

DECISION



217-03 21760
118323
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201395.2

DATE: May 6, 1982

MATTER OF: Association of Soil and Foundation
Engineers--Reconsideration

DIGEST:

Brooks Act provides a procedure which must be used when an agency is selecting an architectural or engineering (A-E) firm to perform A-E services. This procedure is not applicable in procuring a research contract, even though the contractor is expected to use engineers, where it is unnecessary for the contractor itself to be a professional engineering firm to successfully perform the contract.

The Association of Soil and Foundation Engineers (ASFE) requests reconsideration of our decision in Association of Soil and Foundation Engineers, B-201395, July 17, 1981, 81-2 CPD 43. In that decision, we denied ASFE's protest that Brooks Act (40 U.S.C. § 541, et seq. (1976)) procurement procedures should have been used under request for proposals (RFP) DTFH61-81-R-00034, issued by the Federal Highway Administration (FHWA), Department of Transportation, for centrifuge testing of model pile group foundations.

In its request for reconsideration, ASFE states that the RFP specifically estimated that "2600 professional hours" of "geotechnical engineering" would be needed; also, ASFE argues that mechanical engineering and electrical engineering were needed to perform the contract. Pointing to the Maryland statutes relative to engineering as being typical of all State statutes on the subject, ASFE argues that under State statutes only a licensed engineer may offer to perform engineering services. Therefore, ASFE argues that our decision should have held that Brooks Act procedures applied to this procurement.

We disagree and, therefore, affirm our prior decision.

This was a contract for research which FHWA required to further its highway program. FHWA sought a study evaluating a proposed analytical technique--the use of centrifugal testing of pile group models as a means of predicting the behavior of full scale piling structures. While, as AGFE states, the instant RFP indicated that a substantial portion of the work should be performed by professional engineers, the form which the procurement took reflects FHWA's conclusion that, while the work could be performed under the supervision of a licensed engineer, it could also be performed by a variety of other firms.

In this respect, FHWA pointed out:

"Prior to [the procurement] a serious review was undertaken to determine whether or not this acquisition was limited to special professions such as soil and foundation engineers.

"The RFP is not limited to geotechnical firms. The RFP states that experience in geotechnical engineering is required. This expertise can be obtained from universities with well established soils and foundation departments, or any engineering or research firms that have a soils and foundation capability. In addition, other disciplines, such as instrumentation, mechanical design and fabrication, electrical, are required for successful completion of this work. Soils and foundation firms rarely have these additional capabilities."

In our prior consideration of this protest we concluded that since the contract was not being performed in connection with any A-E project, the Brooks Act procedure was not applicable. We see no reason to change our mind.

The Brooks Act provides that Government contracts for A-E services shall be negotiated in accordance with the procedure set forth in the Act. 40 U.S.C. 542. The term "A-E services" is defined in the Act as including those professional services of an A-E 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). An A-E firm is defined to mean a legal entity permitted by law to practice the professions of architecture or engineering. 40 U.S.C. 541(1).

In light of the legislative history of the Brooks Act, we have held that the Act applies to the procurement of services which uniquely or to a substantial or dominant extent logically requires performance by a professionally licensed and qualified A-E firm. Ninneman Engineering--reconsideration, B-184770, March 9, 1977, 77-1 CPD 171. In that case we stated that A-E services essentially consist of design and consultant services typically relating to a Federal construction or related project. We concluded that if such services were not involved and the work could be adequately performed by other than A-E firms, then the services could be procured outside the Brooks Act even though the services could also be performed by an A-E firm.

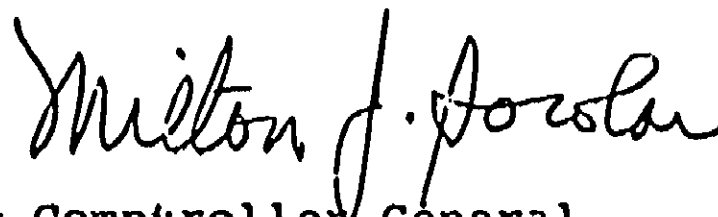
Whether a procurement uniquely or to a substantial or dominant extent requires performance by an A-E firm is a matter within the sound discretion of the contracting agency to decide. Nothing in the provisions or legislative history of the Brooks Act indicates that contracts must be awarded to A-E firms merely because architects or engineers will do any part of the contract work. If, for example, a contracting agency determines that a research project involving engineering and other work can be successfully performed by various types of firms, the procurement should not be restricted to engineering firms, notwithstanding that engineers will be used on the project. Contracting agencies are required to permit all qualified sources to compete for the Government's needs, 41 U.S.C. 252(c), 253(a) and FPR 1-1.302-1(b), and there is no exception to this requirement in the Brooks Act.

We are mindful of ASFE's argument that under state laws only licensed or registered engineers may lawfully respond to work statements which call for the use of engineers. We note, however, that under the Maryland statute cited by ASFE, performance by a corporation of research for the Federal Government is exempted from this requirement. 75-1/2 Anno. Code of Maryland § 19(5) (1960). In any event, we are not saying that non-engineers should be permitted to do engineering work. We are merely saying that a contracting agency,

within the bounds of sound judgment, is free to decide that a particular award need not be restricted to professional engineering firms, even if the specifications call for the use of engineers. Of course, if the agency determines that a contract award should be restricted to A-E firms, the Brooks Act selection procedure must be used. Otherwise, the procedure is not applicable. Ninneman Engineering--reconsideration. supra.

In the instant case FHWA decided that various types of firms could successfully perform the contract. Thus, FHWA concluded that the award should not be restricted to engineering firms. We see no reason to dispute FHWA's judgment.

Prior decision affirmed.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States