FEDERAL CONTRACTING FOR ARCHITECT-ENGINEER SERVICES

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Recent events alleging improprieties in the award of contracts for architect and engineer services have led to an erosion of public confidence in the established procedures and to a reexamination and reevaluation of the methods of selection followed by various agencies--public and private. This situation is recognized by your organization (the APWA) which has convened this seminar to discuss current selection procedures and explore methods of restoring public confidence.

Other private organizations are also exploring possible solutions. For example, we have been informed that the American Institute of Architects (AIA) has been studying state and local architect selection practices and believes that full disclosure of the information upon which selections are based is needed to prevent the alleged abuses as reported by the press. We understand that AIA is now drafting model legislation for consideration by state legislatures. A key feature of this would be creation of a non-political designer selection board. The National Society of Professional Engineers has established a task force to determine if there are deficiencies in the applicable laws, procedures, or ethics involved in the selection of engineers for public work.

The General Services Administration has established a high level, special study committee to review the process for selecting A-Es for Federal projects. Membership will be drawn from private industry, the professions, the academic community, and Government. The committee will study GSA's procedures giving consideration to (1) the A-E selections it has made during the last 4 years, and (2) state and local governments' A-E selection procedures. The committee is to complete its work and submit its recommendations to the Administrator of General Services by June 30, 1974.

The General Accounting Office, in response to Congressional and public interests, is making a review of the procedures used by Federal agencies in the selection of A-Es. We are interested in the effectiveness of the selection provisions and whether they have contributed to certain abuses that have been alleged in A-E contract awards. We intend to evaluate the implementation of Public Law 92-582 (Brooks bill) which established a policy for selecting firms and individuals to perform A-E services for the Government. We will cover such matters as the nature, extent, and significance of "discussions" held with A-Es; whether or not selection panels are used and the criteria used for selection. We will examine into the pattern of A-E awards, particularly as to whether there has been any degree of clustering around a limited number of firms. Also, we will compare and review how various states and localities select A-E firms.

GAO involvement in A-E selection procedures

We in the GAO have been interested in the Government's procurement of A-E services for some time. As you may know we issued a report to the Congress in June 1965 which stated that the fee payable under a particular A-E contract awarded by NASA exceeded the applicable statutory 6 percent fee limitation.

Later NASA requested authority from Congress to enter into A-E contracts for its complex research and development facilities without regard to the 6 percent limitation. Instead of granting the authority, the conference report on the authorization bill directed that we in GAO undertake a Government-wide comprehensive analysis of the statutory fee limitation and submit a report with our conclusions and recommendations for legislative action.

Before the issuance of the conference committee directive, we had begun a survey (early in 1965) of the policies and procedures followed by the major construction agencies for selection of A-Es and for negotiation of fees.

Because this survey was closely related to the review stipulated by the conference report regarding the statutory fee limitation, we combined both these efforts and issued a single report in April 1967. In our report we reached three principal conclusions:

First, the 6 percent statutory fee limitation was impractical and unsound. It simply did not insure that the Government would obtain A-E services at fair and reasonable prices.

Second, A-Es were required to submit and certify cost or pricing data in accordance with the requirements of Public Law 87-653, commonly referred to as the Truth in Negotiations Act, and implementing agency regulations.

Third, the selection of A-Es by Government agencies came within the purview of the competitive negotiation procedures also required by Public Law 87-653.

Public Law 87-653 and implementing regulations provide in essence that in negotiated procurements, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Award is then made to the offeror whose proposal is most advantageous, price and other factors considered.

Our conclusion that A-E procurements were subject to the requirements of competitive negotiation was the most controversial aspect of our report. For many years Government contracting agencies had been following the so-called traditional method of selecting A-Es. Generally, under the traditional method a selection board within the agency collects and maintains data on various A-E firms. When A-E services are required the selection board reviews and evaluates the qualifications of individual firms. Usually, the board recommends, in order of preference and without consideration of price, at least three firms

judged best qualified to perform the services. The first firm is contacted and asked to submit its proposed fee terms. Only if the agency is unable to agree with the A-E to a fair and reasonable price are negotiations terminated and the second choice invited to submit its proposed fee terms. This procedure is followed until a successful agreement is reached. The traditional procedure was and is, in our view, essentially sole source.

