



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** West Coast Copy, Inc.; Pacific Photocopy and  
Research Services

**File:** B-254044; B-254044.2

**Date:** November 16, 1993

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David E. Weiskopf, Esq., and Roberta Echard, Esq.,  
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of the decision.

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### DIGEST

1. Where it is discovered that a solicitation for an indefinite quantity of photocopy services provided no basis for comparing quotations and thus was materially defective, agency may not evaluate competing prices based on newly devised criteria that deviate from the solicitation's stated terms.

2. Although procuring agencies have broad discretion in determining the particular method of price evaluation to be applied, the chosen method must provide a rational basis for source selection.

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### DECISION

West Coast Copy, Inc. (WCCI) and Pacific Photocopy and Research Services (Pacific) protest the award of a licensing agreement by the United States Bankruptcy Court for the Southern District of Florida (the court) to Pitney Bowes Inc. for providing photocopying services to the public at the court. The protesters each contend that their own offered price represents the lowest cost, most advantageous offer to the government, and essentially argue that the evaluation of the competing prices was fundamentally flawed.

We sustain the protests because we conclude that the court improperly based its evaluation of competing quotations on cost comparison methodology that did not provide a rational basis for source selection.

The court issued the solicitation as a "Statement of Work and Quotation Form for In-House Copier Service" on March 19, 1993. Under the 24-month, revocable license agreement that would result, a copier service would occupy space within the courthouse and would provide photocopies of court documents to the general public, as well as related services such as locating the specific document to be copied. The services would provide an alternative source of photocopies to the public; however, the court's staff would continue to provide copies of court documents to the public for a fee.

The price quotations that were submitted for evaluation represented the prices that the vendor would charge the individual public patrons requesting the services. The quotation form requested three types of information from the vendors--copying cost-per-page, special fees, and qualifications--and stated that these were the evaluation criteria that would be considered for award. The form also stated that all evaluation criteria would be given equal consideration.

Vendors were to submit a per-page photocopying price for the initial year and for the following year. Vendors were also instructed to list their fees for special services. The services listed on the form, with blanks for submitting prices, were as follows: locating documents, fax service per page (local), fax service per page (long distance), courier service, and mailing charges (regular, certified, Federal Express, United Parcel Service), with additional space in which vendors were instructed to list any additional services not specified on the form. The form stated that approximately 235,200 copies were made in 1992. In addition to pricing information, vendors were required to provide information about their qualifications. The form specified the type of information that should be submitted to describe the vendor's experience and references.

Five vendors, including the protesters, submitted six quotations in response to the solicitation by the established due date of April 9.

WCCI had submitted two quotations, each with a different pricing structure. In one of these, "Quotation A," WCCI submitted a price-per-page and had completed the blanks for special services with "0," "0 + price of phone call," "no additional charges," etc. In the other one, "Quotation B," WCCI had submitted a significantly lower price-per-page and had submitted prices for each of the special services listed, as well as its own list of additional services/prices, such as "rush charge/order," "telephone reports," "stapling," etc.

Pacific submitted a quotation that included a per-page price for copies and its own list of special services, such as "case research," "certification," "rush," "archive retrieval fee," "estimates (per request)" and "case monitoring."

Pitney Bowes submitted a quotation with a per-page price for copies that increased after the initial year, and prices for special services. Some of the service charges were listed as flat fees, while others were priced by the hour or as a multiplier by which base fees would be increased.

The Clerk of the court conducted preliminary evaluations, contacting the listed references and requesting additional information from vendors concerning the fees proposed for special services. Regarding WCCI's two quotations, the Clerk concluded that Quotation A offered no special services and that Quotation B was the more advantageous offer of the two. On the basis of this conclusion, the clerk did not include Quotation A in its comparison with the remaining four quotations.

Subsequent to the initial evaluations, the vendors were advised by letter that a new wage determination would apply. The vendors were permitted to revise or extend their quotations accordingly, by May 18. Four vendors, including both protesters, responded. The revised or renewed quotations (excluding WCCI's Quotation A) were entered on a chart for comparison purposes. The court's contract coordinator sent identical letters to the four vendors, asking more specific questions about the vendors' qualifications and requesting the vendor to submit a total price for each of four possible requests that might be processed under the licensing agreement. The four hypothetical requests were as follows:

"a - You receive a copy request and the document appears on the docket, but is not in the file when you request the file and you must review the file on separate occasions.

"b - You receive a request in person for a copy of a document and the requestor supplies the court paper number to you.

"c - You receive a request through the mail for a copy of a document and the requestor supplies the court paper number to you.

"d - You receive a request through the mail for one copy of a 10-page document. The requestor wants the copies faxed to their office. The only information given is the case name and the title of the document."

All of the vendors submitted responses by the deadline of June 2. When the court attempted to compare the vendors' submissions, it found that a line-by-line comparison of the four quotations under consideration was impossible, "because of the various additional services offered by the vendors and because many of the proposed costs were stated as "at cost," rather than by dollar amount. Therefore, on its own initiative, the court proceeded to devise 15 different scenarios to represent a variety of possible copy requests. Variations on these scenarios (e.g., adding a "rush" request to the order) expanded the actual number to 25; however, when the court discovered that it could not compare courier charges because of the disparity in the pricing methods submitted (e.g., "at cost," "cost" plus a flat fee, a variety of prices for different geographic areas, etc.), it eliminated the scenarios that involved courier delivery, reducing the number of scenarios to 20. The court calculated the costs for each of these scenarios for each of the firms and created a chart for comparing them to each other.

For each of the scenarios, each firm's quotation was given a color-coded ranking to signify its relative position for that scenario: least expensive, second least expensive, third least expensive, or most expensive. These results were summarized for each firm, on the basis of how often that firm's quotation fell into each of the color/price categories. The court states that "further consideration was given to specific scenarios that, based on the experience of the Clerk's staff, were likely to be requested most frequently." On this basis, 12 of the 20 scenarios were chosen to form the basis for the final price comparison. The final cost analysis was based on comparing the number of times the various vendors received each of the color/price ratings, so that a vendor whose quotation was more often in the "least expensive" category, and less often in the "most expensive" category would be considered lower in price overall.

The court then considered experience and references. The report states that the three references submitted by Pitney Bowes were all local and personally known to the Clerk; that the Clerk had also been told by the Clerk of the Court in Houston, Texas that the court was pleased with similar services performed by Pitney Bowes; and that "the national reputation of Pitney Bowes also weighed in the consideration."

The court concluded that Pitney Bowes' quotation offered the overall lowest quotation based on the various copy request scenarios anticipated to be received, and that it had met the requirement for references. The Clerk awarded the

license agreement to Pitney Bowes on June 16. These protests followed.

WCCI protests that its Quotation A was improperly rejected, contending that the quotation actually offered the lowest cost for the services, and that the evaluation and comparison of quotations were arbitrary and capricious. Similarly, Pacific protests that the evaluation process employed by the court was fundamentally flawed because it provided no basis for comparing costs, and that its own quotation would have been low under a proper evaluation.

As a preliminary issue, the court challenges our jurisdiction of this matter, contending that the government is not procuring goods or services for its own use, but is granting a license to allow the vendor to provide services to the general public. The court acknowledges in its report that our bid protest jurisdiction, under the Competition in Contracting Act of 1984 (CICA) encompasses "a written objection by an interested party to a solicitation by a federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551 et seq. The court argues that the "buyer" in this case is the general public, and emphasizes that the transactions that will occur when photocopies are ordered will be between the public patron and the vendor.

We do not find this argument persuasive. Our jurisdiction does not turn on whether appropriated funds are involved, see Century 21 -- AAIM Realty, Inc., B-246760, Apr. 3, 1992, 92-1 CPD ¶ 345, or whether the actual transactions occur between the federal agency and the vendor. It is clear that but for the contractual agreement with the court, the vendor would not have any transactions with the public patron. Where a concession or similar type contract results in a benefit to the government, the contract is one for the procurement of property or services and therefore is encompassed by our bid protest jurisdiction. See, e.g., Century 21--AAIM Realty, Inc., B-246760, Apr. 3, 1992, 92-1 CPD ¶ 345 and cases cited therein. The interests to be protected--the integrity of the competitive bidding system, enabling the public to have confidence that the government will award contracts fairly--are the same regardless of whether direct government payments will be involved. Where the government invites private vendors to compete for a business opportunity, the performance of which will produce a benefit to the government (such as a reduction in the government agency's own workload or some other support of the agency's mission), all elements necessary to invoke our jurisdiction are present.

As discussed below, the court's decision to obtain the services of a vendor to provide copying services is based on a longstanding need to ease the court's workload and to provide easier public access to court documents. Policies on handling public requests for copies of court records are left to the discretion of each individual court so that the specific demands of that court can be met. Courts must charge the public a fee of \$.50 per page for copies of court documents; this fee is set by statute and has been in place since 1959. One reason the Administrative Office of the United States Courts considers the fee appropriate is that it encourages the public to use alternative methods of obtaining copies of court documents instead of using limited court resources.

In 1991, the General Accounting Office responded to a congressional inquiry regarding whether federal courts were doing an adequate job distributing copies of judicial opinions and other court documents to the public. This request was prompted, in part, by the problems that at least one publisher of court information encountered when requesting copies of documents from federal district courts. In our report, *Courts Can Provide Documents in a More Cost-Effective Manner* (GGD-91-30, B-242498, Feb. 13, 1991), we noted that some courts have instituted alternative procedures to enable the public to obtain copies of court documents, for example by providing vending machines for public use or by contracting out to private vendors. We concluded that these solutions were less expensive for the public, and eased the work load of the clerk's staff, and recommended that the Administrative Office should encourage courts to adopt whatever option, if any, the court clerks determined would most benefit both their operations and the needs of the public. The Administrative Office's protest report shows that the procurement at issue here was motivated by these same concerns: to ease the court's workload and increase access to court records.

It is apparent from the record before us that the court's resources are strained; that the public must be able to obtain copies of court documents; that photocopying services are one area of the staff's duties that may be delegated or contracted out; and that in this case, the court has determined that this type of contract would further the mission of the court, benefiting the court as well as the public. We agree with this determination, and conclude that although the agreement at issue is called a "license," ultimately it is a procurement for services for purposes of our bid protest jurisdiction. See e.g. Gino Morena Enters., 66 Comp. Gen. 321 (1987), 87-1 CPD ¶ 121; New York Telephone Co. et al., 69 Comp. Gen. 61 (1989), 89-2 CPD ¶ 435; Alpine Camping Servs., B-238625.2, June 22, 1990, 90-1 CPD ¶ 580.

The Administrative Office of the United States Courts is an arm of the judicial branch and its procurements are not subject to the Federal Acquisition Regulation. See Superior Reporting Servs., Inc., B-230585, June 16, 1988, 88-1 CPD ¶ 576. Where the protested procurement is not subject to the procurement statutes, we review the matter to determine whether the actions taken by the agency were reasonable. Id. It is that standard that we will apply here.

In considering protests against an agency's evaluation of proposals, we examine the record to determine whether the evaluation was fair and reasonable and consistent with the evaluation criteria stated in the solicitation. See SeaSpace, 70 Comp. Gen. 268 (1991), 91-1 CPD ¶ 179. While procuring agencies have broad discretion in determining the particular method of price evaluation to be applied, the chosen method must provide a rational basis for source selection. Francis & Jackson, Assocs., 57 Comp. Gen. 244 (1978), 78-1 CPD ¶ 79.

Here, the court recognized that the information it had originally solicited from the vendors was inadequate to permit a reasoned comparison of costs. In our view, the difficulties that the court encountered when it attempted to compare prices was caused by two problems. First is the absence of estimates for any of the services to be performed. A solicitation for an indefinite quantity of services must contain estimates, since without them the agency cannot compare proposals on an equal basis or ascertain which offeror submitted the lowest overall cost. See Penn, Ferrara, Adler & Eichel, 66 Comp. Gen. 242 (1987), 87-1 CPD ¶ 134. Where competing proposals for indefinite quantity contracts are evaluated on the basis of unit prices without extending those prices by estimated quantities, there is no necessary relationship between the evaluated price of a particular offeror and the actual price of performance by that offeror. See Health Servs. Internat'l, Inc.; Apex Environmental, Inc., B-247433; B-247433.2, June 5, 1992, 92-1 CPD ¶ 493; see Professional Carpet Serv., B-220913, Feb. 13, 1986, 86-1 CPD ¶ 158. In addition, without estimates, vendors lack the information necessary for pricing their services intelligently.

