

On June 26, 2006, OCP issued RFP No. POAM-2006-R-0005 for the “performance of real-

time, online reverse energy auctions, energy acquisition services and energy consultant services.” (District’s June 11, 2007 Motion to Dismiss/Agency Report (“AR”), Ex. 1). Soderberg was the procurement contracting officer and the RFP stated that Soderberg would execute any award pursuant to the RFP. The RFP contemplated that the successful offeror would conduct reverse auctions in order to identify the lowest-cost supplier of natural gas or electricity to meet the District’s energy supply requirements. The RFP also contained a “Metropolitan Washington Council of Governments Rider Clause” which allowed over governments with the Council of Governments (“COG”) to purchase services under the contract. (AR Ex. 1, Section K.8; Protest ¶ 13).

On July 10, 2006, OCP issued Amendment No. 1, which provided answers to various questions about the RFP. (AR Ex. 2). Proposals were due on July 26, and World Energy and Co-exprise were the only offerors to submit proposals. OCP conducted discussions with the offerors and received best and final offers on August 15 (Co-exprise) and August 16 (World Energy). (AR Ex. 3). On August 16, 2006, OCP issued RFP Amendment No. 2, which reserved to the District the right to make multiple awards. (AR Ex. 2). World Energy states that Amendment No. 2 was issued to the offerors only minutes before the closing time for BAFOs and after it had already submitted its BAFO. World Energy and Co-exprise acknowledged the amendments. (AR Ex. 2). After the RFP closed and after negotiations and evaluations, the contracting officer determined that World Energy and Co-exprise were both technically equal and that their prices for the reverse auctions were fair and reasonable. (AR Ex. 3). World Energy offered a lower price for the natural gas services while Co-exprise offered a lower price for the electricity services. As recorded in his Business Clearance Memorandum dated August 18, 2007, the contracting officer decided to award contracts to both World Energy and Co-exprise. (AR Ex. 3). On August 18, 2006, the contracting officer awarded Contract No. POAM-2006-D-0005-A (AR Ex. 4) to Co-exprise and Contract No. POAM-2006-D-0005-B to World Energy (AR Ex. 5). Soderberg told Havey on August 18 that both World Energy and Co-exprise would receive contracts for energy acquisition services, that World Energy would receive a task order to conduct the first natural gas auction but that no decision had yet been made as to which company would conduct an expected auction for electricity. (Protest ¶ 15).

By an undated letter from World Energy to Soderberg, faxed to OCP on August 23, 2006, World Energy stated in pertinent part:

[W]e are concerned about the impact of the District’s unexpected decision to modify Section B.2 of the solicitation and award multiple contracts for this requirement after World Energy had submitted their Best and Final Offer Inasmuch as World Energy’s BAFO reflected a pricing model based upon a single-award contract, the possibility of receiving only a partial (i.e., natural gas only) award may seriously undermine the basis of the World Energy proposal. . . . World Energy respectfully requests a debriefing to address any deficiencies in its proposal that may have led your office to solicit an alternative awardee.

(AR Ex. 6). On August 31, 2006, Soderberg issued a notice to proceed to World Energy, directing it to conduct the first natural gas reverse auction. (AR Ex. 7).

On September 7, 2006, Soderberg conducted a debriefing as requested by World Energy on August 23. Soderberg informed World Energy of Co-exprise's offered prices and that Co-exprise would be selected to conduct the electricity reverse auction. (Protest ¶ 16). World Energy never timely filed a protest challenging either the solicitation amendment permitting multiple awards nor of the award made to Co-exprise.

By email of September 20, 2006, World Energy's John Harvey requested that Soderberg clarify with the other members of the Council of Governments ("COG") that they could acquire both electricity and natural gas reverse auction services from World Energy under its contract, POAM-2006-D-0005-B. By reply email the same day, Soderberg confirmed that the COG members may use either the District's contract with World Energy or the District's contract with Co-exprise to satisfy their energy auction needs. (AR Ex. 8). Soderberg added that the District had tasked Co-exprise to conduct the first electricity auction and World Energy to conduct the first natural gas auction.

