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**The Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

**Matter of:** Tierra Engineering Consultants, Inc.

**File:** B-222616

**Date:** August 12, 1986

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## DIGESTS

1. Since the Brooks Act requires contracts with architect-engineer firms of demonstrated competence, and implementing regulations require agencies to consider past performance in terms of cost, quality of work, and compliance with performance schedules, protest based on failure of Commerce Business Daily request for expressions of interest to state that past performance will be evaluated is without merit.
2. When protesting architect-engineer firm proposes five individuals as key personnel, specialists, or consultants for a particular project, while awardee plans to do 100 percent of the work himself, agency's evaluation of top three individuals proposed by protester, rather than only one as for awardee, is not improper.
3. When selection criterion involving equitable distribution of architect-engineer contracts among small and minority business firms that have not previously had government contracts is no longer included in applicable regulations, consideration of this factor is not legally required.

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## DECISION

Tierra Engineering Consultants, Inc. protests the award of a contract for architect-engineer services to Claude A. Fetzer. The Bureau of Reclamation, Department of the Interior, selected Mr. Fetzer to analyze and assess the performance of existing embankment dams under solicitation No. 6-CA-81-08510, a small business set-aside.

Tierra, which initially protested to the agency, makes three broad allegations, all based on its debriefing. First, the protester alleges that the Bureau of Reclamation improperly evaluated responses to a Commerce Business Daily (CBD) request for expressions of interest in the procurement. Second, the protester alleges that the selection process favored current and previous contractors and did not attempt to distribute work equitably among small, minority business concerns such as itself. Third, the protester argues that the Bureau of Reclamation should have rejected Mr. Fetzer because he did not submit a required standard form 255, detailing his qualifications for this procurement.

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We deny the protest.

#### STATUTORY AND REGULATORY BACKGROUND

Procurements for architect-engineer services are conducted pursuant to the Brooks Act, 40 U.S.C. §§ 541-544 (1982), and the implementing Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 36.6 (1985). After publicly announcing a requirement, the contracting agency convenes an evaluation board that reviews performance data and statements of qualifications submitted in response to the announcement, as well as data already filed by firms that wish to be considered for architect-engineer contracts. The board must hold discussions with no less than three firms (known as the "short list"), then rank and submit their qualifications to a selection official, who determines the most highly qualified offeror. If the agency is not able to negotiate a satisfactory contract at a fair and reasonable price with the preferred offeror, it is required by statute to enter into negotiations with the second-ranked firm, and so on until an agreement is reached. See Oceanprobe, Inc., B-221222, Feb. 26, 1986, 86-1 CPD ¶ 197.

#### CBD ANNOUNCEMENT

In this case, the CBD request for expressions of interest, published October 18, 1985, stated that the Bureau of Reclamation would award an indefinite quantity contract for an initial and 2 option years. Under the contract, the agency will issue delivery orders directing the successful architect-engineer firm to assess instrumentation data and programs for specific dams and to present conclusions regarding their performance.

The request for expressions of interest listed selection criteria as including, in descending order of importance, (1) qualifications of personnel and (2) past experience involving embankment dams. It referenced CBD Note 63, which states that architect-engineer firms that meet the requirements in a particular announcement are "invited to submit" standard form 254 (Architect-Engineer and Related Services Questionnaire) and standard form 255 (Architect-Engineer and Related Services Questionnaire for Specific Project), and any requested supplemental data. The note further states that selection of a firm for negotiation shall be based on "demonstrated competence and qualifications necessary for the satisfactory performance of the type of professional services required, including any special qualifications required by the procuring agency."

#### EVALUATION OF RESPONSES

In debriefing Tierra, the Bureau of Reclamation provided the firm with a blank copy of the evaluation sheet that it had used to select a short list of 5 firms (out of 26 expressing interest) with whom to conduct discussions. This form provided for assessment of technical qualifications and past performance of the engineers that each offeror proposed for the project.

Individuals were rated on a scale of 100, as follows:

Criterion	Maximum Points
<b>A. Technical Qualifications</b>	
1. Experience in analysis of embankment dam performance based on instrumentation data	25
2. Experience with embankment dam instrumentation systems and equipment	20
3. Experience in the design, analysis, modification, inspection, and/or rehabilitation of embankment dams	20
4. Educational and professional background	10
<b>B. Past Performance on Contracts</b>	
1. Contracting experience	10
2. Quality of performance	15

Evaluators then multiplied each engineer's total point score by the percentage of work to be performed by that individual. Except for the awardee, as discussed below, or other individuals whom offerors indicated would perform a specific portion of the work under the contract, evaluators selected the top three proposed by the offeror, assumed that each would perform one-third of the work, and averaged their scores to obtain a numerical rating. Under this scheme, Mr. Fetzer was found most highly qualified; he received almost twice as many points as Tierra, which ranked 14th among offerors.

#### TIERRA'S PROTEST

##### Allegedly Improper Evaluation

Tierra contends that the evaluation was improper because past performance was not listed as a criterion in the CBD request for expressions of interest. According to Tierra, the agency awarded points for quality of performance only if the offeror had previously performed Bureau of Reclamation contracts or included in its expression of interest testimonials from other previous employers. The fifth-ranked firm received 4 points because it did provide such a testimonial; this firm would not otherwise have been included on the short list.

The Bureau of Reclamation responds that it encountered considerable difficulty in evaluating quality of past performance without relying on the personal knowledge of evaluators or considering information other

than that submitted by offerors. It therefore gave 0 points, indicating satisfactory past performance, to all but the one offeror that provided a laudatory letter from another federal agency.

We do not find the evaluation improper in this regard. The Brooks Act requires contracts with architect-engineer firms of demonstrated competence. 40 U.S.C. § 542. Note 63 of the CBD also refers to demonstrated competence. In addition, the FAR requires agencies, in selecting architect-engineer firms, to consider past performance on contracts with government agencies and private industry in terms of "cost control, quality of work, and compliance with performance schedules." 48 C.F.R. § 36.602-1(a)(4). Offerors therefore are charged with at least constructive knowledge of this criterion, and Tierra cannot argue that it was unaware of it or that the Bureau of Reclamation may not consider past performance. See Tri-State Laundry Services, Inc., B-218042, Feb. 1, 1985, 85-1 CPD ¶ 127, aff'd on reconsideration, Mar. 11, 1985, 85-1 CPD ¶ 295.

In addition, we believe that past performance is reasonably related of the evaluation criterion announced in the CBD, i.e., past experience on embankment dams. An unstated criterion may be applied if it is reasonably related to or encompassed by a stated criterion. See Oceanprobe, Inc., supra.

While it might have been preferable for the Bureau of Reclamation to advise offerors specifically that it wished them to demonstrate the quality of performance on past contracts, the agency was not required to go outside offerors' submissions for this information. FACE Associates, Inc., 63 Comp. Gen. 86 (1983), 83-2 CPD ¶ 643. Since the Bureau of Reclamation received 26 expressions of interest, we believe it reasonably concluded that it would be too much of a burden to contact agencies or private industries for whom offerors had previously performed.

Tierra alleges that evaluators' personal knowledge of the awardee's performance may be reflected in their selection. There is no support for this allegation in the record; Mr. Fetzer and all but one firm on the short list also received 0 points for quality of past performance. Tierra has the burden of proving bias on the part of evaluators, Power Line Models, Inc., B-220381, Feb. 28, 1986, 86-1 CPD ¶ 208, and it has not done so here.

Tierra further contends that the agency improperly evaluated the qualifications of a different number of engineers for different offerors. Tierra apparently was told during its debriefing that while the embankment dam experience of two of the engineers whom it proposed for the project was highly regarded, that of the third was considered weak.

The Bureau of Reclamation responds that the awardee, a consulting geotechnical engineer, will perform 100 percent of the work himself; therefore he was evaluated on that basis. The agency defends its evaluation of the top three individuals proposed by Tierra and other firms as the only way it could treat offerors equally.

We do not find this aspect of the evaluation unreasonable. Again, it might have been preferable for the Bureau of Reclamation to ask offerors themselves to estimate the percent of work to be done by proposed engineers, rather than to make assumptions. However, the record shows that Tierra submitted information on five different individuals in that section of its standard form 255 where it was asked to list "key personnel, specialists, and individual consultants anticipated for the project." Tierra identified the two engineers whose experience was favorably evaluated as its proposed project manager and assistant project manager. The third individual, who was evaluated as having no experience with embankment dams, was specifically identified by Tierra as a geologist who would be working on the project.

The Bureau of Reclamation states that if Tierra and other offerors had been rated only on the experience of their two top engineers, Tierra would still not have been included on the short list. Rather, the protester would have tied with two other offerors for sixth place in the evaluation. Thus, Tierra was not prejudiced by the allegedly deficient evaluation. See Y. T. Huang & Association, Inc., B-217122 et al., Feb. 21, 1985, 85-1 CPD ¶ 220, aff'd on reconsideration, B-218310 et al., Apr. 4, 1985, 85-1 CPD ¶ 392.

#### Bias Toward Known Contractors

Tierra contends that the selection process favored current and prior contractors. It supports this allegation by pointing out the number and dollar volume of Bureau of Reclamation Contracts awarded to one firm under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1982). This particular procurement, while set aside for small business, was not conducted pursuant to section 8(a). Tierra is therefore not entitled to any preference as a minority firm, Y. T. Huang & Assoc., supra, and the evidence concerning contracts awarded to one 8(a) firm is not relevant here.

Tierra apparently believes there should be an equitable distribution of architect-engineer contracts among small and minority business firms that have not previously had government contracts. There is no current regulatory policy on this matter. The Defense Acquisition Regulation, § 18-402.1(v) (DAC 76-31, Oct. 30, 1981), formerly included such a policy, but the superseding FAR section, 48 C.F.R. § 36.601, does not include this consideration. Compare Dhillon Engineers, B-209678, Mar. 16, 1983, 83-1 CPD ¶ 268; R. Christopher Goodwin & Assoc., et al., B-206520, Nov. 5, 1982, 82-2 CPD ¶ 410 (both involving an equitable

distribution criterion). Thus, the basis for selection now is strictly which architect-engineer firm is most highly qualified. 40 U.S.C. § 543; 48 C.F.R. §§ 36.602-1, 36.602-4.

#### Requirement for Standard Form 255

Finally, Tierra urges that the Bureau of Reclamation should have rejected the awardee for failure to submit information as to his qualifications for this procurement on standard form 255. The agency responds that the FAR, 48 C.F.R. § 36.702(b), limits the requirement for standard forms to architect-engineer services for the "construction, alteration, or repair of real property." The agency argues that the awardee here will analyze and assess the performance of embankment dams, based on instrumentation data, rather than construct, alter, or repair the dams. The agency adds that it is its policy not to reject expressions of interest for failure to submit the standard forms, but rather to accept any response that provides the necessary information concerning an offeror's qualifications.

We do not find the failure to submit a standard form 255 fatal to the awardee. This was a negotiated procurement, so the concept of immediate rejection of an offeror as nonresponsive is not applicable. See, e.g., Fort Wainwright Developers, Inc., et al., B-221374, et al., May 14, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 CPD ¶ 459. We also note that Note 63 of the CBD states that offerors are invited to submit the standard forms, not that they are required to do so.

We have reviewed Mr. Fetzer's expression of interest, provided as part of the protest record, and find that it contains information concerning his experience in evaluation of instrumentation data on embankment dams, including copies of articles from professional journals and papers presented at international conferences. So long as the Bureau of Reclamation had sufficient information on which to make a reasonable determination as to which offeror was most highly qualified, we do not believe that the agency was required to reject the awardee for failure to complete a standard form 255.

#### CONCLUSION

Our review of the selection of architect-engineer contractors is limited to an examination of whether the agency's determination was reasonable; we will question the selection only if the protester shows that it was arbitrary. Mounts Engineering, B-218489.4, Apr. 14, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 CPD ¶ 358. We conclude that the Bureau of Reclamation's selection here was reasonable; Tierra has not shown it to be arbitrary.

The protest is denied.

*for* *Seymour Fros*  
Harry R. Van Cleve  
General Counsel