M. Jordan

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Live Oak Pipeline Company

File: B-241175

Date: January 29, 1991

Morton L. Simons, Simons & Simons, for the protester.
R. W. Brown for Gulf Gas Utilities Co., and Joe W. Crutchfield for Union Natural Gas Pipeline Co., interested parties.
Richard R. Butterworth, Jr., Esq., General Services Administration, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Offeror was properly evaluated as not low, in accordance with agency evaluation scheme set forth in amended request for proposals and instructions provided to it. Disagreement with evaluation scheme was required to be protested prior to closing date for receipt of best and final offers.

2. Requirement that offeror certify that it is a public utility, or is otherwise authorized to distribute natural gas in the contract area, concerns a matter of responsibility which may be met after proposals are submitted. Thus, public utility offeror, which subsequently loses that status but regains it prior to award, is eligible for award.

DECISION

Live Oak Pipeline Company protests the award of a contract to Gulf Gas Utilities Co. under request for proposals (RFP) No. GS-OOP-90-BSD-0031, issued by the General Services Administration (GSA) for the supply of natural gas utility services. Live Oak contends that it, not Gulf, is the low offeror and argues that Gulf misrepresented itself as a public utility in its proposal.

We deny the protest.

The RFP solicited proposals to furnish an estimated 75,000 Mcf (thousand cubic feet) of natural gas annually to the Federal Correctional Institution at Three Rivers, Texas, for a period of 10 years. Payment was to be made in accordance with the

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contractor's approved rate schedule, based upon the actual gas volumes metered at the facility. Offerors were required to certify their status as a public utility entity or company legally authorized by the Texas Railroad Commission (TRRC) or appropriate local regulatory authority to distribute natural gas services in Live Oak County, Texas.

Live Oak's first contention concerns the propriety of the agency's evaluation of Live Oak's prices. Each offeror furnished a projected "total initial annual cost" dollar figure for the gas service (Article 2b). Under the terms of the RFP, prices would be subject to fluctuation over the 10-year life of the contract. Accordingly, in order to ensure evaluation of all offerors on a common basis, the initial RFP provided for separate entries for the costs of gas and of connection charges under Article 11 of the RFP, "Evaluation Factors for Award." In Article 11a, each offeror was to select its most favorable rate schedule, from which it was to add other amounts to establish its total annual cost of natural gas, using monthly volumes provided by the government. This cost was to include, among other charges, normal rates, cost of purchased gas, compression charges, certain pipeline transporter charges, and all applicable royalties and taxes.

In Article 11b, each offeror was to enter the total cost of its proposed connection charge, if any, necessary to provide natural gas to the facility. This figure was to be based upon "allowable, allocable, and reasonably incurred costs of construction" based upon the government's "fair share of pipeline usage." Article 11c provided for the total annual cost of gas (11a) and the total connection charge (11b) to be added together to represent the offeror's total cost figure. Award was to be made to the eligible and responsible offeror whose proposal offered the lowest total cost.

Six offerors submitted proposals by the March 19, 1990, closing date. Only four of the six, including Gulf and Live Oak, were included in the competitive range and were requested to clarify their proposals in May. In particular, Live Oak was asked to explain the basis of a proposed $9,830 per month "demand charge"; to advise whether this charge was offered in place of the up-front connection charge; and if so, whether it was a total amortized charge over the 10-year term of the contract. In response, Live Oak explained that its demand charge was in addition to its connection charge, which only included facilities located on the government's property. The firm stated that the demand charge included amortization of its plant costs.

After receiving responses from all offerors, the agency requested each to submit its best and final offer (BAFO) in June. In reviewing the proposals and BAFOs, the contracting officer found that they could be evaluated in two different forms, one with the cost of pipeline connection charged up-front, and the other with the cost amortized in the rates over the 10-year performance period.

The contracting officer also found that each offeror had failed to comply with different provisions of the RFP. He noted that Live Oak had included its monthly "demand charge" in its Article 11a entry as part of the annual cost of gas. The agency requested clarification from Live Oak as to what the portion of the demand charge included amortization of its plant.1/ In response, Live Oak advised that $1,677.50 per month of the $117,960 annual demand charge represented amortized costs of its plant, the total amount of which it identified as $355,500.2/

On July 26, the contracting officer issued an amendment to the RFP and requested BAFOs from each offeror. The amendment provided that the total gas figure in Article 11a "shall not include the connection charge or any portion thereof which has been amortized over the life of this Contract and incorporated into the firm natural gas rate as a demand or monthly charge." Article 11b was similarly amended to provide that offerors "shall" include the "one-time, up-front connection charge" and that no part of that charge was to be included in 11a.

