27697

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-211984 **DATE:** March 16, 1984

MATTER OF: Pikes Peak Water Company

DIGEST:

1. GAO standard of review in bid protests is not independently to determine which proposal is most advantageous to the government, but to consider whether contracting agency's selection is legally objectionable.

2. When solicitation specifies that award will be made on the basis of "price and other factors," award must go to the lowest-priced, responsible offeror whose proposal is acceptable under the evaluation factors listed in a solicitation, and evaluation credit may not be given for factors that are not listed.

3. GAO generally dismisses protests advocating the use of more restrictive specifications since, unlike unduly restrictive specifications, which violate the statutes and regulations requiring free and open competition in federal procurement, specifications that allegedly are not restrictive enough violate no statute or regulation.

4. While successful utility contractor must comply with state statutes, whether and how it does so must be resolved in state courts and not by the contracting officer or GAO.

5. Because applicable regulations require agency to evaluate costs for utility contract over anticipated period of service, evaluation for only first year in which full services will be provided is improper. In absence of a solicitation provision for addition of inflation factor, however, one may not be added to evaluated costs.

028289

6. When solicitation for utility contract lists a range of estimated quantities to be used, and does not specify a single, definite quantity for evaluation purposes, life cycle costs cannot be accurately projected. However, when protester is the highest-priced offeror regardless of quantity, the deficiency did not deny it an award to which it was otherwise entitled, and GAO will deny protest based on improper cost evaluation.

Pikes Peak Water Company protests the Corps of Engineers' proposed award of an indefinite term, requirements contract to supply water to an Air Force installation currently under construction 20 miles outside of Colorado Springs, Colorado. The Corps rejected Pikes Peak's proposal as unreasonably priced and plans to make award to the Cherokee Water and Sanitation District, the only other offeror.

We find the Corps' solicitation and cost evaluation procedures deficient in some respects; however, because these deficiencies did not deny Pikes Peak an award to which it was otherwise entitled, we deny the protest.

Background:

The Air Force installation is to become operational in two phases: the Satellite Communications Support Facility in early 1984 and the Consolidated Space Operations Center in October 1985. The successful contractor will construct, install, operate, and maintain pipelines, pumps, and other equipment necessary to bring water from its own source of supply to both facilities.

The Corps solicited proposals from four offerors in the Colorado Springs area. The solicitation, No. DACA45-83-R-0005, consisted of a cover letter dated January 24, 1983, three attachments (a list of water service specifications, a project map, and an area map), and a

sample contract that incorporated standard terms and conditions for utility service contracts as set forth in Defense Acquisition Regulation (DAR) Supplement No. 5 (October 1, 1974).[1] According to the cover letter, proposals, due by February 24, 1983, were to include the following:

--a detailed description of water available to the offeror, including sources, rights, and present distribution and treatment system;

--a brief history of the offeror;

--a description of available or proposed backup facilities to be used in case of power or equipment failure;

--an estimate of downtime associated with such outages;

--a one-line diagram of proposed facilities, showing the distance from the offeror's present distribution point to the connect point;

--a breakdown of proposed construction costs, including direct costs (design, labor, and materials), indirect costs, and salvage value; and

--proposed rate structures.

The cover letter stated that the Corps would evaluate proposals, conduct discussions if necessary, and award a contract to that "responsive and responsible offeror whose

---

[1]Although DAR § 5-803 generally requires Department of Defense activities to procure utility services under General Services Administration area-wide contracts, in appropriate circumstances they may negotiate separate contracts in accord with Supplement No. 5.

proposal is judged to be in the best interests of the government, price and other factors considered."

The water service specifications required 500 gallons of water a minute to be continuously available at the connect point, which could be either at the southeast or northwest boundary of the installation; the minimum acceptable pressure depended upon which of these points the successful contractor planned to use. The contractor also was required to meet Environmental Protection Agency standards for drinking water and specific standards for hardness and chlorine content.

According to the specifications, estimated consumption, once the installation becomes fully operational in October 1985, will be between 130,000,000 and 175,000,000 gallons a year; until that time, approximately 5 percent of the stated amount is to be used. The government, however, is neither obligated to use nor restricted to these quantities.

The sample contract indicated that the one to be awarded would remain in effect "until terminated at the option of the government" with at least 30 days written notice.

Only two offerors responded to the solicitation. Pikes Peak Water Company, a privately-owned utility, proposed a connect charge of $1,129,379 and a rate of $2.28 per 1,000 gallons, with a minimum monthly charge of $39,939. Cherokee Water and Sanitation District, a quasi-municipal corporation, proposed a connect charge of $359,266, a rate of $2.17 per 1,000 gallons, and a minimum monthly charge of $637.

