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Decision

Matter of: Alpha Marine Services, LLC

File: B-291721; B-291721.3

Date: March 5, 2003

O. Kevin Vincent, Esq., Baker Botts, for the protester.

Michael A. Hopkins, Esq., McKenna Long & Aldridge, for Admiral Towing and Barge Company, an intervenor.

David G. Ranowsky, Esq., and George N. Brezna, Esq., Department of the Navy, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's interpretation of solicitation provision as requiring agency to make award based on lowest overall "cost" (to be determined by application of various cost-related factors not specified in the solicitation) is unreasonable when the solicitation is read as a whole and in a manner giving effect to all of its provisions; the only reasonable interpretation is that award would be made to the offeror with the lowest overall price proposed, calculated using only those factors set out in the solicitation.
2. Protest that awardee's proposal for tugboat services should have been found technically unacceptable in various areas is denied where the record shows that the agency reasonably concluded that the proposal demonstrated that the tugboats to be used to perform the services would comply with the technical requirements in the solicitation and protest essentially reflects disagreement with the agency's judgment.

DECISION

Alpha Marine Services, LLC (AMS) protests the award of a contract to Admiral Towing and Barge Company under request for proposals (RFP) No. N00033-02-R-1022, issued by the Military Sealift Command (MSC), Department of the Navy, for tugboat services. AMS challenges the agency's evaluation of proposals.

We deny the protests.

The RFP, issued on May 10, 2002, contemplated the award of a fixed-price contract for 1 year, with four 1-year options, for the time charter of up to six U.S.-flagged tractor-like tugs for use at the port of San Diego, California, and surrounding waters to service a variety of naval surface and subsurface vessels.¹ Services included towing, mooring, berthing, docking, undocking, escorting identified naval vessels, providing emergency support services, and firefighting.

The solicitation established three evaluation factors: price, technical, and past performance. RFP at 29. The RFP stated that price would be evaluated based on the rates (both daily hire and overtime) and fuel consumption amounts as submitted by the offeror, as well as the Navy's estimated schedule of services, or operations tempo (OPTEMPO). The solicitation established that fuel would be either government-furnished or, if contractor-purchased, treated as a direct reimbursable expense, that is, MSC would reimburse the contractor for its actual fuel costs without any overhead or other indirect costs. Id. at 14; Agency Report (AR), Dec. 27, 2002, at 3-4. Accordingly, offerors were required to submit estimated fuel consumption rates (in barrels per hour) for each of the tugs proposed. RFP attach. 4, at 3. The RFP informed offerors that, for evaluation purposes, "[t]he price of fuel will be based on the [Defense Energy Supply Center] price of fuels on the day the solicitation closes or revised offers are due." RFP at 29.

The RFP also established various minimum performance specifications (i.e., "vessel characteristics") for the tugs proposed, including bollard pull and configuration.² Specifically, the solicitation stated that one of the six tugs proposed shall have a minimum 100,000 pounds forward and astern bollard pull and a minimum 80,000 pounds side bollard pull.³ RFP amend. 1, at 2. The solicitation also specified the acceptable ways through which offerors could provide a certification of bollard pull capability; in addition to an actual test on the offered vessel or a sister ship with identical machinery and systems, offerors could provide the calculated bollard pull of the vessel as certified by a professional engineer in mechanical engineering or naval architecture. RFP amend. 9, at 2; AR, Dec. 27, 2002, at 5. The RFP also required that all proposed tugs be configured in such a manner (e.g., through the use of non-marking fendering systems) so as to prevent metal-to-hull contact with both surface and subsurface vessels. RFP amend. 1, at 2.

¹ The RFP permitted the use of "true-tractor" tugs, such as those proposed by AMS, with an adjustable propulsion system fitted at the forward end of the tug, as well as "reserve-tractor-like" tugs, such as those proposed by Admiral, with an adjustable propulsion system fitted at the aft end of the tug. See RFP amend. 5, at 2.

² Bollard pull is the measure, in pounds, of the strength of a tug's pulling ability.

