



Comptroller General
of the United States
Washington, D.C. 20548

155172

Decision

Matter of: Women's Energy, Inc.; San Franciscans for Public Power; City and County of San Francisco

File: B-258785; B-258785.2; B-258785.3

Date: February 15, 1995

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David J. Williamson, Esq., for Pacific Gas and Electric Company, an interested party.
James L. Weiner, Esq., and Justin P. Patterson, Esq., Department of the Interior, 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

1. Protest alleging that the awardee, the incumbent contractor, should not have been eligible for award due to an organizational conflict of interest is untimely where the protesters were on notice of the firm's participation in the procurement and that the agency had not restricted the firm's participation.
2. Where the agency reasonably considered the awardee's proposal to install an electrical distribution system at no upfront installation costs to the government, and where the agency reasonably considered and evaluated potential cost liabilities to the government as a result of particular contingencies and conditions in the firm's proposal, the agency reasonably awarded the contract to the firm as the most advantageous offeror since, even considering reimbursement of the costs for the stated contingencies and conditions, the firm's evaluated costs were low.

DECISION

Women's Energy, Inc. (WEI), San Franciscans for Public Power (SFPP), and City and County of San Francisco (CCSF) protest the award of a contract to Pacific Gas and Electric Company (PG&E), under request for proposals (RFP) No. 1443RP061094001, issued by the National Park

Service (NPS), Department of the Interior, for the installation of a new electrical distribution system and for the furnishing of electric service for a 10-year period at the Presidio of San Francisco. The protesters principally contend that PG&E should not have been eligible for award due to an organizational conflict of interest, and in the alternative, that NPS' evaluation of PG&E's cost proposal was questionable.

We deny in part and dismiss in part the protests.

BACKGROUND

On October 1, 1994, the Presidio was transferred from the Department of Defense to NPS to become part of the "Golden Gate National Recreation Area." Prior to the transfer, in 1990, NPS determined it would need to replace the Presidio's current, 4 kilovolt (kV) electrical distribution system with a new 12kV system. At the time, PG&E owned 20 percent of the Presidio's electrical distribution system and was the incumbent contractor, responsible for providing electric service to the Presidio under a General Services Administration (GSA) areawide public utilities contract. In 1990 and 1991, NPS modified PG&E's GSA contract to require a preliminary and a final engineering study of the Presidio's electrical distribution system. At that time, NPS intended to make a noncompetitive award to PG&E to construct and own the new electrical distribution system, but, upon learning of other potential providers of electric service, decided to conduct a full and open competitive procurement.

On July 5, 1994, NPS issued the RFP on an unrestricted basis. The RFP contemplated the award of a cost reimbursement, no fee contract for the installation of a new 12kV electrical distribution system and, as amended, a 10-year firm, fixed-price contract with an economic price adjustment provision for providing electric service. The contractor would obtain revenue through the sale of electricity. The RFP schedule included 14 base and 9 additive/option line items. Each line item included estimated unit quantities for which offerors were to insert unit and extended costs. The RFP included as attachments PG&E's final engineering study (which incorporated the preliminary engineering study); a drawing for the proposed underground primary electrical distribution system, which referenced PG&E in the legend; and load data. The RFP included an organizational conflict of interest provision, which referenced Federal Acquisition Regulation subpart 9.5 which addresses this type of conflict situation.

The RFP included the following technical evaluation factors, listed in descending order of importance: (1) solvency and

longevity; (2) retail electric utility service experience; (3) wheel power; (4) ownership of facility; (5) innovative energy concepts; (6) uncontrollable forces; and (7) regulatory climate (including a requirement for obtaining a certificate of public convenience and necessity (CPCN) and a franchise license, or an exemption from these requirements, prior to award). The RFP included the following cost evaluation factors, listed in descending order of importance: (1) cost of ownership of the system; (2) contribution in aid of construction (CIAC) tax; (3) estimated cost of installation of a new 12kV system; (4) rate schedules; (5) operations and maintenance costs; (6) replacement costs; and (7) life-cycle cost (to be calculated by NPS). The RFP stated that cost would be evaluated for realism, completeness, and credibility. The RFP provided that the award would be made to the responsible, most advantageous offeror, with technical considerations more important than cost.

