



Comptroller General
of the United States

Washington, D.C. 20549

Decision

Matter of: Ashland Sales & Service, Inc.

File: B-255159

Date: February 14, 1994

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Marc Lamer, Esq., and Frederic T. Rekstis, Esq., Kostos and Lamer, P.C., for Centre Manufacturing Company, Inc., an interested party.
Michael Trovarelli, Esq., and Lynne Georges, Esq., Defense Personnel Support Center, Defense Logistics Agency, for the agency.
Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to conduct meaningful discussions is sustained where agency concedes that meaningful discussions were not held and the record does not clearly demonstrate that protester was not prejudiced as a result of the failure.

DECISION

Ashland Sales & Service, Inc. protests the award of a contract to Centre Manufacturing Company, Inc. by the Defense Personnel Support Center (DPSC) under request for proposals (RFP) No. DLA100-93-R-0039 for men's and women's utility jackets. Ashland contends that it was prejudiced by a lack of meaningful discussions.

We sustain the protest.

The RFP provided that award would be made to the offeror whose proposal was determined to be most advantageous to the government considering technical merit and price. Although technical merit was identified as being more important than price, offerors were advised that price would become more important as proposals became technically equal. Technical merit was to be measured using four factors listed in descending order of importance: men's and women's product demonstration models (PDM), experience/past performance, manufacturing plan, and quality assurance plan. The RFP also stated that the following ratings would be assigned to

those factors: highly acceptable, acceptable, marginally acceptable, and unacceptable. Offerors were advised that they would be given an opportunity during discussions to address "especially unfavorable" reports of past performance.

Five proposals were submitted. The initial evaluation resulted in Centre's proposal receiving acceptable ratings in all evaluation categories except manufacturing plan, where it received a marginally acceptable rating. Ashland received acceptable ratings for its men's PDM and its quality assurance plan and marginally acceptable ratings for its women's PDM, past performance, and manufacturing plan. Following discussions--in which Ashland was not requested to submit a new women's PDM and asked only to discuss its past performance with commercial customers--best and final offers (BAFO) were submitted and evaluated. Centre's BAFO was determined to be acceptable in all evaluation categories. Ashland's BAFO was determined to be acceptable in all areas except its women's PDM and its past performance; in these areas, the protester's proposal was rated marginally acceptable.

The record shows that Ashland's past performance rating was based on an evaluation of four DPSC contracts where Ashland functioned as a production subcontractor to Vanderbilt Shirt Company, three of which were delinquent: DLA100-92-C-0331, DLA100-90-C-0609, and DLA100-91-C-0376. Vanderbilt was found to have been responsible for delays encountered on contracts -0331 and -0609. Delays on contract -0376 were attributed to Ashland and, together with adverse comments concerning initial start-up problems on its commercial contracts, resulted in the protester's marginally acceptable rating. The contracting officer found that the fourth DPSC contract was completed on schedule with no quality problems and gave Ashland credit for on-time delivery on that contract.

Ashland submitted the lowest-priced proposal at \$1,007,236. Centre's proposal was second low at \$1,137,726. The source selection authority (SSA) made award to Centre based on Centre's higher technical rating. Following a debriefing, Ashland filed this protest alleging that it had been prejudiced by a lack of meaningful discussions concerning its women's PDM and its past performance.

In response to the protest, the agency conceded that meaningful discussions had not been conducted concerning Ashland's women's PDM and its past performance. In its report, DPSC acknowledged that Ashland should have been given an opportunity to correct deficiencies in the women's PDM and concluded that, had that opportunity been provided, Ashland would have corrected those deficiencies.

Additionally, DPSC performed a reevaluation of Ashland's BAFO and, in effect, rescored it to raise the protester's rating for its women's PDM and its overall PDM rating to acceptable, thereby leaving past performance, which the agency continued to find marginally acceptable, as the only discriminating technical difference between Ashland and the awardee.¹ The SSA then ratified his initial selection noting that the difference in past performance ratings indicated that Centre presented a lower performance risk which was sufficient to justify paying the 12.95-percent premium represented by Centre's higher price.

