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In the Appeal of	)	**APPEAL NO. BP-A078**
	)	
SUCCESS INTERNATIONAL CORPORATION	)	DPW13-RFP-001 "Marpi Landfill"
	)	
	)	
	)	

July 17, 2013

This is an appeal by Success International Corporation ("SARS") over the selection of Tangs Corporation ("TANGS") for award of the Marpi Landfill contract. The only issue is whether price should have been an evaluation factor in this RFP. SARS and TANGS were the only two out of five offerors who were selected for further discussions. It was during these discussions that price/cost to the government was discussed.

The RFP had two evaluation factors:

1. Background/Experience and
2. Operational Plan for the landfill.

Since price/cost to the government was not an evaluation factor, DPW selected TANGS for award of the contract based in large part on the company's experience even though TANGS' price was higher than that of SARS.

The CNMI Procurement Regulations require that price/cost to the government be an evaluation factor and since price was not included in the RFP's listing of evaluation factors, the RFP was flawed.

OPA **GRANTS** the appeal and directs DPW to cancel the RFP and re-issue it with price included as an evaluation factor. The fact that pricing was discussed with SARS and TANGS after proposals had been submitted and opened, and that the RFP asked for costs in the Operational Plan, does not satisfy the requirement for inclusion of price in the RFP as an evaluation factor. *See* NMIAC §70-30.3-210(e).

CHRONOLOGY

November 12, 2012: DPW's solicitation DPW13-RFP-001 is approved by the Director, Procurement & Supply.
December 2012: The RFP was advertised three times in a local newspaper.
January 22, 2013: Proposals were opened. Five companies responded to the RFP.
March 26, 2013: "Best and Final Offers" were requested from SARS and TANGS.
April 1, 2013: "Best and Final Offers" were received from SARS and TANGS.
April 5, 2013: DPW recommended the award be given to TANGS after evaluating the SARS and TANGS proposals.
April 10, 2013: SARS protested the award to TANGS based on reading about it in a local paper.
April 11, 2013: Procurement & Supply issued a Notice of Intent to Award in favor of TANGS.
April 16, 2013f: Procurement & Supply accepted SARS' protest and notified all interested parties.
April 22, 2013: TANGS and DPW submitted comments on the SARS protest to Procurement & Supply.
May 23, 2013: The Director of Procurement & Supply issued Director's Decision 13-005 denying SARS' protest.
June 7, 2013: SARS timely appealed the Director's decision to OPA.
June 11, 2013: OPA notified Procurement & Supply of the appeal and requested various documents and a report.
June 13, 2013: The Director of Procurement and Supply issued his Report on the procurement to OPA and the interested parties.
June 20, 2013: TANGS provided comments to OPA regarding SARS' appeal.

DISCUSSION

There were two evaluation factors listed in the RFP:

1. Background/Experience (valued at 40%), and
2. Operational Plan for the landfill (valued at 60%).

Price/cost to the government was not an evaluation factor. However, the section of the RFP entitled "Operational Plan" states

> "Contents of the submitted operational plan must provide sufficient detail to convey an understanding of the scope of work requirements; how the requirements will be met; and detailed information concerning the associated costs as presented in the proposal. Separate examination and costing should be provided for the following areas of the Scope of Work:
>
> 1. Equipment
> 2. Insurance
> 3. Training
> 4. Site Access
> 5. Waste Disposal
> 6. Daily and Intermediate Cover
> 7. Surface Water Control
> 8. Site Personnel
> 9. Leachate Management and Monitoring; and
> 10. Operation of Vegetated Submerged Bed."
>
> DPW13-RFP-001 at p. 2 - 3. (emphasis added)

The plain language of the above section appears to call for an explanation of costs that are in an offeror's proposal but gives no weight or relative importance to such costs.

TANGS argues that because the Operational Plan required that costs be identified, the requirements of NMIAC §70-30.3-210(e) were met. *See* TANGS June 20, 2013 letter to OPA at p. 3.

However, in OPA appeal decision BP-A056, In Re Appeal of Telesource CNMI, Inc., OPA stated

> "Merely listing factors that will be evaluated in an RFP with no statement of their relative importance is typically a questionable technique for disclosing the relative importance of the factors. An offeror, in such a case, would be expected to assume that all of the evaluation criteria are of approximately equal importance."

The RFP here listed two evaluation factors but gave no indication of the relative importance of price/cost to the government. Within the instructions for the Operational Plan, the RFP requested that offerors provide detailed costs for the subsections contained in the Operational Plan but seems to reference to costs "as presented in the proposal." DPW13-RFP-001 at p. 2.

As stated in OPA's appeal BP-A056, a solicitation must list the relative importance of evaluation factors. Here, DPW listed the relative importance of two factors but failed to indicate what level of importance that price/cost to the government would be as an evaluation factor. Just including price/cost in the Operational Plan without specifying its relative importance is insufficient. The CNMI Procurement Regulations are very clear: "the [RFP] shall state the relative importance of price ..." NMIAC 70-30.3-210(e) (emphasis added). DPW13-RFP-001 does not provide reasonable, definite information about price/cost as an evaluation factor and says nothing about the relative importance of such prices or costs. The RFP was vague and indefinite regarding the 'relative importance of price' required by the CNMI Procurement Regulations and, in that regard, the RFP was defective.

The General Accountability Office ("GAO") decides over 2,000 protests annually involving federal government contracts. GAO decisions are issued by the Comptroller General of the United States and are non-authoritative in the CNMI. Where CNMI law or regulation does not exist in procurement appeals, OPA uses GAO decisions for guidance as well as federal and CNMI court decisions. The GAO's guidance regarding the evaluation of price/cost is that it is up to the agency to decide upon the appropriate method for evaluation of cost or price in a given procurement, although the agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. S. J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3, (emphasis added). There was no specific evaluation factor for price/cost and the inclusion of costs in the Operational Plan provided offerors with no relative importance as was required by the CNMI Procurement Regulations.

DECISION

OPA **GRANTS** the appeal of SARS. Under its regulatory authority to fashion a remedy in procurement appeals found in the CNMI Procurement Regulations at NMIAC §70-30.3-510(a), OPA directs the following:

The RFP shall be canceled and re-issued with price/cost to the government as an evaluation factor consistent with Section 70-30.3-210(e) of the CNMI Procurement Regulations.

CONCUR

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DPW13-RFP-001 – Marpi Landfill

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