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DECISION



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

[Protest of Procedures Used in Army RFQ]

FILE: B-199548

DATE: September 15, 1980

MATTER OF: Association of Soil and
Foundation Engineers

DL 605222

DIGEST:

1. Trade association comprised of potential bidders is interested party under Bid Protest Procedures to raise protests concerning economic, professional or legal interests of all members of association where any individual member could raise protest.
2. Protest concerning applicability of Brooks Bill, 40 U.S.C. § 541 et seq. (1976), to Armed Forces and challenging propriety of procedures used by military for procuring engineering services which is filed with GAO more than 10 working days after protester receives initial adverse agency action, is untimely but presents issue of widespread interest and will be considered on merits as significant issue under 4 C.F.R. § 20.2(c) (1980).
3. Brooks Bill only applies per se to agencies subject to Federal Property and Administrative Services Act of 1949, not agencies subject to Armed Services Procurement Act of 1947.
4. Brooks Bill selection policies for architect-engineer contracts are applicable only to military construction projects by virtue of Military Construction Appropriation Acts.
5. Army procurement of engineering and technical services for environmental surveys which may or may not lead to construction is not a construction contract and award is properly based on price competition as well as technical considerations.

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The Association of Soil and Foundation Engineers (ASFE) protests the procedures used in Request for Quotations (RFQ) DAAK11-80-Q-0122, issued by the United States Army Armament Research and Development Command to procure engineering and technical services for conducting environmental surveys to determine whether various contaminants are migrating beyond the boundaries of an Army base. The basis for protest is that the procurement is based on price competition as well as technical considerations, a procedure which ASFE asserts is contrary to the provisions of the Brooks Bill, 40 U.S.C. § 541 et seq. (1976). ASFE sent a letter to the Army on May 29, 1980 protesting the procurement method used in the solicitation. The protest was denied by the contracting officer on June 6. ASFE filed its protest with our Office on July 11, 1980. AGC00911

Interested Party

As a preliminary issue, we must consider whether ASFE, a trade association representing potential offerors, is an "interested party" qualified to raise this protest under our Bid Protest Procedures, 4 C.F.R. § 20.1 (1980).

In determining whether a protester satisfies the interested party criterion, our Office will examine the degree to which the interest is both established and direct. In the course of such an examination, we consider the nature of the issues raised and the direct or indirect benefit to or relief sought by the protester. ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD 245. [We believe the appropriate interest is present here, since the protester raises an issue which involves the economic and professional interests of all its members, any of which could have raised this protest issue on its own.] Consequently, we view ASFE as an interested party within the meaning of 4 C.F.R. § 20.1

Timeliness

Our Bid Protest Procedures, 4 C.F.R. § 20.2, urge protesters to seek resolution of their complaints initially with the contracting agency. Where a protest has been filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of the

protester's receipt of the initial denial by the contracting agency of the protest in order for it to be considered timely by our Office. 4 C.F.R. § 20.2(a).

Although ASFE received notification that its initial protest sent by letter to the Army was rejected by the contracting officer on June 6, 1980, ASFE did not file its protest with our Office until July 11, 1980. The protest filed by ASFE is thus untimely as it was not filed with our Office within 10 working days of ASFE's receipt of notice of initial adverse agency action.

We believe, however, that the protest raises an issue significant to procurement practices or procedures. 4 C.F.R. § 20.2(c). The term "significant issue" refers to a principle of widespread interest to the procurement community. 52 Comp. Gen. 20, 23 (1972). This protest, which initially concerns the applicability of the Brooks Bill to the Armed Forces and which ultimately challenges the propriety of the procedures used in this case and in the future by the Army in procuring engineering services, is of widespread interest. Consequently, we will consider this protest on the merits. See High Voltage Maintenance Corp., 56 Comp. Gen. 160, 162 (1976), 76-2 CPD 473; Michael O'Connor, Inc., 56 Comp. Gen. 107, 108 (1976), 76-2 CPD 456; International Business Machines Corporation, B-193527, October 23, 1979, 79-2 CPD 280. We do not, however, find any legal merit to this protest.

The protester's complaint is premised principally on the applicability of the Brooks Bill per se to Department of Defense contracting for architect-engineering services. Thus, ASFE argues that it is immaterial whether or not construction is involved in the contract (it is the Army's position that there is no construction involved), since the application of the Brooks Bill is not limited solely to construction contracts. "Any service," ASFE claims, "that may be performed only by a registered professional engineer is per se an engineering service" subject to the Brooks Bill selection procedures.

We do not believe it is necessary to decide the all-encompassing nature of the Brooks Bill's application alleged by ASFE or whether this contract requires services

which can only be performed legally by "registered professional engineers" because the legislation in issue only amends the Federal Property and Administration Services Act of 1949, 40 U.S.C. § 471 et seq. (1976), the statute applicable to civilian agencies of the Federal Government. An amendment to the House Bill which would have extended the provisions of the Brooks Bill to military procurements by amending the Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 et seq. (1976) was defeated. 118 Cong. Rec. 24587, 24592 (1972). Nonetheless, the selection policies for architects and engineers authorized by the Brooks Bill have been made applicable to military construction contracts every year since fiscal year 1971 by the Military Construction Appropriation Acts. Thus the FY 1980 Act, Pub. L. 96-125, November 26, 1979, provides that "architect and engineering contracts * * * shall continue to be awarded in accordance with presently established procedures, customs, and practice," i.e., Brooks Bill selection procedures. This language appears only in the Construction Authorization Acts and thus in our view is not authority for the broad application urged by the protester insofar as the military departments are concerned.

Construction is defined by Defense Acquisition Regulation § 18-101.1 to mean:

"Construction, alteration or repair * * * of buildings, structures or other real property."

"Building, structures or other real property" is further defined in the regulation, but is not germane to this decision.

While we believe that the professional services which are required for "construction" must of necessity be included in that definition, we do not believe it reasonable to extend the commonly understood meaning of "construction, alteration or repair" to every conceivable situation in which the services of registered professional engineers may be used or arguably may be required for contract performance. This contract involves an environmental survey and analysis of soil and water samples. The results of the survey may or may not eventually lead to construction, depending on the survey's results. This contract may or

may not require the services of a professional engineer; but this contract is not, in our view, a contract for "construction, alteration or repairs" as those terms are commonly understood. We therefore do not believe the Brooks Bill procedures for the selection of architects and engineers are applicable to this procurement.

Accordingly, the protest is denied.

A handwritten signature in dark ink, appearing to read "Milton J. Aoulan". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

For the Comptroller General
 of the United States