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Decision

Matter of: Port of Bellingham

File: B-401837

Date: December 2, 2009

Lee P. Curtis, Esq., Troy E. Hughes, Esq., and Maggie L. Croteau, Esq., Perkins Coie LLP, for the protester.

James H. Roberts, III, Esq., Van Scoyoc Kelly PLLC, for Port of Newport, an intervenor.

Mark Langstein, Esq., Lynn W. Flanagan, Esq., and Diane M. Canzano, Esq., Department of Commerce, for the agency.

Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency had no reasonable basis to determine that awardee's proposed pier was located outside a designated floodplain area and therefore complied with the solicitation's limitations regarding lease of property located within a base floodplain.
 2. Where awardee's proposed pier construction was within a designated floodplain area, agency failed to properly consider whether there was any practicable alternative to selecting awardee's proposal, as was required by the terms of the solicitation.
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DECISION

Port of Bellingham, of Bellingham, Washington, protests the award of a lease by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), to Port of Newport, of Newport, Oregon, pursuant to solicitation for offers (SFO) No. 09WSA0200C to provide office, warehouse, and related space for NOAA's Marine Operations Center-Pacific (MOC-P).

We sustain the protest.

BACKGROUND

The SFO at issue here was published in November 2008, and contemplated the award of a long-term operating lease to support the activities of NOAA's MOC-P.¹ Among other things, the solicitation sought offers to provide 31,000 square feet of office, warehouse and related space, 1,960 linear feet of pier space, and 20,000 square feet of equipment laydown space. Agency Report (AR), Tab 7, SFO, at 5. The solicitation provided that the lease award would be based on the offer determined to be most advantageous to the government based on application of the following evaluation factors: location of site; site configuration and management; quality of building and pier; availability; past performance and project financing; quality of life; and price. AR, Tab 7, SFO amend. 3, at 2. The solicitation also provided that: "An award of contract will not be made for a property located within a base flood plain or wetland unless the Government has determined that there is no practicable alternative." SFO at 7.

In February 2009, five offers were submitted by four offerors, including Newport and Bellingham.² Upon review and evaluation of the offers, the agency determined that four of the five offers were in the competitive range.³ By letters dated April 20, 2009, the agency advised each of the offerors of their inclusion in the competitive range and identified various issues for discussions.

Concurrent with its ongoing evaluation of proposals, the agency contracted with an engineering firm to perform an environmental assessment (EA) of the various offers, as required by the National Environmental Policy Act of 1969 (NEPA).⁴ In June 2009, the agency published a draft EA that provided in-depth environmental analysis regarding each of the four offered sites; the final EA was published in July with no substantive changes. Among other things, both the draft and final EA stated, under the heading "Floodplains," as follows:

¹ The MOC-P, which has been located in Seattle, Washington, for more than 60 years, provides centralized management for 10 NOAA ships and is the permanent homeport for 4 of those ships. In July 2006, a fire destroyed a significant portion of MOC-P's facilities, forcing NOAA to reduce the scope of its current lease and distribute some of its ships to alternative locations; what remains of the ongoing lease expires in June 2011.

² Bellingham submitted two proposals.

³ Bellingham's second proposal was excluded from the competitive range.

⁴ The agency states that the EA "was performed by personnel from various technical disciplines including, but not limited to, those with background in port engineering, environmental planning, water resources, wetlands, geology, and marine species and habitats." AR, Tab 2, at 15.

[Newport's] proposed dock would be within the 100-year [base] flood plain^[5] (Zone A2),^[6] and is therefore likely to be impacted by flooding, particularly if the finished level of the dock is below an elevation of nine feet NGVD [National Geodetic Vertical Datum].^[7] Additionally, there is some potential for the structure to affect the characteristics of flooding in the area, by trapping debris against the piles of the dock and/or altering the way in which floodwaters circulate/flow within the bay.^[8]

⁵ The agency explains that a "base floodplain" is an area that is likely to be flooded once every 100 years or, described in the alternative, an area that has a 1 percent chance of flooding during a given year. AR, Tab 2, at 16.

⁶ The agency further notes that base floodplains are designated by the Federal Emergency Management Agency (FEMA) as "'Zone A2" where FEMA has established a "base flood elevation" (BFE)—that is, the level of water surface elevation resulting from a 100-year flood. Id.

⁷ There is no dispute that the BFE applicable to Newport's proposed site is 9 feet NGVD.

⁸ In addition to identifying the location of Newport's proposed pier as being within the designated floodplain area, the EA describes various aspects of Newport's proposed pier structure, stating:

A new pier for NOAA use is to be constructed to the west of where the existing piers are currently situated. . . .

Preliminary conceptual design undertaken by the offeror . . . estimated that the new pier would require the following piles:

- * 70 vertical pier piles (60 edge, 10 middle), which are 18 inch diameter, 0.375 inch ASTM 500, filled with concrete to approximately 15 feet below the mudline.
- * 210 batter pier piles (60 edge, 150 middle), of same construction as the vertical pier piles.
- * 240 fender piles, which are 12.75 inch diameter, 0.5 inch wall
- * 22 vertical small boat mooring piles 16 or 18 inches in diameter, 0.375 inch ASTM 500.

It is anticipated that vibratory methods would be used to drive the new piles, although jetting could used, if allowed by the relevant agencies. . . .

(continued...)

AR, Tab 20, Final EA, at 5-96.

During discussions with Newport, the agency brought the floodplain matter to Newport's attention, stating:

It appears that the offered site and pier are in the 100 year flood plain.⁹ This would be all parts of the site lower than 9 feet National Geodetic Vertical Datum (NVGD) . . . are within the 100-year floodplain (Zone A2 on the FEMA map, base flood elevation of 9 feet NVGD). Please confirm in your Final Revised Proposals (FRP's) that the finished site level and structures will be above the 100 year flood plain (see SFO Section 1.7).

AR, Tab 15, Letter from Contracting Officer to Newport, May 14, 2009, at 1.

In response, Newport did not alter the location of its proposed pier, nor did it provide any meaningful explanation as to why the pier should be considered to be outside of the floodplain area.¹⁰ Nonetheless, Newport concluded its response to the agency by stating: "all proposed facilities and structures will be designed above the BFE." AR, Tab 15, Engineer's Memorandum, May 22, 2009, at 3.

Following submission of final proposals, the agency's source evaluation board (SEB) evaluated the competing offers and concluded: "As all four offerors met the requirements of the solicitation each offer was analyzed on both its technical and financial merits to determine the awardee of this procurement." AR, Tab 22, SEB Final Revised Proposal Summary Report, at 54. With regard to evaluation under the non-price evaluation factors, the SEB concluded that "Port of Newport's technical proposal was determined to be the most technically sound" and that "Port of Bellingham's technical proposal received the second highest ranking." *Id.* at 55. With regard to total evaluated price, the agency determined that Bellingham offered

(...continued)

It is anticipated that approximately 42,000 cubic yards would need to be dredged from the proposed pier site. . . .

AR, Tab 20, at 4-18 to 4-19.

⁹ In addition to Newport's proposed pier, the EA noted some potential that Newport's proposed buildings containing office and warehouse space might be constructed below the BFE.

¹⁰ In contrast to Newport's failure to provide any meaningful information regarding the apparent location of Newport's proposed pier within the designated floodplain area, Newport's response did address the other structures on its proposed site.

an annual lease price that was significantly higher than Newport's annual lease price of \$2,533,439. Id. at 65. Based on this evaluation, the agency concluded that "Port of Newport has met all requirements outlined in the solicitation, has been evaluated as the most technically proficient offer, and offers the Government the lowest price." Id. at 58-59.

Newport's proposal was selected for award on August 4. This protest followed.

DISCUSSION

Bellingham protests that the agency failed to comply with the SFO provision that stated: "An award of contract will not be made for a property located within a base flood plain or wetland unless the Government has determined that there is no practicable alternative." See SFO at 7. More specifically, Bellingham protests that Newport's proposed pier was clearly within a designated floodplain area; that the agency had no reasonable basis to conclude otherwise; and that the agency was, therefore, required to make a determination as to whether there was a practicable alternative to Newport's offer.

The agency responds that it "properly concluded that Newport's offered property is not located within the base floodplain," and that, having so concluded, that the agency "was not required to and properly did not conduct a practicable alternative analysis." AR, Tab 2, at 15. In maintaining that Newport did not propose property within the designated floodplain area, the agency refers to the fact that the "finished level" of Newport's proposed pier is projected to be higher than 9 feet NGVD (the applicable BFE) asserting: "[I]f the finished level of the pier were built below 9 NGVD it would be located within the base floodplain and likely impacted by flooding; if it were built above 9 NGVD it would not be in the base floodplain." Agency Response to Protester's Comments, Oct. 16, 2009, at 2. The agency also references Newport's conclusory representation, provided in response to the agency's discussion question, quoted above, that "all proposed facilities and structures will be designed above the BFE."¹¹ On this basis, the agency maintains

¹¹ Despite the agency's purported reliance on Newport's conclusory representation, the contracting officer expressly acknowledges that Newport's response provided no meaningful information regarding the location of its pier, summarizing Newport's response as follows:

The Port of Newport provided a response [to the floodplain discussion question] with its FRP that included a statement an[d] analysis dated May 22, 2009, by a professional engineer with KPFF Engineering, that **except for the pier**, Newport's proposed site was not in a 100-year or base floodplain. [Bold added.]

AR, Tab 1, Contracting Officer's Statement, at 10.

that it reasonably concluded that Newport's proposed pier was outside the designated floodplain area and, accordingly, maintains the agency had no obligation to—and did not—consider whether there was any practicable alternative.

Our Office has previously considered whether, in leasing real property, an agency has properly considered the particular floodplain requirements that are at issue here. See, e.g., Ronald Brown, B-292646, Sept. 20, 2003, 2003 CPD ¶ 170; Vito J. Gautieri, B-261707, Sept. 12, 1995, 95-2 CPD ¶ 131; Alnasco, Inc., B-249863, Dec. 22, 1992, 92-2 CPD ¶ 430; Wise Inv., Inc., B-247497, B-247497.2, 92-1 CPD ¶ 480; Oak Street Distribution Ctr., Inc., B-243197, July 2, 1991, 91-2 CPD ¶ 14; Western Div. Inv.; Columbia Inv. Group, B-213882, B-213882.2, Sept. 5, 1984, 84-2 CPD ¶ 258. In this regard, we have noted that the floodplain requirements flow from Executive Order (EO) No. 11988, 42 Fed. Reg. 26,951 (1977), which precludes a federal agency from providing direct or indirect support of flood plain development when there is a practicable alternative. We have further noted that the purpose of EO No. 11988 is to minimize the impact of floods on human health and safety, as well as to minimize the impact on the environment.¹² See Vito J. Gautieri, *supra*, at 2-3. In considering compliance with these floodplain requirements, we have held that an agency must, at

¹² Specifically, EO No. 11988 states:

[I]n order to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development whenever there is a practicable alternative, it is hereby ordered as follows:

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(1) Before taking an action, each agency shall determine whether the proposed action will occur in a floodplain. . . .

(2) If an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in this Order requiring siting in a floodplain, the agency shall, prior to taking action, (i) design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order, and (ii) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain.

Protesters Comments on Agency Report, exh. 1, at 1-2.

a minimum, consider whether a proposed structure will be located within a designated floodplain area. See, e.g., Ronald W. Brown, supra, at 1-2 (agency reasonably concluded that floodplain provisions did not bar award of lease where proposed building was not located within the floodplain area, even though the periphery of the site was within the floodplain); see also Oak Street Distribution Ctr., supra, at 3-4 (agency properly awarded lease where proposed building was not within floodplain); cf. Wise Inv., Inc., supra, at 2-4 (award of lease not prohibited where ground level of site had been elevated by filling).

Here, based on the record discussed above, there can be no reasonable doubt that Newport's offer proposed to build its pier structure within the designated floodplain area. Further, as noted above, Newport's construction of the pier was a significant aspect of its offer in that the solicitation required offerors to provide a minimum of 1,950 linear feet of pier space.¹³ AR, Tab 7, at 7. Finally, it is clear that the pier structure may have an environmental impact on the floodplain area within which it is to be located.¹⁴

As discussed above, Newport's proposed pier construction within the designated floodplain area was expressly presented to the agency by the very engineering firm the agency retained to, among other things, inform the agency on floodplain matters.¹⁵ Consistent with that notification, in conducting discussions with Newport, the agency requested that Newport address the floodplain issue in the context of the location of its proposed pier; yet, Newport did not.¹⁶ Finally, the fact that the "finished level" of the pier may be above the BFE has no bearing on the clearly apparent fact that the pier structure itself is to be constructed within the designated

¹³ In this regard, in defending against this protest, the contracting officer has stated: "Pier structures are essential to meet the operational requirements of the Marine Operations Center-Pacific." AR, Tab 1, at 11.

¹⁴ As noted above, in addition to concluding that the pier would "likely be impacted by flooding," the EA stated that the pier could potentially affect the area "by trapping debris against the piles of the dock and/or altering the way in which floodwaters circulate/flow within the bay." AR, Tab 20, at 5-96.

¹⁵ As the agency points out, there can be no question as to the qualifications of the personnel that prepared the EA. Specifically, as described by the agency, the EA "was performed by personnel from various technical disciplines including, but not limited to, those with background in port, engineering, environmental planning, water resources, wetlands, geology, and marine species and habitats." AR, Tab 2, at 15.

¹⁶ Indeed, as summarized by the contracting officer, Newport's response to the agency's discussion question regarding the floodplain matter addressed all of Newport's proposed site "except for the pier." AR, Tab 1, at 9.

floodplain area, which will, among other things, require Newport to drive hundreds of concrete piles “approximately 15 feet below the mudline.”¹⁷ See AR, Tab 20 at 4-18. In this regard, neither Newport’s proposal nor the agency’s contemporaneous evaluation documents, address the specific environmental issues identified in the EA report, including the potential for debris to be trapped against the concrete pier piles or the pier’s alteration of the way floodwaters circulate and flow within the bay.

On this record, there was no reasonable basis for the agency to conclude that Newport’s proposal did not fall within the scope of either the solicitation’s express floodplain limitations or EO No. 11988’s limitations regarding potential environmental impacts. Accordingly, the agency was required to consider the

¹⁷ Although not specifically addressed by the parties, we note that FEMA has discussed this issue in connection with the National Flood Insurance Program (NFIP). In a booklet titled “Answer to Questions About the NFIP,” FEMA has stated:

75. Does elevating a structure on posts or pilings remove a building from the Special Flood Hazard Area (SFHA)?

Elevating a structure on posts or pilings does not remove a building from the SFHA. If the ground supporting posts or pilings is within a floodplain, the building is still at risk. The structure is considered to be within the floodplain, and flood insurance will be required as a condition of receipt of Federal or Federally related financing for the structure. The reason for this, even in cases where the flood velocity is minimal, is that the hydrostatic effects of flooding can lead to the failure of the structure’s posts or pilings foundation. The effects of ground saturation can lead to decreased load bearing capacity of the soil supporting the posts or pilings, which can lead to partial or full collapse of the structure. Even small areas of ponding will be subject to the hydrodynamic effects of flooding; no pond or lake is completely free of water movement or wave action. This movement of water can erode the ground around the posts or pilings and may eventually cause collapse of the structure.

FEMA Internet Website at www.fema.gov/business/nfip/fldmanre.shtm.

environmental impact of Newport's proposed pier structure and to determine whether there was a practicable alternative to Newport's offer; the record is clear it did not.

The protest is sustained.¹⁸

RECOMMENDATION

Since the contract award to Newport failed to comply with the solicitation requirements regarding lease of property within a base floodplain, we recommend that the agency comply with those requirements. Specifically, the agency should consider, and document, whether there was a practicable alternative to Newport's offer. In the event the agency's analysis identifies a practicable alternative, as contemplated by the solicitation, we recommend that the agency implement such alternative, if otherwise feasible. In the event the agency's analysis concludes there is no practicable alternative, it should comply with the procedural requirements established in EO No. 11988, as set out above. Further, the agency should provide a copy of its documentation regarding this matter to the parties. Finally, we recommend that the protester be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1) (2009).

Lynn H. Gibson
Acting General Counsel

¹⁸ In defending against this matter, the agency has requested that we dismiss Bellingham's protest for various reasons, including the agency's assertions that it was legally precluded from awarding the lease to Bellingham due to Bellingham's price and/or that Bellingham's proposal should be similarly viewed as offering a structure within a designated floodplain area. We have declined to dismiss the protest based on the agency's post-protest assertions, since it is not clear that, during the acquisition process, the agency considered either of these matters as a mandate for rejecting Bellingham's proposal. While these matters may be proper considerations by the agency in determining if there are practicable alternatives, in the context of the agency's dismissal requests we view the agency's post-protest assertions as being made "in the heat of litigation," and we will not rely on them as bases for dismissing the protest. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 ¶ 91 at 15.