

March 20, 2003

P.S. Protest No. 02-16

HEINTZ MEDIA PRODUCTIONS, LLC

Solicitation No. 412735-02-A-0108

DIGEST

Protest of award of television program production contract is denied. Record does not support protester's suppositions that Postal Inspector influenced selection on behalf of the awardee.

DECISION

Heintz Media Productions, LLC (HMP) protests the award of a contract for the production and marketing of television programs to High Noon Film and Interactive, LLC (High Noon) under solicitation 412735-02-A-0108.

Solicitation A-0108 was issued on February 12, 2002, by the Philadelphia Purchasing and Materials Service Center. As issued, it called for the production of three 30-minute and nine 10-minute television programs on the subject of fraud prevention, "to promote the USPIS's [U. S. Postal Inspection Service's] success in consumer fraud investigations and to educate and inform the American public about the various fraud schemes that could victimize them in the future." (Statement of Work (SOW) para. 2.0.) Pursuant to the SOW, the supplier was to script, cast, shoot, and revise and edit each program into a final version, which it was then to market on the Postal Service's behalf. Offers were to be provided on a fixed-price basis. The solicitation provided that offers would be evaluated on the basis of the following factors:

Proposal-Specific Factors

- The supplier's understanding of the proposal
- The qualifications and experience of the supplier's key personnel
- The superiority of the supplier's technical approach
- Ability to meet the delivery schedule

Supplier-Specific Factors

Past Performance Supplier Capability

Evaluation was to take place in two phases. In the first, written proposals were to be evaluated; in the second, offerors whose written proposals were found satisfactory were to participate in oral presentations in which “the evaluation team will look for examples and presentation(s) of previous program development that incorporate at a minimum the requirements of the USFIS statement of work.”

The SOW was written by Assistant Inspector in Charge (AIC) Giusti, Fraud, Child Exploitation, Asset Forfeiture and Money Laundering. According to AIC Giusti, the SOW was reviewed by Inspector in Charge (INC) Mihalko, Congressional & Public Affairs, and copies were provided to Postal Inspector Kuykendall in AIC Giusti’s office and to Mr. Griffo, a Media Relations Specialist, Congressional, in AIC Mihalko’s office. Inspector Kuykendall had been listed as the Contracting Officer’s Representative (COR) in the initial draft of the SOW. In the SOW as issued, AIC Giusti was identified as the COR.¹

The contracting officer distributed the solicitation to twenty-some prospective offerors. The contracting officer did not publicize the solicitation beyond that distribution because these were commercially available services which she valued at less than \$1,000,000. Purchasing Manual (PM) 3.5.3.a.1(a). The offerors solicited included HMP and High Noon. Both these firms had had prior involvement with the Inspection Service,² and each was identified as a potential offeror by someone in the Inspection Service. According to AIC Giusti, Inspector Kuykendall had requested that High Noon be solicited and IC Mihalko had requested that HMP be solicited.

Proposals were due on March 8. On or before that date, eight proposals were received, of which five proposed prices in excess of \$1,000,000.³ The contracting officer believed that the receipt of proposals exceeding the publicizing threshold required that the requirement be publicized. Before doing so, however, she inquired of AIC Giusti whether he had any changes to the solicitation. He replied by requesting that the requirement be changed to three 60-minute programs and nine 5-8 minute programs. According to

¹ Starting in November, 2001, Insp. Kuykendall had been looking for different employment. In January, 2002, he received a job offer from the Food and Drug Administration, and on May 18, 2002, he resigned from the Inspection Service.

² High Noon had participated in the Inspection Service’s “Know Fraud” campaign and a 1999 public service announcement; HMP in 2001 had produced a two-part documentary series “The Feds: U.S. Postal Inspectors,” which depicted cases from the files of the Inspection Service.

³ The contracting officer states that she did not review the technical proposals at that time nor provide them for anyone else’s review.

the contracting officer, “several prospective offerors” had contracted AIC Giusti indicating “that hour-long programs were easier to market than 30-minute programs.”⁴

Amendment 1, which made that change to the requirement and extended the due date for offers to April 5, was issued on March 13, and the contracting officer publicized the solicitation on FedBizOpps, the Governmentwide Point of Entry, PM 3.5.3.b. Forty-nine offers were eventually received. Those offers were evaluated by an evaluation team composed of AIC Giusti, the program manager; Postal Inspector Trimbur, Mail Theft and Violent Crimes; and Nick Sucich, Senior Producer, USPS-TV. Eight offers, including those of HMP and High Noon, were selected for oral presentations on May 14 and 15. In a meeting on May 29, the three evaluators and the contracting officer selected HMP, High Noon, and a third firm for further discussions.⁵ The three offerors clarified items in their offers and were afforded an opportunity to offer their best pricing.

The contracting officer’s memorandum explaining the best value determination includes the following;

The proposal from High Noon Films offers the best value to produce three one-hour TV program and 9 shorter video productions for the U.S. Postal Inspection Service’s Fraud Prevention Program series. This is based on the combination of the evaluation factors outlined in the solicitation and price. Proposal specific and supplier specific performance evaluation factors, when combined, are more important than price.

Of the 3 suppliers, High Noon Films submitted the second lowest offer and has the second highest score. There is \$664,000 difference in price between High Noon and the highest ranked offeror, Heintz Media Productions. The evaluation committee considers both proposals low risk. The evaluation team was so impressed with High Noon’s thorough and well-prepared oral presentation; they were ranked first in Phase II The committee felt that Heintz did not sell their ideas and concept during the oral presentation and their delivery wasn’t good; not as organized. High Noon exhibited to the committee that they can develop a quality product; therefore, it was determined that the technical advantage noted in Phase I for Heintz is not worth the price differential.

The contracting officer made award to High Noon on August 21. HMP requested a debriefing which was held on September 25. At the debriefing, HMP’s principal, Mr.

⁴ HMP’s protest recites that it made such a suggestion.

⁵ The firms chosen for final discussions were the first-rated (HMP), third-rated (High Noon) and fourth-rated firms; the second-rated firm was not further considered because of concerns about its proposed program format, which “would not be effective.” HMP’s ranking remained higher than High Noon’s in the second phase, although High Noon received a slightly higher score in that phase than had HMP.

Heintz, asserted that Inspector Kuykendahl had improperly influenced the award decision on High Noon's behalf, allegations reiterated in HMP's protest as set out below. Concerned about these serious allegations, the day after the debriefing the contracting officer issued a stop work order to High Noon and requested, through her superior, that the Inspection Service investigate the allegations.

HMP's protest was received in this office on October 7. It recites that prior to the original date for the receipt of offers, Mr. Heintz received a call from Mr. Les Rayburn, High Noon's president, then unknown to him, who told Mr. Heintz that Insp. Kuykendall had advised Mr. Rayburn that HMP had been solicited to propose and that "the award would be a contest between Heintz Media and High Noon," and proposed that "Heintz Media withdraw from the competition and cooperate with High Noon, which would then win the award and then share the work and proceeds with Heintz." Mr. Heintz got the impression that Mr. Rayburn had a close relationship with Insp. Kuykendall, "who would have influence in the outcome of the Solicitation."

In the course of the conversation, Mr. Heintz noted his own close work with Postal Inspectors, including INC Mihalko. Mr. Heintz concluded the conversation without responding to High Noon's proposal. He subsequently discussed the call with INC Mihalko, who told him of High Noon's previous work for the Inspection Service. Subsequently, Mr. Rayburn emailed Mr. Heintz that "Inspector Kuykendall confirmed that he had briefed Inspector Mihalko about the possibility of [High Noon and HMS] working together on this project, and [INC Mihalko] seemed very agreeable."

Mr. Heintz replied to the email expressing a willingness to consider "your work for any upcoming projects," including the postal project, but noting that he didn't "think there is enough time to work out an agreement in this case." Mr. Rayburn replied, thanking him for considering the offer, and suggesting that if either firm received the contract that they consider asking the other to assist in performance.

HMP submitted its proposal and appeared for its oral presentation. At the presentation, Mr. Heintz concluded that the evaluators "did not include any person with significant experience in the purchase, development, production, or distribution of major television documentary programs," that the panel "was disinterested or distracted," and that the evaluators "had already made up their minds to award the contract to somebody else."

HMP advises that it did not receive notice of the award, but, having learned of the award otherwise, inquired of the contracting officer and requested a debriefing. The contracting officer initially advised HMP that it had been "'first in technical' rank before the [oral presentation,] but only second to High Noon thereafter." HMP recites that at its debriefing AIC Giusti "confirmed . . . that Heintz had been ranked behind High Noon in round two . . . [because of] Mr. Heintz' 'personality and style' during [the presentation]."

HMP states that AIC Giusti did not know how Insp. Kuykendall could have gotten "information regarding Heintz Media's [participation] or its standing and prospects in the competition," and "expressed his 'shock' at the breach of confidence that was apparent

in the Rayburn call to Mr. Heintz.” While AIG Giusti stated that Insp. Kuykendall “had nothing to do with [the solicitation],” he later conceded that Insp. Kuykendall “had worked for [AIC Giusti] during the preparation of the solicitation.”

