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Decision

Matter of: M. Matt Durand, LLC

File: B-401793

Date: November 23, 2009

Mary Elizabeth Hall, Esq., Mockbee Hall Drake & Hodge Law Firm, for the protester. Janis R. Millete, Esq., U.S. Army Corps of Engineers, for the agency. Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that, during discussions, agency permitted other offerors, but not protester, to address issues regarding “borrow site” for earthen clay fill material, and that discussions therefore were unequal, is denied where agency was unaware of deficiency in protester’s proposal with regard to borrow site at time of discussions; consistent with solicitation, agency obtained information regarding proposed borrow site issues subsequent to discussions.
 2. Contracting officer reasonably eliminated protester’s proposal from competition where its proposed earthen clay “borrow site” was determined to be unacceptable due to failure to meet environmental requirements, and she had no reason to question that determination.
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DECISION

M. Matt Durand, LLC, of St. Martinsville, Louisiana, protests the rejection of its proposal under request for proposals (RFP) No. W912P8-08-R 0022, issued by the U.S. Army Corps of Engineers for services and supplies related to delivery of earthen clay material for improving the Greater New Orleans Area Hurricane and Storm Damage Risk Reduction System. Durand principally asserts that the Corps conducted unequal discussions and unreasonably eliminated its proposal from the competitive range.

We deny the protest.

The RFP, issued on June 3, 2008, provided for award to the offeror submitting the lowest priced, technically acceptable proposal. RFP at 143-46. Technical

acceptability was to be determined based on 13 subfactors. RFP at 143-146. Proposals found technically acceptable would then be evaluated for price using a reverse auction approach. Id. at 146.

The Corps was required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4371 et seq., to complete an environmental analysis of offerors' proposed earthen clay "borrow sites" (i.e., the areas from which the earthen clay material would be excavated). See 33 C.F.R. Part 230, Procedures for Implementing NEPA. To satisfy this requirement, the Corps utilized an Individual Environmental Report (IER), an "alternative NEPA arrangement" authorized by the NEPA regulations. Id. The RFP specifically made approval of an offeror's "material sources and operations" in an IER a condition for continued participation in the reverse auction and eligibility for award. RFP at 145-46. The IER pertinent to the acquisition here was IER 30, "Contractor-Furnished Borrow Material #5; St. Bernard and St. James Parishes, Louisiana, and Hancock County Mississippi." Agency Report (AR) Tab 29.

The Corps's environmental review under NEPA included a review for compliance with section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, which is designed to ensure that historic properties are considered during federal project planning and execution. AR at 3.¹ Consistent with this requirement for consideration of historic properties, the RFP required each offeror to include with its proposal a Cultural Resources Impact Report (CRIR) prepared by a professional cultural resource management company meeting the standards of NHPA. RFP at 124. The acceptability of an offeror's CRIR was a technical evaluation subfactor under the RFP, as well as a factor in determining inclusion of an offeror's proposal under the IER. RFP at 144, 145-46.

In August 2008, 16 proposals were received, including Durand's. Durand proposed the Port Bienville borrow site in Mississippi as the source of the required earthen clay. Contracting Officer's Statement (COS) at 3. Durand's proposal included a CRIR. Id. After the initial evaluation by the source selection evaluation board (SSEB), 13 proposals, including Durand's, were included in the competitive range. Id. at 4. The SSEB found Durand's proposal to have deficiencies with regard to three technical subfactors: geotechnical report, borrow area management plan, and transportation and stockpiling plan. No weaknesses or deficiencies were noted with regard to the other 10 subfactors, including the CRIR. The competitive range offerors, including Durand, were advised of their proposals' evaluated weaknesses and deficiencies. Three offerors (not Durand) were advised of weaknesses and deficiencies in their CRIRs. Id.

¹ NEPA regulations allow the use of the NEPA process for section 106 purposes. 36 C.F.R. § 800.8(c); AR at 3.

