Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oklahoma County Newspapers, Inc.

File: B-270849; B-270849.2

Date: May 6, 1996

Randy L. Goodman, Esq., and Debby Walden, Esq., for the protester.
V. Burns Hargis, Esq., McAfee & Taft, for the Journal Record Publishing Company, an intervenor.
Richard P. Castiglia, Jr., Esq., Department of the Air Force, for the agency.
Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Offer submitted in trade name properly was accepted for award where evidence of use of trade name was existing and available to agency at time of award and adequately identified corporation that would be bound by offer.

2. Protest that agency improperly credited experience of predecessor firm to successor awardee is denied where awardee retained a significant number of key personnel and some assets of predecessor firm, thus evidencing continuity of operations between the two firms such that predecessor firm's experience was relevant to predicting successor firm's successful performance of contract.

DECISION

Oklahoma County Newspapers, Inc. (OCN) protests the award of a contract to the Journal Record Publishing Company (JRPC) under request for proposals (RFP) No. F34650-96-R-0008, issued by the Department of the Air Force for publication of the base newspaper at Tinker Air Force Base, Oklahoma. The protester contends that (1) the award improperly was made to a nonexistent entity, and (2) the agency improperly evaluated proposals.

We deny the protest.

BACKGROUND

The Air Force issued the RFP on November 13, 1995, for publication of the Tinker Take Off, a weekly civilian enterprise (CE) newspaper.[1] The RFP contemplated award of a 1-year contract, with four 1-year options, to the responsible offeror whose proposal, conforming to the solicitation, would be most advantageous to the government. In this regard, the RFP listed five evaluation criteria--(1) capability concerning various printing aspects, such as type fonts and screens; (2) ability to meet contract requirements, including staff; (3) experience and past performance, including experience in publishing similar publications; (4) convenience of communication between the base public affairs office and the publisher in terms of distance and use of computer equipment; and (5) proposed services in addition to those required.

Two offers--JRPC's and OCN's--were received. Based on the evaluation, the agency determined JRPC's proposal to be superior to OCN's, and thus made award to that firm on December 21, 1995.

NONEXISTENT ENTITY

The protester argues that award was invalid because JRPC was not a legal entity until after the December 21 award; JRPC was incorporated in the state of Delaware (on January 5, 1996) and authorized to do business in the state of Oklahoma (on January 11, 1996).

A contract cannot be awarded to a nonexistent entity, since no firm would be bound to perform the work. National Found. Co., 72 Comp. Gen. 307 (1993), 93-2 CPD ¶ 143. However, this rule does not automatically prohibit award in the name of such an entity, so long as there is evidence establishing an identity between the nominal offeror and a legitimate entity; for example, where the nominal offeror is a trade name used by an established business entity, and available evidence makes it possible to identify the actual offeror with sufficient certainty so that the offeror would not be able to avoid the obligations resulting from acceptance of its offer,

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[1]Under the contract, the commercial publisher for the newspaper is not paid by the government; instead, it receives the right to sell advertising in the newspaper as contractual consideration in exchange for its services as publisher. See 32 C.F.R. Part 247 (1995); Department of Defense Instruction 5120.41 (June 21, 1995); Air Force Instruction 35-301 (Apr. 15, 1994).

acceptance of the offer is proper. Coonrod & Assocs., 67 Comp. Gen. 117 (1987), 87-2 CPD ¶ 549; Sunrise Int'l Group, Inc., B-251956, Feb. 8, 1993, 93-1 CPD ¶ 114; Jack B. Imperiale Fence Co., Inc., B-203261, Oct. 26, 1981, 81-2 CPD ¶ 339.[2]

The record sufficiently establishes an identity between JRPC and Dolan Publishing Company (DPC) so that the offer submitted in the trade name of JRPC would legally bind DPC under the contract. Specifically, on May 8, 1995, during the final option year of JRPC's incumbent contract to publish the Tinker Take Off, JRPC was acquired by DPC, a Minnesota corporation. In connection with this purchase, DPC created a business entity--the Journal Record Acquisition Company (JRAC)--into which the JRPC assets were to be transferred. A bill of sale dated May 8, 1995, filed with the agency to evidence the transfer, provided for sale of (1) JRPC's existing inventory of publications and certain of its tangible assets (such as computers, furniture and equipment) to JRAC,[3] and (2) its intangible assets to DPC, including, specifically, the name "Journal Record Publishing Co." JRAC and DPC were designated collectively as the purchasers. In connection with the sale, a novation agreement was entered into (on May 9) by the agency and JRPC to indicate that JRAC was the successor in interest to JRPC, and JRPC's contract was modified accordingly on July 20. The parties to the sale agreed to delay incorporating a new business entity under the name JRPC to allow time to liquidate the old JRPC's few remaining assets and officially close its books. The old JRPC's name was changed to Hogan Publishing Company on August 30. JRAC's name thereafter was changed to JRPC, which was incorporated in Delaware on January 5, 1996 and authorized to do business in Oklahoma on January 11, 1996.

The agency argues, and we agree, that the bill of sale, which was in existence and known to the agency at the time of award, shows that, at the time of award, JRPC was a trade name belonging to DPC; it was specifically transferred to DPC under the sale agreement as an intangible asset. Further, the Tinker Take Off actually had been published by DPC in the name of JRPC for 7 months prior to the award (i.e.,

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[2]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 generally do not apply, see The Winkler Co., B-252162, June 8, 1993, 93-1 CPD ¶ 444. We review the agency's actions in these procurements to determine whether those actions were reasonable and consistent with other laws and regulations that may be applicable. Gino Morena Enters., 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121; The Winkler Co., supra.

[3]Most of JRPC's printing presses were damaged or destroyed in the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City and were not sold to JRAC or DPC. JRPC's undamaged presses were sold to Printing Inc., JRPC's subcontract printer for the Tinker Take Off.

from the time of the sale and novation agreement in May 1995 to award in December 1995).[4] It thus was reasonably evident to the agency that DPC would be bound by the terms of the contract awarded in the name of JRPC. We therefore conclude that the fact that the new JRPC was not incorporated and registered to do business (in Oklahoma) until 3 weeks after award is irrelevant; JRPC's offer was properly accepted for award.[5]

EVALUATION OF JRPC'S PROPOSAL

OCN alleges that JRPC's proposal improperly was evaluated under the experience/past performance criterion based on the predecessor firm's (and its subcontractor's) experience (JRPC's proposal received a perfect score under this criterion).

An agency properly may evaluate the corporate experience of a new business by considering the experience of a predecessor firm, see J.D. Miles & Sons, Inc., B-251533, Apr. 7, 1993, 93-1 CPD ¶ 300; R. J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220, or a subcontractor, Cleveland Telecommunications Corp., B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105, including experience gained by employees while working for the predecessor firm. J.D. Miles & Sons, Inc., supra. The key consideration is whether the experience evaluated reasonably can be considered predictive of the offeror's performance under the contract. Id.

The evaluation of JRPC's experience was proper. The record shows that the new JRPC retained 16 of 18 of the predecessor firm's publishing employees, comprised of editorial, production, clerical/business, electronic maintenance, and

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[4]Additionally, JRPC's offer cover letter stated that Dolan Media Corporation (DMC) of Minneapolis is the parent of JRPC. In this regard, an organizational chart submitted during the course of the protest indicates that both DPC and JRPC now operate as wholly-owned subsidiaries of DMC and also that DPC holds intangible property used by the operating company JRPC (and its predecessor in name, JRAC).

[5]OCN argues that if JRPC is in fact a trade name for DPC, then JRPC and DPC would have to be the same legal entity. The protester maintains that this is contradicted by execution of the bill of sale, which shows that JRPC and DPC are different legal entities (i.e., if the transferor and the transferee were the same legal entity, the sale would not have been accomplished). This argument fails to distinguish between the old and new JRPC entities. It is clear from the record that although the new JRPC and DPC can be considered the same entity based on DPC's use of JRPC as a trade name at the time of award, the sale was executed between the old JRPC and DPC, which clearly were different entities.

sales/marketing personnel, and thus would remain under the guidance of virtually the same personnel. (The remaining two publishing employees that did not make the transition were in the sales/marketing department.) Also, JRPC's printing subcontractor, Printing, Inc., retained all 25 of the old JRPC's printing and delivery personnel. Finally, some printing assets of the old JRPC were sold to either the new JRPC and its subcontractor, Printing, Inc.--i.e., computers and related equipment were transferred to the new JRPC and some undamaged presses were transferred to Printing, Inc. These circumstances--retention of a significant number of key publishing employees, retention of the printing/delivery employees by the JRPC's subcontract printer, and retention of some printing assets by JRPC and its subcontractor--evidenced significant continuity between the old and new firms' operations, such that the old firm's experience, as well as that of its subcontractor, was relevant in assessing JRPC's experience. Thus, the experience of the predecessor firm properly could be attributed to the successor firm for evaluation purposes.[6]

In comments on the agency's March 19 supplemental report, OCN argues for the first time that the agency failed to reject or downgrade the awardee's proposal for failing to submit supporting documents for technical capability, and examples of technical capability, as required by the solicitation. According to the protester, these allegations are based on a redacted copy of the awardee's proposal received in response to a Freedom of Information Act (FOIA) request.[7]

Under our Bid Protest Regulations, protests not based upon apparent solicitation improprieties must be filed not later than 14 calendar days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1996). Each new protest allegation must independently satisfy the timeliness requirements. GE Gov't Servs., B-235101, Aug. 11, 1989, 89-2 CPD ¶ 128.

OCN was provided a copy of the awardee's redacted proposal--which OCN itself states formed the basis of its additional arguments--under agency cover letter dated

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[6]The protester complains that the old firm's experience should not be attributed to JRPC because not all of the assets of the old firm were transferred to JRPC. However, there is no requirement that all assets be transferred in order to establish the existence of a continuity of operations, at least where, as here, there are other persuasive indications of a continuity of operations and on this basis the experience of the predecessor firm can be attributed to the successor firm.

[7]The awardee's entire proposal, contained in the agency report, and received by the protester's counsel on February 15, 1996, was under the protective order issued in the protest. Because only the protester's counsel was admitted to the protective order, the awardee's unredacted proposal was not available to the protester.

February 28, 1996. For purposes of calculating timeliness, absent evidence to the contrary, we assume that mail is received within 1 calendar week from the date it is sent. See Jack Faucett Assocs.--Recon., B-253329.2, Apr. 12, 1994, 94-1 CPD ¶ 250. We thus assume that the protester received the redacted proposal no later than March 6. As OCN's comments, including these arguments, were not filed until April 5, more than 14 calendar days later, these arguments are untimely and will not be considered.

EVALUATION OF OCN'S PROPOSAL

OCN argues that the agency improperly downgraded its proposal under the second, third, and fourth evaluation criteria based on the following deficiencies: (1) inadequate staff to meet solicitation requirements and current workload, (2) computer equipment not the most technologically advanced and therefore not the most advantageous to the government, and (3) inexperience with publications the size and circulation of the Tinker Take Off. However, even if we found these arguments meritorious, they would not affect the outcome. This is because OCN's proposal was only downgraded 32 points under these criteria, JRPC's proposal was higher-scored by 41 points (347 points for OCN and 388 for JRPC), and the award decision was based on the point scores. Thus, even if OCN's proposal score were raised by the 32 available points, its score would remain lower than JRPC's, and thus it would not be in line for award. It follows that OCN was not competitively prejudiced by the alleged misevaluation of its proposal; we thus will not consider these arguments. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379; MVM, Inc.; Burns Int'l Sec. Servs., 73 Comp. Gen. 124 (1994), 94-1 CPD ¶ 279 (competitive prejudice is an essential element of any viable protest).

The protest is denied.

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