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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Poly-Pacific Technologies, Inc.

File: B-293925.2

Date: December 20, 2004

Chris Howard for the protester.

James B. Howarth, Esq., and Eric Kattner, Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly determined that protester's proposal was technically unacceptable is denied where the protester failed to adequately address technical deficiencies that the agency had brought to the protester's attention during multiple rounds of discussions.

DECISION

Poly-Pacific Technologies, Inc. protests the rejection of its proposal under request for proposals (RFP) No. F42650-03-R-A111, issued by the Department of the Air Force for lease and recycling of abrasive blast media. Poly-Pacific argues that the agency improperly determined that its proposal was technically unacceptable.

We deny the protest.

BACKGROUND

The RFP was issued on March 3, 2004, as a total small business set aside, and anticipated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for an 8-month base period followed by up to four 1-year options. The RFP sought proposals to lease "blast media," such as plastic, aluminum oxide, glass, garnet, and other media blends, to Hill Air Force Base, Utah, for use as an abrasive in the removal of organic and other coatings from aircraft, components, and equipment. RFP, Statement of Work (SOW), at 1. After the material is used as an abrasive and is no longer usable for that purpose, it is deemed "spent blast media" (SBM) and the contractor is responsible for removing the SBM. Id. The RFP required offerors to

propose a means of removing and recycling the SBM that meets U.S. Environmental Protection Agency (EPA) regulations that exclude such recycled products from the definition of “solid waste.” RFP at 23. During the course of the contract the contractor will retain legal title to the media, as well as liability for its handling and disposal. Id.

The RFP technical requirements were comprised of two subfactors, “recycling” and “material conformance.” RFP at 40, ¶ 2.2.1. These technical subfactors required offerors to submit proposals detailing their approach to providing media and recycling SBM as set forth in the SOW. Id. Furthermore, the RFP advised offerors that compliance with all requirements in the RFP and SOW was mandatory, and that proposals which failed to meet those requirements could be rejected as technically unacceptable. RFP at 36, ¶ 4.1, and at 39, ¶ 1.1. The RFP stated that award would be made to the responsible offeror submitting a technically acceptable proposal and offering the lowest evaluated price. RFP at 39, ¶ 1.0.

Poly-Pacific submitted a timely proposal on April 6. Agency Report (AR), Tab 4, Poly-Pacific Proposal. Poly-Pacific proposed to lease media to the agency and recycle the SBM at its facility in Ontario, California. Poly-Pacific stated that it would recycle SBM into “plastic lumber,” a process that involves “mixing shredded high density polyethylene (HDPE) with Spent Blasting Media (SBM) and . . . an extruding process [that] produces plastic lumber which can be used in a number of approved means (above ground decking, rail fencing, general building material).” Id. § M, ¶¶ C, F.

Following its initial technical evaluation of offerors’ proposals, the agency conducted discussions with Poly-Pacific and the other offeror whose proposal was in the competitive range. Contracting Officer’s Statement at 3. During the first round of discussions, the agency requested additional information regarding five areas in which it found Poly-Pacific’s proposal technically unacceptable. AR, Tab 8, First Discussions Questions, at 1-2. Poly-Pacific provided written responses to the agency’s request. AR, Tab 8, First Discussions Responses. Following its evaluation of the Poly-Pacific responses, the agency determined that “there are still major substantive issues that must be resolved.” AR, Tab 8, E-mail from Technical Evaluator to Contracting Officer, June 10, 2004. The agency conducted a second round of discussions with Poly-Pacific, requesting additional information that largely reiterated the agency’s concerns from the first round of discussions. AR, Tab 8, Second Discussions Questions, at 1-2. Poly-Pacific provided written responses to the second round of discussions. AR, Tab 8, Second Discussions Responses. Again, however, the agency determined that Poly-Pacific’s response did not adequately address technical deficiencies in several key areas. AR, Tab 8, E-mail from Technical Evaluator to Contracting Officer, June 24, 2004.

The agency notified Poly-Pacific on September 13 that its proposal was technically unacceptable and was no longer under consideration for award.¹ AR, Tab 12, Notice of Technical Unacceptability, at 1. Poly-Pacific requested a debriefing, and was provided a written explanation of the basis for the elimination of its proposal from award consideration. AR, Tab 13, Debriefing Letter, at 1. The debriefing summary cited five areas in which Poly-Pacific's proposal was technically unacceptable for failing to meet mandatory RFP requirements, all of which were identified during one or both of the two rounds of discussions: (1) failure to demonstrate the ability to recycle a maximum of 110,000 pounds of SBM per month; (2) failure to demonstrate that SBM was an "effective substitute" for HDPE in Poly-Pacific's proposed recycling process; (3) failure to address the agency's concerns regarding the prohibition on "applying recycled products to the land"; (4) failure to address the agency's concerns regarding the RFP's prohibition on "speculative accumulation" of SBM prior to recycling; and (5) failure to demonstrate that there was an established market for Poly-Pacific's recycled product. Id.

