



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

11786

Decision

Matter of: The Winkler Company

File: B-252162

Date: June 8, 1993

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Marc E. Raymond for Amos Press, Inc., an interested party.
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Department of the Air Force, for the agency.

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Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. In a federal procurement for publishing a civilian enterprise (CE) newspaper, to which the Armed Services Procurement Act and the Federal Acquisition Regulations are not applicable, the General Accounting Office will review the contracting agency's actions to determine whether they were reasonable and consistent with laws and regulations which specifically apply to CE newspaper procurements.
2. An agency is not required to conduct discussions or permit proposal revisions, so long as all offerors are treated fairly and equally, under a procurement to select a civilian enterprise (CE) newspaper publisher, where the solicitation states that the agency intends to award on the basis of initial proposals without discussions; while oral presentations were made by the offerors shortly after initial proposals were submitted, the regulations governing CE newspaper publishing contract selections provide for oral presentations to be considered as part of the proposal evaluation and do not require that either discussions or proposal revisions will occur during or as a result of the oral presentations.
3. Agency did not give the proposed use of computers inordinate weight in its award decision, where the use of computer equipment was stressed in the stated evaluation factors and statement of work.

DECISION

The Winkler Company protests an award to Amos Press, Inc. under request for proposals (RFP) No. F33601-92-R9208 issued by the Department of the Air Force for publishing a civilian enterprise (CE) newspaper at Wright-Patterson Air Force Base (AFB), Ohio. Winkler essentially asserts that the Air Force unreasonably evaluated its proposal and failed to give it a reasonable opportunity to revise its proposal.

We deny the protest.

The Air Force issued the RFP on July 7, 1992, for the publishing of Skywrighter, the CE newspaper for Wright-Patterson AFB. CE newspapers are published by commercial publishers under contract with agencies of the Department of Defense (DOD). The news and editorial content of these newspapers are prepared by the agency's public affairs staff. The commercial publisher receives the right to sell advertising in the newspaper as contractual consideration, instead of money, in exchange for its services as publisher. 32 C.F.R. § 247.3(b)(1) (1993); DOD Instruction 5120.4, (Nov. 14, 1984); Air Force Regulation (AFR) 190-1 § 3-15 (Aug. 30, 1991).

The RFP contemplated award of a 2-year contract to begin on October 1, 1992, with options to extend the contract on a 1 or 2-year basis for a total period not to exceed 6 years.¹ The RFP stated:

"The [g]overnment will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the government . . . Since exchange of rights constitutes consideration in a

¹We will not consider Winkler's allegation that the contract awarded to Amos was for a term in excess of that permitted by the CE newspaper procurement regulations. The RFP stated that the contract would be issued for a base period of 2 years with options to renew for a period not to exceed 6 years. Protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1993); Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Since Winkler did not raise this issue until it commented on the agency report to our Office some 7 months after the due date for submission of proposals, the issue is untimely.

[CE] publication contract, the best obtainable product and service in exchange for those rights (e.g., the right to sell advertising) shall be the primary criteria for selection."

The RFP listed 11 general elements and criteria to be considered in the evaluation. The RFP instructed offerors to address each section of the detailed statement of work by discussing how the offeror proposed to accomplish the contract work and to submit initial offers containing the offerors' best terms since award was intended to be made on the basis of initial offers without discussions. The RFP advised prospective offerors that any offeror submitting a proposal by the August 7 due date for receipt of written proposals may give an oral presentation to the source selection group, and that offerors who intended to give presentations should schedule them with the Air Force prior to the submission of offers.

Four offerors, including Winkler and Amos, submitted proposals by the due date. Each of these offerors scheduled presentations for August 13 or 14.

During the course of its August 14 presentation, Winkler discussed the terms of its proposal, which were less restrictive than the requirements stated in the RFP. Winkler was the long-time incumbent contractor and, according to Winkler, it attempted to persuade the Air Force that, based on Winkler's prior experience, the Air Force did not need all of the stated requirements in order to fulfill its mission. The Air Force reaffirmed its stated requirements, at which time Winkler assured the agency that it was willing and able to comply with all of the stated requirements.

According to Winkler, the Air Force displayed at the oral presentation great interest in the use of computers by the publisher under the anticipated contract. On the next work day following its presentation, Winkler submitted a 1-page addition to its proposal containing a computer system diagram which stated that "this diagram is to serve to clarify the language of the Winkler Co. proposal and should not be construed as a limitation of the Winkler Company's commitment to the Skywrighter." The Air Force accepted this document, and considered both it and Winkler's presentation in the evaluation of Winkler's proposal.

On August 25, the Air Force completed its evaluation of written proposals and oral presentations, determined that Amos offered the proposal that would be most advantageous to the government, and awarded the contract to that firm on September 1. In this regard, the Air Force found that Amos

had numerous strengths and no weaknesses. Amos's strengths were found to include: its extensive experience in publishing community-sized newspapers; its proposal offered a wide array of impressive and documented computer equipment and network interfacing facilities that could be connected with the Air Force Public Affairs office; its in-house printing capability; and its use of 100 percent recycled paper. Winkler was rated lower, notwithstanding its acknowledged long and successful track record at Wright-Patterson AFB and its superior understanding of the base environment and Air Force regulations and sensitivities, because its proposal took various material exceptions to the statement of work requirements, and its proposal contained inadequate details for, and a lack of in-house expertise in, the computer system that would be used.

On September 4, Winkler received notice of the award, and on that same day, it requested and received from the Air Force the overall ratings that the source selection group gave Winkler's proposal. Winkler protested to the Air Force on September 21, essentially alleging that the Air Force did not properly apply the stated evaluation criteria.

On December 15, the Air Force debriefed Winkler on the agency's evaluation of Winkler's proposal, explaining the strengths and weaknesses of the proposal. The Air Force states that at this meeting Winkler reiterated its protest and alleged that the source selection group was prejudiced against Winkler as a result of the company's oral presentation. After this meeting, the Air Force decided to reevaluate the proposals, without considering the oral presentations, to determine whether the decision to award to Amos was in fact most advantageous to the government. At this time, the agency also reconsidered its acceptance of the additional proposal information submitted by Winkler after its oral presentation. The Air Force determined that this additional information may have modified Winkler's initial proposal and instructed the source selection group to consider it during reevaluation only to the extent that "it actually clarified" the initial proposal. The Air Force sent a letter to Winkler dated December 22, which stated that the agency would reevaluate proposals.²

On December 23 and 29, based upon the December 15 debriefing, Winkler submitted letters to the Air Force amending its protest to include, among other issues, an allegation that

²This letter did not advise Winkler that oral presentations would not be considered in the reevaluation.

the agency held discussions and did not provide Winkler with a meaningful opportunity to revise its proposal.

The Air Force's reevaluation produced results similar to the original evaluation and confirmed for the agency that the award to Amos was most advantageous to the government. By letter of January 15, 1993, the Air Force denied Winkler's protest.

On February 1, Winkler filed a protest with our Office asserting that the Air Force did not provide Winkler with a reasonable opportunity to revise its proposal after the oral presentations that Winkler now states it regarded as discussions; that it was improper for the agency not to include the oral presentations in the reevaluation of proposals; and that the Air Force accorded more weight to the proposed use of computers than the RFP reasonably inferred.

Since the procurement of goods and services for publishing CE newspapers does not involve the payment of appropriated funds to the contractor, the basic acquisition statutes and regulations, specifically, the Armed Services Procurement Act, 10 U.S.C. § 2301 et seq. (1988 and Supplement IV 1992), and the Federal Acquisition Regulations (FAR), do not apply. Gino Morena Enters., 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121; Military Newspapers of Va., B-249381.2, Jan. 5, 1993, 93-1 CPD ¶ 5; see 10 U.S.C. § 2303(a); FAR §§ 1.103; 2.101. Thus, rather than determining whether the agency complied with the basic acquisition statutes and regulations, we review the agency's actions to determine whether they were reasonable and consistent with any laws and regulations that may be applicable. RJP Ltd., 71 Comp. Gen. 333 (1992), 92-1 CPD ¶ 310; Gino Morena Enters., supra; Military Newspapers of Va., supra. In this regard, this procurement was conducted pursuant to 32 C.F.R. Part 247, Appendix B, § F and AFR 190-1 § 3-15. AFR 190-1 § 3-15(e) states in part, "[i]n selecting a publisher, fair and equal treatment must be given to any responsible, qualified bidder," and the regulation provides various other provisions addressing the procurement of CE publishing services.

Winkler asserts that the oral presentations constituted discussions, and argues that the provisions of the FAR governing proposal revisions after discussions, such as those at FAR § 15.611 requiring federal agencies to request best and final offers (BAFO) after holding discussions, describe a basic principle of the competitive procurement process which should be applicable here. Winkler also asserts that the provision for oral presentations in the RFP reasonably led Winkler to believe that discussions, and an opportunity to submit revised proposals, would occur, and

thus Winkler submitted an initial offer which it intended to revise after discussions. Winkler alleges that since it was not given a reasonable opportunity to revise its proposal, the Air Force should conduct discussions, request BAFOs, and make award based on the revised proposals.

