



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Biloxi-D'Iberville Press

File: B-243975.2

Date: September 27, 1991

Robert Stein for the protester,
Rick Quinn for The Sun Herald, an interested party,
Gregory H. Petkoff, Esq., Department of the Air Force, for the
agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Evaluation that resulted in selection of incumbent to publish installation newspaper was proper where solicitation provided that evaluation would be based in part on past performance and experience in producing similar publications, protester did not timely object to that criterion, and agency properly applied the criterion in determining that awardee's experience was superior to protester's.
2. Agency was not required to hold discussions with offeror where proposal was acceptable as submitted and the only weaknesses--in prior experience--were relative in nature and not correctable through discussions.
3. Discussions with offeror whose otherwise acceptable proposal took exception to certain solicitation requirements was proper where agency determined that proposal could be made acceptable through discussions; resulting decision to amend solicitation was unobjectionable since agency advised all offerors of changed requirements and all offerors responded to those requirements in revised proposals.

DECISION

Biloxi-D'Iberville Press protests the award of a contract to Gulf Publishing Co. under request for proposals (RFP) No. F22600-91-R-0038, issued by the Department of the Air Force for publication of the base newspaper at Keesler Air Force Base, Mississippi. Biloxi argues that the Air Force improperly based the award, in large part, on Gulf's prior

experience as the incumbent, and that the agency gave preferential treatment to that firm.

We deny the protest.

The solicitation sought proposals for the award of a contract to publish a base newspaper, the Keesler News, in accordance with Air Force procedures for obtaining commercial enterprise newspapers. See Air Force Regulation (AFR) 190-1, Public Affairs Policies and Procedures (March 1, 1989). Under these procedures, the contractor is awarded the right to produce and distribute the newspaper, but must cover its costs and derive any profits from advertising revenues, so that the government does not expend appropriated or non-appropriated funds. In return, the government retains the right to determine the editorial content of the publication. This exchange of rights constitutes the contract consideration. Id.; see generally Martin Advertising Agency, Inc., B-225347, Mar. 13, 1987, 87-1 CPD ¶ 285.

The solicitation provided that award would be made to the responsible offeror whose offer, conforming to the solicitation, was most advantageous to the government. The RFP further provided that the selection committee "may hear presentations by the offerors which responded to the request for proposals," and that "an on-site visit of the contractor's plant may be conducted to gather information upon which to base their selection." Regarding the evaluation of proposals, the solicitation stated that "since exchange of rights constitutes the consideration in a commercial enterprise publication contract, the best obtainable product and service in exchange for those rights shall be the primary criteria for selection." Among the major, specific evaluation criteria were "past performance [and] particular experience in publishing this type of publication. . . ."

The selection committee reviewed a total of three proposals, each of which included letters acknowledging the solicitation's statement of work and agreeing to comply with its various provisions. The proposals submitted by Biloxi and another offeror agreed to all provisions and were, therefore, considered by the committee to be acceptable as submitted; consequently, the Air Force did not hold discussions with those firms. The proposal submitted by Gulf, however, took exception and suggested changes to certain solicitation requirements. For example, in place of the requirement that the publisher process film in speeds (measures of the film's sensitivity to light) ranging from ASA 400 to ASA 3200, Gulf proposed that the publisher be required to process only ASA 400 film. Based on these and similar relatively minor exceptions, the committee determined that Gulf's proposal,

though strong in other respects and clearly in the competitive range, was not acceptable as submitted.

As a result, the Air Force conducted discussions with Gulf, and subsequently, on March 22, 1991, issued an amendment modifying several specifications, although not necessarily in the fashion proposed by Gulf. The amendment did not, for example, limit the requirement for processing to ASA 400 film alone, as Gulf had proposed; it only lowered the range of film speeds from ASA 3200 (very high speed) to ASA 1000 (high speed). The amendment, which was sent to all offerors, called for revised proposals by April 1, and advised that further discussions would not be conducted.

