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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: DuRette Construction Company, Inc.

File: B-294379

Date: September 15, 2004

Rob DuRette, DuRette Construction Company, Inc., for the protester.
Byron W. Waters, Esq., United States Department of Agriculture, Forest Service, for the agency.
Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Although agency apparently disclosed potential proposal revision involving cost savings through use of smaller concrete blocks in construction project, which had been raised by protester during discussions, when conducting subsequent discussions with other competitors, even assuming that this disclosure was improper, the protester did not show competitive prejudice where neither protester nor awardee revised its proposal to utilize smaller concrete blocks.

DECISION

DuRette Construction Company, Inc. protests the award of a contract to Southeast Road Builders, Inc. for construction of the Thorne Bay Marine Access Facility (MAF) project, under request for proposals (RFP) No. R10-05-04-34. DuRette argues that an innovative approach to performance, involving the use of smaller precast concrete blocks in construction of the seawall bulkhead, was improperly disclosed to the awardee during discussions.

We deny the protest.

The Thorne Bay MAF is to be used for the transfer, sorting, and loading of logs onto barges for shipment from the Tongass National Forest. A portion of the project specifications required the construction of a seawall bulkhead using precast concrete blocks, described on accompanying drawings. RFP amend. 2 (drawing sheet 17 of 19).

The parties agree that, during discussions, the protester suggested the possibility of savings through the use of smaller concrete blocks. The agency considered this suggestion and determined that it could be acceptable. It then held subsequent discussions in which the agency concedes that the “CO [contracting officer] apparently raised the block size issue with the other offerors as part of the discussions seeking cost savings in the precast concrete portion of the Project.” Memorandum of Law at 302.¹

The protester contends that the use of the smaller sized block was one of unique innovation that should not have been disclosed to other offerors during discussions. The agency contends that use of the small block size involved a change in the specifications that the agency was required to communicate to the other competitors in order to uphold fair competition. It is not necessary to resolve this dispute, however; if the protester is correct, it has nonetheless failed to demonstrate competitive prejudice.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions, that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Even assuming that the disclosure were improper, the agency argues that the protester suffered no prejudice because both the protester’s initial and final proposals are based on using the concrete block sizes described in the RFP, not the smaller block sizes that the protester mentioned during discussions. Memorandum of Law at 305-06. The agency also submits that the awardee, similarly, did not propose the use of smaller concrete blocks in either its original or revised proposals. Id. at 305. Thus the agency’s actions in disclosing to other competitors the possibility of cost savings through the use of smaller concrete blocks had no effect on the protester’s chance of receiving the award; had no disclosure occurred, the protester still would not have received the award.

In its comments, the protester does not challenge these facts or otherwise demonstrate prejudice. Competitive prejudice is an essential element of every viable protest, and even where an agency’s actions may arguably have been improper, we

¹ Pages of the agency report were numbered sequentially. The memorandum of law began at page 301.

will not sustain a protest where the record does not reflect that the protester was prejudiced. Computer Assocs. Int'l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel