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DECISION



José Carlos
Pave. I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-184770

DATE: March 9, 1977

MATTER OF: Minneman Engineering—reconsideration

DIGEST:

Where performance of cadastral (land) survey is incidental to professional A-E services, survey must be procured in course of procurement of such professional A-E services, which must follow method prescribed in Brooks Bill, 40 U.S.C. § 541 et. seq. (Supp II, 1972). If survey is independent of A-E project, established competitive procedures may be used.

The United States Department of Agriculture Forest Service (Forest Service) requests that we reconsider and clarify our decision in Minneman Engineering, B-184770, May 11, 1976, 76-1 CPD 307, in which we sustained a protest by Minneman Engineering (Minneman) against the award of a contract by the Forest Service to Smith-Smith, Inc., for the "Lower O'Brien Cadastral Survey" in Kootenai National Forest, Libby, Montana. In the decision, we concluded that the Forest Service improperly evaluated Minneman's proposal, and that Minneman should have been awarded the contract (although we did not recommend termination of the awarded contract since performance had been substantially and satisfactorily completed). The bases for our conclusion were that the Forest Service did not sufficiently comply with the procedure set out in its own procurement regulations for the evaluation of proposals, and that, in any case, that procedure was "wholly inadequate" to comply with the Brooks Bill, 40 U.S.C. § 541 et. seq. (Supp II, 1972), which states the Federal Government's policy in the procurement of architect-engineer (A-E) services. To its request for reconsideration, the Forest Service questions the implication in our decision that cadastral surveys, which are surveys relating to boundaries and subdivisions of land, must be procured in the manner set forth in the Brooks Bill.

The Brooks Bill declares it to be Federal policy to publicly announce all requirements for "architectural and engineering services" and to negotiate contracts for such services on the basis of demonstrated competence and qualification and at fair and reasonable

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prices. "Architectural and engineering services" are defined at 40 U.S.C. § 541(3) to include "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."

Generally, the selection procedures prescribed require the contracting agencies to publicly announce requirements for A-E services. (This represents a change in the traditional method of obtaining A-E services.) The contracting agency then evaluates A-E statements of qualifications and performance data already on file with the agency and statements submitted by other firms in response to the public announcement. Thereafter, discussions must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach" for providing the services requested. (The discussion requirement is also a change in the traditional selection method.)

Based on established and published criteria, the contracting agency then ranks in order of preference no less than three firms deemed most highly qualified. The legislative history makes it clear that the criteria to be used in ranking the firms for selection and final negotiation should not include or relate, either directly or indirectly, to the fees to be paid the firm. S. REP. No. 1219, 92d Congress, 2d Sess. 8 (1972); H.R. REP. No. 1188, 92d Congress, 2d Sess. 10 (1972).

Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with the firm as to a fair and reasonable price are negotiations terminated and the second ranked firm invited to submit its proposed fee.

Concerning the definition in 40 U.S.C. § 541(3) of "architectural and engineering services," the Forest Service states:

"We have little trouble with the phrase '* * * includes those professional services of an architectural or engineering nature,' but we have some practical difficulties with the phrase 'as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.'"

"For professional services of an architectural or engineering nature, we have taken the position that the work must be such as to require performance by architects or engineers permitted by law, e.g., licensed, to practice that profession in their State. Services of other professionals, such as economists, or services of non-professionals may be included in the contract work.

"If the work proposed is not such as to require professional A&E services, we use normal contracting techniques ranging from the authority to negotiate for professional services at 41 U.S.C. 252(c)(4) to price competitive formal advertising. Problems develop in this area where the service is one that is available from both licensed architect/engineer firms and other firms or individuals. Surveying, archaeological and environmental studies, and geological investigations are examples of the areas where this problem rises.

"We do not view the intent of the Brooks Bill as declaring that any services an architect or engineer or those in their employ may logically perform must be contracted for without regard to price competition. Our reading is that the special contract techniques of the Brooks Bill relate only to those contracts requiring the service of professional architects or engineers in the performance of the proposed work.

