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## Decision

**Matter of:** Excel Manufacturing, LLC

**File:** B-412332.2

**Date:** June 30, 2016

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### DIGEST

Protest is denied where the record does not show that the agency's rating of the protester's past performance was unreasonable or inconsistent with the solicitation's evaluation criteria.

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### DECISION

Excel Manufacturing, LLC (Excel), of El Paso, Texas, protests the Defense Logistics Agency's (DLA) award of a contract under request for proposals (RFP) No. SPEC1C1-15-R-0073 to Carter Industries, Inc. (Carter), of Olive Hill, KY, for supply of three varieties of coveralls. The protester challenges the agency's past performance evaluation.

We deny the protest.

### BACKGROUND

The RFP, issued as a small business set-aside, was for award of an indefinite-delivery, indefinite-quantity contract, for a base year and three option years. RFP at 56-57; Contracting Officer's (CO) Statement (COS) at 2. Award was to be made on a best-value basis to the offeror whose proposal conformed to the RFP and was most advantageous to the Government, cost or price, and other evaluation factors considered. RFP at 56. Non-price factors, in order of importance, were product demonstration model (PDM)/technical risk and past performance confidence

assessment.<sup>1</sup> The non-price factors, when combined, were significantly less important than price. Id. at 57.

Offerors were to be assigned a past performance confidence rating on the basis of two equally-weighted subfactors: relevance of prior contracts and past performance compliance (i.e., how well the contractor performed). Under the relevance subfactor, prior contracts were to be rated as very relevant, relevant, somewhat relevant, not relevant, or neutral. RFP at 60. Under the compliance subfactor, two elements--past quality performance and past delivery performance--were to be rated as outstanding, good, acceptable marginal, unacceptable, or neutral. RFP at 59. The possible overall confidence ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence, or unknown confidence (neutral).<sup>2</sup>

The agency received five proposals prior to the June 12, 2015 closing date. After evaluating the proposals, as relevant to the protest, the agency assigned the following ratings:

OFFEROR	PDM				Past Performance				Total Price
	Manufacturing	Visual	Dimensional	Overall	Relevancy	Quality	Delivery	Overall	
Carter	G/G/G	O/O/O	O/O/O	G	VR	O	O	SubC	\$ [deleted]
Excel	O/G/G	O/O/O	G/G/G	G	VR	G	G	SatC	\$ [deleted]

Agency Report (AR), exh. 12, Source Selection Decision Document (SSDD) at 4.

In comparing Carter to Excel for purposes of the award decision, the source selection authority (SSA) noted that while both offerors had been rated good for their PDMs, Carter had fewer deficiencies than Excel and thus was considered

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<sup>1</sup> Subfactors under the PDM factor were manufacturing operations, visual requirements, and dimensional requirements.

<sup>2</sup> As relevant to the protest here, the RFP defined the ratings of substantial and satisfactory confidence as follows:

Substantial Confidence: Based on the offeror's recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort.

Satisfactory Confidence: Based on the offeror's recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort.

RFP at 60.

slightly superior to Excel under the factor. Further, with regard to past performance, the SSA found as follows:

For the past performance confidence assessment, Carter is rated outstanding for quality and delivery having no quality issues and delivering all of their orders ahead of schedule or on-time with no delinquencies. Carter has Very Relevant experience producing the same item . . . and similar items. During the evaluation period, Excel encountered quality issues that included minor instances of shade failures, 400 trousers with roller marks on the out seam, 210 women's trousers with roller marks on the outseam and side seam and back rise measurements being out of tolerance, and minor quality issues with fabric and components. In addition, Excel had a number of delivery orders that were delivered inexcusably delinquent, though many were delivered less than two weeks late. Excel is currently manufacturing the Flyers coverall and has Very Relevant experience producing the same and similar items. While Carter and Excel are equal in terms of relevancy, I find Carter to be superior to Excel for the past performance confidence assessment factor since Carter has a superior record of 100% on-time deliveries with no delinquencies and no quality issues as compared to Excel which encountered minor quality issues and had inexcusable delinquencies.

SSDD at 23. The SSA concluded that while Excel's price was slightly lower than Carter's, the payment of a slight premium to Carter was warranted in view of Carter's better past performance and slightly better PDM. On September 29, 2015, the agency awarded a contract to Carter. AR, exh. 13, Award Letter.

