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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Photo Science, Inc.

File: B-296391

Date: July 25, 2005

Kurt W. Allen for the protester.

Robert E. Little, Jr., Esq., and V. Paul Clay, Esq., Department of the Navy, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not abuse its discretion in determining that services to identify, measure and analyze natural resource habitats and cultural resource sites, using Global Positioning System services and Geographic Information Systems data management services, are not surveying services subject to the Brooks Act procedures applicable to the procurement of architectural and engineering services.

DECISION

Photo Science, Inc. protests request for proposals (RFP) No. N68711-05-R-8004, issued by the Department of the Navy, Naval Facilities Engineering Command, for natural and cultural survey services in California, Arizona, Nevada and New Mexico. Photo Science protests that these services are architectural and engineering (A-E) services that must be procured using the specialized procedures prescribed by the Brooks Act.

We deny the protest.

Under the Brooks Act, 40 U.S.C.A. §§ 1101-1104 (West 2005),¹ agencies must publicly announce all requirements for A-E services and select contractors for A-E work on the basis of demonstrated technical competence and qualifications. The procedures

¹ The Brooks Act was recodified in 2002, moving it from its previous location at 40 U.S.C. §§ 541-544 (2000) to its present location. Pub. L. No. 107-217, 116 Stat. 1062 (2002).

do not include price competition; rather, the agency must select the most highly qualified firm and negotiate a contract with that firm at a fair and reasonable level of compensation. Terra Surveys, B-294015, Aug. 4, 2004, 2004 CPD ¶ 155 at 1 n.1; Forest Serv., Dept. of Agriculture--Request for Advance Decision, B-233987, B-233987.2, July 14, 1989, 89-2 CPD ¶ 47 at 2.

The RFP, issued April 18, 2005, was not issued using Brooks Act procedures. Instead, the RFP used negotiation procedures that include price as an evaluation factor. The RFP contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity, task order contract for 1 year with 5 option years.

The RFP, as amended, summarized the contract requirements as follows:

The Contractor shall furnish all labor, management, supervision, materials, equipment, travel and transportation necessary to identify, measure and analyze natural resources habitats and the vegetation and wildlife components thereof and/or cultural resources sites and their related components by providing Global Positioning System (GPS) Natural Resources Surveys, Geographic Information Systems (GIS) Data Management, and Aerial Photography Services at various locations in California, Arizona, Nevada, and New Mexico. The majority of the work will be in California. The contractor shall meet all requirements in [attachment] J-C1 for in-house forces prior to award. This contract will not involve the practice of "Land Surveying".

RFP, amend. 1, § C.1.1. Attachment J-C1 states the experience and education requirements for the following contractor employees: senior GIS analyst, senior biologist, field supervisor, GPS technician, and GIS technician. Except for the GIS technician, the required or desired levels of experience for these employees included natural, biological or cultural resource mapping/analysis.

The Brooks Act, as amended, defines A-E services as follows:

(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 or 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.A. § 1102(2) (emphasis added). Federal Acquisition Regulation (FAR) Subpart 36.6 applicable to the acquisition of A-E services essentially restates the statutory definition,² and adds the following:

Professional surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and shall be procured pursuant to section 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to section 36.601. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services shall be procured pursuant to provision in Parts 13, 14 and 15.

FAR § 36.601-4(a)(4).

The agency states that, except for photogrammetry services,³ which will comprise no more than 10 percent of the total potential contract, the RFP does not solicit surveying and mapping services. The purpose of the services solicited is related to the agency's natural resource management obligations such as those imposed by the Endangered Species Act. The agency will issue task orders under the contract for identification of target species and their habitat, or of cultural resources. According to the agency, the contractor's personnel going into the field in response to these task orders will have to possess knowledge and experience in relevant areas of biology or archeology.

As an example, the agency explains that the contractor may be tasked with mapping the burrows of a desert tortoise--a threatened species. The contractor's personnel

² FAR § 2.201 also restates the statutory definition.

³ The RFP includes services to be performed by a licensed photogrammetrist for the production of rectified, stereo aerial photographs.

will require knowledge of the tortoise's habitat and behavior in order to locate the species in the field and, since the agency is only interested in occupied burrows, contract personnel will need to be able to identify and analyze tracks and scat in order to verify recent activity of the target species at a given burrow. The contractor's personnel would then use a commercially available GPS receiver to identify relevant positional information (longitude and latitude) in GPS data format. The agency further explains that target species are often transitory in nature and the positional information represents the resource location only for that given point in time; therefore, a high degree of precision in determining the location is not needed. According to the agency, after data is collected in the field, the contractor would transfer the GPS data to a computer with GIS software, which would generate a "thematic map" showing the relative positions of the tortoise burrows that were found; this thematic map would ordinarily be used as an overlay on a government-furnished base map or photograph of the area. The agency concludes that these are neither traditional surveying and mapping services, nor services of an A-E nature or "incidental services."