"For other work which can be lawfully accomplished in the State by either architects, engineers, or others, those contracting techniques should be used which assure maximum practicable competition, price and other factors considered. * * *

"It is our position that cadastral surveys, the specialty in question in the instant Forest Service case, fall in this latter category. * * *"

We agree with the Forest Service's view that cadastral surveys, which do not require performance by individuals or firms professionally licensed in a State as "architects" or "engineers," are not "professional services of an architectural or engineering nature" as that phrase is used in 40 U.S.C. § 541(3). Our opinion is based primarily on the fact that the Brooks Bill requires that the procurement of "architectural or engineering services" be from an A-E "firm," defined in 40 U.S.C. § 541(1) as "any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering." The intent of that definition is stated in the legislative history as follows:

"* * * This definition has a dual effect: first, it limits the scope of the bill to the procurement of services which members of these professions provide; and second, the definition would have the effect of requiring members of these professions to be properly licensed under the appropriate registration laws of the States and other jurisdictions governing their practice. Thus, the bill relates to architects and/or engineers who are registered under statutes that require, on the basis of education, experience, and other appropriate criteria, a high level of professional capability.

"This definition requires utilization of the method of 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., supra, 7; H.R. REP., supra, 8.

Thus, the phrase "professional services of an architectural or engineering nature" in 40 U.S.C. § 541(3) refers to services which uniquely, or to a "substantial or dominant extent," logically require performance by a professionally licensed and qualified "architect-engineer." In this connection, those services essentially consist of design and consultant services traditionally obtained by the Federal Government in connection with Federal construction and related programs, including alteration and renovation projects. See S. REP., supra, 1; H.R. REP., supra, 1. Accordingly, that phrase in 40 U.S.C. § 541(3) cannot be a basis to require the procurement by Brooks Bill procedures of a cadastral survey, which may be adequately and properly performed by other than an A-E firm.

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The issue is, therefore, as the Forest Service states: whether an activity for which licensing as a professional A-E firm is not required, but which may in fact be performed by an A-E firm as well as by an entity not so licensed, must be procured in accordance with Brooks Bill procedures by virtue of the inclusion in the 40 U.S.C. § 541(3) definition of the A-E services subject to those procedures, of "incidental services that members of these professions and those in their employ may logically or justifiably perform."

We believe that the quoted language itself resolves the matter. It clearly requires reference to Brooks Bill procedures for the procurement of services of which performance is not unique to, but may "logically or justifiably" be performed by, A-E firms or their employees, only where such services are "incidental" to otherwise professional A-E services. As discussed above, such professional services involve those that generally require the performing entity to be a licensed A-E, and typically concern Federal construction and related projects. Thus, where nonprofessional services are to be performed in conjunction with "professional services of an architectural or engineering nature," which clearly must be procured through the Brooks Bill method, the nonprofessional services should be contracted for in the course of the procurement of the professional A-E services.

Apparently, performance of a cadastral survey by an A-E firm would be logical and justifiable. In this connection, the Federal Procurement Regulations implementing the Brooks Bill define "architectural and engineering services" at section 1-4.1002(c) (1964 ed. amend. 150) as:

"* * * those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform: including studies, investigations, surveys, evaluations, consultations, planning, programming, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services." (Emphasis added.)

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In view of our discussion above, if cadastral surveying is in fact "incidental" to professional A-E services to be procured by the Brooks Bill method, the surveying should be included in the contract work. However, we are now advised that the cadastral survey involved in Ninnesan Engineering, supra, was not related to any A-E project. Accordingly, the survey could properly have been procured under competitive statutes and regulations. Our decision of May 11, 1976, is hereby modified to the extent that it is inconsistent with that determination.

R. J. K. 11-12
Acting Comptroller General
of the United States