

Matter of: El Paso Electric Company

File: B-254479

Date: December 22, 1993

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DIGEST

1. Protest alleging that competitive solicitation for electric utility services violates section 8093 of the Fiscal Year 1988 Department of Defense Appropriations Act, which prohibits agencies from procuring electricity in a manner inconsistent with state law, is denied where the solicitation does not violate state law.
2. Protest allegation that solicitation does not provide a meaningful basis for comparing offered prices because there is no meaningful way to compare protester's state-regulated tariff rates to unit prices submitted by non-regulated offerors is denied where solicitation requires award to be made based on lowest total price; agency therefore is required to compare total proposed prices, not unit prices or tariff rates.
3. Solicitation provision allowing offerors to submit proposed prices conditioned upon state regulatory approval is not contrary to Anti-Deficiency Act where no award will be made until after any required approval is obtained.
4. Agency improperly failed to include Service Contract Act wage determination in solicitation for electric utility services generally exempt from the Act's application where Act applies to offerors that are not state-regulated; agency received offers from such firms, but has provided no explanation for its failure to obtain wage determination applicable to them.

DECISION

El Paso Electric Company protests Department of the Air Force request for proposals (RFP) No. F29651-93-R-0005 for electric utility service at Holloman Air Force Base (AFB), New Mexico. El Paso challenges the agency's decision to issue a competitive solicitation, and also protests the RFP's terms.

We deny the protest in part and sustain it in part.

BACKGROUND

The New Mexico Public Utility Act¹ establishes the state's public utility regulatory scheme, and places the authority for regulation in the New Mexico Public Utility Commission. See N.M. Stat. Ann. § 62-6-4(A) (Michie 1978); City of Albuquerque v. New Mexico Pub. Serv. Comm'n, 854 P.2d 348 (N.M. 1993). Under the Act, a public utility is required to obtain approval from the Commission, in the form of a certificate of public convenience and necessity (CCN), for the particular service it proposes to provide. N.M. Stat. Ann. § 62-9-1. El Paso is a public utility covered by the regulatory scheme, although the Act recognizes that this is not true for all companies providing utility services (an interstate firm, for example, is not subject to state regulation). See N.M. Stat. Ann. § 62-3-3. El Paso has provided electric power to Holloman AFB pursuant to a CCN since 1957. El Paso's current contract with the Air Force, executed in 1984, is due to expire on February 28, 1994.

Anticipating the expiration of El Paso's contract, the Air Force issued a competitive RFP for electric utility services on June 15, 1993. The RFP provided for submission of technical proposals demonstrating compliance with specified technical requirements. It also requested price proposals based on whatever pricing scheme the offeror considered appropriate; for example, a regulated public utility could submit prices in the form of approved tariff rates, and a non-public utility could offer unit prices. Award was to be made based on the proposal meeting the agency's technical requirements at the lowest cost to the government.

Shortly before the time set for receipt of proposals on August 12, El Paso filed this protest. El Paso alleges that the solicitation improperly seeks the procurement of electricity competitively, in violation of federal law, and

¹The sections comprising the act are identified in the notes accompanying N.M. Stat. Ann. § 62-13-1 (Michie 1978) (Repl. Pamp. 1984).

is defective in several other respects, including the absence of a Service Contract Act wage determination. As discussed below, we deny the protest against the competitive solicitation and most of the alleged RFP defects. We sustain the protest on the basis that the RFP improperly failed to include the required wage determination.

COMPETITIVE PROCUREMENT OF ELECTRICITY

El Paso alleges that the RFP violates section 8093 of the Fiscal Year 1988 Department of Defense Appropriations Act. This section provides:

"None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service. . . ."

Pub. L. No. 100-202, § 101(b), 101 Stat. 1329-44, 1329-79 (1987). El Paso argues that since it is the only public utility authorized under New Mexico law to provide the services required by the RFP, the Air Force's attempt to obtain competition for these services is inconsistent with state law. Thus, El Paso concludes, the solicitation for competitive proposals violates section 8093.

