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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Restoration and Closure Services, LLC

File: B-295663.6; B-295663.12

Date: April 18, 2005

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DIGEST

1. Consultants' applications for admission to protective order are denied where the applications agreed to restrict the consultants' activities only with regard to the particular site for the procurement being protested, and thus permitted the consultants to engage or assist in the preparation of proposals for the same type of work at other sites where a party to the protest may be a competitor.

2. Protest challenging the agency's evaluation of the protester's proposal on the basis that, although the solicitation did not prescribe or suggest a particular technical approach, the agency was predisposed towards a particular technical solution, is dismissed where there is no reasonable possibility that the protester was prejudiced by the alleged unreasonable evaluation because, even if the protester's proposal had received the maximum points under the contested areas of evaluation, its proposal would have remained lower rated and significantly higher in cost than the proposal selected for award.

DECISION

Restoration and Closure Services, LLC (RCS) protests the evaluation of its proposal and award of a contract to any other firm, under request for proposals (RFP)

No. DE-RP24-040H20179, issued by the Department of Energy (DOE), for environmental remediation services at DOE's Portsmouth, Ohio site.[1]

We dismiss the protest.

BACKGROUND

The Portsmouth Gaseous Diffusion Plant is part of the Portsmouth site, and was operated by DOE and its predecessor agencies as "a uranium enrichment plant . . . to supply both high- and low-enriched uranium for defense purposes and commercial nuclear fuel sales." The operation of the Portsmouth plant "resulted in the generation of significant quantities of radioactive, hazardous, and mixed waste," with the activities at the plant causing the "contamination of equipment, facilities, soil, and ground water with radioactive and hazardous constituents." RFP § C.2.0.

The contractor will be required to provide all personnel, facilities, equipment, materials and supplies (with the exception of that set forth in the contract to be furnished by DOE) to accomplish the remediation services "in a safe, integrated, effective and efficient manner." RFP § C.2.0.3. The RFP specified that the contractor would have "responsibility for total performance under this contract, including determining the specific methods for accomplishing the work within the requirements of the contract." RFP § C.2.0.1. The solicitation also informed offerors that the contractor would be "required to comply with all applicable Federal and State laws and regulations, DOE Directives, permits, agreements and Orders with regulators (both State and Federal)." Id.

The RFP provided for the award of a cost-plus-incentive-fee contract for the Portsmouth site to the offeror submitting the proposal representing the best value to the agency based upon the RFP's technical evaluation criteria and evaluated cost, with the technical evaluation criteria being significantly more important than evaluated cost. In this regard, the solicitation listed the following technical evaluation criteria in descending order of importance: technical approach, integration and schedule; key personnel; experience; project and risk management; and past performance.

The solicitation included detailed instructions for the preparation of proposals. With regard to technical proposals, the solicitation, while stating that "[t]he offeror shall describe its technical approach to address all SOW [statement of work] activities," specifically identified four aspects of the SOW, and informed offerors that for these

[1] The RFP provided for the award of two contracts--one for the remediation services at the Portsmouth site and one for the remediation services at a site in Paducah, Kentucky. This protest concerns the award of the contract for the Portsmouth site only.

aspects they were to "address in more detail its work processes, methods, and innovations." RFP § L.17.I. The solicitation also provided that the agency "intends to evaluate proposals and award a contract without discussions with offerors," and that because of this, "the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint." RFP § L.5(f).

The agency received six proposals by the RFP's closing date. The proposals were evaluated, with LATA/Parallax's proposal receiving 860 out of 1,000 points under the technical evaluation criteria (the highest score of any proposal received), at an evaluated cost of $150.7 million (the lowest evaluated cost). In contrast, RCS's proposal received 530 points (the second lowest score of the proposals received) at an evaluated cost of $197.7 million (the second most expensive evaluated cost). Agency Report (AR), Tab 6, Source Evaluation Board Final Report, at 2. The source selection official determined that the proposal submitted by LATA/Parallax represented the best value to the government, and award was made to that firm. After requesting and receiving a debriefing, RCS filed this protest.

