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**United States Government Accountability Office
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Decision

Matter of: SunEdison, LLC

File: B-298583; B-298583.2

Date: October 30, 2006

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, PLC, for the protester.
Gary R. Allen, Esq., Department of the Air Force, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation required offerors to propose fixed prices and offeror proposed pricing contingent upon “successful completion” of an agreement with a third party, the offer was conditional and should not have been considered for award.

DECISION

SunEdison, LLC protests the award of a contract to PowerLight Corporation under request for proposals (RFP) No. FA4861-06-R-B501, issued by the Department of the Air Force for the construction and operation of a photovoltaic array to supply solar power to Nellis Air Force Base (AFB) in Nevada. The protester contends that the agency’s evaluation of offerors’ prices was flawed.

We sustain the protest.

BACKGROUND

The RFP explained that the agency’s goal in awarding a contract under the RFP was to reduce its unit cost for electrical service to Nellis AFB to below the rate it was paying the Nevada Power Company, and, thus, if all proposals received were for more than the cost of service from Nevada Power, the government might elect not to award a contract. RFP § B.2.3. The RFP also explained that a photovoltaic array produces both renewable energy (solar power) measured in kilowatt-hours (kWh) and renewable energy credits (REC), and that while the agency was aware that an

offeror would need to sell both outputs to have a viable project, the government was interested in acquiring the kWh only.¹

The RFP further explained that the contractor was to operate its solar array, which was to be located on land leased to the contractor by Nellis, “in parallel” with the electricity supplied to Nellis by the Nevada Power Company from outside the base. RFP §§ C.2.3.1, C.2.3.2. Accordingly, offerors were required to furnish all equipment (e.g., inverters and transformers) necessary to connect to the base electrical distribution system. Offerors were also required to submit evidence with their proposals that a request to Nevada Power for an interconnect agreement had been made, with no contract to be awarded until an interconnect agreement with Nevada Power had been secured.

The RFP provided for award to the offeror whose technically acceptable proposal was determined to represent the lowest cost to the government. Proposals were to be evaluated on a pass/fail basis with regard to four “mission requirements” (performance plan, financial capability, implementation plan, and quality plan) and with regard to past performance. Price was to be the deciding factor in the selection of a proposal for award from among those determined to be technically acceptable.

The RFP’s price schedule asked each offeror to furnish a projection as to the monthly output (in kWh) of its proposed solar array and a fixed unit price per kWh. The schedule also asked offerors for an escalation factor to adjust subsequent year prices for inflation. The RFP explained that total evaluated price would be the net present value of the stream of monthly payments that the government would be expected to make to the contractor over a projected contract term of 20 years. RFP

¹ In responding to the protest, the agency furnished the following additional background regarding RECs. RECs are “proof” that renewable energy of a certain amount was generated by a certain renewable energy project. The credits are sold independently from the electricity. Air Force Request for Summary Dismissal, Aug. 21, 2006, at 4, citing Ed Holt, Renewable Energy Certificates and Generation Attributes, Regulatory Assistance Project Issuesletter (May 2003), p. 1. Many states have mandatory renewable energy portfolio standards that require that a certain amount or percentage of a utility company’s generation portfolio be comprised of electricity generated by renewable energy projects. In lieu of building renewable energy generation facilities themselves, utility companies can purchase RECs to meet these requirements. According to the agency, Nevada, where Nellis AFB is located, is such a state. The agency further explains that under Nevada state law, RECs belong to the owner of the renewable energy system, which would be the contractor selected to construct and operate the system here. Accordingly, the contractor selected here would be entitled to sell the RECs generated by the project and use the revenue to discount the rate at which it sells the electricity to the government.

§§ M.2.1.1, M.3.4. For purposes of the price evaluation, each monthly payment was to be calculated by multiplying the offeror's projection of the output of its proposed solar array in kWh by the offeror's proposed unit price per kWh. RFP § M.3.4. The solicitation further explained that the evaluated first year annual price would be the sum of the monthly payments and that subsequent year annual prices would be calculated by multiplying the previous year's annual price by the escalation factor proposed in the schedule. Id.

Offerors were instructed to explain how they had derived their kWh price in their proposals. In particular, they were instructed to furnish information regarding "tax credits, other incentives, sale of RECs, [and expenses for] operation and maintenance." RFP § L.7.6.2.

The RFP provided for evaluation of the reasonableness and realism of offerors' proposed prices. In addition, the RFP provided for a comparison of the cost of acquiring electricity generated by solar power pursuant to the RFP here with the cost of continuing to acquire it from the Nevada Power Company. RFP § M.3.4.3.

Three offerors submitted proposals by the June 16, 2006 closing date. After the initial proposals had been evaluated, the contracting officer furnished each of the offerors with "evaluation notices" describing required information that had not been fully addressed in the proposal or that required clarification. Offerors were instructed to respond to each evaluation notice and to incorporate their responses into a revised proposal.

Upon receipt of revised proposals, the agency evaluators assigned all three proposals ratings of pass with regard to all four mission requirements and with regard to past performance. Accordingly, price became the deciding factor in the selection of an awardee. PowerLight offered a unit price of \$0.0223 per kWh, with no escalation factor for subsequent years, whereas SunEdison offered a unit price of [deleted].² The price evaluators determined the prices of all three offerors to be within a reasonable and realistic range based on the proposed array size and projected output, projected REC price, tax benefits, operation and maintenance costs, and assumptions for construction and financing rates. The Source Selection Authority selected PowerLight's proposal for award on the ground that "[a]ll offers ranked equally in Mission Capability and Past Performance and PowerLight Corporation's proposal offers the lowest proposed price per kWh." Source Selection Document, July 21, 2006, at 1. On July 27, the Air Force awarded a contract to PowerLight.

