

DECISION

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

60800

FILE: B-184770

DATE: May 11, 1976

MATTER OF: Ninneman Engineering

98962

DIGEST:

Where several of the major provisions and policies of the Brooks Bill, 40 U.S.C. § 541 et seq. (Supp. II, 1972) were not followed in awarding Architect-Engineer Contract, such as: (1) no public announcement was made of the proposed procurement; (2) no preliminary negotiations were conducted with three or more of the top contenders; (3) no publication of selection criteria, and, unannounced criteria were improperly used by evaluation board in source selection, such award by Forest Service was improper. However, since there has been substantial completion of contract no recommendation made for its termination.

Ninneman Engineering (Ninneman) of Troy, Montana, protests the award of contract number 262-23 for the "Lower O'Brien Cadastral Survey" in Kootenai National Forest by the United States Department of Agriculture Forest Service (Forest Service), Kootenai National Forest, Libby, Montana, to Shaw-Smith, Inc., Kalispell, Montana. Ninneman claims that it meets all qualifications for the job, that Shaw-Smith is located outside the 100-mile-from-job-site geographic restriction used by the Forest Service in negotiating this procurement, and that its price for the work is \$7,000 lower than that of the present contractor.

The evaluation factors considered by the Forest Service's technical review board included initially the factors enumerated in § 4G-3.7007(c) of their Procurement Regulations. It then took into consideration "other factors," a category of unenumerated factors which their regulations allowed to be considered. Those factors, determined independently by the review board, were the number and dollar size of contracts a firm had in that region within the past 2 fiscal years,

the number and dollar size of current regional Forest Service contracts, and the technical specialties of each firm as noted on their SF-251 (Architect-Engineer Questionnaire) which was on file with the Forest Service. Proximity to the job site, while a factor in limiting consideration to only those firms within 100 miles, was not as important as the other factors.

The Forest Service notes two main reasons for taking the action that it did. First, Ninneman listed cadastral surveys as its fourth specialty on its SF-251. Shaw-Smith noted that specialty as its first. Also, Ninneman and the third firm chosen for possible negotiations each had performed Forest Service contracts in the recent past. Shaw-Smith had performed none. These factors were the determining ones, according to the contracting officer, in selecting Shaw-Smith for the contract.

Ninneman claims that it has outstanding qualifications in all aspects required by Forest Service Procurement Regulations § 4G-3.7007(c) and has submitted a listing of such qualifications. The Forest Service agrees that Ninneman was highly qualified but explains that for the above reasons Shaw-Smith, also well qualified, was chosen.

Concerning Ninneman's contention that Shaw-Smith is located outside the 100 mile from job site geographic restriction on the location of firms eligible to be considered for this project, in view of our analysis below, we do not feel it is necessary to reach this contention.

The Brooks Bill, 40 U.S.C. § 541, et seq. (Supp. II, 1972), sets out the Government's policy in procuring Architect-Engineer (A-E) services. A number of deficiencies in complying with that Act can be found in the subject procurement. The Brooks Bill at § 542 declares that the policy of the Federal Government is to announce in advance the requirements for A-E contracts, to negotiate contracts on the basis of demonstrated competence to perform the service, and to pay a fair and reasonable price for such service. Discussions must be held with at least three people or firms concerning anticipated methods and alternative concepts of completing the proposed procurement. Then three or more of the most qualified firms or people, out of all submissions on hand, in order of preference, must be ranked. See § 543. Negotiations then are conducted with the first preference firm in order to reach a contract with such firm unless a fair and reasonable price cannot be agreed upon. In that event, negotiations are commenced with the second preference firm, and so on, until an agreement is reached. See § 544.

These procedures were not followed. Section 1-1.1003-3(c) of Federal Procurement Regulations (1964 ed. amend. 150), implementing the Brooks Bill, requires that A-E contracts expected to exceed \$10,000 (this contract was for \$20,000) shall be published in the Synopsis, Commerce Business Daily, to solicit firms or persons eligible for the job but without current information on file with the procuring agency. No such public notice of the anticipated procurement was ever published. Thus, the basic policy of the Brooks Bill to encourage wide participation in the procurement process for A-E contracts was frustrated.

Also, the discussions required by 40 U.S.C. § 543 (Supp. II, 1972) with at least three firms regarding anticipated concepts and alternate methods of furnishing the services were not held. The Board merely looked at the information on file or volunteered by A-E firms. It did not announce publicly the proposed procurement, thus not receiving qualifications statements relating to this particular project. Without conducting the discussions contemplated by § 543 the Board's actions were not in compliance with this section of the Brooks Bill which was designed to improve the quality of work being performed for the Government by use of these discussions. See H.R. Rep. No. 92-1188 92d Cong. 2d Sess. 10 (1972).

Also, 40 U.S.C. § 543 (Supp. II, 1972) declares it to be the Government's policy that selection of A-E contractors be based upon criteria established and published by the agency head. While certain criteria were established in the Forest Service's Regulation there was no publication of them as envisioned by the statute.

While the Forest Service Procurement Regulation permits other factors, other than those listed, to be used in the evaluation of proposals they also must be established and set forth in the public notice (missing here) on the particular project.


The criteria cited by the contracting officer as justification for awarding the contract to Shaw-Smith was its specialty in cadastral surveys as well as the fact that it had no recent Forest Service contracts. Forest Service Procurement Regulation § 4G-3. 7007(c)7 states that a firm's experience in relation to the specific services required by a contract is a factor that will affect award. Nowhere is it stated that the number and size of those contracts independent of type or quality of work performed while completing that contract will be used as a factor, let alone a negative factor.

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At § 4G-3.7007(c)9, the regulations note that experience on Federal projects will be counted. However, it is difficult to understand how a prospective contractor could gather from that regulation that recent experience will hurt, rather than help his chance to secure a contract. It is apparent that the prospective contractors were not properly apprised of all the factors that were to be employed in the selection process.

While the record indicates that the Forest Service made a good faith effort to comply with the procedure set out in its own regulations, that procedure is wholly inadequate to comply with the Brooks Bill. The procedure used by the Forest Service does not afford the benefit to the Government of wide participation by available A-E firms through public announcement of proposed contracts. Nor does it allow for the salutary effects discussion with prospective contractors concerning proposed methods of completing the job would have on the final procurement decision. The use of unannounced criteria also deprives the Government of the participation of those who might qualify under the unannounced criteria. See § 543, supra. Moreover, it misleads those actually participating. In this instance, unannounced criteria caused Ninneman's proposal to be rejected.

Thus, for the reasons noted above, we must conclude that the procedures followed in making the instant award were improper. However, as the contract is substantially completed, and it appears that performance is satisfactory, we do not recommend that the contract be terminated. We are by letter of today advising the Secretary of Agriculture of our decision and recommending that the Forest Service Procurement Regulations be amended to comply with the Brooks Bill.


Deputy Comptroller General
of the United States