³ The remaining five tugs proposed were to have a minimum 65,000 pounds forward and astern bollard pull and a minimum 40,000 pounds side bollard pull. RFP amend. 1, at 2.

The RFP initially informed offerors that the anticipated award date was August 9, 2002, with a start date (i.e., “canceling date”) of April 12, 2003, thereby creating a delivery period for existing or newly built tugs of 246 days. RFP at 4, 30. The Navy subsequently amended the solicitation, changing the anticipated award date to November 16, 2002, and the canceling date to August 30, 2003; this resulted in a revised delivery period totaling 287 days. RFP amend. 9, at 2.

In addition to demonstrating compliance with the RFP’s minimum performance specifications, each offeror’s proposal was also to include a strike contingency plan, outlining how the required services would be provided if there was a labor strike. RFP attach. 4, at 1. The solicitation did not establish a required level of detail for an offeror’s strike contingency plan, and the technical evaluation factor stated only that the agency would review an offeror’s proposed vessels and strike contingency plan to ensure compliance with the RFP’s minimum requirements. RFP at 30.

The solicitation also stated that contract award would be made “to that responsible offeror(s) whose technically acceptable offer(s) conforming to the solicitation represents the lowest overall cost to the Government with acceptable past performance.” Id. at 29. At no time prior to the closing date did AMS or any other offeror question the agency about the RFP’s intended basis for contract award.

Four offerors, including AMS and Admiral, submitted initial proposals by the July 15 closing date and final proposal revisions by the October 25 closing date. Admiral’s proposal contemplated the construction of new tugs to satisfy the solicitation’s vessel characteristic requirements. As a result, Admiral’s proposal included relevant ship drawings and professional engineer certifications to demonstrate its compliance with the RFP’s minimum performance specifications. AR, Tab C, Admiral’s Proposal, at 28-33, 45-52, 62-63, 68-69.

In its evaluation of proposals, the agency determined that the proposals of AMS and Admiral met the solicitation’s technical requirements, and that both offerors had acceptable past performance. AR, Tab J, Agency Technical Evaluation of Final Proposal Revisions; AR, Tab L, Business Clearance Memorandum, at 3-4. The Navy also determined that Admiral’s total evaluated price was \$27,613,691.70, while the total evaluated price of AMS was \$31,114,163.44. AR, Tab K, Agency Price Evaluation of Final Proposal Revisions, at 1-3. On November 12 the contracting officer selected Admiral for award as the responsible offeror with acceptable past performance whose technically acceptable proposal offered the lowest cost. AR, Tab L, Business Clearance Memorandum, at 8-9. Following a debriefing, AMS filed this timely protest.

AMS first challenges the agency’s selection of Admiral’s proposal on the ground that it does not in fact represent the lowest overall cost to the government. AMS essentially argues that, although the RFP specified how each offeror’s price would be evaluated (i.e., proposed rates, fuel consumption, and estimated OPTEMPO), it

also stated that contract award would be based on the proposal representing the “lowest overall cost” to the government. In AMS’s view, this solicitation language required the Navy to take into account the technical capabilities of each offeror’s proposal in determining lowest overall cost. Specifically, AMS contends that the tractor tug technology it employs provides greater stability and power when towing vessels as compared to the technology of the tugs proposed by Admiral. According to AMS, because the Navy improperly failed to adjust Admiral’s price in various areas so as to reflect its inferior technology, as well as the transition costs and increased technical risk associated with the replacement of AMS as the incumbent contractor, the agency failed to make contract award consistent with the requirements of the solicitation. Protest, Nov. 27, 2003, at 4-5.

The Navy admits that it intended for the RFP to refer to “lowest overall price,” instead of “lowest overall cost,” as the basis for its award decision. AR, Feb. 7, 2003, at 1. The agency explains that it used the word “cost” here because each offeror’s total evaluated price also included the estimated cost of fuel that the agency would incur as a direct reimbursable expense. *Id.* The agency argues that notwithstanding the misidentification of “price” as “cost,” the solicitation’s enumerated evaluation factors “leave no doubt” as to the intended basis of the agency’s contract award decision. AR, Dec. 27, 2002, at 4. We agree.

Solicitation provisions must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. Media Funding, Inc. d/b/a Media Visions, Inc., B-265642, B-265642.2, Oct. 20, 1995, 95-2 CPD ¶ 185 at 3. When a dispute arises as to the actual meaning of a solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. *Id.* A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. In our view, the only reasonable interpretation of the solicitation is the one advocated by the agency—that the award decision would be based on lowest overall price as calculated using the factors set out in the RFP.

As set forth above, the RFP expressly identified three evaluation factors—price, technical, and past performance—and articulated the method by which the agency would determine each offeror’s price. By contrast, the types of cost adjustments that AMS argues the Navy failed to make to offerors’ proposed prices (*e.g.*, the difference in offerors’ overtime amounts as a result of a tug’s towing speed) are dependent upon technical and cost information that the RFP did not require offerors to provide. While AMS has gone to great lengths to establish that its tug technology is superior to that proposed by Admiral, a contention with which Admiral strongly disagrees, we find that AMS’s interpretation of the solicitation language simply is not consistent with the solicitation when read as a whole and in a reasonable manner. *See Gelco Servs., Inc.*, B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163 at 7. Indeed, we note that none of the offerors, including AMS, took exception to, or expressed confusion regarding, the RFP’s basis for award.

AMS also protests that Admiral's proposal fails to meet certain performance requirements set forth in the RFP. Specifically, the protester contends that: (1) Admiral's large tugboat does not meet the 80,000-pound side bollard pull requirement of the solicitation; (2) Admiral's proposed tugboats are not configured to prevent metal-to-hull contact with subsurface vessels; (3) Admiral's proposal states that it cannot meet the RFP's delivery schedule; and (4) Admiral's strike contingency plan is inadequate.

In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals, but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

In its final proposal revision, Admiral stated that its large tugboat had a side bollard pull of 80,423 pounds. AR, Tab C, Admiral's Proposal, at 68 (Letter from Jensen Maritime, Oct. 24, 2002). Admiral's proposal also explained how its side bollard pull was calculated: available thrust was estimated to fall within a range of approximately 76 - 90 percent of the tug's forward bollard pull (which it had previously determined to be 105,820 pounds), depending upon the angle of the towline with the centerline of the tug.⁴ Id. Admiral's calculations as to both forward and side bollard pull were certified by a professional engineer, who was also the director of engineering for the designer of the tugs proposed by Admiral. Id. Based on these calculations, the agency determined that Admiral's proposal met the RFP's bollard pull requirements.

We find the agency's evaluation here reasonable and consistent with the stated evaluation criteria. The solicitation required an offeror's large tugboat to have a side bollard pull of 80,000 pounds, as certified by a professional engineer. Admiral's proposal met this performance requirement and contained the requisite certification. We see no reason to conclude that the agency's determination in this regard was unreasonable or improper.

In its protest AMS does not challenge Admiral's underlying calculation of the proposed tug's forward bollard pull, but argues that the proper range for the side bollard pull calculation is 70 - 75 percent of a tug's forward bollard pull.⁵ In our view,

⁴ 105,820 pounds x 76 percent = 80,423.2 pounds.

⁵ Using this reduced percentage as argued by AMS results in Admiral's large tug not meeting the solicitation's side bollard pull requirement (105,820 pounds x 75 percent = 79,365 pounds).

AMS's argument regarding the proper efficiency factor to be applied in the calculation of a tug's side bollard pull amounts to mere disagreement with the agency's evaluation of proposals. C. Lawrence Constr. Co., Inc., *supra*. As there is no agreed-upon formula to calculate bollard pull, *see* RFP amend. 7, at 2, nor did the RFP establish one, we find no basis to find the Navy's evaluation of Admiral's proposal to be unreasonable.

