



Comptroller General
of the United States

Washington, D.C. 20548

L. Glass

146427

Decision

Matter of: Southwest Decor, Inc.

File: B-246964; B-246964.2; B-246965; B-246965.2

Date: April 20, 1992

Katharine R. Boyce, Esq., Timothy Mills, Esq., and Curtis V. Gomez, Esq., Patton, Boggs & Blow, for the protester. Jeffrey P. Goldstein for Commercial Drapery Contractors, Inc., an interested party. Hugh J. Hurwitz, Esq., U.S. Department of Justice, for the agency. Michael S. Roys, Esq., Department of the Navy, for the agency. Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where military agency issues a delivery order to Federal Prison Industries, Inc. (FPI) for FPI's purchase from the Federal Supply Schedule (FSS) under circumstances where FPI essentially acts as a purchasing agent for the agency, the agency is required to justify the purchase of other than the lowest priced product available on the FSS.

2. Protester is not prejudiced by agency's failure to follow requirement to justify Federal Supply Schedule purchase of other than the lowest priced product where the agency subsequently reviews protester's lower priced fabric and concludes that purchase of the awardee's fabric is justified because of differences in fabric. Determinations as to aesthetics and suitability involve the subjective judgment of the agency.

DECISION

Southwest Decor, Inc. protests the issuance of a delivery order by the Naval Air Station, Corpus Christi, Texas, for the manufacture and installation of draperies, to Federal Prison Industries, Inc. doing business under the trade name UNICOR. Southwest also protests UNICOR's issuance of a purchase order to Commercial Drapery Contractors, Inc. (CDC) for the requested draperies, hardware and installation under its General Services Administration (GSA) Federal Supply Schedule (FSS) contract. The protester argues that the Navy

improperly issued the delivery order which specified CDC as the required source for the draperies even though CDC was other than the lowest priced FSS contractor.

We deny the protest.

On September 12, 1991, the Navy contracting office received a requisition for the purchase and installation of drapes for the Bachelor Officer Quarters (BOQ) at the Naval Air Station, Corpus Christi. The contracting officer was advised that CDC had already taken measurements and that a pattern had been selected from CDC's sample books. Generally, 18 U.S.C. § 4124 (1988) and Federal Acquisition Regulation (FAR) § 8.602(a) (FAC 90-41) require government agencies to purchase supplies listed in UNICOR's schedule so long as the prices charged do not exceed current market prices. Draperies are listed in the schedule. Accordingly, the contracting officer determined that UNICOR was a mandatory source for this purchase, and, on September 23, a requirement was sent to UNICOR specifying Fabric "CDC #9057" and CDC's FSS contract. On September 26, the Navy issued delivery order No. N00217-91-F-0363, for "pinch pleat style, 100 percent fullness, CDC #9057 pattern, blue-#6 color, and are lined with 100% polyester material" to UNICOR. In accordance with UNICOR's policy permitting the ordering agency to specify an FSS contractor, UNICOR obtained the price for the draperies using the FSS contract and, on November 18, sent the agency a letter explaining that UNICOR would provide the exact draperies specified at a price of \$136,694.

Southwest protested to the Navy the issuance of the delivery order to UNICOR. Southwest argued, among other things, that UNICOR's contract with CDC violated FAR § 8.405-1 (FAC 90-5) because UNICOR did not make award to the vendor with the lowest price available under the FSS.

In response to Southwest's protest, UNICOR advised the Navy that if the Navy determined that Southwest could provide the specified product for less than UNICOR, a waiver would be issued to allow the Navy to purchase the draperies from Southwest. It then would offer its sewing services to Southwest. The Navy provided Southwest a sample of the CDC fabric and asked whether Southwest had the same fabric on its schedule. Southwest, after reviewing the sample, stated that its Tulare #6 was the same material. The contracting officer stated that a review of CDC's and Southwest's GSA schedule contract did not provide enough information on the fabrics offered to permit a proper comparison. The contracting officer then compared the mill specifications for CDC #9057 and Southwest Tulare #6 and concluded that they were different materials. The Navy denied Southwest's protest on November 22. On December 5, UNICOR issued

purchase order No. 122PI-D-0378-92CS to CDC for the requested draperies, hardware and installation for \$136,694. On December 10, Southwest protested to our Office.

The protester primarily argues, as it did in its agency-level protest, that the award is improper because both the Navy and UNICOR violated FAR § 8.405-1, governing use of the FSS, by failing to review at least three price lists from current schedule contractors and UNICOR, as required by its delivery order with the Navy, issued a purchase order to CDC at other than the lowest price available under the FSS.

The Navy maintains that in accordance with FAR § 8.602(a) (FAC 90-4), which requires agencies to purchase required supplies listed in the schedule of products made by UNICOR "at prices not to exceed the current market prices," it issued the delivery order to UNICOR for draperies, a listed product. The Navy contends that it could not have violated FAR § 8.405-1 because it did not directly order the draperies from the FSS contractor, but merely specified the vendor in its delivery order, pursuant to a mandatory purchase from UNICOR.

UNICOR contends that its award to CDC was proper because CDC's schedule item meets the needs of the government at the lowest available price. UNICOR argues that while it was aware of Southwest's price for similar draperies, in accordance with its policy, it ordered the exact draperies specified by the Navy in the delivery order. UNICOR states that it offered to waive its right to this order if the Navy chose to award to Southwest, but that the Navy specified that it needed the CDC fabric.

The record shows, and the Navy does not dispute, that under UNICOR's procedures for "procuring" draperies, UNICOR is merely a conduit for the Navy and acts as a purchasing agent. The record unequivocally shows that UNICOR granted the Navy sole discretion in selecting an FSS contractor for the draperies. UNICOR, in fact, issued the purchase order to CDC under its FSS contract at the direction of the Navy after giving the Navy an opportunity to select any vendor it chose. Under these circumstances, we view UNICOR as essentially the Navy's purchasing agent, such that it must justify the specified purchase.

An agency ordering from an FSS is required to order from the lowest priced vendor unless it can justify purchasing from a higher priced vendor. FAR § 8.405-1(a). The ordering activity must review the schedule price lists that are reasonably available and the FAR effectively requires that the activity review at least three price lists. The provision also requires that the activity fully justify an order at other than the lowest price identified in its

review for a line item which exceeds the small purchase threshold by 10 percent. The provision lists examples of considerations which are acceptable justification for ordering a higher priced item. For example, the order is justified where a lower priced product does not offer features that are required for effective program performance. FAR § 8.405-1(a). Where an agency determines that a justification exists for placing an FSS order with a higher priced vendor, our Office will object only if the determination lacks a reasonable basis. Dictaphone Corp., B-228366, Jan. 12, 1988, 88-1 CPD ¶ 19.

The protester argues that the Navy failed to follow the procedures outlined above. For example, the record does not contain any evidence that prior to selecting the CDC fabric, the Navy ordering activity reviewed any price lists other than CDC's. The Navy also apparently did not justify its order of the higher priced item, relying instead on the fact it was purchasing the item from UNICOR. We agree that the Navy did not comply with the stated requirements of the regulation for purchasing from CDC at the higher price. However, in response to Southwest's agency-level protest, the Navy did compare Southwest's specifications and fabric swatch to the awardee's product. The Navy found differences in the weight, blend and horizontal repeat of the two products which the Navy believed justified selection of CDC's fabric. The protester does not argue that the fabrics are identical, and it is undisputed that they are not the same pattern. The selection of a drapery fabric by its nature is a subjective exercise since it involves such considerations as aesthetics and suitability. A protester's disagreement with the agency's judgment does not invalidate it. See Centurion Films, Inc., B-205570, Mar. 25, 1982, 82-1 CPD ¶ 285. Thus, while the Navy failed to comply with the FAR procedures for ordering from CDC, since Southwest was given a reasonable opportunity to have its comparable fabric considered for award, we do not believe the firm was prejudiced by the Navy's actions. Labrador Airways Ltd., B-241608, Feb. 13, 1991, 91-1 CPD ¶ 167.

We deny the protest.


for James F. Hinchman
General Counsel