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Decision

Matter of: Southern Recycling, L.L.P.

File: B-405446

Date: November 3, 2011

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Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation's price evaluation criterion is unduly restrictive is denied where the record shows that the agency reasonably determined to consider the additional costs to the government for required dry-dock cleaning of vessels for offerors proposing recycling outside the San Francisco Bay area.

DECISION

Southern Recycling, L.L.P. and its subsidiary, International Shipbreaking Limited, LLC (ISL), of New Orleans, Louisiana (hereinafter collectively referred to as Southern), protest the terms of request for sales offers No. SDPEXC-08001, Announcement July 22, 2011, issued by the U.S. Maritime Administration (MARAD) for purchase for dismantlement of four "non-retention" vessels held in the National Defense Reserve Fleet (NDRF) at the Suisun Bay Reserve Fleet (SBRF) in Benicia, California. Southern asserts that the price evaluation and "best value" criteria are inappropriate for a sales contract.

We deny the protest.

MARAD maintains the NDRF, which is comprised of vessels owned by the United States for national defense purposes. Those NDRF vessels which are not part of the Ready Reserve Fleet are to be disposed of by MARAD either through sale or purchase of disposal services. To accomplish its disposal mission, MARAD developed a two-step process. Under Step One, the agency evaluates potential offerors' comprehensive general technical proposals (GTP) to assess their technical

qualifications, facilities, and capability to perform the contracted work. Offerors with acceptable GTPs are placed in a pool to compete--under Step Two--on periodic announcements of specific vessels available for recycling.

The July 22 announcement protested by Southern requests offers to purchase, dismantle, and dispose of four obsolete vessels--PIGEON, PYRO, MISPELLION, and TULARE. Award is to be made to the offeror whose updated technical proposal is acceptable and conforms to the solicitation, and whose sales offer is determined to be the "best value" considering price and non-price factors. Solicitation § 11.1.

The evaluation criteria, "listed in no particular order of priority," include: performance schedule and vendor's available capacity; price and (when applicable) the cost to dry-dock an SBRF vessel; and past performance. Id. §11.2. The solicitation explains that contractors proposing to dismantle SBRF vessels outside the San Francisco Bay area will need to have underwater fouling (marine organic growth) and exfoliating (e.g., peeling) paint removed in a dry-dock facility in the Bay area prior to commencement of the oceanic tow to the recycler's facility. Id. § 1.1.1. Vessels being recycled within the same bio-geographical area (the San Francisco Bay area) are not required to undergo the dry-dock cleaning process. Id. § 7. The solicitation provides that, when required, the cost of dry-docking and related hull cleaning are the responsibility of MARAD and are not to be included in offerors' proposed sales prices. Id. § 1.1.2.

However, for those vessels requiring dry-dock cleaning, the solicitation further provides as follows:

The agency has determined that the total cost to the government of any given award must be considered. Consequently, when awarding an SBRF vessel the agency will consider, as a price-related factor, the cost to the Government of dry-docking a vessel that is being recycled outside the San Francisco Bay area. When available, the agency will utilize actual award prices for dry-docking that specific vessel. When a dry-dock price is unavailable, the agency will estimate the cost based on prior dry-docking prices. Therefore, for sales offers, the cost of dry-docking the vessel(s) will be subtracted from the sales offer to arrive at the total evaluated price that will be used in the best value determination. . . . The same amount will be applied to each offer where the vessel must be dry-docked prior to recycling.

Solicitation § 11.2.1. Prior to the closing time for receipt of Step Two sales offers, Southern filed this protest challenging the price factor and other evaluation criteria.

Southern asserts that the agency's plan to consider the cost of dry-docking in evaluating sales offers is unreasonable and unduly restricts competition. In this regard, it objects to having to account for the potential cost of such work in order to

ensure its sales offer remains competitively high. Southern's assertions are without merit.¹

The determination of a contracting agency's needs, including the selection of evaluation criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. Where a protester challenges a requirement as unduly restrictive, the agency has the responsibility to establish that the requirement is reasonably necessary to meet its needs. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. A protester's mere disagreement with an agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

