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Decision

Matter of: LENS, JV--Costs

File: B-295952.4

Date: December 12, 2005

Albert B. Krachman, Esq., David A. Lieb, Esq., and Brian S. Gocial, Esq., Blank Rome LLP, for the protester.

Robert E. Little, Jr., Esq., Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation for reimbursement of costs for filing and pursuing protest is denied, even though the agency decided to take corrective action in response to the protest, where the record does not establish that protest was clearly meritorious.

DECISION

LENS, JV requests that our Office recommend that the firm be reimbursed the costs of filing and pursuing its protest of the non-selection of firm's proposal under request for proposals (RFP) No. N62742-03-R-1112, issued by the Department of the Navy for an electric utility privatization initiative at the Marine Corps Base Hawaii (MCBH) Kaneohe Bay. In that protest, LENS argued that the agency's "should cost" methodology for operation and maintenance of the electric utility system was flawed and inconsistent with the solicitation and was based upon information not provided to the offeror.

We deny the request.

The RFP was issued pursuant to the Department of Defense's (DOD) program to consider privatization of utility systems at military installations. See DOD Revised Guidance for the Utilities Privatization Program, Oct. 9, 2002. Authority for that program is provided by 10 U.S.C. § 2688 (2000), which provides that the secretary of a military department may convey a utility system to a municipal, private, regional, district, or cooperative utility company or other entity so long as it is in the long-term economic interest of the government.

Here, the RFP invited proposals for the privatization of the electric distribution system at the MCBH Kaneohe Bay. Potential offerors were informed

The New Owner shall own, operate, repair and maintain the Primary (12KV) Electrical Distribution Systems (EDS) at MCBH Kaneohe Bay, providing continuous electric utility service 24 hours per day, 7 days per week. The New Owner shall employ sound utility practices to ensure continuous, dependable, and reliable utility service is provided to [MCBH Kaneohe Bay] and to minimize the scope and length of any service disruption.

RFP, attach. J.3, MCBH Kaneohe Bay Electrical Distribution System Specification, at 1. The RFP also described the major customers, such as family housing, and major facilities to be supported under the solicitation. Id. at 3. In addition, the RFP provided a detailed technical data package that, among other things, described the historical electric usage, electric assets (and for each asset its service life and remaining life), planned capital projects, and “pending/potential energy saving performance contract projects,” and included an assessment of the condition of various electric system assets. Id., attach. 15, Technical Data Package. Minimum service requirements and performance standards were also provided. Among other things, offerors were informed that the electric system was required to be “up 99 % of the time,” that “[e]ach system or major piece of equipment is operational in that there are no significant impacts to customers or the Base,” and that emergency service work be performed, 95 percent of the time, within 15 minutes during normal working hours and within 2 hours outside of normal working hours. Id., attach J.3, MCBH Kaneohe Bay Electrical Distribution System Specification, at 4.

Offerors were required to provide separate technical and price proposals. With respect to the price proposals, offerors were informed that they must submit fixed prices for three items: an upfront payment for purchase of the utility system; a monthly purchase credit for the utility system in lieu of, or in addition to, the upfront monthly payment; and a monthly operation and maintenance (O&M) charge. RFP at 77. The solicitation also required that offerors provide a Capital Renewals and Replacement Schedule identifying all capital upgrades, renewals or replacements, “taking into consideration the condition and future replacement needs of all system capital assets.” This schedule requested that offerors provide an amortized monthly price that “when combined over the life of the system results in complete recovery of investments for continuously renewing and replacing system assets as they fail or reach the end of their useful life.” RFP at 78.

The RFP was a performance-based solicitation. Since the ultimate awardee was to assume ownership of the electric utility system, the RFP did not require capital improvements, upgrades, renewals, or replacements for the electric system infrastructure. Rather, the solicitation essentially catalogued the scope and condition of the infrastructure maintained by the government and required offerors

to propose their plans for addressing the needs of the system over the 50-year life of the contract.

The RFP provided that, for the purpose of entering into exclusive negotiations with the agency for privatization and operation of the electric utility system, the agency would select a single offeror on the basis of a “best value” determination considering the price and technical factors identified in the solicitation. The RFP provided that the selected best-value offeror would enter into negotiations with the agency concerning the purchase of the utility system and a contract for providing the utility service. Offerors were informed that the agency would not enter into a contract with the offeror unless the offeror’s proposal provided fair market value for the utility assets and that entering into a contract with the offeror was in the government’s long-term economic interest. RFP at 83.

In December 2004, the Navy received only the offer from LENS to purchase the electric utility and provide utility services. Although the Navy initially rejected LENS’s proposal as unacceptable, in response to a protest to our Office the Navy took corrective action and included LENS’s proposal in the competitive range and conducted discussions with the firm. Ultimately, the Navy determined that LENS’s final proposal revision was marginal and that LENS’s proposed prices for the utility assets and for provision of utility services were not in the government’s long-term economic interest. Specifically, the Navy found that LENS’s proposed price for the utility assets was \$9 million less than the government’s estimate and that LENS’s proposed net present value (NPV) for O&M of the system for the life of the contract was nearly \$96 million higher (nearly 20 times more) than the government’s should-cost estimate. The Navy also found that LENS’s proposed NPV for capital renewals and replacements was more than \$16 million higher than (more than double) the government’s should-cost estimate. See Agency Report (AR), exh. C, Price Evaluation Board Report, at 3. Based upon these significant price differences and discrepancies, the source selection authority rejected LENS’s proposal for the electric utility privatization.

Following a debriefing, LENS protested to our Office, arguing that the agency’s should-cost methodology for operation and maintenance of the electric utility at the MCBH was flawed and inconsistent with the solicitation and was based upon information not provided to the offerors. In particular, the protester complained that the agency’s should-cost O&M estimate was based upon significantly lower staffing than what LENS had proposed and that this lower staffing was “premised upon a patchwork use of part-time personnel and contractors” that would not satisfy the solicitation requirement to provide reliable, dependable service “24 hours each and every day.” Protest at 12-13. LENS requested that our Office recommend that the agency make award to LENS, “as the [agency’s] cost comparison should be viewed as a nullity.” Id. at 14.

The Navy filed a responsive report to the protest, in which the agency denied that the agency's should-cost estimate was deficient. In particular, the agency argued that its estimate for the agency's performance of electric utility O&M was carefully determined from a review of the MCBH's actual operations and costs, considering the electric utility assets and their condition. Moreover, the agency argued that LENS's proposed price for electric utility system O&M was inflated and reflected the firm's misreading of the solicitation. The agency contended that LENS misunderstood the solicitation requirement for electric service 24 hours per day, every day, as requiring that the firm provide staffing 24 hours per day, every day, and that this misunderstanding resulted in LENS's inflated proposed staffing.

Subsequent to filing its report, the agency decided to take corrective action. Specifically, the Navy informed us that it would reinstate LENS's proposal in the competitive range and amend the RFP to, among other things, clarify the condition of electric utility assets and emphasize that "the performance-based requirements in the Statement of Work do not dictate staffing and operation and maintenance resources or a specific maintenance schedule, which are to be determined by the offeror, based on fulfillment of system and response performance requirements." Agency Corrective Action Letter, Oct. 5, 2005, at 2. The agency also stated that it would validate the agency's should-cost estimate "independently of the should cost-preparing activity." *Id.* at 3.

We dismissed LENS's protest because the agency's corrective action rendered the protester's protest academic. Thereafter, LENS requested that we recommend that the Navy pay the protester the reasonable costs of filing and pursuing the protest.

Where, as here, a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2005); Pemco Aeroplex, Inc.--Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. The mere fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. East Penn Mfg. Co., Inc.--Costs, B-291503.4, Apr. 10, 2003, 2003 CPD ¶ 83 at 3.

Here, the record does not establish that LENS's protest was clearly meritorious. Even were we to accept all of the protester's arguments concerning the agency's should-cost estimate and the adequacy of the solicitation, the record does not show a reasonable possibility that LENS was prejudiced, given the significant difference between the agency's should-cost estimate for government operation and maintenance of the electric utility and LENS's proposed price.¹ See First Fed. Corp.—Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 3 (protest not clearly meritorious where there was no competitive prejudice to the protester, even where agency took corrective action in response to protest). Here, as our Office repeatedly informed the parties during the protest, the record does not show the cost impact on either the agency's should-cost estimate or the protester's proposed price; in fact, this was one of the reasons our Office informed the parties during the protest that a hearing might be necessary to resolve this protest. See Spar Applied Sys.—Declaration of Entitlement, B-276030.2, Sept. 12, 1997, 97-2 CPD ¶ 70 at 5 (a protest was not clearly meritorious where resolution of the protest required substantial further record development such as conducting a hearing to complete and clarify the record). Without further record development in this case, we are unable to determine that there is any reasonable possibility that LENS was prejudiced, even assuming, arguendo, that the agency's conduct of the acquisition was deficient.

The request for a recommendation that costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel

¹ Prejudice is an element of every viable protest, and we will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice. Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5.