



**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** ECC Renewables, LLC; Pacific Power, LLC

**File:** B-408907.3; B-408907.4; B-408907.5; B-408907.8; B-408907.9

**Date:** January 31, 2014

---

Richard B. Oliver, Esq., and J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, for the protesters.

Margaret P. Simmons, Esq., and Kathryn R. Sommerkamp, Esq., Department of the Army, Corps of Engineers, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Source selection authority reasonably excluded protesters' proposals from competitive range where she reasonably concluded that protesters could not easily overcome deficiencies in their proposals pertaining to their failure to submit the requisite number of acceptable projects to demonstrate their financial capability.

---

### DECISION

ECC Renewables, LLC, (ECC-R) of Burlingame, California, and Pacific Power, LLC, (PPL) of Boca Raton, Florida, protest the elimination of their proposals for wind technology from further consideration by the Department of the Army, Corps of Engineers under request for proposals (RFP) No. W912DY-11-R-0036. PPL also protests the elimination of its proposal for biomass technology from further consideration under the same RFP. The protesters argue that the agency unreasonably excluded their proposals from the competitive ranges for the two technologies.

We deny the protests.

### BACKGROUND

The agency issued the solicitation to acquire reliable, locally-generated, renewable and alternative energy. In this connection, the solicitation advised offerors that the government intended to purchase only the energy that was produced and not to acquire any generation assets; accordingly, the contractor was to be responsible for

developing, financing, designing, building, operating, owning, and maintaining the energy plant. The solicitation further advised that the government would purchase the energy produced in accordance with the terms and conditions of site/project specific agreements resulting from task orders to be issued against multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts. In the foregoing regard, the RFP noted that the agency intended to award contracts to all qualified and responsible contractors whose proposals were considered acceptable and whose prices were reasonable and realistic. RFP, as conformed, at 134.

Offerors were invited to propose on one or more of the following renewable/alternative energy production technologies: wind, solar, geothermal, and biomass. Contracts were to be awarded by technology, and the protests here pertain to awards for wind and biomass technology.<sup>1</sup> To be considered eligible for award, a proposal had to be rated acceptable under factor 1 (corporate technical/management experience), factor 2 (financial capability and management approach), and factor 4 (small business participation). In addition, the proposal had to be rated as satisfactory or unknown confidence under factor 3 (past performance), and the offeror's proposed maximum price per kilowatt hour (KWH) had to be reasonable and realistic. The RFP provided that the requirements of factors 1, 2, and 3 could be satisfied by any member of a contractor team arrangement. The RFP also provided that after making awards to the offerors whose initial proposals were considered acceptable, the agency might conduct discussions with other offerors and later make awards to them. Id.

Of relevance to this protest, section M of the RFP furnished offerors with the following guidance pertaining to the evaluation of offerors' financial capability under factor 2:

The term "financial capability" in this context means an Offeror's demonstration that Offeror has sufficient capital resources to self-finance or the ability to obtain third party financing for the construction of a renewable or alternative energy facility, a demonstrated understanding of the financial risks associated with this contract, and the ability to recover the investment over the life of the project expected to be no more than 30 years. This determination will not substitute for the finding of a Contractor's responsibility in accordance with FAR Part 9. This is a special responsibility standard intended to address the considerable upfront costs that will be required for successful completion of Task Orders.

---

<sup>1</sup> Our Office previously issued a decision denying protests by the same two firms pertaining to the awards for solar technology. See ECC Renewables, LLC; Pacific Power, LLC, B-408907 et al., Dec. 18, 2013, 2014 CPD ¶ \_\_\_\_.

a. Ability to Provide Required Capital or Obtain Required Financing at Competitive Rates

Offerors will be evaluated for demonstrated financial capability based on experience and understanding and management of financial risks. Offerors must demonstrate capability to self finance and/or acquire third party financing for renewable energy projects as specified in Section L and the likelihood of being able to provide competitive PPA [power purchase agreements] proposals for renewable energy development based on the Offeror's proposed financing strategy. Offerors will be evaluated for the ability to shoulder monetary risk and withstand long term payback periods. A letter of commitment must be provided from all key subcontractors utilized in the Factor 2 submission.

Id. at 135.

