

FHWA LETTERHEAD:

June 4, 1987

Contracting for Engineering and
Design Services

Mr. Henry Gray, Director
Arkansas State Highway and
Transportation Department
Little Rock, Arkansas

Dear Mr. Gray:

Passage of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law No. 100-17 (1987)) has placed new requirements on contracting for engineering and design services. Section 111(b) of the Act, which amends 23 U.S.C. and 112(b), makes the procurement of engineering and design services qualifications-based, except as described below.

Contracts subject to this provision are those for program and project management, construction management and inspection, feasibility studies, preliminary engineering, design, engineering, surveying, mapping and architectural related services.

In general, the Act requires Federal-aid highway engineering and design service contracts to be awarded in accordance with the provisions of Title IX of the Federal Property and Administrative Services Act of 1949, copy attached, (popularly known as the Brooks Architects-engineers Act) or by using equivalent State qualifications-based procedures. In short, the Brooks Act provides that engineering and architectural service contracts are to be negotiated on the basis of demonstrated qualifications and competence and at fair and reasonable prices. The general procedure used in Brooks Act procurement consists of evaluating the qualifications of prospective firms, ranking them based on their qualifications, and negotiating price starting with the top ranked firm. If a fair and reasonable price cannot be negotiated with the top ranked firm, negotiations would continue with the next ranked candidate.

Under Section 111(b), the AHTD will be required to comply with the Brooks Act or use equivalent procedures unless you have or choose to establish a formal procurement procedure by State statute. The statutes need not specifically prescribe or preclude Brooks Act procedures but must be consistent with OMB Circular A-102, Appendix O.

If you have a State statute governing the procurement of engineering and design services you may continue to operate under present procedures, or any other procedures you may choose that are consistent with State statutes. If you do not now have a State statute for procurement of these services you may continue under your present procedures until either the 10th day following your first complete regular legislative session beginning after April 2, 1987, or by August 1, 1989, whichever comes first. Beginning on that date, you must comply with the Brooks Act or use equivalent State procedures unless you have enacted, or until you do enact, a statute establishing a procurement process.

All applicable Federal-aid contracts authorized after April 2, 1987, are subject to the provisions of the Act. Please let us know how you intend to comply with this Act. This Act does not affect contracts for right-of-way, planning contracts not involving engineering, design and mapping services, and contracts for other types of professional services.

Sincerely yours,

R. G. Fairbrother
Division Administrator

Enclosure



Public Law 92-562
92nd Congress, H. R. 12307
October 27, 1972

"Brooks Act"

An Act

To amend the Federal Property and Administrative Services Act of 1949 in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.) is amended by adding at the end thereof the following new title:

Architects and engineers. Federal selection policy, establishment. 83 Stat. 127; 82 Stat. 1254.

"TITLE IX—SELECTION OF ARCHITECTS AND ENGINEERS

"DEFINITIONS

"Sec. 501. As used in this title—

"(1) The term 'firm' means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

"(2) The term 'agency head' means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

"(3) The term 'architectural and engineering services' includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

82 Stat. 1277
82 Stat. 1279

"POLICY

"Sec. 502. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

"REQUIREMENTS FOR DATA ON ARCHITECTURAL AND ENGINEERING SERVICES

"Sec. 503. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

"NEGOTIATION OF CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

"Sec. 504. (a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

"(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

"(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

Approved October 27, 1972.

LEGISLATIVE HISTORY

HOUSE REPORT No. 92-1186 (Comm. on Government Operations); SENATE REPORT No. 92-1212 (Comm. on Government Operations); CONGRESSIONAL RECORD, Vol. 118 (1972), July 26, considered and passed House, Oct. 14, considered and passed Senate.

SEC. III. CONTRACTS.

~~Enactment of Contract. Section 112(b) of title 23, United States Code, is amended by striking "in that an emergency situation" before the period at the end of the first sentence.~~

(b) **CONTRACTING FOR ENGINEERING AND DESIGN SERVICES.**—Section 112(b) of such title is further amended by striking out "Construction" and inserting in lieu thereof "(1) IN GENERAL.—Subject to paragraph (2), construction" and by adding at the end thereof the following new paragraph:

"(2) **CONTRACTING FOR ENGINEERING AND DESIGN SERVICES.**—

"(A) **GENERAL RULE.**—Each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under title IX of the Federal Property and Administrative Services Act of 1949 or equivalent State qualifications-based requirements.

"(B) **APPLICABILITY.**—

"(i) **IN A COMPLYING STATE.**—If, on the date of the enactment of this paragraph, the services described in subparagraph (A) may be awarded in a State in the manner described in subparagraph (A), subparagraph (A) shall apply in such State beginning on such date of enactment, except to the extent that such State adopts by statute a formal procedure for the procurement of such services.

"(ii) **IN A NONCOMPLYING STATE.**—In the case of any other State, subparagraph (A) shall apply in such State beginning on the earlier of (I) August 1, 1989, or (II) the 10th day following the close of the 1st regular session of the legislature of a State which begins after the date of the enactment of this paragraph, except to the extent that such State adopts or has adopted by statute a formal procedure for the procurement of the services described in subparagraph (A)."

