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Decision

Matter of: Walsh-Atkinson, JV

File: B-405987.2

Date: January 26, 2012

Larry Caudle, Jr., Esq., Kraftson Caudle, LLC, for the protester.

Neil H. O'Donnell, Esq., Rogers Joseph O'Donnell, for Kiewit Infrastructure Company, the intervenor.

Kim J. Sabo, Esq., Department of the Army, U.S. Army Corps of Engineers, for the agency.

Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's proposal for construction of a tunnel system reserved right to build a construction shaft not contemplated by solicitation, and not consistent with requirements for optional construction shaft specifically authorized by the solicitation, agency properly found proposal unacceptable.

DECISION

Walsh/Atkinson Joint Venture (Walsh/Atkinson), of Chicago, Illinois, protests the Department of the Army, U.S. Army Corps of Engineers', award of a contract to Kiewit Infrastructure Company (Kiewit), of Omaha, Nebraska, under request for proposals No. W912P6-11-R-0010, for construction services. Walsh/Atkinson asserts that its proposal improperly was found unacceptable and not considered for award.

We deny the protest.

BACKGROUND

The RFP, issued on June 9, 2011, provided for award of a fixed-price contract for construction of a tunnel system for the Army's Chicagoland Underflow Plan McCook Reservoir. Specifically, the contractor is to construct the Main Tunnel System, a large tunnel with reinforced concrete and steel-lined sections, that will connect the McCook Reservoir to an existing Mainstream Tunnel system. Pertinent here, the

RFP provided an option for a “Construction Shaft,” but set forth specific requirements for this optional shaft, including location, lining, and excavation requirements. Agency Report (AR), Tab A, RFP, § 31 75 07 at 3; see also RFP, Amendment 6, Drawings Vol. 1, Sheet C-150.

Award was to be made on a best value basis considering technical approach/management, experience, past performance, and price. RFP at 39. To receive consideration for award, a rating of no less than “acceptable” had to be received for certain technical subfactors, including Tab 1A, Mainstream Tunnel Connection Plan. Id.

Proposals were received from Walsh/Atkinson, Kiewit, and two other offerors. Pertinent here, the Walsh/Atkinson proposal provided as follows with regard to access:

Access will be through the Main Gate Access Shaft. The Walsh/Atkinson JV has elected not to install the optional contractor construction shaft at this time. The schedule and approach does not include the construction shaft option. However, the Walsh/Atkinson JV does reserve the right to install a contractor construction shaft at our cost if construction circumstances determine it beneficial. This shaft would be installed at a location determined by the contractor and filled prior to protect [sic] completion. Note that access from the existing Construction Shaft (MWRD Contract 73-160-2H) will be required for final removal of the tunnel flume and bulkheads.

AR, Tab U, Walsh/Atkinson Proposal at 1 (emph. added).

The agency’s source selection evaluation board (SSEB) first reviewed the proposals and recommended Walsh/Atkinson, Kiewit, and a third offeror for price evaluation, because they were rated acceptable or above for all technical evaluation factors. AR, Tab CC; see AR, at 2. The agency’s source selection advisory council (SSAC), however, subsequently issued a “Comparative Analysis Report” in which the SSAC indicated, with regard to evaluation subfactor Tab 1A, Mainstream Tunnel Connection Plan, that it did “not concur” with the SSEB’s “acceptable” rating for Walsh/Atkinson. SSAC Report at 4. The SSAC cited the reservation of rights in Walsh/Atkinson’s proposal, set forth above, with regard to a construction shaft. The SSAC explained Walsh/Atkinson’s unacceptability as follows:

This is a clear qualification in conflict with the specifications, wherein the optional construction shaft, if constructed, will be located as indicated on the Contract drawing sheet C-150 and left in place, not backfilled. Specification Section 31 75 07 – Construction Shaft Excavation, paragraph 1.4.1 states “A shaft is defined as a permanent structure with final lining as shown on the drawing and placed within

the supported excavation.” Also paragraph 1.5.1 – Restrictions, states “The Contractor shall comply with all restrictions set as conditions under which the easement or permission was granted to perform the work of the Contract.”

Id. The SSAC therefore determined that the Walsh/Atkinson proposal was unacceptable and would not be recommended for award. Id.

The contract, valued at \$120,962,000, ultimately was awarded to Kiewit on the basis that its proposal offered the best value to the government. This protest followed.

