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In re:) **APPEAL NO. BP-A087**
)
Appeal of Success International) **DPW-SWM 14-RFP-001**
Corporation)
) **“Marpi Landfill Operations”**
)
_____)

BACKGROUND

On March 22, 2014, the Department of Public Works (“DPW”) issued a request for proposals for the Marpi Landfill Operations (“the RFP”). The RFP closed on April 21, 2014. Only two companies presented proposals, Tang’s Corporation (“Tang’s”) and Success International Corporation (“SARS”) and both proposals were considered competitive. *Director’s Decision*, p. 2 (Sept. 10, 2014). An evaluation team consisting of three DPW employees and an employee from the Bureau of Environmental and Coastal Quality conducted a preliminary evaluation, an interview, an inspection, and a secondary evaluation of both companies. *Id.* During the interview both companies were asked the same list of questions and evaluated on their responses. *Id.* Next, the evaluation team asked to inspect the required equipment of both companies prior to their secondary evaluation. *Id.* The evaluation team adjusted the points given to each company based on their answers during the interview and inspection of the required equipment. *Id.* Subsequently, both proposers were asked for a best and final offer. Tang’s was awarded the contract based on its technical knowledge and landfill experience. *Id.*

ISSUES PRESENTED

SARS appeals the protest decision based on three main issues: whether the RFP was flawed, whether the evaluation was performed fairly, and whether DPW was biased.

DISCUSSION¹

The issues raised with the RFP are untimely. Procurement regulations require that “[t]he protest shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.” NMIAC § 70-30.3-501(a)(1). Any alleged deficiencies in the form of the RFP noted by SARS were known or should have been known to SARS during preparation and submission of its proposal. SARS only complained of flaws in the RFP after learning the contract was being awarded to Tang’s. OPA will not allow losing bidders to benefit by claiming deficiencies in the form of a solicitation that could have been identified prior to bid submission. Accordingly, the issues raised by SARS with respect to the RFP are untimely and will not be addressed.

This view is consistent with federal procurement decisions. *See e.g., Gunderson v. University of Alaska*, 922 P.2d 229, 234 n. 6 (Alaska 1996), (*citing* Paul A. Shnizer, *Government Contract Bidding*, 573 (2d ed. 1982) (“Protests against the language and specifications of an Invitation for Bids (IFB)...will not [be] consider[ed]...if the protester goes along with the procurement without objection until it appears that the award may go to another bidder. If the bidder has not protested before then, he is deemed to have acquiesced in the terms of the IFB”)). *See also*, FAR 33.103(e) (“Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for the receipt of proposals”).

The evaluation process was conducted properly. SARS makes several complaints about the evaluation process. Specifically, SARS takes issue with the determinations made by the evaluation committee with respect to compaction and consideration of SARS’ prior operation of the landfill.

¹ Tang’s comments take issue with the form of SARS’ appeal. *See* Tang’s Comments, p. 1 & 2 (Sept. 29, 2014). While the comments are well-taken, OPA declines to dismiss the present appeal summarily at risk of discouraging pro se appellants and instead will address the merits of the appeal.

Determinations made by the evaluation committee “will not be reviewed absent a showing of subjective bad faith, fraud, or lack of a reasonable or rational basis for the determination.” *In re Appeal of Kautz Glass Co.*, OPA Appeal No. BP-A047, p. 12 (Oct. 27, 2005) (OPA declined to review PSS’ determination of a party being a responsible bidder without evidence presented to substantiate the claim that the determination was made incorrectly). This position is consistent with federal procurement authorities. The United States Court of Federal Claims found that mere allegations of errors in the evaluation of proposals, without specific evidence of bias, is insufficient overcome the presumption that the contracting officer acted properly. *Info. Tech. and Applications Corp. v. United States*, 316 F3d 1312, 1323 n. 2 (2003).

In this case, both companies were evaluated initially and considered competitive. *Director’s Decision*, p. 4 (Sept. 10, 2014). A secondary evaluation took place after interviews and equipment inspection were carried out. *Id.* In their comments to the protests, DPW stated it had concerns about SARS’ answers to the list of questions given to both companies, resulting in a lowered rating for SARS after the secondary evaluation. *DPW Comments to Letter of Protest Submitted by SARS*, p. 1 (Aug. 22, 2014). DPW stated “[t]hey seemed to be unfamiliar, inexperienced, and appeared to be guessing for answers.” *Id.* Specifically, the evaluation committee had concerns with their seeming lack of knowledge on the leachate collection system, which is vital in preventing the contamination of groundwater. *Id.* Furthermore, after inspecting the equipment the evaluation committee had concerns about whether the SARS compactor could meet the operational weight requirement of 45,000 lbs. as required by the RFP. *Id.* p. 2. Although the scope of work allowed for 120 days to acquire the necessary equipment, the evaluation committee understandably scored Tang’s higher based on having equipment that meets the necessary criteria and for having placed an order for an additional compactor. There is no evidence to suggest the evaluation committee’s decision was done with bad faith, fraud, or a lacked a reasonable or rational basis.

There is no evidence that DPW was biased in its decision making process. OPA has consistently held that agencies are presumed to act in good faith and parties alleging otherwise must produce sufficient evidence to overcome that presumption. *In re Chong’s Corporation*, OPA Appeal No.

BP-A073, p. 12 (April 11, 2013); *In re: SSFM (Saipan) Engineers, Inc.*, BP-A017, p. 8 (May 17, 1999). *See also, In re Appeal of Resource Management International Corporation*, OPA Appeal No. BP-A055, p. 4 (July 15, 2008) (procurement officials are required to act in good faith and may be presumed to do so). OPA requires that proof of wrong doing be based on actual facts, and not on “suspicion or innuendo.” *In re Chong’s Corporation*, OPA Appeal No. BP-A073, p. 12 (April 11, 2013).

This view is consistent with the federal contracting authorities. The Federal Circuit stated “[i]n order to prevail on an allegation of bad faith, [the protester] must show ‘almost irrefragable’ proof.” *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1337 (Fed. Cir. 2004) *citing Info. Tech. and Applications Corp. v. United States*, 316 F3d 1312, 1323 n. 2 (2003). The Government Accountability Office has continually held a presumption that contracting officers are acting in good faith and refused to “attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.” *Pride Mobility Prods. Corp.*, B-292822.5, p. 5 (Dec. 6, 2004).

In this case, SARS takes issues with other procurements by DPW outside this specific RFP, casts accusations of a conspiracy against SARS by DPW, and alleges that the use of an RFP was inappropriate in this procurement and that an ITB would be more appropriate.² Each of these claims are unsubstantiated and fail to overcome the presumption of good faith on the part of DPW. As a starting point, OPA will not address issues unrelated to this specific RFP in the present decision. Moreover, the opening of the bids outside the presence of SARS is not sufficient proof of bad faith by DPW and amounts to mere suspicion and innuendo.

² Any concerns raised by SARS on the appropriateness on the use of an RFP acquisition in this case is untimely. OPA trusts that procuring agencies are aware of the requirements for acquisitions utilizing the RFP process and will entertain challenges only when timely raised.

DECISION

For the reasons set forth above, SARS appeal is DISMISSED in part due to an untimely protest of the form of the RFP and DENIED in part due to a proper review by the evaluation committee and lack of evidence of bad faith on the part of DPW.

Dated this 11th Day of December 2014.

BY:

CONCUR:



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