On July 14, NPS held a pre-proposal conference which was attended by representatives of CCSF, WEI, SFPF, and PG&E. By the August 8 closing date, these four entities submitted initial proposals. NPS included all proposals, except that of SFPF, in the competitive range. By letter dated August 19, NPS notified SFPF that its proposal was deficient for various specific reasons, and therefore, was not included in the competitive range. By letters of the same date, NPS notified the other offerors of matters for discussion. Subsequent to discussions, WEI requested, but was denied, an extension of the period of time for satisfying the CPCN and franchise license regulatory requirements (from the time of award, as stated in the RFP, to the time when the system would be energized, as requested by WEI).

CCSF, WEI, and PG&E submitted BAFOs by the September 9 closing date. PG&E was ranked first overall (technical and cost), followed by CCSF and WEI, respectively. PG&E offered to install the 12kV electrical distribution system at no upfront installation costs to the government, although it enumerated certain cost-related contingencies and conditions for which NPS could incur liability. On September 28, NPS awarded the contract to PG&E, evaluated as the low cost, most advantageous offeror. These protests, challenging the award to PG&E, followed.¹

¹An argument can be made that only CCSF is an interested party to challenge the award to PG&E since it was ranked second overall.

ORGANIZATIONAL CONFLICT OF INTEREST

CCSF, WEI, and SFPP allege that PG&E should not have been eligible for award due to an organizational conflict of interest as a result of PG&E's performance of the engineering studies for NPS under its predecessor contract for providing electric service to the Presidio. The protesters basically believe that PG&E prepared or assisted in the preparation of the statement of work for this RFP and engaged in systems engineering and technical direction for the upgrading of the Presidio's electrical distribution system, matters which the protesters believe ultimately should have disqualified PG&E for award. We dismiss this basis of protest as untimely.

The record clearly establishes that CCSF knew prior to the submission of its initial proposal by the August 8, 1994, closing date that PG&E was a competitor in this procurement. Specifically, the record shows that by letter dated July 26, CCSF directly requested from PG&E the most current electrical load and billing data for purposes of preparing its proposal. By letter dated July 27, which was telefaxed to CCSF on July 29, PG&E directly responded to CCSF, stating that "the information included in [NPS'] Request for Proposal (RFP) is the same information we are using to prepare PG&E's proposal." (Emphasis added.)

In addition, several months prior to the issuance of the RFP, SFPP was quoted in local newspaper articles complaining about NPS' then-contemplated noncompetitive "giveaway" to PG&E at taxpayer expense. Furthermore, concerning WEI, even if it did not know at the time it submitted its initial proposal that PG&E was a competitor, we believe it knew of PG&E's status at the time it submitted its BAFO, as evidenced by a statement in its BAFO when discussing the time frame for compliance with regulatory requirements that it was its belief that "two other [o]fferors submitted responsive bids to NPS: [PG&E] and [CCSF]."

Moreover, as evidenced by an amendment to the RFP which included the pre-proposal conference sign-in sheet, identifying the individuals in attendance at the conference and the entity on whose behalf the representatives appeared, the protesters, which were each represented at the conference, knew that PG&E also was represented at this conference.

We think this record establishes that for a significant period of time prior to award, the protesters were aware of PG&E's participation in this competitive procurement and that NPS had not restricted PG&E's participation. Under our Bid Protest Regulations, protests not based on solicitation improprieties must be filed within 10 days after the basis

of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1994); Booz-Allen & Hamilton Inc., B-246919, Apr. 14, 1992, 92-1 CPD ¶ 368. We believe the protesters should have raised the issue of an alleged organizational conflict of interest on the part of PG&E and NPS' failure to restrict PG&E's participation in the procurement when each initially became aware of PG&E's participation, not after NPS made the award to PG&E.²

IMPROPER EVALUATION OF PG&E'S COST PROPOSAL

In its initial proposal, PG&E inserted on the schedule unit and extended costs of \$0 for each base and additive/option line item, for a total installation cost of \$0. PG&E included the following explanatory note on the schedule:

"PG&E proposes to install a 12kV electrical system, at its cost, in order to provide electric service to the Presidio and its tenants. Therefore, the unit price breakdown for purposes of this proposal is zero. To review the \$7.8 million value of the 12kV system, on a per-unit basis, see attachment 7."

On attachment 7, PG&E repeated the above explanation and provided unit and extended monetary costs for each base and additive/option line item, reflecting a total value of \$7.8 million. In addition, in its initial proposal, PG&E stated that:

"PG&E will install the 12kV system if the NPS agrees to a long-term full requirement contract for electric services for the Presidio and its tenants. In return for that commitment, PG&E will assume the financial risk for constructing, owning, operating and maintaining the entire system [(including services to the meter)] at no out-of-pocket cost to the NPS [PG&E] believes that revenues from future electric sales to the Presidio will help recover the investment."