In May 1983, Pikes Peak learned that the Corps had determined that both proposals were technically adequate, but had eliminated Pikes Peak from the competition without discussions because of its proposed prices. In its protest to our Office, Pikes Peak argues that this action was arbitrary and unreasonable; the firm challenges both the Corps' evaluation of water rights and sources and its cost evaluation.

Water Rights and Sources:

A. Pikes Peak's Protest:

Pikes Peak alleges first that by requesting detailed information on water rights and sources, the Corps mistakenly led Pikes Peak to believe that it would evaluate and give credit for superiority in these areas, rather than make award solely on the basis of price.

Pikes Peak also argues that its own and Cherokee's proposals cannot be compared or evaluated on an equal basis. Although both offerors will draw groundwater from the Upper Black Squirrel Creek Basin, Pikes Peak argues that a critical difference is that it owns absolute rights to the water it has offered to provide, while Cherokee merely leases water rights, some of which are conditional and currently are being challenged in Colorado courts.

The firm alleges that Cherokee's water rights are legally imperfect because, among other things, its wells have not been properly drilled; water has not been put to "beneficial use" within the time allowed by state statutes; amounts historically used are less than those now being claimed by Cherokee; and use for municipal purposes outside Cimarron Hills, the residential district that Cherokee serves, has not been approved.

Pikes Peak further argues that there was no reasonable basis for the Corps' finding that Cherokee's proposal was technically adequate because, according to Pikes Peak, Cherokee's wells are located in an area of declining water levels. Assuming that the Air Force installation, when operational, will consume approximately 500 acre feet[2] of water a year, Pikes Peak estimates that in 10 years, Cherokee's total annual commitment to the Air Force and to its residential customers will be 3,400 acre feet. Pikes Peak alleges that Cherokee will be unable to supply this

---

[2]An acre foot is the amount of water needed to cover 1 acre of land to a depth of 1 foot; this converts to 325,900 gallons of water. Thus, 500 acre feet a year equals 162,950,000 gallons of water a year.

quantity from its existing wells. Pikes Peak further argues that in times of drought, Cherokee will be obliged to give first priority to its residential customers.

Its own proposal is superior, Pikes Peak contends, because it has an absolute right to pump 850 acre feet of water a year from the Black Squirrel Creek Basin; its own wells are more favorably located, in terms of adequacy of supply; and it has offered to dedicate its entire output to the Air Force installation, since contracts with municipalities near Colorado Springs will expire early in 1984 and will not be renewed except for emergency services, which will be provided on a reciprocal basis.

Finally, Pikes Peak argues that the studies used by the Corps of Engineers to evaluate water rights and sources were done in the 1960s and that the most recent is dated 1974. The firm contends that the Corps had a duty to use independent, outside consultants to evaluate proposals and to resolve the complex legal and hydrological questions involved in this procurement.

B. The Corps' Response:

The Corps responds that it is not concerned with whether offerors' water rights are leased or owned, absolute or conditional. Rather, according to the Corps, it simply seeks a long-term supply of water that meets the minimum standards set forth in the water service specifications at the lowest possible cost. The Corps states that the solicitation did not require--and was not intended to require--offerors to hold title to their water rights or to dedicate their supply to the government. Cherokee's leases of water rights are perpetual, the Corps adds, meaning that they cannot be canceled except by the lessee (Cherokee), so in the Corps' opinion they are equally as reliable as owned water rights.

With regard to the alleged legal deficiencies in Cherokee's water rights, the Corps states that it found it an impossible task to sort through water hearings and court decrees and identify those pertaining to Pikes Peak and Cherokee. It therefore determined that it would require

offerors to furnish such decrees at the beginning of negotiations, which Cherokee has done. If the Department of Defense waited until all disputed rights had been heard by an appropriate court, the Corps continues, it would be unable to buy water.

In evaluating the adequacy of Cherokee's sources of water, the Corps states, its in-house engineers, geologists, and contract specialists used reports by and consulted with officials of the Colorado Ground Water Commission and the U.S. Geological Survey, whom it regarded as independent experts. These individuals, the Corps states, made "educated guesses" that the decline in water levels in the Black Squirrel Creek Basin has been halted or reversed since 1974 because pumping for irrigation of sod farms has been drastically reduced and water management techniques have improved. A geologist from the Omaha District of the Corps who participated in the evaluation of proposals estimates that the aquifer currently is recharging itself at the rate of approximately 7,000 acre feet of water a year. This is almost double the 3,700 acre feet that Cherokee itself projects will be needed annually to serve both the Air Force and its district when fully developed.

