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**Comptroller General
of the United States**

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

Decision

Matter of: Terra Surveys

File: B-294015

Date: August 4, 2004

Larry M. Whiting for the protester.

Lynn W. Flanagan, Esq., Department of Commerce, and Thedlus L. Thompson, Esq., General Services Administration, for the agencies.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's failure to conduct procurement for upgrade of national water level observation network under specialized procedures of the Brooks Act for procurement of architectural-engineering services is denied where protester fails to demonstrate that Act is applicable to required services.

DECISION

Terra Surveys protests the terms of request for quotations (RFQ) No. NCNT0000-4-00014, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for water level monitoring modernization services in Alaska. Terra challenges the agency's intended procurement of the services under a General Services Administration (GSA) Federal Supply Schedule (FSS), arguing that the services are architectural and engineering (A-E) in nature, and the agency thus must procure them under the specialized procedures prescribed by the Brooks Act, 40 U.S.C. §§ 1101-1104 (2000).¹

¹ 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, once a firm is selected as the most highly qualified to provide the services, the agency is to negotiate a contract at a fair and reasonable level of compensation. The Brooks Act defines A-E services as, among other things, professional services of an A-E nature required by state law to be performed by a professional certified to perform the services, as well as "other professional services of an [A-E] nature, or incidental

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We deny the protest.

The RFQ seeks upgrade and operational field services at several of the agency's tide observation stations in Alaska. As part of the agency's effort to modernize its monitoring infrastructure, the RFQ calls for contractor services to install, deploy, and recover water level monitoring instrumentation at various observation sites (as well as to provide emergency recovery of drifting meter mooring buoys, install a new station and maintain others, and upgrade hardware and software). The solicitation requests quotations for a "best value" competition considering technical qualifications and price from firms holding contracts under the GSA schedule for environmental services, geographic information systems. In this regard, after determining that the RFQ performance requirements did not constitute traditional A-E services, and after conducting market research that showed that a number of qualified schedule contractors were available to perform the work, and receiving confirmation from GSA that the RFQ work was within the scope of the environmental services schedule, the agency decided to procure the services under the GSA schedule.²

Terra contends that the RFQ is for A-E services relating to tidal data acquisition, mapping, and surveying, that require performance by registered architects or engineers or their employees, and thus, must be acquired under the Brooks Act.³

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services, which members of the [A-E] professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping" 40 U.S.C. § 1102(2).

² The agency reports, and GSA confirms in a report requested by our Office, that the environmental services schedule, among other things, provides for contractor operational services supporting agencies' environmental programs using geographic information systems. Contracting Officer's Statement at 5. Terra had initially challenged the agency's use of the environmental services schedule, only generally contending that the RFQ was beyond its scope. The record, however, shows that the protester failed to rebut the agency's and GSA's analysis supporting use of the schedule on the basis that the general terms and scope of the schedule encompass the RFQ's services. Since the protester fails to provide any basis to question the reasonableness of the agency's position, with which GSA concurs, we have no basis to review the matter further.

³ We note that although Terra initially argued that Alaska state law requires a licensed surveyor for the RFQ's work, the firm has not rebutted the agency's position that no contractor surveying work or any work related to boundary determinations, as Terra had argued would trigger the alleged licensing requirement, is included in the RFQ, or the agency's analysis supporting its determination that the state law

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Terra also contends that the agency is procuring hydrographic data and services, and that under the Hydrographic Services Improvement Act of 1998 (HSIA), 33 U.S.C. §§ 892 et seq. (2000), the procurement of hydrographic data (such as data acquired through tide and current observations) used in providing hydrographic services (such as the certification of tidal data for use in the production of nautical charts) must be conducted under the specialized qualifications-based procedures of the Brooks Act. Terra points out that the RFQ mentions that an objective of the agency's modernization effort is to "acquire new . . . tidal current measurements." While Terra does not identify any specific RFQ requirement for data acquisition work for mapping and surveying services by the contractor, the protester nonetheless interprets this generally stated objective as a performance requirement for the contractor to obtain and deliver hydrographic data and services, which Terra contends must be performed by a licensed A-E professional.⁴

The agency contends that Terra has misinterpreted the RFQ's requirements in this regard; the agency asserts that Terra has unreasonably concluded that the contractor was to perform a generally stated agency objective to acquire tidal current measurements. The agency contends that the firm instead should have realized from the detailed statement of contractor performance requirements and responsibilities—which is listed under the referenced objective and does not provide any contractor responsibility for the retrieval of the tidal data from the instrumentation—that only the equipment installation/recovery and upgrade/maintenance-type work specifically identified in the RFQ was required here. We agree with the agency's view that Terra bases much of its protest on an unreasonable interpretation of this "objective" provision in the RFQ.

