The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McLaughlin Enterprises Inc.

File: B-229521

Date: March 4, 1988

DIGEST

1. The determination of the relative merits of an offeror's technical proposal is primarily the responsibility of the procuring agency and will be questioned only upon a showing of unreasonableness, an abuse of discretion, or that the procuring agency otherwise violated procurement statutes on regulations. Agency reasonably evaluated proposal as technically unacceptable where, after opportunity to correct deficiency, protester still failed to submit proof of acceptability of hazardous waste treatment process proposed.

2. Post-award protests challenging solicitation's requirement that offeror establish acceptability of hazardous waste treatment process and propriety of alternative means of performing contract are untimely where the bases of the protests were evident from the face of the solicitation and the protests were not filed before the closing date for receipt of initial proposals.

DECISION

McLaughlin Enterprises Inc. protests the rejection of its offer as technically unacceptable under request for proposals (RFP) No. R-87-00106 for the cleanup of soil contaminated with chromium, used in years past as an additive to drilling "mud" at the Naval Petroleum Reserves in California (NPRC). The RFP was issued by Bechtel Petroleum Operations, Inc., the contractor providing management and operating support to the Department of Energy at the NPRC under prime contract No. DE-AC01-FE60520.

We dismiss the protest in part and deny it in part.

Under the RFP, two alternative approaches to the cleanup effort were permissible. Technical and commercial proposals could be submitted for (1) removal and transportation of the contaminated soil to a hazardous waste site approved by the

Environmental Protection Agency (EPA) for wastes of this type, or (2) removal and chemical treatment of the soil to make it non-hazardous waste under California and EPA standards, with disposal on or offsite. Because Bechtel was unable to predetermine the precise volume of contaminated soil, it sought offers of fixed unit prices on an estimated quantity of 200 to 300 cubic yards with a possibility of up to 500 to 600 cubic yards of soil.

With respect to proposals to treat the soil, the RFP's Proposal Instructions and its Specification's "Documentation Requirements" required that the description of the method and manner in which the work would be accomplished include "proof from California and EPA that work previously performed by the [offeror] has resulted in treated soil that is acceptable as non-hazardous waste." "Treatment" offerors also were required to test a sample of NPRC's contaminated soil and submit the result of testing and analysis. The RFP warned that award "may not be made to any offeror who has not been responsive to all instructions, certifications, and representations indicated in [the RFP]." While proposals were to fully comply with the requirements of the solicitation, the RFP did provide that offerors might be advised of "areas of nonresponsiveness" for correction and that corrections not made could cause a proposal to be rejected. Award was to be made to the "responsive, responsible offeror whose offer represents the lowest cost to [Bechtel]."

Of the seven offers received, two were eliminated from further consideration because they did not include a technical proposal. The remaining five offers, including that of McLaughlin, had technical deficiencies requiring additional information and clarification.

McLaughlin was the only offeror to propose treatment of the contaminated soil. In its proposal, McLaughlin reported test results on a sample of NPRC soil which indicated that McLaughlin's treatment process could chemically alter the majority of hexavalent chromium contaminating the soil into trivalent chromium, which is non-hazardous. McLaughlin, however, did not submit the actual laboratory analysis or report concerning the soil sample. In addition, McLaughlin submitted a letter from it to the Alameda County Health Agency, detailing McLaughlin's plan to treat zinc and lead in the soil at a site in Oakland, California. Approval of the plan was indicated by the signature of an Alameda County official on the letter and attached to the letter were synopsized test results indicating the success of the treatment proposed. McLaughlin explained that it had sought

from EPA and the California Department of Health Services (California) documentation of the successful completion of prior treatments. McLaughlin stated that because EPA did not directly oversee many California cleanups, EPA would not issue a certification letter, but that "efforts are continuing in this area."

California provided a letter directly to Bechtel at McLaughlin's request. After quoting the RFP provision on proof of results, California noted that McLaughlin provided laboratory data for two of three cleanup sites which it had treated. The data indicated that the treatment process had the ability to reduce extractable levels of zinc, lead, and hexavalent chromium to below non-hazardous levels. California further noted, however, that "the results from laboratories [we have] used have not been able to confirm [McLaughlin's] results." California stated that it planned to do additional tests to "verify" the McLaughlin process and offered to assist in testing NPRC soil using McLaughlin's or others' treatment processes.