DENIAL OF CONSULTANTS' PROTECTIVE ORDER APPLICATIONS

On February 9, 2005, we issued a protective order in connection with this protest. On March 9, 2005, counsel for RCS submitted the applications of two consultants for admission to the protective order to assist him with the representation of RCS in this protest.

DOE and LATA/Parallax objected to the admission of the consultants. Among other things, the agency and intervenor complained that the consultants had only agreed that they would not participate or assist in the preparation of a proposal for environmental remediation at DOE's Portsmouth site for a period of 2 years.[2] The agency and intervenor argued that because there are a number of remediation solicitations ongoing and upcoming, the consultants' proposed restriction on their activities was too limited in that it would allow the consultants to participate or assist in the preparation of proposals for environmental remediation services at other sites where a party to this protest is a competitor.

[2] Our standard application for consultants contemplates that a consultant agree to not engage or assist in the preparation of proposals for a period of 2 years, not only at the particular site that is the subject of the procurement under protest, but for the general subject matter involved in the protested procurement (in this circumstance environmental remediation services) where the consultant knows or has reason to know that a party to the protest will be a competitor, subcontractor, or teaming member.

RCS responded that the restrictions suggested by DOE and the intervenor (although consistent with the standard terms of our protective order) were too restrictive, and argued that "[t]hese restrictions would freeze out the consultants for two years from any DOE work and presumably, from any government work. No one could get a technical consultant under those circumstances." Protester's Letter Regarding Protective Order Applications, Mar. 14, 2005, at 1.

In considering the propriety of granting or denying an applicant admission to a protective order, we review each application in order to determine whether the applicant is involved in competitive decision-making and whether there is otherwise an unacceptable risk of inadvertent disclosure of protected information should the applicant be granted access to protected material. See McDonnell Douglas Corp., B-295694.2, B-295694.3, June 16, 1995, 95-2 CPD ¶ 51 at 7-8 (denial of admission of in-house counsel), citing U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed.Cir. 1984). With respect to the applications of consultants to a protective order, we consider and balance a variety of factors, including our Office's desire for assistance in resolving the specific issues of the protest, the protester's need for consultants to pursue its protest adequately, the nature and sensitivity of the material sought to be protected, and whether there is opposition to an applicant expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. See EER Sys. Corp., B-256383 et al., June 7, 1994, 94-1 CPD ¶ 354 at 9.

The applications of the consultants here disclosed that the consultants are well-qualified in their respective fields, with one consultant being qualified in the analysis of groundwater systems, and the other consultant being qualified in the investigation of the origin, fate and transport of organic and inorganic chemicals in natural and man-made environments. The applications also disclosed that the consultants performed consulting services for a variety of industry and government groups. However, the consultants agreed in their respective applications only that they would not engage or assist in the preparation of a proposal to be submitted to any agency of the United States for the "Portsmouth Gaseous Diffusion Plant where I know or have reason to know that any party to the protester, or any successor entity, will be a competitor, subcontractor, or teaming member" for 2 years from the date of the application.

By failing to agree to not engage or assist in the preparation of a proposal to be submitted to any agency of the United States government for environmental remediation services for a period of 2 years, the consultants left open the possibility that they would engage or assist in the preparation of proposals for this work where a party to the protest will be a competitor. In fact, by its arguments, RCS recognized that the consultants may well perform proposal preparation assistance for this very type of work, even where a party to the protest may be a competitor, subcontractor or teaming member. Although we have no reason to question the consultants' promises not to disclose protected material if the consultants were to subsequently

provide services in support of proposal preparation for environmental remediation work for an agency of the United States government, this would require the consultants to continually compartmentalize information to protect information obtained under our protective order. We found that this created more than a minimal risk of inadvertent disclosure, and therefore in the absence of any agreement between the parties, we denied the consultants' applications for admission to the protective order. See McDonnell Douglas Corp., supra, at 8.

PROTEST CONTENTIONS AND AGENCY RESPONSES

The protester argues that the agency's evaluation of its proposal was unreasonable. Specifically, the protester points out that during the pendency of this procurement, the incumbent contractor issued a solicitation for a subcontract that, in contrast to the DOE RFP here, prescribed a certain technical approach (termed "pump and treat") to accomplish certain of the remediation work required by this RFP. The protester argues that although the RFP here did not prescribe a specific technical approach to accomplishing the remediation services, DOE was "predisposed" in favor of the "pump and treat" approach prescribed in the incumbent's solicitation, and that because of this, the protester's proposed "innovative 'push technology' process did not get a full and fair evaluation." Protester's Comments at 6-7. The protester asserts that if it had known that DOE was predisposed towards a "pump and treat" approach, as evidenced, in the protester's view, by the incumbent contractor's solicitation, it "would have submitted a different technical approach that would have complied" with what the protester argues was "the specified design." RCS concludes that DOE should thus cancel the award and allow offerors to submit a technical approach that complies with the "specified design."[3] Protester's Comments at 7.

The agency responds that, contrary to the protester's assertions, it was not predisposed towards any specific technical approach to accomplishing the work required, and that its evaluation of the protester's proposed approach was reasonably based. The agency adds that because much of the protest is based upon the protester's view that the incumbent contractor's solicitation is inconsistent with DOE's RFP, and the protester was aware of the incumbent contractor's solicitation well before filing this protest, the protest here is untimely. DOE also argues that RCS was not prejudiced in any case, even assuming that RCS's proposal was

[3] RCS initially protested that the agency's evaluation of its proposal under the "experience" and "past performance" criteria was unreasonable. The agency report responded in detail to these arguments, and the protester did not respond to the agency's position in either its comments or supplemental comments. Accordingly, we consider RCS to have abandoned these aspects of its protest and will not consider them further. See Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 5 n.3.

misevaluated under the evaluation criteria implicated by RCS's protest, because of its significantly lower technical score and higher evaluated cost and because it has not challenged any aspect of the evaluation of LATA/Parallax's proposal. AR at 15.

LACK OF PREJUDICE

Competitive prejudice is necessary before we will sustain a protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest, even if deficiencies, such as an unreasonable or unequal evaluation of proposals, are found. CAE USA, Inc., B-293002, B-293002.2, Jan. 12, 2004, 2004 CPD ¶ 25 at 16.

Here, we agree with DOE that the record establishes that even if RCS were correct in its assertions, there was no possible prejudice to the protester. We first note that RCS has not protested the evaluation of LATA/Parallax's proposal or the evaluation of its own proposal under the key personnel evaluation criterion, and has abandoned its protest concerning the evaluation under the experience and past performance evaluation criteria. With regard to the remainder of RCS's protest, the record reflects that the agency downgraded the protester's proposal under the technical approach, integration and schedule, and project and risk management criteria because of the agency's determination that the protester's proposed approach posed certain risks. However, even if RCS had received the maximum score under each of these criteria, its overall score would have increased to only 835 points, which is still lower then the awardee's proposal's technical score of 860 points.[4] Given this, the fact that the protester's evaluated cost was $47 million higher than the awardee's, and that the protester has made no claim that it would have been able to reduce its proposed costs, we fail to see how the protester was prejudiced by the alleged errors in the agency's evaluation, or how the protester would have a reasonable possibility

[4] Specifically, the record reflects that proposals were scored on a 0-10 point scale under each of the technical evaluation criteria, and that a "weighting" factor was then applied to the scores received consistent with the criteria's order of importance. In this regard, weighting factors of 45 and 10 were applied to the proposals' scores under the technical approach, integration and schedule and project and risk management criteria, respectively. AR, Tab 6, SSEB Final Report, at 11. RCS's proposal had received scores of 5 out of 10 points and 2 out of 10 points under these criteria, with total weighted point scores of 225 and 20 points for the technical approach, integration and schedule and project and risk management criteria. Id. at 3. Even assuming that RCS's scores under these two criteria were increased to 10 points (the maximum available), its total weighted scores would increase to 450 and 100 points under these criteria, for a total increase in score of 305 points. Given that RCS's proposal had received a total weighted score of 530 points, its total weighted score (assuming perfect scores under these two factors) would increase to only 835 points.

for award if the solicitation had been amended and the protester given an opportunity to submit a proposal with a different technical approach "that would have complied" with what the protester argues was "the specified design." See EBA Ernest Bland Assoc., B-270496, Mar. 13, 1996, 96-1 CPD ¶ 148 at 6.

The protest is dismissed.

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General Counsel