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Decision

Matter of: American States Utilities Services, Inc.

File: B-291307.3

Date: June 30, 2004

Stephen M. Sorett, Esq., and John A. Burkholder, Esq., McKenna Long & Aldridge, for the protester.
Kenneth A. Martin, Esq., Martin & Associates, for U.S. Filter Operation Systems, Inc.
Robert E. Little, Jr., Esq., Department of the Navy, for the agency.
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DIGEST

1. Protest that agency evaluated protester's proposal, under request for proposals for utilities privatization, against undisclosed criteria for pricing structure, operations and maintenance savings, and subcontractor experience is denied, where evaluation was consistent with the solicitation's evaluation criteria and agency's conclusions are reasonably supported by the record.

2. Protest that agency held inadequate and misleading discussions with protester concerning subcontractor capability is denied, where agency informed protester of its concerns during discussions and protester's response did not alleviate those concerns; agency did not mislead protester by failing to reiterate the concerns that were not alleviated after reviewing protester's response to the initial discussions.

DECISION

American States Utilities Services, Inc. (ASUS) protests the Department of the Navy's award of a contract to U.S. Filter Operation Systems, Inc. (USFOS), under request for proposals (RFP) No. N62470-00-R-3602, for utilities privatization. ASUS asserts that its proposal was unfairly evaluated against unstated criteria, and that the discussions held with the firm were inadequate and misleading.

We deny the protest.

BACKGROUND

The Navy seeks to privatize 58 different utility systems for wastewater and potable water collection, distribution and treatment located throughout Virginia, West Virginia, and North Carolina. As set forth in the RFP, the agency's objective for privatizing these systems is to "transfer ownership responsibility and risks to a highly qualified private party, utilize private capital for System investments, and secure and maintain high quality, reliable service that is more economical." RFP § 5.2.1; see RFP §§ 1, 3. 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.

The RFP was a performance-based solicitation with the stated intent of providing offerors with the "maximum flexibility in developing privatization solutions." RFP § 5.1. Offerors were encouraged to "utilize their creativity, skills, and expertise in proposing an offer that is most advantageous" to the agency, RFP §§ 3, 7; thus, according to the solicitation, "the majority of terms and conditions for privatization have been left to the development" of the offerors. RFP § 5.1.

Under the solicitation, award was to be made to the offeror whose proposal represented the best value to the government based on two evaluation factors: (1) technical, including equally weighted subfactors for service requirements, experience/past performance, financial capability, and support for small businesses; and (2) economic/price, including equally weighted subfactors for economic/price and long term cost. In addition, the RFP provided for a risk assessment to be performed with respect to each pricing element of a proposal. The RFP stated that the technical and economic/price subfactors were equally important.

Both ASUS and USFOS submitted proposals in response to the RFP that were found to be in the competitive range. The Navy then held several comprehensive rounds of discussions with the offerors concerning the economics, weaknesses and deficiencies in their proposals, the goals and objectives of utilities privatization, the Navy's preferences regarding pricing structure, and the requirements for asset conveyance. The agency also conducted site visits and interviews with existing customers and employees of the offerors to further evaluate the firms' operating, maintenance, and administration practices. At the conclusion of these discussions, the agency requested submission of final proposal revisions (FPR).

USFOS submitted an FPR for 34 different water and wastewater facilities, while ASUS submitted an FPR for 19 water systems and 18 wastewater systems. USFOS's proposal received an overall proposal rating of good, while ASUS's was rated as only acceptable. The evaluation board evaluated offerors' proposals as follows:

		ASUS	USFOS
Overall Price Rating		Acceptable	Good
	Economic/Price	Good	Good
	Long Term Cost	Acceptable	Good
Overall Technical Rating		Acceptable	Acceptable
	Service Requirements	Good	Good
	Experience/ Past Performance	Acceptable	Good
	Financial Capability	Acceptable	Acceptable
	Small Business Support	Acceptable	Acceptable
Overall Proposal Rating		Acceptable	Good

The Navy specifically found USFOS's pricing structure to be more favorable to the government and less risky than ASUS's. USFOS offered a 50-year service contract with a 25-year fixed price (with economic price adjustment), which the agency considered to be its preferred method of pricing because it provided the most predictability and long-term stability in price. In addition, USFOS proposed to [REDACTED]; the agency viewed this approach as a strength because it provided for recompetition as a means of price redetermination. In contrast, while ASUS proposed to assume full responsibility for the operation, maintenance, and recapitalization of the potable water and wastewater systems for a period of 50 years, ASUS's FPR provided for a price redetermination after 2 years, and every 5 years thereafter, which the Navy viewed as posing an increased price risk to the government.

