the PSC's ruling, Hardin's storm water pricing is not in fact a regulated tariff rate. The record, however, reflects that regardless of which schedule was used, both Hardin and AWS submitted essentially equivalent pricing information for both of their wastewater and storm water plans and there is no indication of any prejudice resulting from this alleged error.

Hardin clearly put the agency on notice that its prices had to be approved by the PSC--this was inherent to the regulated nature of Hardin's proposal. It does not appear, however, that either Hardin or the agency anticipated that the PSC would not take jurisdiction over the storm water pricing, nor is it clear what consequence this will have under the terms of the agency's contract with Hardin. In addition, the regulatory scheme to which Hardin and the contract are ultimately subject and the consequences of regulation will be manifest only during the agency's administration of the contract with Hardin. Because the question of whether Hardin's proposed pricing and service may or may not be subject to regulation or modification by the PSC is essentially one to be addressed post-award, the protester's concerns in this regard are effectively rendered matters of contract administration, which we do not review. See 4 C.F.R. § 21.5(a) (2004).

Moreover, even assuming that the agency had recognized the concerns raised by the protester in its evaluation of Hardin's proposal, there is no reasonable basis for concluding that Hardin's rating under the subfactor would have been other than low. The wastewater system constituted the bulk of the privatization effort in terms of the infrastructure and the pricing of the proposals. As the agency notes, based upon Hardin's final proposal, the storm water portion of the contract represented less than 15 percent of the total annual price. Agency's Supplemental Report at 4. Moreover, regulation of Hardin's prices by the PSC during the initial 3 years of the contract was not inconsistent with the agency's conclusions about the long-term price and service advantages associated with regulation by the PSC given the contract's 50-year term, especially where the PSC's authority to adjust or modify the price was limited to situations where the price was essentially found to be unjust or unfair.

Price Realism

The protester argues that the agency's under the price realism subfactor was flawed. According to AWS, the agency failed to account for the fact that Hardin's transition costs and costs for R&R were "suspiciously low" when compared to AWS's pricing for the same cost elements.[8] The protester's challenge in this regard, however, is misplaced as AWS misapprehends and misstates Hardin's pricing elements for transition and R&R.

While agencies are required to perform some sort of price analysis or cost analysis on negotiated contracts to ensure that the agreed-price is fair and reasonable, where, as here, the award of a fixed-price contract is contemplated, a proposal's price

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[8] AWS also challenges the agency's evaluation of Hardin's initial [deleted] per 1,000 gallon rate. This issue is of no consequence because it is not based on Hardin's final proposed pricing. Rather, Hardin abandoned this variable rate in favor of a fixed monthly rate, a fact that the protester failed to address in its challenge of the agency's price realism analysis.

realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. OMV Med., Inc.; Saratoga Med. Ctr. Inc., B-281387 et al., Feb. 3, 1999, 99-1 CPD ¶ 52 at 5. However, an agency may provide for a realism analysis in the solicitation for such purposes as measuring an offeror's understanding of the solicitation requirements, The Cube Corp., B-277353, Oct. 2, 1997, 97-2 CPD ¶ 92 at 4, or to avoid the risk of poor performance from a contractor who is forced to provide services at little or no profit. Ameriko, Inc., B-277068, Aug. 29, 1997, 97-2 CPD ¶ 76 at 3. The depth of an agency's realism analysis is a matter within the sound exercise of the agency's discretion. Volmar Constr., Inc., B-272188.2, Sept. 18, 1996, 96-2 CPD ¶ 119 at 6.

As an initial matter, the record reflects that the agency's realism analysis was based on its extensive discussions with Hardin regarding its pricing, the cost elements of its pricing, and the detailed breakdowns of Hardin's price structure, as well as the agency's comparison of Hardin's total pricing with the government cost estimate, and Hardin's regulatory status. These considerations formed the basis for the agency's conclusions that Hardin's prices and costs were fair and reasonable, that the work could be performed at the respective prices, and that Hardin's proposal represented low risk. In our view, the agency's realism analysis was sufficient. See FAR § 15.404-1(d)(3).

AWS, however, essentially challenges the depth of the agency's analysis. In support of its challenge the protester first contends that Hardin's costs for transition were "suspiciously low" since Hardin's proposal included only $30,000 for "permit transfer," addressing only one of the seven required transition activities, while its own proposal included a line item under its ICI price for "transition costs" of [deleted] covering personnel expenses and the purchase of vehicles, tools, and equipment. Protester's Comments at 12.

AWS's comparison of its transition costs with Hardin's much lower cost for permit transfer, however, is unwarranted and mischaracterizes Hardin's prices. First, while the RFP set forth seven transition activities that offerors had to address in their technical proposals,[9] the RFP did not provide for offerors to separately identify their costs for these activities and Hardin's proposal did not separate these costs in its price proposal. While the $30,000 identified by Hardin pertains to a transition element (permit transfer), Hardin simply stated this as a cost under its ICI. Thus,

[9] Under the technical capability factor, subfactor 4, operational transition plan, offerors were required to address the following seven areas: (1) performance start date; (2) connection requirements; (3) new meter requirements; (4) permits and procedures; (5) inventory transfer requirements; (6) initial meter reading; and (7) authorized personnel and points of contact.

AWS's characterization of Hardin's proposal as including only $30,000 for transition misstates Hardin's proposal.