In the course of discussions, McLaughlin was advised, inter alia, that it was required to submit written confirmation from California and EPA that work previously performed by McLaughlin had resulted in treated soil that was acceptable as non-hazardous waste. In response, McLaughlin again submitted its letter which had been countersigned by the Alameda County official, along with a follow-up letter from McLaughlin to Alameda County. In its revised proposal, McLaughlin explained that the cleanup of the Oakland site was under Alameda County cognizance and that the project was approached from mutually acceptable guidelines. McLaughlin noted that California had only sent an observer "to supervise without taking over the site." The follow-up letter from McLaughlin to Alameda County contained synopsized test results indicating successful treatment and McLaughlin's conclusion that the "treatment was entirely successful."

The EPA also furnished a letter to Bechtel which stated that McLaughlin had registered with EPA as an organization treating soils by chemical fixation and solidification and had been issued a permanent EPA number. The EPA advised Bechtel that the latter was required to adhere to the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA) (Pub. L. No. 96-510). In particular, EPA referred to CERCLA's preference for treatment of contaminated materials

"where practicable treatment technologies are available" instead of offsite transportation and disposal. 42 U.S.C.A. § 9621(b) (1986). The EPA advised that it did not endorse vendors of any technologies and had not "reviewed, approved, or endorsed any treatment technologies" including those of McLaughlin.

When this supplemental information was reviewed by Bechtel, it determined that McLaughlin's technical proposal was not acceptable. In a letter to McLaughlin, Bechtel stated that since McLaughlin's proposal did not satisfy all the technical requirements of the RFP, it was determined to be "technically not responsible."

The contract was awarded to United States Pollution Control, Inc., which proposed to haul away the contaminated soil to its disposal site in Utah, which was approved by EPA for CERCLA hazardous waste. Pending the resolution of the protest, Energy has directed Bechtel to withhold issuance of a notice to proceed.

As a preliminary matter, Energy has asserted that McLaughlin's protest is untimely. Although the contracting officer received a copy of the protest in a timely fashion, Energy maintains that our Office did not receive the protest within 10 working days after the basis of the protest was known to McLaughlin. Energy is incorrect. McLaughlin's protest, which was forwarded by a member of Congress, was received and time stamped by our Office of Congressional Relations 4 calendar days before the document was also time stamped by our Document Control Section. Using the earlier date, since that is when the protest actually was received by the General Accounting Office, the protest was received in a timely fashion in accordance with our Regulations. 4 C.F.R. § 21.2(b) (1987).

On the merits, McLaughlin contends that as the low offeror it should be awarded the contract since it furnished sufficient proof of the ability of its treatment process to result in non-hazardous waste. In McLaughlin's view, it obtained "as strong an endorsement" from California and EPA as one could expect, and to require a more extensive endorsement was unreasonable. McLaughlin also alleges that the awardee's proposal to haul the waste to Utah violates state and federal law and that dumping hazardous waste leaves the government open to future liability if cleanup of the dump is required. In correspondence submitted after the

filing of its protest, McLaughlin also asserts, as a small business, that Bechtel's finding that it was "technically not responsible" raises an issue as to McLaughlin's responsibility which should have been decided by the Small Business Administration (SBA) through the certificate of competency procedures.

Energy maintains that McLaughlin's proposal properly was found to be technically unacceptable because McLaughlin failed to furnish the required proof from California and EPA that its past treatments had resulted in non-hazardous waste.1/ Energy disputes McLaughlin's conclusion that the procurement violated state or federal law and specifically disputes the applicability of the California statute on which McLaughlin relies (H.&S.C.A. § 25356 (1986)). Energy also disputes the magnitude of risk alleged by McLaughlin to be associated with possible liability for cleanup of the disposal site. We agree that McLaughlin's proposal was properly rejected as technically unacceptable.

The procuring agency has the primary responsibility for evaluating the relative merits of offerors' technical proposals and enjoys a reasonable amount of discretion in the evaluation of those proposals. METIS Corp., 54 Comp. Gen. 612 (1975), 75-1 CPD ¶ 44. We will not independently determine the relative merit of proposals, and will only overturn the agency evaluation upon a clear showing of unreasonableness, an abuse of discretion, or a violation of the procurement statutes and regulations. See SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121; PacOrd, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7. Moreover, the protester has the burden of showing that the evaluation was not reasonable. Coherent Laser Systems, Inc., B-204701, June 2, 1982, 82-1 CPD ¶ 517. As discussed below, there is no indication that the decision to reject McLaughlin's offer was unreasonable, an abuse of discretion, or a violation of procurement law. The requirement for submission of proof that its process was successful was clear and McLaughlin was advised during discussions that the original information submitted was deficient.

