



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Creative Apparel Associates

File: B-275139

Date: January 24, 1997

Ruth E. Ganister, Esq., and Glenn L. Blackwell, Esq., Rosenthal and Ganister, for the protester.

Marc Lamer, Esq., Kostos and Lamer, P.C., an intervenor.

Gale Furman, Esq., Defense Logistics Agency, for the agency.

Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that agency improperly evaluated awardee's proposal is denied where evaluation documentation clearly demonstrates that the ratings assigned to the proposal were reasonable and reflected the solicitation's stated evaluation criteria.

2. Protest against award to offeror with a lower-cost, lower-rated proposal is denied where agency reasonably determined that cost premium associated with award to higher-rated, higher-priced offeror was not justified by slightly higher technical rating.

DECISION

Creative Apparel Associates protests the Defense Logistics Agency's award of a contract to Carter Industries, Inc. to provide police security jackets under request for proposals (RFP) No. SPO100-95-R-0305.

We deny the protest.

The RFP contemplated the award of a firm, fixed-price contract for a base quantity with two option quantities of jackets.¹ The RFP stated that technical criteria would be more important than price in the source selection decision. The RFP set forth a

¹The solicitation required prices for the option quantities and stated that for price evaluation purposes the agency would use the total of the proposed prices for the base and option quantities.

technical evaluation scheme which provided that proposals would be evaluated under the following technical criteria, listed in descending order of importance: product demonstration model, past performance, manufacturing plan, and quality assurance plan. The RFP called for offerors to submit a written summary of their past experience and quality history during the past 2 years which demonstrated their capability to manufacture the jacket in accordance with the specification and delivery requirements.²

Four proposals were received in response to the solicitation, and the agency, after considering both cost and technical factors, included the three highest technically ranked proposals in the competitive range. Carter's proposal stated that the company was formed with the purpose of purchasing the assets of Isratex, Inc., which filed for protection from its creditors under Chapter 11 Bankruptcy proceedings in May 1994. Pursuant to a reorganization plan, Carter began managing the daily operations of Isratex's business in June 1995, and, in this regard, began performance on contracts which had been awarded to Isratex.³ Carter is managed by its two owners, Mr. Wolf and Mr. Azrak, neither of whom had a prior association with Isratex. On June 21, 1996, the novation of five of Isratex's government contracts to Carter was finally approved.⁴ Carter took the position in its proposal that it did not have any past performance history since it had not manufactured any end items for either the U.S. Government or commercial customers, and therefore deserved a "neutral" rating for past performance.⁵

²The RFP stated that the evaluation of each offeror's past performance is a subjective assessment that would be based on both the proposal and input from outside sources.

³The reorganization plan and asset transfer were eventually approved and finalized in December 1995.

⁴A novation agreement is a "legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the government recognizes the transfer of the contract and related assets." Federal Acquisition Regulation (FAR) § 42.1201.

⁵FAR § 15.608(a)(2)(iii) provides that firms without relevant past performance history will receive a neutral evaluation for past performance.

Written discussions were conducted with the competitive range offerors. The contracting officer determined that specific past performance data did in fact exist for Carter because Carter had been performing Isratex's contracts since June 1995, even though the novation agreement was not approved until later. Therefore, during discussions, Carter was asked, among other things, to provide information and explanations regarding delinquencies on certain contracts which were originally awarded to Isratex and were currently being performed by Carter pursuant to the novation agreement. Based on this performance record, the contracting officer determined that a neutral rating was not justified, and gave Carter a "marginally acceptable" rating for past performance.

All offerors submitted best and final offers (BAFO) by the closing date. The BAFO's were evaluated as follows:

Offeror	Total Price (Base quantity plus two option quantities)	Technical Rating
Carter	\$2,954,958.72	Marginally Acceptable
Creative	\$3,247,249.60	Acceptable
Offeror C	\$3,512,978.56	Acceptable

Creative's proposal was evaluated as acceptable under all four criteria, while the Carter proposal was evaluated as acceptable under three, but marginally acceptable under past performance resulting in an overall rating of marginally acceptable. While Carter's proposal received a slightly lower overall technical rating than Creative's proposal because of its past performance assessment, the agency decided that Carter's proposal represented the best value to the government based on its significantly lower price. This protest followed.

Creative raises numerous arguments to the effect that the technical evaluation was improper, and that the resulting source selection therefore was invalid. We have reviewed the record and conclude that these arguments are without merit.

TECHNICAL EVALUATION OF PROPOSALS

The evaluation of technical proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best methods of accommodating them. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16. In reviewing an agency evaluation, we will not

reevaluate technical proposals but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria. MAR, Inc., B-246889, Apr. 14, 1992, 92-1 CPD ¶ 367.

Past Performance

Creative first argues that the agency gave Carter "favored treatment" when it evaluated Carter's past performance. Specifically, Creative argues that the agency treated Carter leniently even though it was behind schedule in a number of contracts that it had assumed from Isratex.

The record, as outlined above, is to the contrary. The contracting officer explicitly considered the Isratex contracts that were taken over and performed by Carter as of June 1995, declining to give Carter the requested "neutral" rating for past performance, and instead, after evaluating Carter's response concerning certain delinquencies, giving it a "marginally acceptable" rating for past performance. During the final evaluation, the contracting officer noted that Carter had successfully completed and delivered quality end items on two contracts, and that after the bankruptcy was finalized that it had negotiated and was performing under a revised delivery schedule for three other contracts. The contracting officer stated that:

"The contracts novated by Carter are clearly their legal responsibility. In addition, Mr. Wolf and Mr. Azrak of Carter Inds. have been managing the Isratex Corporation since June 1995. Therefore, Carter cannot be given a neutral rating. However, in full consideration of all of the circumstances surrounding both the bankruptcy proceedings and the asset transfer, a rating of Unacceptable also appears unwarranted. Therefore, based on Carter's demonstrated attempts to perform on several of the Isratex contracts (excluding 93-C-0393), the lack of evidence regarding substantial quality problems in the proposed plant and the recognition of the potential limitations of Carter to fully address contractual responsibilities for these contracts prior to the finalization of bankruptcy proceedings in December, the Contracting Officer has determined that a rating of Marginally Acceptable is appropriate."

We see nothing unreasonable about this assessment. The contracting officer took into account the adverse effect the Isratex bankruptcy proceedings had on Carter's ability to perform the contracts assumed from Isratex, noting that there had been some delays in performance, but also that Carter was limited in what it could do because of the bankruptcy situation. She therefore considered that Carter had successfully completed and delivered quality end items on two contracts and that it had negotiated and was performing under a revised delivery schedule for three

other contracts. On these facts, we fail to see how the agency's evaluation of Carter's performance as "marginally acceptable" is unreasonable.⁶

AWARD

Contracting Officer's Independent Determination

Creative also protests that the contracting officer's determination to award a contract to Carter was flawed because it was not the product of her own independent judgment. Rather, Creative alleges that the contracting officer was encouraged to favorably evaluate Carter's past performance by the agency's Office of Counsel.

The contracting officer states that she had considered mitigating circumstances surrounding Creative's delinquencies on three contracts, and the agency's Office of Counsel recommended that she also afford Carter the same consideration. The contracting officer further states that she discussed the bankruptcy process and its effect on management decisions with the Office of Counsel and then independently reviewed and favorably revised Carter's past performance assessment from an extremely negative rating to the upper end of the "marginally acceptable" range.⁷

⁶The protester also objects to the contracting officer's statement, made in the agency report submitted in response to this protest, that Carter's owners, Mr. Wolf and Mr. Azrak, had "held high level management positions and had experience in the garment business." The RFP asked offerors to describe past experience which demonstrates the capability to manufacture the items under this solicitation. Both Mr. Wolf and Mr. Azrak have managed the daily operations of Carter from June 1995 and during that time have successfully produced and delivered quality garments. Mr. Wolf was the CEO of Mark Solutions, Inc., which produced modular jail cells, and Mr. Azrak was the President and principal shareholder in Latique, Inc., which engaged in the import and export of handbags, backpacks, and accessories. Based on this information, the contracting officer reasonably determined that Carter's owners had experience in the garment business and had high level management experience.

⁷We are not persuaded by the protester's argument that the contracting officer improperly failed to alter Carter's past performance rating after revising her evaluation of this factor. This assertion is contrary to the well established principle that adjectival ratings and point scores are only a guide to assist contracting agencies in evaluating proposals. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Broad adjectival ratings, as used here, do allow agencies to reasonably conduct adequate evaluations of proposals.

We find without merit Creative's suggestion that the contracting officer's willingness to accept advice from her legal experts regarding legal issues which affected her award decision rendered the final award decision improper. The record establishes that the contracting officer relied on and accepted legal advice with regard to the effects of the bankruptcy process, and that she then independently evaluated Carter's past performance. The contracting officer's decision to accept the advice of her legal experts on legal issues reflects reasoned logic and sound judgment, and her decision to award a contract after considering and accepting the advice of those experts constituted an appropriate exercise of her own independent judgment.

Cost/Technical Tradeoff

Finally, Creative argues that the award decision was flawed since the agency did not fully take into account Creative's evaluated superiority under the technical factors and cost became the deciding factor, contrary to the announced criteria in the RFP. Source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results; cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6. Even where cost or price is the least important evaluation factor, an agency may award to an offeror with a lower-cost, lower-scored proposal if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified. Id.; Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321.

The tradeoff here was reasonable. The agency recognized that Creative's proposal was slightly more advantageous under the non-price factors. The source selection authority determined, however, that since Carter had received fully acceptable ratings for all of the evaluation factors except the past performance factor where the constraints of the bankruptcy situation had adversely affected Carter's ability to perform, Creative's advantage under the non-price factors simply was not great enough to warrant award at Creative's higher price. The record provides no basis for questioning the agency's conclusion that Creative's technical advantage was less

significant than Carter's price advantage. While price was the least important evaluation factor, the agency was not precluded (as Creative's argument suggests) from ultimately basing the award on the lowest price merely because the price factor was least important. See Dayton T. Brown, Inc., supra.⁸

The protest is denied.

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⁸Creative's references to other DLA procurements where award was made to the higher technically rated proposal regardless of price are irrelevant since each procurement is a separate transaction, and action taken on any one procurement does not govern the conduct of other similar procurement. Rack Eng'g. Co., B-208554, Mar. 7, 1983, 83-1 CPD ¶ 224.