We disagree with Winkler that the RFP requires discussions to be conducted and proposal revisions requested. The RFP solicited written proposals and permitted offerors to elect to make oral presentations, although such presentations were not required. The applicable regulations expressly provide for "oral presentations" to be considered as part of the proposal evaluation. See 32 C.F.R. Part 247, Appendix B § F.; AFR 190-1 § 3-15(g). There is no provision in the regulations stating that discussions must be conducted, that the oral presentations constitute discussions, or that proposal revisions or BAFOs would be solicited. The award evaluation provisions included in the solicitation as required by AFR § 3-15(q) Figure 3-4., Award Evaluation, state at paragraph 1.b. that:

"The government may award a contract on the basis of initial offers received without discussions. Therefore, each initial offer should contain the publisher's best terms from the ability to meet the selection criteria and provide the government the best possible service and product."

In addition, the RFP specifically incorporated the contract award provision at FAR § 52.215-16 Alternate III, which replaces the word "may" and states that the government "intends to" award without discussions.

Consequently, under the CE newspaper publishing procurement scheme, the oral presentation is simply part of the initial proposal and discussions and the opportunity to submit proposal revisions, as envisioned in procurements governed by the FAR, are not required.¹ In this regard, nothing in

Winkler alleges that it received oral advice from the Air Force instructing it to consider the oral presentations as discussions and that it would be permitted to revise its proposal. This advice was allegedly given by a retired Air Force officer who was not involved in this procurement as well as the contracting officer. However, the RFP specifically incorporated the provision at FAR § 52.215-14 "Explanation to Prospective Offeror," which states that oral explanations given before award will not be binding. It is well established that when this provision is in a solicitation (continued...)

the regulations governing CE newspaper procurements suggests that the oral presentations would constitute discussions and no provision suggests that proposal revisions would be requested or permitted either during or following the presentations. Rather, the RFP instructed offerors that, although oral presentations were permitted, no discussions were intended and offerors should offer their best terms in their initial proposals. Under the circumstances, we find no requirement that the offerors be afforded the opportunity to submit revised proposals or BAFOs because of the oral presentations, so long as all offerors received fair and equal treatment in regard to the oral presentations.

Winkler alleges that the Air Force permitted Winkler to revise its proposal at the oral presentation and in the document submitted after the presentation, and thus the Air Force was required to formally request revised proposals from all offerors. Even if we assume this was true, or that discussions were otherwise conducted with Winkler, the protester was not prejudiced. Winkler admittedly submitted an initial proposal that failed to satisfy all of the requirements of the RFP and thus sought to revise its proposal. To the extent that the Air Force considered any portion of these proposed revisions without providing the same opportunity to other offerors, Winkler had a competitive advantage. Since Winkler did not receive the award even with this assumed competitive advantage, neither Winkler nor any other offeror could have been prejudiced by the discussions and/or opportunities to revise its proposal that may have occurred during, or as a result of, Winkler's oral presentation, and we have no basis to object to the award.⁴ See National Med. Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1.

³(...continued)

tation, offerors bear the risk of relying on oral advice in preparing proposals and they must suffer any consequences that may result when they do so. Tri-State Laundry Servs., Inc. d/b/a Holzberg's Launderers and Cleaners, B-218042, Feb. 1, 1985, 85-1 CPD ¶ 127.

⁴Alternatively, to the extent that Winkler may also be arguing that the Air Force did not accept its offer at the oral presentation to revise its written proposal to meet all of the solicitation requirements, there is no evidence that the Air Force accepted any proposal revisions from any other offerors; therefore, if the Air Force did not accept Winkler's revised offer to meet all of the solicitation requirements, Winkler was not prejudiced because it received the same treatment as all of the other offerors.

Winkler asserts that the Air Force permitted Amos to revise its proposal by having Amos sign before award a stipulation that its proposal would be incorporated into the contract. The Air Force states that Amos made no revisions to its written proposal and the record confirms this; Amos's stipulation was a procedural formality and did not revise Amos's offer in any way. A proposal by an offeror constitutes an offer which upon acceptance by the contracting agency creates a binding contract. 31 Comp. Gen. 76 (1951); see FAR §§ 2.101; 15.402(d).

Winkler also protests that it was improper for the Air Force to eliminate the oral presentations from its reevaluation of offers. While the Air Force did not consider oral presentations in its reevaluation in response to Winkler's agency-level protest because it believed Winkler's primary complaint was that the presentation evaluation prejudiced Winkler, the agency did evaluate and consider the oral presentations in its original evaluation. Winkler's proposal was neither selected for award when the oral presentations were considered in the original selection decision nor in the reevaluation. We find no basis to object to the elimination of the oral presentations from the reevaluation absent a showing that the evaluation was otherwise unreasonable or that Winkler was prejudiced by the reevaluation. Except for its assertion that the Air Force overweighed computer equipment in the evaluation, Winkler did not timely protest to our Office the underlying factual bases for the initial award evaluation or reevaluation, even though Winkler had been provided during the course of the agency-level protest with the evaluation documentation concerning both the evaluation and the reevaluation.⁵

As indicated above, Winkler's protest of the award selection centers on its allegation that the Air Force placed more

⁵While Winkler's comments on the report make various references to the aspects of the evaluation, these contentions, if they are considered protest bases, would be untimely under our Bid protest Regulations, 4 C.F.R. § 21.2(a)(2). See CapitolCare, Inc., B-241976, Mar. 19, 1991, 91-1 CPD ¶ 300. Moreover, notwithstanding Winkler's complaint that the reevaluation prejudiced Winkler because it failed to account for Winkler's verbal withdrawal of the exceptions that its written proposal took to the solicitation's statement of work requirements, the initial evaluation--under which Winkler also was not selected--recognized and accepted what Winkler had stated during the oral presentation that it would comply with these requirements.

weight on computer support in making its award decision than an offeror could reasonably infer from the RFP.

The RFP stated that offerors shall provide the agency's Public Affairs Office with:

"IBM compatible computer equipment or word processing software compatible with government equipment. Said equipment shall be designed so as to give the Skywrighter office direct communication with the publisher's office to avoid physical (hand carried) computer disc, and expedite data transfer."

The RFP stated that the use of computer equipment would be evaluated as part of its selection decision. The stated evaluation factors include convenience of communication between publisher and the public affairs office, including computer equipment; equipment; and computer/laser generated line art. Furthermore, during the pre-proposal conference--which both Amos and Winkler attended--the Air Force presented detailed information about the agency's existing computer capabilities and what was desired. The Air Force specifically stated at that time that, if an offeror chose to replace the existing government equipment, at least seven computers would be needed.

Amos offered the Air Force a choice of two complete computer systems designed to support newspaper publishing. Amos gave a detailed list of the hardware and software components offered under each choice, both of which included eight computers for the Air Force and permitted electronic transfer of data between computers located in the agency's and Amos's offices. Amos also described the experience which it had in installing and using both systems in the newspaper publishing business, including a dedicated computer support staff.

Winkler proposed to enhance the agency's existing system of computer equipment by supplying the Air Force with one computer, as well as with hardware to permit electronic transfer of data between computers located in the agency's and Winkler's offices. In an attachment to its written proposal, Winkler provided some explanation concerning proposed installation and use of the computer equipment offered and stated:

"These steps provide the basis for a gradual conversion to total electronic publishing should that become the objective of the [Air Force]."

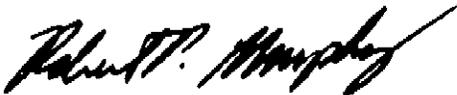
The diagram which Winkler submitted after its oral presentation provided a visual description of the computer-related component of its proposal. The document also stated that the diagram was "to serve to clarify the language" of the written proposal and that it was not intended to be "a limitation of the Winkler Company's commitment to the Skywrighter."

The source selection group summarized its findings in a memorandum to the contracting officer explaining its reasons for evaluating Amos's proposal as the best offer. The memorandum listed six key factors of Amos's proposal supporting its decision. One of these factors stated that Amos provided "the most detailed explanation of the networking options which are critical to the [agency's] interface with the publisher." The Air Force considered Winkler's approach as an improvement over the existing system, but it did not offer the degree of immediate improvement to the production process as did the other offerors.

From our review of the proposals and evaluation documentation, we find that the Air Force reasonably determined that Amos's proposal, which offered more computer equipment than Winkler and significant computer experience, was superior to Winkler's proposal in the area of computerized communication. Since the statement of work and evaluation criteria emphasized computerized communication between offices, it was reasonable for the Air Force to consider Amos's superior computer component of its proposal as a key factor in the award decision. We note that this was not the only key factor in the Air Force's decision, nor did the RFP assign less weight to the use of computer equipment than to these other factors considered. Under the circumstances, we find that the Air Force did not place greater weight on the proposed use of computers than prospective offerors could reasonably infer from the RFP.

In sum, Winkler's protest has provided no basis for us to find the agency's selection to be unreasonable.

The protest is denied.


for James F. Hinchman
General Counsel