1/ Energy also claims that the proposal was technically unacceptable because the McLaughlin process had not been shown to be permanent. This deficiency apparently was not discussed with McLaughlin prior to the rejection of its proposal. Since the proposal was otherwise technically unacceptable, we need not decide the propriety of this ground for rejection.

First, we note that this protest is untimely insofar as it alleges that the solicitation was unreasonable in seeking endorsements from EPA and California. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that protests against solicitation improprieties, apparent before the closing date of an RFP, be filed prior to closing. The requirement for proof from these agencies was part of the RFP and in its proposal McLaughlin alluded to its difficulty in obtaining the requested proof. Thus, the alleged impropriety was apparent on the face of the RFP. Since, McLaughlin's protest was not filed with our Office until approximately 2 months after the closing date of the RFP, this, contention is untimely and will not be considered. Dresser Argus Inc., B-228557, Nov. 5, 1987, 87-2 CPD ¶ 452.

The essence of the RFP requirement was that offerors such as McLaughlin, who proposed chemical treatment of the soil, had to provide proof that their process would result in material considered non-hazardous by the State and Federal agencies charged with the responsibility of regulating hazardous waste disposal. McLaughlin's submission of synopsized test results, unverified by California and unsupported by actual laboratory reports, did not meet the proof required by the RFP. While Alameda County's and others' willingness to allow McLaughlin to use its process to treat hazardous waste is indicative of success, such an indication was not an adequate substitute for the proof required by the RFP. Having failed to meet a clear requirement of the RFP, after being advised of this deficiency in discussions, McLaughlin's proposal was reasonably rejected as technically unacceptable. See Atrium Building Partnership, B-228958, Nov. 17, 1987, 87-2 CPD ¶ 491.

McLaughlin argues that it submitted the best proof it could from California and EPA since neither would make a greater endorsement than that reflected in McLaughlin's submission. It would appear that this may be true only of the EPA, since it stated that it would not "endorse" any treatment process, although it is not clear to us that the RFP sought an "endorsement" when it required proof that EPA considered the results of a prior McLaughlin treatment to be non-hazardous. However, even assuming that EPA would not make such a certification, this does not mean that the proof requirement in the RFP led to the unreasonable rejection of McLaughlin's proposal. McLaughlin also was required to submit proof from California, which was apparently willing to certify the prior success of McLaughlin's process, but only after it could verify McLaughlin's test results, which California had been unable to "confirm" through its laboratories using soil samples provided to it by McLaughlin. Thus, even if the EPA

requirement were removed from the RFP, the California requirement would remain viable, and in view of the inconclusive nature of California's advice on the matter, McLaughlin failed to meet that requirement.

McLaughlin's argument that it submitted the best proof it could from California is simply a disagreement with Bechtel's evaluation. The fact that McLaughlin objects to that evaluation, and believes its proposal was better than as evaluated, does not render the evaluation unreasonable. See DALFI, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ 24.

McLaughlin's allegations regarding the violation of California and federal law which would result from awarding a contract for hauling away the waste, and the potential liability of the government if the disposal site itself requires cleanup in the future, are untimely. Any alleged violations as well as the repercussions of hauling away the hazardous waste instead of treating it on-site were apparent on the face of the RFP since both methods were permissible. Since it waited until after the closing date for receipt of proposals to protest, McLaughlin's contentions in this regard will not be considered. Dresser Argus Inc., B-228557, supra.2/

Finally, we reject McLaughlin's argument that the SBA is required to review Bechtel's finding that McLaughlin was "technically not responsible." The SBA has statutory authority to review a finding of nonresponsibility regarding a small business concern. 15 U.S.C. § 637(b) (1982); Federal Acquisition Regulation subpart 19.6 (1986). However, Bechtel did not reject McLaughlin's proposal due to a finding that the offeror was not responsible, but rather due to its finding the firm's proposal was technically unacceptable. The inartful reference by Bechtel to McLaughlin's proposal deficiencies as rendering it "technically not responsible," instead of "technically unacceptable," does not change the nature of the determination.

The protest is dismissed in part and denied in part.

James F. Hinchman
General Counsel

2/ In any event, we find no evidence of record that the proposed disposal of the waste at an EPA-approved disposal site in Utah violates applicable California or federal statutes and regulations.