Photo Science specifically does not allege that the RFP solicits mapping services that would require application of Brooks Act procedures.⁴ Protester's Comments at 1. The issue for our Office to resolve, then, is whether the agency is acquiring "surveying services" for which the Brooks Act procedures are required.

It is within the discretion of the contracting agency to determine on a case-by-case basis, in accordance with the Brooks Act and the FAR, whether the service being procured requires application of Brooks Act procedures. We will review such determinations where it is alleged that the agency has abused its discretion or made the determination in bad faith. Forest Serv., Dept. of Agriculture--Request for Advance Decision, *supra*, at 5-6.

We first address the matter of the photogrammetry services included in this RFP, which services the agency concedes are A-E services but asserts constitute only a minor portion of the contract. FAR § 36.601-3(c) states:

When the contract statement of work includes both architect-engineer services and other services, the contracting officer shall follow the procedures in this subpart if the statement of work, substantially or to a dominant extent, specifies performance or approval by a registered or licensed architect or engineer. If the statement of work does not specify such performance or approval, the contracting officer shall follow the procedures in Parts 13, 14, or 15.

⁴ The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council recently considered and rejected requests to amend the language at FAR § 36.601-4(a)(4) concerning mapping services. 70 Fed. Reg. 20,329-20,333 (2005).

Therefore, Brooks Act procedures will not apply to a solicitation for both A-E and non-A-E services if the A-E services do not constitute a substantial or dominant extent of the work required. See Terra Surveys, supra, at 4 n.6; Consulting Eng'rs Council of Metro. Washington, B-211553, Nov. 7, 1983, 84-1 CPD ¶ 92 at 3.

Here, the parties agree that the photogrammetry services in the contract—i.e., surveying and making maps through the use of aerial photography—are surveying services that are “incidental services” under the Brooks Act. The protester has not refuted the agency’s statements that the government’s inventory of base maps and photographs is large, and that photogrammetry services will only be required in the rare instance that the government does not have an existing map or photograph of an area covered under a task order. Since there is nothing in the record to suggest that photogrammetry services would be a substantial or dominant extent of the work under this RFP, the photogrammetry services alone do not provide a basis to require the agency to apply Brooks Act procedures to this RFP.

The protester asserts that the surveying services required here are “traditional” or “incidental” A-E services, which are required to be obtained under the Brooks Act. See 40 U.S.C.A § 1102(2)(C). The agency responds that the services included in this RFP (other than photogrammetry services) are not professional services of an A-E nature or “incidental services” that members of the A-E profession may logically or justifiably perform.

Previously, our Office had held that traditional surveying services were not professional services of an A-E nature, and interpreted “incidental services,” as defined in the Brooks Act, to mean services performed in conjunction with professional services of an A-E nature; therefore, we found that the acquisition of surveying services alone did not require application of Brooks Act procedures. See Ninneman Eng'g-Recon., B-184770, Mar. 9, 1977, 77-1 CPD ¶ 171 at 4-6. In response to our decisions, Congress amended the Brooks Act definition of A-E services to the current statutory language. Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988); Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988). Our Office reviewed the corresponding legislative history, which revealed that Congress considered that the decisions by our Office had interpreted the definition of A-E services more narrowly than was intended, particularly in the case of surveying and mapping services. Forest Serv., Dept. of Agriculture—Request for Advance Decision, supra, at 4. We accordingly amended our test for identifying A-E services to reflect the amended statutory language now in force.

Based on that amendment, and specifically the “incidental services” portion of the definition of A-E services, 40 U.S.C.A. § 1102(2)(C), we now first identify whether a service is the type which is incidental to professional services of an A-E nature, and if so, whether the service is one which members of the architectural and engineering profession may logically or justifiably perform. Forest Serv., Dept. of Agriculture—Request for Advance Decision, supra, at 4-5. Consistent with the language in the statute that surveying and mapping services are “incidental services,” we have since

held that “traditional” surveying services are “incidental services” requiring application of Brooks Act procedures, and have rejected agency determinations to the contrary.⁵ White Shield, Inc., B-235967, Oct. 30, 1989, 89-2 CPD ¶ 392 at 2-3 (cadastral surveying services); Fodrea Land Surveys, B-235413, Oct. 19, 1989, 89-2 CPD ¶ 364 at 1-2 (same); White Shield, Inc., B-235522, Sept. 21, 1989, 89-2 CPD ¶ 257 at 2-3 (same).

Here, however, the RFP does not solicit traditional surveying services, and the protester has not shown that the services solicited are incidental to professional services of an A-E nature which members of the A-E profession (and individuals in their employ) may logically or justifiably perform. The contractor will not perform land surveys or produce maps reflecting land surveys (except for the photogrammetry services discussed above). Rather, the contractor will be primarily identifying and recording the location of flora, fauna and cultural resources using existing maps. According to the agency, and not rebutted by the protester, this work has traditionally been performed by field biologists and archeologists (*i.e.*, field technicians) using compass and camera to crudely record the locations of target species on existing maps. The advent of commercially available GPS equipment has made the recording of location more efficient, but it has not changed the nature of this activity from one of life sciences to one of architecture, engineering or surveying. According to the agency, the required professional expertise has always been, and continues to be, knowledge of what to locate on an existing map, not how to identify geographic position with the accuracy and reliability of a professional surveyor.

There is nothing in the protest record demonstrating that the mere use of GPS equipment to identify location should be considered surveying services. The GPS system was not developed for the surveying or the A-E professions; rather, GPS is a satellite-based positioning system operated by the Department of Defense (DOD). RFP § C.7.2.7. In recent years, GPS technology has become available to the general public, and many fields, both professional and non-professional, have applied the technology to their particular uses. The agency states, and the protester does not

⁵ The protester states that legislative history clearly shows Congressional intent for acquisitions of all surveying services to be subject to the Brooks Act. We find that only the acquisition of “traditional” surveying services is subject to the Brooks Act. As observed by Congressman Jack Brooks, the amendment was not intended to expand the definition to cover services “that are not traditionally understood or accepted [A-E] activities, are not incidental to such [A-E] activities, or have not in themselves traditionally been considered [A-E] services.” 134 Cong. Rec. H10,606, H10,613 (1988). Given the multiple meanings of the word “survey,” many of which are not performed by professional surveyors (*e.g.*, archeological surveys, ethnographic surveys, telephone surveys), it is apparent that just because the contract requires some kind of “survey” does not subject it to the Brooks Act.

deny, that the A-E profession has only developed and applied GPS (and GIS technologies) to A-E work in the past 10 years. We note that at the same time other segments of society have developed and applied GPS technology to just about any activity in which geographic location is of relevance. According to the agency, one such application has been by the natural resources community to record the location of transient biological resources. Specifically with regard to the services solicited under the RFP, a biologist or other field technician walks the land, notes where a given species being observed is at that point in time, and records and reports that information. We agree with the agency that the fact that such a biological field study adopts modern technology to record and report field observations does not transform the activity from that of a biological field study to something else. In this regard, the agency reports that the advantage of using GPS equipment to record the location of field observations is the ease with which the field technician can determine his or her location at any point in time simply by pressing a button on the GPS equipment without needing to reference any other point on the land. Thus, the record provides no basis to consider this activity to be surveying services that would customarily be performed by a professional surveyor, or by other A-E professionals or individuals in their employ.⁶

In response, the protester asserts that the proper use of a GPS receiver requires a professional surveyor and describes a highly technical process that a professional surveyor must apply in order to perform surveying with GPS equipment. This process includes knowledge of how many satellites are being used, the “satellite geometry” with respect to the location being surveyed, and engineering concepts such as “multipath” and “signal-to-noise ratio.” However, the record shows that the highly accurate measurement process described by Photo Science is not what the agency needs or wants, and it is not what the RFP solicits.

Photo Science also argues that the services required here are professional services of an architectural or engineering nature that are required by state law to be performed

⁶ Additionally, the protester references regulations applicable to the acquisition of surveying and mapping services by the U.S. Army Corps of Engineers, and a notice issued by the U.S. Geological Service (USGS) describing an intent to procure services using Brooks Act procedures, as evidence that other agencies consider similar services as surveying services subject to the Brooks Act. The alleged similarity to the services solicited here is not apparent on the face of those documents or from the protester’s reference to them. The referenced Corps of Engineers regulations, EFARS § 36.601-4 (which are not applicable to the Navy), generally describe traditional engineering/land surveying and mapping services. The USGS notice also describes traditional engineering/land surveying and mapping services. Although the USGS notice specifically identifies the use of GPS and GIS services, they are clearly described in the context of traditional surveying and mapping services to be supervised and overseen by a certified photogrammetrist or registered/licensed professional engineer.

