



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Kerry Lindahl

**File:** B-276057

**Date:** May 7, 1997

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Kerry Lindahl, the protester.

Friedrich St. Florian, an intervenor.

Harmon R. Eggers, Esq., and Lydia R. Kupersmith, Esq., General Services Administration, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. Protester which entered design competition for the National World War II Memorial is an interested party to challenge the selection of a designer on the basis that the agency improperly reduced the amount of below-grade interior space allegedly required to be included in the design of the Memorial, notwithstanding that agency did not consider protester's late entry, since if the protest were sustained, the appropriate remedy would be a resolicitation under which the protester could compete.

2. Allegation that in selecting a final design for the National World War II Memorial contracting agency may not significantly change the amount of space required to be included in entries in the preliminary design competition--on the basis of which the designer finalist was selected--is denied where, when read in the context of the purpose of the competition, nothing in the Commerce Business Daily notice publicizing the design competition or in a program brochure distributed by the contracting agency to potential entrants can reasonably be read to limit the agency, in selection of a final design, to the physical characteristics listed as parameters for the preliminary design competition.

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## **DECISION**

Kerry Lindahl protests the selection of Friedrich St. Florian as the architect with whom to negotiate an architect-engineer (A-E) contract under solicitation No. GS-11P-96-AQC-0017. The solicitation was issued by the General Services Administration (GSA) on behalf of the American Battle Monuments Commission (ABMC), for design and other A-E services in connection with the National World War II (WWII) Memorial. The protester contends that after announcing the

competition, GSA improperly made a material change in the requirements for the design of the Memorial by reducing the amount of below-grade interior space initially called for, without affording all competitors an opportunity to submit a new design responding to GSA's revised space requirements.

We deny the protest.

## BACKGROUND

The design competition, classified by GSA as a procurement of A-E services, is governed by the Brooks Act, 40 U.S.C. §§ 541-544 (1994), and the implementing provisions of Federal Acquisition Regulation (FAR) subpart 36.6. These authorities require agencies to publicly announce their A-E requirements, listing general and project-specific evaluation criteria; appoint A-E evaluation boards to review qualification statements already on file, as well as those submitted in response to the synopsis; and evaluate and rank at least three firms on a short list for further contract negotiations in order of ranking. See generally FAR subpart 36.6; Geographic Resource Solutions, B-260402, June 19, 1995, 95-1 CPD ¶ 278 at 2. In accordance with these requirements, the agency announced the design competition in the Commerce Business Daily (CBD) on June 11, 1996.<sup>1</sup> GSA synopsisized the evaluation criteria and requested interested firms to submit a completed standard form (SF) 254 (A-E and Related Services Questionnaire), and SF 255 (A-E and Related Services for Specific Project Questionnaire), in accordance with FAR § 36.603(b) (FAC 90-29). The synopsis constituted the solicitation.

The Memorial is to be located in Washington, D.C., between the Lincoln Memorial and the Washington Monument, at a site referred to as the Rainbow Pool, extending from the east end of the Reflecting Pool to 17th Street. The CBD announcement explained that the selection process was to be conducted in two stages. In Stage I, in addition to qualifications data, designers were to submit a sketch or graphic illustrating their preliminary design vision for the WWII Memorial, in either black and white or color, mounted on a foam core board, and a narrative description of their intention and philosophy as related to the proposed Memorial. Stage I submissions were to be evaluated for originality, appropriateness, feasibility, and compliance with the project requirements contained in a "Preliminary Program

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<sup>1</sup>The competition was initially announced in a CBD notice published April 19, subsequently amended on May 17, and superseded by the June 11 CBD announcement.

Brochure" (the Brochure) available from GSA. At the conclusion of the Stage I evaluations, the agency was to select at least five designers to proceed to Stage II of the competition and participate in a more detailed conceptual design competition.

More than 400 entries, including the protester's, were submitted for consideration in Stage I. An A-E board and a design jury evaluated the qualifications data and initial submissions and selected six designers to proceed to Stage II. Mr. Lindahl's entry was not selected for further consideration.<sup>2</sup>

By letter dated August 21, the agency informed all unsuccessful designers of the results of the Stage I competition. The agency then provided the six Stage II competitors with another brochure, which contained more specific information related to architectural, landscaping, and water elements, as well as ceremonial, memorial, and musical components to be considered in designing the Memorial. The Stage II brochure also contained more detailed project requirements related to physical aspects of the Memorial (e.g., size, height, topography, accessibility, etc.). Based on their consideration of the Stage II submissions, the evaluators recommended that St. Florian be selected for further negotiations to design the Memorial; the ABMC accepted that recommendation. St. Florian's selection was announced at a White House ceremony on January 17, 1997.

As relevant to this protest, a newspaper article publicizing the event described St. Florian's design as including four interior rooms for "'presentational and educational space' as called for by the ABMC" but noted that "[w]hat will be placed in the four interior rooms . . . is yet to be decided."<sup>3</sup> The article also quoted an ABMC official as stating that "[o]ur own thinking has been changed, and we're scaling down the amount of enclosed space considerably from initial estimates." The article further stated that the ABMC had "already removed one sizable element, a 400-seat auditorium that was required in all of the competing designs." According to the quoted official, "[ABMC] just began to question who would use it, would operate it, [and] what was the real need." Following publication of the article, Mr. Lindahl filed this protest in our Office.

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<sup>2</sup>As discussed further below, Mr. Lindahl's entry in fact was submitted after the time set for receipt of entries.

<sup>3</sup>Benjamin Forgey, World War II Memorial Design Unveiled, Washington Post, January 18, 1997, at A1.

## PROTESTER'S CONTENTION AND AGENCY POSITION

Mr. Lindahl argues that after announcing the Stage I competition, GSA improperly made a material change in the design requirements. Mr. Lindahl contends that the Brochure required that the Stage I sketches include 7,400 square meters (SM) of below-grade interior space in the Memorial. According to the protester, based on the newspaper article publicizing the selection decision, St. Florian's design will be substantially "scaled down" to include only about 4,900 SM of below-grade interior space. Mr. Lindahl asserts that this proposed reduction is significant and requires GSA to cancel the solicitation and resolicit based on the revised below-grade, interior space requirements.

The agency does not dispute that the amount of below-grade interior space included in the final design of the Memorial, such as the auditorium facility, will probably be reduced from that originally proposed by St. Florian. GSA essentially argues, however, that the purpose of the competition was to select a designer, not a final design for the Memorial, adding that the design of this or any memorial of this magnitude is essentially an evolutionary process. As such, the agency expects that the Memorial design inevitably will undergo several revisions and refinements as the project proceeds from an initial, preliminary design stage to a final approved monument.

## DISCUSSION

### Interested Party

The CBD announcement stated that Stage I entries were to be received at a designated room at GSA by 2:30 p.m. on August 12, 1996. It is undisputed that Mr. Lindahl attempted to deliver his entry to the designated room on August 13, sometime after 4:00 p.m. Finding that room closed, Mr. Lindahl delivered his entry to the contracting office, where a GSA employee accepted it and marked it as late. GSA did not consider Mr. Lindahl's late entry, but states that due to the sheer number of Stage I entries, it inadvertently failed to notify Mr. Lindahl that his submission had been rejected as late.

GSA relies on our decision in Flight Resources Inc., 65 Comp. Gen. 619 (1986), 86-1 CPD ¶ 518, to argue that since the protester's Stage I entry was late, and therefore ineligible for further consideration in Stage II, Mr. Lindahl lacks the requisite interest under our Bid Protest Regulations to maintain the protest.

Under the bid protest provisions of the Competition in Contract Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), as amended by Pub. L. No. 104-106, §§ 4321(d), 5501, 5603, 110 Stat. 186, 674, 698, 700 (1996), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier

whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1997). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261, 262 (1988), 88-1 CPD ¶ 151 at 2-3.

The facts in Flight Resources Inc., *supra*, are distinguishable from the instant case. That decision involved a procurement for the operation of a general aviation service facility at Washington National Airport. Unlike the design competition conducted by GSA under FAR subpart 36.6, the procurement in Flight Resources Inc. was conducted using the two-step, sealed bidding procedures set forth at FAR subpart 14.5. Under those procedures, step one consists of a request for technical proposals without price to determine the acceptability of the supplies or services offered. Step two involves the submission of sealed bids by those firms that submitted acceptable technical proposals in step one. Award is then made to the responsible bidder with the lowest responsive bid in accordance with FAR subpart 14.4.

Flight Resources submitted its step one proposal late; consequently, the firm's proposal was not eligible for further consideration. In its subsequent protest to our Office, Flight Resources alleged that in negotiations following step one, the agency had significantly changed its needs, which required that the agency cancel the solicitation and resolicit the requirement. The basis for the protester's allegation was that, apparently for evaluation purposes, the agency had placed a ceiling on the amount of investment in fixed improvements and operating facilities offerors would make if awarded the contract.

We found that since Flight Resources's technical proposal was properly rejected as late and since, under FAR § 14.501, only those offerors that submitted acceptable step one proposals could participate in step two, only those offerors had a legitimate interest in the results of the evaluation. Accordingly, we concluded that Flight Resources was not an interested party to maintain the protest because, even if we had sustained the protest, the appropriate remedy would have been to reevaluate (without the alleged investment ceiling) only the proposals of those offerors eligible for participation in step two. Since the agency properly rejected Flight Resources's technical proposal as late, the firm's proposal would not have been eligible for reevaluation and, thus, Flight Resources would not have been eligible for award.

By contrast here, if we were to sustain the protest, the appropriate remedy would be for GSA to cancel the solicitation and issue a new solicitation with revised space requirements. See, e.g., Denwood Properties Corp., 72 Comp. Gen. 181, 182 (1993), 93-1 CPD ¶ 380 at 3; CV Assocs.--Recon., B-243460.2, Aug. 20, 1991, 91-2 CPD ¶ 171 at 2; 120 Church St. Assocs., B-232139.5, Feb. 28, 1990, 90-1 CPD ¶ 244 at 4 (in each

of these cases, the agency reasonably canceled a solicitation for leased space where its advertised space requirements either significantly decreased or increased after issuing the solicitation). Since Mr. Lindahl would have the opportunity to compete under a new solicitation, he is an interested party to maintain the protest. 3M Deutschland GmbH, B-221841, May 20, 1986, 86-1 CPD ¶ 473 at 3.

## Analysis

At issue here is whether the Brochure provided that the final design for the Memorial would include a specified, pre-established amount of below-grade, interior space. As relevant here, the Brochure stated as follows:

"The WWII Memorial is intended to convey, through a variety of means and art forms, the meaning of WWII to America and the [w]orld. This objective may be met in part by above-grade, unenclosed, architectural and other design elements. Below-grade interior space should be included in the design to provide for special rooms or halls of honor and remembrance, multimedia interactive educational facilities, an auditorium theater and a visitor information center. The estimated space needed for these purposes is approximately 7400 SM. . . ."

Mr. Lindahl concedes that it was reasonable to assume that GSA ultimately would allow some deviation in the amount of below-grade interior space to be included in the Stage I designs. He maintains, however, that a reduction from 7,400 SM, as announced in the Brochure, to 4,900 SM, as proposed to be included in St. Florian's final design, is a material change not contemplated by the Brochure. Mr. Lindahl maintains that had he known that the agency required only 4,900 SM of below-grade, interior space for the Memorial, his original conceptual design (and presumably those of other Stage I participants) would have been significantly different.<sup>4</sup>

A solicitation must be read as a whole and in a reasonable manner, giving effect to all its provisions. Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228 at 6. Here, while the agency did not issue a "solicitation" in the form of a request

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<sup>4</sup>Mr. Lindahl also contends that the requirement for an estimated 7,400 SM of below-grade interior space and other provisions in the Brochure needed clarification or rewording to be unambiguous and more precise. These arguments, which essentially take issue with the language contained in the Brochure, are untimely and will not be considered. If Mr. Lindahl believed that any aspect of the Brochure was unclear, he was required to raise those objections prior to the time established for submission of initial Stage I entries. Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1).

for proposals or invitation for bids, we think that the same principle applies with respect to the language in the Brochure and the CBD notice announcing the competition since the CBD notice was the solicitation and it referenced the Brochure.

In announcing the design competition, the Brochure emphasized that

"[t]he [ABMC], rather than prescribing a mandatory design program for the WWII Memorial, prefers to offer the fullest opportunity for the design professions to interpret and develop a composition of civic design elements to achieve a result worthy of the event, of those being remembered, and of the Memorial's incomparable setting. In design, the [ABMC] asks only for the highest quality of artistry, spiritual substance, and respect for the Memorial's environs."

The Brochure went on to explain that

"[t]he purposes and philosophy underlying the [WWII] Memorial serve as broad guidelines for its design. It is to honor and express the nations's deep and enduring respect and gratitude to all the American men and women who served in the United States Armed Forces during WWII, those who gave their lives as well as those who survived. Without hubris or vainglory, the [M]emorial should convey a sense of remembrance and national pride, fortitude, valor, suffering and sacrifice of its fighting forces and their heroic accomplishments.

. . . . .

The design challenge is to strive to capture in architectural form, memorial art, inscribed words and landscaped setting, the stirring spirit and meaning of this unique moment in American history, a moment in time which, in profound ways, changed forever the face of American life and the direction of world history."

The Brochure further emphasized that while the strong presence of other monuments near the site (e.g., the Washington Monument, the Lincoln and Jefferson Memorials, the White House, and the Mall itself) provides a context to which designers of the WWII Memorial may wish to respond, "the choice of design, philosophy and style guiding the proposed memorial design are to be the prerogative of the designer."

In our view, it is clear from the Brochure that the purpose of the competition was to select a designer--rather than a final design--based on the creative talent and design vision shown in the initial submissions. We recognize that the Brochure contained references to the type and amount of space to be included in the initial designs, stating that "[d]esigned enclosed interior space for the [M]emorial should be provided below grade . . . " and that "[t]he estimated space needed for these purposes is approximately 7,400 SM." When read with the purpose of the competition in mind, however, we think that the only reasonable interpretation is that these provisions were intended to serve as a common framework against which preliminary designs could be--and in fact were--judged. Nothing in the CBD announcement or the Brochure indicated that in selecting an architect for further negotiations following Stage II of the competition, the government was bound or otherwise limited by the information in the Brochure in selecting a final design.<sup>5</sup>

Moreover, while St. Florian has been selected as the architect for negotiating a contract based in part on his proposed design, the design approval and construction process involves several federal agencies and authorities, all of which could recommend further changes to the plans for the Memorial. For instance, the Commemorative Works Act of 1986, 40 U.S.C. §§ 1001-1010 (1994), requires that the ABMC consult with the National Capital Memorial Commission regarding the site location and the design of the Memorial. 40 U.S.C. 1007(a)(1). Additionally, the Secretary of the Interior or the Administrator of General Services is required to submit site and design proposals to the Commission of Fine Arts and the National Capital Planning Commission for their approval. 40 U.S.C. § 1007(a)(2). As the protester recognizes, any one, or several, of these authorities could recommend a myriad of changes to the design before the final plans for the Memorial are agreed upon and approved.<sup>6</sup> This statutory scheme, which vests several entities with authority to recommend changes to and ultimately approve the final design of the Memorial, further supports our conclusion that the design competition was not intended to select a final, static design for the Memorial, but rather to serve as the starting point of an evolutionary process which ultimately could result in changes to the preliminary Stage I designs submitted in response to the Brochure.

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<sup>5</sup>The Brochure's reference to the below-grade interior space in relatively imprecise terms--as "estimated space" and "approximately" 7,400 SM--lends support to our conclusion that the government was not bound by this figure, nor expected designs to include a specified amount of below-grade interior space.

<sup>6</sup>As an additional part of the design approval and construction process, the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994), and the National Historical Preservation Act of 1966, 16 U.S.C. §§ 470-470x-e (1994), must also be satisfied.

In sum, given the purpose of the Brochure--i.e., to provide general information about the project and guidance on submitting Stage I entries--and in light of the nature of the design competition--to select a designer based on demonstrated abilities, qualifications, and artistic talent--there is no basis for our Office to object to the modification to the amount of below-grade interior space in the design of the Memorial.

The protest is denied.

Comptroller General  
of the United States