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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Tridentis LLC

File: B-412539

Date: March 18, 2016

Ronald S. Perlman, Esq., and Elizabeth N. Jochum, Esq., Holland & Knight, LLP, for the protester.

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

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision to use Brooks Act procedures to acquire naval architectural and marine engineering services is denied; there is nothing on the face of the statute that would preclude using the Brooks Act for acquiring naval architectural and marine engineering services, nor is there anything on the face of the statute that limits its application to the acquisition of architect-engineering services solely in connection with the construction of a building, structure or facility.

DECISION

Tridentis LLC, of Alexandria, Virginia, protests the terms of request for proposals (RFP) No. W912BU-16-R-0004, issued by the Department of the Army, U.S. Army Corps of Engineers, for naval architecture and marine engineering services.

Tridentis maintains that the agency impermissibly has issued the RFP using the procedures of the Brooks Act, 40 U.S.C. §§ 1101-1104, for acquiring architect-engineer (A-E) services.

We deny the protest.

The RFP contemplates the award of up to two indefinite-delivery, indefinite-quantity contracts to perform naval architecture, marine engineering, dredging engineering, electrical, structural, modeling, computer-aided design and drafting services, as well as preliminary design, detailed (final) design and related design studies, analysis and reports. RFP Synopsis at 1. The contracts to be awarded are principally for the design of various boats, floating structures and accessories. Id. at 2. The RFP

requires, among other things, that all work produced under the contract be reviewed and approved by a registered professional engineer (PE). The sole question in this protest is whether or not the agency properly may use the procedures of the Brooks Act to acquire naval architecture and marine engineering services.

By way of background, the Brooks Act requires federal agencies to select contractors for A-E work on the basis of demonstrated technical competence and qualifications. The procedures do not include price competition. Rather, under Brooks Act procedures, the agency selects at least three concerns and ranks them in order of preference. The agency then conducts negotiations with the first-ranked firm (that is, the firm selected as the most highly qualified to provide the services), in an effort to establish a fair and reasonable level of compensation; if those negotiations fail, the agency then negotiates with the second-ranked firm, and so on, until agreement is reached. See 40 U.S.C. § § 1103, 1104.

The protester maintains that the Brooks Act may only be used where an agency is acquiring A-E services in connection with the construction of a building, structure or facility that is immovable and erected on land. According to the protester, Congress never intended the Brooks Act to be applicable to naval architecture and marine engineering services. Tridentis argues that the agency instead is required to use negotiated procurement procedures under part 15 of the Federal Acquisition Regulation (FAR) to meet its requirements.

The agency responds that it properly may use Brooks Act procedures for its acquisition. The agency maintains that the definition of A-E services included in the statute and FAR part 36 is broad enough to encompass the services it is soliciting.

We agree with the agency that the language of the Brooks Act is broad enough to encompass the solicited services. The Brooks Act provides as follows:

Architectural and engineering services. The term "architectural and engineering services" means--

(A) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and

engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

40 U.S.C. § 1102(2). The agency relies on the terms of subsection “C” in support of its position.¹

Our review of the statutory language leads us to conclude that the limitation urged by the protester--that Brooks Act procedures may be used only to acquire A-E services performed in connection with the construction of a building, structure or facility on land--does not exist. We note at the outset that subsection “B” of the statute specifically identifies acquiring professional services of an architectural or engineering nature that are “associated with research, planning, development, design, construction, alteration, or repair of real property.” This specific statutory language appears to be precisely the limitation that the protester is urging.

However, subsection “C” of the statute (on which the agency relies) provides a separate, different, and supplemental definition of A-E services that is not tied to any activity associated with real property. It simply defines A-E services as “other professional services of an architectural and engineering nature” that may be performed by members of the architectural and engineering professions, without limitation. 40 U.S.C. § 1102(2)(C). The statute does not identify or enumerate--and indeed is silent about--which architectural and engineering disciplines or professions to which it refers. It also lists a number of generic examples of activities that clearly encompass the activities contemplated under the current solicitation, including performing studies, preparing conceptual designs, preparing plans and

¹ The agency identifies the terms of FAR § 36.601-4(a)(3) as the authority for its solicitation. That provision implements--and essentially mirrors--clause “C” of the Brooks Act quoted above and provides as follows:

Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.

specifications, and reviewing drawings. Thus, we conclude that the agency reasonably has determined that the disciplines of naval architecture and marine engineering are encompassed by this broad definition, and that the activities for which the agency seeks to contract are included in the list of activities identified in the statute.

In support of its position, the protester directs our attention to the legislative history of the Brooks Act, H. R. Rep. No. 92-1188 (1972) and S. Rep. No. 92-1219 (1972). However, those materials are not probative because the 1972 version of the Brooks Act included a definition of A-E services that was different from the definition in the current version of the statute. The prior definition was as follows:

The term, "architectural and engineering services" includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

Pub. L. No. 92-582, 86 Stat. 1278-9 (1972). The current definition was the product of a 1988 amendment² clarifying the definition of A-E services, in part, in reaction to decisions of our Office that appeared to narrow the definition of A-E services. In this connection, the legislative history of the amended definition provided as follows:

Section 8 of H.R. 3345 amends a section of title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq. [currently 40 U.S.C. § 1101 et seq.]), which provides a qualifications-based process for the selection of architects, engineers, and providers of related services. This procedure was enacted into law in 1972 as P.L. 92-572. In the intervening years, changing technology and applications, as well as several decisions of the Comptroller General which might have been interpreted as narrowing the applicability of this law, have made clear the need to clarify for Federal agencies the range of services that are subject to the 1972 Act's procedures. To that end, Section 8 amends section 541 of 40 U.S.C. to provide a more complete and explicit definition of subject services than exists in current law.

H. R. Rep. No. 100-911 at 24 (1988); see also H. R. Rep. No. 100-1070 (Conference Report) at 89 (1988); 134 Cong. Rec. H30062 (daily ed. Oct. 12, 1988) (Statement of Mr. Myers, (emphasis supplied)): "It is the intent of this new definition . . . to clarify and make permanent the application of the Brooks A/E law to the

² The current definition actually was included in two separate, but identical, statutes, Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988) and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988).

services of surveying and mapping firms and other appropriate services for all Federal agencies.”

The amended definition was the subject of a request for an advance decision from our Office by the Forest Service. Forest Service, Dep’t. of Agriculture--Request for Advance Decision, B-233987, B-233987.2, July 14, 1989, 89-2 CPD ¶ 47. That decision responded to the Forest Service’s inquiry regarding whether it was appropriate to acquire mapping and surveying services, property line marking services, preliminary surveys, construction surveys, construction sampling and testing, map scribing, map digitizing, map aerotriangulation, map compilation, mapping photolab activities, and value analysis engineering studies.³ In response, we advised the Forest Service as follows:

However, with regard to other specific services not associated with a specific A-E project that are mentioned by the Forest Service, the determination of Brooks Act applicability should be made initially on a case-by-case basis by the contracting officer in accordance with the definition provided in the 1988 amendment and the FAR, since, as indicated in the conference report, this initial decision is within the discretion of the contracting agency. See H.R. Rep. No. 100-1070 at 89. We will review such determinations where it is alleged that the contracting officer has abused his discretion or made the determination in bad faith.

Forest Service, Dep’t. of Agriculture--Request for Advance Decision, *supra.* at 6.

We recognize that agencies typically use Brooks Act procedures to acquire A-E services in connection with the construction of buildings, structures and facilities. We also recognize that there is nothing in the express terms of the Brooks Act or its legislative history that specifically mentions the acquisition of naval architectural and marine engineering services. Nonetheless, agencies enjoy a degree of discretion in deciding, on a case-by-case basis, whether or not the services they are acquiring are A-E services. Forest Service, Dep’t. of Agriculture--Request for Advance Decision, *supra.* at 6; see also White Shield, Inc., B-235967, Oct. 30, 1989, 89-2 CPD ¶ 392; Photo Science, Inc., B-296391, July 25, 2005, 2005 CPD ¶ 140. Where an agency reasonably determines that the services being acquired are A-E services, the requirements of the Brooks Act apply, even where the ultimate object of the acquisition is not the construction of a building, structure or facility.

³ We note that none of these services are necessarily the types of service that would only be performed in connection with the construction of a building, structure or facility.

In the final analysis, as discussed above, there is nothing on the face of the statute that would preclude using Brooks Act procedures for acquiring naval architectural and marine engineering services, as the agency proposes to do here. There also is nothing on the face of the statute that limits its application to the acquisition of A-E services solely in connection with the construction of a building, structure or facility, as urged by the protester.

The protest is denied.

Susan A. Poling
General Counsel