In addition, the Navy determined that the overall life-cycle cost of USFOS's proposal was [REDACTED] percent lower than under government ownership, including [REDACTED] percent savings in operations and maintenance (O&M) costs and [REDACTED] percent savings in capital expenditures. In contrast, the overall life-cycle cost of ASUS's proposal was only [REDACTED] percent lower than under government ownership, including [REDACTED] percent savings in O&M costs and [REDACTED] percent savings in capital expenditures. Further, the Navy found advantageous USFOS's higher O&M savings, on the basis that offerors generally have more control over their O&M charges and, as a result, the projections of O&M savings were likely to be more reliable.

While the Navy found both offers to be overall technically acceptable, it determined that USFOS's offer was more advantageous. For example, while USFOS proposed that it would perform as the prime contractor for the service contract, ASUS proposed to have a subcontractor provide the O&M support for the Navy systems and perform most of the wastewater portion of the proposal. The Navy found that ASUS's reliance on the subcontractor posed a risk to performance because of the subcontractor's apparent lack of experience operating wastewater collection systems similar in size and complexity to the Navy systems, and because award of this contract could require a 148-percent growth in the subcontractor's business.

The Navy concluded that, based on its more advantageous technical approach, more favorable pricing structure, and lower risk, USFOS's proposal represented the best value to the government, and that the due diligence process therefore should commence with that firm. Upon being notified that it was no longer being considered for award, ASUS first protested to the agency and then, when that protest was denied, filed this protest with our Office.

EVALUATION

ASUS challenges the Navy's evaluation of its proposal. The protester asserts that the Navy applied unstated evaluation criteria in three areas: the evaluation of its proposal pricing structure, O&M savings, and subcontractor experience.

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. PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 3. Based on our review of the record, we find the agency's selection of USFOS to be reasonable.

Pricing Structure

ASUS asserts that the agency evaluated its proposal against an undisclosed "4-tier" pricing preference in which a "design-build-operate"(DBO) contract structure was the preferred approach. According to ASUS, it was told "for the first time at the debriefing" that the Navy's order of pricing preference (ranging from most favorable to least favorable) was as follows: (1) a firm-fixed-price approach along the lines of a DBO for a 25 year time period and possible use of a "trust"; (2) cost of service approach; (3) price redetermination based on agreed upon events as a "trigger"; and (4) price redetermination to occur every 5 years. Protest at 6.

ASUS's argument is without merit. As an initial matter, the Navy denies that it preferred a DBO approach; according to the agency, a DBO approach was never considered to be a viable one in a federal privatization program, and the concept was mentioned in the debriefing only as a lead-in to explaining the concept of third-party ownership arrangements in the context of utilities privatization. Agency Report at 5. Based upon our review of the record, we find nothing to indicate that consideration of a DBO approach played any role in the evaluation.

Instead, our review of the record indicates that the Navy emphasized, both in the evaluation and in its communications with ASUS, the agency's desire for long-term price predictability and a reduction in the cost risk to the government. For example, ASUS was told that the "Navy is looking for the least risky, flexible contract, with cost predictability." Minutes from May 6, 2003 Discussion Session, at 2. The Navy explained that it "requires price predictability" and advised ASUS that "[y]our redetermination is risky. The more a price can be fixed over time, the better." Id. at 3. Indeed, ASUS admits in its response to discussion questions that:

> [t]here have been three (3) differing pricing structures discussed in meetings with the Government. These are, in order of Government preference: 1) Long term fixed[-]price with recompetition/ redetermination at year 25, 2) Cost of Service, and 3) Price Redetermination.

ASUS Response to Discussion Questions, Aug. 11, 2003, at 6. Notwithstanding the Navy's advice to the contrary, however, ASUS informed the Navy that it would "not be able to have a fixed price with escalator for a 25-year period," id., and ASUS instead proposed a price redetermination after 2 years, and every 5 years thereafter. We find that the agency reasonably viewed ASUS's approach as posing an increased price risk to the government.

O&M Savings Versus Capital Savings

ASUS complains that its proposal was considered less favorably than USFOS's and "downgraded" under the economic/price subfactor based on an undisclosed preference for O&M savings as opposed to capital savings. This argument is without merit.

The record indicates that the Navy did not "downgrade" ASUS's proposal in the evaluation on account of its mix of O&M and capital savings, but instead rated it "good" under this price subfactor, and assessed it a "strength" for the firm's proposed O&M and capital savings. Evaluation Board Report at 14. The record confirms that the Navy merely considered offerors' proposed O&M and capital savings as a discriminator between proposals in terms of price risk. Id. at 4. Such a comparison was consistent with the stated evaluation approach, which provided that the agency would evaluate, under the economic/price subfactor, the "purchase price . . . with [a] breakout of capitalization component," and that each price element would be evaluated for risk. RFP § 6. To the extent that ASUS complains it was not informed that a higher O&M and lower capital savings approach (like that proposed by USFOS) would be considered more favorably, such disclosure was not necessary; where, as here, the solicitation allows for alternative approaches to meeting the agency's requirements, the agency is not required to advise a technically acceptable offeror that it considers another approach to be superior to that proposed by the protester. Cerner Corp., B-293093, B-293093.2, Feb. 2, 2004, 2004 CPD ¶ 34 at 8.[1]

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[1] While ASUS suggests that the agency's more favorable evaluation of USFOS's higher O&M and lower capital savings approach was based on appropriations

(continued...)