HMP “believes” that Insp. Kuykendall “had official or unofficial input into . . . the Solicitation . . . during its drafting [and revision], the evaluation of competing proposals, the naming of selection committee members, and the meetings with [offerors]” before he left the Postal Service and possibly thereafter. It draws a series of inferences from the facts that it recites, including that:

- Information about HMP was inappropriately shared with High Noon;
- High Noon inappropriately sought to intimidate HMP to withdraw from the competition or to collude to subvert the integrity of the solicitation process;
- Someone within the Inspection Service caused the revision of the solicitation “to make up for perceived deficiencies in the original proposals of one or more bidders [*sic*]”; and
- The selection panel was inappropriately comprised, instructed regarding evaluation standards, or erroneously used a purely subjective standard to evaluate HMP’s proposal.

HMP asks that the award to High Noon be set aside and the contract awarded to it or that it be afforded other equitable relief.

High Noon submitted comments on the protest in which it asserts that it learned of HMP’s involvement with the Inspection Service through an Internet search which disclosed its production of “The Feds”; that Insp. Kuykendall’s only involvement on its behalf was his inquiry to INC Mihalko concerning his reaction to a “joint bid” by High Noon and HMP; that at no point in the conversation with Mr. Heintz did Mr. Rayburn “ask, demand, suggest, or imply that [HMP] ‘withdraw’ from the competition.” High Noon avers no involvement in the amendment of the solicitation, but notes that it is “common knowledge in the industry” that sixty minute programs are favored over thirty minute programs. It contends that HMP’s protest is untimely on various grounds pursuant to PM 3.6.4.⁶

The contracting officer’s report incorporates the investigative report prepared by the Internal Affairs Division of the Inspection Service in response to her request. Based on that report, the contracting officer concludes that Inspector Kuykendall’s only involve-

⁶ In this regard, it is likely the case that HMP’s objection to the solicitation amendment is untimely under PM 3.6.4.c., but the remainder of its objections are timely in the context of its objection to the award decision; PM 3.6.4.d

ment with the purchase involved review of an early draft of the solicitation,⁷ that he lacked access to any procurement sensitive information (such as the initial proposed list of suppliers) relating to the purchase, and that he did not influence the award. She concludes, consistent with statements from Mr. Rayburn in the investigative report, that Mr. Rayburn assumed HMP's interest in the requirement by reason of Internet research conducted by High Noon which identified HMP's previous production, "The Feds."

The contracting officer denies that the solicitation amendment was intended to favor any particular offeror; instead, it was based on AIC Giusti's advice that several suppliers had suggested it, and she made the change before she had reviewed any of the offerors' technical proposals. She contends that the proposal evaluation team was properly constituted of individuals with skills and knowledge relevant to the solicitation, and that those evaluators properly scored HMP's and High Noon's oral presentations. She contends that HMP's presentation was not well organized and did not include information of the "originality and quality" of the High Noon presentation.

HMP submitted comments responding to the contracting officer's report. Those comments contend that that Insp. Kuykendall was extensively involved in the television project on High Noon's behalf. HMP asserts that two statements attributed to Insp. Kuykendall and Les Rayburn in the investigative report are false,⁸ and that they were intended to explain plausibly how Insp. Kuykendall and Mr. Rayburn acquired the otherwise proprietary information of HMP's interest in the solicitation.

HMP contends that given Kuykendall's involvement on High Noon's behalf, Mr. Rayburn's comment to Mr. Heintz concerning Insp. Kuykendall's influence was a threat, rather than a bluff or puffing, which was carried out through Insp. Kuykendall's "undue, unseemly, and likely unlawful influence on the Solicitation, the process, and the award."

HMP asserts, based on the investigative report, that among the improper information transmitted to High Noon was a "confidential, pre-established ceiling price," and that knowledge of that price allowed High Noon to propose a price below that amount, while HMP's price was just above it. HMP also finds reason for concern in a comment AIC Giusti reported that he made to Mr. Rayburn shortly after award, that Insp. Kuykendall "was to have no involvement with the Inspection Service project."

⁷ The contracting officer concludes that Insp. Kuykendall was removed from the project when he advised his superiors that he had been offered employment elsewhere. The investigative report offers that as one ground for that removal; the other was Insp. Kuykendall's "personal relationship with Les Rayburn of High Noon Film."

⁸ In the first statement, Insp. Kuykendall recounts that he was contacted by telephone by Mr. Heintz, who inquired about the solicitation and statement of work, a conversation with Mr. Heintz denies took place. In the second statement, Mr. Rayburn said that he learned that HMP was participating in the solicitation "from a former Heintz employee named John Arnold." Mr. Heintz denies employing or knowing a John Arnold.

The contracting officer submitted rebuttal comments which make the following points:

- Insp. Kuykendall’s “early contacts” with the solicitation do not establish that he had anything to do with the evaluation or award.
- Insp. Kuykendall’s communications with High Noon about the solicitation and his efforts in establishing High Noon as a participant in the competition did not involve confidential matters since the requirement was publicized.
- Any indications that Insp. Kuykendall may have given that a High Noon/HMP venture would be favorably considered are irrelevant since no such venture was undertaken.
- The statements which HMP rebuts are unimportant; the protester has failed to show that any information communicated to High Noon “in any way advantaged [it] or affected the award decision.”
- No Inspection Service ceiling price was ever communicated to the contracting officer, who made the award decision without regard to it.

High Noon submitted rebuttal comments which assert that Mr. Rayburn never asserted that John Arnold was an employee of HMP; rather, he once employed Mr. Rayburn and briefly discussed the solicitation and prospective offerors with employees of High Noon. If the investigative report states that Mr. Arnold was a Heintz employee, it is in error. Further, High Noon was not aware of any “ceiling price.”

DISCUSSION

HMP contends that the involvement of Insp. Kuykendall on behalf of a competitor in this purchase improperly tainted the results of the competition. In support of that contention, it recites an incident which occurred at the start of the purchase process, inferring either that Insp. Kuykendall continued to influence the process after the initial incident, or that his initial influence had been sufficient to affect, improperly, the eventual result.

The extent of Insp. Kuykendall’s involvement with High Noon in connection with this solicitation is disputed.⁹ It is undisputed that he arranged for High Noon to obtain the initial solicitation, and that he discussed with INC Mihalko High Noon’s proposal that it team with HMP. HMP contends that Mr. Rayburn advised that it learned of HMP’s interest in

⁹ The protest file, and particularly the investigative report prepared by the Inspection Service’s Internal Affairs division, establishes that Inspector Kuykendall had been a next door neighbor of High Noon’s Les Rayburn in Birmingham, AL; had been involved with High Noon on the Postal Service’s behalf in connection with the “Know Fraud” campaign and the 1999 public service announcement; had been an actor in two or three commercials produced by High Noon; and considered Mr. Rayburn a close friend, an opinion Mr. Rayburn reciprocated.

the solicitation from Insp. Kuykendall, but both Mr. Rayburn and Insp. Kuykendall state that High Noon's assumption of Heintz' interest came from its research. If Insp. Kuykendall had disclosed HMP's interest in the solicitation to High Noon, doing so would have been inconsistent with purchasing policy.¹⁰ However, we conclude on this record that Insp. Kuykendall was not the source of High Noon's information about HMP. Given the contrary information set out in the contracting officer's report, the protester has not borne its burden of proof in this regard.¹¹

The remainder of HMP's concerns about how Insp. Kuykendall might have contributed to the award decision are even less supported assumptions and conjectures.¹² They afford no basis to challenge the evaluator's determination.¹³

HMP's conjectures that the evaluation panel may have been improperly constituted, or that the solicitation amendment may have been intended to benefit a particular offeror are similarly unpersuasive.

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

¹⁰ See, e.g., PM 4.2.3.c.2.(a): "Information concerning the . . . identity of [prospective] suppliers may not be disclosed outside the Postal Service, except when necessary for proposal evaluation, or to anyone in the Postal Service not having a legitimate interest." Although this admonition falls in a section headed "After Receipt of Proposals," there is no reason why it should not apply when a prospective supplier's identity is known before that time. It may also be noted that 4.2.3.c. allows the release of solicitation mailing lists (identifying potential suppliers) only by the contracting officer and only when the contracting officer determines 1) the "purchase is highly competitive and [2]) that competition will not be harmed by the release."

¹¹ "[I]n any factual dispute we accept as true the statements made by the contracting officer absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's statements." *North American Manufacturing Corporation*, P.S. Protest Nos. 94-29; 94-30 September 16, 1994.

¹² Contrary to these surmises, the record discloses that he had little to do with the solicitation before it was issued, had nothing to do with the solicitation from mid-January on, and had left the Postal Service before the evaluators made their final decisions on the proposals.

¹³ "To the extent that the protesters contend that the decision was the result of bias, they are faced with an extremely heavy burden of proof that they have failed to meet. The evidence in that regard must be 'well-nigh irrefragable,' that is, 'impossible to deny or refute.'" *Flamingo Industries (USA) Ltd, et al*; P.S. Protest Nos. 99-01 - 05, May 6, 1999.