For example, about 2 years ago we examined the A-E procurements of one major construction agency (GSA). Out of 227 procurements spanning a 2-year period, it was necessary to go beyond the first firm selected in only 17 instances. Of the 17 instances, we were able to find reasons for failing to reach agreement in 15 of the cases. Eight A-E firms refused to accept a design fee within the 6 percent limitation. In four instances, a firm associated with the selected offeror was dissolved. Two firms were committed to other work. And, one was forced to withdraw because of damage to necessary equipment. "Competition," as the word is generally understood in the procurement community, simply did not exist.

Because of the complexity of the questions raised, we advised the agencies that our Office would take no action until the Congress had clarified its intent whether or not selection should be under the competitive negotiation procedures of Public Law 87-653.

Public Law 92-582

The Congress did consider the need for legislation in this area and passed Public Law 92-582 (The Brooks Bill) in October 1972. The

law provides that it is Government policy to publicly announce all requirements for architectural and engineering services and to negotiate contracts for these services on the basis of demonstrated competence and qualification for the type of services required. The law provides for the evaluation of A-Es' statements of their qualifications and performance data, discussions with at least three firms of their approach to the proposed project, and selection of no less than three firms in order of preference. The law provides for negotiation of a contract with the highest qualified firm possible at a fair and reasonable price.

While the Brooks Bill does not apply to agencies covered by the Armed Services Procurement Act (i.e., the Department of Defense, NASA, and the Coast Guard), DOD has incorporated features of the law into its procurement regulations.

The Brooks Bill, in effect, reflects the traditional method of A-E selection with two exceptions:

First, Government agencies are required to publicly announce requirements for A-E services. This requirement is a helpful step in providing the opportunity for more architectural and engineering firms to participate in Federal procurements. The need for this is indicated by the results of a survey by our Office, which showed that the top 20 A-E firms selected by the major Federal procurement agencies during fiscal year 1971 received the bulk of the awards in terms of dollar value.

The second departure from the traditional A-E selection procedures is the mandatory requirement for discussions with at least three firms before ranking the firms in order of preference for price negotiations. Discussions are to embrace anticipated concepts and the relative utility of alternative methods for furnishing the required services. This is also an improvement. However, if our goal is to achieve viable competition, the real question is the scope and extent of the required discussions.

In our view, the legislative intent of the requirement would militate against any meaningful discussion of design concepts both as to content and overall impact on the initial selection process. Also, total project costs, including the A-E's fee, play little or no part in the discussions.

We opposed enactment of the Brooks Bill because we believed that the well-recognized concept of competitive negotiations could be successfully applied to the procurement of A-E services as it has been applied to similar professional services without degrading the quality of the services furnished.

We also suggested withholding congressional action on legislation until such time as the Commission on Government Procurement, then actively studying the question, had an opportunity to report its recommendations to the Congress. The Congress, however, decided to proceed with the enactment of Public Law 92-582. The committee reports,

however, recognized that the Congress could amend the law to reflect the Procurement Commission's recommendations if these were considered preferable to the provisions enacted.

Recommendations of the Commission on Government Procurement

The Commission on Government Procurement issued its report in December 1972 and recommended that:

--Procurement of A-E services, so far as is practicable, be based "on competitive negotiations, taking into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee. The Commission's support of competitive negotiations is based on the premise that the fee to be charged will not be the dominant factor in contracting for professional services."

--Policy guidance be provided "through the proposed Office of Federal Procurement Policy, specifying that on projects with estimated costs in excess of $500,000 proposals for A-E contracts should include estimates of the total economic (life-cycle) cost of the project to the Government where it appears that realistic estimates are feasible. Exceptions to this policy should be provided by the agency head or his designee," and

--Consideration be given to "reimbursing A-Es for the costs incurred in submitting proposals in those instances where unusual design and engineering problems are involved and substantial work effort is necessary for A-Es to submit proposals."

The Commission's recommendations are in consonance with our views as previously expressed in reports, testimony, and other documentation. We have emphasized and reemphasized that we are not advocating the use of formal advertised procedures which require award to the responsible bidder submitting the lowest bid, provided it conforms to the Government's advertised specifications. In contrast,

the flexibility inherent in the concept of competitive negotiation permits an award to be made to the best advantage of the Government, price and other factors considered.

