

DECISION

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

FILE: B-209547**DATE:** May 23, 1983**MATTER OF:** Association of Soil and Foundation
Engineers**DIGEST:**

1. GAO will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act.
2. Protest that a solicitation requirement that an "engineer" perform the contract and affix his seal to surveys and drawings is unduly restrictive of competition is denied since there was no prejudice to the firms represented by the protester.

The Association of Soil and Foundation Engineers (ASFE) protests the use of standard competitive procedures under invitation for bids No. 540-19-83 issued by the Veterans Administration (VA). ASFE contends that the services should have been procured under the special procedures prescribed in the Brooks Act, 40 U.S.C. § 541 et seq. (1976), for the procurement of architectural and engineering (A-E) services. ASFE alternatively contends that if the VA does not in fact require A-E services subject to the Brooks Act, the specifications are unduly restrictive of competition. We deny the protest.

The VA issued the solicitation to secure data necessary to determine the feasibility of a site in Grafton, West Virginia for future cemetery development. The contractor is required to drill soil borings, classify soils and rocks, and:

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- "(c) Perform necessary tests as required in order to comment on the following:
- (1) Detailed description of all soil, rock and fill material encountered.
 - (2) The control of ground water during proposed project construction phase and for the completed project operation.
 - (3) Comment on roadway construction relative to an asphaltic pavement typical section.
 - (4) Engineering and construction characteristics of rock, hardpan or fragipan, and rippability of any or all of these, if present.
 - (5) Unit weight, cohesion, angle of internal friction and other pertinent data for soil types for use in determining slope stability and forces on retaining walls.
 - (6) Detailed description of soil compaction requirements to achieve soil stability on slopes of 2:1 and/or 1:1.
 - (7) Determine the frost penetration depth.
- (d) Include any other factors which could influence the design of roadways, grading, drainage and landscape establishment pertaining to general operation of a cemetery."

Last, the contractor is required to provide a site, topographic, utility and landscape survey.

The VA determined that the purpose of the procurement is not to obtain engineering or design services, but rather to secure a description of the surface and subsurface conditions existing on the site. The report is to be used as a database for the eventual in-house evaluation of the site and determination of feasibility for cemetery development. In the VA's view, the contemplated contract is only for

preliminary testing, surveying and technical reporting; the professional A-E aspects of the contemplated project will be performed in-house after the completion of the contract. Therefore, the VA employed standard competitive procedures to secure the services.

ASFE contends that the VA should have used the procedures prescribed by the Brooks Act rather than competitive bidding procedures. The Brooks Act declares it be Federal policy to negotiate contracts for A-E services on the basis of demonstrated competence and qualifications; the procedures do not include price competition. The protester asserts that the requirement to comment on ground water control, evaluate engineering and construction aspects of rock, and determine pertinent data needed to calculate slope stability and forces on retaining walls and the requirement to include other factors which could influence the design of roadways, etc., are A-E services as defined by the Brooks Act. ASFE believes that these services constitute a substantial part of the requirement and that the other services, such as soil boring, testing and surveying, are incidental to these A-E services.

Initially we point out that the solicitation does not actually require the contractor to comment on ground water control, roadway construction, etc., but rather merely requires the contractor to perform the tests and produce the data upon which such comments may be based. Thus, this portion of the solicitation merely requires the contractor to report data from which engineering judgments may be made and does not actually require the contractor to make engineering judgments.

In any event, even if we accept ASFE's assertion that certain aspects of the requirement are A-E in nature, it does not follow as a matter of logical necessity that Brooks Act procedures had to be used in the procurements. The reason is that the Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. See Association of Soil and Foundation Engineers--Reconsideration, 61 Comp. Gen. 377 (1982), 82-1 CPD 429. Rather, the Act's procedures, and the restriction to A-E firms attached to them, apply to the procurement of services which uniquely or to a substantial or dominant extent require performance by a professionally licensed and qualified A-E firm. Nineman Engineering--reconsideration, B-184770, March 9, 1977, 77-1 CPD 171. Of necessity, this determination is

based on the nature and circumstances of the work to be done and the needs of the contracting agency. Such determinations are the responsibility of the contracting agency, not our Office and, therefore, we have recognized broad discretion on the part of the agency in making such determinations. See Association of Soil and Foundation Engineers, B-204634, February 2, 1982, 82-1 CPD 77. The proper role of this Office in these cases is to defer to the judgment of the agency unless the agency's conclusions are so unreasonable as to demonstrate a clear intent either to circumvent the Act or to employ the noncompetitive procedures enunciated by the Act to secure services that should properly be solicited by competitive means. Association of Soil and Foundation Engineers, B-209196, B-208925.2, April 5, 1983, 62 Comp. Gen. ___, 83-1 CPD ___.

Although ASFE disagrees with the VA on this issue, it has not established that the VA's conclusions are unreasonable so as to warrant a conclusion that the VA intended to circumvent the Brooks Act. On the contrary, given the relative scope of the clearly nonprofessional services and the alleged engineering services, we believe the VA's determination was reasonable. Therefore, we deny the protest on this issue.

ASFE alternatively contends that the solicitation is unduly restrictive. ASFE points out that the solicitation refers to the prospective contractor as the "engineer" and requires the engineer to furnish all necessary labor, materials and services. Additionally, the solicitation requires the engineer to affix his seal to all drawings. ASFE argues that, assuming that the agency's requirement is not A-E in nature as VA asserts, the solicitation overstates the agency's needs and restricts competition by requiring an engineer to perform the services.

The VA reports that the references to an engineer and engineer's seal were inadvertent. In formulating the solicitation, the VA used a portion of a Statement of Task contained in a previous Brooks Act procurement. The VA deleted the portions of the Statement of Task describing engineering services from the instant solicitation, but mistakenly failed to delete references to an engineer. Inasmuch as the inclusion of the references was completely inadvertent and the VA has determined that the services are not A-E in nature and need not be performed by an engineer,

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we agree with ASFE that the restrictions are not reasonably related to the VA's minimum needs. Nevertheless, we fail to perceive how ASFE was prejudiced by the use of the term engineer since all of ASFE's members are engineering firms. See Association of Soil and Foundation Engineers, B-204634, February 2, 1982, 82-1 CPD 77. Moreover, no party which may have been prejudiced by the restriction (i.e., a firm capable of performing the services, but which is not an engineering firm) has complained of the solicitation.

The protest is denied.

for Milton J. Aoulan
Comptroller General
of the United States