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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Moboco, Inc.

File: B-409186; B-409186.2

Date: February 5, 2014

James Lindquist for the protester.

Elin M. Dugan, Esq., Department of Agriculture, Forest Service, for the agency.

Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably rejected protester's application for special-use permit for water transportation services where the application failed to meet requirements stated in prospectus.

DECISION

Moboco, Inc., of Wetmore, Michigan, protests the issuance of a special-use permit to Seaberg Contracting, Inc., of Munising, Michigan, under a concession prospectus issued by the Department of Agriculture, Forest Service for a permit to provide passenger and vehicle water transportation services for the Grand Island National Recreation Area in the Hiawatha National Forest.¹ The protester argues that the agency unreasonably evaluated its submission as having several deficiencies, which rendered the submission unacceptable.

We deny the protest.

In 2013, the agency issued a prospectus soliciting applications for the issuance of a special-use permit granting the permit holder the exclusive right to provide passenger ferrying services and vehicle ferrying services to Grand Island National

¹ The agency issued the prospectus for the award of the special-use permit pursuant to its authority under the Granger-Thye Act, as codified at 16 U.S.C. § 580d, which establishes that the Forest Service may permit private entities to use land or structures under the agency's administrative control.

Recreation Area. Prospectus at 4. This permit allows the holder to provide and collect payment for passenger and vehicle ferrying services. In exchange for this right, the permit holder must provide additional services, such as maintenance and reconditioning work, and pay a fee to the government for the fair market value for the use of its land and improvements.² Agency Report (AR) Tab 1, Memorandum of Law, at 1-2. The prospectus established the permit would be for an initial 5-year base period with an additional 5-year option period. Selection was to be made on a best-value basis considering the applicant's operating submission (including required and optional services), business plan/experience, fees charged to the public, fee to the agency, and special/optional services offered. Prospectus at 24. Moboco is the incumbent holder of the Grand Island National Recreation Area special-use permit and has held this permit since the 1990s.

As it is relevant to this protest, when the agency issued the subject prospectus it included several requirements, which are not required under the current permit agreement with Moboco. Among others, the prospectus provides that the permit holder is required to provide maintenance and reconditioning services for "daily litter pickup during the operating season" and "daily cleaning of the inside of the toilet building at Grand Island Landing." Id. at 7, 13, 47-48. The permit holder is also to obtain liability insurance for government-furnished vessels. Id. at 13, 17, 25, 32-33, 49, 54.

Regarding fees, firms were instructed to provide a list of all fees they propose to charge the public for the required "[p]assenger ferrying services" and for "[t]ransporting the public's vehicles" (including agency and contractor vehicles). Id. at 22. Proposed "fees to be charged to the public" were to be considered income to the permit holder. Id. Each firm was also to propose a fee that it would pay the agency. This fee was to reflect the fair market value for the firm's use of the government's property and was to be based on the concession's gross revenue. In this regard, the prospectus established a minimum annual fee of \$3,150, which was calculated based on the incumbent's revenue; however, a lower fee could be proposed if it was documented by the applicant to represent fair market value. Id. at 23, 34.

The agency received applications from two firms, including Moboco, by the April 1, 2013 closing date and communications were held with both firms to address deficiencies in their applications. AR Tab 1 at 6-7. Regarding the daily janitorial services requirements, the agency advised Moboco that its initial submission was

² Our jurisdiction extends to concession selections where the concessionaire, as here, is to provide services to an agency which it would otherwise have to purchase or perform in addition to authorizing a firm to provide services to park visitors. See Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 5-8 (jurisdiction extends to protest by concessionaire for ferryboat services required to provide janitorial services for agency's docks and piers).

deficient because it merely stated it would continue to take care of routine maintenance without affirmatively committing to meet the prospectus' new requirements for daily toilet cleaning and daily litter pickup. Id. In response, Moboco committed to checking the bathrooms daily, cleaning the toilets once or twice per week, checking the garbage cans daily and emptying them as needed. Id. at 7. Upon reviewing Moboco's response, the agency concluded that the protester still did not commit to the stated requirement for daily cleaning and daily litter pickup, and the agency concluded that the protester's revised submission failed to satisfy the required terms of the prospectus. Id.

Regarding the requirement for the permit holder to obtain insurance for government-furnished vessels, Moboco initially indicated that it would obtain the insurance if the vessel agreement (which would provide the permit holder permission to use the government's vessels) was acceptable to its current insurance provider, and if the agency reimbursed the cost of the insurance. Id. at 5. The agency advised Moboco that it found this aspect of the submission deficient because it was conditional and reflected an improper charge to the agency. AR Tab 10, Discussions Letter at 3-4; Prospectus at 49. In its revised submission, the protester repeated the condition that it would obtain the insurance if its current insurance provider agreed to a vessel agreement between the agency and the protester.

While Moboco did not directly address the cost of the insurance, it radically altered its initial submission to include charging the government \$20,000 annually, with an annual escalation, to generally "maintain barge service for the calendar year." Protester's Comments at 7. The selection official considered the protester's response insufficient to address the concerns communicated to Moboco. Id. at 14.

The agency also concluded that Moboco's application was deficient because it failed to provide a rate schedule, as required, for the permit holder's charges to the public for transporting the public's (including agency and contractor) vehicles. As indicated in the prospectus, under the incumbent permit the services had been provided at no cost. In its revised submission, responding to this deficiency, the protester indicated that it would charge the agency \$20,000 annually to operate the barge services, and added that if the agency wanted reimbursement for this charge it could bill the owners of the public vehicles. Id. The agency rejected the application as inconsistent with the requirements of the prospectus. This protest followed.

The protester argues that the agency improperly rejected its application as noncompliant with prospectus requirements. We disagree.

We have reviewed the record of the evaluation of the protester's application and find no basis to question the reasonableness of the agency's evaluation. See Starfleet Marine Transp., Inc., supra (where appropriated funds are not used to

award a concession contract, we limit our review to whether the agency's actions were reasonable and consistent with applicable procurement rules; a protester's mere disagreement with the agency's actions does not show they lacked a reasonable basis). The prospectus contained clear direction, reiterated during discussions, for, among other things, firms to demonstrate compliance with the daily janitorial requirements. Moboco, however, failed to do so since it only committed to cleaning the toilets, at most, twice per week, not daily, and did not commit to emptying trash on a daily basis.

Regarding the necessary insurance, again, Moboco did not provide a firm commitment to provide such insurance. Rather, it made the provision of insurance contingent on approval by its insurance carrier of a vessel agreement between the government and Moboco. Moreover, the protester's final submission, which imposed an annual fee on the government to cover the costs of operating the ferry, and indicated that the government should collect a fee from users if it wanted to recoup this cost, was fundamentally at odds with the basic premise of the prospectus, which was to have the permit holder collect the fees to cover the costs of operation and the permit holder to pay the government for the fair market value of using the government's lands and equipment.³ An offeror is responsible for demonstrating affirmatively the merits of its proposal and risks rejection if it fails to do so. See John Blood, B-402133, Jan. 15, 2010, 2010 CPD ¶ 30 at 3-4. The

³ To the extent the protester believed that the \$20,000 annual fee to the government was proper because the contemplated permit agreement allows the holder to recoup certain costs from the government for maintaining the government's equipment, it is mistaken. First, as a general matter, the prospectus did not provide for the evaluation of an offset agreement as the protester appears to have proposed; rather, the prospectus provided for the submission of a fee offset agreement after the selection of the permit applicant. Prospectus at 25. Second, to the extent the prospectus provided for an applicant to propose a "consolidated fee payment" to pay for an "offset project," the protester did not indicate that it had proposed a "consolidated fee." *Id.* at 23. Third, even if such a fee had been considered, it did not address the agency's concern that the protester failed to provide a fee schedule for charges to the public and instead chose to transfer that responsibility to the government, which was not contemplated by the prospectus.

protester has provided no basis for us to question the reasonableness of the agency's rejection of its submission.⁴

The protest is denied.

Susan A. Poling
General Counsel

⁴ The protester's submission was also found deficient because the firm failed to commit to the use of a particular government-furnished passenger vessel when 13 or more passengers are waiting for transport during the summer months. Given the reasonableness of the agency's evaluation and exclusion of the protester's submission on separate bases, as discussed above, we need not discuss this additional issue of noncompliance. To the extent the protester generally alleged that the selection of the successful firm may have considered terms not included in the prospectus, we dismiss the contention. The protester's speculation does not establish a valid basis for challenging the agency's selection; the protester has not provided the requisite detailed statement of legal and factual support establishing the likelihood that the agency violated applicable procurement laws and rules. Pacific Photocopy and Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4; Bid Protest Regulations, 4 C.F.R. § 21.5(f).