



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Tennier Industries, Inc.

File: B-286706.2; B-286706.3

Date: March 14, 2001

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
James J. McCullough, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Tennessee Apparel Corporation, an intervenor.
Katherine A. Day, Esq., Department of Justice, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging best value source selection decision is sustained where record shows that agency based decision, in part, on considerations not included in solicitation's evaluation scheme.

DECISION

Tennier Industries, Inc. protests the award of a contract to Tennessee Apparel Corporation (TAC) under request for proposals (RFP) No. TX00000005, issued by the Federal Bureau of Prisons (BOP), Department of Justice, for quantities of laminated camouflage cloth cut into pieces to be used in the manufacture of trousers. Tennier maintains that the agency miscalculated the offerors' past performance and improperly made its source selection decision based on considerations not set forth in the RFP's evaluation scheme.

We sustain the protest.

The RFP contemplated the award of an indefinite-delivery/indefinite-quantity contract for a base year, with two 1-year options. The evaluation was to be conducted on a best value basis. The RFP listed two non-price evaluation factors, in descending order of importance: past performance and specification statement of work. RFP § M.5. The solicitation contained no elaboration regarding what would be encompassed in the agency's review under these factors, and the agency did not have a source selection plan that otherwise described them. As for price, for each contract year offerors were required to submit fixed unit prices for fabric for nine sizes of trousers, and also a price for tape used to finish the seams of the trousers.

RFP § B. The two non-price factors, when combined, were significantly more important than price. RFP § M.5.

BOP received offers only from TAC and the protester. After evaluating the proposals¹, the agency assigned the following point scores:

Offeror	Past Perf. (60 avail. points)	Specif./SOW (25 points)	Price (15 points)	Total Score	Price
TAC	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Tennier	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]

Based on these evaluation results, the agency selected TAC as the firm submitting the proposal offering the best overall value to the government, and thus made award to that firm.

PAST PERFORMANCE

Tennier protests the agency's evaluation of its proposal under the past performance factor, specifically, that BOP improperly applied the adjectival standards used in the evaluation, assigning its proposal a "good" instead of an "excellent" rating for each of the three prior contracts that BOP reviewed.

Our Office does not independently evaluate proposals, but instead reviews the agency's evaluation to ensure that it is reasonable and consistent with the solicitation's stated evaluation scheme. Westinghouse Gov't and Envtl. Servs. Co., Inc., B-280928 et al., Dec. 4, 1998, 99-1 CPD ¶ 3 at 5. When considering the ratings assigned by an agency to an offeror's proposal we have consistently taken the position that evaluation ratings, be they adjectival, numerical or color, are merely guides for intelligent decision-making in the procurement process. KBM Group, Inc., B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 11. The relevant consideration in our review of an agency's evaluation is whether the record demonstrates that the agency reasonably assessed the relative merits of the proposals in accordance with the stated criteria. Id.

The record shows that BOP reasonably determined that TAC's past performance was superior to Tennier's. In discussing Tennier's performance on two Defense Supply Center Philadelphia (DSCP) contracts, the DSCP representative stated that there were no problems noted under either contract, that deliveries had been timely and

¹ These results are from a reevaluation conducted by the agency in response to an earlier protest, which was withdrawn after the agency represented that it would reevaluate proposals and make a new source selection decision. B-286706, Nov. 17, 2000. This protest concerns only the reevaluation and new source selection decision.

quality acceptable, and that he would do business with Tennier again. Tennier Past Performance Evaluation Report, Nov. 20, 2000, at 2. Similarly, the commenting official for the third contract (a General Services Administration contract) stated that there were no quality or other problems with Tennier's performance, and that the official would do business with the firm again. *Id.* These comments not only are consistent with the BOP rating scheme—which called for a good rating where most sources of information state that the offeror's performance was good or better than average, and that they would willingly do business with that firm again, Summary of Best Value Reevaluation, Nov. 28, 2000, at 4—but, more importantly, when compared to the comments received from TAC's references, established a reasonable basis for differentiating between the offerors. In this regard, TAC's performance consistently was described in more favorable terms, with the officials commenting that TAC had performed "with flying colors," that its "quality was great," and that it was an "excellent company." TAC Past Performance Evaluation Report, Nov. 20, 2000, at 2. (These comments also are consistent with the standard articulated for an excellent rating, which requires the appropriate reviewing officials to consistently describe the firm's performance as superior.) We conclude that the evaluation in this area was reasonable.

SOURCE SELECTION DECISION

Tennier maintains that the agency's source selection decision was improper because it articulates several benefits associated with the TAC proposal that were not specified in the solicitation as evaluation considerations. The agency responds that the additional elements considered (discussed below), while not expressly identified in the RFP, nonetheless were properly considered as logically encompassed by the past performance evaluation factor.

While agencies have broad discretion in making source selection decisions, their decisions must be rational and consistent with the solicitation's stated evaluation scheme; an agency may not announce one basis for evaluation and award in the RFP and then evaluate proposals and make award on a different basis. Marquette Med. Sys., Inc., B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90 at 5-6.

The source selection decision document articulates three considerations other than past performance that formed the basis for the agency's decision to select TAC's higher-priced offer for award.² None of these considerations is either identified in the RFP as an evaluation criterion, or logically encompassed within the stated

² Specifically, the document states, "Based on the above [three considerations], along with the past performance evaluation information, it is determined by the Contracting Officer that award be made to [TAC]." Price Analysis After Reevaluation at 2.

criteria. The first of these considerations is reflected in the source selection statement as follows:

The past services received from [TAC] for prompt exchanges for customer return are outstanding. The technical assistance provided to [the agency] was outstanding. The technical assistance would be worth more than [the price difference between the proposals].

Price Analysis After Reevaluation at 1. The basis for this statement is not clear. Neither the RFP nor the agency's past performance evaluation materials make any reference to either "past services received for prompt exchanges" or "technical assistance provided to the agency." Moreover, there is nothing in TAC's proposal or in the past performance references that refers to these considerations, and the agency has not explained the basis for its conclusion in its report in response to the protest. Thus, even if we agreed with the agency that these findings are logically encompassed within the past performance factor, we would have no basis for finding that the agency's conclusion with respect to TAC was reasonable.³

The other two considerations similarly lack support in the record. The source selection decision sets forth the second consideration as follows:

The cut parts will be exact to the DSCP specification. Therefore, there will be far less rejects, and sewing and taping parts together will take less time. Less time would be more savings for [the agency].

Price Analysis After Reevaluation at 1. However, there is no mention of this consideration in either the evaluation criteria outlined in the RFP, the agency's evaluation materials, or TAC's proposal materials. Finally, the source selection decision states that:

The exact cuts produced by [TAC] will result in using less material. The material is currently at \$28.00 a yard. It will take approximately two yards to make one pair of pants. We would estimate that the saving would be approximately \$1.50 per trouser by using computerized automated machine. The contract is for approximately 225,000 pairs, so the savings over 3 years would be at \$337,500.

Price Analysis After Reevaluation at 2. Again, there is nothing in the RFP or the evaluation materials referring to cost savings attributable to cutting precision, and

³ Similarly, the RFP did not mention these considerations under the specification and statement of work factor--as indicated, there was no description or elaboration provided for this factor; nothing in any of TAC's submissions makes reference to these considerations; and the agency did not prepare any narrative materials in assigning the two proposals identical perfect scores for this factor.

there is nothing in TAC's proposal relating to this consideration. Moreover, the agency's finding appears to be invalid on its face. While the agency identifies cost savings to the government from efficiencies in TAC's cutting method, as noted above, the solicitation contemplated the award of a fixed unit price contract; thus, to the extent that TAC's technical approach will result in using less material, the savings, if any, will accrue to TAC, not the government. Accordingly, we sustain Tennier's protest.⁴

RECOMMENDATION

We recommend that, to the extent that the agency wants to consider the elements outlined above in connection with its award decision, it amend the RFP to clearly state the basis upon which proposals will be evaluated and award will be made. If, on the other hand, the agency concludes that the elements discussed above are unnecessary to meet its requirements, it should reevaluate the proposals and make a source selection decision consistent with our decision. We further recommend that the agency reimburse Tennier the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees, to the extent that those costs were incurred in connection with its assertion that the agency improperly considered elements outside the stated evaluation scheme. 4 C.F.R. § 21.8(d)(1) (2000). Tennier's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁴ The agency states in its report that it would have made award to TAC even if it had not considered the three additional elements. Agency Report, Jan. 12, 2001 at 20. However, since the record shows that the agency's decision was expressly based, in part, on those three elements, we find it inappropriate to accord this statement, made in the heat of litigation, any significant weight. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.