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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Petchem Incorporated

File: B-287071.3

Date: August 1, 2001

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, for Universal Yacht Services, Inc., an intervenor.

Robert M. Elwell, Esq., and George N. Brezna, Esq., Department of the Navy, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation did not require an offeror's proposed personnel transfer vessel to be outfitted and configured to comply with material solicitation requirements at the time of award, but rather provided a 40-day post-award period for compliance, agency reasonably selected the awardee's lower-priced, technically equal proposal for award.

DECISION

Petchem Incorporated protests the award of a contract to Universal Yacht Services, Inc. (UYS) under request for proposals (RFP) No. N00033-00-R-1033, issued by the Department of the Navy, Military Sealift Command, for a personnel transfer vessel (PTV) which will be used to conduct open ocean transfers of passengers and cargo between sea-borne submarines and the shore in the area of Port Canaveral, Florida. Petchem contends that UYS should not have been eligible for award because its proposed PTV did not satisfy material solicitation requirements at the time of award.

We deny the protest.¹

The RFP, issued as a total small business set-aside on September 22, 2000, contemplated the award of a fixed-price time charter² contract for a base period and three 1-year option periods to the responsible offeror whose proposal was determined to be most advantageous to the government, considering price, technical characteristics of the proposed vessel, and an offeror's past performance. (These three factors were equally weighted.) The RFP's statement of work contained a list of required minimum vessel characteristics. For example, and as relevant here, the RFP contained the following minimum vessel characteristics:

Characteristic	Minimum
Surface/Subsurface Configurations	Configured to prevent metal-to-hull contact with surface/subsurface vessels under all conditions of pitch and roll
Passenger Capacity	49 passengers; seating required for at least 50 percent of passengers; a sheltered HVAC area required for at least 75 percent of passengers
Maximum Draft	16 feet at any time and sufficient to prevent the vessel from riding up on the submarine hull while engaging in personnel transfer operations
Surface/Subsurface Fendering	Fendering sufficient to prevent metal-to-metal contact with surface/subsurface vessels under all conditions of pitch and roll
Brow	One brow on port side to allow for safe transfer of 2 passengers at a time

RFP at 6-7; RFP amend. 3 at 2.

¹ This protest follows the agency's implementation of our recommendation for corrective action, as described in Universal Yacht Servs., Inc., B-287071, B-287071.2, Apr. 4, 2001, 2001 CPD ¶ 74. In this earlier protest, UYS protested the award to Petchem (the incumbent contractor), arguing that the agency improperly waived a material transit speed solicitation requirement for Petchem and improperly accepted Petchem's nonconforming proposal for award. We sustained the UYS protest, concluding that because Petchem's proposal failed to conform to the RFP's transit speed requirement, the proposal was technically unacceptable and could not form the basis for award. We recommended that the agency reopen discussions with Petchem and UYS, request another final technical proposal revision from each firm for evaluation, and make a new source selection decision.

² A time charter is a maritime contract giving the charterer--here, the agency--exclusive use of a named vessel for a designated period of time.

The RFP contained as an attachment a blank “Vessel Characteristic Sheet” on which an offeror was required to insert the particular characteristics for the vessel being proposed. The RFP stated that the contractor “shall provide the vessel [proposed] with the characteristics offered and accepted at the time of award.” RFP at 6. The RFP also contained the following “layday” delivery provision which stated in relevant part:

The Vessel . . . shall be delivered to the Charterer . . . not later than 1600 hours local time (place of delivery) on the canceling date stated in the solicitation . . . Hire shall commence upon acceptance of the Vessel by the Charterer but not before the commencing date stated in the solicitation . . . Charterer shall have the liberty to cancel this Charter at no cost to the Government should the Vessel . . . not be ready in accordance with the provisions hereof by the canceling date stated in the solicitation.

RFP at 15.

The RFP, as amended, provided that the “commencing date” was the date of award and the “canceling date” was “40 [d]ays after award.” RFP amend. 9 at 2.

In reopening discussions with Petchem and UYS, the agency advised the firms of technical deficiencies and weaknesses in their proposals. (The firms were advised that past performance and price would not be discussed because the agency was using the offerors’ previously submitted, and evaluated, past performance and pricing information.) Petchem proposed the same vessel—the “Christine S”—which it used to successfully perform the PTV requirements under the predecessor contract. UYS proposed the vessel known as the “Captain Roy.” While each firm completed a vessel characteristic sheet for its proposed vessel without taking exception to any of the RFP’s minimum vessel characteristics, there was a basic difference in the proposed vessels. Specifically, Petchem’s vessel was currently outfitted and configured to satisfy the RFP’s minimum vessel characteristics, while the UYS vessel would require the installation of fendering and a brow and Coast Guard approval to carry 49 passengers. In other words, if awarded the contract, Petchem could immediately provide a vessel compliant with the RFP’s minimum vessel characteristics, while UYS would need the 40-day layday period, as described above, to outfit and configure its vessel to satisfy the RFP requirements.

The contracting officer, who served as the source selection authority, determined that the proposals of Petchem and UYS were essentially technically equal. In commenting on the technical characteristics of the proposed vessels, the contracting officer noted that Petchem proposed a proven vessel currently configured for performing the PTV requirements; that there were no concerns expressed by the customer and end-users with respect to the capabilities of Petchem’s vessel; and that

Petchem's vessel could carry 52 passengers in an area with 100-percent HVAC and seating for all. AR, Tab 20, Source Selection Document, at 1-2.