In our view, the stated agency objective, read in context, relates to NOAA's overall long term modernization plan to acquire new tidal measurements. In this regard, the

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cited by the protester—relating to land surveys—is inapplicable. Consequently, we have no basis to review the contention further.

⁴ In the alternative, Terra appears to be suggesting that the contractor's placement of the instrumentation itself should be considered A-E services, because the accuracy of any data ultimately acquired from that instrumentation (that Terra speculates might be used by the agency in future hydrographic services or other products of an A-E nature) would depend upon the contractor's proper installation of the instrumentation. As the agency points out, however, and as is discussed in this decision, the agency will be conducting ongoing evaluation of the propriety of the installation, and, as such, will itself be conducting the allegedly A-E-type work described by the protester. In this regard, agency personnel will be responsible for confirmation of proper installation and stability; the agency also reports that it will remain responsible for the calibration and operation of the equipment, and the retrieval of data.

RFQ does not require tidal or current data compilation by the contractor for any mapping or surveying purpose or otherwise. Rather, the RFQ predominantly anticipates contractor services for the installation and retrieval of water level instrumentation (and, to a much lesser extent, requires limited performance of certain station upgrades and maintenance tasks). As the contracting officer explains, although the agency may acquire water level or current measurements from the instrumentation, it will do so on its own, with agency personnel, and for its own use.⁵

The following points--unchallenged by the protester--provide additional support for the agency's determination that the RFQ's services are not A-E services under the Brooks Act. First, the agency reports that it performs the same work with agency technical staff, not its A-E professional-series personnel. Next, only government personnel will calibrate and operate the instrumentation; in this regard, it is also significant that if any data is ultimately acquired by agency personnel from the water level monitoring instrumentation, only agency personnel will access and use it, not the contractor. In fact, as the agency points out, under the terms of the RFQ, the contractor will be paid for its performance of the RFQ's installation and other equipment and station upgrade work even if no data is ever acquired from the instrumentation. See Declaration of NOAA Deputy Director at 2-4.

Terra initially asserted that certain solicitation requirements for field reconnaissance (related to the installation of a new station) and certain leveling measurements constituted A-E work requiring Brooks Act procedures. The agency has explained, however, that the challenged leveling measurements are to be taken by the contractor to assess the propriety of the instrumentation installation, as well as the stability of the instrumentation, and not, as Terra had speculated, for use in nautical chart preparation or boundary determinations. In its comments on the agency's report on the protest, Terra fails to rebut the agency's reasonable explanation of its equipment-related needs for this limited leveling measurement review--which, in our view, essentially relates to quality assurance of the equipment installation, and not the A-E type of hydrographic services the protester suggests.⁶ As to its initial

⁵ As such, we also cannot find that the protester has adequately supported its general contention that the agency here is procuring hydrographic data for use in providing hydrographic services under the HSIA; accordingly, Terra's argument that the HSIA requires use of Brooks Act procedures here is unpersuasive. See 33 U.S.C. § 892(4).

⁶ Terra also does not respond to the agency's position that, even if the RFQ's measurement requirements were considered A-E in nature, given the minimal amount of such work under the RFQ, which instead predominantly calls for work that is not A-E in nature, Terra has not shown that the contracting officer abused his discretion in failing to procure the full scope of RFQ requirements under the Brooks Act. See Federal Acquisition Regulation § 36.601-3(c), (d).

challenge to the RFQ's site planning requirements for the installation of a new station, the protester abandons that argument in its comments as well, and, in fact, concedes that the RFQ fails to contain any design work that is A-E in nature. In short, as Terra has failed to persuasively support its challenge to the solicitation, the record before us provides no basis to question the propriety of the agency's actions.

The protest is denied.

Anthony H. Gamboa
General Counsel