

DECISION



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

FILE: B-195778

DATE: February 20, 1980

MATTER OF: Communications Corps Incorporated

DIGEST:

[Protest Alleging Improper Award of Contract]

1. Request by protester for pre-proposal submission conference with agency personnel to obtain their "insights" was properly denied since accommodation of request would have conferred protester with competitive advantage.
2. Government is not required to equalize competitive advantages enjoyed by an offeror as a result of its own particular circumstances, including the award of prior contracts.
3. Failure of successful offeror to include "level of effort" data with its technical proposal was inconsequential where solicitation did not make inclusion mandatory and where such information was readily available from offeror's cost proposal.
4. Agency's downgrading of protester's proposal for offering approach outside scope of RFP is not unreasonable where record does not establish that agency official orally advised protester that such approach would be acceptable.
5. Where RFP provided that technical evaluation factors took precedence over cost, and record includes agency evaluators' point scores and accompanying evaluation narrative documenting perceived technical superiority of successful offeror, GAO finds no abuse of discretion in award to that offeror despite protester's submission of lower-priced offer.

~~008720~~

111610

6. Allegation of inadequacies in negotiation process is untimely where not filed within 10 working days from date on which basis for allegation was known.

3938
Communication Corps Inc. (ComCorps) protests the award of a contract by the National Park Service (Park- 3 Service) to Osprey Productions Inc. (Osprey) under request for proposals (RFP) CX-1100-INV-187 for a motion picture concerning the natural history of Gulf Islands National Seashore. 3939

ComCorps contends that the award to Osprey was improper because Osprey had a competitive advantage as the result of a prior project it performed for the agency and because ComCorps, which was determined to be technically qualified, offered a lower price. The protester also argues that its proposal was improperly downgraded because it followed the advice of an agency official and alleges that adequate discussions were not conducted by the Park Service. Finally ComCorps maintains that Osprey's proposal should have been downgraded for that firm's failure to include data relating to its proposed level of effort in its technical proposal as required in the RFP instructions.

For the following reasons we consider the award to Osprey valid and deny ComCorps' protest.

The RFP, which contemplated the award of a fixed-price contract, instructed offerors to submit both a technical proposal and a "business" (cost) proposal. Technical proposals were to carry greater weight than cost proposals in the evaluation.

As part of their technical proposals, offerors were to submit one or two recent films by the proposed producer or the proposed production team. These were to be evaluated for achievement of purpose, creativity, continuity and technical quality; these considerations were to constitute 40 percent of the technical

evaluation. The other criteria and their weights, which the RFP established for the evaluation of technical proposals, were: "Proposed production team and producer qualifications" - 25 percent; "A brief narrative describing the producer's approach to the subject matter of the proposed film" - 25 percent; and "Organizational capabilities" - 10 percent.

Initial technical proposals were evaluated by a committee of three reviewers, each of whom scored the proposals under the evaluation criteria. Osprey received scores of 94, 82, and 95 for an aggregate of 271 points (the highest score received by any offeror), followed by ComCorps with scores of 85, 70, and 85 for a total of 240 points.

The accompanying narrative described the workmanship of Osprey's sample films to be "excellent". The narrative continued:

"Excellent, innovative camera work, music composition, and all phases of production exhibited the ability to do a quality job for this motion picture. Had a good grasp of the requirements of this project which was shown in their approach to the film."

The evaluators determined that ComCorps' film samples were "very good", while its camera work, script and editing were "excellent". However, the evaluators expressed concern over ComCorps' desire to restructure the approach outlined in the RFP to emphasize environmental change, and the evaluators stated this would be acceptable only if done within the outline of the RFP. ComCorps' approach was found "a bit lacking in detail" and the evaluators believed library music was used in the sample film although an original score was required for the picture. The committee nevertheless agreed that ComCorps could produce a quality motion picture.

After reviewing the cost proposals of Osprey, ComCorps, and the third ranked offeror, the project officer determined that each firm had provided good pricing information and was prepared to provide the expected "level of effort". Consequently these three firms were included in the competitive range for discussions.

After the agency held oral discussions with the three firms, each submitted a best and final offer. These were scored (this time by only one evaluator) under the established criteria with the result that Osprey received 95 points, followed by ComCorps with 83.

The project officer determined on the basis of the experience of Osprey's proposed production team, the range of experience of the motion picture company and the sample films submitted, that the expertise of Osprey's team and the innovative approach evidenced in its proposal warranted the expenditure of an additional \$5,000. He stated that while ComCorps' best and final offer clarified questions raised by the selection committee, the modifications to the Park Service's concept for the movie proposed by ComCorps would necessitate a further re-write of the scheme outlined in the RFP at a time when the project could not afford the delay necessary for approvals of a new film idea. Consequently, the award was made on August 3 to Osprey at a price of \$45,860.

ComCorps complains that it was denied an opportunity for a conference with the Park Service's project officer prior to submitting its proposal to obtain "insights that would allow ComCorps to be more completely responsive to the creative whims of the man who would ultimately be the final judge of our efforts." ComCorps contends such an opportunity was essential to overcome the competitive advantage enjoyed by Osprey as a result of its prior performance under a purchase order issued by the Park Service for script development work concerning the same Gulf Islands.

The Park Service reports that ComCorps was unable to provide written identification of specific technical or business management items that required clarification or modification of the RFP. Rather, the requested conference was to be a "somewhat open ended discussion of the Gulf Island project", and the Park Service states that it denied the request since such a meeting would provide ComCorps with an unfair competitive advantage.

The Park Service also points out that while Osprey's president had been previously awarded a purchase order to write a script for the "cine" conversion of a parkwide film which introduces the park and the activities at Gulf Islands, the film which is the subject of the protest is a natural history movie based upon a view of the Gulf Islands as an ecosystem. The agency maintains that they are two entirely different projects which require different skills and resources to produce.

We have consistently stated that the Government is not required to equalize competition on a particular procurement by considering the competitive advantages accruing to firms due to their particular circumstances, including the award of other contracts. Although a competitive advantage may well exist, the test of propriety or legality of an award is whether that advantage was the result of unfair action by the Government. See National Motors Corporation, B-189933, June 7, 1978, 78-1 CPD 416.

We agree with the Park Service that the pre-proposal conference suggested by ComCorps would have been prejudicial to other prospective offerors, and we believe that ComCorps' request was properly denied. The record does not establish that any of ComCorps' competitors, including Osprey, gained advantages for this procurement through any means other than the performance of prior contracts. Thus, the Park Service was not required to equalize any such competitive advantages in connection with this procurement.

The protester questions the propriety of accepting Osprey's proposal in view of an instruction in the RFP advising that while costs or labor rates were not to be included in an offeror's technical proposal, "the level of effort (man-hours for labor categories of individuals to be assigned to the project, materials to be used, and travel) are proper topics of discussion in this section." ComCorps alleges that Osprey's technical proposal made no mention of its level of effort.

The Park Service explains that this data relates to the allocation and distribution of resources to a project, and the extent to which an offeror provides the data in the technical proposal is a matter of business judgment. The Park Service advises that the failure to provide such data would not necessarily impact on the technical evaluation.

Apparently, it was the intent of the Park Service to encourage offerors to demonstrate their understanding of the amount of work required by setting forth their proposed level of effort in their technical proposals. Since the evaluation committee was able to conclude on the basis of the cost proposals (which were required to contain the same type of information covered by the instruction) that Osprey, as well as the other two offerors, provided the expected level of effort, the Park Service did not act unreasonably by not rejecting or downgrading Osprey for not conforming to the nonmandatory instruction. We do agree with the protester that this instruction is somewhat vague and should either be clarified or not used in future procurements.

ComCorps' concern regarding improper downgrading of its proposal stems from its decision to modify and expand the film treatment originally set out in the RFP. ComCorps states that prior to this decision, it telephoned a procurement officer and was assured that any modification which improved the original treatment would be welcomed provided it could be produced within the context of the provisions outlined in the RFP and as long as the revised treatment encompassed the subject matter delineated by

the RFP. The protester contends it fully complied with this condition and yet was penalized in the evaluation.

The Park Service indicates that it informed ComCorps that a restructuring of the approach set forth in the RFP would be acceptable only if done within the outlines of the RFP and states that it informed ComCorps of its position both before initial proposals were submitted and during negotiations. The agency states that ComCorps' proposal to modify and expand the concept would require that the RFP be restructured. The Park Service viewed this as a "significant element" in the award decision. The record shows that in the final evaluation ComCorps received 18 out of a possible 25 points for its technical approach.

ComCorps evidently interpreted the Park Service's comments as permitting any restructuring of the concept for the film provided it stayed within all other boundaries of the RFP such as budget and delivery schedule.

We do not believe it was reasonable for ComCorps to assume it could submit an approach that was not within the concept set forth in the RFP in the absence of a specific provision in the RFP permitting such deviations. Nor can we conclude from the record that agency personnel informed ComCorps that such would be the case. Thus, we cannot conclude that the agency acted unreasonably in expressing concern over the ComCorps proposed approach or in evaluating the ComCorps proposal in light of that concern.

ComCorps objects to the award to Osprey at a higher price notwithstanding that the evaluation committee considered ComCorps fully qualified to provide the Park Service with an acceptable production. The protester contends that the justifications for the award offered by the Park Service such as Osprey's "innovative approach" or "expertise of team" lack substance. The RFP, as previously noted, specifically stated that in the award selection technical proposals carry greater weight than cost proposals, and the record includes the evaluators' point scoring and accompanying narratives documenting their conclusions as to the technical superiority of the Osprey proposal under the established evaluation criteria.

We have held that procuring officials enjoy a reasonable range of discretion in the evaluation of proposals and the determination as to which offer is to be accepted for award. Such determinations are entitled to great weight and must not be disturbed unless shown to be unreasonable or in violation of procurement statutes or regulations. The fact that a protester may not agree with the evaluation does not render it unreasonable. See Rockwell International Corporation, 56 Comp. Gen. 905 (1977), 77-2 CPD 119. We have also consistently recognized, in the negotiation of a 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. General Exhibits, 56 Comp. Gen. 882, 887 (1977), 77-2 CPD 101.

Our review of the record shows no evaluator scored the ComCorps proposal higher than the Osprey proposal in any evaluation category, and the accompanying narrative cites, as reasons for the superiority of the Osprey proposal, the credentials of Osprey's production team, the company's range of experience, its innovative approach, and excellence of its film samples.

In short, it appears that the Park Service had to choose between an outstanding proposal and a good proposal. There is nothing in the record to establish that the Park Service's determination that Osprey's proposal was technically superior was unreasonable or in violation of procurement statutes or regulations. Thus, we do not believe the agency abused its discretion by scoring Osprey higher than ComCorps or by determining that the technical superiority of Osprey's proposal justified an award to it despite the higher price.

Finally, ComCorps contends that the oral discussions which the Park Service conducted with it were inadequate. Our Bid Protest Procedures, 4 C.F.R., Part 20 (1979), provide that protest allegations must be filed within 10 working days from the time the basis for the allegation was known or should have been known. 4 C.F.R. § 20.2(b)(2).

In this instance, oral discussions were concluded in the latter days of June 1979 and the record shows that ComCorps was furnished with the reasons for the award selection on August 6, 1979. Since the basis for any protest of the adequacy of oral negotiations should have been known by ComCorps no later than that date, and since this allegation was not filed until December 1979, it is untimely and will not be considered.

The protest is denied in part and dismissed in part.



Deputy Comptroller General
of the United States