Section L of the RFP instructed offerors to demonstrate their ability to provide/obtain the required capital/financing. Offerors were to "describe the measures that would be taken to ensure the continued availability of the required capital throughout Task Order performance and means to minimize financial and performance risk," such as "subordination agreements, parent company guaranty agreements, deferred payment arrangements, sinking funds, credit backing, and deferred [principal] payments." Id. at 120. In addition, for each technology on which they were proposing, offerors were to provide examples of projects demonstrating their financing capability. For wind technology, the solicitation instructed offerors to provide "three (3) relevant 4MW [mega watt] or larger renewable energy projects which were self-financed or for which third party financing was obtained by your firm." Id. For biomass technology, offerors were to provide two projects meeting the same criteria. For each project, offerors were to provide the total dollar value, the percent self-financed versus obtained from a third party, the identity of the third party financier, and an explanation of how the capital investment was amortized.

Both ECC-R and PPL submitted proposals for the wind and biomass technologies. Both offerors identified [deleted] as financing team partners, and both furnished the following project as one of their examples of a financed wind project:<sup>2</sup>

---

<sup>2</sup> In compliance with the solicitation's instructions, both offerors also furnished two other wind project examples. The agency did not take issue with the acceptability of these projects; accordingly, we do not address them in this decision.

| Project Title/Description | Self or Third Party Financing | Total Dollar Amount | % Self-Financed Versus Obtained From A Third Party |
|---------------------------|-------------------------------|---------------------|--|
| [deleted]                 | [deleted]                     | [deleted]           | [deleted]  |

ECC-R Proposal, Vol. II, at Tab A-9; PPL Proposal, Vol. II, at Tab A-9. In addition, PPL furnished the following project as one of its examples of a financed biomass project:

| Project Title/Description | Self or Third Party Financing | Total Dollar Amount | % Self-Financed Versus Obtained From A Third Party |
|---------------------------|-------------------------------|---------------------|--|
| [deleted]                 | [deleted]                     | [deleted]           | [deleted]  |

PPL Proposal, Vol. II, at Tab A-14.

By letters dated September 9, 2013, the agency notified both ECC-R and PPL that their proposals for wind technology had not been selected for award.<sup>3</sup> By letter of September 23, 2013, the agency further notified PPL that its biomass proposal had not been accepted.<sup>4</sup> Both offerors timely requested debriefings, which were furnished in writing on October 22.

<sup>3</sup> The letters identified 17 companies that had received awards for wind technology. As discussed more fully below, the agency reports on the wind protests disclosed that in addition to making initial award to these 17 firms, the agency established a competitive range of 5 proposals (selected with the intention of holding discussions that might lead to further awards).

<sup>4</sup> The letter to PPL regarding the biomass awards identified 13 awardees. (Among the firms selected for award was ECC-R.) While, as above, the notification letters made no mention that a competitive range had been established, the agency report disclosed that in addition to making initial award to the 13 identified firms, the agency established a competitive range of 3 proposals (selected with the intention of holding discussions that might lead to further awards).

The debriefing letters for wind technology advised both offerors that their proposals received ratings of acceptable for the experience and small business participation factors and a rating of satisfactory confidence for past performance; in addition, the prices of both offerors were found reasonable and realistic. Each letter further advised, however, that because one of the three wind power project examples provided did not meet the solicitation's requirements, the proposal had been rated as unacceptable under the financial capability/management approach factor. In this regard, each letter explained as follows:

The Offeror failed to provide three wind power project examples, 4MW or larger, for which it self-financed or for which third-party financing was obtained for itself as required on page 120 of the RFP. In the third project example, [deleted]. This example does not meet the requirement of the solicitation to demonstrate the ability to self-finance or acquire third-party financing for renewable energy projects for your firm.

PPL Debriefing Letter for Wind Technology, Oct. 22, 2013, at 1.<sup>5</sup>

The PPL debriefing letter for biomass technology advised that PPL's proposal had received the same ratings as above under the various evaluation factors. The letter identified the following deficiency under the financial capability/management approach factor:

The Offeror failed to provide two 4MW or larger biomass renewable technology projects for which it self-financed or for which third-party financing was obtained for itself as required on page 120 of the RFP. The first project example met the criteria; however the second project example did not. The Offeror's [deleted] (not Key Subcontractors on the proposal). It demonstrates [deleted] can arrange financing for another client with a different credit profile but it does not demonstrate the Offeror's ability to obtain financing for itself.

PPL Debriefing Letter for Biomass Technology, Oct. 22, 2013, at 1-2.

Both companies protested to our Office on October 28.

## DISCUSSION

---

<sup>5</sup> With the exception of a couple of minor, non-substantive variations in wording, the explanation in ECC-R's debriefing letter was identical.

The protesters argue that the agency unreasonably failed to include their proposals in the competitive range for wind technology, and PPL raises the same argument with regard to biomass technology. In this connection, consistent with the terms of the solicitation, the agency made a number of awards on the basis of initial proposals and also established competitive ranges for both technologies, with the intention of entering into discussions with additional offerors.

