



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: USA TODAY

File: B-278650

Date: February 20, 1998

Trisa J. Thompson, Esq., Kelly P. Doran, Esq., and G. Mathew Koehl, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

David R. Johnson, Esq., Theodore J. Boutrous, Jr., Esq., and James C.

Dougherty, Esq., Gibson, Dunn & Crutcher, for Miller Advertising Agency, Inc., an intervenor.

John A. Krump, Esq., Department of Justice, for the agency.

Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency reasonably decides that technical proposals are essentially equal, agency properly may award to low-priced offeror.

DECISION

USA TODAY protests the Federal Bureau of Investigation's (FBI) award of a fixed-price, indefinite delivery, indefinite quantity contract to Miller Advertising Agency, Inc. under request for proposals (RFP) No. 7116 for advertising services. USA TODAY argues that the FBI failed to evaluate proposals consistent with the stated evaluation criteria and, as a result, performed a flawed price/technical tradeoff analysis.

We deny the protest.

The RFP is intended to provide advertising to meet the FBI's statutory requirement to provide public notice of seized properties subject to forfeiture. The RFP provided that award would be made to that offeror whose proposal, conforming to the solicitation, was determined to be in the best interests of the government. The RFP stated that proposals would be evaluated for technical capabilities, price, and past performance and that these evaluation areas were listed in order of importance. Technical criteria consisted of the following areas for evaluation:

The Offeror must demonstrate how th[e] proposal addresses requirements and specifications of the Statement of Work and the practicalness and probable effectiveness of those methods.

The Offeror must provide detailed documentation that substantiates that the specific requirement that their newspaper has general circulation in all the Judicial Districts of the United States and its Territories.

The Offeror must clearly demonstrate their ability to receive data electronically (or manually if necessary) accurately and completely and publish that same information accurately. Methods to be used to validate data received and published must be clearly explained.

The RFP also explained in detail how past performance would be evaluated.

Further, of relevance here, by amendment No. 1, the agency responded as follows to a question asked by USA TODAY prior to the initial closing time:

QUESTION: What is the minimum circulation a newspaper must deliver in each Judicial District to be considered a newspaper of "general circulation?"

ANSWER: Property seized for purposes of federal forfeiture laws must be published in a newspaper of general circulation in the judicial district where the property was seized or where the forfeiture action is brought. See Title 19, Code of Federal Regulations, Section 162.45(b); Title 21, Code of Federal Regulations, Section 1316.75; and Title 28, Code of Federal Regulations, Section 8.8(c). The term "general circulation" is not defined in the governing statute or enabling legislation. The FBI conducted a review of case law attempting to define a newspaper of "general circulation in a judicial district" which would satisfy the statutory-and regulatory requirements. The following legal factors must be considered:

1. That the publications be a "newspaper"
2. That the newspaper be published at a minimum on a weekly basis
3. That the newspaper be readily available in all judicial districts to anyone who wishes to obtain it (demonstrated by circulation figures in that judicial district - both subscription and newsstand)

4. That the content of the newspaper contain news or information of a general character and of a general interest, appeals to public generally and reaches a diverse readership
5. That the newspaper advertise in such a manner as to bring legal advertisements or official notices to the attention of the general public
6. That the newspaper have at least one newspaper in circulation by subscription per 4,000 people in that judicial district (FBI's threshold of de minimus circulation)
7. That the newspaper have a national circulation

The FBI received proposals from eight firms including USA TODAY and Miller, which proposed to advertise in The New York Times. The proposals were evaluated by the FBI's Advertising Services Committee (ASC). Using a rating worksheet, the ASC rated each proposal for five technical criterion reflecting the technical requirements in the statement of work and one criterion regarding a firm's prior experience in publishing electronically and accurately. The five criteria reflecting the technical requirements were as follows:

Must provide advertisement once a week for three consecutive weeks in publication of general circulation,

Must substantiate newspaper has a general circulation in all judicial districts.

Must publish advertisement in newspaper published weekly and must accept the text for the ad publication five working days prior to publication.

Must substantiate ability to receive data through electronic means accurately and publish same information accurately.

Must provide draft copies of each weekly advertisement to the FBI so that data may be examined for accuracy before advertisement is published

The ASC panel members individually rated each offeror's proposal in accordance with the factors described above, and completed evaluator worksheets with comments. The ASC prepared a memorandum which contained the results of the ASC's evaluation. Although the record contains no indication that the panel members actually point-scored proposals, the memorandum ranked offerors "in descending numerical order of technical acceptability." Each offeror's evaluation

was then described in a narrative synopsis. USA TODAY was listed first; Miller was listed second. The memorandum also included an attachment which showed a letter rating for each evaluation criterion. Of relevance here, the second highest rating, "check," indicated that the vendor met the criteria in the referenced RFP section. The highest rating was a "plus" rating which meant that the vendor exceeded the criterion. USA TODAY and Miller received identical ratings--an [deleted]. Miller was the low-priced offeror based on initial proposals.