DISCUSSION

Poly-Pacific contends that the agency misevaluated its technical proposal and improperly eliminated its proposal from consideration for award. Specifically, in its initial protest, Poly-Pacific argues that the agency unreasonably evaluated each of the five areas identified in its debriefing by the agency as technical deficient.

Where a protester challenges an agency's evaluation resulting in the rejection of its proposal as technically unacceptable, our review is limited to considering whether the evaluation is reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. Clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Id.; Outdoor Venture Corp., B-288894.2, Dec. 19, 2001, 2002 CPD ¶ 13 at 2-3. As with any evaluation review, our chief concern is whether the record supports the agency's conclusions. Innovative Logistics Techniques, Inc., B-275786.2, Apr. 2, 1997, 97-1 CPD ¶ 144 at 9.

We find that the agency's conclusions regarding technical deficiencies in Poly-Pacific's proposal are reasonable in at least three of the five areas: (1) effective substitute, (2) speculative accumulation, and (3) known market. Since the RFP advised that an offeror's proposal which does not comply with all RFP requirements could be rejected as technically unacceptable, and because we find that the agency's

¹ The agency has stated that it had not made an award at the time of the protest, and does not intend to make an award prior to our decision. Contracting Officer's Statement at 1.

evaluation of these three areas was reasonable and sufficient to find Poly-Pacific's proposal technically unacceptable as not demonstrating the ability to meet material RFP requirements, we do not need to address the balance of Poly-Pacific's initial protest counts as we would not sustain the protest even if we found that the agency had unreasonably evaluated Poly-Pacific's proposal with regard to those remaining issues.² See Shilog Ltd., Inc., B-261412.4, Nov. 8, 1995, 95-2 CPD ¶ 260 at 9-10. To the extent that Poly-Pacific disagrees with the agency's conclusions, its mere disagreement with the agency's evaluation does not render the evaluation unreasonable. Kathryn Huddleston & Assoc., Ltd., B-294035, July 30, 2004, 2004 CPD ¶ 142 at 2.

We additionally find, as discussed below, that the agency conducted meaningful discussions with Poly-Pacific, but that Poly-Pacific did not adequately respond to the agency's concerns. The agency reasonably informed Poly-Pacific during two rounds of discussions of all of the areas in which its proposal was found technically unacceptable, and afforded Poly-Pacific the opportunity to address those deficiencies. An offeror that does not adequately respond to an agency's request for additional information during discussions risks having its proposal rejected as technically unacceptable, especially where, as here, the offeror had multiple opportunities to address the same agency concern. See A-1 Serv. Co., Inc., B-291568, Jan. 16, 2003, 2003 CPD ¶ 27 at 4.

Effective Substitute

Offerors were required to acknowledge that SBM is a "spent material" that can no longer be used for its original purpose, but will not be considered a "solid waste" under EPA rules if it is recycled using one of three methods identified in 40 C.F.R. § 261.2(e)(1)(i)-(iii). RFP § L, ¶ 4.2.3.i. As relevant here, an offeror that proposes to recycle SBM using method (ii) under the above-identified regulation would use the SBM as an "effective substitute" for a commercial product in the recycling process.³ Id. The RFP stated that

² Poly-Pacific makes several additional allegations in its comments and supplemental comments that we do not address here, such as challenges to the responsibility of the remaining offeror. We have reviewed all of Poly-Pacific's additional grounds and do not find any merit to them.

³ Poly-Pacific's initial proposal stated that it intended to follow recycling method (i), by using SBM "as in ingredient in an industrial process to make a product." AR, Tab 4, Poly-Pacific Proposal, § M. However, in its discussions with the agency, Poly-Pacific demonstrated that it in fact intended to rely on method (ii) because it was treating SBM as a substitute for a commercial product, namely a substitute for coloring and HDPE, reducing the need for each in the production of plastic lumber. Poly-Pacific confirms this understanding in its comments on the agency report, stating that Poly-Pacific "accepts the premise that the SBM is a 'spent material' ...

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[i]f method (ii) is used, the contractor shall provide documentation showing how much SBM is used in the formulation and what ingredients it is a substitute for shall be provided. Proof that it is an “effective substitute” shall be provided, such that the “toxics along for the ride (TAR)” concern, as addressed by EPA, is satisfied. This documentation must be provided to the government and also to regulatory agencies.

RFP § L, ¶ 4.2.3.i.

Poly-Pacific proposed to use SBM along with HDPE in the production of plastic lumber in a manner similar to the production of plastic lumber by its subsidiary, Everwood Agriculture Products International, Inc. AR, Tab 4, Poly-Pacific Proposal, § M. Poly-Pacific currently recycles HDPE, in the form of shredded used pesticide containers, into plastic lumber in its Everwood facility in Aylmer, Ontario (Canada).

During the second round of discussions, the agency noted that Poly-Pacific had not adequately addressed the effective substitute requirement:

Poly-Pacific suggests that SBM is a replacement material for “clean” HDPE in production formulation. You also state that SBM is an effective substitute for HDPE, including reduction of the amount of color concentrate that must be added to the mix, that it makes the product much stronger and more pliable and finally that it modulates the impact of temperature changes . . . [P]lease provide technical documentation that supports these statements. Further, has appropriate documentation of these statements been provided to the States of California and/or Utah?

AR, Tab 8, Second Discussions Questions, at 1.

In its response, Poly-Pacific referred the agency to a report prepared in October 2001 by CH2M HILL, a consultant retained by Poly-Pacific, and submitted in Poly-Pacific’s initial proposal. AR, Tab 8, Second Discussions Responses, at 1. The CH2M report evaluated the recycling process at the Everwood facility in Canada, but not Poly-Pacific’s facility in California. Poly-Pacific’s response reiterated the CH2M report’s observation that the addition of SBM in the recycling process was effective in

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and confirm[s] that Poly-Pacific uses method number (ii) (40[]CFR 261.2(e)(1)).” Comments at 3. Poly-Pacific’s responses to the discussions questions and its comments during this protest make clear that it understood that the agency was evaluating its proposal under the method (ii) “effective substitute” standard.

reducing the need for additional coloring and increasing the strength of the final product. AR, Tab 8, Second Discussions Responses, at 1-2. The agency concluded, however, that the response was still inadequate because the claims made by Poly-Pacific concerning the benefits of the use of SBM were not supported by technical data that could be reviewed by the agency, and that the California and Utah agencies had apparently not been provided Poly-Pacific documentation concerning the use of SBM as an effective substitute. AR, Tab 8, Second Discussions Evaluation, at 2.

We conclude that the agency reasonably found that, despite the agency's request to provide specific data, Poly-Pacific did not adequately respond to the agency's concerns and thus did not demonstrate that SBM was an effective substitute in Poly-Pacific's recycling process. The CH2M report did not contain any specific information aside from the claim that "[c]omponents of the [SBM] (i.e. the paint chips) improve the final product by adding strength and uniform colour." CH2M Report at 4-3. The only technical data cited was that "the use of colour concentrate pellets . . . have been significantly reduced . . . [f]or example, less than 1 percent colorant is now required for the grey plastic lumber (as compared to the previous 4 percent)." Id. at 3-2. Aside from this information, neither the CH2M report nor Poly-Pacific's responses to the discussions questions furnish or even cite to data to support the claims regarding strength or temperature, as requested by the agency, and do not cite any information regarding the "toxics along for the ride" requirements.

Furthermore, we find that the agency reasonably concluded that Poly-Pacific failed to adequately address the RFP requirement that state regulatory agencies be provided with documentation regarding the effective substitute criterion. During the second round of discussions, the agency requested that Poly-Pacific state whether "appropriate documentation" of the data indicating compliance with the effective substitute requirement had been provided to the respective Utah and California environmental regulatory agencies. Poly-Pacific responded that Utah and California "have been well informed of our processes as evidenced by the approval letters from these states" that were submitted with Poly-Pacific's proposal. AR, Tab 8, Second Discussions Responses, at 2. We agree with the agency that Poly-Pacific's reliance on these letters, however, does not clearly satisfy the requirement as both letters condition approval of Poly-Pacific's recycling process on its ability to conform the process to specific requirements. For example, the California state letter conditions approval of Poly-Pacific's recycling process on its ability to utilize SBM as an effective substitute for a commercial product. AR, Tab 4, Poly-Pacific Proposal, Letter from California Environmental Protection Agency, June 30, 1998, at 1. There is no evidence in the record that Poly-Pacific provided adequate documentation pertaining to the "effective substitute" criterion for its California facility to the state agencies, as required by the RFP.

Prohibition on Speculative Accumulation

The RFP prohibited offerors from “speculatively accumulating” SBM, that is, the contractor was required to recycle or dispose of all SBM removed from Hill AFB as it is collected. RFP § L, ¶ 4.2.3.j.iii. As part of the requirement to describe their proposed recycling process, offerors were required to demonstrate their ability to comply with the prohibition on speculative accumulation, that is, the SBM would be immediately recycled without accumulation of SBM inventory:

“Materials accumulated speculatively”, the definition of which is given at 40[]CFR 261.1(c)([8])). The SBM, prior to recycle, shall not be accumulated speculatively. The Offeror shall provide documentation and data that demonstrates compliance with this requirement for each month that the recycle process has been used.

Id.

The agency determined that Poly-Pacific had not addressed this requirement in its initial proposal, and asked during discussions, “How will Poly-Pacific insure that they meet the regulatory requirement for speculative accumulation? Specifically, how the recycling and operational processes employed as part of this effort will in fact comply with the specific requirements detailed in paragraph 4.2.3.j?” AR, Tab 8, First Discussions Questions, at 2.

Poly-Pacific responded by explaining that “[s]ince the capacity of the recycling facilities far exceed the anticipated volume of SBM to be recycled, Poly-Pacific does not have any reason to ‘speculatively accumulate,’” and further explained that if additional contracts are obtained by Poly-Pacific that affect its capacity to recycle SBM, the firm has “bank financing” for additional equipment that “can be readily set up.” AR, Tab 8, First Discussions Responses, at 4.

The agency determined that Poly-Pacific’s response to the discussions question did not provide adequate documentation to support its assurances that SBM would not be speculatively accumulated. AR, Tab 8, E-mail from Technical Evaluator to Contracting Officer, June 10, 2004, at 2. In the second round of discussions, the agency specifically requested data demonstrating that Poly-Pacific could meet the non-speculative accumulation requirement: “Another significant concern is your ability to meet the ‘speculative accumulation’ requirement. Please provide documentation to demonstrate how you have met this requirement in previous years. This would include data on hazardous SBM receipts, usage and beginning and ending inventory by month and year.” AR, Tab 8, Second Discussions Questions, at 2. In response to the specific request for annual and monthly data, Poly-Pacific provided data regarding annual recycling of SBM and sales of plastic lumber. AR, Tab 8, Second Discussions Responses, at 3.

The agency determined that Poly-Pacific's failure to provide monthly data regarding recycling was a technical deficiency. AR, Tab 8, Second Discussions Evaluation, at 2. Poly-Pacific concedes that it did not respond to the request for monthly accumulation and usage data, but instead challenges the agency's evaluation by noting that EPA regulations at 40 C.F.R. § 261.1(c)(8) do not require monthly certifications that SBM is not being speculatively accumulated. Comments at 7. Thus, Poly-Pacific contends, the agency improperly requested information regarding "a 'standard of appropriate monthly inventory and sales information' . . . [as] [t]his just is not required by regulation." Comments at 7.

Poly-Pacific's objection here fails because it is untimely, as the requirement to demonstrate that all SBM received in a month is recycled without accumulation was clearly set forth in the RFP. RFP § L, ¶ 4.2.3.j.iii. Offerors were thus required to challenge the requirement prior to the time for receipt of proposals. Because Poly-Pacific did not raise this challenge to a solicitation provision prior to the time for receipt of proposals, its protest of this ground is untimely and cannot be raised post-award. Bid Protest Regulations, 4 C.F.R. § 21.2(c)(1) (2004).

Because Poly-Pacific did not provide information regarding monthly usage of SBM that demonstrated compliance with the RFP requirement, despite repeated requests by the agency, we conclude that the agency reasonably determined that Poly-Pacific failed to meet this RFP requirement.

Demonstration of a Market for Resulting Product

The RFP required offerors to demonstrate that there is a "known market or disposition" for recycled SBM products. SOW ¶ 6.12 (incorporating by reference 40 C.F.R. § 261.2(f)). During the first round of discussions, the agency requested that Poly-Pacific provide "historical sales quantities" to demonstrate that "there is a viable market for the product produced from the spent media." AR, Tab 8, First Discussions Questions, at 2.

In its response, Poly-Pacific cited sales figures for its Canadian plastic lumber production facility, noting that annual sales from 2002 through 2004 averaged 74,000 to 76,000 pieces. AR, Tab 8, First Discussions Responses, at 5. Poly-Pacific estimates that the maximum amount of plastic produced under the proposed contract, assuming full collection, would require additional sales of approximately 56,170 pieces per year. Id. Poly-Pacific added that it perceived a large market demand based on its ability to sell all of its production to date. Id.