The competitive range is to be comprised of the most highly-rated proposals. Federal Acquisition Regulation § 15.306(c)(1). The evaluation of proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency. NAE-TECH Remediation Servs., B-402158, Jan. 25, 2010, 2010 CPD ¶ 89 at 3. In reviewing challenges to an agency's competitive range determination, our Office does not independently reevaluate proposals; rather, we examine the evaluation to determine whether it is reasonable. Id.

Here, in making her competitive range decision, the source selection authority (SSA) distinguished between proposals with deficiencies that were "easily correctable" and proposals with deficiencies that were not; she considered the former to be the most highly-rated proposals and established a competitive range limited to them. Source Selection Decision/Competitive Range Determination (Wind Technology), June 15, 2013, at 14-16; Source Selection Decision/Competitive Range Determination (Biomass Technology), July 16, 2013, at 20-23. While the contemporaneous record does not explain the basis upon which the SSA differentiated between easily correctable and not-easily correctable deficiencies, the agency explained in responding to the protests here that easily correctable deficiencies were those that could be addressed without major revision of the offeror's proposal.<sup>6</sup> Because the SSA did not consider the deficiencies in the

---

<sup>6</sup> The protesters also argue that the contemporaneous evaluation record is inadequately documented in that it does not explain the SSA's basis for distinguishing between easily correctable deficiencies and not-easily correctable deficiencies, and that the agency treated them unequally by excluding their proposals from the competitive range while including in the competitive range other proposals that would require revision to make them acceptable. In its reports, the agency furnished a reasonable explanation for why the SSA considered some deficiencies to be easily correctable and others not to be, which was, in essence, that the former could be corrected via the submission of supplemental information by the offeror, whereas the latter would require rewriting of the proposal. The agency's explanation is the sort of post hoc filling in of previously unrecorded detail that we will consider, SENTEL Corp., B-407060, B-407060.2, Oct. 26, 2012, 2012 CPD ¶ 309 at 9 n.6; accordingly, we find the protester's first argument to be without merit. Moreover, because the record establishes that the agency had a reasonable  
(continued...)

protesters' proposals to be easily correctable, she did not include either proposal in the competitive range for wind technology. She also excluded PPL's proposal from the competitive range for biomass technology.<sup>7</sup>

In our view, the SSA reasonably concluded that major revisions were required to address the deficiencies in the proposals. In this regard, neither protester submitted the requisite number of acceptable projects to demonstrate its financial capability-- absent such information, the proposals were properly found technically unacceptable and would need to address this fundamental defect in any future revision. The protesters maintain that they could have easily substituted other projects, and that the SSA simply assumed "that an offeror who proposed a project that was found not to qualify could not substitute another project from its existing team that could qualify." PPL Supplemental Comments on Wind Protest, Jan. 6, 2014, at 30.<sup>8</sup> In our view, however, it was entirely reasonable for the SSA to have concluded that if the protesters had other acceptable projects, they would have included them in their proposals, rather than proposing unacceptable projects.

---

(...continued)

basis for distinguishing between the two types of deficiency, we find the allegation of unequal treatment to be unsupported.

<sup>7</sup> PPL also argued that the agency's rejection of its proposal as unacceptable for failure to demonstrate adequate financial capability was essentially a determination of nonresponsibility and because PPL is a small business, the Army should have referred the matter to the Small Business Administration (SBA) for consideration under its Certificate of Competency (CoC) procedures. In responding to the protest, the agency agreed to take corrective action with regard to this issue by referring the matter of PPL's responsibility to the SBA. Because the agency has advised us that it will be taking corrective action to address the alleged impropriety, we dismiss this issue as academic. We recognize that the protester has argued that we should recommend that it be reimbursed its costs of pursuing the issue because the agency did not commit to taking corrective action with regard to the matter until after it had filed its agency report on the protest; however, we decline to make such a recommendation at this juncture. Our Bid Protest Regulations contemplate that requests for recommendations of protest cost reimbursement will be made after protests have been closed. See 4 C.F.R. § 21.8(e) (2013).

<sup>8</sup> Also, ECC-R Supplemental Comments on Wind Protest, Jan. 6, 2014, at 24, and PPL Supplemental Comments on Biomass Protest, Jan. 6, 2014, at 26-27.

Accordingly, we have no basis to conclude that the SSA unreasonably excluded the protesters' proposals from the competitive ranges for wind and biomass technologies.

The protests are denied.

Susan A. Poling  
General Counsel