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**Comptroller General
of the United States**

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

Decision

Matter of: American Artisan Productions, Inc.

File: B-292380

Date: July 30, 2003

Arthur L. Friedman for the protester.

Alton E. Woods, Esq., and Jeanne A. Anderson, Esq., Department of the Interior, and John W. Klein, Esq., and Gene Marie M. Pade, Esq., Small Business Administration, for the agencies.

Sharon L. Larkin, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly imposed bond requirement in solicitation for the design, fabrication, and installation of exhibits, despite the fact that it may restrict competition, where agency reasonably determined that bonds were necessary to ensure timely completion of project and to protect the government from losses that would result from contractor default.
 2. Agency's determination not to set aside procurement for small businesses was proper where agency reasonably concluded—based on market surveys and concurrence of the Small Business Administration—that it could not expect to receive proposals from at least two responsible small business offerors at fair market prices.
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DECISION

American Artisan Productions, Inc. (AAP), protests the terms of request for proposals (RFP) No. NDR030034, issued by the Department of the Interior, Bureau of Land Management (BLM), for the design, fabrication, and installation of exhibits for two "Interpretive Centers" in Montana. AAP contends that the RFP, issued as an unrestricted solicitation, should have been set aside for small businesses, and that the bid and performance bond requirement restricts small business competition and is unnecessary.

We deny the protest.

The RFP, issued May 19, 2003, as an unrestricted solicitation, sought fixed-price proposals for the design, fabrication, shipment, and installation of interior and exterior exhibits for two new Interpretative Centers depicting the Lewis and Clark expedition. The centers were intended to, among other things, increase recognition of the areas' history, including the areas' connection with the Lewis and Clark expedition, and were to be constructed and opened between 2003 and 2006 to coincide with the national bicentennial celebration of that expedition. RFP at 2-3; § C, Statement of Work (SOW), at 1, 3-4.

According to the BLM, the "project has great historical significance" and completion of the exhibit work before the bicentennial celebration ends is "critical." Contracting Officer's Statement at 1, 5. In this regard, the RFP established performance periods for building construction, exhibit installation, and opening dates for each center, and provided an estimated budget for the total project that was "not to exceed" \$1.4 million. RFP, § C, SOW, at 2-3, 5. The RFP also required an offeror to provide a bid guarantee and performance bond, and expressly included Federal Acquisition Regulation (FAR) § 52.228-1 ("Bid Guarantee"), § 52.228-2 ("Additional Bond Security"), and § 52.228-16 ("Performance and Payment Bonds--Other Than Construction"). RFP, amend. 0001, at 1, 3-4.

Prior to issuing the RFP, the BLM conducted several nationwide market searches on the Small Business Administration's (SBA) Procurement Marketing Access Network (Pro-Net) to ascertain whether the requirement should be set aside for small businesses.¹ The BLM searched North American Industry Classification System (NAICS) 541420, Industrial Exhibit Design, and found two Historically Underutilized Business Zone (HUBZone) firms with bonding capacity; however, neither firm was found to have experience in designing, fabricating, and installing exhibits. The BLM also searched Pro-Net utilizing the keyword "exhibits." This search returned 124 firms, but the listing did not identify the business status of the firms or their bonding capacity.

Based upon its market research, the BLM concluded that two or more small business with bonding capacity were not likely to submit proposals and that the RFP should not be set aside for small businesses. On April 11, the BLM submitted a Department of the Interior Acquisition Screening and Review Form to the SBA, indicating that the work would be advertised as an unrestricted procurement. Agency Report, Tab 2.

After reviewing the form, the SBA suggested that the BLM perform a Pro-Net search of NAISC 541850, Display Advertising; however, upon further discussions between

¹ Pro-Net is an on-line database of information on more than 195,000 small, disadvantaged, Section 8(a), Historically Underutilized Business Zone, and women-owned businesses. See <www.pro-net.sba.gov>.

the agencies, it was agreed that NAISC 541890, Other Specialized Design Services, was a more appropriate classification. The BLM searched Pro-Net for NAISC 541890, which revealed three HUBZone firms with adequate bonding capacity, but the BLM found that these firms had no experience in the design, fabrication, and installation of exhibits. The SBA procurement center representative signed the Acquisition and Review Form on April 29, authorizing the issuance of an unrestricted solicitation. On May 19, the BLM issued the RFP, open to both large and small businesses.

On May 21, AAP notified the SBA's local office that it believed the "contracting officer has ignored the 'Rule of Two'" set forth in FAR § 19.502-2 in issuing an unrestricted solicitation, and that the bond requirement constitutes an "additional restraint" upon small businesses which "ties up the small business capital and places us out of the competitive market." Protest, attach. 1, E-mail from AAP to the SBA.

On May 22, the SBA responded that, according to the BLM, the bond was required to "keep the artists on the job" based upon past experiences of the BLM. The SBA informed AAP that the SBA has a Surety Bond Division to assist small businesses to qualify for these bonds, and that AAP would not "be out this expense" because it could invoice the BLM and receive payment at the beginning of the contract. Protest, attach. 2, E-mail from the SBA to AAP.

With regard to the BLM's decision not to set aside the procurement for small businesses, the SBA stated that the BLM had two past experiences with large exhibit work, and it had tried to set aside one of those experiences for small businesses without success. The SBA stated that, according to the BLM, the RFP requires both design and fabrication, and most small businesses perform design work, but not fabrication. The SBA informed AAP that "[i]f you still think that there are four small businesses who can perform this work, please . . . get back to me . . . with a description of your firms' capabilities and the others' as they relate to the statement of work." Id.

Later that day, AAP provided the names of three "design build" firms, including itself, that AAP asserted have "untarnished reputations."² It described its own experience as including "design and production" work, but did not describe the experience or capabilities of the other firms. It also did not state whether any of the firms, or AAP, had the requisite bonding capacity. AAP suggested that the BLM consult the "bidders mailing list" and contact the "Exhibit Designers and Producers Association" for a listing of "additional eligible small businesses." Protest, attach. 3, E-mail from AAP to the SBA.

² AAP did not provide any identifying or contact information for the firms, such as address or telephone number.

On May 23, AAP again contacted the SBA and repeated its concerns regarding small business participation and the bond requirement. Protest, attach. 4, E-mail from AAP to SBA. However, on May 28, the SBA informed AAP that the “Contracting Officer stands by her decision” concerning both issues. Protest, attach. 5, E-mail from the SBA to AAP. Later that day, AAP filed its protest with this Office.

AAP protests that the bid guarantee and performance bond requirement is unreasonable. It generally contends that the BLM did not reasonably investigate whether the bond requirement is necessary, or whether other alternatives are available, and argues that the requirement is “used as a ploy to eliminate small business[es] from participating.” Protest at 2.

A bid guarantee refers to a form of security ensuring that the bidder will not withdraw its bid within the period specified for acceptance, and that the bidder will execute a written contract and furnish required bonds within the time specified in the bid. A performance bond secures performance and fulfillment of the contractor’s obligations under the contract, and may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the government’s interest. FAR § 28.001; § 28.103-2. 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. In reviewing the bond requirements contained in a particular solicitation, we look only to see if they are reasonable and imposed in good faith. Iowa-Illinois Cleaning Co.; Patco Indus., B-254805 et al., Jan. 18, 1994, 94-1 CPD ¶ 22 at 2 (hereinafter “Iowa-Illinois”).

Specifically, AAP contends that the BLM failed to research other agencies’ solicitations as to the need for a bond requirement. Protester’s Comments at 2-3. In support of this argument, the firm provides examples of solicitations that other agencies issued without the requirement to show that the requirement imposed by the BLM is unreasonable. However, we are unaware of any authority that requires the BLM to search, or adopt, another agency’s needs or solicitation requirements. In any event, the BLM explains that it has imposed bond requirements in two similar contracts for exhibit and design fabrication in the past year and, as noted above, BLM’s experience demonstrated that a bond requirement was necessary to “keep the artists on the job.” Protest, attach. 2, E-mail from the SBA to AAP.

AAP also argues that the inclusion of progress payments or issuance of a Certificate of Competency by the SBA would adequately protect the BLM without the need for a bid guarantee and performance bond. However, neither option protects the BLM from losses incurred as the result of a defaulting contractor, or precludes the contracting officer from exercising her discretion to include bond requirements in the RFP to protect the government’s interest. Moreover, the making of progress

payments before delivery of the exhibits is one of the bases set forth in the FAR that justify the imposition of a bond requirement.³ FAR § 28.103-2(a)(3).

In our view, the contracting officer reasonably imposed the bid and performance bond requirement here. As the BLM explains, the requirement is necessary to ensure completion before the bicentennial celebration of the Lewis and Clark expedition ends and protect against losses resulting from a defaulting contractor's failure to meet this deadline. As noted above, the timely completion of this project was "critical" to the agency, given the project's "great historical significance." Contracting Officer's Statement at 1, 5. While AAP contends that the bond requirement "does not guarantee" timely performance and was not needed, Protester's Comments at 4, this disagreement with the BLM's judgment does not render it unreasonable. D.J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 CPD ¶ 121 at 4. Although a bond requirement may restrict competition, and may even exclude some small businesses, that possibility alone, absent a finding of unreasonableness or bad faith, does not render a bond requirement improper. Maintrac Corp., B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257 at 3. AAP has presented no evidence of bad faith and, as discussed above, we find that the BLM's determination was reasonable.

AAP next protests that the BLM "made an unreasonable determination not to set aside the procurement for small business" because it failed to perform adequate market research. Protester's Comments at 8.

An acquisition is required to be set aside for small businesses if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small businesses at fair market prices. FAR § 19.502-2(b). Generally, we regard such a determination to be a matter of business judgment within the contracting officer's discretion, which we will not disturb unless unreasonable. Quality Hotel Westshore; Quality Inn Busch Gardens, B-290046, May 31, 2002, 2002 CPD ¶ 91 at 3. (hereinafter "Quality Hotel"). However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two responsible small businesses at fair market prices, and we will review a protest of a contracting officer's decision in that regard to determine whether the contracting officer made such efforts. Id. The use of any

³ AAP also suggests that bid and performance bonds should not be required because this is not a construction contract. Protester's Comments at 3. Although it is true that an agency generally should not impose performance bond requirements in non-construction contracts, the FAR permits their use when, as here, they are found necessary to protect the government's interest; and a bid guarantee may be required whenever there is requirement for a performance bond. FAR § 28.101-1(a); Iowa-Illinois, supra, at 2.

particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys, and advice from the SBA may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3.

As noted above, the contracting officer performed three Pro-Net searches, at least one of which was performed in consultation with the SBA, and from these searches could not identify two or more small businesses with bonding capacity that could perform design, fabrication, and installation work. Based on these results, and with the concurrence of the SBA, the contracting officer determined that there was no reasonable expectation that the BLM would receive two or more offers from small businesses in response to the RFP. We find this determination to be reasonable. We accord substantial weight to the fact that the contracting officer's determination was made in concurrence with the SBA, was subsequently reviewed by the SBA's local office, and was again reviewed by the SBA during this protest and found not to be unreasonable. Quality Hotel, *supra*, at 4; CardioMetrix, B-260747, July 18, 1995, 95-2 CPD ¶ 28 at 3.

AAP contends that the contracting officer should have consulted the bidders list and contacted the firms and trade associations identified by AAP during its post-solicitation communications with the SBA and in its post-protest submissions. However, AAP did not apprise the BLM of this information prior to the issuance of the RFP,⁴ and information that first becomes available after issuance of a solicitation does not necessarily demonstrate the unreasonableness of a contracting officer's determination not to set aside a procurement. Fayetteville Group Practice, Inc., B-226422, May 26, 1987, 87-1 CPD ¶ 541 at 4. In this case, we think the contracting officer undertook sufficient and reasonable efforts through the Pro-Net searches and consultation with the SBA to reasonably conclude that two or more small businesses with bonding capacity would not be available to perform the work.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Moreover, the BLM no longer maintains a bidders list. Contracting Officer's Statement at 2.

