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Decision

Matter of: USS Chartering, LLC

File: B-407601

Date: January 15, 2013

Lee Dougherty, Esq., and Katherine A. Straw, Esq., Fluet, Huber & Hoang PLLC, for the protester.

Dismas N. Locaria, Esq., D. Edward Wilson, Jr., Esq., and Melanie Jones Totman, Esq., Venable LLP, for Crowley Petroleum Services, Inc., the intervenor.

Kelly McKallagat, Esq, Kimberly G. Foxx, Esq., and Gordon Ivins, Esq., Department of the Navy, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging an agency's affirmative determination of responsibility is denied where the record demonstrates that the agency considered information concerning the awardee's affiliation with a firm that pled guilty to price fixing.

2. Protest challenging the evaluation of the protester's price is denied where the agency's price evaluation was consistent with the solicitation criteria and reasonable.

DECISION

USS Chartering, LLC, of Edison, New Jersey, protests the award of a contract to Crowley Petroleum Services, Inc., of Jacksonville, Florida, under request for proposals (RFP) No. N00033-12-R-5428, issued by the Department of the Navy, Military Sealift Command, for ship charter services. USS Chartering argues that the award to Crowley Petroleum was improper because the awardee is affiliated with a firm that recently pled guilty to price fixing.

We deny the protest.

BACKGROUND

The RFP, issued on August 24, 2012, provided for the award of a fixed-price contract for the charter of a double hull barge to transport barrels of petroleum for one year. Offerors were informed that award would be made to the responsible firm with acceptable/neutral past performance that submitted the lowest-priced, technically acceptable proposal. RFP at 29.

With respect to the evaluation of price, the RFP stated that the evaluated price would be the sum of the offeror's charter hire rate for one year and its fuel, divided by the number of barrels that the barge could transport. In this regard, the RFP informed offerors that for evaluation purposes the offerors should anticipate that the barge will

be underway laden 95 days at 12 knots, underway in ballast 76 days at 12 knots, inport loading 74 days, inport discharging 80 days, and inport cleaning for 40 days.

RFP at 29. The solicitation also provided standard Defense Logistics Agency prices and fuel conversion costs for calculating the offeror's fuel costs. Id. at 29-30.

The agency received proposals from 3 firms, including USS Chartering and Crowley Petroleum, by the September 27 closing date. Crowley Petroleum was found to have submitted the lowest-priced, technically acceptable proposal. See Agency Report (AR), Tab 8, Abstract of Final Proposals, at 1. The contracting officer (CO) also determined that Crowley Petroleum was responsible. In this regard, the CO considered the firm's past performance, financial resources, organization and ability to perform the contract. See CO's Statement at 2-3; AR, Tab 9, Business Clearance Memorandum, at 18. The CO also reviewed, among other things, the Excluded Parties List System (EPLS); the Past Performance Information Retrieval System, and the Federal Awardee Performance and Integrity Information System (FAPIS). See CO's Statement at 3; AR, Tab 9, Business Clearance Memorandum, at 10, 18.

In making his affirmative determination of Crowley Petroleum's responsibility, the CO was aware that Crowley Liner Services, Inc. had recently pled guilty to felony price fixing.¹ AR, Tab 9, Business Clearance Memorandum, at 18. Crowley

¹ On July 31, 2012, Crowley Liner pled guilty to fixing prices for freight transportation between the continental United States and Puerto Rico. AR, Tab 15, Affidavit of Director of Chartering and Ship Operations, Military Sealift Command, at 1. In this regard, this director and the CO were aware from a news article of the criminal case against Crowley Liner with respect to the price fixing and that five identified individuals had also pled guilty. Id.

Petroleum and Crowley Liner are wholly-owned corporate subsidiaries of Crowley Maritime Corporation. Supp. Legal Memorandum at 1. The CO contacted the Navy Acquisition Integrity Office, and was informed that only Crowley Liner had been “implicated in this matter and that no prohibition existed currently against awarding a contract to Crowley Petroleum Services.” AR, Tab 9, Business Clearance Memorandum, at 18. The CO also reviewed the webpage of the parent corporation, Crowley Maritime, and determined that Crowley Petroleum and Crowley Liner were “independent affiliates,” and that there was no indication that Crowley Liner exercised any control over the awardee. See Legal Memorandum at 3. Furthermore, the CO found no indication that the five individuals who pled guilty in this matter were associated with Crowley Petroleum. The CO concluded that the criminal matter concerned only Crowley Liner and that Crowley Petroleum was responsible. AR, Tab 9, Business Clearance Memorandum, at 17-18.

