Ayer PL-II

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AAA Engineering and Drafting, Inc., et al.

File: B-225605

Date: May 7, 1987

DIGEST

Contracting agency may solicit mapping services by competitive proposals instead of Brooks Act procedures, where such approach is permitted by applicable statutes, and services may be adequately and properly performed by other than an architectural/engineering firm and are unrelated to an architectural/engineering project.

DECISION

Seven organizations--three firms (AAA Engineering and Drafting, Inc., Dames and Moore Special Services (D&M), and Greenhorne and O'Mara, Inc. (G&O)), and four trade associations (American Congress on Surveying and Mapping, American Society for Photogrammetry and Remote Sensing, Management Association for Private Photogrammetric Surveyors, and American Society for Civil Engineers)--protest the method of procuring mapping services under request for proposals (RFP) No. DMA800-87-R-0020, issued by the Defense Mapping Agency (DMA). The solicitation calls for the physical construction of overlays used in making maps. The protesters contend that DMA must use the procurement procedures set out in the Brooks Act, 40 U.S.C. § 541 et seq. (1982),[1]/ made

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1/ Under these procedures, applicable to procurements of professional architect-engineering (A-E) services, requirements and evaluation criteria are publicly announced, the qualifications of interested firms 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. See Charles A. Martin & Associates, B-223059, B-223243, Sept. 5, 1986, 65 Comp. Gen. _____, 86-2 C.P.D. ¶ 268.

applicable to military procurements by the Military Construction Codification Act of 1982 (Codification Act), 10 U.S.C. § 2855 (1982). We deny the protest.

DMA originally solicited this requirement using Brooks Act procedures, since the procurement was initiated during the effective period of section 8087 of the Department of Defense Appropriations Act, 1986 (1986 Act), passed as part of Pub. L. No. 99-190, § 101(b), 99 Stat. 1185, 1216 (1985). This act provided that:

> "None of the funds appropriated in this Act shall be used for professional . . . mapping services performed by contract for [DMA] unless those contracts are procured in accordance with [Brooks Act procedures] outlined [in the Codification Act]."

The three protesting firms responded to that procurement, were selected as the three most qualified firms, and were ranked in the following order: G&O, AAA and D&M. Because G&O could not provide the entire requirement, DMA awarded G&O as much work as it could perform and entered into discussions with AAA concerning the balance of the requirement. AAA submitted a price proposal, but before DMA could award a contract the 1986 Act expired and the Department of Defense Appropriations Act, 1987 (1987 Act), passed initially as part of Pub. L. No. 99-500, § 101(c), 100 Stat. 1783, 1783-83 (Oct. 18, 1986), and later as part of Pub. L. No. 99-591, § 101(c), 100 Stat. 3341, 3341-83 (Oct. 30, 1986), was enacted. DMA proceeded to cancel AAA's portion of the procurement because the 1987 Act did not include the restriction from the 1986 Act and, in DMA's view, therefore did not require DMA to use Brooks Act procedures. DMA subsequently issued the protested RFP for the balance of its mapping services requirement.

The protesters advance two arguments why DMA must procure its mapping services using Brooks Act procedures. First, the protesters read the 1987 Act as requiring DMA to use Brooks Act procedures for procuring mapping services. Second, the protesters argue that Congress, in a series of actions beginning with the enactment of the Codification Act, has made clear that the definition of A-E services includes mapping services.

Preliminary Issues

DMA urges dismissal of the protests on three grounds: AAA is the only interested party among the seven protesters; AAA's protest is untimely; and AAA failed to notify the agency of its protest grounds within 1 day of filing in our Office, as

required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1986). Dismissal is not warranted, however. Our Office will review an untimely protest if it raises issues significant to the procurement system. 4 C.F.R. § 21.2(c). We find that this is such a protest, since the issues raised concern the applicability of the Brooks Act procedures to DMA procurements of mapping services under current law, an issue of first impression. See Bell Atlanticom Systems, Inc., B-222601.2, June 30, 1986, 86-2 C.P.D. ¶ 19. The protester's failure also to furnish DMA with a timely copy of its protest is not a basis for dismissing a protest where, as here, the delay is minor and did not prevent the agency from submitting a timely administrative report. Colt Industries, B-218834.2, Sept. 11, 1985, 85-2 C.P.D. ¶ 284. Since AAA's protest is appropriate for review, no purpose would be served by dismissing the cases of the other protesters.

Was DMA Required by the 1987 Act to Use Brooks Act Procedures When Contracting for Mapping Services?

The protesters contend that the 1987 Act's legislative history requires DMA to continue using Brooks Act procedures when contracting for mapping services. While the protesters concede that the 1987 Act itself does not contain the 1986 Act's restriction or otherwise expressly require DMA to follow Brooks Act requirements, they argue that language in the 1987 Act's legislative history (House/Senate Appropriations Committee Reports and the Joint Conference Committee Report) has the effect of requiring DMA to continue using Brooks Act procedures for mapping services procurements in fiscal year 1987. Specifically, the protesters rely on the following language in both the House and Senate committee reports:

> "While the Committee has not renewed bill language restricting the contracting authority of the Defense Mapping Agency, the Committee believes that the Agency must evaluate contractors for professional mapping . . . services on the basis of demonstrated competence and qualifications. . . . This clarifies these professional mapping . . . services as being among the architecture, engineering and related services which are procured under [Brooks Act procedures]." H.R. Rep. No. 99-793, 99th Cong., 2d Sess. 89 (1986); S. Rep. No. 99-446, 99th Cong., 2d Sess. 77 (1986).

The protesters contend that the following language from the Joint Conference Committee Report incorporated the House and Senate report language into the 1987 Act:

> "The conference agreement on House Joint Resolution 738 incorporates some of the provisions of both the House and Senate versions of the Department of Defense Appropriations Act, 1987, and has the effect of enacting the Act into law. The language and allocations set forth in House Report 99-793 and Senate Report 99-446 should be complied with unless specifically addressed in this joint resolution and statement of the managers to the contrary." H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 438-439 (1986).

DMA takes the position that, although Congress clearly required DMA to use Brooks Act procedures for mapping services procurements in 1986 by including express language to that effect in the 1986 Act, Congress just as clearly eliminated this requirement for 1987 by omitting the language from the 1987 Act. DMA also points out that, for over 13 years (from the time of DMA's establishment in 1972 until the passage of the 1986 Act), DMA never used Brooks Act procedures to obtain mapping services. DMA concludes that the restriction no longer applies. We agree with DMA's position.

The 1986 Act contains no language indicating that the Brooks Act procedure restriction on mapping service procurements was to have future effect. Quite to the contrary, the 1986 Act's restriction on DMA contracting specifically pertains only to funds appropriated under the 1986 Act ("None of the funds appropriated in this Act . . . "). In the absence of some evidence in the statute that the restriction was meant to apply beyond fiscal year 1986, it becomes particularly significant, we think, that the 1987 Act omits the restrictive language; this omission strongly suggests to us that Congress simply intended to lift the restriction for 1987.

The House Report on the 1986 Act does refer to the restriction on DMA's contracting authority as a "new general provision" that "clarifies these professional mapping . . . services as Architecture, Engineering and Related Services, requiring the services to be procured in accordance with [Brooks Act procedures]." H. R. Rep. No. 99-332, 99th Cong., 1st Sess. 364 (1985). Although we would agree that this language suggests permanency, it was not included in the accompanying House bill or the 1986 Act itself, both of which, again, limited the restriction's applicability to the use of fiscal year 1986 funds.

While views expressed in a statute's legislative history of course may be relevant in statutory interpretation, those views are not a substitute for the statute itself where the meaning of the statute appears plain on its face. As we stated in our decision in LTV Aerospace Corp., 55 Comp. Gen. 307, 325 (1975), 75-2 C.P.D. ¶ 203:

> ". . . as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there."

Thus, since the 1987 Act contains no language requiring DMA to use Brooks Act procedures in procuring mapping services, and the legislative history confirms that the 1986 Act restrictive language knowingly was omitted from the 1987 Act by Congress, there is no basis for finding that DMA was required to use Brooks Act procedures for these procurements in 1987.2/ The legislative history on which the protesters rely does not constitute binding law.

Are Mapping Services Included Within the Definition of A-E Services?

The protesters maintain as their second argument that Congress, in a series of actions beginning with the enactment of the Brooks Act, has made clear that the definition of A-E services includes mapping services. These actions include passage of the Codification Act, and the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (1984), as well as the congressional intent expressed in the 1986 and 1987 Acts. Although our Office has

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2/ The protesters cite a recent Ninth Circuit decision, Edward v. Bowen, 785 F. 2d 1440 (9th Cir. 1986), for the proposition that when an appropriations act is silent on a point, it is proper to resort to the act's legislative history to resolve congressional intent. In that case, however, the court resorted to congressional intent only after finding the appropriations act ambiguous as to whether certain funds remained available for obligation in the new fiscal year. No such ambiguity exists here where, absent affirmative law requiring DMA to use Brooks Act procedures, DMA conducts its procurements in accordance with generally applicable procurement laws and regulations.

always viewed mapping services as incidental services, not subject to Brooks Act procedures in the same manner as traditional A-E services, the protesters urge that Congress has expressed its view that our definition of A-E services is too narrow and that a proper definition of A-E services grants mapping services a status equal to that enjoyed by traditional A-E services.

The Brooks Act defines A-E services as including:

> "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." 40 U.S.C. § 541(3).

Interpreting this language in our decisions, we have 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 or its employees and are "incidental" to "professional" A-E services, which clearly must be procured by the Brooks Act method. Mounts Engineering, B-223650, B-224446, B-224447, Sept. 12, 1986, 86-2 C.P.D. ¶ 293; Ninneman Engineering--Reconsideration, B-184770, Mar. 9, 1977, 77-1 C.P.D. § 171.

In other words, we have 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 A-E services (i.e., as part of an A-E project).

The protesters argue that decisions of our Office following this line of reasoning are no longer apposite, and that our test no longer is good law, in the face of Congress' alleged expansion of the Brooks Act definition of A-E services to include mapping services. The protesters cite our decision in Association of Soil and Foundation Engineers--Reconsideration, B-199548.2, Aug. 13, 1982, 82-2 C.P.D. ¶ 128, as evidence that even our Office has applied a broader definition of A-E services than the interpretation reflected in the two-prong test. We disagree.

First, since our prior decisions are based on our interpretation of applicable statutes, and we have found that the 1986 and 1987 Acts do not change permanent law, the legislative history of these acts does not render our prior decisions invalid.

Second, the Codification Act provided only that Brooks Act procedures would apply to military procurements; there is nothing in the Act or its legislative history which expands the definition of A-E services so as to require the use of Brooks Act procedures when an agency is only contracting for incidental services. The protesters' argument to the contrary is based on their interpretation of our decision in Association of Soil and Foundation Engineers--Reconsideration as adopting an expansive definition of A-E services. The protesters' interpretation is incorrect. We held in that decision merely that the military departments should apply Brooks Act procedures not only to construction contracts requiring A-E services, but to all kinds of contracts involving A-E services (for example, an engineering services contract for conducting an environmental survey of ground contaminant migration).[3/] The decision was not intended to, and did not, expand the definition of A-E services to include incidental services.

Finally, the protesters claim that their position is "reinforced by the substantive language of [CICA]," but they fail to cite the provision to which they are referring or to explain how, precisely, their position is reinforced. The only relevant provision we have found in CICA provides that Brooks Act procedures are considered "competitive procedures" under CICA. This language does not expand the definition of A-E services on its face. The protesters have cited no legislative history on the point other than a brief colloquy between Senators Percy and Cohen, 129 Cong. Rec. S16007 (daily ed. Nov. 11, 1983), concluding with agreement between the Senators that CICA would require that all federal agencies procure mapping services using Brooks Act procedures. Again, the Senators' understanding at the time of this debate notwithstanding, CICA, as finally adopted by Congress, does not contain language expanding the definition of A-E services. Accordingly, in our 1986 decision in Mounts Engineering, B-223650, supra, reached after passage of CICA, we did not expand our definition of A-E services but, rather, applied our two-prong test to determine whether Brooks Act procedures had to be used. This argument therefore is without merit.

3/ The decision reversed our prior decision Association of Soil and Foundation Engineers, B-199548, Sept. 15, 1980, 80-2 C.P.D. ¶ 196, which limited the application of Brooks Act procedures only to those A-E services used in military construction projects.

We conclude that neither the Brooks Act, the Codification Act, nor CICA operate to make Brooks Act procedures mandatory for the instant procurement. The protesters also have not contended that performance of the work requires an A-E firm, or that the mapping services are part of an A-E project and therefore incidental to professional A-E services which must be procured by the Brooks Act method. We therefore find no basis for objecting to DMA's use of generally applicable procurement procedures in obtaining these mapping services.

The protests are denied.

Harry R. Van Cleve
General Counsel