Each offeror submitted a BAFO by the closing date of August 1. Live Oak's new BAFO included the same connection charge in Article 11b and--contrary to the instructions in the RFP amendment--a figure in Article 11a that not only included its annual charge for natural gas as established according to the RFP instructions, but also a "demand charge." Accordingly, the contracting officer specifically advised Live Oak to ensure that it deleted any portion of the firm's connection charge from the Article 11a portion of its proposal. Since each offeror again had failed to fully comply with all provisions of the revised RFP, a subsequent BAFO was requested by August 8. In further discussions, the agency attempted to make certain that each offeror interpreted the words

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1/ While the term "plant" is not specifically defined, the record suggests that it referred to that portion of Live Oak's facilities for which it planned to obtain reimbursement from the government.

2/ Live Oak's demand charge of $9,830 per month for the first year was based upon its estimate of the peak daily demand. The charge in subsequent years would be the greater of the first year figure or a calculation based upon the maximum use during any 60-minute period during the prior contract year.

"connection charge" to mean the same thing: a one-time, up-front charge that the government would be billed for the construction of and connection to the offeror's facilities of whatever was necessary to service the correctional facility's natural gas requirement.

In response, Live Oak submitted a BAFO which deleted the "demand charge" in Article 11a. In Article 11b, it added $355,000, representing costs of its plant, to the $62,168 figure identified in the previous BAFO as the connection charge. The contracting officer added the Article 11a and 11b figures in each proposal to arrive at an evaluated total first year cost of $634,686 for Live Oak and $396,527 for Gulf. On August 17, the contracting officer advised all offerors that he intended to award Gulf the contract. That same day, in two letters, Live Oak challenged the award, contending that it was the low offeror and that Gulf was not a public utility.

On August 23, Live Oak requested a debriefing, and reiterated its August 17 contentions. The contracting officer requested Gulf to recertify that it was authorized to distribute natural gas in Live Oak County. After receiving this certification along with a letter from the TRRC stating that Gulf was a public utility as of August 23, the contracting officer awarded the contract to Gulf. On August 31, Live Oak received a written debriefing and was informed that the agency had denied its protest. Gulf then filed a protest with our Office.

Live Oak contends that it should have been awarded the contract because its first year price, as stated in Article 2b, is lower than Gulf's first year price. While its total evaluated cost from Article 11 is higher than Gulf's cost, Live Oak argues that this figure is not appropriate for evaluation. In this regard, Live Oak contends that when the contracting officer explained that it was to insert its total plant cost as a connection charge in Article 11b, Live Oak expressed its disagreement with the contracting officer. The only reason it included that cost was because the contracting officer required it to do so or risk having its offer rejected. Thus, it concludes that the agency evaluation was unreasonable. We disagree.

For evaluation purposes, in Article 11, the government apparently sought to normalize the offerors' prices by segregating the first year's gas costs, based upon offerors' schedule rates, from the total of other non-gas charges, denominated connection charges, based upon the government's fair share of pipeline usage. The sum of these figures represented, for evaluation purposes, each offeror's total cost figure. The RFP further provided that this total was to be the basis for determining the award.

While Live Oak expressed disagreement with the contracting officer's explanation, it did not file a protest. To the extent Live Oak is now protesting the agency's evaluation scheme, it is untimely. Protests based upon alleged improprieties in a solicitation which are subsequently incorporated into the solicitation, must be protested not later than the next closing date for receipt of proposals following the incorporation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990).

Further, we find nothing objectionable in the agency's evaluation scheme. Since the offerors proposed different pricing structures for charging of gas services, the agency reasonably sought to obtain comparable figures for evaluation purposes. None of Live Oak's arguments establishes that its total cost, as defined in Article 11, is low.

For example, in its agency level protest, Live Oak explained that its demand charge represented the government's fair share of the connection charge. During discussions, it advised the agency that its demand charge was in addition to the connection charge. It also explained that $1,677.50 per month of its demand charge represented the amortized plant charge, the total of which (presumably over 10 years) it identified as $335,500.3/ Live Oak now calculates its "appropriate" Article 11 figure as the sum of its first year's commodity charge ($237,518) and its first year's demand charge ($117,960) for a total of $355,478 (the same as its projected first year gas cost in Article 2b of its proposal). However, it does not take into account the fact that Live Oak intended to charge the government a demand charge throughout the contract term and that for evaluation purposes the figure in Article 11b is to represent a total charge, not just the charge for the first year. In view of the requirements of Article 11b for a total connection charge to be entered, and Live Oak's identification of both a connection charge and facility-related demand charges, it was reasonable for the government to require that Live Oak's Article 11b total connection charge include its demand charges. To the extent Live Oak argues that the demand charge should be considered as separate from the connection charge, we find this annual charge had to be considered by the government in its cost evaluation so that it could evaluate

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3/ Live Oak did not explain the precise relationship between the monthly and total plant figures. By our calculation, payment of $1,677.50 each month for 10 years would amount to only $201,300.

offerors on a common basis. In short, we find the evaluation to be proper.

Live Oak's argument that an award should have been made on the basis of initial proposals is untimely since it was not filed within 10 days after Live Oak was aware of this basis for protest. See 4 C.F.R. § 21.2(a)(2). Live Oak's further argument that the multiple BAFO rounds were improper and prejudicial to it is also untimely since it was not raised until after the award was made to Gulf. See 4 C.F.R. § 21.2(a)(1).

Live Oak next contends that Gulf is not entitled to the award because it was not a public utility at the time of each of its BAFOs and the RFP required offerors to certify that they had that status. The agency maintains that Gulf's status as a public utility is a matter of responsibility. We agree.

Where an RFP requirement concerns a matter of an offeror's status as a public utility, it concerns responsibility. See Brunswick Corp. and Brownell & Co. Inc., B-225784.2, B-225784.3, July 22, 1987, 87-2 CPD ¶ 74. Such responsibility requirements may be met after the submission of a proposal and in some instances, up to the time of performance. VA Venture; St. Anthony Medical Center, Inc., B-222622, B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289.

Here, the RFP required certification that an offeror was a public utility or company legally authorized by the TRRC or other authority to distribute natural gas services in the contract area. At the time of its initial proposal, Gulf was a public utility, but lost that status prior to the submission of its first BAFO. Gulf again was certified as a public utility by the TRRC on August 23, prior to receiving the award. Further, the TRRC informed the contracting officer that an entity could be legally authorized to distribute natural gas without being recognized as a public utility by the TRRC. The contracting officer also considered the experience of Gulf's parent company, which had more than 5 years experience and was designated a public utility by the TRRC. See Hardie-Tynes Mfg. Co.--Recon., B-237938.2, June 25, 1990, 90-1 CPD ¶ 587. Under these circumstances, we believe the contracting officer reasonably determined that Gulf was responsible and eligible for the award.

Live Oak also notes that Gulf's rates were not set until after award even though the RFP required that proposals be based on effective rates approved by the TRRC or local public regulatory authority as of the date of the proposal. Live Oak argues that without an approved rate schedule, the award commits the government to pay an amount which is indeterminate and subject to the contractor's unfettered control. Although

Gulf's rates for the government apparently were not "approved" by the TRRC at the time of Gulf's proposal, we do not find that the contracting officer erred in considering that rate or that Live Oak suffered any competitive harm as a result.

Under Texas law, a utility rate for large volume contract customers, such as the government here, is considered by the TRRC as "just and reasonable" and shall be approved if set on the basis of competition with another gas utility or supplier. TEX. REV. CIV. STAT. ANN. Art. 1446e, § 5.02(b) (Vernon 1990). The rate submitted by Gulf in its proposal and subsequently approved by the TRRC was set through the instant competition. While that rate fluctuates according to a stated formula, this does not mean that the government has contracted for an indeterminate amount. The formula, provided in the schedule filed with the TRRC and in the contract, is based upon a certain percentage of the average of three other pipelines operating in Texas and reported in a published gas market report. We note that the approved rate proposed by Live Oak is subject to a monthly adjustment on the basis of a similar formula to that in Gulf's contract and was, at the time of its proposal, approximately $1.00 per Mcf higher than Gulf's rate. We do not believe that Live Oak's allegation provides a valid basis for protest since it offered the same kind of pricing adjustments in its own offer.

The protest is denied.

for Robert P. Murphy
James F. Hinchman
General Counsel