The agency explains that its costs in these sales transactions vary depending upon where the ship recycling takes place. In this regard, MARAD cites the National Invasive Species Act, 16 U.S.C. § 4701 et seq. (2006), as implemented, for the requirement to mitigate the transmission of non-indigenous aquatic species. Exec. Order No. 13112, 64 FR 6183 (Feb. 3, 1999). Likewise, the record indicates that the States of Texas and Louisiana (where Southern has locations) have emphasized the need for SBRF vessels to be cleaned before entering their waters. Contracting Officer's (CO) Statement, ¶ 13, Letter from Texas Department of Parks and Wildlife, May 3, 2010; Letter from Louisiana Department of Wildlife and Fisheries, Dec. 3, 2009. The agency explains that, consistent with the requirement to avoid transmission of non-indigenous aquatic species, the solicitation provides that, where vessels are to be transited to a qualified recycling facility outside the same bio-geographical area where the vessel is currently berthed, marine growth must be removed from the vessel's hull before it leaves for another area. CO Statement, ¶¶ 13, 14; Solicitation § 7.

Further, because MARAD retains title to the vessels until they reach a qualified recycling facility, and due to the expense of dry-docking and the scarcity of dry-dock facilities in the San Francisco Bay area, MARAD determined to bear the cost of hull cleaning itself, instead of requiring contractors to do so. CO Statement, ¶ 13; CO Supplemental Statement, ¶¶ 5-6. Since the cost to the government is necessarily higher when a vessel's hull must be cleaned before transit to the recycling facility, the agency included the challenged price evaluation factor to account for these

¹ Southern raises numerous arguments in support of its protest. We have considered all of them and find that they either are without merit or are untimely. This decision addresses the more significant issues.

varying costs. The agency explains that, in this way, it can measure which contractual arrangement would result in the “least cost to the government.” Agency Report at 5.

Where, as here, the solicitation so provides, an agency’s evaluation and best value determination may include factors that affect the relative benefits to the government such as contract administrative costs, loss of tax revenues, and schedule delays. See AmClyde Engineered Prods. Co., Inc., B-282271, B-282271.2, June 21, 1999, 99-2 CPD ¶ 5 at 8. Since MARAD faces differing costs depending upon the place of performance, we find nothing unreasonable in the agency’s application of a price evaluation factor to take those variations into account.

Southern asserts that the price evaluation factor provides another potential offeror--Allied Defense Recycling (ADR)--with a competitive advantage because ADR is a qualified recycler located in the San Francisco Bay area, and thus its proposed sale price would not be adjusted under the solicitation’s evaluation scheme. However, there is no requirement that an agency equalize a competitive advantage that a firm may enjoy because of its own particular business circumstances, where that advantage does not result from a preference or unfair action by the government. Carr’s Wild Horse Ctr., B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 4. Here, neither ADR’s status as a qualified recycler in the San Francisco Bay area, nor its operation of dry-dock facilities represent an unfair advantage created by the government.

Southern also protests that this sales solicitation improperly provides for award on a “best value” basis instead of sealed bids as allegedly required by 46 U.S.C. § 57102, and improperly fails to disclose the relative weights of the evaluation factors. These issues are untimely. In this regard, our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2011). Here the agency’s original sales solicitation (No. SDPEXC-08001) was issued on November 6, 2008 and both provided for the submission of technical proposals under Step One and identified the evaluation criteria for subsequent requests for sales offers under Step Two. Southern and its subsidiary, ISL, responded under Step One in or around November 2008. Agency Motion to Dismiss at 2-3. Since the original November 2008 sales solicitation included the same evaluation criteria Southern now challenges (i.e., best value and lack of identified weights for

evaluation factors), the current protest, filed more than 2½ years later, is untimely and not for consideration by our Office. ²

We deny the protest.

Lynn H. Gibson
General Counsel

² Southern relies on a footnote in Southern Scrap Material Co., B-401124, May 13, 2009, at 4 n.2 (unpublished), which it interprets as indicating that protests of evaluation criteria are timely if raised prior to the closing date for a particular Step Two solicitation. That footnote, however, did not specifically address the significance of Step One to a Step Two solicitation challenge when indicating that the referenced solicitation challenge there was untimely. In any case, as noted above, our Office is of the view that a challenge to a particular solicitation provision in a Step Two solicitation is untimely where the same provision was also in the preceding Step One solicitation issued more than 2½ years earlier. Moreover, to the extent Southern claims to have relied on our earlier May 2009 decision, any such reliance was not detrimental. In this regard, since the criteria challenged here were disclosed in the November 2008 Step One solicitation, and the protester had already certified its prior proposal under Step One, any protest challenging such criteria already was untimely as of the time of our May 2009 decision.