AMS also argues that the tug configuration as proposed by Admiral will not preclude metal-to-hull contact as required by the RFP. Admiral's proposal included drawings and specifications for the newly constructed vessels it would employ if awarded the contract. These submissions demonstrated how the proposed tugs were configured, through the use of fendering systems, to preclude both surface and subsurface metal-to-hull contact. The agency evaluated Admiral's proposal and determined that it met the technical requirements here. AR, Tab J, Agency Technical Evaluation of Final Proposal Revisions, at 1. In making this determination the agency also took into account the past performance of similarly configured tugs: only in one instance, which was the result of broken fendering, did metal-to-hull contact occur between a "reserve-tractor-like" tug as proposed by Admiral and a subsurface vessel. Contracting Officer's Statement at 2. Based on the record here, we find that the agency reasonably determined that the tugs proposed by Admiral would meet the configuration requirements.

In its protest AMS does not assert that Admiral's tugs cannot meet the RFP's configuration requirements here; instead, AMS argues that Admiral's configuration (with, allegedly, approximately 6 inches of clearance between drive system and naval vessel) has a higher risk of metal-to-hull contact than AMS's configuration (with, allegedly, more than 12 inches of clearance between drive system and naval vessel). Protester's Comments, Jan. 9, 2003, at 10, exh. 2, Declaration of John W. Waterhouse, at 6. We need not resolve whether AMS's configuration is in fact technically superior because the RFP informed offerors that the agency's evaluation of proposals and award decision was one of technical acceptability. As the agency properly evaluated Admiral's proposal against the RFP's minimum performance specifications, and reasonably determined that Admiral's proposal met the relevant configuration requirements, we find no basis to disturb the agency's evaluation here.

AMS also protests that Admiral's proposal states that it cannot meet the RFP's delivery schedule.⁶ As detailed above, the solicitation originally established a

⁶ To the extent AMS also argues that Admiral's proposal should have been found technically unacceptable because Admiral proposed to use newly built tugs, we find this ground of protest to be untimely raised. Our Bid Protest Regulations require that protests based on other than alleged solicitation defects be filed within 10 days of when the basis of protest is known or should have been known. 4 C.F.R. § 21.5(a) (2002). Here, AMS was aware no later than the date it filed its original protest

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delivery schedule of 246 days (the time between the anticipated award date and the canceling date). During discussions Admiral informed the agency that it would require a period of 347 days for the construction and delivery of its proposed tugs. AR, Tab C, Admiral's Proposal, at 34 (Fax Transmission, Sept. 4, 2002). Subsequent solicitation amendments modified both the anticipated award date and canceling date, finally resulting in a revised delivery period of 287 days. RFP amend. 9, at 2. In its final proposal revision, Admiral stated that the "proposed vessels will meet all requirements of the solicitation as amended." AR, Tab C, Admiral's Proposal, at 42 (Letter from Admiral, Sept. 27, 2002). Admiral also acknowledged every solicitation amendment that revised the delivery schedule. Id. at 67 (Letter from Admiral, Oct. 25, 2002). In the subsequent evaluation of proposals the Navy determined that Admiral's proposal agreed to comply with the RFP's delivery schedule. AR, Tab L, Business Clearance Memorandum, at 2.

We find the agency's evaluation here to be reasonable. There are no documents in the record to support a finding that Admiral advised the Navy that it would not comply with the delivery schedule or that its proposal was conditional on the agency's acceptance of an alternate canceling date. The fact that Admiral had essentially requested a longer delivery schedule during discussions does not negate the offeror's subsequent unconditional agreement to comply with the solicitation's delivery schedule.

AMS also challenges Admiral's strike contingency plan as inadequate. In outlining how services would be provided without interruption if there were a labor strike, Admiral stated,

[DELETED].

AR, Tab C, Admiral's Proposal, at 25. The agency determined that Admiral's proposal, including its strike contingency plan, was acceptable.

AMS argues that Admiral's strike contingency plan is inadequate and fails to meet the requirements of the solicitation because the plan does not state when the union contract expires nor does it provide any information regarding Admiral's plans to ensure continuity of services following expiration of the pertinent collective bargaining agreement. Protest, Jan. 9, 2003, at 12-13.