In its BAFO, while keeping the total installation cost at \$0, PG&E reduced, by \$1.3 million, the value of the

²We point out that NPS did "level the playing field" and did mitigate any perceived conflict resulting from PG&E's status as the incumbent contractor and its performance of engineering studies for NPS under its predecessor contract by providing as attachments to the RFP PG&E's preliminary and final engineering studies, a drawing of the proposed underground primary electrical distribution system, and load data.

system from \$7.8 million to \$6.5 million. In its BAFO, PG&E did not revise the cost breakdown as reflected in attachment 7 of its initial proposal. However, in its BAFO, PC&E requested that in the event the Presidio's hospital complex, a major consumer of electricity, is not leased by the time the system is energized, that NPS pay PG&E \$2 million. In addition, PG&E listed 21 installation conditions, without specifying actual monetary costs, for which NPS could be liable.

In evaluating PG&E's cost proposal and in awarding the contract to PG&E, NPS evaluated the firm's installation cost at \$0, but included \$2 million for the hospital complex lease contingency and \$2 million for the installation conditions. NPS believed that while it would incur no upfront installation costs, other contingencies and conditions could result in payments of up to \$4 million to PG&E.

The protesters basically question NPS' evaluation of PG&E's cost proposal. The protesters allege that NPS was predisposed to award the contract to PG&E, citing as evidence NPS' characterization of PG&E's cost proposal for installation of a new 12kV electrical distribution system as resulting in "no cost" to the government when, in fact, NPS committed \$4 million to cover contingencies and conditions contained in PG&E's proposal. The protesters also argue that PG&E's cost proposal is "suspicious" and not credible because, among other things, PG&E's current cost figures are significantly less than the cost figures it proposed in 1993 when it was engaged in a noncompetitive procurement with NPS. The protesters maintain that this alleged lack of credibility was overlooked by NPS in its evaluation of PG&E's cost proposal.

As a preliminary matter, while the protesters question the credibility of PG&E's lower current cost figures submitted in response to this competitive procurement vis-a-vis its higher cost figures submitted in the previous year as part of a noncompetitive procurement, we think that NPS' decision to ultimately conduct a competitive procurement likely compelled PG&E to reexamine and reduce its costs in order to be competitive. Clearly, each procurement stands alone and the proper focus in this case is the cost figures within the four corners of PG&E's current proposal, not its cost figures submitted under entirely different circumstances. See, e.g., Gardiner, Kamya & Assocs., P.C., B-253805, Oct. 13, 1993, 93-2 CPD ¶ 223.

Based on our review of the cost proposals of PG&E, CCSF, and WEI, we conclude that NPS reasonably evaluated PG&E's proposed costs as low for the cost reimbursement

installation portion of the contract.³ In this regard, PG&E, CCSF, and WEI proposed the following costs:

	PG&E	CCSF	WEI
installation costs	\$0 upfront; \$2 million (valuation of installation conditions)	\$6.9 million	\$7.7 million
cost of ownership of the system	\$2 million (hospital lease contingency)	\$1.7 million	\$4.5 million
CIAC tax	\$0	\$0	\$12.2 million

We think NPS could reasonably determine that the government would incur no upfront installation costs by awarding the contract to PG&E based on PG&E's completion of the schedule by inserting \$0 for each line item and for the total installation cost, and based on PG&E's explanation that it would "assume the financial risk" to install the new 12kV electrical distribution system at "no out-of-pocket cost" to NPS. With respect to PG&E's enumeration of certain installation conditions which, if encountered, could result in costs charged to the government, NPS limited its liability for these conditions to \$2 million, as evidenced by the terms of the contract. In addition, NPS considered and evaluated another potential \$2 million liability based on not leasing the hospital complex by the time the system is energized. Finally, based on CCSF's argument that PG&E would incur the CIAC tax (which is contrary to PG&E's assertion and NPS' evaluation), we have assumed the worst case scenario by adding \$2.6 million to PG&E's proposed costs (a figure which represents PG&E's stated savings to NPS because it is not charging NPS for upfront installation costs and a figure which is higher than that suggested by CCSF).