² The price of the third offeror (Offeror A) was still higher.

DISCUSSION

The protester primarily argues that the agency's evaluation of the offerors' prices was flawed in that it failed to take into consideration that PowerLight's price was offered contingent upon "successful completion of an REC purchase agreement with Nevada Power," whereas its own price was offered on an unconditional basis. As explained below, we agree with the protester that the agency's price evaluation was flawed and we find that PowerLight's inclusion of a contingency in its pricing rendered the proposal ineligible for award.³

³ In its initial protest, SunEdison also argued that it had been granted "Tier One Award" status by Nevada Power, whereas PowerLight had not been, and that it was therefore entitled to sell RECs to Nevada Power, whereas PowerLight was not. (The protester never explained what Tier One Award status signified.) The agency responded that SunEdison was not the only prospective contractor from which Nevada Power would be willing to acquire RECs, citing a letter from Nevada Power to Nellis Air Force Base's Deputy Base Civil Engineer dated February 21, 2006, which provided in relevant part as follows:

. . . NPC [Nevada Power Company] is interested in purchasing the RECs generated by [a renewable energy facility at Nellis AFB]. However, NPC can only agree to purchase RECs from a Nellis project after Nellis selects a developer for the project.

. . . [A]ny agreement between NPC and a developer of renewable resources located at Nellis or any other Air Force facility is contingent upon the Air Force selecting the developer best suited to the Air Force's requirements. . . .

After the Air Force selects a developer, and the developer's REC price is acceptable, Nevada Power Company expects to enter into or continue discussions with that developer to purchase RECs generated by the project. . . . [A]ll renewable energy contracts by Nevada Power Company are contingent upon Public Utility Commission of Nevada approval.

Agency Report (AR), Tab 25. In responding to the agency report, the protester did not attempt to rebut the agency position that it was not in fact the only offeror that would be able to sell RECs to Nevada Power; accordingly, we consider it to have abandoned this issue.

In its initial price proposal, PowerLight made clear that it did not believe that it could confidently predict the amount that Nevada Power would be willing to pay for RECs. In this regard, the proposal provided as follows:

[deleted]

Where a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. Omega World Travel, Inc.; Sato/Travel, Inc., B-288861.5 et al., Aug. 21, 2002, 2002 CPD ¶ 149 at 6. Here, not only did PowerLight make its offer conditional upon successful completion of an REC purchase agreement, but further, it acknowledged the uncertainty of such an agreement being reached. In this connection, for an REC purchase agreement to be successfully completed, both parties will need to be satisfied with the REC purchase price, meaning that not only must Nevada Power be willing to buy the RECs, but also PowerLight must be willing to accept Nevada Power's price. Because the RFP here requested prices on a fixed-price basis, it was improper for the Air Force to make award to PowerLight on the basis of its contingently priced offer.

To the extent that the agency argues that it was permissible for it to accept PowerLight's offer despite its pricing contingency because the proposals of the other two offerors contained similar contingencies, we disagree. While Offeror A's proposal did provide for adjustment of its offered price in the event that the REC price received differed from the price that it had assumed, see Offeror A Revised Price Proposal at Revision Page IV-4--meaning that Offeror A's price, like PowerLight's, was not fixed--SunEdison's proposal did not. In this connection, SunEdison noted in its final price proposal (in response to an evaluation notice virtually identical to the one furnished to PowerLight instructing that the Air Force did not intend to renegotiate rates after award of the contract and that failure of assumptions to materialize was not considered to be justification for renegotiation of rates) that one of the key assumptions on which its price was based was a portfolio energy credit price of [deleted].⁴ Sun Edison explained that this price was in accordance with a Portfolio Energy Credit Purchase Agreement (PCPA) that it had negotiated with Nevada Power, and that while the agreement had yet to be finalized, "SunEdison assumes the risk of final PCPA pricing and the final PCPA price will not [a]ffect Nellis' Energy Price." SunEdison Price Proposal, July 14, 2006, at first unnumbered page and at 3. Thus, SunEdison, in contrast to PowerLight, did not make its pricing contingent on negotiation of an agreement with Nevada Power for

⁴ The price evaluators noted that the reference to an REC price of [deleted] appeared to be [deleted], and that the protester had in fact used a price of [deleted] in the calculations used to explain the derivation of its price. The evaluators further noted that definitive clarification of the point was not considered necessary to determine the low price offeror since either REC price supported the price offered in the schedule. Price Evaluation Report for SunEdison at 3.

sale of the RECs at a price that it regarded as acceptable; to the contrary, SunEdison expressly assumed the risk that the final price negotiated with Nevada Power for the RECs might differ from the price that it had used in developing its kWh price and guaranteed that the price that it had offered would not be affected by such a change.

Because we find that the Air Force improperly made award to PowerLight on the basis of an offer that contained conditional pricing, we sustain the protest.⁵ We recommend that the agency either reopen negotiations with the offerors to determine whether the pricing contingencies can be eliminated or that it terminate the contract awarded to PowerLight and, if otherwise appropriate, proceed with award to SunEdison as the only offeror to propose fixed prices.⁶ We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel

⁵ We have considered the protester's alternative argument--that PowerLight's proposal should have been determined technically unacceptable for failing to offer evidence that PowerLight had sought an interconnect agreement with Nevada Power--and find it to be without merit.

⁶ As noted above, Nevada Power Company has stated that it will enter into discussions regarding purchase of the RECs only with the firm selected for award under the RFP. Given that, in view of Nevada Power's position, no offeror can enter into a binding agreement for sale of the RECs until after award is made, we would have no objection if the agency, as an alternative to proceeding with award under the RFP as currently structured, instead chose to reexamine whether requiring offerors to propose fixed prices is the best approach to meeting its needs.