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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Great Lakes Dredge & Dock Company, LLC

File: B-411207

Date: June 8, 2015

Paul R. Hurst, Esq., and Kendall R. Enyard, Esq., Steptoe & Johnson LLP, for the protester.

Dana P. Friedman, Esq., and Maureen A. McAndrew, Esq., Department of the Army, for the agency.

Pedro E. Briones, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of an agency's cancellation of an invitation for bids after bid opening is denied where unforeseen litigation over the acquisition of property easements required for contract performance, and ensuing condemnation proceedings of an indeterminate duration, provided a compelling reason to cancel the solicitation.

DECISION

Great Lakes Dredge & Dock Company, LLC, (GLDD) of Oak Brook, Illinois, protests the cancellation of invitation for bids (IFB) No. W912BU-14-B-0002, issued by the Department of the Army, Corps of Engineers, for beachfill and sand dune construction on Absecon Island, New Jersey. GLDD contends that the Corps lacked a compelling reason to cancel the IFB.

We deny the protest.

BACKGROUND

The procurement is part of a decades-long joint project between the Corps and the State of New Jersey, Department of Environmental Protection (NJDEP), for hurricane and storm damage reduction on Absecon Island, an 8-mile long barrier island in Atlantic County, New Jersey, comprised of four coastal municipalities: Atlantic City, Ventnor City, Margate City, and the Borough of Longport. See Absecon Island Coastal Storm Risk Management, available at www.nap.usace.army.mil/Missions/CivilWorks/AbseconIslandStormDamageReduction.aspx. The

project consists of berm and dune beachfill to be constructed along the oceanfront of the four municipalities. Id. The Atlantic City and most of the Ventnor City beachfill was completed in June 2004. See id. Under a new project partnership agreement to complete the remaining beachfill, NJDEP is responsible for acquiring the necessary real estate interests, and the Corps is responsible for construction costs. Agency Report (AR) at 1-2.

On September 15, 2014, the Philadelphia District of the Corps issued the IFB seeking a contractor to construct the remaining stretch of beachfill in Margate, Longport, and the southern portion of Ventnor. IFB at 1; IFB § 01 11 00, Summary of Work, at 1. The solicitation incorporated Federal Acquisition Regulation (FAR) clause 52.214-19, Contract Award-Sealed Bidding-Construction, which provides for award to the lowest-priced responsible bidder. IFB § 00 21 00-4. The IFB warned bidders that bids would not be opened unless the real estate issues had been resolved, and that there was no guarantee that the outstanding issues would be resolved or that a contract would be awarded. IFB at 3.

On October 1, NJDEP filed administrative orders with the Atlantic County Clerk's Office "taking" (i.e., seizing) perpetual easements and other property interests for specified oceanfront parcels in Margate in order to proceed with the project. See Margate v. United States Army Corps of Engineers, No. 14-cv-7303, at 5-8 (D.N.J. Jan. 15, 2015). Property interests over parcels in Longport were separately acquired through that borough's exercise of the New Jersey Disaster Control Act, which grants municipal governing bodies the authority to seize property in order to restore or construct protective coastal barriers.¹ See Contracting Officer (CO) Statement at 2, citing N.J.S.A. App. A §§ 9-51.5--51.7.

On October 14, NJDEP provided an "Authorization for Entry for Construction" to the Corps certifying that NJDEP had obtained sufficient title and real property interest over the required parcels in order for the Corps to begin construction. AR, Tab H, NJDEP Authorization for Entry for Constr., at 1. The authorization was executed by the administrator of NJDEP, as well as the assistant attorney general for NJDEP, who certified that NJDEP had the legal authority to grant the authorization. Id.

Two firms, including GLDD, submitted bids in response to the IFB that were opened on October 28. CO Statement at 3. GLDD was the apparent low bidder. AR, Tab I, Bid Abstract, at 3.

On November 24, hours before the Corps was to award the contract to GLDD, Margate City and two private oceanfront landowners sought, in U.S. District Court, a temporary restraining order (TRO) to enjoin the Corps and NJDEP from awarding

¹ The remaining parcels in Ventnor are not directly at issue here.

any contract for the construction of sand dunes on Margate beaches. CO Statement at 3; see Margate, supra, at 2. Among other things, the plaintiffs argued that NJDEP's taking of property interests by administrative order failed to comply with the condemnation proceedings required under New Jersey's Eminent Domain Act, N.J.S.A. tit. 20, thereby denying the plaintiffs of their right to challenge the state's determination that the taking was for a public use.² Margate, supra, at 9; CO Statement at 3.

The federal district court granted the TRO on that same date (November 24), and the Corps immediately discontinued efforts to award the contract. CO Statement at 4. On December 4, following a court hearing on the TRO, the contracting officer requested that both bidders extend their bids for 60 days during the pendency of the court proceedings. Id. at 3; see AR, Tabs L-N, Requests for Bid Extension. GLDD only agreed to extend its bid for 30 days; the second bidder agreed to extend its bid for 60 days.³ AR, Tabs N-O, Bidder Responses to Extension Requests.

On January 15, 2015, the federal district court issued an opinion agreeing with Margate and the private landowners that NJDEP's seizure of property interests, by administrative order, likely violated the state's Eminent Domain Act. See Margate, supra, at 17. However, the court denied, without prejudice,⁴ the plaintiffs' motion for preliminary injunction because construction of the project was not imminent and NJDEP represented to the court that NJDEP would file formal condemnation proceedings for the parcels. Id. at 24-28.