By internal OCP email dated September 22, 2006, the contracting officer decided to "lock in" the prices of natural gas that were quoted by Washington Gas Energy Services, Inc, under the third option year of a cooperative purchase agreement which the District had previously entered into with Prince William County Public Schools, a solicitation agent for the COG. (AR Ex. 9). By letter to World Energy dated September 22, 2006, the contracting officer notified World Energy that the District had decided to rescind the August 31 notice to proceed with the natural gas action since it was in the best interest of the District to exercise the option on the current supply contract rather than conduct the reverse auction. (AR Ex. 9).

By letter dated October 13, 2006, World Energy filed with the contracting officer a dispute pursuant to the disputes clause of its contract. (AR Ex. 10). World Energy raised a number of issues with respect to contract administration: (a) rescission of the notice to proceed with the natural gas auction was inconsistent with the District's obligation to World Energy under the contract, and revealed a "bait-and-switch" by the District with respect to the allocation of work under the contract; (b) the contract is a requirements contract mandating that the District's energy supply acquisition requirements be filled by World Energy; (c) the contract entitles World Energy to conduct online reverse auctions to whatever extent that the District has requirements for natural gas and/or electrical power; (d) the District's rescission notice constitutes a breach of the contract and is not a permissible termination for convenience unless the District has a valid reason for the termination; (e) at the time of award of contract, the District acted in bad faith since the District did not intend to honor its commitment to utilize World Energy's services for its natural gas and electrical power supply acquisition requirements; and (f) the contracting officer's administration of the contract was tainted by a conflict of interest since World Energy refused to participate in an unrelated prospective transaction in which World Energy understood the contracting officer to have a significant and direct personal financial interest and that any resulting personal disappointment or frustration with World Energy regarding that matter irretrievably compromised the contracting officer's objectivity for administering the contract. (AR Ex. 10).

On October 26, 2006, Harvey from World Energy initiated a meeting with Soderberg in an effort to resolve the October 13 claims. We learn from an undated letter from World Energy

received by the contracting officer on November 3, 2006, that at this meeting the parties agreed to “defer formal dispute procedures” while they attempted to resolve the dispute by the contracting officer proposing “contract modifications that would specify standards for issuing task orders for all requirements within the scope of work.” (AR Ex. 12; CAB D-1308 Complaint ¶ 33). Soderberg had a draft response denying each of the claims of World Energy, however the draft letter was never delivered to World Energy and was left as a memorandum to the file containing the contracting officer’s rationale for rejecting World Energy’s October 13 claims. (AR Ex. 11; District’s June 26, 2007 Reply). In the memorandum, the contracting officer indicates that (1) World Energy acknowledged Amendment 2 to the RFP and agreed, without objection, to multiple awards; (2) future natural gas reverse auctions may be required by the District and participating parties but the District is not required to procure its energy requirements only through reverse auctions; and (3) logistics, timing, price, and the slow progress of World Energy to move the auction forward were factors in his determination to rescind the notice to proceed and instead exercise an option on another existing contract. (AR Ex. 11).

By letter dated November 8, 2006, Soderberg responded to World Energy setting forth the procedures by which he would evaluate World Energy and Co-exprise to determine the awardee of future task orders for natural gas and electricity. In addition, the contracting officer notified World Energy that the District may decide to fill the need for energy by direct purchases from suppliers, without using reverse auction services. (AR Ex. 12). In a December 8, 2006 letter, World Energy responded to the contracting officer and requested further clarification of the procedures for awarding future task orders and requesting appropriate contract modifications to clarify that the contract would not be administered as a “full requirements” contract. (AR Ex. 12). By letter dated December 26, 2006, the contracting officer responded to the December 8, 2006 letter of World Energy, declining to revise the procedures set forth in his letter dated November 8, 2006, and concluding the letter by stating: “If World Energy does not believe that it can meet the terms required by these task order evaluation criteria please let me know and we can discuss the possibility of releasing World Energy from the above referenced contract or formally amending the terms thereof.” (AR Ex. 12).

On February 8, 2007, Ms. Patti Lovelady, an energy consultant working on behalf of OCP, called Harvey to ask if World Energy would be interested in canceling the contract and participating in a re-competition. Harvey stated that World Energy was fully committed to providing services to meet the District’s full energy supply procurement requirements, and that it would not agree to cancel its contract. By letter of February 15, 2007, Harvey reiterated World Energy’s objection to the suggestion that it agree to cancel the contract. (World Energy 06-19-2007 Response, Ex. 17). He explained that a re-competition of the contract would be problematic, as World Energy’s pricing for the natural gas auction had become public as a result of the prior award, and that a re-competition would allow competitors to undercut World Energy’s pricing.

On February 27, 2007, Soderberg issued a notice terminating World Energy’s contract for the convenience of the District, effective March 1, 2007. (AR Ex. 13).

By Amendment M0001 to Co-exprise’s contract signed by Soderberg on March 8, 2007, Co-exprise agreed to reduce its price for the reverse auction for natural gas from \$0.07/dth to

\$0.0495/dth as a flat fee for all natural gas volumes acquired through the reverse auction. (AR Ex. 2). Co-exprise's revised price thus was exactly \$0.005 less than the BAFO price (\$0.05/dth) offered by World Energy in August 2006.

On March 12, 2007, Soderberg issued a notice to proceed to Co-exprise to perform the reverse auction for natural gas. (AR Ex. 14). By email string dated April 9, 2007 and April 10, 2007, between World Energy and the District, the contracting officer notified World Energy that Co-exprise was going to conduct the reverse energy auction for natural gas. (AR Ex. 15).

On May 4, 2007, the District issued an invitation for bids to identify natural gas supply providers to participate in the online reverse auction to supply natural gas to be conducted by Co-exprise pursuant to its August 2006 contract and the March 12, 2007 task order. World Energy states that it learned of the invitation for bids on May 16, 2007.

World Energy filed its protest on May 18, 2007, protesting the District's "designation of Co-exprise to conduct this natural gas supply auction." (Protest, at 2). World Energy argues that it, not Co-exprise, should have been the one to conduct the online reverse auction. World Energy simultaneously filed a notice of appeal with our Board, docketed as CAB No. D-1308, stating in pertinent part:

[World Energy] hereby files this notice of appeal based on actions taken by the Office of Contracting and Procurement ("OCP") regarding contract number POAM-2006-D-0005-B ("the Contract"). World Energy notices this appeal to contest OCP's termination of the Contract and the contracting officer's failure to recuse himself in light of a conflict of interest. This appeal is timely, as it is being filed less than 90 days after the termination was issued on February 27, 2007, as well as "within a reasonable time" after the Contracting Officer's failure to render a final decision on World Energy's request for his recusal, which was submitted on October 13, 2006.

(CAB No. D-1308, Notice of Appeal, at 1).

By Determination and Finding to Proceed with Contract Performance While a Protest is Pending ("D&F") dated May 29, 2007, the District decided to continue with the reverse auction for natural gas, which was scheduled for June 4, 2007. On May 30, 2007, World Energy challenged the District's D&F, but the Board sustained the D&F in an order dated June 1, 2007. Co-exprise conducted the online reverse auction on June 4, 2007, as scheduled.

DISCUSSION

World Energy frames its protest as challenging the May 2007 invitation for bids issued to the natural gas suppliers to participate in the online reverse auction that was to be conducted by Co-exprise on June 4, 2007. Thus, World Energy asserts that (1) the District made an improper sole source "selection" of Co-exprise to conduct the reverse auction; (2) World Energy was improperly excluded from revising its BAFO pricing but Co-exprise was permitted to reduce its pricing slightly below World Energy's prices; (3) Co-exprise was a nonresponsible contractor; (4) the contracting

officer failed to follow task order award procedures spelled out in his November 8, 2006 letter; (5) the District failed to award the reverse auction to a required source, namely World Energy; and (6) the contracting officer was subject to a conflict of interest that compelled his recusal from selecting the contractor to conduct the reverse auction for natural gas supplies.

The facts demonstrate that World Energy's true complaint is that Soderberg, the contracting officer, improperly dealt with it after contract award in August 2006, including the rescission of its August 31, 2006 task order to conduct the natural gas reverse auction, the series of transactions relating to its October 13, 2006 contract claims, and culminating in the February 27, 2007 convenience termination of its contract. World Energy's allegations are properly seen as contract administration disputes that are properly within our dispute jurisdiction and will be addressed in World Energy's appeal, CAB No. D-1308. To the extent that the protest allegations challenge the August 18, 2006 award to Co-exprise, those allegations are clearly untimely. World Energy received a debriefing on September 7, 2006, and never filed a protest challenging the dual award to Co-exprise nor the amendment permitting multiple awards.

For these reasons, we dismiss World Energy's protest.

SO ORDERED.

DATED: September 28, 2007

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge