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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: NVT Technologies, Inc.

File: B-292302.3

Date: October 20, 2003

Jeffrey A. Lovitky, Esq., for the protester.

Douglas W. Kornreich, Esq., and Jonathan Baker, Esq., Department of Health and Human Services, and Kenneth Dodds, Esq., U.S. Small Business Administration, for the agencies.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably imposed bond requirements in a solicitation for real property management services, despite the fact that these requirements may restrict competition, where the agency reasonably determined that the bonds were necessary to protect substantial and mission-critical infrastructure that will be entrusted by the agency to the contractor in order to perform the contract.

DECISION

NVT Technologies, Inc. protests the terms of request for proposals (RFP) No. 263-03-P(BC)-0044, issued by the Department of Health and Human Services (HHS) pursuant to Office of Management and Budget Circular A-76 and the Circular's Revised Supplemental Handbook, to determine whether it would be more economical to perform a broad range of real property management services in-house at five HHS facilities in the states of Maryland, North Carolina, and Montana, or to contract for these services under the referenced solicitation. NVT is a small business concern currently performing real property management services at an HHS facility in North Carolina. NVT argues that under this RFP, the agency has improperly bundled requirements for real property management services that are currently being performed by small businesses, like itself, and has imposed unreasonable bond requirements which unduly restrict small business participation in this procurement.

We deny the protest.

The RFP was issued on an unrestricted basis on May 15, 2003. Under the RFP, if a private-sector offeror successfully competed against the government's "most efficient organization," *i.e.*, the government's in-house staffing plan, the agency would award a contract for a 2-year base period and three 1-year option periods. As relevant here, the RFP contained requirements for performance and payment bonds, with each bond having to be in an amount equal to 50 percent of the original contract price. The agency has estimated the annual acquisition value to be \$100 million. Contracting Officer's Statement at 4. The amended closing date for receipt of initial proposals was July 29. NVT did not submit a proposal.

BUNDLING ISSUE

In its protest filed with our Office on July 29, NVT argued that the agency failed to justify its decision to bundle in accordance with the "substantial bundling" analysis required by Federal Acquisition Regulation (FAR) § 7.107(e). Protest at 3.¹

FAR § 7.107(e) states as follows:

Substantial bundling is any bundling that results in a contract with an average annual value of \$10 million or more. When the proposed acquisition strategy involves substantial bundling, the acquisition strategy must—

- (1) Identify the specific benefits anticipated to be derived from bundling;
- (2) Include an assessment of the specific impediments to participation by small business concerns as contractors that result from bundling;
- (3) Specify actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;
- (4) Specify actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

¹ In its July 29 protest, while NVT made other general allegations concerning bundling, NVT's allegation that the agency did not perform a substantial bundling analysis in accordance with regulatory requirements was the only specific bundling issue raised by the firm.

- (5) Include a specific determination that the anticipated benefits of the proposed bundled contract justify its use.²

On July 31, the agency sent to the protester a 5-page determination and findings document that was captioned “Documentation of Acquisition Strategy Relating to Substantial Bundling as Required by FAR [§] 7.107(e).” In this document, the agency addressed each provision of FAR § 7.107(e), as set forth above. (This document was executed in May 2003, a few days after the RFP was issued; this document was signed by the contracting officer, the HHS small business specialist, and the Small Business Administration procurement center representative.) By letter dated July 31, the protester advised our Office that the agency “ha[d] satisfied NVT’s Document Production Request through the submission of documents on this date.” Letter from Protester to GAO, July 31, 2003.

On August 29, the agency filed its administrative report, which included a copy of the May 2003 substantial bundling analysis document previously provided to NVT on July 31. The agency pointed out that contrary to NVT’s position, the agency did in fact comply with FAR § 7.107(e) by performing a substantial bundling analysis. In its comments on the agency’s administrative report filed on September 10,³ NVT, for the first time, challenged in a number of respects the merits of the agency’s May 2003 substantial bundling analysis. This September 10 challenge, made more than 10 days after NVT received on July 31 the agency’s substantial bundling analysis document, is untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2003). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.—Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Here, NVT acknowledged receipt on July 31 of the agency’s document addressing the regulatory requirements for a substantial bundling analysis. However, since NVT did not challenge the merits of the agency’s substantial bundling analysis until more than 10 days after it received the relevant document, we will not consider NVT’s protest in this regard.

² FAR § 7.107(h) does not exempt A-76 competitions from the substantial bundling analysis required by FAR § 7.107(e).

³ NVT requested, and our Office granted, a 1-day extension for the filing of comments.