On February 13, in an unrelated case, the Superior Court in neighboring Ocean County ruled that New Jersey's Disaster Control Act did not authorize the Township of Long Beach to acquire easements for shore protection unless the municipality

² As explained in the court's opinion, Margate had long opposed NJDEP's storm prevention strategies (including its current joint project with the Corps to construct 13 foot high, 25 foot wide sand dunes), because Margate residents believed the local topography and the city's system of bulkheads were sufficient to prevent catastrophic storm damage. Margate v. United States Army Corps of Engineers, No. 14-cv-7303, at 4-5 (D.N.J. Jan. 15, 2015).

³ On January 19, GLDD extended its bid for an additional 30 days. AR, Tab P, GLDD Bid Extension No. 2, at 1-2.

⁴ The court ordered the Corps to give 10-days prior notice in the event that the Corps prepared to proceed with construction, in order to give the plaintiffs an opportunity to seek reconsideration of the court's denial of the preliminary injunction. Margate, supra, at 28.

also complied with the procedures required under the state's Eminent Domain Act.⁵ Minke Family Trust v. Long Beach, No. OCN-L-3033-14, at 1-2, 11 (N.J. Super. Ct. Feb. 13, 2015). As relevant here and as noted above, the Borough of Longport had exercised this same Disaster Control Act authority to seize the property interests needed to complete the Longport portion of the Absecon Island project.

On February 24, the agency cancelled the IFB. The contracting officer informed the bidders that he had determined, pursuant to FAR § 14.404-1(c)(10), that it was in the public interest to cancel the solicitation, because the legal challenges to the real estate acquisitions for the project had not been resolved. See, e.g., AR, Tab V, IFB Cancellation Letter to GLDD. He advised the bidders that award of the contract under the pending litigation would pose a significant risk to the government. Id. This protest followed.

DISCUSSION

GLDD argues that the Corps lacks a compelling reason to cancel the IFB after bid opening, and maintains that the agency did not meaningfully consider delaying contract award. GLDD complains that its competitors will seek to undercut its low bid in any subsequent re-procurement, and urges the Corps to reinstate the IFB and permit bidders to extend their bid acceptance periods pending resolution of the real estate issues.

The Corps asserts that its inability to provide the required real estate interests, and the indeterminate amount of time that it will take NJDEP to acquire those interests through the more time consuming eminent domain process, provide compelling reasons to cancel the IFB.⁶ Moreover, the Corps maintains that the project performance period will remain unknown for many months--likely impacting bid prices and the availability of other offerors to compete for the requirement--which also provide compelling reasons to cancel the solicitation.⁷ AR at 9, citing, inter alia,

⁵ The Long Beach Island Project is also a joint storm damage reduction project between the Corps and NJDEP. See www.nap.usace.army.mil/Missions/CivilWorks/LongBeachIslandStormDamageReduction.aspx.

⁶ The Corps maintains that the earliest possible date by which NJDEP could acquire the necessary real estate interests through condemnation under the state's Eminent Domain Act would be mid to late June 2015, but that there is a high likelihood that the time period would be substantially longer and indeterminate if further litigation arises in that regard. AR at 6; see, e.g., supra n.4 (court denying plaintiffs' motion for preliminary injunction without prejudice in order to permit plaintiffs to renew their motion prior to project construction).

⁷ The IFB stated that the work must be completed by April 15, 2016. IFB § 00 73 00 SC-1.

Southwest Marine, Inc., B-229596, B-229598, Jan. 12, 1988, 88-1 CPD ¶ 22. The Corps maintains that when it issued the IFB, neither the Corps, nor NJDEP, expected the litigation discussed above, which effectively reversed NJDEP's earlier authorization for construction.

A contracting agency must have a compelling reason to cancel an IFB after bid opening due to the potential adverse impact on the competitive bidding system of resoliciting after bid prices have been exposed. FAR § 14.404-1(a)(1); HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298 at 5. Contracting officials have broad discretion to determine whether a compelling reason to cancel exists, and our review is limited to considering the reasonableness of their decision. Chenega Mgmt., LLC, B-290598, Aug. 8, 2002, 2002 CPD ¶ 143 at 2.

We find the Corps' decision to cancel the IFB reasonable under the circumstances described above. The Margate litigation, and the indeterminate delays that are likely to result from the required condemnation proceedings, provided compelling reasons for the Corps to cancel the solicitation. The Corps' decision is also consistent with the IFB's explicit (and emphatic) warning to potential bidders that there was no guarantee that outstanding real estate issues would be resolved or that a contract would be awarded. IFB at 3. Moreover, contrary to the protester's assertion, the Corps did in fact consider postponing the award date and requested that bidders extend their bids for 60 days, as discussed above. Despite its arguments now, GLDD initially refused to extend its bid for 60 days, and agreed only to a 30-day extension, which it later extended to 60 days.

While the protester apparently believes that the Corps should continue to seek an indefinite number of bid extensions, we believe that the agency acted reasonably here and was not required to do more. To the extent that GLDD asserts that the Corps did not consider the risks to bidders of cancelling the IFB without award, the agency states, and the protester does not dispute, that the decision to cancel the IFB was taken after substantial consultation with the project manager, real estate professionals, legal counsel, and others, who concluded that the litigation may negatively impact the progress of any awarded contract. We find no basis to disagree with the agency's deliberations or ultimate decision to cancel the solicitation.

The protest is denied.

Susan A. Poling
General Counsel