DECISION

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

FILE: B-213932.2 DATE: September 18, 1984

MATTER OF: Howard R. Lane, FAIA
Associates--Reconsideration

DIGEST:

Prior decision holding that contracting agency properly canceled a Brooks Act procurement, because of a significant increase in the scope of the project that was originally advertised is affirmed, since there has not been a showing of material errors of fact and/or law in the decision which warrant its reversal or modification.

Howard R. Lane, FAIA Associates requests reconsideration of our decision in Howard R. Lane, FAIA Associates, B-213932, Aug. 2, 1984, 84-2 CPD ¶ ____, in which we held that contracting agencies enjoy broad discretion in determining when it is appropriate to cancel a Brooks Act procurement, so long as a reasonable basis for the cancellation exists. Lane alleges that our decision contains material errors and omissions of fact which warrant its reversal or modification. We affirm our prior decision.

In May 1980, the Veterans Administration (VA) selected Lane as the most highly qualified firm under the special procedures of the Brooks Act (40 U.S.C. §§ 541-544 (1982)) to perform professional architectural and engineering (A-E) services relating to a building project at the VA Medical Center, Phoenix, Arizona. The Brooks Act requires federal agencies to select A-E contractors on the basis of demonstrated competence and qualifications; the Act's procedures do not include price competition. Once a firm is selected as being the most qualified, the agency then negotiates a satisfactory contract with the firm at a price determined to be fair and reasonable to the government. In this

matter, however, the VA never negotiated a contract with Lane at the time of its selection because the precise scope of the project had not been established. More than 3 years later, the VA canceled the procurement because the final scope of work substantially exceeded the scope as originally contemplated and planned to readvertise what it considered to be an essentially new project.

Lane asserted that the cancellation was improper principally for the reason that the project had no defined scope at the time of its selection, and therefore that the scope could not be said to have dramatically changed during the following 3 years. It was Lane's belief that it had been selected for the project because of its broad experience and qualifications, apart from any particularized scope of work, and thus that the allegedly increased scope would be immaterial to its performance as the most highly qualified A-E firm.

It was our view, however, that the scope of the project had significantly changed in terms of both magnitude and complexity during the 3-year period. As we pointed out, the VA had originally anticipated that the Phoenix Medical Center would be expanded with the addition of a new two-story structure housing eight functions (mainly administrative and mental health services) at an estimated cost of some $4.5 million. In August 1983, the VA finalized this original scope at an increase of 40,000 square feet of new building space for 11 functions at a cost of some $16.5 million. However, in October 1983, as the result of a new survey of its needs, the VA determined that its requirements had greatly increased. The new scope of the project encompassed a new building of four stories and a basement and two additional floors of an existing structure. There would now be some 23 functions, including intensive care units, surgery, and radiology. The project was anticipated to entail 183,000 square feet of new construction at an estimated cost of some $53.5 million. We concluded that this expanded scope was a sufficient justification for the VA to cancel the procurement, under the well settled principle that an agency enjoys broad discretion in deciding whether to

cancel a solicitation and need only establish a reasonable basis for the cancellation of a negotiated procurement. Although Brooks Act procedures are fundamentally different from traditional procurement procedures, we believed that agencies should be afforded the same discretion to cancel, and saw no harm to the procurement system or to competing firms in allowing Brooks Act procurements to be canceled when the agency has established the necessary reasonable basis.

Although Lane does not contest our conclusion of law, the firm asserts that our decision contains material errors and omissions of fact. Specifically, Lane alleges that the VA knew 2 years prior to the Commerce Business Daily (CBD) publication of the advertisement for the original project that the estimated cost was $16.5 million, not $4.5 million; therefore, according to Lane, we erred in characterizing the estimated cost for the expanded project as a "ten-fold increase." Additionally, Lane asserts that we omitted two material sentences from our quotation of the CBD notice referred to above, as follows:

> "Only applicants who have the requisite capabilities and resources, either in-house or in association with a recognized health care planner, will be considered. Evidence that the applicant can furnish the sophisticated health care planning required for complex hospital projects will be a significant factor in the selection criteria."

Thus, Lane urges, our decision does not accurately reflect that the VA apparently anticipated a project scope of work far beyond one for merely administrative and mental health functions at a relatively modest cost, and accordingly argues that the VA cannot now say that the new scope of work involves complex and sophisticated functions never originally contemplated.

In order to prevail in its request for reconsideration, a protester must show material errors of fact and/or law in the prior decision which would warrant its

reversal or modification. See United States Contracting Corporation--Reconsideration, B-210275.2, Dec. 28, 1983, 84-1 CPD ¶ 31. Here, Lane challenges our adjectival characterization of the increased project scope, but fails to demonstrate that the increased scope did not represent a significant change in the agency's requirements, and therefore that it was not a reasonable basis for the cancellation. Certainly, the new scope of work was greatly increased from the old, encompassing more than four times the anticipated square footage for construction, twice the number of medical functions, and a significant increase in the estimated cost. Any one of those increases in the project scope, in our view, would have been a sufficient reason for the cancellation. Cf. J.C. Yamas Company, B-211105, Dec. 7, 1983, 83-2 CPD ¶ 653.

We also believe that the sentences from the CBD notice which we did not include in our prior decision were not material. In essence, Lane is alleging that the VA, from the beginning, contemplated that the project would entail the construction of complex and sophisticated functions at the Medical Center as are now embraced by the new scope of work. In light of the extensive record in this case, however, such a position is clearly untenable. The fact that Lane and others might have been evaluated for competence and qualifications beyond those which would be needed to perform A-E services relative only to the construction of a two-story structure housing mainly administrative and mental health functions does not establish that the VA knew at the time of Lane's selection in 1980 that the final project scope would entail the construction of a four-story building housing intensive care, surgical, and radiology facilities.

In any event, the point of our conclusion was not that the VA never anticipated that the project might involve more than administrative and mental health functions, but rather that the cancellation of this Brooks Act procurement satisfied the standard applicable to negotiated procurements, that is, that a reasonable basis for it existed.

Lane also asserts that it expended substantial sums of money in anticipation of receiving the contract. As unfortunate as this may be, we think that the firm proceeded at its own peril in incurring any expenses not directly related to its initial selection as the most qualified potential A-E contractor, since it is our belief that the government was under no legal obligation to negotiate a satisfactory contract with Lane at that time or thereafter. Here, we see nothing to indicate that the VA knew that Lane was incurring expenses beyond that relative to the A-E selection process in anticipation of the contract, and it is our view that Lane acted unreasonably in incurring costs prior to the negotiation and award of a contract for the services.

Our prior decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States