In addition, to the extent that AWS identified more than [deleted] for its transition cost under its proposed ICI price, several significant elements of this cost (e.g., vehicle and equipment purchases) were independent of and unrelated to the seven transition activities identified in the solicitation. As the agency notes, the majority of the items to be addressed in transition generally involved only personnel costs, which Hardin included under its O&M pricing. Supp. Agency Report at 5. In addition, Hardin captured its costs for vehicles and equipment under its O&M price instead of its ICI price, which is where AWS included these costs, based on the agency's request. See n.3, supra. Thus, the $30,000 figure cited by AWS does not support the basis of comparison suggested by AWS, and it does not raise concerns about the agency's evaluation of Hardin's proposal for price realism.

Similarly, the concerns raised by AWS with regard to Hardin's R&R pricing are premised on a mischaracterization of Hardin's proposal. In support of its contention that Hardin's R&R costs were "suspiciously low," AWS attempts to draw a comparison between its R&R pricing and Hardin's; however, in making this comparison, AWS misstates Hardin's R&R costs. The protester asserts that it proposed to replace or repair 30 percent of tested lines and 80 percent of tested manholes and included approximately [deleted] million in its proposal for this work, while Hardin included only approximately $440,000 for this same required work. Protester's Comments at 12.

The record reflects that AWS's R&R plan proposed to address approximately 40 percent of the systems' lines, while Hardin's R&R plan, on the other hand, proposed to address approximately 80 percent of the lines over the life of the contract by replacing, on average, 6,658 LF of sewer line per year and also repairing, on average, the same amount of line, at an annual cost of [deleted] for 50 years.[10] The $440,000 figure cited by the protester simply represented Hardin's proposed cost under its ICI plan for addressing immediate repairs to lines ($200,000) and manholes ($244,400), which Hardin determined were necessary to bring the utility system up to applicable standards, and therefore does not form a basis for comparing the [deleted] figure cited by AWS, which, as the protester notes, represents costs for its own R&R plan.

AWS also argues that Hardin's proposal was based on a different scope of work because Hardin indicated in its proposal that it would not replace lines for areas

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[10] Hardin addressed manholes in two ways. Under its ICI plan, Hardin proposed repairing 326 manholes during the initial 2 years of the contract and, under its R&R plan, Hardin included the cost of repairing or replacing 24 manholes per year during the 50-year life of the contract. Hardin's Final Proposal at FPR-V-I-2-52, FPR-V-I-3-88.

where housing redevelopment had been planned because it anticipated that the utilities in those areas were going to be replaced by the government. According to AWS, the solicitation did not notify offerors of this fact; rather, the solicitation sought offerors' plans for addressing 922,870 LF of sewer line on the base. AWS further notes that during discussions, it was encouraged by the agency to address replacement of the entire wastewater system. The protester's contentions, however, are unfounded.

First, Hardin's R&R plan provided for addressing approximately 80 percent of the lines--twice that proposed by AWS. Thus, it is patently unreasonable for AWS to contend that it suffered any competitive harm as a result of Hardin's allegedly having competed under a different scope of work. Second, there is no indication in the record that offerors were provided with unequal information regarding the solicitation's requirements. The agency correctly notes that the RFP set forth the scope of the utility systems for privatization and required offerors to provide their plans for addressing the needs of the systems. It did not require a particular solution for repairing or replacing the systems in their entirety. Hardin, evidently aware of future proposed plans for base housing, simply sought to refrain from replacing or repairing lines that it believed were already slated to be replaced by the government. To the extent that the agency noted during discussions that AWS failed to address R&R for the entire system, this was in the context of the agency's concerns that AWS only addressed 40 percent of the system and failed to sufficiently set forth the costs of the plan per year and the components of the costs. In the face of this concern, AWS retained its 40 percent R&R plan, as noted above. Thus, AWS's suggestion that its discussions with the agency resulted in its submitting a proposal based on a scope of work different from that of Hardin is without merit.

Contingent Offer

Finally, the protester asserts that Hardin's proposal was rendered unacceptable because the offer was conditioned upon PSC approval of the contract. In its proposal Hardin represented that its rates would be subject to PSC approval and the contract between Hardin and the government provided that, if Hardin failed to obtain PSC approval, the contract could be terminated without cost to either party. AR, Tab 15, Preamble to Hardin Contract. Citing our decision in Sabreliner Corp., B-218033, Mar. 6, 1985, 85-1 CPD ¶ 280, AWS contends that "qualified" offers are inherently unacceptable. Our decision in Saberliner, however, does not stand for the proposition suggested by AWS and is clearly distinguishable from the case at hand. In Sabreliner, which arose in the context of an invitation for bids, we simply held that an agency improperly accepted a bid where the bid was rendered nonresponsive by virtue of an ambiguity in its price. Sabreliner does not suggest that a proposal submitted in response to an RFP is rendered unacceptable per se where its price is contingent upon approval by an independent regulatory body.

In this case, PSC approval was a regulatory process to be addressed after contract award and the consequences of approval or disapproval were ultimately matters of contract administration--they were not elements of the agency's evaluation of proposals and did not factor in the selection process. Moreover, to conclude that Hardin's proposal was rendered unacceptable based on the need for post-award regulatory approval of the contract rates by the PSC would have effectively precluded regulated utilities from competing under the solicitation. Such a result was not contemplated by the RFP, which expressly anticipated the submission of tariff rates by regulated offerors.

The protest is denied.

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General Counsel