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Decision

Matter of: West Coast Unlimited

File: B-281070.2

Date: August 18, 1999

R. Wade Curtis, Esq., Belnap, Curtis & Drozda, for the protester.
Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's unacceptability determination in a negotiated procurement is denied where the agency also determined, prior to making its award decisions, on the basis of a cost/technical tradeoff that the protester would not be in line for award, even if its proposal was considered acceptable and where the protester does not demonstrate that the agency's judgment is unreasonable or not in accord with the solicitation requirements.

DECISION

West Coast Unlimited protests several awards under request for proposals (RFP) No. 49-98-11, issued by the Forest Service, Department of Agriculture, for mobile shower facilities at various locations in the western United States.

We deny the protest.

The RFP provided for the award of multiple fixed-price requirements contracts for mobile shower facilities for 1 base year with 4 option years. RFP §§ L.4, L.5. The RFP contained 24 line items, each representing a geographic area for a particular time period (for example, line item 6 provided for shower services in the Sacramento, California, area for June 1 through October 15). RFP § B. Offerors were permitted to submit proposals for any number of locations.

The contract services include providing all equipment, labor, materials, and supplies normally associated with mobile shower facilities. RFP § C.1.1.2. In this regard, contractors would be required to:

[p]rovide equipment and operate that equipment in accordance with all current Federal, State, local laws or standards, [Occupational Safety and Health Agency] regulations, the National Electrical Code, the Uniform Plumbing Code, Federal and State Potable Water Codes, and other contractual requirements stated herein.

RFP amend. 4, § C.1.5.10. Minimum requirements for the shower units were also stated. Among other things, the shower units were required to be "constructed of nonporous, readily cleanable surfaces," be capable of showering a minimum of 500 persons at an incident, have no less than 12 showerheads, and provide segregated showering areas for men and women. Id. § C.3. In addition, offerors were informed that "[n]o galvanized pipes, fittings, or fixtures are allowed" in the shower units. Id. § C.3.1.11.

The RFP provided for award on the basis of a cost/technical tradeoff and stated the following evaluation factors, in descending order of importance: past performance, equipment, ability to understand and perform the work, experience, and price. The technical factors as a whole were more important than price. RFP amend. 1, § M.4. The RFP also provided for an inspection of an offeror's proposed equipment during the technical evaluation. RFP § L.10.

The agency received 25 proposals, including West Coast's, by the April 22, 1998 closing date. Following the evaluation of proposals, two, including West Coast's, were found to be technically unacceptable. The remaining proposals were included in the competitive range for discussions and equipment inspections. Contracting Officer's Statement at 1. West Coast protested its exclusion from the competitive range to our Office. The Forest Service and West Coast entered into a settlement agreement to include West Coast's proposal in the competitive range, and the protester withdrew its protest.

The Forest Service inspected West Coast's proposed equipment and conducted discussions with the protester. As a part of the agency's request for best and final offers (BAFO), the Forest Service informed West Coast of the weaknesses and deficiencies identified in its proposal from the agency's evaluation and equipment inspection. Among other things, the agency noted that "[g]alvanized pipe and fixtures are present," that polyvinylchloride (PVC) piping was not properly configured or secured adequately, and that non-potable hoses are present. Agency Report, Tab F, Letter from Contracting Officer to West Coast 1-2 (Dec. 16, 1998).

West Coast's revised offer was evaluated as follows:

Past Performance	Neutral
Equipment	Unacceptable
Ability to Understand and Perform the Work	Acceptable
Past Experience	Acceptable

West Coast's neutral past performance rating was based on its lack of specific experience in providing these services.

West Coast's proposal was again found technically unacceptable, given its unacceptable rating under the equipment factor. Agency Report, Tab I.1, BAFO Consensus Rating Sheet, at 3-4. Under this factor, the evaluators found, among other things, that West Coast had used PVC piping inside its unit, which the evaluators stated violated the Uniform Plumbing Code. In addition, the offerors noted that simply installing additional clamps, as West Coast had stated it would do, would not satisfy other requirements of the Uniform Plumbing Code; rather, the configuration of the pipe needed to be redesigned. In addition, the evaluators expressed concern that the use of PVC pipe would not be durable enough to meet the agency's needs given the heavy use required for the showers. The evaluators also noted that although the West Coast stated in its BAFO that galvanized pipe and fixtures are not present in its design, the offeror had used galvanized sheeting in its shower walls (which it considered to be fixtures), contrary to the RFP requirements.

A detailed evaluation report was prepared that made award recommendations for each of the contract line items, based upon a cost/technical tradeoff analysis. Agency Report, Tab I.3, Technical Evaluation Team Contract Award Recommendation Report. West Coast's proposal and that of another offeror were reported to be technically unacceptable and were not considered in the cost/technical tradeoff analysis. However, the evaluators performed an "alternative assessment" of West Coast's BAFO, as if it had been considered technically acceptable, to ascertain whether West Coast's offer would be in line for award at any of the locations offered by the firm. Agency Report, Tab I.6, Alternate Assessment. For each of the locations, the evaluators compared the relative technical merits and price of West Coast's offer with that of the recommended awardee. The evaluators concluded that even assuming that West Coast's offer was found technically acceptable, the firm's proposal would not represent the best value to the government for any location.

The evaluators' award recommendation report and alternative assessment were provided to the contracting officer (CO) and the head of the contracting activity (HCA). They accepted the evaluators' findings and made awards in accordance with the report's recommendations. Agency Report, Tab I.4, CO Concurrence and HCA

Approval of Contract Award. West Coast was notified that it was not a successful offeror and that its proposal had been determined to be technically unacceptable. Protest, exh. A, Letter from Contracting Officer to West Coast (May 6, 1999). Specifically, West Coast was informed:

In our letter to you providing an opportunity to submit a [BAFO], dated July 23, 1998, numerous equipment deficiencies were noted. We received a [BAFO] from you which provided information on how some items were corrected, inadequate information for others, and major deficiencies were clearly not corrected. Examples are the configuration of the pipe, the use of PVC pipe, and galvanized fixtures which are violations of the Uniform Plumbing Code and solicitation requirements. As a result, your equipment is found to be in noncompliance with the solicitation specifications making your overall offer unacceptable.

Id. at 3.

This protest followed. West Coast does not dispute the agency's findings that it proposed the use of galvanized sheeting on its shower walls, proposed the use of PVC pipe, or provided little information concerning the reconfiguration of its piping, but disagrees that its proposal was unacceptable. West Coast asserts that it is entitled to two awards from among four different locations: Redding, Sacramento, Reno, and Albuquerque.¹ Protester's Comments at 13.

We do not resolve West Coast's complaint concerning the acceptability of its proposal because, as explained below, the agency's "alternative assessment" establishes that West Coast would not be in line for award, even assuming the acceptability of its proposal, at any of the locations sought by West Coast. In short, the record establishes that West Coast was not prejudiced even were we to find that the Forest Service unreasonably concluded that West Coast's proposal was unacceptable. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

¹West Coast also argues that it should receive an award at Corona, California, which would be in addition to the award made by the agency to another offeror. West Coast does not assert that this other award should be disturbed. The RFP provides, however, for only one award at the Corona location. RFP amend. 1, §§ B, M.3.4.

As noted above, the agency's alternative assessment documents the basis for its determination that, based upon a cost/technical tradeoff analysis comparing West Coast's offer with that of the awardee, the protester would not be in line for award for any of the 10 locations sought by the protester. For example, with respect to the Redding location, the awardee proposed to provide mobile shower services at a price of \$3,045 per day (\$152.25 per shower head for 20 heads), and West Coast proposed a price of \$2,900 per day (\$170.59 per shower head for 17 heads). The awardee's proposal was assessed to be exceptional overall, as compared to West Coast's overall acceptable rating (assuming the protester's equipment was considered technically acceptable). Specifically, the evaluators noted that the awardee offered a strong organization with trained and experienced personnel to operate the shower unit and had many years of relevant, good past performance operating mobile shower facilities. This is in contrast to West Coast, which had no relevant mobile shower experience and a small organization with less experienced proposed personnel. In addition, the evaluators identified a number of advantages in the awardee's design over West Coast's. For example, the awardee was found to offer a well-maintained, substantially renovated shower unit that featured brass and copper piping that the evaluators believed would be more durable than West Coast's exposed PVC pipes. Also, the awardee offered fixed-wall dressing areas within the shower unit while West Coast proposed dressing areas in tents attached to the mobile shower unit. In addition, the awardee proposed floor drains in each shower stall while West Coast proposed one common drain. In short, the evaluators determined that the awardee's high quality equipment, more advantageous design, and proven record of capability and high performance made its solution a better value than West Coast's for the Redding location despite West Coast's \$145 per day lower price. Agency Report, Tab I.6, Alternative Assessment, at 6.

As it did for the Redding location, the alternative assessment documents the agency's judgment that West Coast would not be in line for award at any of the locations. Specifically, for each location the evaluators found, among other things, that the awardees had specific, relevant past performance and offered superior equipment to West Coast's.

The protester does not specifically challenge the evaluated technical superiority of the awardees' equipment nor does West Coast assert that it had specific, relevant past performance.² The protester also does not contend that the agency's cost/technical tradeoff analysis is inconsistent in any regard with the RFP. Instead, West Coast asserts that it is entitled to two awards either at Sacramento and Redding, California, based upon its lower overall prices or at Reno, Nevada, and Albuquerque, New Mexico, based upon its lower per shower head, per day price. West Coast also complains that the agency's evaluation of its past performance

²In fact, the protester admitted that it did not have mobile shower facility experience. Protest at 7.

relative to other offerors is contrary to Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv), which requires the agency to treat neutrally an offeror without a record of relevant past performance.³ The protester asserts that "the only way to give effect to [this] requirement" is to treat the "Protester [as] equal in experience with all other offeror[s]." Protester's Comments at 11.

First, with regard West Coast's argument that it should receive awards based upon its lower pricing, the government in a negotiated procurement is not required to make award to the lowest-priced, technically acceptable offeror unless the RFP specifies that price will be determinative. Miltope Corp.; Aydin Corp., B-258554.4 et al., June 6, 1995, 95-1 CPD ¶ 285 at 14. Here, the RFP provided for a cost/technical tradeoff in the selection of the most advantageous offer to the government and specified that price was the least important evaluation factor. We find no reason to object to the agency's cost/technical tradeoff, based upon West Coast's mere assertion that it should be entitled to award based upon its somewhat lower pricing.⁴

We also do not agree with West Coast's view that FAR § 15.305(a)(2)(iv) required the agency to consider West Coast's lack of relevant past performance to be the same as an offeror's relevant, good past performance. Rather, an agency may properly in its cost/technical tradeoff analysis consider the difference between a higher-priced offeror with a good performance rating over a lower-priced offeror with a neutral performance rating. Phillips Indus., Inc., B-280645, Sept. 17, 1998, 98-2 CPD ¶ 74 at 5; Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 at 3. Moreover, adopting West Coast's interpretation would require the agency to evaluate West Coast's lack of relevant past performance favorably, contrary to the specific language of the regulation, which requires a neutral evaluation.

Because we do not agree with West Coast that it should be entitled to award on the basis of its lower pricing and neutral past performance rating and given West Coast's failure to specifically challenge the reasonableness of the agency's assessment of the

³FAR § 15.305(a)(2)(iv) provides that "[i]n the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance."

⁴West Coast also complains that the RFP did not provide for the consideration of offerors' per shower head pricing. The record shows, however, that the agency considered offerors' per shower head pricing only as a tool in its cost/technical tradeoff analysis, which is unobjectionable, and not as a separate evaluation factor, as West Coast apparently believes. See Purvis Sys., Inc., B-245761, B-245761.2, Jan. 31, 1992, 92-1 CPD ¶ 132 at 12.

technical superiority of the awardees' offers, we have no basis to conclude that West Coast would be in line for award, even if its proposal were determined to be technically acceptable.⁶

The protest is denied.

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⁶West Coast also complains that the contracting officer's assessment of its proposal was motivated by bias and that the agency violated the parties' settlement agreement by not removing the contracting officer from this procurement. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Ameriko Maintenance Co., B-253274; B-253274.2, Aug. 25, 1993, 93-2 CPD ¶ 121 at 5. Thus, where a protester alleges bias on the part of government officials, the protester must provide credible evidence demonstrating a bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17. West Coast has not provided any credible evidence of bias nor does the record otherwise show that the agency's evaluation conclusions were motivated by bias. Also, the record shows that the agency acted in accordance with the parties' settlement agreement.