We see nothing in the protested RFP that is inconsistent with the New Mexico regulatory requirements.²

While under New Mexico law a regulated public utility must obtain a CCN for the particular services it intends to furnish, and must receive Commission approval of its proposed rates for those services, there appears to be no statutory or regulatory prohibition (El Paso does not allege otherwise) against more than one public utility applying for a CCN for the same services, or against the conducting of a competition to determine the public utility with which the soliciting entity will contract pending Commission approval. Indeed, El Paso acknowledges that this could happen and that, in this event, the Commission would have to consider whether to grant the new application and, at the same time,

²The agency maintains that section 8093 does not apply to this solicitation because most of the area of Holloman AFB covered by the RFP is under exclusive federal jurisdiction--a federal enclave--and therefore is not subject to state law. In view of our conclusion that the competition here does not violate New Mexico law, we need not address this issue.

whether to terminate or modify any existing CCN. This being the case, El Paso's assertion that it currently is the only public utility authorized to provide the services covered by the Air Force's RFP does not establish that the competition is improper under New Mexico law. Rather, El Paso's current exclusive status notwithstanding, state law would merely require a successful public utility offeror other than El Paso to obtain a CCN covering the services required under the RFP, and to have its rates approved, before providing any services under the contract. (Of course, if the successful offeror were other than a state-regulated public utility, the CCN requirement would not apply at all.)

This view is consistent with a recent decision by the Supreme Court of New Mexico (the court having the ultimate authority to interpret the laws of that state) in a case involving analogous facts. In City of Albuquerque v. New Mexico Pub. Serv. Comm'n, supra, the court considered whether the state's public utility regulatory scheme precluded the City of Albuquerque from competing the electric utility requirement for its inhabitants, as the Commission had ruled. Although the central issue was whether the city had authority to contract for utility services on behalf of its inhabitants, the court, in concluding that the city has such authority, stated that the city could contract directly with a public utility without the Commission's prior approval (although the contract ultimately would be subject to the Commission's exclusive statutory authority over public utilities, i.e., to decide whether to issue a CCN to a particular public utility and to approve the rates proposed).

We thus conclude that the Air Force's RFP for the competitive acquisition of electric power service is not inconsistent with New Mexico law.

³While the RFP permits offerors to propose rates subject to the Commission's approval, it also states that the Air Force's acceptance of a proposal that is subject to regulatory approval shall not constitute the agency's concurrence in, or agreement with, the need for such approval. El Paso argues that this RFP provision constitutes a refusal to acknowledge the Commission's authority over the rates to be charged by a regulated public utility under the contract, and thus violates state law (and thus, under its interpretation, section 8093). We disagree. The statement is not itself a violation of state law, and does not unequivocally assert that the Air Force will violate state law in the future. We do note that, notwithstanding the agency's interpretation as to the laws applicable to this acquisition, it would appear that any

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RFP EVALUATION SCHEME

As explained above, the RFP permits offerors to submit price proposals on any basis they choose. This is because the agency contemplated receiving--and in fact did receive--proposals from regulated public utilities (like El Paso) that will base their offers on approved tariff rates, and from non-public utilities that will base their proposals on fixed unit prices. Accordingly, section L-300 requires offerors to furnish either a completed section B price schedule based on unit prices, or a "substitute" price schedule. The RFP requires support for the offered prices in the form of estimated monthly charges, to be calculated based on the proposed price schedule and the agency's load estimates. The award selection is to be based on the "lowest net cost of service."

El Paso alleges that the RFP is defective because it does not provide a basis for meaningful comparison of offered prices. As a regulated public utility, El Paso asserts, it may only offer a substitute price schedule based on the tariff rates that have been approved by the Commission; these rates are incompatible with the unit pricing format of the section B price schedule. El Paso alleges that the RFP has no mechanism for comparing tariff rates to unit prices, or for converting tariff rates to monthly charges, and therefore does not provide a proper basis for determining which proposal offers the lowest net cost of service.

This allegation is without merit. To determine the lowest net cost of service to the government, the Air Force need only compare the offerors' total prices, whether these totals are based on unit prices or tariff rates. The RFP provides offerors with a common basis on which to prepare their price proposals, in the form of estimated demand figures; El Paso has not challenged these estimates. Thus, whether an offeror's proposal is based on tariff prices or unit prices, the proposal should accurately reflect the offeror's estimate of the total cost of providing the required services. Under the terms of the RFP, the agency

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contract award to a public utility essentially must be subject to Commission approval, since the Commission has exclusive authority to determine (under the CCN issuance process) the manner in which (or whether) a public utility may provide service in the state, and to set the rates at which it may do so.

may only compare these proposed total prices in determining the low offeror.

OTHER ALLEGED IMPROPRIETIES

El Paso contends that an award under the RFP to any other regulated public utility will violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), which prohibits an agency from entering into a contract obligation in excess of the appropriation covering the contract. El Paso explains that the award would violate the Act if the Commission, upon its review, required an otherwise successful public utility offeror to increase its rates above those on which its selection was based; in that situation, El Paso asserts, the Air Force would be required to pay the contractor more than the award price, and thereby violate the act.