To the extent that Pikes Peak is questioning its judgment that Cherokee is capable of performing the contract, the Corps cites 4 C.F.R. § 21.3(g)(4), as added by 48 Fed. Reg. 1932 (1983), and argues that the matter is not reviewable by our Office under our policy of not questioning affirmative determinations of responsibility. And although the Corps did not actually consider whether Pikes Peak was responsible, the agency implies that it might have found the firm nonresponsible because since May 1982 it has been operating under Chapter 11 bankruptcy rules and because, at the time of evaluation, Pikes Peak's assets were being advertised for sale.

C. GAO Analysis--Water Rights and Sources:

In considering Pikes Peak's arguments concerning Cherokee's water rights and sources, our standard of review is not independently to determine which proposal is most

advantageous to the government. We are limited instead to considering whether the Corps' selection of Cherokee is legally objectionable. The Jonathan Corporation, B-199407.2, September 23, 1982, 82-2 CPD 260. For the following reasons, we find that it is not.

First, it is difficult to see how Pikes Peak was misled or reasonably could have believed that an award decision would be made on the basis of whether water rights were leased or owned. The solicitation stated that award would be made on the basis of "price and other factors." Our Office has interpreted this phrase to include factors implicitly considered in any procurement, such as the responsibility of offerors and any factor prescribed by law, regulation, or the public interest. CEL-U-DEX Corporation, B-195012, February 7, 1980, 80-1 CPD 102. In short, under "price and other factors," award must be made to the lowest-priced, responsible offeror whose proposal is acceptable under the evaluation factors listed in the solicitation. Los Angeles Community College District, B-207096.2, August 8, 1983, 83-2 CPD 175; Freund Precision, Inc., B-209785, January 24, 1983, 83-1 CPD 83.

Pikes Peak correctly states that in competitive procurements, offerors must be treated equally and must be provided a common basis for submission of proposals. However, specifications must be couched in terms that will permit the broadest field of competition within the minimum needs of the government, and they need not state a preference, for example, for new or used equipment, if either will satisfy the government's requirements. All that is required is that the relative desirability of the goods or services sought be logically and reasonably related to or encompassed by the stated evaluation factors. See GTE Automatic Electric, Inc., B-209393, September 19, 1983, 83-2 CPD 340.

The solicitation in this case did not differentiate between leased and owned water rights, and did not state a preference for either one or the other. The Corps therefore could not properly have given Pikes Peak greater evaluation credit because it owned, rather than leased, its water rights. Because these factors were not listed in the

solicitation and offerors were not otherwise advised of them, the Corps was required to treat Pikes Peak's and Cherokee's proposals equally in this regard. See CEL-U-DEX Corporation, supra. If Pikes Peak offered to provide more than the solicitation required, it was not the result of arbitrary or capricious government action. Cf. Condur Aerospace Corporation--Claim for Proposal Preparation Costs, B-187349, July 14, 1977, 77-2 CPD 24 (also involving an allegedly misleading solicitation).

To the extent that Pikes Peak is arguing that the Corps should have expressed a preference for owned, rather than leased water rights, the firm is essentially advocating that the specifications should be more restrictive. A protest on this basis, filed after the closing date for receipt of initial proposals, is untimely. 4 C.F.R. § 21.2. In any event, our Office generally dismisses such protests, since unlike unduly restrictive specifications, which violate the requirement for free and open competition in federal procurement, specifications that allegedly are not restrictive enough violate no statute or regulation, and their use is not subject to legal objection. See Drexel Heritage Furnishings, Inc., B-213169, December 14, 1983, 83-2 CPD 686.

Second, the record in this case, to which Cherokee also has contributed, is replete with Colorado court decrees, hydrological reports, and maps of the Black Squirrel Creek Basin. It reflects a serious disagreement between the protester and the Corps of Engineers as to Cherokee's legal right to pump the quantity of water that will be needed by the Air Force installation and as to the adequacy and reliability of Cherokee's sources. We do not believe, however, that it supports a finding that the Corps' selection of Cherokee was clearly unreasonable.

The legal questions concerning Cherokee's water rights, such as whether they are conditional or absolute, how much water Cherokee may pump, and the uses to which that water may be put, must be resolved in the appropriate state courts. See Hooper Goode, Inc., B-209830, March 30, 1983, 83-1 CPD 329. The situation, in our opinion, is analogous to that of a contractor who is required by a

solicitation to have "all necessary licenses." In such a case, the matter is between the contractor and the state or local licensing authority, and the contracting officer need not determine whether a specific licensing requirement has been met. See, for example, Goodhew Ambulance Service, Inc., B-209488.2, May 9, 1983, 83-1 CPD 487. Similarly, while the successful contractor here must comply with Colorado statutes in the pumping and distribution of water to the Air Force installation, whether and how it does so is not for determination by the contracting officer or, for that matter, by our Office.

Other questions concerning Cherokee's water rights and sources, such as whether water levels in the Black Squirrel Creek Basin are still declining, the extent to which the aquifer is recharging itself, and what Cherokee's total commitments will be 10 years hence, when the Cimarron Hills residential district is fully developed, are not susceptible to a single, clearly correct answer, and the experts whose opinions have been presented to our Office disagree among themselves. These questions therefore do not provide a legal basis for objection to the proposed award. See Logistical Support, Inc. et al., B-208722, B-208722.2, August 12, 1983, 83-2 CPD 202. (We do not agree with the Corps that these questions relate only to the capability of Cherokee to perform the contract, i.e., its responsibility, since here they also have been used to determine technical acceptability, an appropriate use in negotiated procurement. See Anderson Engineering and Testing Company, B-208632, January 31, 1983, 83-1 CPD 99.)

Finally, we are not aware of any statute or regulation, and Pikes Peak has not cited one, that would require the use of outside consultants in a procurement such as this. We presume agency personnel are well trained, competent, and selected for their expertise in evaluating proposals, Cadillac Gage Company, B-209102, July 15, 1983, 83-2 CPD 96, and Pikes Peak has not rebutted this presumption.

Cost Evaluation:

A. Pikes Peak's Protest:

Pikes Peak's second major area of protest concerns the Corps' cost evaluation. It argues that the Corps

violated DAR Supplement No. 5 by not evaluating costs over the 30-year estimated life of the Air Force installation. Pikes Peak contends that if Cherokee were evaluated on this basis, its proposed price would be higher than Pikes Peak's because of scheduled increases in Cherokee's raw water costs.

Pikes Peak points out that the Cimarron Development Corporation, developer of the residential district, actually holds 7/8 of the leases for water that Cherokee is offering to supply and charges Cherokee for any amounts pumped in excess of 1,000 acre feet. Under an agreement between Cimarron and Cherokee, this user fee is adjusted every 3 years according to the Consumer Price Index. Assuming a 6 percent annual inflation rate, Pikes Peak has calculated that Cherokee's 30-year costs will be $14,399,931, or $2,132,512 more than the $12,267,419 that the Corps has projected for Pikes Peak.[3]

In addition, Pikes Peak contends that the Corps' decision to eliminate it from competition without discussions was arbitrary and capricious. The firm argues that its connect charge and minimum monthly rates reflect the fact that its water rights are owned and would be dedicated to the Air Force installation. If the Corps believed these were too high, Pikes Peak argues, there was a possibility of negotiating them downward.

B. The Corps' Response:

The Corps responds that there is no set formula for evaluating life cycle costs in utility procurements because different suppliers structure their proposals in different ways, depending upon such things as their distance from a

---

[3]Pikes Peak's figures are based on Cherokee's having to pay Cimarron a user fee of $156 per acre foot for 500 acre feet of water a year, with an adjustment every third year for 30 years. Cherokee's proposal, however, shows that its current user fee is $150.28 per acre foot and that the next adjustment will be in September 1985.

project and their willingness to accept government contributions for construction, to be repaid by reduced rates over a specified period. According to the Corps, its normal evaluation method, which it followed here, is to weigh all cost factors and to accept the offer that is in the best interest of the government.

Although the Corps did not actually calculate life cycle costs except in the context of the protest, its $12,267,419 figure for Pikes Peak includes the connect charge plus the minimum monthly charge for the entire 30 years. The Corps projects Cherokee's costs for the same period at $8,353,270 to $9,601,432, depending upon the quantity of water used.[4]

Pikes Peak's use of a 6 percent inflation factor for Cherokee's raw water costs is wrong, the Corps argues, because the actual annual inflation rate in the Colorado Springs area is less than 3 percent.[5] Moreover, the contracting officer states, it is unrealistic to assume that only Cherokee's costs will increase, and any inflation factor must be applied equally to both proposals.

The Corps further contends that Pikes Peak's calculations should not have been based on use of 500 acre feet of water a year, since the Air Force installation will consume only 100 acre feet the first year and 401 acre feet in each of the following years. According to the Corps, Cherokee's 30-year life cycle costs, including a 6 percent inflation factor, will be $11,128,341, or $1,138,988 less

---

[4]The Corps' figure for Pikes Peak assumes that no more than the quantity covered by the minimum monthly charge, or 162,840,000 gallons, will be used. The highest dollar figure for Cherokee appears to be based on the use of 150,000,000 gallons a year, rather than the high of 175,000,000 gallons specified in the solicitation.

[5]Corps here fails to recognize that the Consumer Price Index is a national, not a local, index.

than Pikes Peak's. The Corps concludes that even if it had evaluated life cycle costs, Cherokee would be the lowest-priced, responsible offeror.

As for its decision not to hold discussions with Pikes Peak, the Corps states that there appeared to be little or no room for price negotiation, since documents included with Pikes Peak's proposal indicated that the large insurance company that holds a first mortgage on all the firm's real and personal property offered to finance the new construction that Pikes Peak would need to serve the Air Force installation only if Pikes Peak could obtain a contract at the prices set forth in its proposal. The Corps therefore determined that Pikes Peak had no reasonable chance for award, justifying its elimination from the competitive range.

C. GAO Analysis--Cost Evaluation:

In our opinion, the cost comparison made by the Corps was not in accord with DAR Supplement No. 5, which requires consideration of the "total cost to the government for estimated quantities (including known changes in quantity) over the anticipated period of service set forth in the request for proposals." Here, the Corps looked at proposed prices only for the first year in which the Air Force installation will be fully operational.

Meaningful future competition here appears unlikely, since the successful contractor will be required to construct and maintain a pipeline from its own source of water to the Air Force installation, and any new contractor would be required to construct and maintain a new pipeline. We therefore believe the Corps should have evaluated costs over the estimated life of the Air Force installation, or 30 years, and should have included appropriate language in the solicitation indicating how these costs would be measured. We are not persuaded that difficulties in comparing connect charges, proposed rebates for such charges, if offered, and the like would prevent evaluation on this basis.

As for inflation, Cherokee's proposal confirms the fact that its raw water costs are subject to adjustment

every 3 years in proportion to changes in the Consumer Price Index. There is nothing in Pikes Peak's proposal, however, that indicates that its prices will remain fixed over the term of the contract. Neither firm's rates are subject to regulation by a public utility commission or other independent regulatory body, and under Supplement No. 5, with "reasonable cause," rates may be renegotiated at the request of either party to a utility contract. See DAR S5-203.2. It therefore appears that Pikes Peak's rates also may be increased during the term of the contract, even if its raw water costs do not change. It would be speculative to assume for evaluation purposes that Cherokee's rates will increase and Pikes Peak's will remain fixed, and in any event, since an intent to include an inflation factor was not indicated in the solicitation, one cannot now be used for evaluation purposes. CEL-U-DEX Corporation, supra.

Life cycle costs cannot be accurately projected now, however, because the solicitation did not indicate a single estimated quantity of water that would be used for evaluation purposes, but rather specified a range of from 130,000,000 to 175,000,000 gallons a year. The discrepancies between the 30-year costs projected by Pikes Peak and by the Corps are attributable in part to their use of different quantities and, in some but not all cases, their attempts to convert these quantities to acre feet, a measure that was not used at all in the solicitation.

In the absence of an evaluation formula, we have not attempted to calculate life cycle costs for either offeror ourselves, but we cannot conclude that Pikes Peak had a reasonable chance for award, since it appears that under almost any evaluation formula it would have been the highest-priced offeror. There is a nearly $800,000 difference in connect charges between Pikes Peak and Cherokee, and a nearly $40,000 difference in each month's minimum charges. In addition, Pikes Peak's proposed rate per 1,000 gallons is 11 cents higher than Cherokee's.

We therefore find that the Corps' exclusion of Pikes Peak from the competitive range, without discussions,

is not legally objectionable. See Informatics General Corporation, B-210709, June 30, 1983, 83-2 CPD 47. If the Corps had conducted discussions with both offerors, it would have been able to clarify, for example, whether Pikes Peak actually intended to apply its minimum monthly charge during the 21 months (from January 1984 through September 1985) when estimated usage would be only 5 percent of that specified for the period after the Air Force installation becomes operational. However, since the solicitation stated that discussions would be held "if necessary," Pikes Peak had notice that the Corps might make award on the basis of initial proposals, and if it did not intend to apply this minimum charge, it should have said so.

In summary, because the deficiencies in the Corps' solicitation and cost evaluation procedures did not deny Pikes Peak an award to which it was otherwise entitled, we deny the protest. See Lingtec, Incorporated, B-208777, August 30, 1983, 83-2 CPD 279.

Milton J. Socolar

Acting Comptroller General
of the United States