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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Artisan Productions, Inc.

File: B-292559; B-292559.2

Date: October 7, 2003

Arthur Friedman for the protester.

Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation instructed offerors to submit past performance references for projects similar in size, complexity and nature to the contract being awarded and indicated that past performance would be evaluated based on performance of work similar in nature to that required by the solicitation, the agency reasonably downgraded protester's proposal for not identifying project references that were comparable in dollar value to that of the requirement solicited.
 2. Because solicitation provided that the agency would evaluate the quality and workmanship of samples of museum exhibit work completed by offerors' proposed personnel, it was reasonable for the agency to consider the aesthetic quality of the work samples submitted by the offerors.
 3. Contracting agency reasonably concluded that awardee's use of a subcontractor which had participated in the development of the solicitation's specifications did not present an organizational conflict of interest because the subcontractor had worked only on design aspects of the specifications, more than one contractor was involved in preparing the specifications, and the subcontractor was not in a position to draft specifications favoring its own products.
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DECISION

American Artisan Productions, Inc. (AAP) protests the award of a contract to Promotion Products, Inc. (PPI) under request for proposals (RFP) No. N9325020022, issued by the National Park Service (NPS), Department of the Interior, for services in connection with museum exhibits at the John Day Fossil Beds National Monument, a national park in Kimberly, Oregon. AAP principally alleges that the agency's

evaluation of its technical proposal was improper, and that the award to PPI was improper due to an impermissible conflict of interest resulting from PPI's use of a subcontractor (High Desert Museum (HDM)) which had assisted NPS in developing the RFP's specifications.

We deny the protest.

The RFP, issued on February 11, 2003, contemplated the award of a fixed-price contract for the design, development, fabrication and installation of approximately 2,400 square feet of museum exhibits, and several stand-alone lobby exhibits, at the Thomas Condon Paleontology Center, and for approximately 500 square feet of museum exhibits at the James Cant Ranch House, both of which are located at the John Day Fossil Beds National Monument. The solicitation specifically stated that the contractor is to provide "project management, additional exhibit design, where needed; production, and installation services for all exhibit elements, including murals, models, fossil mounts, audio (soundscapes), audio equipment, lighting, and security elements" RFP § C, at 1.

Prior to issuing the solicitation, NPS, in partnership with HDM (as well as other contractors), completed approximately 95 percent of the planning and design development work for the exhibits at the two sites. These plans and designs were then incorporated by NPS in the solicitation as exhibit specifications and drawings. Remaining design elements include development of final edited text for exhibit panels and selection of final graphics for the panels.

The RFP listed four technical evaluation factors in descending order of importance: (1) past performance; (2) ability to fabricate both cultural and natural history exhibitry; (3) key personnel; and (4) samples of work. Five subfactors were listed under the past performance factor: (1) quality of products and services; (2) customer satisfaction; (3) cost control; (4) timeliness of performance; and (5) business relations. As relevant to the subject protest, under the samples of work factor, proposals were to be evaluated based on "the quality and workmanship of exhibits as shown by photographs and a description of the exhibit projects that were completed by key personnel proposed for use under the contract." RFP § M, at 2.

The solicitation provided that, after evaluating the offerors' initial proposals, the agency would establish a competitive range, hold discussions with those offerors in the competitive range, and, after receipt of revised proposals, make award to the offeror whose proposal "[would] be most advantageous to the Government, cost or price and other factors considered." Id. at 4. When making this determination, a firm's technical quality and experience, including past performance, would be considered more important than cost or price. Id.

Section L of the RFP instructed offerors to prepare their technical proposals as a separate package and indicated that the technical portion of an offeror's proposal would be the most important single factor in the evaluation of offers. Section L

described the minimum information that offerors were to provide in their technical proposals and, with regard to past performance, it instructed offerors to provide references to contracts they had performed which were similar in size, complexity and nature to the John Day Fossil Beds National Monument project. The instructions further indicated that past performance would be “evaluated on performance under existing and prior contracts for work similar in nature and complexity to that required by the solicitation.” RFP § L, at 3.

