



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Molly Maguires

File: B-278056

Date: December 22, 1997

Beverly Yablin for the protester.

Thomas Kelly, Esq., Government Printing Office, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against Government Printing Office's nonresponsibility determination is denied where it was based on the protester's unsatisfactory technical capability, the fact that most of the work samples provided by the protester were illustrations rather than published design work as required under the solicitation, and that the agency was unable to verify the protester's claimed experience.

DECISION

Molly Maguires protests its rejection as nonresponsible under an invitation for bids (IFB) designated as Program 3216-M, issued by the Government Printing Office (GPO) for graphic design services. Molly Maguires contends that the nonresponsibility determination lacked a reasonable basis and was made in bad faith.

We deny the protest.

Program 3216-M contemplated the award of multiple 1-year contracts for the procurement of graphic design services for the Defense Automated Printing Service. Section 1, the general terms and conditions of the solicitation, stated that, because of the creative nature of the work required under Program 3216-M, firms selected to perform the contract must have, among other things, "[e]xperience, including references, reputation, and record of accomplishment in designing and illustrating projects of a similar size, scope, and complexity." The solicitation also advised that, in order to determine bidder responsibility, the agency may conduct a pre-award survey or require the submission of other evidence of artistic, technical, production, managerial, financial, and similar abilities.

When bids were opened on July 31, Molly Maguires was the apparent low bidder. During the ensuing pre-award survey, Molly Maguires provided the agency representative with a "Capabilities Statement" outlining, among other things, the

background of the owner/principal of the firm; the firm's financial status, equipment and supplies; and a list of 12 corporate clients. The protester provided neither an address or phone number for any of these 12 references, nor the name of a specific contact for any of the references. Molly Maguires also provided GPO with a copy of a letter of reference from a judge in whose courtroom Molly Maguires's principal had done case illustrations and artwork for a TV news program. The letter was written by the judge and addressed to an advertising firm. The protester also submitted a letter from an art college in Philadelphia certifying that Molly Maguires's principal had graduated from the college in 1987.

In the agency's August 15 record of Molly Maguires's pre-award survey, the agency representative noted the size of the studio and the available equipment. On the survey report, the agency representative specifically noted that the protester's technical capability was unsatisfactory, that most work samples shown to the agency representative were illustrations rather than published design samples, that the limited number of graphics samples did not appear to be recently produced, and that Molly Maguires would not relinquish the samples, so the agency photocopied them.¹ The agency representative concluded that the protester provided "no evidence [that] the contractor is proficient at producing production-ready art, either electronically or mechanically." The record of the survey also shows that the agency representative contacted four businesses referenced by Molly Maguires as previous clients, but that none of the personnel contacted by the agency representative were able to confirm that Molly Maguires had done business for the firm. Because Molly Maguires failed to furnish acceptable samples and it did not appear that the firm was able to produce production-ready work, and because the agency could not verify Molly Maguires's references or current clients, the agency determined that Molly Maguires was nonresponsible.² The agency awarded contracts to three bidders and, upon learning of the award and of the nonresponsibility determination, Molly Maguires protested to this Office.

Molly Maguires protests that the nonresponsibility determination was unreasonable because it was based on an improper pre-award survey. Specifically, the protester argues that it was "never ever asked for a list of references" but, as noted above, provided the list of corporate clients and two letters of reference. The protester alleges that she asked GPO on several occasions if the agency wanted additional information, but that the agency representative never identified any required

¹The record shows that the protester brought the samples to the agency and that agency personnel photocopied the samples in the presence of the protester.

²GPO need not refer a nonresponsibility determination of a small business to the Small Business Administration (SBA) for review because GPO is a legislative branch agency not subject to SBA jurisdiction. Chandler Mktg. Group, B-247184, May 11, 1992, 92-1 CPD ¶ 434 at 4.

additional information. The protester also states that it also offered the GPO copies of its owner's/principal's 1099 (miscellaneous income) tax forms but the offer was refused by the agency.

Molly Maguires's principal states that, after reviewing the GPO report on the protest, she called the references contacted by the GPO, and asserts that one of the references denied saying the words attributed to her by the GPO representative in the agency's pre-award survey record and another reference stated that the protester was listed on the firm's active records. The third firm was the advertising firm that had been sent the letter of reference from the judge. Molly Maguires's principal concedes that she never worked for the advertising firm, but argues that she never claimed that she worked there and questions why the judge was never contacted. As for the fourth reference, the firm allegedly denied that the person the GPO representative listed as having been contacted was an employee of that firm.

Finally, the protester alleges that the agency representative would not look at her work at the pre-award survey and notes that there is no reference to her work in the handwritten notes made by the agency representative concerning the pre-award survey. The protester argues that it provided samples of production-ready art as required by the solicitation, specifically noting an invitation the protester designed for the Kentucky Derby and work for TV Guide. Molly Maguires also questions the agency's emphasis on "current" work since the solicitation does not specifically state that bidders must provide current work samples. The protester argues that because "current" is not defined in the solicitation, "we can interpret current to mean any work done within the last 5-10 years." The protester asserts that it provided six current samples of its work. The protester argues that the agency's inability to verify Molly Maguires's work and the agency's dissatisfaction with the protester's work samples clearly show that the survey evaluation and subsequent rejection were erroneous and arbitrary and demonstrate bad faith on the part of the agency.

A contracting agency has broad discretion in making responsibility determinations, since it must bear the brunt of difficulties experienced in obtaining the required performance. Automated Datatron Inc., 68 Comp. Gen. 89, 91 (1988), 88-2 CPD ¶ 481 at 2-3. Although responsibility determinations must be based on fact, and reached in good faith, they are of necessity a matter of business judgment. Chandler Mktg. Group, *supra*, at 3. We will not question a nonresponsibility determination unless the record shows bad faith on the part of agency officials or there is a lack of any reasonable basis for the determination. EPCo Assocs., B-238015, Apr. 13, 1990, 90-1 CPD ¶ 388 at 5.

Although Molly Maguires contends that it responded adequately to GPO's request for references and work samples, the record shows otherwise. Specifically, as the protester concedes and its "Capability Statement" shows, Molly Maguires did not provide information, including addresses, phone numbers, or specific individual

contacts for any of the references listed. The protester contends that these specifics are "unnecessary and undesirable" to include on a capabilities statement. Indeed, Molly Maguires states in its protest (with reference to a conversation with the agency representative) that, "[t]o my utter disbelief, [the agency representative] informed me [that] he was trying to call people to verify my work." In this respect, the IFB put bidders on notice that they were to provide references and other detailed information regarding their experience, which should have apprised the protester that GPO would contact references and that it was incumbent on bidders to provide traceable references.

While the protester provided corporate names as references, the protester does not claim, nor does the record show, that Molly Maguires ever furnished phone numbers or addresses for the firms listed as clients. In a declaration submitted by the agency representative, he states, as noted above, that while Molly Maguires's principal listed corporate clients, she "would not provide the addresses, telephone numbers or names of individuals to contact" at those firms and she "refused to provide the same information" for current clients. The protester concedes that the agency representative, in a phone conversation in late August, "asked for names and telephone numbers of people at the companies for which [Molly Maguires's principal] did work." While the protester's principal provided the names of nine individuals, she does not assert that she provided phone numbers or addresses for these contacts.³ As a result of Molly Maguires's failure to provide complete reference information, the GPO representative himself tried to find references for Molly Maguires at the firms listed by the protester. The record shows that the agency representative contacted four firms that he knew were in the Philadelphia area and whose phone numbers were available from the phone book. He generally contacted the referenced firm's art department or art director. In view of Molly

³While GPO and the protester state that they had several conversations concerning required additional information, both submitted documentation, in the form of telephone logs, of only that one late August telephone call. In that conversation, both GPO and Molly Maguires noted that Molly Maguires provided GPO with additional references. However, the logs are not identical. While Molly Maguires's log states that the protester provided four specific individuals to contact at KYW-TV, Humana, Thomas Jefferson Hospital and Capital Holding, GPO's log states that Molly Maguires provided three specific individuals to contact at KYW-TV, Thomas Jefferson Hospital, and a reference connected with the Kentucky Derby. As for a contact at Capital Holding, GPO's log states that the protester provided no contact or address. Neither log suggests that any phone numbers for the contacts were provided by the protester. GPO's log also states that the agency representative asked for names of current or recent clients but that the protester could not provide any. The agency log also states that the representative suggested that Molly Maguires call the agency "if any [recent clients] come to mind."

Maguires's failure to give GPO even one contact and corresponding phone number, we find unobjectionable the manner in which GPO made its own inquiries into Molly Maguires's past experience.

The protester's argument that the agency rejected its offer to provide forms to indicate the type of compensation its principal received from various companies is without relevance. GPO's request for references was not simply for the purpose of verifying employment, which is all that these forms would have done. Rather, references are requested, especially in circumstances, as here, where the work involves creativity, to assess the bidder's skill, including creativity and timeliness. Employment tax forms do not address these issues.

As to Molly Maguires's argument that the agency representative refused to look at her work at the pre-award survey, while the representative's handwritten notes do not reference the protester's samples, the complete pre-award survey report does discuss the protester's work samples. Moreover, in its comments, Molly Maguires states that its principal had "already shown [her] portfolio book to [the agency representative] on the day the bids were opened." The protester also concedes that she brought in additional samples of her work on August 21. Molly Maguires states that it provided more samples than the agency required. As to production-ready design samples, GPO concedes, as Molly Maguires argues, that the protester did have samples of production-ready designs. However, as noted above, GPO found that most of Molly Maguires's samples were illustrations and the protester does not rebut this statement. Indeed, Molly Maguires points to only two examples of production-ready work and admits that, while considered a form of graphics, "[a] lot of [Molly Maguires's] work done for TV stations was illustration"

We find without merit the protester's argument that the agency emphasized current work samples yet the solicitation did not specify that current work samples would be required. We find it reasonable for the agency to request current samples when conducting a pre-award survey. While Molly Maguires states that it provided some current work samples, the most recent pay information provided by the protester was for 1993 and Molly Maguires's principal concedes that for the last 2 years she has been primarily involved in building and working on a home. In any event, the agency examined all of the work samples submitted, regardless of recency and found insufficient examples of the type of work required under the solicitation.

Finally, we find without merit the protester's allegation of bad faith. To show bad faith, a protester must submit convincing proof that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Campbell Indus., B-238871, July 3, 1990, 90-2 CPD ¶ 5 at 9. Molly Maguires's argument that the nonresponsibility determination had no reasonable basis and therefore must have been made in bad faith is unsupported by the record, which, as discussed

above, reflects that GPO did, in fact, have a reasonable basis to find Molly Maguires nonresponsible. Accordingly, the allegation of bad faith is unfounded.

The protest is denied.

Comptroller General
of the United States