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

Decision

Matter of: GE American Communications, Inc.

File: B-240385

Date: November 16, 1990

Alexander P. Humphrey, Esq., for the protester.
Jordan S. Musen, Esq., Defense Communications Agency, for the agency.
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly awarded contract to low, technically acceptable, responsible offeror where protester's allegations that awardee's proposal failed to meet certain solicitation specifications are not supported by the record.

2. Where solicitation requires the acquisition of necessary approvals and permits by the awardee, this is ordinarily a performance requirement encompassed in a contracting officer's affirmative responsibility determination, which is not subject to review by the General Accounting Office except in limited circumstances not present here.

DECISION

GE American Communications, Inc. protests the award of a firm, fixed-price contract to U.S. Electrodynamics, Inc. (USEI), under request for proposals (RFP) No. DCA200-90-R-0024, issued by the Defense Communications Agency (DCA) for a leased satellite service providing a simplex, full-time 36 MHZ television satellite service for the Armed Forces Radio and Television Programming Service (AFRTS). GE contends that the agency improperly awarded the contract to USEI, the low offeror, because its proposal was not responsive to the solicitation. GE also alleges that the agency improperly provided USEI with preferential information about the satellite earth station sites.

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

DCA issued the RFP on January 19, 1990, with an amended closing date of March 23. The RFP provided for a firm, fixed-price contract with a term of up to 10 years. The original

solicitation requirements include uplink service between the AFRTS Broadcast Center in Sun Valley, California, to a satellite(s) and downlink service to bases in Canada, Bermuda, Puerto Rico, Cuba, Greenland and Panama.1/ Downlink service to the east and west coasts to provide uplinking to the Atlantic and Pacific INTELSAT and INMARSAT satellites is also required. The services being procured are to provide AFRTS with satellite network distribution service for the AFRTS Broadcast Center signal directly to U.S. bases on the North American Continent and connectivity to the Atlantic and Pacific Satellites for distribution worldwide. The RFP provided for award to the low-priced, technically acceptable offeror, with price being calculated on a total discounted life cycle cost basis which included usage, maintenance, installation and options over a 10-year period.

The agency received two offers in response to the RFP, one from USEI, a small business, and the other from the incumbent, GE. The technical evaluation team conducted evaluations on March 26 and 27. Both offerors' technical proposals were included in the competitive range and letters containing discussion items were sent to both on April 3, with responses due April 6. The technical evaluators required further information from GE and GE's responses clarified uncertainties. The agency invited GE to participate in oral discussions, but GE declined to do so on May 1. USEI's responses required further technical clarifications and, therefore, the agency conducted oral discussions with USEI on April 24. On April 30, USEI submitted written responses to questions raised during the discussions.

The agency issued a request for best and final offers (BAFO) on May 2, initially requesting receipt of BAFOs by May 9, but extending this closing date until June 11 because of changes in the scope of the requirement.2/ After determining that both BAFOs were technically acceptable, the contracting activity completed its price analysis on June 13 and determined that USEI was the apparent low offeror with a discounted life-cycle cost of $10,691,202. GE's cost was $10,990,667. Following the contracting officer's affirmative determination of responsibility on June 14, award was made to USEI on June 26. GE filed a protest in our Office on July 11 alleging that USEI failed: (1) to show the existence of an

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1/ The uplink is the transmitting segment of the satellite communications link and the downlink is the receiving segment of the satellite transmission system.

2/ In particular, the agency amended the statement of work to delete two sites in Greenland after the request for BAFOs and gave offerors an extension to revise their proposals accordingly.

interference free uplink site; (2) to comply with the requirement that the service be carried by "Protected Transponder Service"; and (3) to provide evidence of authority to provide downlinks. GE also alleges that the agency gave preferential treatment to USEI by providing only USEI with site visits.