Eight firms, including AAP and PPI, submitted proposals by the RFP’s April 14 closing date and the agency convened a technical evaluation panel (TEP) to evaluate the offerors’ initial technical proposals. The TEP assigned each proposal a score and, based upon that score, the proposals were assigned an adjectival rating and a numerical ranking.¹ PPI’s proposal was rated exceptional with the highest initial technical evaluation score of 95.33 (no weaknesses were identified), and, accordingly, was ranked first technically. AAP’s received a technical rating of good and was ranked fifth, with a score of 82.33.

As part of the initial evaluation of AAP’s proposal, the TEP identified several weaknesses. Regarding AAP’s past performance, the TEP noted that AAP’s contract references were for smaller-scale projects than the John Day Fossil Beds National Monument. AAP’s proposal contained past performance information regarding three contracts it had completed within the last 3 years. The first was for outdoor exhibits at the JFK Special Forces Museum, in the amount of \$87,205. The second was described as phase I of the world’s largest fire museum, in the amount of \$750,000, with design and production of an 8,000 square foot fire museum. The third was identified as a contract for a Forest Service visitor center, in the amount of \$127,000. The TEP also noted that the exhibit examples submitted by AAP did not include “rendering of complex geological formations”; AAP’s paleontology examples were primarily of dinosaurs, which the TEP indicated were not relevant to the John Day Fossil Beds National Monument project; and some of the examples submitted looked artificial. AR, Tab 10, TEP Report, at 5-6.

Before establishing the competitive range, the contracting officer ranked the proposals in terms of price. AAP submitted the lowest-priced offer in the amount of \$1,043,318² and, therefore, was ranked first. PPI’s proposal was ranked fifth.

¹ The TEP was composed of three panelists, each of whom independently rated and scored the offerors’ technical proposals. The total possible score an offeror could receive was 100 points. Offerors’ adjectival ratings and numerical rankings were based on an average of the panelists’ scores. See Agency Report (AR), Tab 10, TEP Report.

² AAP also included with its proposal an alternative “value engineering” cost proposal with a price of \$986,667. The agency, however, did not consider that alternative proposal. AAP has not challenged this decision.

Based on the evaluations of the initial proposals, all eight offerors were found to be within the competitive range, and, on June 5, the agency held telephone discussions with all the offerors.

Because PPI's technical proposal did not have any perceived weaknesses, the agency suggested only that PPI take a "second look" at its price proposal. AR, Tab 10, TEP Report, at 7. During its discussions with AAP, however, the agency highlighted AAP's various weaknesses. NPS indicated that its examples and references were for smaller scale projects and asked AAP to provide examples of its largest projects. NPS also asked AAP "to provide examples of non-dinosaur paleontological exhibits, i.e. mammals and renderings of complex geological formations." AAP's Comments on Agency Report, Aug. 18, 2003, at 4. In response, AAP submitted information regarding three additional projects, the largest of which was completed in 1985 and in the amount of \$817,000.

AAP also sought to send a sample of a typical fossil section in concrete to the agency's contracting office in Seattle. The contracting officer, however, informed AAP that the sample should be sent directly to the John Day Fossil Beds National Monument because "the Seattle office did not have the staff or room to handle, store, or evaluate such an object." Agency's Response to Protester's Comments, Aug. 29, 2003, encl. at 4. According to AAP, it did not send the sample to the park because, notwithstanding AAP's alleged two requests, the contracting officer failed to provide AAP with an address or a delivery contact for the park.

After reviewing the revised proposals, the lead technical evaluator, in a memorandum to the contracting officer, concluded that the supplementary material submitted and/or changes to the technical proposals would not alter the TEP's scores and he therefore recommended adopting the TEP's initial technical scores. See AR, Tab 10, Evaluation of Offerors' Supplemental Submissions and Revised Price Proposals, June 26, 2003.

In a memorandum dated June 26, the contracting officer determined that PPI ranked the highest technically with a score of 95.33; concluded that PPI's price (\$1,230,000), when compared with the other prices submitted and the government estimate (\$1,234,228), was fair and reasonable; and determined that PPI's proposal represented the best value to the government. See AR, Tab 11, Source Selection Authority (SSA) Decision. On June 27, the agency awarded the contract to PPI and notified the unsuccessful offerors of the award decision on June 30.