In addition, in its September 10 comments, NVT argued for the first time that the agency's bundled solicitation violates the Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1) (2000), which generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. We will not consider this argument, based on an alleged solicitation impropriety, because it was not timely raised prior to the July 29 amended closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

BOND REQUIREMENTS ISSUE

NVT argues that the agency abused its discretion by requiring performance and payment bonds, with the penal sum of each bond having to be in an amount equal to 50 percent of the contract price. NVT maintains that these bond requirements unduly restrict the ability of a small business, like itself, to compete under this procurement.

An agency has the discretion to impose bond requirements in appropriate circumstances as a necessary and proper means to secure fulfillment of the contractor's obligations. While generally an agency should not require bonds for other than construction contracts, the FAR recognizes, and NVT acknowledges, Protest at 4, that FAR § 28.103-2 permits the use of bonds for nonconstruction contracts when it is necessary to protect the government's interests, such as where government property is being provided to the contractor for use in performing the contract. In reviewing the bond requirements contained in a particular solicitation, we look only to see if they are reasonably imposed. American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 4. Here, we conclude that the agency had a reasonable basis to impose bond requirements under this RFP.

More specifically, the agency explains in its administrative report that performance and payment bonds are necessary because the agency will be entrusting a substantial amount of infrastructure to the contractor and the continuous operation of this infrastructure is critical to the agency's mission. Under the RFP, the contractor will be responsible for the care and maintenance of major research laboratories and critical care centers that must run 24 hours per day, 365 days per year. The contractor will be required to operate systems that provide life support for patients and laboratory animals and that protect research materials. For example, the RFP requires the contractor to operate the National Institutes of Health (NIH) campus in Bethesda, Maryland, which includes more than 70 buildings and 8 million gross square feet of building space on 300 acres; the contractor will be required to continuously maintain utility plants, clinical care centers, and research facilities. The RFP also requires the contractor to maintain the Research Triangle Park, North Carolina campus of the National Institute of Environmental Health Sciences (NIEHS), which is a facility of over 1 million square feet on 504 acres; the contractor will be required to run the central utility plant, a medical-pathological incinerator, and a hazardous waste facility that supports not only the NIEHS, but also the

Environmental Protection Agency. The RFP further requires the contractor to operate the Rocky Mountain Labs in Hamilton, Montana, which include over 30 buildings and 220,000 square feet of space on 33 acres; these labs contain critical vaccine and biodefense research. In addition, the RFP requires the contractor to maintain the NIH Animal Center in Poolesville, Maryland, which is a 513-acre site used for animal and quarantine studies. Finally, the RFP requires the contractor to maintain the Gerontology Research Center at the Johns Hopkins Bayview campus in Baltimore, Maryland, which includes approximately 220,000 gross square feet of space for science and clinical research laboratories, animal holding and procedure rooms, and freezers for long-term specimen storage. Memorandum of Law at 6.

In sum, the record shows that the agency imposed bond requirements because the contractor will be responsible for maintaining substantial and critical HHS facilities that are involved in highly sensitive medical research and because a contractor's failure to properly perform real property management services at these facilities would seriously compromise the agency's mission. In these circumstances, where NVT has not provided any meaningful rebuttal to the agency's position, we have no basis to question the reasonableness of the agency's determination to impose bond requirements.

To the extent NVT complains that these bond requirements, including the penal sums, will effectively preclude small businesses, like itself, from competing under this RFP as prime contractors, we point out that although a bond requirement may restrict competition and may even exclude some small businesses, that possibility alone, absent a finding of unreasonableness, does not render a bond requirement improper. American Artisan Prods., Inc., *supra*, at 5; see also J & J Maint., Inc., B-239035, July 16, 1990, 90-2 CPD ¶ 35 at 2-3 (GAO held that there was nothing inherently unreasonable in the agency's determination to require a 100-percent performance bond where continued performance of services essential to the operation of a major installation was necessary).

Finally, our analysis of the bond requirements leads us to conclude that NVT is not an interested party to raise other challenges to the RFP. In several places in its comments, NVT effectively concedes that it would not submit a proposal so long as the bond requirements remained in the RFP. For example, NVT states that "while [it] was disadvantaged by the consolidated nature of this procurement, it would nonetheless have submitted a proposal had the penal sums on the bonds been eliminated." Protester's Comments at 6. In other words, NVT concedes that the bond requirements had to be eliminated in order for the firm to compete under this RFP. In light of this concession and our conclusion, as discussed above, that the bond requirements were reasonably imposed, we conclude that NVT is not an interested party to challenge any of the other terms of the RFP (*e.g.*, terms involving the applicable wage determination and an evaluation factor related to small business subcontracting requirements) because NVT, absent the elimination of the bond

requirements, admits that it cannot compete as prime contractor and, as a result, is not a prospective offeror under this RFP. 4 C.F.R. § 21.0(a).

The protest is denied.

Anthony H. Gamboa
General Counsel