Negotiation requires the contracting officials of the Government to consider those factors of the procurement other than price which, in a proper case, may result in an award to one offeror as opposed to another less qualified offeror submitting a lower price. The award of an A-E contract may and properly should be made to the offeror whose proposal promises the greatest value to the Government in terms of performance and total cost, rather than to an offeror who merely proposes to perform for the lowest fee.

The Procurement Commission has endorsed this view. The Commission stated that "No one familiar with the nature of A-E services, and their importance in minimizing the costs of construction, maintaining, and using a facility, advocates formal advertising for sealed bids to do A-E work; nor do we advocate competition on the basis of the fee charged. However, we believe that the architect-engineer fee is an appropriate factor for consideration in instances where competing A-E firms are otherwise equal." Given the importance of the other factors to be considered in making the selection of the A-E, selection on the basis of lowest proposed fee would be a rare occurrence. Nevertheless, the Commission maintains and we agree that knowledge and discussion of the proposed fee can be beneficial. Consideration and analysis of a proposed fee can lead to a better

understanding on the part of all parties regarding the level of effort to be applied and can reveal how well the proposed contractors understand the nature of the work required.

The Commission recommended that consideration be given to reimbursing A-Es for costs incurred in submitting proposals involving unusual problems and substantial work effort. When it is clearly demonstrated that substantial costs and professional efforts were expended in connection with a unique and technically complex project, we believe that consideration should be given to compensating a deserving, but unsuccessful A-E for its reasonable proposal costs.

Dissenting opinion of commission minority

While the majority of the Commission has supported the position outlined previously, three of the 12 members of the Commission submitted a dissenting position. This minority group recommends that the procurement of A-E services should continue to be based on the selection-out process as generally contemplated by Public Law 92-582 (the Brooks Bill).

The minority's dissenting position maintains that the method recommended by the majority would be less effective in obtaining the best professional services than the traditional selection method. They are concerned that under the procedure supported by the majority, the A-Es estimate of cost might become the "primary factor" for selection purposes. However, as I have indicated, the concern that fee would become the primary factor in A-E selection is not supported by the experience in other related areas. Contracts for management

consultant services, research and development, and technically advanced weapons and aerospace systems--many of which require a significant degree of expert talent and ingenuity--have been accomplished successfully through competitive negotiation.

IME Guidelines for selection of consultants

While our efforts in the past and the thrust of my preceding remarks have been applicable to Federal procurement practices, we believe that the same principles and procedures can be applied at state and local government levels when procurements of comparable A-E services are sought. We have noted that the guidelines for retaining consultants prepared by your Institute for Municipal Engineering (IME) provide for the traditional method of selecting A-Es. The guidelines provide for the negotiation of the fee after the consultant is selected. The IME expressed the philosophy that the public can best be protected from paying excessive fees on such projects through the efforts of the individuals involved in the selection process such as the director of public works or the selection advisory committee of whom at least one member should be a qualified professional engineer or architect. Nevertheless, the IME acknowledged that "there is an increasing demand for more openness in public business and growing opposition to the practice of negotiating agreements." In our opinion, competitive negotiation would provide for increased openness in public business.

The IME pointed out that some public agencies follow alternative procedures in selecting consultants which consider compensation as a factor in the selection process. Use of the alternative is intended for projects of a routine nature or planning and research studies or similar non-design type work.

For example, in routine projects, standard compensation schedules are prepared. At least three prequalified A-Es would then be invited to submit proposals to do the work at the rates stated in the schedule.

For more complex non-design type studies pertaining to public works, the usual screening process, as provided in the IME guidelines would be followed. The three best qualified consultants would then be invited to submit proposals, including compensation. In this case compensation would be one of the factors to be considered in the selection process.

The IME states that there is a division of professional opinion on the merits of the alternative procedures, therefore it has taken no official position on the use of the procedures. However, it plans to evaluate the experiences of public agencies using the procedures and, if appropriate, to revise its guidelines for selection of consultants. We would be very interested in IME's findings with respect to the feasibility of this alternative approach to selecting A-Es. In summary, we believe the adoption of meaningful competitive negotiation procedures would expand competition and afford the best

assurance that contract awards for A-E services will result in superior overall performance. Finally, we believe that competitive negotiation, by encouraging a broader and more objective evaluation of potential A-E contractors, would lead to increased public confidence in the selection process.