Subcontractor Experience

ASUS challenges the determination by the Navy, and the consequent assignment of a weakness to its proposal on the basis, that its proposed subcontractor lacked pipe experience comparable to the required effort. In this regard, the Navy expressed concern because the subcontractor that ASUS proposed as the prime contractor for the wastewater portion of the required effort possessed less than 85 miles of collection pipe experience, whereas there was a total of 229 miles of collection pipe to be operated and maintained.

As an initial matter, ASUS argues that consideration of this type of pipe experience is not included within the stated evaluation criteria. We disagree. The RFP expressly required that, with respect to the experience/past performance evaluation factor, each offeror "shall demonstrate" in its proposal:

> experience (including subcontractors) in . . . operation and maintenance of utility systems over the last 10 years. The experience should be of similar or greater size and complexity as the utility(s) covered by the Offeror's proposal.

RFP § 7. Further, the RFP also specifically required offerors, in describing their experience/past performance, to discuss the number of miles of collection pipe they have operated and maintained. Id.

ASUS also asserts that the agency held inadequate and misleading discussions concerning its subcontractor's capability and potential for growth. Specifically, it contends that it was not given an opportunity to respond to the agency's concern that with the addition of the Navy wastewater systems, the subcontractor could experience a 148 percent growth in annual revenues, which could increase the risk of poor performance. Evaluation Board Report at 18.

Although discussions must address at least deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. We review the adequacy of discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Northrop Grumman Info. Tech., Inc.,

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(...continued)
process considerations, the contemporaneous evaluation record supports the agency's position that the Navy's evaluation instead was based on the view that because offerors generally have more control over their O&M charges, the projections of O&M savings were likely to be more reliable. Evaluation Board Report at 4. We find nothing improper or otherwise unreasonable in the evaluation in this regard.

B-290080 et al., June 10, 2002, 2002 CPD ¶ 136 at 6. For discussions to be meaningful, they must lead offerors into the areas of their proposals requiring amplification or revision, but this requirement does not obligate an agency to "spoon-feed" an offeror, ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7, nor does it create an obligation for agencies to conduct successive rounds of discussions until all proposal defects have been corrected. OMV Med., Inc., B-281490, Feb. 16, 1999, 99-1 CPD ¶ 38 at 7. However, in conducting discussions, an agency may not prejudicially mislead offerors. American Sys. Corp., B-292755, B-292755.2, Dec. 3, 2003, 2003 CPD ¶ 225 at 7.

Here, ASUS admits that, "[d]uring discussions . . . the Navy expressed concerns about [the subcontractor's] size and its capability to perform the subcontracted work if it were to experience rapid growth as a result of this project." ASUS Comments at 7. However, ASUS notes that, in response to these expressed concerns, it provided financial records regarding the subcontractor's viability, a corporate guarantee from ASUS's parent company, and an explanation of the subcontractor's plans to hire the workers from the existing government workforce necessary to operate the wastewater systems. ASUS argues that the agency's apparent "acceptance" of the information and "failure to point out any continuing perceived weaknesses" was misleading and denied ASUS the opportunity to revise it proposal. Id. at 8. We disagree.

Nothing in the record suggests that the agency misled ASUS regarding its concerns. ASUS has pointed to no affirmative statements by the Navy indicating that the agency viewed the concerns it had raised regarding the proposed subcontractor as having been resolved. Further, since the agency was not required to reiterate concerns that were not alleviated after reviewing the protester's response to the initial discussions, OMV Med., Inc., supra, the mere fact that the Navy remained silent after the protester's response could not reasonably be understood here as an indication that the agency found ASUS's response to be satisfactory.

ASUS questions the assigned weakness with respect to the experience of its subcontractor, asserting that pipe operation and maintenance is the least difficult and most routine of all the work contemplated by the contract. However, the Navy explains that since the wastewater systems to be privatized consist almost entirely of piping and pumping stations, maintenance and repair of wastewater piping is a significant part of the required effort. Agency Report at 6. ASUS has not shown the agency position in this regard to be unreasonable. See Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3 (mere disagreement with the agency's conclusions is insufficient to render those conclusions unreasonable).

The protest is denied.

Anthony H. Gamboa
General Counsel