Here, the court has only anecdotal information regarding the requests it received in the past.<sup>1</sup> It has no statistical

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<sup>1</sup>While the quotation form does mention the estimated total number of copies that were made the previous year, no apparent use of this figure was made during the evaluation. Moreover, the total number of copies is irrelevant here, since prices would vary markedly depending on how many

(continued...)

data or tracking information to document the pattern of use in the past: the protest report states that "the court did not and does not possess any records concerning the number and types of request made by the public to the copy vendor," and states that the court "was not attempting to project any estimates of the requests a copy vendor could expect."

The court's alternative to providing its best estimates of projected service volume, the color/price rating system, is not a reasonable method of comparing prices. Under this methodology--comparing how frequently a vendor's price was "least expensive" or "most expensive" for a given scenario--the magnitude of the differences in price was not evaluated. Thus, a vendor whose prices were often in the least expensive category, but only by a negligible margin, and infrequently in the most expensive category, but by a large margin, could appear to be more advantageous. With no consideration given to the likely frequency of the various scenarios, it is clear that there is no relationship between the low-priced quote as determined by the court and the firm most likely to be the actual low-priced contractor. The protesters demonstrate this fact by submitting figures and charts that show that the awardee's price may well have been the highest among these three vendors, with each protester concluding, however, that its own price was actually low.

The second problem faced by the court was the absence of any uniform basis upon which to evaluate quotations. The request for prices for "any additional services not specified above" permitted some vendors to separately price services, such as collating, stapling, folding, stuffing, etc., that other vendors included without additional charge, or to list other types of service, such as "rush," which could increase the cost by as much as 50 percent. In fact, when the court devised its final 20 scenarios for comparison, a vendor's "rush" charge was calculated, notwithstanding the fact that it was not listed on the quotation form, and despite the fact that the term was never defined and reflected different intentions by the vendors. This charge was considered in the comparison without any apparent regard for the frequency with which it could be expected or the type of order to which it might be applied--so that a vendor who increased its price for a "rush" order by 50 percent was compared to a vendor who applied a flat fee; the result could have varied greatly, depending on the other services included in the

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<sup>1</sup>(...continued)

copies were required for a particular order and whether the order included special services.

particular order and the volume of copies involved.<sup>2</sup> Notwithstanding a notice in the quotation form that "submission of . . . sliding price scales or minimum order requirements shall be cause for rejection of a proposal," the awardee's quotation included charges that varied according to the volume of pages, according to the length of time expended (with a minimum 15-minute charge), or (for expediting the order) represented a factor by which the entire order would be increased. In this situation, the court had no way to compare prices, and could not determine which offer was lowest.

We sustain the protest. The court can provide a reasonable and common basis for selection by specifying specific services upon which vendors submit quotations on a fixed-price or other uniform basis, along with the court's best estimate of its future needs for each service. We recommend that the court issue such a revised solicitation. Although the licensing agreement has already been entered and Pitney Bowes is already performing the services, the agreement is revocable without cause and without liability for any termination costs, with 30 days notice. The current agreement should be terminated if Pitney Bowes is not in line for award after the evaluation of quotations under the revised procurement, followed by award of the licensing agreement to the successful firm. We also find Pacific and WCCI entitled to the costs of filing and pursuing their protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), the protesters' certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Administrative Office of the United States Courts within 60 days after receipt of this decision.

The protests are sustained.

*for*   
Comptroller General  
of the United States

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<sup>2</sup>Obviously, a 10 dollar flat "rush" fee applied to an order involving only a single page would dramatically increase the price; on the other hand, a 50 percent surcharge would represent an enormous increase in price for a high-volume order.