DECISION

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

81-1 cpd 455

FILE: B-199970 DATE: June 8, 1981

MATTER OF: Association of Soil and Foundation Engineers

DIGEST:

Procurement procedures set forth in Brooks Bill, 40 U.S.C. § 541 et seq. (1976) are inapplicable where: (1) agency determines that soil testing analysis and report can be performed by other than professional architect-engineering (A-E) firm; (2) protester has failed to show that applicable State law specifically requires use of A-E firm for such services; and (3) contract is not incidental to A-E project.

The Association of Soil and Foundation Engineers (ASFE) protests the procedures used under request for quotation (RFQ) No. FQ467201930004 issued by the Department of the Air Force (Air Force) to obtain a soil testing analysis and report preliminary to rebuilding a taxiway at Castle Air Force Base, California. ASFE contends that the RFQ improperly utilized small purchase procedures because the procurement should have been conducted in accordance with the procedures required by the Brooks Bill, 40 U.S.C. § 541 et seq. (1976).

The protester argues that the Brooks Bill procedures are mandated because the services being solicited, particularly the report, must, allegedly, be performed by an engineering firm licensed in California in order to meet the requirements set forth in the RFQ. The Air Force asserts that the services in question do not require performance by an engineer or engineering firm and, therefore, since the estimated value of the award is under $10,000, it is appropriate to use small purchase procedures instead of Brooks Bill procurement procedures. We do not find any merit to this protest.

The RFQ at issue is a resolicitation for services which had initially been solicited under small purchase procedures by an RFQ containing the following requirement:

> "CERTIFICATION: The soils investigation and report shall be under the direct supervision of a registered professional engineer proficient in soils and foundation engineering. The report shall be certified by the registered professional engineer."

In response to a complaint by ASFE that the solicitation should have been issued under Brooks Bill procedures, the Air Force canceled the RFQ.

The Air Force then reviewed the RFQ and determined that it had overstated agency needs. Accordingly, it revised the specifications to:

> "(a) delete the requirement for supervision by a registered professional engineer because such a service was not needed; (b) specify the exact location and number of test pits to be dug and borings to be taken; (c) specify the specific soil tests to be performed; and (d) require only the submission of a narrative soil investigation report rather than a narrative report of soils investigation with conclusions and recommendations."

The Air Force Contracting Officer who reviewed the revised specifications then determined that acquisition using small purchase procedures, rather than Brooks Bill procedures, was appropriate. The RFQ was subsequently issued to four soil test firms two of which submitted quotations. ASFE then filed a protest with our Office; award is being held in abeyance pending our decision.

It is the Air Force's view that the above RFQ revisions effectively converted the procurement from one in which the required services would necessarily involve the services of an engineering firm, to one in which the required services would not necessarily involve the services of an engineering firm. As further explained by the Air Force:

"There is no violation of [the Brooks Bill] by procurement of specific soil tests testing laboratory.

"The testing laboratory will provide a test report on the results of * * * soil tests but will not necessarily include technical comments or contractor recommendations.

"We do not believe a soil investigation by an [engineering] firm is necessary since [an Air Force] civil engineer should be able to design the project using the soil test reports.

"[The] main concern is the replacement of unstable soil supporting taxiway pavement. Results of [the] soil tests should determine the area and depth to be removed."

In reply, the ASFE contends that the revised RFQ still requires the exercise of the kind of judgment which, in the ASFE's view, may only be furnished under California law by a licensed engineering firm. For example, the ASFE notes that paragraph 7, Technical Specifications, of the revised RFQ requires the test report to "define the location and quantitative extent of all soil conditions" that do not meet certain specified characteristics. The ASFE argues that this requirement asks the contractor who prepares the report to "determine if the thickness of the [taxiway] pavement is compatible with the subsurface materials gathered through testing." And the ASFE argues that, although a "testing laboratory" may make "tests and offe[r] results of those tests," only an engineer licensed under California law may make the "judgment as to whether or not the subsurface [soils] are or are not compatible with the asphalt in place." Thus, according to the ASFE, any testing laboratory which may be interested in the work in question "must be under the control of a registered civil engineer" under California law.

Further, the ASFE argues that the contractor under the RFQ is to exercise judgment in regard to the procedures involved in taking soil samples, i.e., in determining the size of the "surface openings" of the "test pits." Finally, the ASFE argues that "all or most of all the firms to which the RFQ was sent are engineering firms."

The threshold question for decision is whether Brooks Bill procedures are generally applicable to Department of Defense contracting for architect-engineering (A-E) services. In Association of Soil and Foundation Engineers, B-199548, September 15, 1980, 80-2 CPD 196, we held that Defense contracts for A-E services are covered by Brooks Bill procedures only to the extent that the contracts are for "construction." ASFE has requested that we reconsider our decision. Nevertheless, it is clear that the present procurement is so intimately linked to the taxiway project (which is apparently to be completed regardless of the results of the report) that the procurement must be viewed as one for "construction." Thus, to the extent a Defense procurement must involve "construction" before these procedures apply, the subject procurement so qualifies.

In deciding whether Brooks Bill procedures apply here, we next determine the extent that a licensed engineer may necessarily be involved in performing these services. This approach is consistent with Umpqua Surveying Company, B-199348, December 15, 1980, 80-2 CPD 429, where we said:

> "In Ninneman Engineering--Reconsideration, B-184770, March 9, 1977, 77-1 CPD 171, we found that both the language of the Brooks Bill and the legislative history indicate that the Bill's procedures apply whenever (1) the controlling jurisdiction requires an A-E firm to meet a particular degree of professional capabilitiy in order to perform the desired services, or (2) the services logically or justifiably may be performed by an otherwise professional A-E firm and are 'incidental' to professional A-E services, which clearly must be procured by the Brooks Bill method."

Recently, we affirmed our denial of a similar protest by the ASFE against a procurement by the Fish and Wildlife Service (FWS) for "testing of soil samples obtained, and [for reporting] on the results of the samples obtained and testing performed." Association of Soil and Foundation Engineers--Reconsideration, B-200999, May 11, 1981. The approach taken in that case is for application in resolving the protest here. As we said in that decision: ⊙2

> "The procuring agency has primary responsibility for determining its minimum needs. * * *. The record provided no basis

> for our Office to dispute [the agency's] position that the work could be performed competently by other than an engineer. Moreover, our review of [pertinent] State [law] 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 is not an engineer and concluded that the Brooks Bill procedures were not applicable * * *.
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> "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. * * *. The ASFE did not carry its burden in this case."

Moreover, in our May 11 decision we concluded that the soil services involved were not required to be performed by an A-E firm under the circumstances even if a "judgmental report" was required--to the extent the "agency admitted that someone other than an engineer could competently report on the soil samplings."

Here, as in our May 11 decision, we are not in a position to question the procuring agency's judgment that the required services may be competently performed

by someone other than a licensed engineer. Specifically, we cannot question the Air Force's view that the information to be provided in the report in response to paragraph 7, above, of the RFQ may be properly stated in the form of a test result which does not necessarily involve the judgment of an engineer licensed under California law. Moreover, we are not aware of any pertinent California law which specifically requires that the report of the service to be furnished here must be prepared only by a licensed engineer; nor are we aware of any California State court or administrative ruling specifically bearing on the services in question. Finally, we cannot question the Air Force's apparent position that even though the contractor for the services may exercise some limited discretion in the taking of the soil samples this fact does not mean the services must necessarily be performed only by a licensed engineer.

In view of these considerations, it is our view that the protester has failed to show that the services here fall within the first category of the above Ninneman decision. Consequently, it is irrelevant that the RFQ was sent to several A-E firms.

Further, since engineering work for the design of the actual runway will be performed by the Air Force's engineer, and because the soil testing services are not incidental to any other A-E project, the contract in issue does not fall within the decision's second category.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States