The protester asserts that the agency erred in determining that the RFP prohibited Walsh/Atkinson from constructing a temporary construction shaft for alternative access. Specifically, the protester argues that it did not propose the optional construction shaft described in the RFP, and instead specifically declined to accept the option for that shaft. Protest at 6-7; see also Comments at 13. Rather, the protester asserts that it reserved the right to build a “temporary contractor construction shaft” as an “alternate point of entry,” as permitted by the solicitation. Protest at 7-9. In this regard, Walsh/Atkinson points to the “Proposal Requirements” section of the RFP, which provide with regard to Tab 1A:

Tab 1A – Mainstream Tunnel Construction Plan: The Mainstream Tunnel Connection Plan shall address the proposed methods, sequence of work, and approach to construction for the connection between the proposed Main Tunnel and the existing Mainstream Tunnel, including access either from a Construction Shaft (Contractor Option) or alternate point of entry, while protecting the work from live tunnel flows.

RFP at 30 (emphasis by protester). According to the protester, this provision demonstrates that construction access could be from either the optional construction shaft identified in the RFP or an “alternate point of entry.” The protester also argues that the construction shaft it reserved the right to install is just such an “alternate point of entry,” specifically authorized by the RFP. As a result, the protester argues it was unreasonable to conclude its proposal was technically unacceptable.

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency’s judgment was reasonable, and in accord with the RFP criteria and applicable procurement statutes and regulations. Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Where a dispute exists as to the meaning of solicitation language, we will resolve the matter by reading the solicitation as a

whole and in a manner that gives effect to all provisions of the solicitation. See Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149 at 5; CCITE/SC, B-400782, Nov. 21, 2008, 2008 CPD ¶ 216 at 3. Moreover, any proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable and may not form the basis for an award. L&E Assocs., Inc., B-258808.4, June 22, 1995, 95-1 CPD ¶ 288 at 4.

Here, we agree with the agency's interpretation of the RFP. In this regard, the RFP in specification section 31 75 07, "Construction Shaft Excavation," included specific requirements for a construction shaft. As noted by the agency, Walsh/Atkinson's proposed construction shaft was at variance with several of these requirements, including requirements regarding permanency and location. Specification Section 31 75 07, paragraph 1.4.1. In this regard, the agency notes that changing the location of the shaft would require a modification to the agency's current easement. AR, at 4.

Further, Walsh/Atkinson argues that the RFP language allowing "access either from a Construction Shaft (Contractor Option) or alternate point of entry," permitted it to propose an optional construction shaft without meeting the specification section 31 75 07 requirements for construction shafts simply by characterizing its shaft as an "alternate point of entry" rather than a "Construction Shaft (Contractor Option)." We agree with the agency that this interpretation is not consistent with the RFP when read as a whole, see CCITE/SC, supra, at 3, since it gives no effect to the requirements imposed by specification section 31 75 07, "Construction Shaft Excavation," regarding a contractor optional construction shaft. Indeed, Walsh/Atkinson's expansive reading of the solicitation provision for an "alternate point of entry," would permit a contractor to undertake virtually any construction or other activity irrespective of any other requirements of the contract.

Walsh/Atkinson's urged interpretation is further undercut by the questions and answers (Q&A) raised during the procurement, and incorporated into the solicitation. These Q&As clearly indicate that any contractor construction shaft would be governed by explicit RFP requirements and government direction, and would not be at the discretion of the contractor. For example:

7/13/11 Can the location and/or final internal diameter for concrete of the optional construction shaft be changed?

USACE Response. The location of the optional Construction Shaft cannot be changed. The size of the shaft can be different than that shown in the Contract Documents but needs to be kept to a reasonable size and will be subject to approval by the Government and MWRD.

AR, Tab L, RFP Amendment 6, at 23.

7/11/11 Will the Contractor be allowed to put a construction shaft down at the intersection of the existing tunnel and new tunnel?

USACE Response. No.

AR, Tab K, RFP Amendment 5, at 16.

7/25/11 Would the contractor be allowed to build a construction shaft and temporary Mainstream Tunnel diversion tunnel around the Connection on the north side of the Connection?

USACE Response: No.

AR, Tab P, RFP Amendment 7, at 14. We agree with the agency that these questions and answers should have put Walsh/Atkinson on notice that a construction shaft differing materially from the shaft described in the RFP was not permitted. Accordingly, the agency reasonably found this proposal to be unacceptable. Spectrofuge Corp. of North Carolina, Inc.-Recon., B-281030.3, Apr. 9, 1999, 99-1 CPD ¶ 65 at 2 (proposal which reserved offeror's right to escalate its prices was noncompliant with RFP and could not form the basis of award).

The protest is denied.

Lynn H. Gibson
General Counsel