Award was made to Crowley Petroleum as the responsible offeror with acceptable past performance that submitted the lowest-priced, technically acceptable offer.² This protest followed.³

DISCUSSION

Affirmative Determination of Responsibility

USS Chartering objects to the agency’s affirmative responsibility determination of Crowley Petroleum, arguing that the CO failed to consider relevant information and unreasonably ignored adverse information pertaining to Crowley Liner’s integrity. In this regard, the protester points to evidence that it gathered from public records, including court documents, which the protester contends shows that the two firms share key personnel, office space, and operations structures, such that the agency should have found the two firms to be “a single entity.” Protest at 6, 7.

As a general matter, our Office does not review an affirmative determination of responsibility by a CO. 4 C.F.R. § 21.5(c) (2012); CapRock Gov’t Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490 et al., May 11, 2010, 2010 CPD ¶ 124 at 26; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 20. We will, however, review a challenge to an agency’s affirmative responsibility determination where the protester presents specific evidence that the CO may have ignored information that, by its nature,

² Crowley Petroleum’s evaluated price was \$16,506,028 (\$106.49 per barrel). The protester’s evaluated price was \$18,288,825 (\$[DELETED] per barrel). AR, Tab 8, Abstract of Final Proposals, at 1.

³ We considered all of the protester’s arguments in reaching our decision, although we address only the principal ones.

would be expected to have a strong bearing on whether the awardee should be found responsible. Compare Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 (CO generally aware of allegations of misconduct by awardee and took no steps to consider the awardee's record of integrity and business ethics) with Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. (CO aware of adverse information concerning the awardee's integrity and considered it).

As described above, the record here shows that the CO was aware of the adverse information concerning Crowley Liner and considered the relationship of the two firms. The CO concluded from his review that the two firms were not so closely affiliated or jointly controlled such that the adverse information concerning Crowley Liner should be imputed to Crowley Petroleum. Thus, the record shows that the CO was aware of and did consider whether the misconduct of Crowley Liner affected Crowley Petroleum's responsibility. Although USS Chartering challenges the adequacy and reasonableness of the CO's investigation, this challenge does not present an exception to our rules barring consideration of challenges to an agency's affirmative determination of responsibility.⁴ See CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., *supra*, at 26. Moreover, we also conclude that the protester's arguments concerning the allegedly close affiliation of Crowley Petroleum and Crowley Liner reflect disagreement with the CO's judgment that the two firms were not so closely affiliated or jointly controlled.

Price Evaluation

The protester also challenges the agency's evaluation of its price, arguing that its evaluated price should have been found to be lower than the awardee's. Specifically, USS Chartering provided in its final proposal revision that its vessel "can clean underway. Above consumption only if inport cleaning required." USS Chartering Final Proposal Revision, attach. 1, Fuel Consumption. USS Chartering argues that the Navy should not have included 40 days of fuel for inport cleaning in the protester's evaluated price. Protest at 8.

The Navy responds that the RFP required offerors to provide eight tank washings in their charter rates and provided that an offeror's evaluated price would include 40 days of inport cleaning. AR at 4-6, citing RFP at 29. We agree. To the extent

⁴ We also do not agree with the protester that the facts and circumstances here are "nearly identical" to those in the Court of Federal Claims decision in Impresa Construzioni Geom. Domenico Garufi v. United States, 52 Fed. Cl. 421 (2002), in which the court found the contracting officer's affirmative determination of responsibility to be unreasonable because the CO had failed to reasonably consider questions concerning an awardee's integrity and business ethics. Here, the CO specifically considered the relationship of the two firms.

USS Chartering argues otherwise, it was required to raise this challenge to the terms of the solicitation prior to the closing time for receipt of proposals. 21 C.F.R. § 21.2(a)(1) (2012).

The Navy also states that, if the protester is arguing that it offered the Navy a “discount” with respect to the required tank washings, the protester’s proposal did not clearly indicate this. Supp. AR at 4. We agree. Although USS Chartering indicated in its final proposal revision that its vessel had the ability to “clean underway,” the protester also provided its fuel consumption rate for inport cleaning, which USS Chartering stated was to be used if inport cleaning was required. Given that the RFP indicated that proposed prices were to be based upon 40 days of inport cleaning and that USS Chartering did not clearly indicate in its revised proposals that inport cleaning was not required, we have no basis to find unreasonable the Navy’s inclusion of these costs in the protester’s evaluated price.

The protest is denied.

Susan A. Poling
General Counsel