or approved by a person licensed, registered, or certified to provide the services. See 40 U.S.C.A § 1102(2)(A). For example, the protester quotes portions of the definition of land surveying under the California Professional Land Surveyors” Act, Cal. Bus. & Prof. Code §§ 8700-8806 (Deering 2005), as follows:

A person . . . practices land surveying within the meaning of this chapter who . . . does or offers to do any one or more of the following:

* * * * *

(e) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of points, monuments, or stations for use in the practice of land surveying or to stating the position of geodetic control points, monuments, or station by California Coordinate System coordinates.

(g) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described [above].

* * * * *

(m) Creates, prepares, or modifies electronic computerized data in the performance of the activities described {above}.

Id., § 8726.

The protester alleges that the solicited GPS services meet the requirements in paragraphs (e) and (f) of the California statute. We disagree. The RFP calls for the contractor to identify natural resources habitats, vegetation, wildlife components and cultural resources in a designated area and then use GPS equipment to identify their respective locations. Our review indicates that paragraph (e) does not apply because the contractor will not determine the position of any monument or reference point which marks a property line, boundary or corner, nor will the contractor set, reset or replace any such monument or reference point. Paragraph (f) does not apply because the agency does not require any geodetic or cadastral surveying--the RFP does not require the contractor to take into account the figure and size of the earth in order to identify any point or location; rather, the contractor is expected to use GPS equipment to receive the location information

from the DOD satellites. The California code does not state that use of GPS equipment to identify location constitutes the practice of surveying.

The protester also alleges that the solicited GIS services meet the requirements in paragraphs (f), (g) and (m) of the California statute. We again disagree. The RFP defines GIS as a computerized mapping system in which a map is made “intelligent” by attaching attribute data. RFP § C.7.2.4. As described above, the agency’s requirement is for the contractor to enter the GPS data points and information about the corresponding resource observed in the field, such as the type of bird or plant identified, into the GIS mapping system and produce a thematic map, which is laid over a government-furnished base map or photograph, which then can be used for environmental planning purposes. Here, as stated above, paragraph (f) does not apply because the RFP does not solicit any geodetic or cadastral surveying. Also, since the services here will not use or rely upon geodetic or cadastral surveying services, sections (g) or (m) also do not apply.

The protester nevertheless alleges that the California Board for Professional Engineers and Land Surveyors determined that the services covered by this RFP constitute land surveying. The allegation is based on an e-mail response from the Executive Director of the Board to an informal inquiry by a professional organization (apparently on the protester’s behalf). This response was not represented to be an official ruling by the Board, but simply enclosed a 2-line statement from a “consultant Land Surveyor” of the Board that did not include an examination of the terms of the RFP. In this regard, the inquiry from the professional organization to the Board did not include the RFP’s statement of work, but only included the agency’s presolicitation notice, which did not contain more than a summary description of the services to be solicited and did not identify that the purpose of the contract would be to identify, measure and analyze natural resources habitats and the vegetation and wildlife components thereof, and/or cultural resources sites and their related components. Based on this record, we cannot find that the agency unreasonably made a determination that was contrary to state law.⁷

Finally, the protester alleges that this RFP is for “professional services of an [A-E] nature performed by contract that are associated with research . . . of real property.” See 40 U.S.C.A § 1102(2)(B). The protester states that since the habitats and cultural resources being identified under the RFP are situated on real property, this contract is for research of real property. However, even if this contract could properly be construed as associated with the research of real property (which we regard as a strained interpretation of this section), the first part of the definition—i.e.,

⁷ Given that the RFP states that the majority of work will be performed in California, we do not discuss here similar statutes from the other states covered under the RFP. We have, however, reviewed all of the protester’s references to those statutes and find no basis to conclude that those statutes apply to the services solicited here.

professional services of an A-E nature--is not satisfied here (at least not to a substantial or dominant extent) for the reasons discussed above.

In sum, there is nothing in the record to suggest that members of the A-E profession, or individuals under their employ, might logically or justifiably perform these services. In addition, there is nothing inherently of an A-E nature in the biological and cultural research that the agency is soliciting. Moreover, there is no showing that the use of GPS and GIS services, regardless of their application, should be considered surveying or A-E services. Under the circumstances, we have no basis to find that the agency abused its discretion or acted in bad faith here in determining that the Brooks Act did not apply.

The protest is denied.

Anthony H. Gamboa
General Counsel