

Speigel



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: White Shield, Inc.

File: B-235522

Date: September 21, 1989

DIGEST

Contracting agency must solicit traditional surveying and mapping services by Brooks Act procedures instead of competitive proposals, since the services may be logically or justifiably performed by architectural engineering firm, whether or not related to architectural-engineering project.

DECISION

White Shield, Inc., protests the use of standard competitive procedures to secure cadastral mapping survey services at four sites in the Malheur National Forest in Grant County, Oregon, under request for proposals (RFP) No. 4-89-34, issued by the Forest Service, Department of Agriculture. The protester contends that the required surveying and mapping work is architectural and engineering (A-E) in nature and as such it must be procured in accordance with the special procedures set forth in the Brooks Act for the federal government's procurement of A-E services. See 40 U.S.C. §§ 541-544 (1982) (amended 1988).

The protest is sustained.

White Shield alleges that the required surveying and mapping work involves the type of work included within the definition of professional architectural and engineering services. The Forest Service argues that the decision to use competitive rather than Brooks Act procedures is supported by decisions of this Office such as Ninneman Eng'g--Reconsideration, B-184770, Mar. 9, 1977, 77-1 CPD ¶ 171. In that decision we held that where a survey is independent of an A-E project, the survey may properly be procured under competitive statutes and regulations. The agency states that the surveying services are not being procured as part of any A-E project and no incidental A-E contract exists or is contemplated. On April 28, 1989, the contracting officer determined to proceed with this

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procurement, pending an advance decision, infra, which the Forest Service had requested from our Office on December 23, 1988.

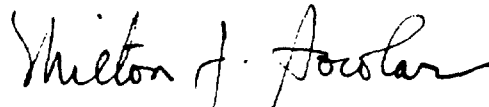
White Shield contends that the definition of A-E services as stated in Ninneman Eng'g--Reconsideration, B-184770, supra, is no longer applicable. It argues that both the language and the legislative history of the Brooks Act, as amended in 1988, make clear that the definition of A-E services includes traditional surveying and mapping services, whether or not incidental to an A-E project, and the Forest Service is required therefore to use Brooks Act procedures for procuring these services. We agree.

Recently we issued a decision to clarify the requirement for utilizing Brooks Act procedures when procuring A-E services as a result of the 1988 amendment. Forest Service, Dep't. of Agriculture--Request for Advance Decision, B-233987, et al., 68 Comp. Gen. _____, July 14, 1989, 89-2 CPD ¶ 47. As noted in that decision, the 1988 amendment to the Brooks Act contains a new provision which defines the term "architectural and engineering services." Clause (C) of the amendment includes in the definition "other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including . . . surveying and mapping . . . services." 40 U.S.C. § 541 (1982); as amended by Pub. L. No. 100-656, § 742, 102 Stat. 3853, Pub. L. 100-679, § 8, 102 Stat. 4055 (1988). Further, the legislative history of the amendment supports the argument that agencies are required to use Brooks Act procedures for procuring traditional surveying and mapping services. 134 Cong. Rec. H10058 (daily ed. Oct. 12, 1988) (statement of Mr. Myers); see also H.R. Rep. No. 911, 100th Cong., 2d Sess. 24 (1988), and Federal Acquisition Regulation § 36.102 (FAC 84-45).

In this case, Brooks Act procedures were not applied on the basis that the services were not part of an A-E project and no incidental A-E contract exists or is contemplated, in reliance on Ninneman Eng'g--Reconsideration, B-184770, supra. However, as indicated in above, the Ninneman test no longer applies. The test to be applied now is not whether the service is incidental to an A-E project; rather it is whether the service is of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions may logically or justifiably perform. In Forest Service, Dep't. of Agriculture--Request for Advance Decision, supra, we stated that the determination of Brooks Act applicability should be made

initially on a case-by-case basis by the contracting officer since this initial decision is within the discretion of the contracting agency. However, the contracting agency's exercise of discretion must be consistent with the statutory and regulatory requirements. In this regard, the Brooks Act amendment specifically lists surveying and mapping as examples of services which members of the architectural and engineering professions may logically or justifiably perform. In our view, surveying and mapping services traditionally performed by members of the architectural and engineering professions (and individuals in their employ) are clearly subject to the Brooks Act procedures. Since there is no indication that the surveying and mapping services involved here are not traditional A-E services, Brooks Act procedures should have been applied. Therefore, the protest is sustained.

The normal recommendation that the procurement be resolicited in accordance with Brooks Act procedures is impractical in this case because the contract has already been fully performed. White Shield is entitled, however, to the reasonable costs of pursuing this protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). White Shield's claim for such costs should be submitted directly to the Forest Service. 4 C.F.R. § 21.6(e).

for 
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