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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

81-1 CPD 367

FILE: B-200999.2

DATE: May 11, 1981

MATTER OF: Association of Soil and Foundation
Engineers--Reconsideration

DIGEST:

1. Prior decision holding that Brooks Bill procedures (40 U.S.C. § 541, et seq. (1976)) were not applicable to procurement of soil boring and related services is affirmed. Even though protester disagrees with contracting agency determination that reporting on soil samples could be competently performed by other than engineer, we cannot overrule agency determination as unreasonable based upon our review of State statutes.
2. In deciding protest, GAO is not confined to issues raised by protester. Where procurement deficiency is obvious from review of agency report on protest, GAO will state views and recommend corrective action if appropriate.
3. Request for reconsideration does not provide basis for reversing prior decision where arguments made in support of request are merely rehash of arguments previously made and considered in reaching prior decision.

The Association of Soil and Foundation Engineers (ASFE) requests reconsideration of our decision in Association of Soil and Foundation Engineers, B-200999, 4 February 17, 1981, 81-1 CPD 99. In that decision we held that the Fish and Wildlife Service (FWS) did not

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have to use the Brooks Bill procedures (40 U.S.C. § 541, ~~et seq.~~ (1976)) instead of competitive bidding in the procurement of soil boring and related services. We also held that, since the FWS had argued that the procured services could be performed without using a registered professional engineer, the solicitation requirement that a report be furnished by a registered professional engineer was without a reasonable basis and, therefore, was unduly restrictive of competition.

Upon reconsideration, we affirm our February 17, 1981, decision.

The material facts were stated in our prior decision and will only be repeated here insofar as is necessary to dispose of the issues raised by the ASFE in its request for reconsideration.

In connection with our resolution of the issue of whether the Brooks Bill procedures should have been used in this procurement, we stated at page 2 of the February 17 decision that:

" * * * 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."

The ASFE argues that it did not concede the correctness of the agency's contention that an engineer was not really needed to report on the soil samples obtained. What the ASFE had stated in response to the agency assertion that an engineer was not needed and that a geologist could perform competently was that "[The procuring activity official] may be correct about his contention." The ASFE now argues that its statement meant that the agency official might also be incorrect. Accordingly, the ASFE argues that our decision was based upon a factual error and, therefore, should be reversed.

B-200999.2

3

We think the ASFE's argument on this point is a matter of semantics and that our interpretation of the ASFE's statement as agreeing with the agency's position on this point was reasonable. In any event, our holding on this issue was not based upon whether the ASFE agreed with the contracting official's opinion.

The procuring agency has primary responsibility for determining its minimum needs. General Exhibits, Inc., B-195536, January 15, 1980, 80-1 CPD 43. The record provided no basis for our Office to dispute FWS's position that the work could be performed competently by other than an engineer. Moreover, our review of State statutes revealed no statute which specifically required that soil borings and reports on soil borings be performed only by a registered professional engineer and no such statute was cited by the ASFE. Therefore, we could not substitute our judgment for the agency's that the work, including the report, could be performed by someone who was not an engineer and concluded that the Brooks Bill procedures were not applicable based upon the standards enunciated in Ninneman Engineering--reconsideration, B-184770, March 9, 1977, 77-1 CPD 171.

We did not then hold and we are not now holding that all contracts for soil boring and related reporting services must be procured by competitive bidding and that the solicitations cannot be restricted to engineers. Each procurement must be judged separately taking into account the individual circumstances of the work to be done and the needs of the agency involved. This determination is primarily the responsibility of the procuring activity and not our Office. Accordingly, if the ASFE or any other protester wishes to have us overrule an agency's decision to require/not require an engineer for a particular service, that protester must carry its burden of proof and show the agency's determination to be unreasonable. See Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415; General Exhibits, Inc., supra. The ASFE did not carry its burden in this case.

The ASFE also contends that our ruling as to the inapplicability of the Brooks Bill was wrong because it was based upon our misunderstanding of the work required under this contract. The ASFE believes that we did not understand that two different types of services were required: (1) soil borings and (2) a judgmental report based upon the soil samples obtained. This allegation is untrue. We were aware that two separate but related types of services were required and we do not agree that our decision on this point was erroneous.

In connection with our holding that the solicitation was overly restrictive because it required a report by a registered professional engineer when the agency admitted that someone other than an engineer could competently report on the soil samplings, the ASFE argues that we should not have ruled on this point since the ASFE had never specifically protested this issue. However, pursuant to our authority to settle and adjust public accounts and claims against the Government, we recommend action to preserve the integrity of the competitive bidding system where necessary, and it is our purpose under our bid protest function to assure compliance with the rules governing expenditure of public funds. In this regard, we do not consider ourselves confined to address only the issues raised by a party to a protest over the award of a Federal contract. See, for example, Redifon Computers Limited--Reconsideration, B-186691, June 30, 1977, 77-1 CPD 463. Where, as here, the impropriety in the solicitation was obvious from our review of the agency report, we will state our views and make recommendations if appropriate.

The remainder of the ASFE's arguments for reconsideration are merely a réhash of arguments previously made by the ASFE and considered by our Office in the February 17, 1981, decision. Since these arguments do not present any evidence demonstrating errors of fact or law in the original decision, nor provide any substantive information not previously considered, we find no basis for reversing our prior decision based upon these arguments. Lamar Electro-Air Corporation--Reconsideration, B-193793.5, February 19, 1980, 80-1 CPD 138.

B-200999.2

Accordingly, our prior decision denying the ASFE's protest in part and sustaining its protest in part is affirmed.

Harvey R. Van Cleave

For the Acting Comptroller General
of the United States