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Decision

Matter of: USFilter Operating Services, Inc.

File: B-293215

Date: February 10, 2004

Kenneth A. Martin, Esq., Martin & Associates, for the protester.

Michael W. Clancy, Esq., Dykema Gossett, for American Water Systems, Inc., an intervenor.

Gregory Zagorin, Esq., Defense Logistics Agency, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to conduct meaningful discussions with protester is denied where record shows that agency specifically brought its concerns to protester's attention during negotiations.

DECISION

USFilter Operating Services, Inc. (USF) protests the award of a contract to American Water Services, Inc. (AWS) under request for proposals (RFP) No. SPO600-01-R-0067, issued by the Defense Logistics Agency (DLA) to privatize the water and wastewater systems at Fort Rucker, Alabama. USF asserts that the agency improperly failed to conduct meaningful discussions with USF, improperly evaluated AWS's proposal, and made award without regard for the solicitation's evaluation and award criteria.

We deny the protest.

The RFP was issued pursuant to the authority in 10 U.S.C. § 2688 (2000), under which the Secretary of a military department may convey some or all of the government's interest in a utility system to a municipal, private, regional, district or cooperative utility company or other entity. Where more than one entity is interested in the conveyance, competitive procedures must be used to determine which entity will be the eventual conveyee. 10 U.S.C. § 2688(b)(1). The Secretary may not make the conveyance unless an economic analysis has been presented to various committees of Congress showing that the long-term economic benefit of the

conveyance exceeds its long-term cost, and that the conveyance will reduce the long-term cost of the utility services to the government. 10 U.S.C. § 2688(e).

The RFP contemplated the award of one or more 50-year contracts for the conveyance and operation of various utility systems at Fort Rucker. This protest concerns only the water and wastewater systems. The RFP provided for a “best value” evaluation taking into consideration technical and risk factors, as well as price. In evaluating price, the agency compared offerors’ proposed prices to an estimate of the government’s cost to retain ownership and operation of the systems, to determine whether privatizing the utility systems would be in the long-term interests of the government and, reflecting the requirements of 10 U.S.C. § 2688, also provided as follows:

The Government will only acquire utility services if it conveys the related utility system(s). The Government can only convey the utility system(s) if it determines that (1) the long-term economic benefit of the conveyance to the United States exceeds the long-term economic cost of the conveyance to the United States, and (2) the conveyance will reduce the long-term costs of the United States for utility services provided by the utility system concerned. Award, if at all, will only be made by the duly authorized execution of the Easement and the utility service contract.

RFP at 12.

The agency received proposals from USF and AWS¹ and, after evaluation, engaged in discussions with the two concerns. The agency accomplished the discussions by providing each firm with an opportunity to respond to a series of five negotiation messages, and then soliciting and obtaining final proposal revisions (FPR). Agency Report (AR), exhs. 3-13, 26-34. After receiving USF’s FPR, the agency concluded that the firm was ineligible for award under the requirements of 10 U.S.C. § 2688, because its final price was higher than the government’s estimate for the agency to retain ownership and operation of the water and wastewater systems. AR, exh. 20, at 1. Specifically, the record shows that USF proposed on an “all or none” basis for both the water and wastewater systems—that is, the firm would not accept award of only one or the other system—and its final price was [deleted], versus the agency’s estimate of \$99,993,444 to retain ownership and operation of the two systems. Id. at 3. (USF’s proposed price was lower than the government estimate for the wastewater system, but higher for the water system, such that its combined “all or none” price exceeded the combined estimates for both systems.)

¹ The agency received several other proposals for other utility systems at Fort Rucker, such as the gas and electric systems.

DISCUSSIONS

USF does not protest the evaluation of its proposed price. Rather, USF maintains that the agency failed to engage in meaningful discussions with it by failing to provide adequate notice that its price exceeded the government estimate, and by failing to adequately discuss the implications of its “all or none” proposal. With respect to the former point, the record shows that the agency did apprise USF in the second negotiation message that its proposed price exceeded the government estimate. USF maintains, however, that when it thereafter submitted pricing that continued to exceed the government estimate, the agency was required to again raise the matter with the firm. With respect to the latter point, the record shows that, in its request for FPRs, the agency asked USF to clarify whether its offer was still “all or none.” AR, exh. 12, at 1. USF maintains that the agency was required to apprise it of the fact that unbundling the proposal could have made it eligible for award of the wastewater system.

We have no basis to object to the adequacy of discussions here. Discussions are legally adequate where offerors are advised of the weaknesses, excesses and deficiencies in their proposals. Professional Performance Dev. Group, Inc., B-279561.2 et al., July 6, 1998, 99-2 CPD ¶ 29 at 5. While discussions should be as specific as practicable, there is no requirement that they be all-encompassing or extremely specific in describing the agency’s concerns; rather, the legal requirement is that they generally lead offerors into the areas of their proposals that require amplification or correction, without being misleading. Id. Where an agency has advised an offeror of an area of concern, there is no legal requirement that it raise the issue again in a subsequent round of discussions, even where the issue continues to be of concern to the agency. Id. at 5 n.3.