On July 1, AAP requested a post-award debriefing in accordance with Federal Acquisition Regulation (FAR) Part 15. The contracting officer provided AAP with a written debriefing, which was sent by facsimile and mailed on July 3. In the debriefing letter, the contracting officer discussed the significant weaknesses in AAP's technical proposal. Specifically, with regard to the past performance factor, the contracting officer noted that most of the examples of work submitted by AAP

were for projects that were smaller in scale and complexity when compared to the John Day project and stated that “other firms submitted proposals documenting many completed projects that were up to 10 times greater in scale than the John Day project, and many submitted a range of large (\$5 million plus) to smaller projects.” See AR, Tab 14, Debriefing letter, July 3, 2003, at 1.

With regard to the second evaluation factor, ability to fabricate both cultural and natural history exhibitry, the contracting officer stated, in part, that most of the natural history examples submitted by AAP “did not deal with paleontological themes” and that “the quality (realism) of the natural history exhibitry . . . submitted . . . was not deemed as good as other firms submitting proposals.” Id.

As to the third evaluation factor, key personnel, the contracting officer indicated, in part, that the examples of AAP’s muralists’ work were inferior to the quality of work submitted by other firms and asserted that PPI’s key personnel, particularly its muralists, were superior to those of other offerors. Id. at 1-2.

Due to transmission problems AAP did not receive the contracting officer’s debriefing until July 7 and, as a consequence, AAP filed an initial protest, dated July 6, prior to its receipt of the written debriefing. Upon receipt of the debriefing, however, AAP filed a subsequent protest on July 7, elaborating on its earlier filed protest.³

Evaluation of AAP’s Proposal

AAP challenges the agency’s evaluation of its proposal in several respects. AAP argues that: (1) the agency deviated from the solicitation’s stated evaluation criteria by downgrading its proposal under the past performance factor because AAP had no completed museum exhibits in the \$5-\$10 million range; and (2) the agency improperly relied on its determination that AAP’s muralists were inferior to PPI’s muralists since such a comparison is inherently subjective and cannot be a valid basis for award.⁴

³ AAP argues that the contracting officer’s debriefing was not sufficiently detailed and was “arbitrary and capricious.” Our Office will not review a protester’s contention that the debriefing it received was inadequate because the adequacy of a debriefing is a procedural matter concerning an agency’s actions after award, which are unrelated to the validity of the award itself. HpkWebDac, B-291538.2, Jan. 22, 2003, 2003 CPD ¶ 28 at 2. As a result, this protest ground will not be considered further.

⁴ In its comments to the agency report, AAP also argues that the agency should not have downgraded its proposal for not dealing with paleontological themes because, according to AAP, the contracting officer denied it the opportunity to submit its sample of a typical fossil section in concrete. AAP, however, knew of this basis for

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When reviewing a protest of an agency's proposal evaluation, we will consider whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Preferred Sys. Solutions, B-291750, Feb. 24, 2003, 2003 CPD ¶ 56 at 2. Here, as discussed in detail below, we see no basis to question the agency's evaluation.

Past Performance

AAP argues that the agency employed an unstated evaluation criterion by downgrading its past performance score because AAP had not completed museum exhibits in the \$5-\$10 million range. This argument, however, is unsupported by the record. AAP's challenge is based on the section of its debriefing wherein the agency notes that other firms submitted proposals documenting projects that were up to 10 times greater in scale than the John Day project, and many submitted a range of large (\$5 million plus) to smaller projects. This statement, however, when read in context, does not support AAP's conclusion that the agency required offerors to have completed exhibits in the \$5-\$10 million range.

The RFP expressly instructed offerors to provide references to contracts they had performed which were "similar in size, complexity and nature" to the John Day Fossil Beds National Monument project. RFP § L, at 2. AAP's debriefing specifically noted that the contract references submitted by AAP were for projects smaller in scale and complexity relative to the John Day project. NPS had raised this concern with AAP during discussions, which led to AAP's submission of additional contract references.