While the FBI sent clarification questions to several offerors, the agency had no questions concerning the proposals of USA TODAY and Miller. After evaluation of the clarification responses, three firms including USA TODAY and Miller received a [deleted]. The FBI requested best and final offers (BAFO); Miller remained the lowest-priced offeror. The FBI's price evaluation for the base year and options showed that Miller's evaluated BAFO price was more than [deleted] below USA TODAY's price. The contract specialist prepared a memorandum to her unit chief. She noted that the final technical ranking indicated that "Miller [was] virtually the same technically as the number one ranked proposal (USA TODAY)." She stated that "[i]n view of the [deleted] difference between the evaluated price of [these two offerors, it] is determined that Miller offers the best value overall to the FBI." She recommended award to Miller. The unit chief made the same recommendation to the chief contracting officer based on Miller's [deleted] lower price. The contract review board subsequently approved the award.

USA TODAY challenges the FBI's decision to award to Miller primarily because it believes that, under the evaluation criteria, its own proposal is technically superior, not technically equal, to Miller's proposal because its circulation is greater than the circulation of The New York Times. USA TODAY believes it should have been awarded a significantly higher technical evaluation score or rating because of its greater circulation. To establish its technical superiority, the protester relies on the amendment discussed above which listed "legal factors" to be considered in defining a newspaper of "general circulation in a judicial district." The protester argues that the FBI did not evaluate these factors and, based solely on circulation figures submitted in its proposal, USA TODAY was superior with regard to these factors--being available in all judicial districts, having at least one newspaper in circulation by subscription per 4,000 people in each judicial district (subscription factor), having a national circulation, appealing to the public generally, and having diverse readership.

The FBI concedes it did not specifically evaluate whether each newspaper met the subscription factor identified in amendment No. 1. The FBI asserts it looked to this factor as one of many factors which would indicate whether a newspaper was one of "general circulation"--that is, that the newspaper had a national circulation, had at least some circulation in each judicial district, and was a newspaper of general interest. The FBI points out that, based on circulation figures nationally and by districts and other information contained in the proposals, USA TODAY and The

New York Times met the "general circulation in a judicial district" requirement. The FBI also points out that the RFP did not specifically ask for, and that no offeror provided, circulation information indicating the number of subscriptions per judicial district. The FBI asked for and was provided both newspapers' gross circulation figures by judicial district. The FBI acknowledges the one statement in the ASC initial evaluation memorandum that numerically ranked USA TODAY first based on initial proposals. However, it notes that the subsequent evaluation record shows that the agency's contracting officials viewed the proposals of USA TODAY and Miller as technically equal and did not identify USA TODAY's proposal as technically superior. Given the [deleted] price premium associated with the proposal of USA TODAY, the FBI maintains that its decision to award to Miller, even if USA TODAY should have been higher rated, would have been reasonable in any event.

Initially, we agree with the agency that amendment No. 1 did not set forth minimum, mandatory requirements for "general circulation in a judicial district." By its own terms, the amendment provided that for defining a newspaper of "general circulation in a judicial district," "the following factors must be considered." The factors were listed as factors to be considered--nowhere were they described as mandatory minimums. Further, in amendment No. 1, the answer to the question concerning minimum circulation required in a judicial district to be considered a newspaper of general circulation was not described as amending the statement of work or evaluation criteria in the RFP. In our view, the answer is reasonably read as further guidance to the vendors as to what factors the FBI would consider in deciding whether a newspaper would be considered one of general circulation. Nothing in the RFP or the amendment indicated that a newspaper failing to meet one of these factors could not still be considered as one having a general circulation and as being technically acceptable. Further, to the extent USA TODAY argues that the FBI improperly failed to consider the subscription factor, the FBI has argued, and our review of the record confirms, that neither USA TODAY (nor Miller) furnished the information necessary to evaluate whether the offerors' circulation figures met this requirement. Thus, it is reasonable to conclude that neither USA TODAY nor Miller read this requirement as a minimum requirement which had to be satisfied.¹

In view of our conclusion, the dispositive issue is whether or not the FBI reasonably concluded the proposals were technically equal. As explained above, the evaluators concluded that both proposals met the requirements that the proposed newspaper be one of general circulation. Both offerors provided circulation figures to establish their position that they had general circulation in all judicial districts. Although the ASC initially may have ranked USA TODAY higher than Miller, the agency evaluators ultimately did not conclude that the proposal presentations

¹[deleted]

regarding circulation was a meaningful discriminator between the USA TODAY and Miller proposals. Based on our review of the evaluation record, we find the agency's conclusion that the two proposals were technically equal to be reasonable. Since the agency reasonably found the two proposals technically equal, selection of the lower-priced proposal was proper, even though the RFP assigned less weight to price than to technical capabilities. Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332 at 5.

The protest is denied.

Comptroller General
of the United States