On the basis of the revised proposals, all three members of the selection committee determined that Gulf was best qualified for the award. Specifically, although all three proposals were found to conform to the solicitation requirements (as amended), the committee found that Gulf scored best in the major evaluation areas, particularly past performance and specialized publication experience. On April 16, Biloxi requested an opportunity to make a personal presentation to the committee; the request was denied on April 24. No other offeror requested, or was given, the opportunity to make such a presentation. On April 27, Biloxi received notice that the contract had been awarded to Gulf; its protest followed.

Biloxi asserts that the Air Force improperly favored Gulf, the incumbent, in basing its selection for award primarily on Gulf's "past performance" and "proven service," which, according to the protester, "are not part of the qualifications and should have no part in the determination." If these were the primary selection criteria in every procurement, the protester asserts, no firm other than the incumbent could ever compete successfully. As further evidence of the preferential treatment given to Gulf, Biloxi states that the selection committee improperly failed to provide Biloxi an opportunity to make a presentation that could have explained or clarified its proposal. Similarly, Biloxi contends that the agency improperly held unilateral discussions with Gulf regarding that firm's exceptions to solicitation requirements, without advising Biloxi of those discussions and affording it an equal opportunity to revise and improve its proposal. Based on these and similar actions, Biloxi argues, the Air Force failed to afford all offerors "fair and equal treatment."

We find nothing in the record to indicate that the Air Force unduly favored Gulf or otherwise acted improperly. While the record does confirm Biloxi's assertion that a major consideration in the selection of Gulf was that firm's specialized experience in publishing a base newspaper, this was consistent with the solicitation's stated evaluation criteria; as noted

above, the solicitation clearly stated that "past performance [and] particular experience in publishing this type of publication" would be major factors in selecting a publisher of the Keesler News. The record indicates that experience was important to the agency, in part, because of the significance of the newspaper to essential agency activities, and therefore the need for a high level of reliability. AFR 190-1 ¶ 3-15(c) provides that "command communication needs and requirements are of paramount consideration"; the solicitation reflected that concern, explicitly stating that the newspaper's "purpose is to provide the commander a primary means of communicating mission-essential information to members of the command." Where based on such legitimate agency needs, it is proper for an agency to emphasize specific expertise and experience in the selection process. See, e.g., Product Research, Inc., B-223439.2, Sept. 18, 1986, 86-2 CPD ¶ 317; Skyland Scientific Servs., Inc., B-229700, Feb. 9, 1988, 88-1 CPD ¶ 129.

Biloxi does not argue that its own experience was equal or superior to Gulf's, and the record shows that it was not. For example, while Biloxi, in its proposal, described experience it had gained in publishing several newspapers, none of that experience was specifically related to the publication of a newspaper for a military installation. Gulf, on the other hand, indicated in its proposal that it had gained considerable specialized experience of that type in publishing the Keesler News. Contrary to Biloxi's objection, Gulf's advantage in the evaluation was due, not to its incumbency, but to the fact that it possessed experience publishing a military installation newspaper, while Biloxi did not. We conclude that the agency properly applied the evaluation criteria related to prior experience. See Burnside-Ott Aviation Training, B-229793, Mar. 4, 1988, 88-1 CPD ¶ 236 (allegation of improper emphasis on prior experience, based on agency bias, in selection of contractor, held to be without merit where evaluation criteria provided for such an emphasis and evaluation was consistent with those criteria).

To the extent that Biloxi objects to the use of Gulf's prior experience as a primary selection factor, the protest is untimely. As noted above, the solicitation clearly stated that experience would be a major selection factor. If Biloxi believed that it was improper for the agency to give major consideration to the specialized experience of the incumbent or other similarly situated firms, then Biloxi should have objected prior to the time set for the submission of proposals; protests based upon alleged improprieties which, as in this case, are apparent in the solicitation, must be filed not later than the closing date for receipt of proposals.