Given that all of the projects submitted by AAP were less than the dollar value of the John Day project, and the project with the highest dollar value (\$817,000) was completed in 1985, approximately 18 years ago, the agency's concerns about AAP's contract references and its evaluation of AAP's past performance were wholly reasonable. While AAP argues that several of the projects it submitted were larger than the John Day project in total square footage, the agency correctly points out that it was within its discretion to consider not only the square footage of the

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protest when it received its debriefing on July 7 (AAP cites the debriefing as the sole evidence in support of its position). Because AAP waited until its comments on the agency report, filed on August 21, to raise the issue, it is untimely. Our Bid Protest Regulations do not contemplate the untimely, piecemeal presentation of protest issues, and in this regard, a protester may not delay raising additional protest grounds where, as here, the protester was aware of those grounds at the time of filing its initial protest. See 4 C.F.R. § 21.2(a)(2) (2003); JAVIS Automation & Eng'g, Inc., B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11.

projects submitted but to also consider their cost as an objective way of assessing the complexity and scale of the projects submitted. See Knightsbridge Constr. Corp., B-291475.2, Jan. 10, 2003, 2003 CPD ¶ 5 at 3.

The comment in AAP's debriefing letter, that other offerors had completed projects of a larger scale and for greater dollar amounts than the John Day project, merely served as a point of comparison with the other proposals. There is no evidence in the record suggesting that NPS downgraded AAP or any other offeror for not having exhibits in the \$5-\$10 million range. It is significant to note in this regard that the awardee, PPI, did not identify any exhibits in the \$5-\$10 million range; PPI's highest dollar value contract reference was \$2.5 million.

Evaluation of Muralists

AAP also argues that the agency improperly evaluated the quality of the work of its muralists by comparing them with those of PPI and concluding that PPI's muralists were superior. According to AAP, its muralists are among "the world's foremost natural history artists" and any preference for PPI's muralists "is like saying I like Rembrandt better than Leonardo da Vinci." Protest, July 7, 2003, at 2. According to AAP, the agency should have evaluated only whether its muralists were capable of doing the work in a cost-effective manner.

The solicitation, however, instructed offerors to submit samples of work by their proposed personnel and stated that offerors' samples would be evaluated "based on the quality and workmanship of exhibits." RFP § M, at 2 (emphasis added). Because NPS was evaluating samples of artwork submitted by the offerors' muralists, aesthetic judgments were an inherent aspect of the agency's evaluation of the "quality and workmanship" of those samples. NPS, therefore, did not act improperly by comparing the aesthetic quality of AAP's muralists to those of PPI.

Due to the fact that aesthetic judgments are inherently subjective, the exercise of such judgments remains within the reasonable discretion of procuring officials. SDA Inc., B-256075, B-256206, May 2, 1994, 94-2 CPD ¶ 71 at 10. There is nothing in the record to suggest that the agency abused its discretion in this regard. While AAP may disagree with the agency's aesthetic assessments of its muralists' work, its mere disagreement with the agency's evaluation is not a sufficient basis for finding the agency's evaluation unreasonable. Bell Free Contractors, Inc., B-227576, Oct. 30, 1987, 87-2 CPD ¶ 418 at 5.

Conflicts of Interest

In its comments on the agency report, AAP, for the first time, asserted the existence of a conflict of interest based on PPI's proposed use of a subcontractor (HDM) which had also worked on the solicitation's specifications. As support for its position, AAP cites FAR § 9.505-2(b)(1), which provides as follows:

If a contractor prepares, or assists in preparing, a work statement . . . that contractor may not supply the . . . services unless: (i) It is the sole source; (ii) It has participated in the development and design work; or (iii) More than one contractor has been involved in preparing the work statement.

Our Bid Protest Regulations provide that protests based on other than alleged solicitation improprieties must be filed not later than 10 days after the protester knew or should have known the basis of protest. 4 C.F.R. § 21.2(a)(2). AAP was on notice of the fact that HDM had a role in developing the solicitation's specifications from the solicitation itself, which had an express statement to that effect and also clearly marked the specifications and various drawings with HDM's logo and name. Further, AAP learned of PPI's involvement with HDM on July 17, by virtue of an e-mail message from one of its own subcontractors. See AAP's Comments on Agency Report, August 18, 2003, Tab 4. Because AAP learned of this basis for protest on July 17, but first raised the issue more than 10 days later, it is untimely.

Even assuming AAP's challenge to be timely, it is, in any event, without merit. The responsibility for determining whether a conflict exists, and whether a firm should be excluded from competition, rests with the procuring agency, and our Office will not sustain a protest challenging an agency's determination in this regard unless it is shown to be unreasonable. SSR Engineers, Inc., B-282244, June 18, 1999, 99-2 CPD ¶ 27 at 2. Procurement officials are to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant conflict of interest exists. FAR § 9.505. Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 4.

In this case, as a preliminary matter, the prohibition in FAR § 9.505-2(b)(1), by its own terms, does not apply. Assuming HDM's work on the specifications in some way implicated FAR § 9.505-2(b)(1), two of the exceptions contained in this section would, nevertheless, apply. As noted above, FAR § 9.505-2(b)(1)(ii) exempts from the provision's prohibition a contractor who has participated in the design and development work; HDM worked on design aspects for the John Day project exhibits. Agency's Response to Protester's Comments, Aug. 29, 2003, encl. at 2-3. The second exception (FAR § 9.505-2(b)(1)(iii)) applies where more than one contractor has been involved in preparing the work statements; here, firms other than HDM worked on the specifications as well.⁵ Id., encl. at 3.

⁵ AAP's argument also appears somewhat disingenuous, given that AAP itself included in its proposal a subcontractor (Delta A/V Systems) which, like HDM, worked on the specifications for the John Day project exhibits. See id.; AAP's proposal, Tab C, at 1; RFP, amend. 7, two Delta A/V files.

While not specifically addressed by AAP, the agency also correctly points out that FAR § 9.505-2(a)(1) likewise would not render the award to PPI improper in this case. FAR § 9.505-2(a)(1) generally prohibits a contractor from preparing and furnishing complete specifications covering nondevelopmental items and then furnishing those items either as a prime contractor or as a subcontractor. The concern addressed by this provision is that the contractor could skew the competition, whether intentionally or not, in favor of itself. Snell Enters., Inc., supra, at 3. In this case, the agency represents that HDM did not provide “complete specifications.” Agency’s Response to Protester’s Comments, Aug. 29, 2003, at 3. In addition, prior to the release of the solicitation, the contracting officer determined that HDM’s participation in the competition did not create a conflict because HDM was not in a position to draft specifications favoring its own products since HDM does not perform the type of work solicited. Id., encl. at 2. The agency explains that HDM is dedicated to exhibit design work, while the subject solicitation is primarily for exhibit fabrication and installation. Id. Based on the record here, there is no basis to question the agency’s determination that HDM should not have been precluded from participating in the competition.

In connection with its conflict of interest argument, AAP also highlights the fact that PPI’s price of \$1,230,000 was close to the government estimate of \$1,234,228, and thereby suggests that HDM provided PPI with an unfair advantage with its price proposal. According to AAP, this should have “raised a red flag” with the contracting officer. In a joint statement, the contracting officer and the head of the TEP assert that, while HDM did provide the agency with cost information about the design work it had performed, HDM did not prepare the government estimate and the government estimate was never provided to HDM. Id., encl. at 3. In our view, AAP’s contentions concerning the proximity of PPI’s price to the government estimate are based entirely on mere suspicion and innuendo; the record before us simply does not support AAP’s speculation. See Snell Enters., Inc., supra, at 4.

As a final matter, AAP alleges that the contracting officer was biased against it. AAP argues that the contracting officer’s bias is evidenced by the various allegations discussed above. Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. ACC Constr. Co., Inc., B-289167, Jan. 15, 2002, 2002 CPD ¶ 21 at 4. Here, AAP has not provided any proof to support this allegation.

The protest is denied.

Anthony H. Gamboa
General Counsel