The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Forest Service, Department of Agriculture--
Request for Advance Decision

File: B-233987; B-233987.2

Date: July 14, 1989

DIGEST

Amendment to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 (1982) (the Brooks Act), clarifying the definition of architectural and engineering services subject to specialized Brooks Act procedures modifies prior General Accounting Office decisions interpreting the scope of the definition.

DECISION

The Forest Service, United States Department of Agriculture, has requested an advance decision from our Office on the proper interpretation of the revised definition of architectural and engineering (A-E) services contained in Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988) and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), amending 40 U.S.C. § 541 (1982) (the Brooks Act).1/ The principal question raised by the Forest Service is whether various services enumerated in the new definition of A-E services, including mapping and surveying, require the use of specialized A-E procedures prescribed by the Brooks Act when those services are not being procured incidental to or in conjunction with traditional A-E projects.

BACKGROUND

With the enactment of the Brooks Act in 1972, Congress established specialized procedures for the procurement of

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1/ These two Acts, passed within two days of each other, contain identical provisions revising the definition of A-E services.

A-E services. Specifically, the Brooks Act requires the mandatory use of special procedures to procure A-E services encompassed by the definition contained in the Act. Under these procedures, requirements and evaluation criteria are publicly announced, the qualifications of interested firms are evaluated, discussions are held, and the three most qualified firms are ranked in order of preference. Negotiations then are conducted with the highest ranked firm. If an agreement cannot be reached on a fair price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. AAA Engineering and Drafting, Inc., et al., 66 Comp. Gen. 436 (1987), 87-1 CPD ¶ 488. While contracts are required to be awarded at fair and reasonable prices on the basis of demonstrated competence and qualifications, the Brooks Act procedures effectively eliminate price competition for these professional services. Prior to the 1988 amendment, A-E services were defined at 40 U.S.C. § 541(3) (1982) as "those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform."

Interpreting this language in our decisions, we developed a two-pronged test for determining when Brooks Act procedures apply: (1) where 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) where the services "logically or justifiably" may be performed by a professional A-E firm and are "incidental" to professional A-E services (i.e., as part of an A-E project and provided in the course of furnishing A-E services for that project). See Mounts Engineering, B-230790; B-230791, Apr. 13, 1988, 88-1 CPD ¶ 365; AAA Engineering and Drafting, Inc., et al., 66 Comp. Gen. at 440; Ninneman Engineering--Reconsideration, B-184770, Mar. 9, 1977, 77-1 CPD ¶ 171.

In Ninneman, we explained that the first prong of the test was based primarily on the fact that the Brooks Act requires the procurement of "architectural or engineering services" to be from an A-E firm, which was defined in the Act as "any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering." 40 U.S.C. § 541(1). We quoted the legislative history of the Act as follows:

> "This definition requires utilization of the selection provided in the bill for the procurement of architectural and engineering services, or also when the scope and the nature of the proposal, to

> a substantial or dominant extent, logically falls within the unique expertise of these professions."

S. Rep. No. 1219, 92d Congress, 2d Sess. 8 (1972); H.R. Rep. No. 1188, 92d Congress, 2d Sess. 10 (1972). Thus, we concluded that the first part of the Brooks Act definition, "professional services of an architectural or engineering nature," refers to "services which uniquely, or to a 'substantial or dominant extent' logically require performance by a professionally licensed and qualified 'architect-engineer.'" Ninneman Engineering--Reconsideration, B-184770, supra. We noted that this definition would consist essentially of design and consultant services procured by federal agencies in connection with construction programs.

The second part of the definition of A-E services included "incidental services that members of these (A-E) professions and those in their employ may logically or justifiably perform." 40 U.S.C. § 541. We interpreted this language as meaning that Brooks Act procedures are applicable where the services may "logically or justifiably" be performed by A-E firms and where such services are "incidental" to other professional A-E services. Thus, as stated above, we interpreted the Brooks Act as requiring incidental services to be procured with Brooks Act procedures only when provided by an A-E firm in the course of providing other A-E services and as part of an A-E project. AAA Engineering and Drafting, Inc., et al., 66 Comp. Gen. at 440.

THE 1988 AMENDMENT

As stated above, the definition of A-E services was recently amended by two separate but identical provisions of law. These statutes, Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988), and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), amended the Brooks Act definition at 40 U.S.C. § 541 to establish three separate and independent categories of A-E services, as follows:

> "(3) The term 'architectural and engineering services' means-
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> "(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

"(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

"(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manual, and other related services."

The legislative history of Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988), indicates that the amendment is intended to clarify the definition of A-E services in response to General Accounting Office decisions issued since the enactment of the Brooks Act, "which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping." 134 Cong. Rec. H10058 (daily ed. Oct. 12, 1988) (statement of Mr. Myers). See also H.R. Rep. No. 911, 100th Cong., 2d Sess. 24 (1988) concerning Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), which also notes the interpretation of the Act by our Office.

The conference report (H.R. Rep. No. 100-1070, 100th Cong., 2d Sess. 89 (1988)) also clearly recognizes that the new definition of A-E services does not impair an agency's discretion to decide (on a case-by-case basis) what type of services should be performed by an A-E firm as opposed to a construction contractor.

DISCUSSION

The definition of A-E services as stated in the 1988 amendment requires us to modify the two-pronged test enunciated in our prior decisions. Clause (C) of the 1988 amendment includes in the definition "other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform . . . ." The statute then lists services such as surveying and mapping which fall

into this category. Thus, the revised definition now makes it clear that "incidental services" means types of services which are incidental to (part of) A-E services, and not, as we previously have held, incidental to an A-E project. The test to be applied in making this determination, then, is not whether the service is incidental to a traditional A-E project; rather, it is first, whether the service is the type which is incidental to professional services of an architectural or engineering nature, and if so, whether the service is one which members of the architectural and engineering profession may logically or justifiably perform.

Effective March 31, 1989, an interim rule implementing this new definition was promulgated which amends the definition of A-E services in the Federal Acquisition Regulation (FAR). The revised FAR definition (subsection (c) of section 36.102 (FAC 84-45)) states, consistent with our interpretation of the amendment, that A-E services include:

> "Other professional services of an architectural or engineering nature (including surveying and mapping, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that the contracting officer determines should logically or justifiably be performed by members of the architectural and engineering professions (and individuals in their employ)."

Thus, the FAR revision provides that a contracting officer, in determining whether particular services are subject to the Brooks Act procedures, must determine whether the services, independent of any project, are of an A-E nature which should logically or justifiably be performed by A-E professionals.

The Forest Service requests our decision on specific services for which it commonly contracts.2/ The agency states that several of the services are done as work preliminary to road, trail, or bridge construction. To the extent that they are part of an A-E project and are services

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2/ The services listed by the Forest Service for our consideration in addition to mapping and surveying are property line marking services, preliminary surveys, construction surveys, construction sampling and testing, map scribing, map digitizing, map aerotriangulation, map compilation, mapping photolab activities, and value analysis engineering studies.

which apparently should be performed by traditional A-E firms, we note that they are considered A-E services under FAR § 36.102(d) as well as section 36.102(c). However, with regard to other specific services not associated with a specific A-E project that are mentioned by the Forest Service, the determination of Brooks Act applicability should be made initially on a case-by-case basis by the contracting officer in accordance with the definition provided in the 1988 amendment and the FAR, since, as indicated in the conference report, this initial decision is within the discretion of the contracting agency. See H.R. Rep. No. 100-1070 at 89. We will review such determinations where it is alleged that the contracting officer has abused his discretion or made the determination in bad faith.

for James F. Hinchman
Comptroller General
of the United States