A contracting agency is responsible for evaluating the information submitted by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's proposal; we will not disturb this technical

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(November 27, 2002) that Admiral's proposal contemplated the use of tugs that had yet to be built. Since AMS did not raise this issue until January 9, 2003, it is untimely.

determination unless it is shown to be unreasonable. Thames Towboat Co., Inc., B-282982, Sept. 9, 1999, 99-2 CPD ¶ 100 at 4. Contrary to AMS's view, the RFP did not require that offerors submit detailed technical information, either as to compliance with the solicitation's performance specifications or as to an offeror's strike contingency plan. While Admiral's strike contingency plan could have identified the expiration date of its collective bargaining agreement, there was no requirement here that it do so. Likewise, while the agency's evaluation of Admiral's strike contingency plan may have considered this information, the failure to do so does not make the agency's determination here unreasonable.

Lastly, AMS argues that the agency improperly evaluated Admiral's proposed fuel consumption. As set forth above, the solicitation established that fuel would be either government-furnished or, if contractor-purchased, treated as a direct reimbursable expense. As a result, the RFP required offerors to submit the estimated fuel consumption amounts for the tugs proposed. The determination of an offeror's total evaluated price was a product of both the daily and overtime rates proposed by an offeror and the estimated cost of fuel. While offerors were required to warrant that fuel consumption when performing harbor work would be at the average consumption rate identified in their proposals, RFP at 11, the solicitation generally did not limit the government's liability to pay the cost of the actual fuel consumed to the rate set forth in an offeror's proposal.⁷

Admiral's proposal set forth a fuel consumption rate of [DELETED] barrels per hour for both the one large tugboat and the five smaller tugs proposed. The agency determined that at the consumption rates proposed, Admiral's fuel costs totaled \$[DELETED] annually, or \$[DELETED] for the total contract period. AR, Tab K, Agency Price Evaluation of Final Proposal Revisions, at 2. AMS argues that Admiral's fuel consumption rate is significantly understated; the protester contends that a more realistic fuel consumption rate would be between [DELETED] barrels per hour for Admiral's high-powered tug, and [DELETED] barrels per hour for the smaller five tugs. AMS bases this assertion on the calculations of its consultant (who considered the particular characteristics of the tugs which Admiral proposed), historical fuel consumption rates for the work to be performed, and the fuel consumption rates proposed by other offerors. AMS argues, based on its fuel consumption estimates, that Admiral understated its fuel costs by \$[DELETED]

⁷ While the agency would not bear the cost of the fuel consumed by the contractor when the vessel was in an "off-hire status," RFP at 14, 16, or the costs of the additional fuel consumed in excess of the rate proposed if due to mechanical defect, breakdown, casualty, or inefficiency, RFP at 16, the solicitation clearly does not "cap" the government's liability for the costs of fuel at the consumption rates in an offeror's proposal.

annually, or a total of \$[DELETED] for the total contract period.⁸ We need not resolve this issue regarding the reasonableness of Admiral's fuel consumption rates, however, because the record demonstrates that the protester could not have been prejudiced as a result of any alleged error in this regard.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Parmatic Filter Corp., B-285288.3, B-285288.4, Mar. 30, 2001, 2001 CPD ¶ 71 at 11; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, AMS alleges that the agency's unreasonable evaluation resulted in the Navy understating Admiral's evaluated price by \$[DELETED]. By contrast, the total evaluated price difference between the proposals of Admiral and AMS was in excess of \$3.5 million. Under these circumstances, we conclude that AMS could not have been prejudiced since, even assuming the agency's evaluation of Admiral's fuel consumption costs was unreasonable and should be adjusted as alleged by AMS, Admiral's proposal would remain lower priced and thus in line for award under the terms of the RFP.

The protests are denied.

Anthony H. Gamboa
General Counsel

⁸ AMS determined this amount by using the same formula employed by the agency for evaluating fuel consumption costs, but using an aggregate rate of [DELETED] barrels per hour for all six of Admiral's tugs. Protester's Comments, Jan. 9, 2003, at 7. The protester explains that [DELETED] barrels per hour is the maximum fuel consumption rate calculated by its consultant for Admiral's five smaller tugs, and is in the middle of the range calculated for the large tug. Id.