



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Carter Industries, Inc.

File: B-270702

Date: February 15, 1996

Marc Lamer, Esq., Kostos and Lamer, for the protester.
James G. Birnbaum, Esq., and Dawn Marie Piselli, Esq., Davis, Birnbaum, Marcou, Seymour & Colgan, for ORC Industries, Inc., an intervenor.
Gweyn Colaberdino, Esq., Defense Logistics Agency, for the agency.
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the protester fails to timely protest a defect in the solicitation's initial proposal award provision, that is, the failure of the solicitation to include one of two mandatory alternate clauses which indicate either the agency's intention to conduct discussions prior to making an award or the agency's intention to award without discussions, the agency's decision to award a contract on the basis of initial proposals without discussions to an offeror which submitted a higher technically rated, higher-priced proposal was reasonable and consistent with the terms of the solicitation.

DECISION

Carter Industries, Inc. protests the award of a contract to ORC Industries, Inc. under request for proposals (RFP) No. SPO100-95-R-0148, issued by the Defense Personnel Support Center, Defense Logistics Agency, for quantities of parkas and trousers. Carter argues that the agency improperly awarded the contract on the basis of initial proposals without discussions.

We dismiss the protest.

The RFP, issued on June 16, 1995, contemplated the award of a firm, fixed-price, indefinite quantity contract for a base period with 2 option periods. The RFP stated that the award would be made to the responsible offeror whose proposal was deemed to represent the most advantageous proposal to the government, technical evaluation factors and price considered. The RFP contained the following technical evaluation factors, listed in descending order of importance: (1) experience/past performance; (2) manufacturing plan; (3) quick response; (4) electronic data interchange; and (5) quality assurance plan. With respect to experience/past

performance, the RFP stated that "[i]f discussions are conducted, offeror's [sic] will be given an opportunity to address especially unfavorable reports of past performance and the offeror's response, or lack thereof, will be taken into consideration." The RFP stated that technical evaluation factors were considered more important than price.

As reflected in the source selection plan for this procurement, the agency intended to award the contract on the basis of initial proposals without discussions. However, the agency failed to incorporate in the RFP, by marking the appropriate box, the clause at Federal Acquisition Regulation (FAR) § 52.215-16, captioned "Contract Award (Jul 1990) Alternate III (Aug 1991)," which states that "[t]he Government intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary."¹

Five firms, including Carter and ORC, submitted technical and price proposals by the July 24 amended closing date for receipt of initial proposals. Technical proposals were evaluated by assigning an adjectival rating of highly acceptable (HA), acceptable (A), marginally acceptable (MA), or unacceptable (UA) to each technical evaluation factor. An offeror's technical proposal was also assigned an overall adjectival rating. The technical proposals of Carter and ORC were evaluated as follows:

	<u>Carter</u>	<u>ORC</u>
Experience/Past Performance	UA	A
Manufacturing Plan	MA	A
Quick Response	MA	A
Electronic Data Interchange	MA	HA
Quality Assurance Plan	A	A
Overall Rating	MA	A

Carter's price was approximately 1.6 percent less than ORC's price.

¹The agency also had the option of incorporating, by marking the appropriate box, the clause at FAR § 52.215-16, captioned "Contract Award (Jul 1990) Alternate II (Nov 1992)," which states that "[t]he Government intends to evaluate proposals and award a contract after written or oral discussions with all responsible offerors who submit proposals within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." Again, the agency failed to incorporate this clause by marking the appropriate box.

On November 27, the agency, on the basis of initial proposals without discussions, awarded the contract to ORC whose higher technically rated, higher-priced proposal was determined to represent the most advantageous offer to the government. This protest followed.

Carter argues that since the agency did not incorporate in the RFP the clause at FAR § 52.215-16 Alternate III, thereby failing to notify offerors of its intention to award on the basis of initial proposals without discussions, discussions were required prior to making an award. See FAR § 15.610. Carter particularly focuses on the agency's failure to conduct discussions with respect to the experience/past performance evaluation factor. In this regard, Carter, a newly formed company with no prior clothing manufacturing experience, was in the process of acquiring the assets (including, according to its proposal, the workforce, plant management, and supervisory personnel) of Isratex, Inc., a clothing manufacturer which had been awarded numerous contracts by the agency, but which had filed for bankruptcy. Because Carter did not have any clothing manufacturing experience of its own and because Carter would be the successor-in-interest to Isratex after acquiring the firm's facility, equipment, and personnel, the agency evaluated Carter's proposal for the experience/past performance evaluation factor in light of Isratex's experience/past performance. For this evaluation factor, Carter was rated unacceptable in light of Isratex's inability to meet required delivery schedules, its delinquency on 85 percent of its contracts, and its failure to manufacture quality products. Carter maintains that had the agency conducted discussions, it could have explained why Isratex's negative performance history should not have been attributed to Carter.²

Under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a)(2)(B)(ii) (1994), solicitations for competitive proposals must contain:

"either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary."

This provision, as implemented by FAR § 15.407(d)(4), requires that all solicitations for competitive proposals issued by the Department of Defense include the clause

²We point out that Carter does not argue that the agency should have conducted discussions regarding the manufacturing plan, quick response, and electronic data interchange evaluation factors for which Carter received marginally acceptable ratings.

at FAR § 52.215-16 Alternate II if the agency intends to conduct discussions prior to making an award or the clause at FAR § 52.215-16 Alternate III if the agency intends to award without discussions.³

While the agency intended to award the contract on the basis of initial proposals without discussions, it concedes that it failed to incorporate in the RFP the mandatory clause at FAR § 52.215-16 Alternate III. Nevertheless, with respect to the experience/past performance evaluation factor, the RFP did not guarantee that discussions in this area would be conducted as evidenced by the statement in the RFP that "if discussions are conducted" offerors would be able to address unfavorable reports of past performance. (Emphasis added). In addition, Carter acknowledged in its proposal the possibility, but not the guarantee, of discussions. Specifically, in addressing the quick response and electronic data interchange requirements, Carter expressed its intention to be capable of having these requirements immediately operational and that "[t]his will be documented to the Government if and when discussions on this proposal are opened." (Emphasis added).

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of initial proposals must be filed prior to that closing time. 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. In this case, it was apparent from the RFP that the agency had not incorporated either of the two mandatory alternate clauses indicating either the agency's intention to conduct discussions prior to making an award or the agency's intention to award without discussions. In addition, the RFP simply provided for the possibility of, but did not guarantee, discussions regarding the experience/past performance evaluation factor. Under these circumstances, where the RFP did not state that discussions would be conducted prior to award, a fact acknowledged by Carter in its proposal, we think it was incumbent upon Carter, if it wanted to ensure that discussions would be conducted, to protest the agency's failure to explicitly state its intention in this regard prior to the amended closing date for receipt of initial proposals. We conclude that Carter's post-award protest that the agency, by failing to incorporate in the RFP the clause at FAR § 52.215-16 Alternate III, was required to conduct discussions is untimely. See ADT Sec. Sys., Inc., B-249932.2, Feb. 4, 1993, 93-1 CPD ¶ 100.

Since the RFP did not guarantee discussions regarding the experience/past performance evaluation factor, we cannot conclude that the agency unreasonably determined not to conduct discussions with Carter regarding the attribution of

³These clauses have subsequently been redesignated. See FAR § 52.215-16 (FAC 90-31).

Isratex's negative performance history to Carter. Accordingly, we have no basis to object to the award to ORC on the basis of initial proposals without discussions as ORC's higher technically rated, higher-priced proposal was determined to represent the most advantageous offer to the government, consistent with the terms of the RFP.

The protest is dismissed.

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of the United States