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FANNICE

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Contract Award Under Competitive Bidding Process]

FILE: B-200999

DATE: February 17, 1981

MATTER OF: Association of Soil and Foundation Engineers

DIGEST:

1. Where soil boring contract can be performed by other than architectural or engineering (A-E) firms and is independent of A-E project, competitive bidding procedure may be used in lieu of selection method set forth in Brooks Bill, 40 U.S.C. § 541, et seq. (1976).
2. Solicitation requirement for report by registered professional engineer is unduly restrictive of competition where contracting agency admits that other than engineer can perform work required.

The Association of Soil and Foundation Engineers (ASFE) protests against award of a contract for soil boring services required at the Prime Hook National Wildlife Refuge by the Fish and Wildlife Service (FWS), Department of the Interior, to Edward H. Richardson Associates, Inc., under competitive bidding procedures. ASFE argues that, since the solicitation called for the services of a professional engineer, the procurement should have been conducted in compliance with the procedures set forth in the Brooks Bill, 40 U.S.C. § 541, et seq. (1976), which states the Federal Government's policy in the procurement of architect-engineer (A-E) services.

The protest is sustained in part and denied in part. However, we cannot recommend any corrective action with respect to this particular procurement because of the extent of performance.

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The solicitation required the contractor to bore two test holes, to perform related testing of soil samples obtained, and to submit a final report on the results of the samplings obtained and testing performed thereon. Essentially, ASFE's argument is based upon the fact that the bidding schedule stated that the final report was required to be furnished by a "Registered Professional Engineer." The ASFE believes that this requirement brings the entire contract within the purview of the Brooks Bill since any of the required services which need not be performed by an engineer are services which are "incidental" to the engineering services required.

The Department of the Interior argues that this procurement is not for A-E services subject to the Brooks Bill because the requirement for a report by a professional engineer is only a small part of the entire contract. The Department of the Interior states, and ASFE concedes, that although the solicitation requires a report by a registered professional engineer, the technical judgments to be made on the soil samples could be performed competently by a geologist as well as by an engineer. Furthermore, the agency reports that construction design work to be performed after the soil borings are completed will be performed in-house by FWS architects and engineers.

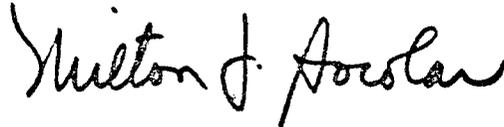
The issue then is whether services which need not necessarily be performed by an A-E firm must be procured under Brooks Bill procedures because the solicitation requires the services of an A-E firm for a portion of the work.

In our decision in Ninneman Engineering--reconsideration, B-184770, March 9, 1977, 77-1 CPD 171, we found that both the language of the Brooks Bill and its legislative history indicate that the bill's procedures apply whenever (1) the controlling jurisdiction requires an A-E firm to meet a particular degree of professional capability in order to perform the desired services, or (2) the services logically or justifiably may be performed by an otherwise professional A-E firm and are "incidental" to professional A-E services, which clearly must be procured by the Brooks Bill method.

[All parties to the present protest agree that the soil boring services can be performed by other than an engineering firm (i.e., a geologist) and we are not aware of any State or local law requiring the use of a registered professional engineer to perform such work. Accordingly, it is clear that under Ninneman, supra, the solicitation's requirement for a report by a registered professional engineer, in the absence of a State or local licensing requirement, does not bring the procurement within the purview of the Brooks Bill.]

Moreover, the contracting agency has admitted that the required testing and reporting can be accomplished "with perfectly acceptable levels of competence by a geologist" as well as by an engineer. Although we have held that a contracting agency may impose a restriction on competition if the restriction is deemed necessary to meet the agency's actual minimum needs, in the present case, we do not believe the restriction imposed by the solicitation's reporting requirement had a reasonable basis. See Norfolk Shipbuilding and Drydock Corporation, B-200668, January 27, 1981, 81-1 CPD _____; National Stenomask Verbatim Reporters Association, B-183837, August 5, 1975, 75-2 CPD 84. Thus, we believe the provision was unduly restrictive of competition. In this connection, we note that Interior has advised that this requirement will not be included in future solicitations for similar services. Because the contract was awarded on October 23, 1980, and work was required to be completed within 30 days of award, corrective action is not feasible.]

[The protest is denied to the extent it involves the Brooks Bill applicability and sustained to the extent that it concerns the requirement that a report be submitted by a registered professional engineer.]



Acting Comptroller General
of the United States