



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Charles Kendall & Partners, Ltd.

File: B-310093

Date: November 26, 2007

Hugh Mainwaring, Charles Kendall & Partners, Ltd., Inc., for the protester.
Roger D. Waldron, Esq., Mayer Brown LLP, for Polaris Sales, Inc., an intervenor.
Maj. Walter R. Dukes, and Arthur M. Bolely, Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement which provided for award on the basis of a price/delivery/small business participation tradeoff, protest challenging the selection of the high-priced proposal is denied, where, consistent with the solicitation's evaluation factors, the source selection authority considered the awardee's offer of a shorter delivery schedule, and concluded that faster deliveries outweighed the protester's price advantage; this kind of conclusion is well within the discretion given selection officials to make tradeoff decisions.

DECISION

Charles Kendall & Partners, Ltd. (CKP) protests the award of a contract to Polaris Sales, Inc. under request for proposals (RFP) NO. W56HZV-07-R-G093, issued by the United States Army Tank-Automotive Armaments Life Cycle Management Command for all terrain vehicles (ATVs) and ATV trailers, along with spare parts and services, for use by security forces in Afghanistan and Iraq.

The protest is denied.

The RFP provided for the award of a 3-year requirements contract. The RFP included estimated quantities for the ATVs and trailers for each of the 3 years. The RFP provided for a two-phased evaluation process. Offerors were informed that, under phase I, the firms' proposals would be evaluated on an acceptable/not acceptable basis for compliance with the RFP's specifications. An acceptable

proposal was defined as one “where there is essentially no doubt” that the offered ATVs and trailers would “meet each of the specification requirements.” RFP ¶ M.2.1.

Offerors were informed that those proposals found to be acceptable would be evaluated using a tradeoff process to determine which proposal is most advantageous under the following phase II evaluation factors: delivery, small business participation and price. The delivery factor was more important than price, and price was more important than small business participation.

With respect to the delivery factor, the RFP provided that the agency would evaluate on the basis of the dates of the offeror’s proposed Days After Receipt of Order (DARO) for completion of deliveries at FOB Origin and to the final FOB Destination point in Umm Qasr, Iraq of the government’s total estimated initial order of 596 ATVs and 596 ATV trailers. The RFP further stated that the delivery evaluation would assess the extent to which the deliveries would satisfy the RFP’s objective delivery schedules for FOB Origin and for FOB Destination, as well as the level of risk associated with the proposed delivery schedule. For purposes of this RFP, the government’s objective delivery dates for the estimated initial order quantity of ATVs and ATV trailers, for both FOB Origin and FOB Destination, were 210 DARO. Offerors were informed that the basis for award would be a price/technical tradeoff taking into consideration the “relative advantages, disadvantages, and risks of each proposal.” RFP ¶ M.2.2.

Seven proposals were received, including those from CKP and Polaris, by the closing date for receipt of proposals. After discussions, five firms’ offers, including those of CKP and Polaris, were determined to be technically acceptable in the phase I evaluation. After completion of evaluation under phase II, the source selection authority (SSA) concluded that the award decision came down to a choice between the proposal of CKP, which offered the lowest evaluated price, and Polaris, which offered the best delivery schedule with a very low risk rating. CKP’s and Polaris’ final revised proposals were evaluated under phase II as follows:

Offeror (with delivery terms offered in DARO)	Delivery Rating/Risk	Price	Sm. Bus. Participation
CKP ATV - 180 days-FOB Origin - 140 days-FOB Destination Trailer - 80 days-FOB Origin - 85 days-FOB Destination	Good/ Low Risk	\$13,352,870	Good
Polaris ATV - 60 days-FOB Origin - 60 days-FOB Destination Trailer - 60 days-FOB Origin - 60 days-FOB Destination	Excellent/ Very Low Risk	\$18,893,567	Good

Agency Report (AR), Tab 17, Source Selection Decision, at 3.

The agency concluded that the Polaris delivery schedule was concise, detailed and indicated an excellent understanding and approach. As a result, Polaris was rated excellent/very low risk under the delivery evaluation factor. AR, Tab 14, Delivery Area Evaluation, at 2. More importantly, Polaris had a large existing inventory of ATVs and commitment letters from the original manufacturer. The SSA selected Polaris for award, despite its \$5.5 million price premium, because of the proposal's faster delivery schedule. Specifically, the SSA found the Polaris proposal to be more advantageous overall because of its delivery advantage. Because of the urgent need for the items, the SSA stated that she was willing to pay a price premium for substantially quicker delivery time at a lower risk. AR, Tab 17, Source Selection Decision, at 5. Award was made to Polaris and this protest followed.

CKP complains that the RFP was ambiguous and misleading in that it failed to state that deliveries above and beyond the stated government delivery objective would be rewarded under the evaluation. CKP further argues that the government's failure to vary its DARO objective mislead offerors about the actual criticality of the requirements and that it viewed the government's objective delivery date to be an accurate and fair representation of what the government believed to be acceptable.

To the extent that this protest argues about the solicitation delivery evaluation factor, many of the arguments it raises are untimely. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are

apparent prior to the closing time for receipt of proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (2007).

