

DOCUMENT RESUME

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[Alleged Improprieties in Request for Proposals]. B-188916.
August 9, 1977. 8 pp. + 2 enclosures (2 pp.).

Decision re: General Exhibits, Inc.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Corps of
Engineers, Seattle, WA; Exhibit Designers and Producers
Association.

Authority: 4 C.F.R. 20.2(h)(1). A.S.P.R. 1-706.3. A.S.P.R.
3-501(h). A.S.P.R., App. E-504.1. 40 Comp. Gen. 106. 53
Comp. Gen. 270. 50 Comp. Gen. 679. 55 Comp. Gen. 244. 52
Comp. Gen. 854. 52 Comp. Gen. 857. B-185755 (1976). B-180245
(1974). B-186614 (1976). B-186950 (1976). B-185046 (1976).

The protester alleged various improprieties in the
request for proposals for a firm fixed-price contract for the
design, fabrication, and installation of interpretive displays.
An individual who files a protest in behalf of an association
may continue the protest in behalf of his firm when the
association subsequently withdraws from the protest. The
agency's decision not to set aside procurement for small
business is not subject to legal objection. There is no
requirement for the use of detailed design specifications in the
procurement of creative design concepts. Where an agency seeks
creativity and innovative approaches, the agency is not required
to award the contract on the basis of the lowest price since
other factors are paramount. (Author/SC)

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J. Metopoulos
Proc. II



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20543

FILE: B-188916

DATE: August 9, 1977

MATTER OF: General Exhibits, Inc.

DIGEST:

1. Individual who files protest in behalf of Association may continue protest in behalf of his firm when GAO is subsequently notified that Association withdraws from protest. For purpose of timeliness protest may be considered as having been filed by individual's firm initially.
2. Contracting officer's decision not to set aside procurement for small business because of lack of sufficient number of qualified small business firms for the procurement is not subject to legal objection.
3. In a solicitation for services inclusion of clause providing for site inspection was proper on Government installation notwithstanding protester's contention that contract was essentially one for supplies.
4. In procurement of creative design concepts, which calls for creativity on part of individual offerors, agency's needs can be described only broadly; there is no requirement for use of detailed design specifications in such circumstances. Further, where agency seeks creativity and innovative approaches, agency is not required to award contract on basis of lowest price since factors other than price are paramount.
5. Allegation that solicitation failed to indicate relative importance of evaluation criteria is without merit where criteria were listed in descending order of importance and solicitation so informed offerors. Absence from solicitation of precise numerical weights to be employed in evaluation is consistent with regulatory provision precluding such disclosure.
6. Evaluation of prior experience/past performance is not improper or discriminatory with respect to small business.

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7. Evaluation of traditional responsibility factors such as experience is not improper when agency has legitimate need to consider such factors in making relative assessment of offerors' proposals.
8. Absence of solicitation providing for progress payments is not objectionable where only a 90-day performance period is involved.

General Exhibits, Inc. (GEI) has alleged various improprieties in request for proposals (RFP) No. DACW67-77-R-0008, issued March 28, 1977 by the Army Corps of Engineers, Seattle, Washington. The solicitation contemplated the award of a firm fixed-price contract for the design, fabrication and installation of interpretive displays for the Visitor Center at Lake Washington Ship Canal and Hiram M. Chittenden Locks, Seattle, Washington. The center is to serve as a model for other similar centers throughout the country, and its purpose is to assist visitors to understand the role of the Corps of Engineers through project-related information.

The protester alleges that the requirement should have been issued as a small business set-aside since the Corps was purportedly aware of the availability of a number of capable small business concerns. Moreover, GEI contends that the RFP included a number of unreasonable and unnecessary requirements that worked to the detriment of small business concerns.

GEI first objects to a site examination clause, contending that the provision requires an unnecessary and expensive outlay of money, that the site conditions can be described in the RFP, and that the requirement for a site examination is legally restricted to contracts calling for the performance of services whereas the instant procurement is for supplies. GEI also objects to the RFP requirements for "speculative design concepts," "creative input" and "drawings requiring an unnecessary outlay of capital." GEI argues that the proposal should include a complete description of the design required and materials to be used. GEI considers the method of procurement used to be inappropriate, and feels that it should be accomplished through the award of a design contract under which the contractor would design the visitor center and produce specifications that would permit the issuance of an IFB for construction of the center.

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Further, the protester contends that the award should be made to the lowest responsible offeror since the Government may not negotiate contracts at "premium prices" to obtain services of superior quality.

The protester also takes exception to various aspects of the solicitation's evaluation criteria, set out below:

"1. EVALUATION CRITERIA

"Evaluation of proposals will be made in the relative order of importance below:

- a. Design originality, creativity and effectiveness of use of materials, colors, and graphics to accomplish specified objectives.
- b. The appropriateness of the proposed materials, as well as their quality, ease of maintenance, resistance to vandalism and aesthetic appearance.
- c. The quality of performance, reliability and appropriateness for the areas intended of the audio and electronic equipment provided by the offeror.
- d. The professional qualifications of the personnel who will be assigned the various project tasks, including: fabrication, script editing, graphics design, audio direction and production, visual direction, production and programming.
- e. The capability of the offeror to perform the scope of work within the time frame specified, based on past work performance of a similar nature.
- f. The cost in conjunction with the effectiveness, quality and scope of the proposal. The Government reserves the right to reject any or all proposals at any time prior to award; to negotiate with any or all offerors; to award a contract to other than the offeror submitting the lowest price offered; and to award a contract to the offeror submitting the proposal determined by the Government to be the greatest value to the government."

With regard to the above-listed factors, GEI complains that:

criterion (a) is defective in that it is too abstract

criterion (b) is defective in that the Government fails to list inappropriate materials, standard maintenance limitations, or what security measures are required

criterion (c) is vague, ambiguous, and fails to establish a minimum need

criterion (d) does not state minimum acceptable qualifications

criterion (e) is discriminatory against small businesses because they may not have had prior experience even though they are qualified to perform.

It is also contended that factors (d) and (e) relate solely to an offeror's responsibility and by their inclusion as evaluation factors, the contracting officer is circumventing the authority of the Small Business Administration (SBA) to certify the competency of small business concerns as to matters of capacity and credit. Our decision 40 Comp. Gen. 106 (1960) is cited in this regard.

It is further contended that the solicitation fails to indicate the relative order of importance of the evaluation criteria in terms of ascending or descending order, so that no notice is provided whether cost (factor(f)) is of paramount or least importance. GEI also complains that the RFP fails to specify a point system so that all offerors will be apprised as to the precise mathematical basis upon which proposals will be scored.

Finally, GEI complains that the RFP does not provide for progress payments, requiring a small business to finance a \$230,000 project under which payment will be made only after the project is completed and installed.

Initially, the Army contends that the GEI protest is untimely pursuant to section 20.2(b)(1) of our Bid Protest Procedures, which states that protests based upon alleged solicitation improprieties should be filed prior to the closing date for receipt of initial proposals.

4 C.F.R. § 20.2(b)(1) (1977). This protest initially was timely filed in our Office on April 25, 1977, the day before the time period for accepting proposals was to close, by Mr. Arthur L. Friedman in behalf of Exhibit Designers and Producers Association (the Association). On May 5, Mr. Friedman notified us that the Association had ordered him, as an officer of the Association, to withdraw the protest filed in behalf of the Association. However, Mr. Friedman requested "as an individual exhibit designer, producer and small business * * * and on the bid list for this procurement" to be allowed to have the protest "continued in behalf of my firm (GEI)." The Army argues that since the Association reportedly "never intended to question the specifications" the GEI protest which was first filed after the closing date for receipt of proposals is untimely.

We believe the protest should be considered to be timely. While the Army states that the Association never intended to protest the RFP, it is clear that Mr. Friedman did intend to protest. We do not think the intent of our timeliness standard is violated by permitting Mr. Friedman to substitute his firm, GEI, as the party in interest and treating the protest as if it had been filed initially by that firm.

As to the merits of the protest, the record shows that the contracting officer considered the possibility of setting the procurement aside for small business but rejected that course of action when he concluded that there were not a sufficient number of small business concerns capable of performing this contract because of the tight completion schedule (90-day delivery) and the budget limitations. In this regard, the Army reports that on April 28, 1977, a Small Business Administration (SBA) representative investigated the non-initiation of a set-aside, and no appeal was taken. See Armed Services Procurement Regulation (ASPR) § 1-706.3. (1976 ed.). Moreover, there is no legal requirement that any particular procurement be set aside for small business. B-164555, September 10, 1968. Thus, we are unable to object to the contracting officer's determination to solicit on an unrestricted basis. See Groton Piping Corporation and Thomas Electric Company (Joint Venture), B-185755, April 12, 1973, 78-1 CPD 247.

With regard to the provision for a site inspection the clause in question merely urged offerors to satisfy themselves as to any general and local conditions that may affect their particular cost of performance. The contracting officer explains that the clause was included in the RFP in accordance with ASPR § 3-501(b) Sec. C(XIII) which requires

that the "site visit" clause be inserted in all contracts for the performance of services at a Government installation. Although the protester argues that the instant contract is a supply contract, it is clear that the contractor will be required to perform services at a Government installation. Therefore we think it was appropriate to include a "site visit" clause in the RFP.

Also we are unable to agree with the protester's objection to the RFP requirements for "speculative design concepts", "creative input" and drawings. The record indicates that the procurement is not only for the purchase of a final product but also for the development of a design concept to serve as a model for other similar centers throughout the country. Inasmuch as there has been no prior procurement of these particular services, and since the purpose of the procurement is to acquire the fruits of the successful offeror's creativity, we are unable to say that the contract objectives should be accomplished through detailed design specifications. In any case, we have recognized that the procuring agency must determine how its needs can best be met, and we cannot object to the determination absent a finding of unreasonableness or arbitrariness. 53 Comp. Gen. 270 (1973). We do not find these factors in this case.

As for the contention that the effort should be accomplished through the award of a design contract and a subsequent issuance of an IFB for the project, we note from the record that the entire project is scheduled to be completed by September 2, 1977, so that the Visitor Center will be available for public use before the Labor day weekend. The purpose of the September 2 completion date is to take advantage of the peak late summer season and holiday weekend to test reaction to this prototype center and utilize the information gained on the balance of these visitor centers. It is obvious that the Army could not meet the September 2 deadline if this project were divided into two segments as urged by GEI. Consequently, we find no basis to question the early completion date.

Next the protester, citing 50 Comp. Gen. 679 (1971), argues that this fixed-price contract should be awarded based on the lowest priced, acceptable technical proposal and that the agency has no authority to pay premium prices in order to obtain supplies or services of superior quality. The cited case, however, involved a mess attendant services procurement where offerors were required to enter staffing levels in manning charts to show the number of personnel required to perform described services. There the agency made award to the offeror proposing the greatest total hours on the basis that this offeror's price per manhour was low. We held that the award should have been

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made instead to the acceptable offeror who submitted the lowest total price. That situation is not applicable here, where the agency is seeking creativity and innovation rather than manpower and factors other than price are paramount. As we have consistently recognized, in the negotiation of fixed-price (as well as cost-type) contracts price need not be the controlling factor, and award may be made to a higher-priced, higher technically rated offeror. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 188. Therefore, we cannot sustain the protester's contention.

Moreover, we do not agree with GEI's contention that the evaluation criteria, set out above, give no indication of their relative order of importance in terms of ascending or descending order. The solicitation clearly stated that the evaluation "will be made in the relative order of importance below" and then listed the factors set forth above. No reasonable reading could indicate other than that (a) was most important and (f) least important. In our opinion the RFP adequately sets forth the relative order of importance of the evaluation factors. See BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237 and cases cited therein. GEI also has noted that a point system was not specified. However, ASPR § 3-501(b) Sec. D(i) specifically requires that numerical weights which may be employed in the evaluation of proposals not be disclosed in a solicitation.

With regard to GEI's specific objections to the criteria, we note that the nature of the procurement makes it impossible to specify precisely what will or will not be acceptable since it cannot be anticipated what each offeror will submit as its unique approach. Accordingly, the agency must consider each approach offered on its individual merits, including submitted personnel qualifications, and determine the relative degree to which each meets the established evaluation criteria. Also we find nothing in factor (e) (past performance) that unreasonably discriminates against small business as alleged by GEI. There is nothing improper in requesting information on previous work performed as it might reflect on an offeror's capabilities, or in the evaluation of such capabilities. See, e.g., Augmentation, Inc., B-186614, September 10, 1976, 76-2 CPD 234; SBD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511; 52 Comp. Gen. 718 (1973).

The protester also believes that factors (d) (qualifications of proposed personnel) and (e) are "responsibility" factors solely within SBA's authority concerning matters of capacity and credit. It cites 40 Comp. Gen. 106 (1960) in support of this position. That

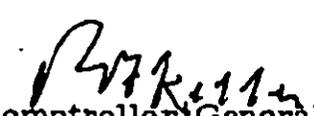
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case concerned an invitation for bids which required that each bidder must qualify as a manufacturer experienced in the design and manufacture of equipment similar to that required by the invitation. We held that the invitation requirement clearly went to the matter of capacity (and therefore responsibility) so that the authority of the SBA could not be defeated by treating the issue as one of responsiveness.

However, in negotiated procurements evaluation factors normally bearing on responsibility, such as "experience" and "other resources" are widely used in conjunction with evaluation factors bearing on technical approach, and all evaluation factors, whether relating to traditional concepts of responsibility or to technical approach, may properly be used to make relative assessments of the merits of individual proposals. See Harry Kahn Associates, Inc., B-185046, July 19, 1976, 76-2 CPD 51, and cases cited. Those relative assessments should not be considered responsibility findings, which are made after proposal evaluation has been completed. 52 Comp. Gen. 854, 857 (1973). Accordingly, we are unable to object to the use of (d) and (e) as evaluation factors.

Finally, concerning the failure of the solicitation to provide for progress payments, the contracting officer states that such payments are inappropriate for a procurement with an approximate 90 day performance period and a \$230,000 ceiling. In reviewing the ASPR, we find that Appendix E-504.1 provides for the inclusion of progress payments in advertised procurements when the contracting officer considers that the period between the beginning of the work and required delivery will exceed four months for small business concerns, or when he considers them otherwise useful. While we cannot find a comparable provision in the ASPR applicable to negotiated procurements, we think that the minimum 4-month period applicable to advertised procurements may be used as a standard in the case of negotiated procurements. Under the circumstances, we are unable to conclude that progress payments were required.

In view of the foregoing, we do not find that the solicitation is legally objectionable and the protest is accordingly denied.


Deputy Comptroller General
of the United States



J. Notopoulos
Proc. II
COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-188916

August 9, 1977

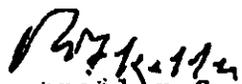
Mr. William B. Cherkasky
Staff Director
Select Committee on Small Business
United States Senate

Dear Mr. Cherkasky:

Pursuant to your interest on the protest of General Exhibits, Inc., under Army Corps of Engineers solicitation No. DACW67-77-R-0008, we enclose a copy of our decision of today setting forth our conclusions on the matter.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosure



J. Nicospoulou
Proc. II

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-188916

August 9, 1977

The Honorable Richard S. Schweiker
United States Senate

Dear Senator Schweiker:

Pursuant to your interest in the protest of General Exhibits, Inc., under Army Corps of Engineers solicitation DACW67-77-R-0008, we enclose a copy of our decision of today, setting forth our conclusions on the matter. Also enclosed, as requested, is the correspondence attached to your referral memo dated May 2, 1977.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosures