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## Decision

**Matter of:** ECC Renewables, LLC; Pacific Power, LLC

**File:** B-408907; B-408907.2; B-408907.6; B-408907.7

**Date:** December 18, 2013

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Richard B. Oliver, Esq., and J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, for the protesters.

Hal J. Perloff, Esq., and Elizabeth Leavy, Esq., Husch Blackwell LLP, for Lend Lease (US) Public Partnerships LLC, an intervenor.

Mark J. Maier, Esq., McGuireWoods LLP, and Geoffrey F. Gasperini, Esq., for Dominion Energy, Inc., an intervenor.

Margaret P. Simmons, Esq., and Kathryn R. Sommerkamp, Esq., Department of the Army, Corps of Engineers, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protests arguing that agency improperly rejected proposals as unacceptable are denied where challenges are based on an unreasonable interpretation of the solicitation.

2. Agency did not treat offerors unequally by including in the competitive range proposals with deficiencies that it considered to be easily correctable, while excluding proposals with deficiencies that the agency did not consider to be easily correctable.

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### DECISION

ECC Renewables, LLC, (ECC-R) of Burlingame, California, and Pacific Power, LLC, (PPL) of Boca Raton, Florida, protest the elimination of their proposals for solar technology from further consideration by the Department of the Army, Corps of Engineers under request for proposals (RFP) No. W912DY-11-R-0036. The protesters argue that the agency unreasonably evaluated their proposals as unacceptable and unfairly excluded their proposals from the competitive range.

We deny the protests.

## BACKGROUND

The agency issued the solicitation to acquire reliable, locally-generated, renewable and alternative energy. In this connection, the solicitation advised offerors that the government intended to purchase only the energy that was produced and not to acquire any generation assets; accordingly, the contractor was to be responsible for developing, financing, designing, building, operating, owning, and maintaining the energy plant. The solicitation further advised that the government would purchase the energy produced in accordance with the terms and conditions of site/project specific agreements resulting from task orders to be issued against multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts. In the foregoing regard, the RFP noted that the agency intended to award contracts to all qualified and responsible contractors whose proposals were considered acceptable and whose prices were reasonable and realistic. RFP as conformed at 134; Agency Report, Tab 3.

Offerors were invited to propose on one or more of the following renewable/alternative energy production technologies: wind, solar, geothermal, and biomass. Contracts were to be awarded by technology, and the protests here pertain to awards for solar technology. To be considered eligible for award, a proposal had to be rated acceptable under factor 1 (corporate technical/management experience), factor 2 (financial capability and management approach), and factor 4 (small business participation). In addition, the proposal had to be rated as satisfactory or unknown confidence under factor 3 (past performance), and the offeror's proposed maximum price per kilowatt hour (KWH) had to be reasonable and realistic. The RFP provided that the requirements of factors 1, 2, and 3 could be satisfied by any member of a contractor team arrangement. The RFP also provided that after making awards to the offerors whose initial proposals were considered acceptable, the agency might conduct discussions with other offerors and later make awards to them. Id.

Of relevance to this protest, section M of the RFP furnished offerors with the following guidance pertaining to the evaluation of offerors' financial capability under factor 2:

The term "financial capability" in this context means an Offeror's demonstration that Offeror has sufficient capital resources to self-finance or the ability to obtain third party financing for the construction of a renewable or alternative energy facility, a demonstrated understanding of the financial risks associated with this contract, and the ability to recover the investment over the life of the project expected to be no more than 30 years. This determination will not substitute for the finding of a Contractor's responsibility in accordance

with FAR Part 9. This is a special responsibility standard intended to address the considerable upfront costs that will be required for successful completion of Task Orders.

a. Ability to Provide Required Capital or Obtain Required Financing at Competitive Rates

Offerors will be evaluated for demonstrated financial capability based on experience and understanding and management of financial risks. Offerors must demonstrate capability to self finance and/or acquire third party financing for renewable energy projects as specified in Section L and the likelihood of being able to provide competitive PPA [power purchase agreements] proposals for renewable energy development based on the Offeror's proposed financing strategy. Offerors will be evaluated for the ability to shoulder monetary risk and withstand long term payback periods. A letter of commitment must be provided from all key subcontractors utilized in the Factor 2 submission.

Id. at 135.

Section L of the RFP instructed offerors to demonstrate their ability to provide/obtain the required capital/financing. Offerors were to "describe the measures that would be taken to ensure the continued availability of the required capital throughout Task Order performance and means to minimize financial and performance risk," such as "subordination agreements, parent company guaranty agreements, deferred payment arrangements, sinking funds, credit backing, and deferred [principal] payments." Id. at 120. In addition, for each technology on which they were proposing, offerors were to provide examples of projects demonstrating their financing capability. With regard to solar in particular, the solicitation instructed offerors to provide "two (2) relevant 2MW [mega watt] or larger renewable energy projects which were self-financed or for which third party financing was obtained by your firm." Id. For each project, offerors were to provide the total dollar value, the percent self-financed versus obtained from a third party, the identity of the third party financier, and an explanation of how the capital investment was amortized.

Both ECC-R and PPL submitted proposals for solar technology. Both offerors identified [deleted] as financing team partners, and both furnished the following two examples of financed solar projects:

Project Title/Description	Self or Third Party Financing	Total Dollar Amount	% Self-Financed Versus Obtained From A Third Party
[deleted]	[deleted]	[deleted]	[deleted]
[deleted]	[deleted]	[deleted]	[deleted]

\*ECC-R's proposal referred to ECC-R here, whereas PPL's referred to PPL.

ECC-R Proposal, Vol. II, at Tab A-11; PPL Proposal, Vol. II, at Tab A-11.

By letters dated August 27, 2013, the agency notified both ECC-R and PPL that their proposals for solar technology had not been selected for award.<sup>1</sup> Both offerors timely requested debriefings, which were furnished in writing on September 12. The debriefing letters indicated that both proposals had received ratings of acceptable for the experience and small business participation factors and a rating of satisfactory confidence for past performance; in addition, the prices of both offerors had been determined reasonable and realistic. The letters further indicated, however, that the proposals had been rated as unacceptable under the financial capability/management approach factor since the offerors failed to provide examples of solar power projects, which they self-financed or for which they obtained third-party financing as provided by the RFP. In this regard, the letters explained as follows:

The Offeror failed to provide any solar power project examples, 2 MW or larger, for which it self-financed or for which third-party financing was obtained for itself as required on page 120 of the RFP. The first project example was financed by [deleted]. [Deleted] helped structure a partnership flip structure for another entity but this does not demonstrate the Offeror's ability to obtain financing for itself. In the second project example, Key Subcontractor, [deleted], but again this does not demonstrate the Offeror's ability to obtain financing for itself.

ECC-R and PPL Debriefing Letters, Sept. 12, 2013, at 1. Both companies protested to our Office on September 17.

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<sup>1</sup> The letters identified 22 companies that had received awards. As discussed more fully below, documentation produced by the agency in responding to the instant protests disclosed that in addition to making initial award to these 22 firms, the agency established a competitive range of 17 proposals, with the intention of entering into discussions with these offerors.

## DISCUSSION

Both ECC-R and PPL argue that the agency's finding of deficiency is unreasonable. The protesters maintain that the solicitation provision requiring the submission of two solar projects that were self-financed or for which third party financing was obtained did not include a requirement that the projects demonstrate an offeror's ability to obtain financing for itself. According to the protesters, the agency is reading into the solicitation a requirement that is not there. Moreover, even if the agency's interpretation of the solicitation language is reasonable, the protesters maintain that their interpretation is also reasonable, and that the RFP therefore contains a latent ambiguity. Finally, the protesters argue that to the extent the agency established a competitive range for the purpose of holding discussions, their proposals should have been included in the competitive range.

### Financial Capability

Where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, an interpretation of a solicitation must be consistent with such a reading. ArmorWorks Enters., LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3. Here, notwithstanding their arguments to the contrary, we conclude that the protesters' interpretation of the language in question is not reasonable.

The solicitation made clear that the purpose of the sample projects was to demonstrate the offeror's ability to self-finance or obtain third party financing for the upfront costs of constructing its alternative/renewable energy-generating facility. See § M excerpt quoted on pp. 2-3 supra. Given this purpose, the requirement for submission of two sample projects demonstrating the offeror's capability to obtain funding for projects could only have reasonably been understood as relating to the offerors' own projects. Adopting the protesters' interpretation would be patently unreasonable since it would allow a firm to qualify simply by showing that it had been able to arrange financing for another developer with which it has no relationship and which is not a member of its team. While the protesters' sample projects demonstrated that their financing team partners had previously arranged financing for solar technology projects developed by parties having no relationship to the offerors here, they did not demonstrate the ability of either offeror (or any member of its team) to obtain funding for its own projects. Accordingly, we conclude that the evaluators reasonably considered the projects unacceptable.<sup>2</sup>

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<sup>2</sup> PPL also argues that the agency's rejection of its proposal as unacceptable for failure to demonstrate adequate financial capability was essentially a determination of nonresponsibility and because PPL is a small business, the Army should have  
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## Competitive Range Decision

The protesters further argue that the agency unreasonably failed to include their proposals in the competitive range for solar technology. In this connection, consistent with the terms of the solicitation, the agency both selected 22 proposals for award and established a competitive range of 17 proposals.

The competitive range is to be comprised of the most highly rated proposals. Federal Acquisition Regulation § 15.306(c)(1). The evaluation of proposals and resulting determination as to whether a particular offer is in the competitive range are matters within the discretion of the contracting agency. NAE-TECH Remediation Servs., B-402158, Jan. 25, 2010, 2010 CPD ¶ 89 at 3. In reviewing challenges to an agency's competitive range determination, our Office does not independently reevaluate proposals; rather, we examine the evaluation to determine whether it is reasonable. Id.