The record shows that the agency’s discussions with USF were adequate to put the firm on notice of the agency’s concerns. As to providing notice that the firm’s proposed price exceeded the government estimate, the record shows that the agency’s negotiation message to USF was quite specific, stating as follows:

Be advised that your Operations and Maintenance (O&M) charges are approximately 75% over the independent Government should-cost estimate for the same life cycle of 50 years. Additionally, your Renewals & Replacements (R&R) are approximately 180% over the independent Government should-cost estimate for the same life cycle of 50 years.

AR, exh. 5, at 1. In its report, the agency states--and USF does not dispute--that O&M and R&R costs represent the overwhelming majority of the value of the requirement. AR, Dec. 8, 2003, at 2. Thus, USF was on notice from this message, not only that its proposed price exceeded the government estimate, but also the degree to which it exceeded the estimate. The agency was not required to advise the firm in

subsequent messages that its proposal continued to exceed the government estimate. Professional Performance Dev. Group, Inc., *supra*, at 5 n.3. The agency thus met its obligation to provide meaningful discussions in this area.

As for notice regarding the implications of USF's offering on an "all or none" basis, USF made a business judgment to compete for the two systems on that basis; that is, USF decided that it did not want to receive an award for only one of the two systems. Faced with this express limitation in USF's proposal, the agency correctly concluded that there was no reason--and that it had no obligation--to advise USF that its "all or none" offer would preclude its receiving award for one of the systems. Nevertheless, the agency brought this area to USF's attention in its request for USF's FPR, stating as follows: "Please also advise if your offer is still to be considered an 'all-or-none' by which award for one system can not be made without award for the other system." AR, exh. 12, at 1. USF replied: "In terms of your other question with regard to 'all-or-none', USFOS is prepared to operate the water and wastewater systems as a combined contract award of both systems." AR, exh. 13, at 3. This question--though not required to be raised--clearly was specific enough to provide the notice to which USF claims it was entitled.

We conclude that the agency discharged its obligation to engage in meaningful discussions with USF, and that USF was properly found to be ineligible for award because its proposed price exceeded the government estimate for the requirement.

THE AWS PROPOSAL

USF also challenges the evaluation of AWS's proposal, asserting that the agency improperly failed to assess the risk associated with AWS's low price.² According to the protester, had the agency performed the required analysis, it would have determined that the firm's price was so low that it either demonstrated a lack of understanding of the requirement or was unrealistic to meet the requirement.

USF's assertion is not supported by the record. The agency specifically evaluated the risk associated with AWS's proposed pricing. In this regard, the record shows that the agency assigned the AWS proposal [deleted] risk ratings under several evaluation factors, as well as an overall [deleted] risk rating, based on its pricing.

² The RFP required the agency to assign a risk rating to the proposals based on a determination of whether the proposal posed a risk of degraded utility services, and whether the proposed price was realistic, that is, reflected a clear understanding of the requirements and was consistent with the offeror's technical approach. RFP at 78. Although the solicitation sought fixed-price offers with prospective price redetermination (see Federal Acquisition Regulation (FAR) § 52.216-5), it provided for an assessment of realism for purposes of assigning risk ratings to the proposals, consistent with FAR § 15.404-1(d)(3).

AR, exh. 23, at 3. In this regard, the evaluators stated: “The Government estimate for initial capital upgrade projects [for water distribution] is \$13.8M. AWS’s estimate for the same projects is [deleted]. There is a [deleted] risk that additional funds will be required [deleted].” *Id.* at 6. Elsewhere, the evaluators stated: “The Government estimate for day-to-day O&M is \$18.7M. AWS’s estimate for day-to-day O&M is [deleted]. There is a [deleted] risk that additional funds will be required [deleted].” *Id.* at 10. Finally, the evaluators stated: “The Government estimate for initial capital upgrade projects [for wastewater collection] is \$27.8M. AWS’s estimate for the same projects is [deleted]. There is a [deleted] risk that additional funds will be required [deleted].” *Id.* at 11. The record thus clearly shows that the agency considered and quantified the risk it identified as arising from AWS’s comparatively low prices. We therefore conclude that the agency evaluated AWS’s proposed price in accordance with the scheme set forth in the RFP and, based on that evaluation, reasonably found that the proposal, while representing a [deleted] risk of increased prices in the future, was acceptable.

USF asserts that the agency improperly failed to perform a best-value tradeoff in making award to AWS. According to the protester, the RFP required the agency to evaluate the relative merits of the proposals and trade off between AWS’s low price on the one hand, and USF’s technical superiority on the other (both firms’ proposals received identical technical ratings, but USF’s received a lower risk rating). As noted, however, USF’s proposal was properly rejected as ineligible for award pursuant to 10 U.S.C. § 2688, because the firm’s price exceeded the government estimate of continued in-house performance. Thus, only the AWS proposal remained eligible for award, and no tradeoff was required under these circumstances. See LifeCare, Inc., B-291672, B-291672.2, Feb. 20, 2003, 2003 CPD ¶ 95 at 4 n.13.

The protest is denied.

Anthony H. Gamboa
General Counsel