The agency determined that Poly-Pacific's response was inadequate, as it only addressed production and sales of plastic lumber from its Canadian facility, and not the California facility that would perform the work under the contract. AR, Tab 8, E-mail from Technical Evaluator to Contracting Officer, June 10, 2004. The agency's second round of discussions questions requested that Poly-Pacific provide specific data regarding sales and overall amounts of recycled materials produced at its

California facility in pounds, as opposed to dollar amounts, and by product type. AR, Tab 8, Second Discussions Questions at 2. The agency also asked Poly-Pacific to address the agency's concern that "if you meet our concerns about the 'Applied to the Land/Fence Post' issue, how will this impact your projected sales analysis? That is, if all sales of products that could be used as fence posts [can] not contain SBM what is the impact on sales and on the usage of SBM in your production?"⁴ Id.

In its response, Poly-Pacific provided its projections for sales of plastic lumber for its California facility for 2004 to 2006, which were prepared in 2003 based on Poly-Pacific's "assum[ption] the plastic lumber operation will start in 2004, and sales will increase steadily for the next three years." AR, Tab 8, Second Discussions Responses, at 4. Poly-Pacific stated it would only produce plastic lumber to be used above ground, and that it believed the market for such products "is likely to grow exponentially over the coming decade." Id.

Following Poly-Pacific's response to the second round of discussions, the agency concluded that although the data addressed projected sales for the California facility, Poly-Pacific did not provide data in terms of pounds and types of products produced as requested, and did not address the effect on the projected market by the shift in the type of the product to be produced (from 5 inch round to 4x4 inch dimensions) or the effect of the decision to produce products that will not be applied to the land. AR, Tab 8, Second Discussions Evaluation, at 4.

We conclude that the agency reasonably determined that Poly-Pacific failed to address the agency's concerns that its proposal did not demonstrate a market for its recycled product. The agency was concerned that Poly-Pacific's historical sales data pertained only to 5 inch round plastic lumber produced in its Canada facility, and there was no historical data demonstrating a market for the 4x4 inch plastic lumber material to be produced at the California facility. AR, Tab 8, E-mail from Technical Evaluator to Contracting Officer, June 10, 2004. As the agency points out, whereas the plastic lumber produced at the Canadian facility under the "Everwood" product line is advertised and promoted as fence posts, Poly-Pacific's response to the discussions questions did not address the potential effect on the market for its product from compliance with the prohibition on producing products as fence posts.⁵ As Poly-Pacific acknowledges, it has limited sales data for its California

⁴ The RFP stated that products made from recycled SBM could not be items that are "applied to the land," meaning "without limitation such items as fence posts, blocks or concrete block like products or other items that are used underground and/or that are used in contact with the earth." RFP at 37, ¶ 4.2.3.j(i).

⁵ The agency observed that the Poly-Pacific website for recycled plastic lumber manufactured by its Everwood subsidiary promotes the plastic lumber as suitable for fence posts, and contains several pictures of the product used as fence posts. AR, Tab 8, Second Discussions Evaluation. We note that this promotional material is still
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facility because its current production there is small. Comments at 8 (“At this time we are producing a very limited amount of lumber due to the limited amount of contracts at the California facility.”) Thus, the agency reasonably found that Poly-Pacific’s statement that there is demand for its product was speculative and did not clearly meet the requirement to identify a viable market for non-fence post plastic lumber.

In light of the agency’s material concerns with Poly-Pacific’s technical proposal and the failure of Poly-Pacific to adequately address those concerns, we find nothing unreasonable in the agency’s determination that Poly-Pacific’s proposal was technically unacceptable.⁶

The protest is denied.

Anthony H. Gamboa
General Counsel

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posted on Poly-Pacific’s website. See Everwood website, available at
<http://www.poly-pacific.com/everwood.htm>.

⁶ In addition to its challenges to the technical evaluation, Poly-Pacific also alleges that the agency was biased against its proposal, as evidenced by the agency’s refusal to accept what Poly-Pacific believes was adequate evidence of its technical acceptability. Protest at 2. As discussed above, we conclude that the evaluation was reasonable and supported by the record and we find no evidence of bias in the record and, accordingly, deny this aspect of the protest. Paraclete Armor & Equip., Inc., B-293509, Feb. 24, 2004, 2004 CPD ¶ 67 at 7.