The agency explains, and we agree, that the scenario El Paso describes will not result in a violation of the Anti-Deficiency Act. This is because the Air Force could (and states that it would) withhold the actual contract award to a public utility until after Commission approval of the contract; at that juncture, the amount of the government's obligation, and whether it exceeded the relevant appropriation, would be clear. Again, if the successful offeror were not a regulated public utility, the state law requirement for regulatory approval would not apply, and the award would be made at the offered price.

⁴El Paso alleges that the RFP is defective because it does not identify all of the factors and subfactors, and their relative weights, that the agency will use to evaluate technical proposals. See 10 U.S.C. § 2305(a)(2)(A) (Supp. IV 1992). El Paso is incorrect. As noted above, the stated basis for award is technical acceptability and low price. In other words, among offerors meeting all the technical requirements, price is the only factor to be considered in making the award. The technical factors thus have no weight relative to each other or to price. That being the case, offerors need only establish that they meet the RFP's technical requirements. The RFP sets forth four elements offerors must furnish with their proposals to establish technical acceptability, including a schedule of events addressing certain performance requirements, a line diagram of the proposed service, a detailed response to the statement of work requirements, and a description of the proposed demand side management program. The RFP thus complies with the statutory requirements for identification of the evaluation factors and their relative weights.

VIOLETION OF SERVICE CONTRACT ACT

Under the Service Contract Act (SCA), as amended, 41 U.S.C. § 351-358 (1988), employees generally must be paid at least the minimum hourly wages set forth in Department of Labor (DOL) area wage determinations. 41 U.S.C. § 351(a)(1). Regulations implementing the SCA require agencies to notify DOL of their intent to enter into a service contract exceeding \$2,500 in value, and to list the classes of workers expected to be employed. See 29 C.F.R. part 4 (1993); see also Federal Acquisition Regulation (FAR) subpart 22.10. DOL generally will issue a wage determination in response to an agency's notice of intent, and the contracting officer must incorporate the determination into the solicitation. FAR § 22.1012-1. If there is any question or doubt as to the applicability of the SCA to a particular contract, the agency must raise it in a timely manner with DOL for a specific determination. 29 C.F.R. § 4.4(a)(1). In no event may a contract subject to the SCA on which more than five employees are contemplated to be used be awarded without an appropriate wage determination. 29 C.F.R. § 4.4(f).

Although contracts with state-regulated public utility services companies are exempt from the SCA, see 29 C.F.R. § 4.120, the potential contractors here include non-regulated companies, such as those operating interstate, contracts with which are not covered by this exemption. (In fact, the agency received proposals from two such firms.) This being the case, this procurement was subject to the requirement that the agency seek a wage determination from DOL.

The Air Force did not do that here and has not provided any meaningful explanation for failing to do so. As indicated above, the regulations mandate that the agency provide a listing of the classes of employees to be used. The Air Force states that, in connection with one element of contract performance, it was unable to determine what classes of employees would be used. That, however, does not excuse the Air Force's failure to seek a wage determination. It may have had to make some affirmative effort to identify applicable employee classifications--the level and nature of such an effort are not clear from the regulations--or, at minimum, contact DOL for advice. 29 C.F.R. § 4.4(a)(1). There is no evidence in the record that the Air Force made an effort to ascertain the employee classifications that could be involved in the contract, or that it contacted DOL for advice. Given the mandatory nature of the SCA requirements, it was unreasonable for the Air Force to ignore the notice requirement altogether, notwithstanding

the undisputed applicability of the SCA to the requirement.⁵ See generally PacOrd, Inc., B-253690, Oct. 8, 1993, 93-2 CPD ¶ ____ (under FAR and SCA regulations, agency is required to make considerable effort to identify possible places of performance for inclusion in wage determination).

Accordingly, we sustain the protest. By letter of today to the Secretary of the Air Force, we recommend that the agency request a wage determination, amend the RFP to incorporate it, and invite revised proposals. We also find El Paso entitled to reimbursement of its costs of filing and pursuing the SCA protest issue, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1993). In accordance with 4 C.F.R. § 21.6(f), El Paso's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is denied in part and sustained in part.

Comptroller General
of the United States

⁵The agency's failure to comply with the SCA regulations presents the reasonable possibility of prejudice to El Paso because the wage determination potentially would have increased the prices offered by non-public utility companies. See Park Sys. Maint., Inc., B-252453.4; B-253373.3, Nov. 4, 1993, 93-2 CPD ¶ _____. The Air Force has stated its intention to incorporate any applicable SCA wage rates into the contract ultimately awarded; however, this merely would create the possibility that the awardee's price could be increased above that offered by El Paso (which, as a regulated public utility, generally is not subject to the SCA requirements). See generally The Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52.