Section L-11 of the solicitation expressly encourages offerors to conduct site surveys, and USEI apparently conducted site surveys without the assistance of any DCA personnel. The agency states that any information obtained by USEI concerning GE site operations was not provided by DCA, and must have come from GE personnel. DCA also asserts that if any party would have "inside information" it would be GE, which has been the incumbent on the AFRTS contract during the past 10 years. The record demonstrates that all offerors were treated equally and provided with the same information by the agency. GE did not receive any site surveys because it did not request any, and while GE argues that DCA should have required that employees designated by GE accompany other offerors during any survey, GE does not provide, and we are not aware of, any basis for a requirement that the agency mandate such accompaniment. We do not find any evidence that information was improperly disclosed by the government, or that DCA's action otherwise suggests bias or preferential treatment in favor of USEI. See Laser Power Technologies, Inc., B-233369, B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267.

With respect to the question of whether USEI's proposal is compliant with the RFP, the contracting agency is responsible for evaluating the information supplied by an offeror and ascertaining whether it is sufficient to establish the technical acceptability of its offer, since the contracting agency must bear the burden of any difficulties incurred by reason of a defective evaluation. Dictaphone Corp., B-238159, Apr. 23, 1990, 90-1 CPD ¶ 409. Accordingly, we will not disturb the agency's determination unless it is shown to be unreasonable. Sach Sinha & Assocs., Inc., B-236911, Jan. 12, 1990, 90-1 CPD ¶ 50. As discussed below, the record does not support GE's allegations that USEI's proposal fails to satisfy the RFP specifications.

INTERFERENCE-FREE UPLINK SITE

GE first contends that DCA should have rejected USEI's proposal because USEI failed to obtain an interference-free site where satellite signals could be uplinked from the AFRTS studios. GE points out that section H.25 of the RFP states:

> "A presence of Radio Frequency Interference (RFI) shall not be an acceptable basis for extending the contracted service implementation

interval and/or date nor an increase to the contracted price(s) for the required communications services."

GE argues that the clear purpose of this provision is to prohibit the offer of AFRTS service for which there is interference caused by other users sharing the same or adjacent frequencies, and that it requires the offeror to find an interference-free site. GE also alleges that the Federal Communications Commission (FCC) will not allow operation of AFRTS service which interferes with other users. The protester alleges that USEI did not provide any evidence that it could successfully uplink interference-free AFRTS signals to a satellite from the AFRTS studios.

DCA agrees that an interference-free uplink site is required for satisfactory contract performance, but points out that the statement of work provides that "if the uplink is located on the BC facility (the AFRTS studios in Sun Valley), the government will provide space and utilities."3/ The solicitation does not require that offerors select an uplink site or obtain FCC approval prior to award. DCA explains that the customary practice within the satellite industry, with respect to government contracts, is that whenever the government in its discretion provides uplink space, the contractor conducts an interference signal test on that site. If the contractor detects interfering signals that cannot be shielded, then it notifies the government, which is obligated to provide satisfactory alternative space. Here, USEI's proposal stated that it intends to install its earth station at the BC facility, thus it is the agency's obligation to provide USEI with suitable space. USEI has fulfilled its obligations in this regard, and the question of whether its equipment performs as required is a matter of contract administration which our Office will not consider under our bid protest function. Trading Atlanta, Ltd., B-239056, Aug. 1, 1990, 90-2 CPD ¶ 88.

PROTECTED TRANSPONDER SERVICE

GE next alleges that USEI plans to use the Spacenet 2 satellite operated by GTE Spacenet, without making adequate provision for continuation of AFRTS service in the event that this satellite or one of its components malfunctions, ceases to function altogether, or reaches the end of its life prior

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3/ The agency correctly points out that section H.25 does not impose the requirement in question, rather this section merely constitutes a limitation on the excuses available to a contractor to extend delivery requirements or to make demands for price increases.

to the expiration of the contract. GE contends that USEI fails to comply with the solicitation requirement that the service be carried by "protected transponder service."4/ GE explains that typically a satellite will have spare transponders, called "in-orbit spares" which supplant a failed main transponder, and the protester alleges that this is the protection proposed by USEI. GE argues that this is an insufficient back-up system because the RFP provides that restoration must be made with an "in-orbit system." GE contends that even if an "in-orbit system" means contingent access to an in-orbit spare, this protection provides only limited restoration in the event of transponder failure here because Spacenet 2 has only 7 transponder spares to protect 24 transponders. GE argues that these spares could already be used by Spacenet 2's other customers if their transponders failed before AFRTS'. Therefore, GE argues that USEI's access to a spare transponder does not provide "protected transponder service" within the meaning of the RFP. GE contends that to be protected, an offeror must provide a back-up transponder on entirely different satellites. GE further alleges that Spacenet 2's estimated life-span ends in 1995, less than halfway through the term of the contract, and therefore USEI must provide "in-orbit system" restoration, or at least USEI must document sufficient arrangements to reassign AFRTS to another satellite in the event of failure or life-end of Spacenet 2.

In fact, the RFP does not require that the back-up transponder be on a separate satellite. Further, USEI's proposal does provide both means of restoration; that is, USEI may utilize Spacenet 2's spare transponders and USEI proposes to use a separate transponder on another satellite which will be launched within the next 36 months, well before the expected life-end of Spacenet 2. Accordingly, the agency had a reasonable basis to determine that USEI's approach was technically acceptable.

To the extent that GE is alleging that the RFP should have required a separate, in-orbit spare transponder at the time of award, the protest is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1990). Further, to the extent that GE is alleging that some time in the future during the performance of the contract USEI may fail to provide adequate

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4/ A communications satellite transponder receives uplink signals, amplifies them, and then rebroadcasts them to earth stations configured to receive such signals.

transponder service, we dismiss this protest basis as it concerns a matter of contract administration. Trading Atlanta Ltd., B-239256, supra.

DOWNLINK AUTHORITY

GE's final argument is that USEI failed to provide evidence of requisite domestic and foreign approvals of USEI's downlink facilities, because USEI has not provided a Letter of Agreement from any of the three military installations for its downlinking facilities.5/ GE also argues that USEI has not demonstrated that Spacenet 2 itself possesses the necessary authority to serve Panama.

In particular, GE asserts that USEI is required to obtain FCC approval for siting its downlink earth facilities because foreign transmissions are being made. GE also contends that authorization from the Republic of Panama is required for the Panama Canal Zone downlink. Finally, GE contends that USEI does not have necessary authorizations from the Host Base Facilities Engineers.

DCA points out that FCC approval is unnecessary because the FCC has ruled that the transmissions in question do not fall within FCC's definition of foreign transmissions. DCA states that no approval is required from the Republic of Panama, rather, mere courtesy notification by the contracting officer is sufficient for the change in contractors, since the frequency was in use by or for the United States Armed Forces prior to the passage of the Panama Canal Treaty of 1977. With respect to the Host Base Facilities Engineers' authorizations, DCA states that such approvals are customarily provided subsequent to the award of a contract, and that RFP does not require approval prior to award.

Since the solicitation does not require that the offeror obtain, prior to receiving the award, any of the permits or approvals at issue, the requirements constitute performance obligations rather than definitive responsibility criteria or requirements for technical evaluation. See Telos Field Eng'g, 68 Comp. Gen. 295 (1989), 89-1 CPD ¶ 238; Cumberland Sound Pilots Assoc.--Recon., B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. The ability to meet specification requirements is encompassed by a contracting officer's subjective affirmative determination of responsibility. Id. Our Office will not review an affirmative determination of responsibility absent a showing that procuring officials acted with fraud or bad faith, or that they failed to apply a definitive solicitation

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5/ Downlinking facilities consist of satellite antennas configured to receive AFRTS.

criterion. 4 C.F.R. § 21.3(m)(5); DJ Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59. Neither exception is present here.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel