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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: BOSS Construction, Inc.

File: B-402143.2; B-402143.3

Date: February 19, 2010

James T. Hopkins, Esq., Schiffrin Olson Schlemlein & Hopkins, PLLC, for the protester.

Lee P. Curtis, Esq., and Troy E. Hughes, Esq., Perkins Coie LLP, for Mowat Construction Company, Inc., an intervenor.

Craig T. Donovan, Esq., and James L. Weiner, Esq., Department of the Interior, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rated proposal unacceptable is denied where solicitation specified 18-month limit for completion of all work, and protester's proposed schedule showed completion of some activities 20 days after the 18-month limit.

DECISION

BOSS Construction, Inc., of Bellingham, Washington, protests the award of a contract to Mowat Construction Company, Inc., of Woodinville, Washington, by the Department of the Interior, Bureau of Reclamation (BoR), under solicitation No. 09SP101729 for construction services on the Weber Siphon Project, as part of the Columbia Basin Project in Grant County, Washington. BOSS argues that its proposed schedule was misevaluated as unacceptable, and that Mowat also proposed an unacceptable schedule.

We deny the protest.

BACKGROUND

On August 6, 2009, the BoR issued the solicitation, seeking proposals for installation of the "second barrels" of the Weber Branch Siphon and Weber Coulee Siphon on the East Low Canal of the Columbia Basin Project, in Washington. The solicitation instructed offerors to propose a technical approach, including a detailed critical path

method (CPM) schedule, and provide past performance information and a price. Solicitation at L-17 to L-18. The solicitation specified that BoR would evaluate proposals under five non-price factors: past performance, corporate and key personnel experience, draft CPM schedule, quality control plan, and socio-economic factors. The solicitation provided that BoR would evaluate proposals and make award to the offeror whose proposal provided the best value, based on both price and non-price factors. Solicitation at M-1 to M-2.

As relevant to the protest issues, in order to allow the release of water for irrigation when needed, the solicitation provided that the “East Low Canal operates 24 hours a day from mid-March to mid-October.” Solicitation amend. 1 at 00332-1 (Specification § 00332).

The solicitation also specified that the contractor was required to “complete the entire work ready for use not later than 18 months following receipt of the notice to proceed.” The solicitation further explained that “[t]he time stated for completion shall include final cleanup of the premises.” Solicitation at F-1. The solicitation also explained that the evaluation of the draft CPM schedule factor would consider three subfactors, in descending order of importance: (1) compliance with the required completion date, including milestones; (2) realism of the schedule; and (3) estimated need for government construction oversight. Solicitation at M-1 to M-2.

BoR received 11 proposals, including proposals from both BOSS and Mowat.

In its proposal, BOSS provided a CPM schedule, as requested by the solicitation. BOSS candidly acknowledges that its proposed schedule showed “very minor project close out activities and final project completion . . . a modest 20 days after the required completion date.” Protest at 3.

Mowat’s proposed CPM schedule included a task for testing concrete joints of the siphon construction, backfilling, and anode testing, which the schedule showed would begin on March 14, 2011, and would be completed on March 25. Agency Report (AR), Mowat Proposal Binder, Factor 3 Tab (CPM Schedule) at sheet 5. The schedule showed that the entire project, include seeding and site restoration, would be completed within 18 months.

The initial evaluation results were as follows:

	Past Perf.	Experience	Schedule	QC Plan	Socio-economic	Overall
Offeror A	Good+	Good+	Good	Good	Good+	Good+
BOSS	Poor	Good-	Poor	Good	Good-	Poor
Offeror B	Poor	Poor	Poor	Good	Good-	Poor
Offeror C	Good+	Good+	Good	Good	Good	Good+
Offeror D	Good-	Good-	Good-	Good-	Good+	Good-
Mowat	Good	Good	Good+	Good	Good	Good

Offeror E	Good-	Good-	Poor+	Good-	Good-	Good-
Offeror F	Good-	Poor+	Good-	Good-	Good	Poor+
Offeror G	Good	Good	Good-	Good	Poor	Good
Offeror H	Good+	Good	Good	Good	Good+	Good
Offeror I	Good-	Good-	Good-	Good-	Good+	Good-

AR, Tab 9, Price Negotiation Memorandum, at 2.

The price evaluation calculated BOSS's price as \$18,855,591, which was the lowest evaluated price, while Mowat's evaluated price was calculated as \$20,237,462, and was the second-lowest price. AR, Tab 8, Price Evaluation Spreadsheet, at 1-2.

The Contracting Officer (CO) considered the evaluation, including a detailed discussion of the basis for each offeror's rating under each evaluation factor. The CO ultimately selected Mowat for award after explaining why the advantages that higher-rated offerors had over Mowat did not justify paying their higher prices. AR, Tab 9, SSD, at 2-10.

When BOSS protested the initial award, BoR announced that it would take corrective action by reevaluating BOSS's proposal. Our Office dismissed BOSS's protest. BOSS Constr., Inc., B-402143, Oct. 29, 2009.

The reevaluation concluded that BOSS should have been rated unacceptable overall, based on its CPM schedule, and the CO once again selected Mowat for award. AR, Tab 9, Source Selection Decision, at 2. After being notified of the results of the reevaluation, BOSS filed this protest.

DISCUSSION

BOSS argues that its proposal was improperly downgraded under the CPM schedule factor and attempts to justify its decision to propose a schedule that exceeded the completion deadline:

BOSS intentionally placed a one month lag in the start of hydroseeding and site restoration work after completion of the physical structures [by the deadline] . . . because, given the locale and seasonal weather conditions at the project site, seeding should not practically and effectively be commenced as of [the required completion date].

Protest at 5.

Accordingly, BOSS argues that it was unreasonable to downgrade its proposal based on what it argues was the only proper way to complete the work.

BoR argues that the specification clearly required completion within 18 months, and specified that schedules would be evaluated on this basis, among others. By failing

to meet the 18-month completion, BoR argues that the rating of BOSS as unacceptable under the CPM factor was proper.

In reviewing a protest of an agency's evaluation of proposals, our review is confined to a determination of whether the agency acted reasonably and consistent with the terms of the solicitation and applicable statutes and regulations. Cooperativa Maratori Riuniti-Anese, B-294747, Oct. 15, 2004, 2004, CPD ¶ 210 at 2. A firm delivery schedule or completion date set forth in a solicitation is a material requirement, precluding acceptance of any proposal not offering to meet that date. In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and may not form the basis for an award. Id. at 3.

BOSS emphasizes certain provisions of the solicitation that indicated that the schedule in the offeror's proposal would not be final, and did not need to be "contract quality," and therefore the fact that its schedule exceeded the time permitted should not have been treated as a significant failure. We disagree. There is no dispute on this record that BOSS's proposed schedule exceeded the limit specified in the solicitation, and as noted above, such requirements are material. Accordingly, we cannot conclude that the agency acted improperly in rating BOSS unacceptable under the CPM schedule factor.¹

To the extent that BOSS argues that Mowat's proposed schedule did not show that the construction of the new siphon would be completed to allow the start of the irrigation season in mid-March, as specified in the solicitation, Supp. Protest at 1, the record does not support its claim.

BoR responds that a review of the detailed tasks within Mowat's schedule show that the firm would be able to complete testing of joints in the siphon construction on March 14 or within a day or two after, at which time water flow for irrigation could begin. Thus BoR argues it reasonably concluded that Mowat's schedule meets the requirement of making the siphon usable by the start of the irrigation season in "mid-March."

The solicitation does not define the term "mid-March," or provide any other basis on which offerors should have understood that term to imply an exact date. Accordingly, since BoR's construction of "mid-March" to include March 14 (or a few

¹ Although BOSS argues that its approach was the only sensible one given its views on the conditions for successful seeding and site restoration work, it did not challenge the terms of the solicitation in a timely manner, before the due date for proposals, and therefore we will not consider its arguments to the extent that they are an untimely challenge to the terms of the solicitation. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2009).

days after that) is a reasonable one, we have no basis to question it. Even though BOSS argues that BoR should have interpreted Mowat's schedule to provide for completion of joint testing as late as March 25, BoR has pointed out that a detailed analysis of the underlying tasks (or "fragmentary networks") within Mowat's schedule undermine BOSS's interpretation. In our view, BoR has shown that its interpretation of Mowat's proposed schedule is supported by the record and is a reasonable one.

The protest is denied.²

Lynn H. Gibson
Acting General Counsel

² BOSS also argues that Mowat "made no effort to place [the seeding] work into the most favorable time and weather conditions possible." Protester's Comments at 8; see also Supp. Protest at 2. We do not view this argument as stating a valid basis of protest. Even if true, BOSS has not shown that Mowat's approach to seeding was contrary to the terms of the solicitation, or otherwise should have rendered its proposal unacceptable.