



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Court Copies & Images, Inc.

File: B-277268; B-277268.2

Date: September 24, 1997

John B. McDaniel, Esq., and O. Kevin Vincent, Esq., Baker & Botts, LLP, for the protester.

Roberta M. Echard, Esq., Administrative Office of the U.S. Courts, for the agency. Scott Riback, Esq., and John Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly found protester's quotations technically unacceptable based on its performance of predecessor contract for requirements being solicited is denied where record supports agency's evaluation finding of significant problems with protester's performance.

DECISION

Court Copies & Images, Inc. (CCI) protests the actions of the Administrative Office of the United States Courts (AOUSC) in eliminating its quotations from further consideration under requests for quotations (RFQ) for copying services at four locations of the United States Bankruptcy Court for the Central District of California.¹ CCI maintains that the agency unreasonably found its quotations technically unacceptable based on its prior performance of copier services at several Bankruptcy Court locations.

We deny the protest.

The solicitations contemplated the award of license agreements to the firms selected based on price and experience/prior performance. This latter factor was comprised of four considerations: experience in providing copying and related services equivalent to the estimated number of copies being solicited; courtesy and professionalism of the vendor in responding to the public; the quality of the copies and timeliness in providing them; and overall performance in providing similar

¹The RFQs were for services at the United States Bankruptcy Courts located at Santa Ana, Santa Barbara, Los Angeles and San Bernadino, California; the four RFQs are unnumbered and identical.

services. Quotations were to include three references for which the firm had performed similar services, and a list of courts for which they had performed such services. The RFQs explained that the agency would evaluate materials submitted with the quotations, as well as information obtained by the agency through reference checks. On the basis of its review, the agency assigned quotations a rating of either acceptable or unacceptable for the experience/prior performance factor.

CCI quoted the lowest price for all four locations, but the AOUSC rejected CCI's quotations as technically unacceptable based primarily on the firm's prior performance of the requirements at three of the four locations being solicited. According to the agency, CCI's performance under the predecessor license agreements had been unacceptable because of CCI's failure to offer all services required in a manner that reflected favorably upon the reputation of the courts, and because of the firm's continued violation of the terms of the license agreements in numerous instances, for example, by sending copies by facsimile and imposing minimum order amounts for transactions where the purchaser wanted to pay using a credit card or check. Additionally, the agency found two of CCI's three non-court references of only marginal relevance because the two concerns--both law firms--indicated that their primary involvement had been with CCI's affiliated concern, BDR, which the law firms used for file retrieval rather than copying services.

CCI takes issue with the agency's evaluation of its prior performance. While CCI concedes that it had several difficulties at the outset of contract performance, it maintains that it rapidly resolved all matters brought to its attention by the courts, and that its more recent performance has been exemplary. CCI therefore contends that the agency's determination that its prior performance was technically unacceptable was unreasonable because it failed to consider that CCI's performance improved shortly after the startup of the contract.

When evaluating past performance, agencies properly may take into consideration a firm's overall performance, and not just its most recent activities, and properly may downgrade a firm even where, compared to its earlier performance, its more recent performance is improved. See GEC Marconi Elec. Sys. Corp., B-276186; B-276186.2, May 21, 1997, 97-2 CPD ¶ 23 at 12-13. Our Office will review a past performance evaluation only to ensure that it was reasonable and consistent with the evaluation criteria. Id.²

²Because AOUSC is part of the judicial branch, it is not subject to the procurement statutes and regulations governing executive branch procurements. Nonetheless, we review AOUSC procurements to ensure that the agency's actions are reasonable. Superior Reporting Servs., Inc., B-230585, June 16, 1988, 88-1 CPD ¶ 576 at 3.

The evaluation here was reasonable; the record supports the agency's finding of inadequate performance by CCI throughout its prior contracts, including its more recent performance. Of particular concern to the agency were CCI's activities that tended to reflect negatively on the courts, as well as those activities that raised some potential for at least the appearance of impropriety on the part of CCI.

Among other problems, there were several concerns relating to CCI's apparent misrepresentations with respect to the terms of its license agreements. During a March 1995 audit of CCI's Los Angeles operation (almost 6 months after CCI commenced performance), the agency found that CCI's price brochures included statements that either were not true or misrepresented the position of the court regarding the firm's policies. In this regard, CCI's price brochure stated that customers obtaining services by mail were required to include a self-addressed, stamped envelope in order for CCI to process the request and that this requirement was "[d]ue to the stipulations of our contract." In fact, there was no such stipulation in CCI's license agreement, and the agency found that this amounted to a misrepresentation of the contract to the public. Despite the agency's bringing this concern to CCI's attention, in May 1995 CCI submitted brochures for agency approval that continued to include the representation concerning the requirement that mail-in customers include a self-addressed, stamped envelope with their orders due to the "stipulations" of CCI's contract. The same audit revealed that CCI's price brochure represented that its charges and services "were deemed by the U.S. Bankruptcy Court to be the most beneficial to the public." The agency deemed this representation inconsistent with the requirement of CCI's license that the vendor refrain from referring to the license in commercial literature in a manner that stated or implied that the services offered were endorsed or preferred by the government. The agency also found that CCI was imposing minimum charges for credit card and check payments, also in violation of CCI's license agreement.

The record shows that similar problems existed at the other locations where CCI had been awarded a license. For example, an April 1995 audit of the firm's operations at the San Bernadino location found that CCI was not processing mail-in orders where the order did not include a self-addressed, stamped envelope, and that CCI would not telephone mail-in customers where there was a problem with their order unless the customer had a toll-free number or would accept CCI's collect call. During this audit, the agency found a box containing a large quantity of unprocessed mail-in requests that was labeled "toes-up file," and found as well that, in some instances, CCI would cash the check submitted by the mail-in customer but not mail out the order because of a lack of a self-addressed, stamped envelope.

In an audit of CCI's Santa Barbara operation in April 1995, the agency found that CCI would provide documents by facsimile, but only to its debit account holders.

The agency was concerned with this practice, both because CCI's license agreement did not permit the firm to offer facsimile services, and because this practice suggested that CCI was providing preferential service to customers that maintained an account with CCI. The audit report concluded with the observation:

It is believed that having a debit account with CCI is being used as a requirement to obtain professional service from CCI, whereas customers that do not have a debit account receive lesser service.

The agency again audited CCI's operations in the spring of 1996 and found continuing problems with the firm's performance, notwithstanding the agency's having brought the matters to CCI's attention on numerous occasions. For example, during the contract period, CCI's license agreement had been amended to grant the firm authority, not only to copy files, but also to retrieve files from the courts' central file rooms; this service was to be available to all customers. In a May 1996 audit of CCI's Los Angeles operation, the agency discovered that CCI would provide file retrieval services only to those customers having a debit account with CCI.³ The firm's telephone message at the Los Angeles location also failed to state affirmatively that file retrieval services were available and continued to state that there were minimum charges for payments by credit card or check and that CCI would not return telephone inquiries where the customer did not have a toll-free number or did not accept collect calls. Similarly, CCI's price list at the Santa Barbara location continued to represent that CCI would furnish copies by facsimile, but only where the customer maintained a debit account with CCI. Additionally, an audit of CCI's San Bernadino operation reflected the firm's continued practice of providing copies by facsimile, despite the fact that the firm did not have authority to do so; the audit concluded that the practice "is a flagrant violation of the license and [a June 1995 letter that noted the fact that this service was not authorized]."

In addition to these continuing problems, the record contains numerous letters of complaint from customers to the courts relating to an apparently improper relationship between CCI and its affiliate BDR. (BDR is a concern that provides the same type of file retrieval service offered by other customers of the copy service.) The letters relate several customer concerns, including CCI's alleged preferential processing of BDR requests, and use of the copyroom facilities by BDR employees to conduct BDR business.

³The agency discovered this performance problem by sending auditors to the copyroom to request files known to be in the central file room. The auditors were denied the file retrieval service and told to obtain the files themselves for CCI to perform the copying. The record further shows that the practice persisted even after the matter was brought to the attention of CCI.

We conclude that the record contains ample evidence showing that the agency had a reasonable basis for finding CCI technically unacceptable based on its past performance.

CCI contends that the agency improperly discounted the favorable references it received from the three private concerns identified in its quotation. According to the protester, the agency mistakenly determined that two of these favorable references were for file retrieval rather than copier services when, in fact, these references had used the copier services of CCI. In support of its position, CCI has furnished a letter from one of the references in which the cognizant individual clarifies his position, stating that his firm uses CCI for both file retrieval and copier service. In a related argument, CCI maintains that the agency contacted one of the eventual awardees after quotations were submitted to obtain an additional reference because the firm had included only two instead of the required three references. CCI contends that the agency should have solicited additional references from it when the agency found that two of its references were not relevant.

Even given the agency's apparent error in finding that one of CCI's references was referring to BDR rather than CCI, the agency nonetheless reasonably discounted CCI's private references as less relevant than its court references in reaching its determination as to the acceptability of CCI's quotations. In this respect, agencies properly may consider as more relevant--and properly may give more weight to--prior experience references for the precise services being solicited than to references involving services that are merely similar in nature. Fidelity Techs. Corp., B-258944, Feb. 22, 1995, 95-1 CPD ¶ 112 at 2-3. Here, the RFQs indicated that the agency would give consideration to references that were for copier services which were equivalent in terms of the number of copies called for. CCI does not contend, and the record does not show, that the two references discounted by the agency were for services similar in magnitude to those called for under the solicitations; in fact, both references were for private law firms requiring copier services at a level far below the quantity estimates included in the solicitations. Additionally, the record shows only that the agency gave less weight to the private references, but did not ignore them completely. In this respect, the memorandum that discusses the agency's findings states:

In balancing these references, consideration was given to the fact that the solicitation is specifically for on-site copy centers, and the court references reflect CCI's on-site copy centers experience as the incumbent in [three locations].

In light of the terms of the solicitations, as well as the highly relevant nature of CCI's court references, we have no basis for objecting to the agency's discounting CCI's private references in evaluating the firm's prior performance.

We also have no basis for finding the solicitation of an additional reference from one of the awardees was inherently unfair to CCI. As noted, the agency did not rely heavily on CCI's private references in reaching its conclusions about the firm's prior performance. Thus, to the extent that CCI now contends that it should have been given an opportunity to substitute one of its private references, there is no basis in the record for concluding that such a substitution would have had any significant effect on the agency's evaluation of CCI's prior performance.

CCI also maintains that the agency engaged in disparate treatment of the vendors when evaluating the prior performance of one of the other awardees. CCI contends that the agency did not consider one of the four references included in the awardee's submissions when it performed its technical evaluation. According to CCI, this reference is especially probative because it shows that the awardee was not performing satisfactorily at the San Fernando Valley location of the Court. CCI concludes that the agency's actions show that it was applying a different standard of scrutiny when evaluating CCI as compared to the other vendor.

In reviewing allegations of disparate treatment, we examine the record to ensure that the agency's evaluation was reasonable, consistent with the terms of the solicitation, and fairly reflected the relative merits of the competing submissions. See PW Constr., Inc., B-272248; B-272248.2, Sept. 13, 1996, 96-2 CPD ¶ 130 at 3-4. On the basis of the record before us, we have no basis for finding that the AOUSC treated the vendors in a disparate manner when evaluating their prior performance.

The record shows that the reference that the agency did not evaluate relates to a license agreement awarded to that firm in July 1996. The record includes no information showing concerns on the part of the agency with respect to the firm's performance under that license. Rather, it shows that shortly after award of the license, there developed a disagreement between the awardee and CCI's affiliate BDR regarding the processing of BDR's work at the location in question; CCI's affiliate submitted several complaints to the agency regarding the matter, and the record shows that the parties were apparently able to reach agreement about how the difficulties were to be addressed. In any case, the record shows that the awardee's prior performance was found technically acceptable based primarily on the firm's satisfactory performance of copy service requirements at several other courts both within the central district of California as well as in New York and Ohio, where the firm processed much larger quantities of work than contemplated under the solicitations here. CCI does not allege that the awardee's performance under those contracts was unsatisfactory--or that the agency's evaluation of those

references was disparately favorable compared to its evaluation of CCI's references--and we have no other basis for finding the evaluation improper.

The protest is denied.⁴

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⁴In a separate protest, CCI challenged the actions of the agency in issuing several interim purchase orders for its requirements during the pendency of the protest. After CCI filed this second protest, the agency terminated the purchase orders and made other arrangements to obtain its interim requirements from the Department of Treasury; in response to that action, CCI requested that it be reimbursed the costs of filing and pursuing the second protest. We decline to grant CCI's request. The record shows that the purchase orders were only used for approximately 1 week, and they were terminated 1 day after CCI filed its protest regarding the issue. Since the agency acted within 1 day of being made aware of CCI's allegations, there is no basis for finding CCI entitled to the costs of filing and pursuing this protest. Southeast Technical Servs.--Entitlement to Costs, B-272374.2, Mar. 11, 1997, 97-1 CPD ¶ 107 (corrective action within 6 days of when issue became framed constituted prompt corrective action, and protester not entitled to costs of filing and pursuing protest).