To the extent, however that some of the arguments regarding the agency's interpretation of the delivery evaluation factor are timely, we disagree. The RFP here specifically informed offerors that award would be made under Phase II of the evaluation on a price/technical tradeoff basis, considering the evaluated advantages, disadvantages and risks of each proposal under the delivery, small business participation, and price factors. The RFP also advised that offerors' proposed delivery schedules for FOB origin and FOB destination would be considered under the delivery evaluation factor. RFP § M.2.2. Moreover, the RFP advised that the delivery factor was the most important evaluation factor.

Based on our review of the record—and contrary to the protester's contention that had it known the importance of the delivery factor in the evaluation of proposals, it would have adjusted its delivery dates accordingly—the record shows that the protester proposed delivery dates that were significantly below the government's stated objectives. In this regard, the protester's proposal, on its face, suggests that the protester understood that the agency needed these items sooner than later, and understood the importance of an expedited delivery schedule. The record shows that CKP simply did not propose a delivery schedule that was as favorable as the delivery schedule proposed by Polaris.

CKP also challenges the SSA's price/technical tradeoff determination that Polaris' offer of a shorter delivery schedule was worth the \$5.5 million price premium associated with Polaris' higher-priced proposal.

In our view, selection officials have considerable discretion in making price/technical decisions. Their judgments in these tradeoffs are by their nature subjective; nevertheless, the exercise of these judgments must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected. Award may be made to a firm that submitted a higher-rated, higher-price proposal where the decision is consistent with the evaluation criteria and the agency reasonably determines that the technical superiority of the higher-priced offer outweighs the price difference. ACS State Healthcare, LLC et al., B-292981 et al., Jan. 9, 2004, 2004 CPD ¶ 57 at 44.

Here, the SSA recognized CKP's price advantage, but concluded that Polaris' shorter delivery schedule was worth the price premium. In making this decision, the SSA appropriately recognized the relative importance of the solicitation's evaluation factors, in particular that the delivery factor was more important than the price factor. AR, Tab 17, Source Selection Decision, at 4. The SSA noted that there was an urgent need for these items and indicated that she was willing to pay the price premium for faster deliveries with lower risk. Although CKP does not believe that Polaris' faster delivery schedule was worth an additional \$5.5 million, CKP's disagreement with the SSA's business judgment does not show that that judgment is

unreasonable. See ACS State Healthcare, LLC et al., supra, at 45. Rather, we find that the decision reflects a price/technical tradeoff assessment that is within the realm of discretion given selection officials on these matters.

In a supplemental protest filing submitted after receipt of the agency report, CKP also complains that the Polaris proposal should have been rejected as technically unacceptable under the Phase I evaluation because Polaris failed to provide radial tires as required by the solicitation.

With respect to the specification for wheels and tires, the RFP provided the following:

8.1 The vehicle shall be provided with tubeless on/off road radial tires and wheels. The tires shall be dual-sport/purpose and designed for requirements stated in paragraph 11.2 of this specification.

8.2 Run flats are desired.

RFP, attach. 1.

While the agency acknowledges that the above-quoted provision is ambiguous, it maintains that either a radial or a bias-ply run flat tire would have been acceptable. The agency states that it viewed run flat tires as superior to radial tires, and recognized that run flat tires are more expensive than radials. The agency, and the protester, both represent that there are apparently no available ATV tires that can be termed both radial and run flats. Finally, the record shows that the protester, apparently recognizing the ambiguity, offered both types of tires:

The Offeror notes that TACOM desire[s] “Run Flat” tyres--reference SOW “Attachment 1 Para 8 Wheels and Tyres Pg 2/3.”--the offeror offers Good Year Run Flat tyres and attached full technical details in the Manual Annex to Volume 1. However please note it is NOT possible to have Radial Run Flats with ATV technology. Goodyear has verified this. We offer TACOM a choice at no extra cost either Run Flat or a Radial Good Year equivalent that is not run flat.

CKP Proposal, at 51.

In our view, the agency’s decision to accept run flat tires has not, in any way, prejudiced CKP. Even if we conclude that the awardee’s proposal of a run flat tire deviated from the specifications and represented a relaxation of the specifications, our Office will not sustain a protest without evidence of prejudice to the protester; that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

In a situation like here, the question becomes how would the protester have altered its proposal to its competitive advantage had it been given the opportunity to respond to an altered requirement. See Warren Elect. Constr. Corp., B-236173, B-236173.4, B-236173.5, July 16, 1990, 90-2 CPD ¶ 34 at 9. The record shows that CKP understood that the agency desired a run flat tire, offered to provide the agency a run flat tire at its proposed price, and cannot claim to have been injured by the agency's decision to accept a run flat tire, rather than the radial tire that the solicitation required. Moreover, there is no debate here that the run flat tire offered by both CKP and Polaris--and accepted by the agency--is considered the more desirable tire and the more expensive one. Simply put, CKP seeks now to use the solicitation's patent ambiguity to bar Polaris from award on the basis that Polaris did not think to offer, as an alternative, a radial tire that all understood was less desirable. Since there is no indication on this record that CKP could have altered its approach with respect to the tire requirement, we think CKP has not been prejudiced. Id.

The protest is denied.

Gary L. Kepplinger
General Counsel