After receiving a written debriefing, Excel filed a timely protest with our Office. On October 29, 2015, DLA notified our Office that it would take corrective action by performing and documenting a new price/technical tradeoff analysis and making a new award decision. DLA Letter to GAO, Oct. 29, 2015. In view of the agency's corrective action, Excel withdrew its protest. Excel Email to GAO, October 29, 2015. On March 4, 2016, DLA again made award to Carter, affirming the original award decision. Protest at 2. The agency provided Excel with a second debriefing on March 29, 2016. Protest, exh. 2, Second Debriefing. This protest followed on March 30, 2016.

## DISCUSSION

Excel challenges the agency's evaluation under the past performance factor.<sup>3</sup> We have considered all of Excel's arguments and conclude that none provides a basis to sustain the protest. We address Excel's most significant arguments below.

### Excel's Past Performance Confidence Assessment

As noted above, Excel received a rating of good for the past quality performance element. AR, exh. 10, Excel Tech. Eval., at 3. The evaluators made note of several contracts on which Excel had received comments such as "minor occurrences of shade failures," material accepted "under a waiver," "roller marks," and measurement "out of tolerance." Id. In particular, the contracting officer points to contract SPM1C1-12-D-1042, where there were "minor occurrences of shade failures," and contract SPM1C1-14-D-1006, where there were 400 trousers accepted with a waiver for "roller marks on the out seam and side seam." COS at 18; see AR, exh. 10, Excel Tech. Eval., at 18. The CO asserts that, based on these issues, a rating of good was appropriate under the rating definitions in the RFP. COS at 19-20.

Excel challenges this rating, asserting that the agency "held against Excel" the fact that it had to request and receive waivers for minor shade discrepancies in fabrics. Protest at 2, 7-9. Excel asserts that the "shade issues" were entirely without its fault or negligence and were experienced by all contractors. Id. at 7. Excel asserts that the "shade issues for those fabrics which were required to be used for a number of end items purchased by the procuring agency were widespread and affected virtually every manufacturer who was required to deliver end items made from the specified fabrics." Id. Excel concludes, accordingly, that the "matter of the slight minor discrepancies should not have been held against Excel – or any other contractor so affected." Id. at 8.

In response, the CO maintains that while shade failures may have been widespread, this "does not negate the fact that Excel did not deliver items which met the shade requirements and that a waiver was required." COS at 18. The CO also notes that, in any event, the agency considered the shade discrepancies minor. COS at 16.

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<sup>3</sup> Excel also challenged the evaluation of its proposal under the Product Demonstration Model Technical Risk factor. Protest at 2-3, 5-7; see RFP at 57. The agency responded to Excel's allegations in the agency report, see COS at 16, but the protester failed to address the agency's arguments in its comments. Accordingly, we consider Excel to have abandoned this protest ground. IntelliDyne, LLC, B-409107 et al., Jan. 16, 2014, 2014 CPD ¶ 34 at 3 n.3.

The evaluation of an offeror's past performance is a matter of agency discretion and, by its very nature, is a subjective judgment. We will not question an agency's judgment, nor substitute our own, unless the agency's judgment is clearly unreasonable or inconsistent with the solicitation's evaluation criteria. Concepts & Strategies, Inc., B-405930, Jan. 12, 2012, 2012 CPD ¶ 47 at 7.

Here, Excel has not shown that the agency's treatment of the "minor" shade discrepancies or its rating of the protester's proposal as good under the past performance quality element was clearly unreasonable or inconsistent with the RFP's evaluation criteria.<sup>4</sup> A past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether that contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of the contractor's corrective actions. CMJR, LLC d/b/a Mokatron, B-405170, Sept. 7, 2011, 2011 CPD ¶ 175 at 6. Further, there is nothing in the RFP that indicates that past performance issues would not be considered if they were common among the offerors.

In addition, it is also clear from the record that, in any event, the "shade discrepancies" did not receive significant weight in the evaluation. COS at 18. In the contemporaneous evaluation documents, the evaluators repeatedly referred to the "shade failures" as "minor," in marked contrast to issues such as "roller marks" and measurements "out of tolerance." AR, exh. 10, Excel Tech. Eval., at 3. In fact, there is no indication that the shade issues played any part in Excel's good rating under the past performance factor.

The protester also takes issue with the evaluators' finding that under contract SPM1C1-14-D-1006, "trousers were accepted under a waiver with the noted defect of roller marks on the out seam and side seam." Id. Excel concedes that the delivered garments had "roller marks," but advises that it reported this circumstance to the contracting agency, which ultimately accepted the garments after payment of a small administrative fee. Protest at 8-9. Excel asserts it was improper for the agency to penalize Excel for having given the agency the option to accept the garments. Id.; see also Comments at 6.

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<sup>4</sup> The RFP defined a rating of good as follows:

The offeror's past performance record indicates the offeror consistently meets or exceed some contract requirements. Past contractual performance has been accomplished with some minor problems for which corrective actions taken by the offeror have been effective.

RFP at 59.

The CO disputes the protester's claim that it offered the agency a choice as to whether to accept the garments, contending that the protester's position is "unsupported and contrary to the Agency's records concerning the event." COS at 19. The CO contends that we need not resolve the "he-said/she-said" argument, however, because there is no dispute that the trousers contained deficiencies.

We find the protester's argument to be unpersuasive. As indicated above, a past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether that contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of the contractor's corrective actions. CMJR, LLC d/b/a Mokatron, supra.

With regard to Excel's past delivery performance, the evaluators found 23 delivery orders shipped with "inexcusable delays," but nonetheless assigned Excel a good rating for this factor, considering its favorable CPARS ratings and the fact that a number of its delinquencies were two weeks or less. AR, exh. 10, Excel Tech. Eval., at 3-4. Excel does not challenge this rating in its protest, although it received substantial information regarding these issues in its debriefings. Protest, exh.1, October 7, 2015, Debriefing, at 5; Protest, exh. 2, March 29, 2016, Debriefing, at 5-7. In its comments on the agency report, however, Excel raised several issues regarding its past delivery performance. Comments at 5-7. Since these issues were raised more than 10 days after Excel received its debriefings, they are untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

#### Evaluation of Carter Proposal

In its comments on the agency report, Excel asserts that, although the agency held the waivers for shade issues against Excel, Carter also received waivers for "shade failures" and did not satisfy the shade requirements of its contract. Comments at 4-5. The protester points out that the agency maintains that "there were no quality or warranty issues pertaining to the Carter past quality assessment and past performance assessment" found by the evaluators. Comments at 2, citing COS at 10, 22; AR, exh. 11, Carter Tech. Eval., at 3. Excel asserts, however, that it is a "matter of public record that Carter received at least 4 waivers for shade for fabrics used under contract SPMC1C1-11-D-1067" and asserts that these waivers "would have been comparable to the shade waivers that Excel was forced to request under its contract – 1006." Comments at 3.<sup>5</sup> Excel concludes that all "fabric printers had the same problems with shade," id., and asserts that while the shade waivers were

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<sup>5</sup> Excel's reference to contract "-1006" is unclear here, since its technical evaluation included no reference to a shade issue under that contract. See AR, exh. 10, Excel Tech. Eval. at 3.

specifically considered and held against Excel in the evaluation of its offer, they were not acknowledged or considered in the evaluation of the Carter offer. Id. at 4. We find these arguments unpersuasive. First, we note that Excel's assertion that Carter's shade issues were not considered in the evaluation of Carter's proposal is speculative. Although Carter's technical evaluation does not cite shade issues specifically, it does indicate that Carter's relevant performance had been "accomplished with few minor problems for which corrective actions taken by the offeror have been highly effective." AR, exh. 11, Carter Tech. Eval., at 3. Further, the shade issues were considered by the evaluators to be "minor." Id. In this regard, the protester concedes that Carter does not make battle dress/combat uniforms and therefore "did not experience the shade problems to the extent contractors, including Excel, who make the battle dress/combat uniforms did." Comments at 5 n.2.

In sum, there is no indication in the record that the shade issues impacted the offerors' past performance evaluation specifically or the source selection decision generally. Although the evaluators cited shade issues in Excel's evaluation, they described the issues as "minor;" likewise, in his statement, the CO refers to the shade discrepancies as "minor." COS at 18. The record here simply does not show that shade issues had any material effect on the evaluation ratings or on the source selection decision. In fact, the evaluation indicates clearly that the award decision turned in large part on Carter's excellent on-time delivery performance, not minor shade issues. See AR, exh. 12, SSDD, at 23.

The protest is denied.

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General Counsel