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**Comptroller General
of the United States**

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

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Decision

Matter of: W. Gohman Construction Co.

File: B-401877

Date: December 2, 2009

Tamara M. McNulty, Esq., Duane Morris LLP, for the protester.
Lt. Col. Dana J. Chase, Department of the Army, for the agency.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's proposal as unacceptable where solicitation provided that contractor would be responsible for all temporary (during construction) utility costs, and protester's proposal took exception to requirement, stating that its price excluded sewer and water accessibility fees.

DECISION

W. Gohman Construction Co., of St. Joseph, Minnesota, protests the award of a contract to Holte/Graham Joint Venture, of Ramsey, Minnesota, under request for proposals (RFP) No. W912LM-09-R-0002, issued by the Department of the Army, Army National Guard, for the construction of the Arden Hills Readiness Center, Phase I, at the Arden Hills Army Training Site in Minnesota. Gohman argues that the agency improperly determined that its price was incomplete, and that its proposal therefore was unacceptable, for failing to include sewer and water accessibility charges (SAC/WAC).

We deny the protest.

The RFP, issued as a small business set-aside on May 29, 2009, contemplated the award of a fixed-price construction contract. Section 00100 of the solicitation provided instructions for the preparation of proposals. As relevant here, paragraph 10, Information Regarding Availability of Utility Services, advised offerors that

It has been determined that all temporary utilities shall be the responsibility of the contractor. The contractor will pay all

charges (hook up fees, metering, monthly usage, etc.) resulting from temporary utilities. The offerors will take this into consideration when computing its offer.

RFP at 11. This advice was repeated in section 00800, paragraph 7, Utility Services, which stated that “the contractor will pay all charges (hook up fees, metering, monthly usage, etc.) resulting from temporary utilities. The offerors will take this into consideration when computing their offer.” Id. at 41. The Army also provided each offeror with a 100% Design Submittal on a compact disc (CD), which included additional references to the offeror’s responsibility for utility services, including, for example, paragraph 1.29, Utilities, which states

The contracting officer has determined that government-operated utilities are not adequate and will not be furnished to the contractor without charge where existing outlets are available. The contractor is responsible for installing temporary service outlets, as necessary. Any expense incurred to gain access to these utilities (temporary tap-ins, etc.) shall be the responsibility of the contractor and all utilities shall be returned to their original configurations at the end of the contracts. No alterations to existing utilities shall be accomplished without the written permission of the contracting officer.

RFP, CD, 100% Design Submittal. Additionally, paragraph 1.3, Use Charges of Section 015000--Temporary Facilities and Control, states that the “Contractor shall pay for utilities,” and “shall sign utility services contract,” which included sewer and water in a list of items. Id.

Award was to be made, without discussions, to the offeror whose proposal represented the “best value” to the government, considering specified evaluation factors and price. RFP at 17, 19. Offerors were to submit prices for 10 contract line items (CLINs), including CLIN 0001, Construct Arden Hills Readiness Center. RFP amend. 1, at 2-4. The agency received eight proposals, including Gohman’s and Holte’s, by the June 30 closing time. Gohman’s proposal indicated that the offered price for CLIN 0001 (construct Arden Hills Readiness Center) “excludes SAC and WAC fees.” AR, Tab 5, Gohman Proposal, at 7.

A source selection evaluation board (SSEB) evaluated the proposals. Gohman’s price was low at \$11,125,266; Holte’s was second low at \$11,157,587. AR, Tab 15, Source Selection Decision, at 3. However, the SSEB determined that Gohman had qualified its offer by stating that its price did not include SAC/WAC fees. AR, Tab 14, SSEB Report, at 10. Due to omission of this required pricing element, the agency determined that Gohman had not agreed to be responsible for SAC/WAC fees, and that its proposal therefore was ineligible for award. AR at 7; AR, Tab 14, SSEB Report, at 10. By letter dated July 29, the Army notified Gohman that its proposal was found not to be the best value because its price was incomplete based on its

exclusion of SAC/WAC fees, and that award was made to Holte. AR, Tab 9, Notice of Award, at 1.

Following a debriefing, Gohman filed an agency-level protest, arguing that the SAC/WAC fees were not required. The agency dismissed the protest, citing the language of RFP section 00800, advising offerors that they were responsible for all charges related to temporary utilities. AR, Tab 10, Contracting Officer Response to Agency Protest, at 2. On September 8, Gohman filed this protest with our Office.

Gohman asserts that, contrary to the Army's determination, it "bid everything that was required to be bid under the terms" of the RFP. Protest at 3.

Where a protest challenges an agency's technical evaluation, we will review the evaluation record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Government Acquisitions, Inc., B-401048 et al., May 4, 2009, 2009 CPD ¶ 137 at 8. It is well-settled that a proposal that fails to conform to a solicitation's requirements cannot form the basis for an award. Id.

The evaluation and rejection of Gohman's proposal were unobjectionable. The solicitation clearly provided that the contractor would be responsible for all costs related to providing temporary utilities, that is, utilities necessary during the construction of the center. There is no dispute that sewer and water service constitute utilities--and, as noted above, the list of utilities in the Design Submittal, at paragraph 1.3, included sewer and water. It likewise is undisputed that Gohman's proposal specifically provided that its price excluded SAC/WAC fees. Under these circumstances, the agency reasonably determined that Gohman had not agreed to be responsible for the costs of SAC/WAC during construction, contrary to the RFP's express requirements, and that its proposal therefore was unacceptable.

In challenging the agency's determination, Gohman cites paragraphs 1.29 and 1.31 of the Design Submittal, and asserts that the only costs associated with utilities are those related to obtaining permits, installing temporary utilities (and returning them to their original configuration), and gaining access to the utilities. Protest at 5-6. Gohman claims that "Nowhere, however, in the Solicitation does it mention utility fees generally or SAC/WAC fees particularly," which, it asserts, "makes sense" because these fees "are not determinable until a plan is submitted to the Metropolitan Council by the Army Architect," id. at 6, and that, indeed, there may be no SAC/WAC fees assessed against the Army. Protester Comments at 2.

Gohman's argument that it properly excluded the SAC/WAC fees because the RFP did not specifically identify those fees as among the utility costs to be borne by the contractor is without merit because it ignores the plain language of RFP section 00100, paragraph 10. As noted above, that provision stated that the contractor "will pay all charges (hook up fees, metering, monthly usage, etc.) resulting from

temporary utilities.” This language was sufficiently inclusive that, in the absence of an exception for SAC/WAC fees, it should have been clear that these fees were among the utility charges that were to be the responsibility of the contractor. The language cited by the protester as well as the language in RFP section 00100, paragraph 10 make it clear that the contractor is responsible for all utility charges. The fact that utility fees ultimately may not be assessed is irrelevant, particularly since Gohman concedes that it does not know conclusively that such fees will not be assessed under any circumstances. Protest at 6; Protester Comments at 2.

The protest is denied.

Lynn H. Gibson
Acting General Counsel