In February, 2009 the Corps received revised proposals from 12 offerors (1 offeror did not submit a revised proposal). AR Tab 11. On March 12, following evaluation of the revised proposals, seven offerors, including Durand, were advised that their proposals had been “determined technically acceptable” and would remain in the competitive range. The notifications further advised:

Your proposal will enter an alternative National Environmental Policy Act arrangement pursuant to the statutory requirements of 42 U.S.C. 4371, as disclosed in the solicitation. This process may take up to one hundred and twenty (120) days.

COS at 5; see, e.g., AR Tab 13, Agency Letter to Durand, Mar. 12, 2009.

Consistent with the March 12 letter, the remaining proposals, including Durand’s, were subjected to the NEPA process described in RFP § 5.1.1, above. As part of this process, by letters dated June 1, the Corps’s Environmental Planning and Compliance Branch (EPCB) requested that various interested entities, including Indian tribes and Mississippi State officials, comment on Durand’s proposed Port Bienville borrow site. AR Tab 16. These letters advised that the Corps had determined that the Port Bienville site “does not contain significant cultural resources,” but included a copy of the CRIR prepared by Durand’s consultant and generally advised that the “undertaking has the potential to affect historic properties.” See, e.g., id. at 1-2.

The EPCB received several responses to the June 1 letters. By letter dated June 8, the Jena Band of Choctaw Indians advised the EPCB that it was “not in agreement” that the Port Bienville site “should not be considered ... a historic property” under section 106. AR Tab 17. The Jena Choctaws also advised that the site “may be of greater significance to the Choctaw people.” Id. By letter of June 25, the Mississippi State Historic Preservation Officer (MSHPO) advised the EPCB that it had “no objections to the proposed undertaking.” AR Tab 18. However, in a second letter, dated June 29, MSHPO advised EPCB that it had come to his attention “that there may be significant Choctaw cultural resources in the project area, including the possibility of burials,” and went on to state that, “As such, we are withdrawing our previous concurrence and will be in consultation with the Mississippi Band of Choctaw Indians before providing any further comments on this project.” AR Tab 19. By e-mail dated June 30, the Mississippi Band of Choctaw Indians advised that it had “a number of concerns with the project,” including the “high probability” of “intact or disturbed human burials,” and that, “If there are human bones there, they must be recovered and treated in a respectful manner, not bulldozed away or made fill for a levy.” AR Tab 20. The tribe further advised that “a 100% survey of the area needs to be completed,” and noted that the “archeological reports on this project do not even mention that this Choctaw community existed, let alone address the possible presence of house sites cemeteries, or burials.” Id. Finally, the tribe cautioned that “This obviously is of significant concern to us and must be addressed before this project can move forward.” Id.

By letter dated July 15, the EPCB advised Durand that it had decided to deny the proposed Port Bienville site as a source of borrow material for IER 30. AR Tab 22. The EPCB cited the objections of the Jena and Mississippi Choctaws and the withdrawal of SHPO's concurrence in approval of the site. Id. The letter further advised that "Resolution of these issues may involve the completion and review of additional and extensive cultural resources investigations at your expense." Id.

In a letter dated July 20, Durand responded to the EPCB's July 15 letter, disputing several of the conclusions therein. AR Tab 24. Durand asserted that there was no archeological site of concern within the proposed excavation site, that the only site was "nearly a half-mile away," and that there thus would be "no adverse impact." Id. Durand further advised that its consultant had met with the Mississippi Choctaws' archaeologist in an effort to identify specific Choctaw concerns, and that the Choctaw archaeologist indicated that the Choctaws' concerns were settlements that were in the area as well as the potential for human remains that may have been interred near residences. Id. These settlements were known to a Choctaw Elder living in the area and Durand's consultant was scheduled to meet with that person on July 21 to identify grave and house locations so they could be "protected as part of the proposed mining process." Id. Durand advised that, "If either of these resources are identified within the proposed mine area, an agreement will be reached with the Choctaw that will allow the development of the mine, while ensuring that those resources are protected." Id. at 2. Durand requested that the Port Bienville site "be retained in the IER 30 review process" until "IER 30 is ready to enter the public review process." Id.

By letter dated July 23, the contracting officer notified Durand that, since "the proposed Port Bienville borrow site [had] been denied further consideration" in IER 30, Durand's revised proposal "is considered unacceptable." AR, Tab 25, at 2; AR, Tab 25, at 1, Contracting Officer's Memorandum, July 23, 2009.

By letter dated July 27, the EPCB replied to Durand's July 20 letter, advising that it had reviewed the "new information" provided in the letter, but that, because of "the significance of the Indian tribal issues raised and the time to possibly resolve these issues," it was "not possible" to include the Port Bienville borrow site for consideration in IER 30. Tab 27. During the remainder of July and August, Durand continued to provide information to the EPCB, requesting reinstatement of the Port Bienville Site, or at least a portion of the site that had been included in a prior IER. AR Tabs 28, 30, 31.

Durand challenges the rejection of its proposal on several grounds. We have considered all of Durand's arguments and find that they are without merit. We address Durand's primary arguments below.

DISCUSSIONS

Durand asserts that the discussions following evaluation of offerors' technical proposals were unequal, contrary to the requirements of Federal Acquisition Regulation (FAR) § 15.306(a), since the Corps discussed CRIR deficiencies with three offerors, but failed to discuss similar issues with Durand. Protester's Comments at 12, 14.

The scope and extent of discussions with offerors in the competitive range are a matter of the contracting officer's judgment. FAR § 15.306(d)(3); Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 5. Although discussions may not be conducted in a manner that favors one offeror over another, FAR § 15.306(e)(1); see Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61, and offerors must be given an equal opportunity to revise their proposals, discussions need not be identical among offerors; rather, discussions are to be tailored to each offeror's proposal. FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6.

The discussions here were unobjectionable. While, as noted, three offerors were advised during discussions that their CRIRs contained weaknesses and deficiencies, Durand's proposal was found acceptable with regard to its CRIR, so the agency determined that there was nothing in that area to discuss with Durand. AR Tabs 8, 9. Durand does not assert that its CRIR included information that should have put the Corps on notice of a problem with its proposed borrow site, and we find nothing in the record showing that the agency otherwise was or should have been aware, at the time of discussions, of the problems that came to light months later. Indeed, as noted above, in providing the Indian and Mississippi State entities an opportunity to comment on Durand's proposed borrow site, the EPCB advised that it did not appear that the site would be problematic. AR Tab 16. Under these circumstances, where the objections to the proposed site were unknown by the agency--from Durand's proposal or otherwise--at the time of discussions, there is no basis for us to find that the discussions with Durand were unequal or otherwise deficient. See Metcalf Constr. Co., Inc., B-289100, Jan. 14, 2002, 2002 CPD ¶ 31 at 5 (although agency informed other offerors during discussions that their prices exceeded applicable budget ceilings, agency was not required to discuss budget ceilings with protester, whose prices did not exceed ceilings at time of discussions); KBM Group, Inc., B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 10 (agency did not conduct unequal discussions with awardee and protester where agency conducted technical discussions with awardee, whose technical proposal was initially evaluated as containing a number of weaknesses, while conducting no technical discussions with protester, whose initial proposal was evaluated as containing no weaknesses).

Durand asserts that the Corps should have contacted Indian tribes and other interested entities prior to the technical acceptability determination, which would

have then made it possible to raise the objections with Durand during discussions. However, the description of the technical evaluation requirements for offerors' CRIRs in section M of the RFP includes no requirement for, or even mention of, coordination with tribal or state authorities, and there was nothing elsewhere in the RFP that required the agency to coordinate with these entities early in the procurement process. Durand cites RFP section L.2.2.2, which sets forth instructions for offerors, and provides with regard to the CRIR that "The Government is responsible for all coordination activities with federally recognized Tribes and State Historic Preservation Officers." Protest at 3-4. However, there is nothing in this provision indicating the timing for the agency's coordination with the identified entities. We conclude that this argument is without merit.

