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Decision

Matter of: American Apparel, Inc.

File: B-407399.2

Date: April 30, 2013

Victor A. Kubli, Esq., Law Office of Victor A. Kubli, P.C., for the protester.
Marc Lamer, Esq., Kostos and Lamer, P.C., for Bluewater Defense, the intervenor.
Joseph R. Weidenburner, Esq., Defense Logistics Agency, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that agency failed to consider past performance information of the awardee for the period after the solicitation's closing date is denied where the solicitation called for assessment of past performance information for the period prior to the solicitation's closing date.
 2. Protest challenging agency technical evaluation is denied where the technical evaluation was reasonable and consistent with the terms of the solicitation.
 3. Protest challenging agency's selection of a lower-priced offer is denied where the source selection decision was consistent with the solicitation's best value award criteria.
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DECISION

American Apparel, Inc., of Selma, Alabama, protests the award of a contract to Bluewater Defense, of San Lorenzo, Puerto Rico, by the Department of Defense, Defense Logistics Agency (DLA), under request for proposals (RFP) No. SPM1C1-10-R-0028, for the manufacture of Army Combat Uniform (ACU) trousers.

We deny the protest.

BACKGROUND

On January 25, 2010, the agency issued four separate RFPs for the acquisition of three types of ACU coats and trousers. One RFP was issued on an unrestricted

basis, the second was a HUBZone set-aside, the third was a Section 8(a) set-aside, and the fourth was a small business set-aside. Each solicitation contained two lots, Lot 0001C for coats, and Lot 0001T for trousers. American Apparel's protest concerns only Lot 0001T of the unrestricted solicitation.

The solicitation anticipated award of a fixed-price, indefinite-delivery/indefinite-quantity contract with a 1-year base period and up to four 1-year option periods. RFP at 9. The RFP established an annual minimum order quantity of 352,000 trousers, an annual estimated quantity of 880,000, and an annual maximum order quantity of 1,364,000 trousers. Id. at 9. Award was to be made to the proposal that represented the best value to the government considering four evaluation factors: product demonstration models (PDM); past performance/experience; socioeconomic support; and price. RFP at 182. The RFP advised that the non-price factors were listed in descending order of importance, and that all non-price factors combined were significantly more important than price; as other evaluation factors became more equal, price was to become more important. Id. at 182.

The PDM factor was comprised of three equally important subfactors: manufacturing operations, visual requirements, and dimensional requirements. Proposals were to be assigned ratings of exceptional, very good, satisfactory, marginal, or unsatisfactory, reflecting the degree to which the offeror's PDMs conformed to requirements associated with these subfactors. Id. at 182-184.

Under the past performance/experience factor, DLA was to assess recent past performance information as an indicator of successful contract performance. The RFP explained that "[f]or the period two years prior to the solicitation closing date, the Government will assess offeror-submitted past performance information, as well as relevant information from any other sources, for use as an indicator to successful contract performance." Id. at 184. DLA was to evaluate this information under three subfactors: experience, quality of items/delivery performance, and, for large businesses only, compliance with contractual socioeconomic subcontracting/mentoring goals. The first two subfactors were equally important and, together, were more important than the third subfactor. Id. at 182. Proposals were to be rated as exceptional, very good, satisfactory, marginal, or unsatisfactory. Id. at 184-185.

For the socioeconomic support factor, offerors were not given adjectival ratings. Instead, each offeror was ranked on a comparative basis among all other offerors.

Total price was to be calculated by multiplying each offeror's proposed unit price for each item by a specified quantity, for each performance period. The total price for each item (inclusive of options) was to be summed to calculate each offeror's total proposed price. RFP at 186.

DLA received offers from 10 firms by the September 23, 2010 closing date. After an initial evaluation, all offerors remained in the competitive range. After completing one round of discussions, the agency eliminated one firm from the competition and obtained final revised proposals from the remaining firms. The agency rated the offerors' final revised proposals as follows:

	Price	PDM	PP/Exp.	Socioecon. Support	Overall
Bluewater	\$324,735,664	Satisfactory	Very Good	2	Satisfactory
American	[DELETED]	Satisfactory	Very Good	3	Satisfactory
Offeror A	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror B	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror C	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror D	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror E	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror F	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Offeror G	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]

Agency Report (AR) at 11.

On January 13, the agency source selection authority (SSA) issued a source selection decision (SSD) detailing the selection of Bluewater as the best value to the government. Within the SSD, the SSA compared Bluewater's proposal to all competing proposals, including the proposal submitted by American.

Concerning the SSD's comparison of Bluewater to American, the SSA concluded that American was "slightly superior" to Bluewater under the PDM factor where, overall, Bluewater's PDM had four defects (three easily correctable and one requiring preventative corrective action) and American's PDM had only three (two easily correctable and one requiring preventative corrective action). SSD at 4. For the past performance/experience evaluation, the SSA rated Bluewater "superior to American." Id. Under this factor, the SSA identified the delivery performance subfactor as the primary discriminator, finding that Bluewater had a rating of [DELETED] percent for on-time, or ahead of schedule, performance, while American had a rating of only [DELETED] percent. Id. at 6. The SSA also found Bluewater superior under the socioeconomic support factor since "[DELETED]." Id.

In the final tradeoff decision, as between American and Bluewater, the SSA concluded that neither firm held an overall technical advantage, noting that American was slightly superior for PDM, the most important factor, but Bluewater was superior for the past performance/experience and socioeconomic support factors. Specifically, the SSA explained as follows:

The weight of the PDM evaluation and level of superiority of American compared to the weight of the Past Performance/Experience evaluation and level of superiority of Bluewater, coupled with the weight of the Socioeconomic Support, and ranking of the two offerors, lead to the conclusion that neither firm holds a technical advantage relative to the other.

Id. at 7. Since the SSA considered Bluewater and American to be essentially equal under the non-price factor, and Bluewater was lower priced, as compared to American, the SSA identified Bluewater as the better value to the government. Id. at 8.

Thereafter, on November 1, 2012, the contracting officer prepared a memorandum for the record regarding a briefing delivered to the SSA. As relevant, the memorandum states that the SSA was briefed on the results of a supplementary past performance review conducted due to the length of time that had passed between the RFP's closing date and the time of the award decision. This supplementary review found that, since the closing time of the RFP, both Bluewater's and American's on-time, or ahead of schedule, performance had decreased, but that Bluewater's performance was still superior to American's performance. Specifically:

When evaluating Bluewater for the additional two years [since the closing date of the RFP], their record of on or ahead of schedule decreased from [DELETED] to [DELETED], and American's record of on or ahead of schedule decreased from [DELETED] to [DELETED]. While both offerors records of on-time deliveries have decreased since their initial evaluation, they would both still be considered Very Good for their overall past performance rating, and on a comparative basis, Bluewater would still be considered superior to American for overall past performance.

AR, Tab 4, Memorandum, at 1. The record shows that the SSA considered the supplemental past performance information in making his affirmative determination of responsibility regarding Bluewater. The determination of responsibility noted that Bluewater had encountered certain performance deficiencies, but found that Bluewater maintained the production capacity, technical capacity, financial strength, integrity, and business ethics to be found responsible. AR, Tab 5, Determination of Responsibility, at 1.

The agency made the award to Bluewater on January 18, 2013. The agency then conducted a post-award debriefing with American on January 24. This protest followed.

DISCUSSION

American challenges the agency's conclusion that both it and Bluewater were essentially equal under the non-price factors. In this regard, American argues that the agency unreasonably failed to consider certain recent performance deficiencies in Bluewater's past performance, and unreasonably rated American's PDM as satisfactory, where its PDM subfactor ratings were [DELETED]. American also argues that the agency's best value tradeoff decision was unreasonable and inconsistent with the terms of the solicitation.

With respect to American's challenges to the agency's evaluation of Bluewater's past performance, there is no dispute that all of the alleged deficiencies cited by American occurred subsequent to the closing time of the RFP. Thus, these issues were outside the timeframe of the past performance evaluation established by the solicitation, which provided for examining past performance "[f]or the period two years prior to the solicitation closing date." RFP at 184. Nonetheless, American asserts that the agency was required to consider this information in assigning Bluewater's past performance rating where the record demonstrates that the agency was aware of Bluewater's more recent performance issues. American argues that the knowledge of Bluewater's recent performance deficiencies was therefore "too close at hand" for the agency to ignore in the past performance evaluation. We disagree.

In reviewing an agency's evaluation of proposals, our Office will question the agency's evaluation only where it violates a procurement statute or regulation, lacks a reasonable basis, or is inconsistent with the stated evaluation criteria for award. Birdwell Bros. Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5. Here, we find nothing in the agency's evaluation unreasonable or inconsistent with the terms of the solicitation.

The RFP in this case provided that offerors' past performance would be assessed "[f]or the period two years prior to the solicitation closing date," which in this case covered the time period between September 23, 2008, and the closing date of September 22, 2010. RFP at 184. Where the Bluewater performance deficiencies identified by American fall outside of that time period, there was nothing improper about the agency's decision not to consider these issues. See FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 (agency not required to consider past performance information outside of the time period set forth in the solicitation, even where solicitation reserved the agency's right to do so).

We also find no error concerning the agency's evaluation of American's PDM. In its protest, American first alleged that the agency's evaluation was flawed because an average of its PDM subfactor scores--[DELETED]--should have resulted in a "very good" overall PDM rating, rather than a satisfactory rating. However, the RFP did

not set forth an evaluation scheme considering the average of the PDM subfactor ratings. Rather, the RFP stated that in the event that “the PDM meets the stated requirements of the acquisition documentation . . . but contains a deficiency or deficiencies that require preventative corrective action in production,” the PDM warrants a “satisfactory” rating. RFP at 183. The agency determined that American’s PDM contained one defect under the [DELETED] subfactor that required preventative corrective action. Based on the presence of a defect requiring preventative corrective action, the agency rated American’s PDM as satisfactory in accordance with the RFP’s evaluation terms.

American next argues that any defects in its PDM were in fact minor and easily correctable, and that the agency erred in its determination that a defect under the [DELETED] subfactor required preventative corrective action. The agency’s evaluation of American’s PDM indicates that two defects were identified for the [DELETED] subfactor, as follows:

Deficiencies that are not significant and are very easily correctable during production:

[DELETED]

Deficiencies requiring preventative corrective action in production:

[DELETED]

AR, Tab 10, American PDM Evaluation, at 7 (italics original). Later, in the overall summary of American’s PDM ratings, the agency stated that:

This PDM has [DELETED] defects. It was rated Satisfactory due to two instances of [DELETED]. It has a notably clean fly construction. While [DELETED] will require corrective action in production, the overall PDM quality would indicate an understanding of the technical requirements and an ability to provide an acceptable quality product with a reasonable probability of successful contract performance. This PDM merits a very high level Satisfactory rating.

Id.

Nonetheless, American asserts that the “[DELETED]” defect in its PDM should have been considered easily correctable, and its overall PDM rating raised to “very good.” American cites our Office to a DLA publication indicating that [DELETED] is most commonly attributable to a blunt or broken needle. Comments, Exhibit A, Analysis of Defects in Trouser Manufacturing: Development of a Knowledge-Based

Framework, at 14. American argues that a blunt or broken needle is a routine occurrence that is easily correctable in production by replacing the damaged needle.

However, according to the RFP, the cited defect in American's PDM--"[DELETED]"-- is classified as a major, rather than minor, material defect, which includes a "[h]ole, cut, tear, smash, burn, needle chew, exposed drill hole, run, thin place, dye streak, color not as specified, misweave, [or] visible mend." RFP at 119-120. The agency explains that [DELETED] does not occur just due to a broken needle, but rather more commonly is the sign of a corrected sewing operation, and that the defect can impact the durability of the garment. Agency Response, March 22, 2013, at 1.

In reviewing challenges to the agency's proposal evaluation, we do not reevaluate proposals, but, rather, review the agency's evaluation to ensure that it was reasonable, consistent with the terms of the solicitation, and consistent with applicable statutes and regulations. Philips Med. Sys. of N. Am. Co, B-293945.2, June 17, 2004, 2004 CPD ¶ 129 at 2. In this case, we conclude that the agency's determination that American's PDM warranted a satisfactory rating is fully supported by the evaluation, and in accordance with the RFP's stated evaluation scheme. Further, American's argument that defects in its PDM were easily correctable represents no more than disagreement with the agency's reasonable evaluation, and provides no basis for our Office to sustain the protest.

American next asserts that the agency's tradeoff decision was unreasonable and failed to follow the RFP's guidance that all non-price factors combined were significantly more important than price. RFP at 182. According to American, the agency abandoned the best value terms of RFP and reduced the competition to award on a low-price technically acceptable basis.¹

As a general matter, where price is secondary to technical considerations under a solicitation's evaluation scheme, the selection of a lower-priced proposal over a proposal with a higher technical rating requires an adequate justification, *i.e.*, one showing the agency reasonably concluded that notwithstanding the point or adjectival differential between the two proposals, they were essentially equal in technical merit, or that the differential in the evaluation ratings between the proposals was not worth the cost premium associated with selection of the higher technically rated proposal. Wackenhut Services, Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 12. In making these determinations, the propriety of a price/technical tradeoff turns not on the difference in technical scores per se, but on whether the contracting agency's judgment concerning the significance of that

¹ American's challenge of the best value decision is in large part premised on its belief that the agency erred in its conduct of the past performance and PDM evaluations. As discussed above, we have no basis to question these evaluations.

difference was reasonable in light of the solicitation's evaluation scheme. In this regard, adjectival ratings and point scores are but guides to, and not substitutes for, intelligent decision making. SAMS EI Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 17. Source selection officials have broad discretion in determining the manner and extent to which they will make use of, not only the adjectival ratings or point scores, but also the written narrative justification underlying those technical results, subject only to the tests of rationality and consistency with the evaluation criteria. Development Alternatives, Inc., B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54 at 9; Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364 at 4.

In this case, as explained above, the SSA documented his conclusion that "neither firm holds a technical advantage relative to the other," where American held a slight advantage under the most important non-price factor, but Bluewater held a more significant advantage under the second most important non-price factor, and was also higher rated under the third non-price factor. SSD at 7. Accordingly, the SSA concluded that Bluewater's lower-priced proposal represented the best value to the government. Based on our review of the record here, we conclude that the SSA's determination of technical equality between American and Bluewater was rational and well documented, and find nothing unreasonable in the determination that the price advantage of Bluewater's proposal represented the best value to the government.

The protest is denied.

Susan A. Poling
General Counsel