4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3739 (1991); Hogan Property Co., B-242795; B-242795.2, June 7, 1991, 91-1 CPD ¶ 549. Since Biloxi's objection was not raised until after the award had been made, it is untimely. Id. Again, moreover, there generally is nothing improper in an agency's specifying prior experience as an evaluation factor where, as here, it reflects the agency's needs. Product Research, Inc., supra.

Nor are we persuaded otherwise by Biloxi's specific allegations of preferential treatment. For example, we find no merit in Biloxi's assertion that the agency acted unfairly in denying it an opportunity to make a presentation concerning its proposal. As an initial matter, we note that the allegation is untimely. As recounted above, the March 22 amendment to the solicitation clearly stated that no further discussions would be held, and that final proposals must be submitted by April 1. Under our Regulations, the time to have objected to the failure to allow Biloxi to make an oral presentation was not later than 10 days after the basis for protest was known--that is, not later than 10 days after Biloxi received the amendment that stated that no further discussions would be held. 4 C.F.R. § 21.2(a)(2) (1991). As noted above, however, Biloxi did not specifically request an opportunity to make a presentation until April 16, more than 2 weeks after the closing date, and did not protest the matter for another 3 weeks after that, by which time award had been made. Consequently, this protest ground is untimely raised. In any case, as noted above, the RFP clearly stated that the agency's selection committee "may hear presentations," and that on-site visits "may be conducted"; that is, it was clear from the RFP that personal presentations were entirely discretionary with the agency. This being the case, there was nothing improper in the agency's decision not to allow offerors to make such presentations.

There also was nothing improper or indicative of bias in the negotiation process. The purpose of negotiations is to lead all offerors having a reasonable chance at being selected into the areas of their proposals that require amplification, or to point out weaknesses or deficiencies in them, and then to afford the firms an opportunity to revise their offers. See Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. In the case of Biloxi's proposal, the record shows that the Air Force considered the proposal fully acceptable as submitted, in that it conformed to all material requirements of the RFP. Thus, there were no deficiencies to discuss with Biloxi, including the primary area in which Biloxi was weak relative to Gulf, past performance. See Transact Int'l, Inc., B-241589, Feb. 21, 1991, 91-1 CPD ¶ 196 (agency need not discuss with offerors matters such as past performance which,

by their nature, are not subject to correction through the discussion process).

The situation with Gulf's proposal was different. As previously noted, Gulf initially took exception to several solicitation requirements, and the Air Force determined that Gulf's proposal thus could not be accepted as submitted. The agency concluded, however, that the proposal, but for the exceptions, was equal or superior to the others, and was susceptible of being made acceptable in all respects. Under those circumstances, it was entirely proper for the agency to hold discussions with Gulf; although award on the basis of a proposal that does not meet specific solicitation requirements is improper, the contracting agency properly may include such a proposal in the competitive range and hold discussions to correct any deficiencies. Turner Int'l, Inc., B-232049, Nov. 3, 1988, 88-2 CPD ¶ 434; see also Carter Chevrolet Agency, Inc., B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584 (nothing objectionable in contracting officer's determination that discussions would be necessary to ensure that exceptions to specifications would be addressed).

Once the agency reviewed the exceptions Gulf had taken to the requirements, the agency did not, as Biloxi seems to suggest, allow Gulf unilaterally to benefit from the discussions; rather, the Air Force amended the solicitation in relatively minor respects and requested revised proposals from all three offerors, without further discussions with any of them. Biloxi did not object, and does not argue now, that those modifications were unreasonable or that it was prejudiced by the changes; indeed, all three offerors agreed to conform to them in their entirety and, as a consequence, all three final proposals were found to be acceptable. We conclude that the discussions with Gulf were proper and did not constitute preferential treatment.

Although Biloxi questions the subjective motivation of the selection committee, where, as here, the protester fails to demonstrate bias, its allegations must be regarded as mere speculation; unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. See Burnside-Ott Aviation Training, B-229793, Mar. 4, 1988, 88-1 CPD ¶ 236.

The protest is denied.


for James F. Hinchman
General Counsel