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DECISION



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

FILE: B-204634 **DATE:** February 2, 1982

MATTER OF: Association of Soil and Foundation
Engineers

DIGEST:

1. Where contracting agency determines that soil boring and related services can be performed by other than architectural or engineering (A-E) firm and contract is independent of any A-E project, competitive bidding may be used in lieu of selection method set forth in Brooks Act, 40 U.S.C. § 541, et seq. (1976).
2. Solicitation requirements that "technical engineering staff" be approved by contracting officer before commencement of soil boring and that contractor have "sufficient registered professional staff" are unduly restrictive of competition where contracting agency argues that professionals other than engineers (for example, geologists) could fulfill requirements. No corrective action is recommended since there was no competitive prejudice to bidders because agency informed them that other than engineers could fulfill these requirements.

The Association of Soil and Foundation Engineers (ASFE) protests the use of competitive procedures under invitation for bids (IFB) No. DACW69-81-B-0085 issued by the United States Army Corps of Engineers. The IFB called for providing all services, materials, and equipment necessary to drill soil borings at the Summersville Dam in West Virginia and at the John W. Flannagan Dam in Virginia. Among the services required under the contract were installation and testing of piezometers, installation of surface displacement monuments, and collection of subsurface soil samples. The ASFE initially contends that, because the solicitation requires the services of registered professional engineers to supervise the drilling operations, the selection method for the procurement of architectural and engineering (A-E)

services set out in the Brooks Act (40 U.S.C. § 541, et seq., (1976)) should have been used. In the alternative, the ASFE argues that, if the required supervision can be performed properly by other than professional engineers, then the invitation's requirements for "registered professional staff" and submission of the names and qualifications of "technical engineering staff" to the contracting officer for approval constitute an undue restriction on competition. We deny the protest with regard to the ASFE's initial contention; however, we find that the ASFE's alternative argument has merit.

The protester believes that the Brooks Act procedures are mandated because the services being procured must be performed by licensed professional engineers. The protester points out that, even though the actual drilling, soil sampling, and installation of equipment can be accomplished by personnel other than engineers, the invitation states in paragraph C-2 that, "The Contractor shall provide sufficient registered professional staff, experienced in instrumentation, to direct all phases of work under this contract." The Corps of Engineers argues that this requirement can be fulfilled by the use of "any person qualified by proper experience, training and/or education (such as a geologist)." The ASFE counters with the argument that geologists are not required to be registered under West Virginia law and, therefore, this requirement must contemplate the use of engineers since these professionals are required to be registered under the laws of all states. Furthermore, the ASFE points out that paragraph C-2 expressly states that the contractor's "technical engineering staff" must be approved by the contracting officer before drilling can commence under the contract. The Corps of Engineers reports that the words "technical engineering staff" were inadvertently used in the invitation for bids even though no engineering staff was contemplated. The Corps of Engineers also reports that all prospective bidders who inquired were informed that professionals other than engineers could be approved by the contracting officer even though the term "engineer" appeared in the invitation. The Corps of Engineers argues that there are no known State statutes requiring the use of engineers for soil

borings. Furthermore, the Corps of Engineers contends that no reports or analysis are required of the contractor under this contract and that Government employees will perform any A-E services which may be related to the work performed under this contract.

The Brooks Act declares it to be Federal policy to publicly announce all requirements for A-E services and to negotiate contracts for these services on the basis of demonstrated competence and qualification. In our decision in Ninneman Engineering--Reconsideration, B-184770, March 9, 1977, 77-1 CPD 171, we established that the bill's procedures apply whenever (1) a State statute requires a registered A-E firm to perform the desired services or (2) the services may logically or justifiably be performed by a registered A-E firm and are incidental to A-E services which clearly must be procured by the Brooks Bill method.

Whether the Corps of Engineers needs professional engineering services under this solicitation and, therefore, the Brooks Act should apply is a decision which must be based upon the circumstances of the work to be done and the needs of the contracting agency. This determination is primarily the responsibility of the procuring activity not our Office. Therefore, we will not question an agency's decision not to require an engineer for a particular service unless the protester shows that the determination was unreasonable. See Association of Soil and Foundation Engineers--Reconsideration, B-200999.2, May 11, 1981, 81-1 CPD 367.

The Corps of Engineers has determined that the work can be properly accomplished by other than an A-E firm and the protester has not presented sufficient evidence for us to conclude that the Corps of Engineers' determination was unreasonable. This is particularly true since the Corps of Engineers has indicated that any A-E services which may arise in connection with this contract will be performed in-house. We note that under the terms of the solicitation the drilling locations and methods and location of piezometers are subject to approval of the contracting officer, inspection of work performed is to be made by the contracting officer or his representative before acceptance by the Government, and there

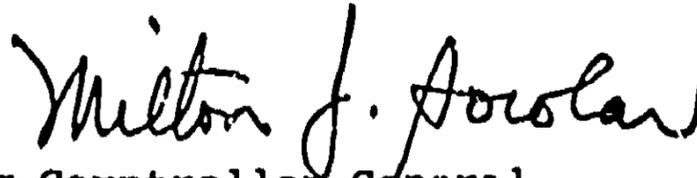
is no requirement for the contractor to analyze the samples obtained. Accordingly, we do not disagree with the contracting agency's determination in this case.

Moreover, our review of State statutes revealed no statute which specifically requires that soil borings and related work be performed only by registered professional engineers and no such statute has been cited by the ASFE. Even though the required services may logically or justifiably be performed by a registered A-E firm as well as by other than an A-E firm (a geologist, for example), there is no evidence that the present contract is being performed in conjunction with any A-E project. Therefore, we conclude the procurement was properly conducted under competitive procedures, and we are denying the ASFE's protest insofar as it contends that the Brooks Act procedures were required in this case.

We find the ASFE's alternative argument to have merit. The Corps of Engineers has argued convincingly that it does not need the services of engineers under this contract. However, the express terms of paragraph C-2 of the invitation require approval of the "technical engineering staff" proposed by the contractor. Moreover, we think that paragraph C-2's requirement that the contractor provide "sufficient registered professional staff" implies that the services of engineers are necessary to be eligible for award under this solicitation, especially in view of the fact that engineers are required to be registered under West Virginia law and geologists are not. In effect, these provisions imposed an unnecessary requirement upon all bidders. 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, the Corps of Engineers has admitted that it did not need engineering staff since it will perform such work using in-house staff. Thus, we conclude that the requirements for "sufficient registered professional staff" and approval of "technical engineering staff" as set forth in the invitation had no reasonable basis. See Association of Soil and Foundation Engineers, B-200999, February 17, 1981, 81-1 CPD 99. Accordingly, we agree with the

ASFE that the provisions were unduly restrictive of competition. However, the Corps of Engineers did inform all potential bidders who inquired that the paragraph C-2 requirements were being interpreted as not necessitating the use of engineers. Moreover, the ASFE's members (whom we understand to be exclusively engineering firms) were not prejudiced by the solicitation's restrictions.

The protest is denied as to the argument that the Brooks Act procedures were mandated. However, we agree with the ASFE that language denoting the use of engineers should not be used in solicitations when this is not an actual need of the agency. By letter of today, we are notifying the Secretary of the Army of this impropriety so that future solicitations will be properly worded to state only the minimum needs of the agency.



Acting Comptroller General
of the United States