The agency considered the proposals with "easily correctable" deficiencies to be the most highly rated here and established a competitive range limited to these firms.<sup>3</sup>

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referred the matter to the Small Business Administration (SBA) for consideration under its Certificate of Competency (CoC) procedures. In its report, the agency agreed to take corrective action with regard to this issue by referring the matter of PPL's responsibility to the SBA. Because the agency has advised us that it will be taking corrective action to address the alleged impropriety, we dismiss this issue as academic. While PPL contends that the agency has improperly delayed implementation of its proposed corrective action until after a decision has been issued on its protest to our Office, the fact remains that the corrective action proposed by the agency is precisely the corrective action that we would recommend were we to sustain PPL's protest on this issue, and thus there is nothing to be gained by having us render an opinion on the merits of the issue.

<sup>3</sup> The SSA explained the basis for her competitive range determination in greater detail as follows:

The following firms received an Unacceptable rating in Factor 2 and/or under Factor 4 or had unreasonable/unrealistic/noncompliant pricing in Factor 5; however, the deficiencies may be easily correctable, and the firms have a reasonable chance of being selected for award if given the opportunity to submit revised proposals. These firms are considered to have the most highly-rated proposals (among the firms not immediately selected for award) and are therefore determined to be in the competitive range. The Government will enter into

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Source Selection Decision/Competitive Range Determination (Solar Technology), May 8, 2013, at 33. The agency explained in its report that it considered easily correctable deficiencies to be those that could be corrected without major revision of the offeror's proposal. The agency further explained that the deficiencies identified as easily correctable fell into the following six categories: (1) unrealistically low pricing, unreasonably high pricing, or noncompliant pricing proposals; (2) deficiencies in the offeror's small business participation plan; (3) deficiencies related to lack of complete information pertaining to the offeror's financial capability (e.g., failure to provide information relating to amortization, percent self-financed versus third-party financed); (4) failure to provide a performance guarantee or letter of commitment from parent company while relying on the parent company for experience; (5) insufficient wording in letter of commitment, and (6) failure to provide an organizational chart. Agency Supplemental Report on ECC-R Protest, Nov. 20, 2013, at 2; Agency Supplemental Report on PPL Protest, Nov. 20, 2013, at 2. Because the agency did not consider the deficiencies in the protesters' proposals pertaining to their failure to submit project examples demonstrating their financial capability to be easily correctable, the agency did not include either proposal in the competitive range for solar technology.

The protesters maintain that the deficiency identified in each of their proposals could have been corrected without major revisions. ECC-R contends that in the past performance section of its proposal, it identified two 2 MW or larger solar power project examples where its committed team member [deleted] obtained third party financing for a project that it developed; thus, ECC-R argues, all it would have had to do to address the deficiency is to copy a few paragraphs from the past performance section and insert them into the section of the proposal addressing its financial capability. Similarly, PPL maintains that in the past performance section of its proposal, it identified one 2 MW or larger solar power project example where its committed team member, [deleted], obtained third party financing for a project that it developed--and that [deleted] has developed a number of other solar projects involving third party financing that it could easily have included in a revised proposal.

In response, the agency argued that the protesters could not have cured the deficiencies in their proposals simply by substituting the projects described above in the sections addressing their financial capability because such substitutions would have necessitated accompanying changes to the protesters' descriptions of their organizational/management approaches. In this connection, the agency maintained

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discussions with the Offerors in the competitive range, and these Offerors will have the opportunity to submit Final Proposal Revisions.

Id.

that ECC-R and PPL would have had to revise the organizational/management approach sections of their proposals to indicate that [deleted] would be providing financing for the contract. In responding to the agency reports, the protesters did not take issue with or seek to rebut the agency's argument that substitution of the projects in question would have required revisions to the protesters' organizational/management approaches; accordingly, the protesters have failed to demonstrate the unreasonableness of the agency's judgment in this regard.

The protesters also argue that the agency treated them unequally by excluding their proposals from the competitive range on the basis that major revisions would be required to make the proposals acceptable, while including in the competitive range proposals of other offerors that would likewise have required major revisions to make them acceptable.<sup>4</sup> As an example, the protesters note that some of the proposals included in the competitive range were missing small business plans, a deficiency that, according to the protesters, could not have been overcome without the submission of substantial new material.

We find this argument to be without merit. It is clear from the record here that in determining which proposals were easily correctable and which were not, the SSA distinguished between deficiencies that could be corrected via the submission of supplemental information by the offeror, and deficiencies that would require rewriting of an existing section of an offeror's proposal. Because the agency had a reasonable basis for distinguishing between the two types of deficiencies, the protesters' arguments of unequal treatment are without merit.

The protests are denied.

Susan A. Poling  
General Counsel

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<sup>4</sup> In a related vein, the protesters argue that the contemporaneous evaluation record is inadequately documented in that it does not explain the SSA's basis for distinguishing between easily correctable deficiencies and not-easily correctable deficiencies. We are not persuaded by the protesters' argument. In its reports, the agency furnished a reasonable explanation for why the SSA considered some deficiencies to be easily correctable and others not to be, and the agency's explanation is the sort of post hoc filling in of previously unrecorded detail that we will consider. SENTEL Corp., B-407060, B-407060.2, Oct. 26, 2012, 2012 CPD ¶ 309 at 9 n.6.