In making the award to PG&E, we believe that while NPS could reasonably expect to incur no upfront installation costs, it could reasonably expect to incur \$6.6 million for a lease contingency, installation conditions, and a CIAC tax. To

³While it is not clear from NPS' contemporaneous cost evaluation documentation the basis for its assignment of points for the various cost factors, we think since PG&E proposed the lowest cost, NPS reasonably assigned the highest number of points for cost to PG&E.

the extent NPS regarded PG&E's valuation of the system as a cap or ceiling on installation costs which PG&E would incur, we think, based upon the terms of PG&E's proposal and contract, that any installation costs incurred beyond PG&E's valuation would be the responsibility of PG&E, not the government, except for the \$2 million maximum allotted for the stated installation conditions.⁴ In contrast, an award to CCSF or WEI would result in substantial upfront installation costs and substantially higher total costs. Neither CCSF nor WEI, both of which had access to PG&E's cost proposal and NPS' evaluation documentation, has shown that either of their proposals would result in lower installation and related costs to the government. Therefore, we conclude that NPS reasonably evaluated PG&E's proposed costs as low.⁵

CCSF

CCSF also challenges NPS' evaluation of its technical proposal, vis-a-vis the evaluation of PG&E's technical proposal, in four technical areas. For solvency and

⁴The record shows that in its initial proposal, PG&E undervalued its installation costs by approximately \$1.4 million due to its failure to account for 308 units of a particular line item, which when multiplied by the unit cost, results in an additional \$1.4 million in value. Based on PG&E's initial proposal, we think the value of the installation to the government was actually \$9.2 million, as opposed to \$7.8 million. In its BAFO, PG&E reduced the value of the installation by \$1.3 million. Based on the corrected \$9.2 million valuation in its initial proposal, we believe the accurate valuation in its BAFO should be \$7.9 million. In any event, there is no indication, regardless of the valuation which is used, that PG&E submitted other than the low evaluated cost.

⁵Concerning NPS' evaluation of each offerors' electric rates, the record shows that in the life-cycle cost analysis for CCSF, unlike for PG&E and WEI, NPS did not account for rate differences for high and low usage. However, we do not believe that CCSF was prejudiced since, other than for speculation, there has been no showing that PG&E's and CCSF's rates would be other than basically comparable in the marketplace. In fact, in its BAFO, CCSF explains that its actual final rates "are expected to be consistent with 'market rates' for the region." Moreover, the record shows that CCSF's and WEI's evaluated average life-cycle cost rates were less per kilowatt hour than PG&E's rates. Finally, it does not appear that in evaluating electric rates that NPS considered potential discounts or rebates for any offeror.

longevity, CCSF argues that it should have received the highest score (which would have been, at a maximum, 4 points higher than PG&E's score); for retail experience, CCSF argues that it should have been rated equal to PG&E; and for regulatory requirements, for which CCSF and PG&E were rated equal, CCSF argues that it should have received the highest score (which would have been, at a maximum, 3 points higher than PG&E's score). CCSF further points out that for innovative energy concepts, it and PG&E were rated equal.

The record shows that NPS described these technical areas as strengths for both CCSF and PG&E, although it assigned overall higher points to PG&E. Both firms received high ratings. Based on this record, we cannot conclude that the evaluation of these offerors was unreasonable. While CCSF received a raw score of 834 out of 1,000 points, compared to PG&E, which received a raw score of 928 points, even if we adjusted CCSF's raw score as suggested--CCSF would have 921 points and PG&E would have 928 points--and viewed these offerors as essentially technically equal, cost properly would be the determining factor in the selection of the awardee. Therefore, an award to PG&E would still be appropriate since its evaluated costs were low.⁶ See Hill's Capitol Sec., Inc., B-250983, Mar. 2, 1993, 93-1 CPD ¶ 190; International SOS Assistance, Inc., B-245571.5, Jan. 26, 1993, 93-1 CPD ¶ 273.

SFPP

SFPP also generally challenges NPS' decision not to include its proposal in the competitive range, thereby precluding any opportunity for discussions and the submission of a BAFO.

Protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis of protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2).