We further note that the evaluation scheme set forth in the RFP clearly contemplated that offerors' CRIRs would be reviewed twice: first in the evaluation of proposals, RFP at 144 (§ 4.1b), and subsequently with regard to the determination whether to include offerors' borrow sites in the IER. RFP at 145-46 (§ 5.1.1). The agency's actions were consistent with the RFP in this regard. To the extent Durand believed that some earlier review was required, and that this dual review--and the attendant possibility that a proposal could be rejected based on the results of either--was improper, the protest is untimely. Again, the RFP did not provide for a NEPA review early in the procurement process, and specifically provided for a dual review. Such alleged deficiencies on the face of a solicitation must be protested prior to the initial closing time. 4 C.F.R. § 21.1(a) (2009).

REJECTION OF PROPOSAL

Durand asserts that the rejection of its proposal was "arbitrary and capricious." Protest at 8-10. It claims that, as a factual matter, there are no affected historic sites at the Port Bienville site, and that the Corps improperly declined its offer to adjust the boundaries of the borrow site and to enter into a prophylactic memorandum of agreement with the Choctaws. *Id.* The Corps responds that it reasonably relied on, and was required to consider, the position taken by the Choctaws, that it was not required to grant Durand's request to adjust the borrow site, and that Durand's plan regarding a memorandum of understanding with the Choctaws was "purely speculative" and therefore not acceptable. AR at 11-13.

In reviewing a protest challenging an agency's proposal evaluation, it is not our role to reevaluate proposals. Rather, we will consider only whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Anwar Al-Anduols, B-401550, B-401550.3, Sept. 22, 2009, 2009 CPD ¶ __ .

The agency reasonably determined that Durand's proposal was unacceptable. Inclusion of the proposed borrow site in the IER was an express precondition to an offeror's being eligible for award. RFP at 145-46. While Durand disagrees with the EPCB's findings, the contracting officer was presented with a conclusive

determination by the EPCB that Durand's site would not be included in the IER, AR, Tab 25, Contracting Officer's Memorandum, July 23, 2009, and her rejection of the proposal on this basis was consistent with the RFP. There is no indication in the record that the contracting officer had any reason to believe that the EPCB's determination was defective, unsupported, or suspect in any way. Moreover, the protester's disagreement with the EPCB's determination notwithstanding, it has not established any error or impropriety in that determination. Under these circumstances, the contracting officer reasonably relied on the determination in rejecting Durand's proposal. See generally Daisung Co., B-294142, Aug. 20, 2004, 2004 CPD ¶ 196 (where contracting officer's determination to exclude offeror from competition was based on information provided by agency audit and criminal investigation divisions, contracting officer acted properly in relying on that information, which GAO will not question); John Blood, B-290593, Aug. 26, 2002, 2002 CPD ¶ 151 at 4 (contracting officer could rely on past performance information he had no reason to question); Advanced Commc'n Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3 (agency reasonably relied on Defense Contract Audit Agency's advice in performing cost realism analysis).

To the extent the protester believes the agency should have delayed the procurement until it had the opportunity to resolve the identified issues with its borrow site, there simply was no requirement that it do so after—as we have found—reasonably rejecting the firm's proposal. We note that the EPCB did continue communications with Durand regarding the Port Bienville site after initially rejecting the site for inclusion in IED 30, but ultimately declined to change its determination, concluding there was no indication that a prompt resolution was at hand or likelihood that its determination would be reversed. See, e.g., AR Tabs 24, 25, 27, 28; COS at 12-13. The agency advises, unrebutted by the protester, that as of October 23, Durand had not resolved its issues with the Choctaw tribes and the Mississippi SHPO. Agency Supp. Report at 4. We further note that the contracting officer determined that any further delay would impact other levee construction contracts dependent on borrow material obtained under this procurement. COS at 16.

The protest is denied.

Lynn H. Gibson
Acting General Counsel