In contrast, the contracting officer noted that UYS warranted that its proposed vessel would meet all RFP requirements. The contracting officer recognized that UYS provided detailed information on how its vessel would be outfitted and configured, including the installation of fendering and a brow; that the UYS vessel could carry 49 passengers in an area with 100-percent HVAC and seating for all; and that the UYS vessel offered three-engine redundancy and a higher speed. Id. at 2.

In summarizing his view that the proposals of Petchem and UYS were technically equal, the contracting officer commented that although Petchem's vessel offered a higher passenger capability that could reduce the number of voyages, this benefit was of nominal value since it would only come into play during the summer months when large groups of midshipmen were transferred. The contracting officer also commented that while the UYS vessel offered higher speeds, the value of those speeds was nominal because of the short distances involved in the transfers. In addition, the contracting officer did not consider the decreased technical risk associated with Petchem's already-installed fendering and brow to be a significant advantage because UYS submitted a detailed plan for the installation of these items on its proposed vessel. The contracting officer determined that although the vessels proposed by Petchem and UYS each had characteristics that provided marginal increases in value, these items did not constitute true technical discriminators between the two vessels. The contracting officer concluded that UYS was as capable as Petchem in terms of delivering a technically compliant vessel. Id.

With respect to past performance, the contracting officer recognized that Petchem, as the incumbent contractor, had directly relevant experience. Petchem's proposal was rated excellent in the past performance area. The contracting officer pointed out that UYS received a neutral past performance rating since it was a relatively new company with no corporate past performance history; however, UYS did have personnel with experience in the specific mission requirements contemplated by the RFP. Id. at 3. With respect to price, Petchem's proposed price was approximately 14 percent higher than the UYS proposed price. Id.

In making his selection decision, the contracting officer stated that the only aspect of Petchem's proposal that was of greater value than that of the UYS proposal was Petchem's excellent past performance rating, as compared to the UYS neutral rating. According to the contracting officer, "[a]ll that can be accurately said, however, is that Petchem's performance is known and [the UYS performance] is not, as nothing can be inferred from the latter's neutral rating." Id. at 3. The contracting officer continued that "[a]lthough the value of Petchem's known performance would be worth a slightly higher price, [it is not] worth the significantly higher price." Id. at 3-4. The contracting officer concluded that the performance risks associated with the UYS proposal were insufficient to justify paying such a higher price to Petchem. Id. at 4. Accordingly, on June 12, 2001, the contracting officer awarded the contract

to UYS, whose technically equal, lower-priced proposal was determined most advantageous to the government.

Initially, we point out that the evaluation record shows that the proposals of Petchem and UYS were technically acceptable since neither offeror, in its respective proposal, took exception to the RFP's minimum vessel characteristics. Petchem does not identify any instance in which UYS took exception in its proposal to any RFP requirement, but rather argues that UYS should not have been eligible for award because, at the time of award, its proposed vessel was not immediately outfitted and configured to satisfy the RFP's minimum vessel characteristics, as shown in the graphic above. Petchem believes that its proposed vessel, which would be immediately compliant at the time of award, should have been selected to perform the agency's PTV requirements. We disagree.

Here, the RFP did not require an offeror's proposed vessel to be outfitted and configured at the time of award in order to be eligible for award. Rather, under the terms of the RFP, as set forth above, the successful offeror had up to 40 days after award, during the layday period, to outfit and configure its proposed vessel, as evaluated by the agency, and to deliver a vessel in compliance with the terms of the RFP. We note that in its protest, Petchem acknowledges that the UYS "proposal was accepted, apparently because Amendment 0009 to the Solicitation allowed offerors time between award of the contract and the actual submission of the vessel to begin work on the contract." Protest at 6. On this record, where the RFP did not require an offeror's proposed vessel to comply with material RFP requirements at the time of award, but rather provided a 40-day post-award period for compliance, the agency reasonably selected the UYS lower-priced, technically equal proposal for award.³

Petchem further expresses concern, based on its own knowledge and on reports and analyses provided by naval architects consulted by the firm, that the UYS vessel, even if outfitted and configured as proposed, will not be able to perform the RFP requirements. For example, Petchem believes that because of its aluminum hull and shallow draft, the UYS proposed vessel will "ride the hull" of the submarine and will have "metal to metal contact" under conditions of pitch and roll. Protester's Comments, July 16, 2001, at 11.

To the extent that Petchem's concern materializes at the time of delivery and performance, it will involve a matter of contract administration over which we do not exercise jurisdiction. In this respect, our Office considers bid protest challenges to the award or proposed award of contracts. 31 U.S.C. § 3552 (Supp. IV 1998). Therefore, we generally do not review matters of contract administration, which are

³ The layday provision of the RFP gives the agency the right to cancel the UYS contract at no cost to the government if the UYS vessel does not comply with the RFP requirements by the canceling date 40 days after award.

within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2001).

Therefore, on this record, we have no basis to question the award to UYS whose technically equal, lower-priced proposal was determined most advantageous to the government.⁴

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ In its initial protest, Petchem challenged the contracting officer's decision that the firm's excellent past performance as the incumbent contractor did not justify the payment of a significant price premium. In its administrative report, the agency addressed this matter. In its comments on the agency report, Petchem did not meaningfully rebut the agency's position. Accordingly, we deem this basis for protest to be abandoned. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520 at 4 n.2.