Here, by letter dated August 19, NPS informed SFPP that its proposal was deficient for the following reasons: minimum discussion in its proposal regarding the evaluation criteria; repetitious cost items in the installation cost

⁶While CCSF complains that NPS did not consider its alternate proposal for upgrading, in lieu of replacing, the current electrical distribution system, we point out that the RFP clearly called for the replacement of the current system with a new 12kV system. To the extent CCSF is challenging the terms of the RFP, its protest is untimely. 4 C.F.R. § 21.2(a)(1).

estimate; no confirmation or subcontracting agreement with CCSF; no staffing information; no evidence of regulatory compliance; and no evidence of performance in the field. In its letter, NPS advised that SFPP's proposal would not be included in the competitive range. In its comments to the agency report, SFPP acknowledges receipt of this letter. SFPP's protest, challenging NPS' evaluation and decision not to include its proposal in the competitive range, which was filed with our Office on October 11, approximately 7 weeks after being notified of NPS' decision, is clearly untimely. See C&M Data Management Corp.--Recon., B-253245.3, Sept. 16, 1993, 93-2 CPD ¶ 172.

WEI

WEI also challenges as restrictive of competition the term of the RFP requiring offerors to have a CPCN and a franchise license, or to have been determined exempt from these regulatory requirements, prior to award. WEI does not challenge the substance of the RFP requirement, but rather the time frame for complying with the requirement, suggesting that compliance by the time the system is energized would be sufficient.

The record shows that after being advised of the inclusion of its initial proposal in the competitive range and after discussions, by letter dated September 1, WEI requested an extension of the time frame for compliance with the RFP requirement. By letter dated September 7, NPS denied WEI's request. With its BAFO, WEI included copies of its applications for a CPCN and a franchise license, and in the alternative, its applications for exemption. By letter dated September 23, WEI reiterated its request for an extension. On September 28, NPS awarded the contract to PG&E. WEI filed its protest on October 4.

WEI's argument involves an alleged solicitation impropriety which was not timely protested with our Office prior to the closing time for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).⁷

⁷Even if WEI's letter of September 1 is construed as a timely agency-level protest, prior to the submission of its BAFO, no later than September 7, when NPS denied WEI's request, WEI had actual knowledge of adverse agency action. Where a protest is first filed with the agency, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action regarding the protest. 4 C.F.R. § 21.2(a)(3); Tony's Fine Foods, B-254959.2; B-254961.2, Jan. 31, 1994, 94-1 CPD ¶ 51. (continued...)

In its protest and comments to the agency report, WEI also expresses disagreement, in a cursory fashion, with NPS' evaluation of its proposal in the technical areas regarding wheel power, retail experience, and solvency and longevity. With respect to WEI's demonstrated ability to transfer, or wheel, power to the Presidio, in its initial proposal, WEI explains that it "has secured a firm offer from [a particular electric power company] to negotiate the terms of and enter into a contract with [WEI]" under which the company would supply power to meet all of the Presidio's needs. WEI further refers to "[t]he terms of the contract [which the company] has offered to enter into with [WEI]." In its BAFO, WEI states that "[u]nder the terms of the offer to WEI by [the particular electric power company, the company] is responsible for delivering power to the Presidio."

Based on WEI's proposal, we believe NPS reasonably downgraded WEI for the wheel power technical evaluation factor because the firm failed to adequately demonstrate its ability to transfer power to the Presidio. In this regard, the language in WEI's proposal suggests that while it had a potential arrangement with an electric power company to wheel power to the Presidio, it did not have a firm agreement or contract with this company. We cannot conclude that NPS' evaluation of WEI's proposal for this technical area was unreasonable.

Moreover, under the terms of the RFP, specifically for the solvency and longevity and retail electric utility experience technical evaluation factors, offerors were required to demonstrate their history and experience in providing all aspects of electric utility service. In its proposal, WEI states that it "has been in the business of marketing natural gas in excess of 3 years." It further explains that while it has "come together specifically for the Presidio project" by assembling a highly experienced team, including members with experience with the Presidio's electrical distribution system, WEI admits that its team has "not had the opportunity to work together on electric distribution systems."

Based on WEI's proposal, we think NPS reasonably concluded that WEI lacked experience in providing electric utility service. The record shows that while WEI's corporate experience has historically been in marketing natural gas, NPS did consider individual team members' specific electric

⁷(...continued)

Accordingly, WEI's subsequent protest filed with our Office approximately 1 month after NPS' denial of its request is untimely.

utility service experience. We believe NPS reasonably concluded, in light of the magnitude of this project to install a new system and to provide electricity for 10 years, that the ability of WEI's assembled team to satisfactorily perform the requirements of the RFP was not clear since the team was specifically assembled for this project and had no previous experience in working together. On this record, we have no basis to disturb NPS' evaluation of WEI's solvency and longevity and experience in the electric utility field.

The protests are denied in part and dismissed in part.

for *Ronald Berger*
Robert P. Murphy
General Counsel