The agency argues that Ashland was not prejudiced by a lack of discussions because Ashland's protest submission and the reevaluation conducted during the course of the protest resulted in no change to the disputed past performance rating. For the reasons set forth below, we disagree.

Agencies are generally required to hold meaningful discussions with all offerors in the competitive range. Federal Acquisition Regulation § 15.610(b); Aydin Vector Div., B-243430, July 22, 1991, 91-2 CPD ¶ 79. Where, as is here conceded, an agency fails in its duty to hold meaningful discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. The Jonathan Corp.; Metro Mach. Corp., B-251698.3; B-251698.4, May 17, 1993, 93-2 CPD ¶ 174. In other words, it must be clear from the record that the protester was not prejudiced in order to deny the protest. See American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.

With respect to the reevaluation of Ashland's women's PDM, as explained, the agency concedes that the protester should have been given an opportunity to submit a new PDM. In its reanalysis, DPSC decided that an acceptable rating is now appropriate. This reanalysis of the most important technical evaluation factor is not a substitute for meaningful discussions, since it does not include the possibility that Ashland may have submitted a highly acceptable women's PDM and thereby enhanced its competitive

¹Questions concerning Ashland's commercial past performance were resolved in favor of the protester during the reevaluation.

position in this closely scored competition in which it submitted the low offer.²

The agency's reevaluation of Ashland's past performance focused on two DPSC contracts for which Ashland performed as a sewing subcontractor to Vanderbilt, the prime contractor, which was responsible for timely supplying the protester with materials: -0609 and -0376. With respect to contract -0609, DPSC's contract files show that delivery delays began as early as January of 1992. In the initial evaluation, the results of which were adopted by the SSA in his source selection decision, Ashland was excused from any responsibility for delays on the contract and all contract delinquencies were found to be due to "financial problems being experienced by Vanderbilt." In the post-protest reevaluation, however, Ashland was found to be responsible for delays between January and June of 1992 because the protester reportedly advised another DPSC contracting officer during negotiations related to another solicitation that Vanderbilt's financial problems began in June of 1992, thereby causing the contracting officer in this case to infer that delays before June of 1992 were Ashland's responsibility. In response to the reevaluation, however, Ashland maintains that Vanderbilt's financial problems actually began in January of 1992, and asserts that these problems caused Vanderbilt to be unable to obtain fabric. The lack of fabric, was, according to Ashland, the reason for delays in deliveries of finished goods to DPSC.

We have carefully reviewed the agency's findings and explanation concerning contract -0609 and we agree with the protester that they are not supported by the record. The contracting officer's own notes of the reevaluation do not explicitly implicate Ashland in the delays, and the agency refers to nothing in the -0609 contract file that attributes the delays to Ashland. The agency does not explain why the reevaluation results contradict its original conclusion excusing Ashland and finding Vanderbilt responsible for all delivery delays on the contract. Further, the contract file contains a number of references to Vanderbilt's serious financial problems. We consider the original evaluation results to be a more reliable indicator of Ashland's past performance than the agency's unsupported post-protest explanations concerning contract -0609. United Int'l Eng'g, Inc., et al., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122.

²No highly acceptable ratings were assigned during the evaluation. Nonetheless, Ashland has considerable experience in fabricating utility jackets so the possibility of a rating higher than acceptable cannot be ruled out.

With regard to contract -0376, the agency argues in its reanalysis that two letters from Vanderbilt requesting delivery extensions directly attribute contract delinquencies to Ashland. According to the agency, in the first letter, dated September 28, 1990, "Vanderbilt stated that the delinquency was due to the failure of its subcontractor, Ashland, to properly forecast and plan the requisite personnel and time to meet the required deliveries." We find that the letter states only that the delays were the result of a "somewhat slower than anticipated build-up of production" and does not mention Ashland. In addition, in response to the letter, DPSC found at the time that the delays were due to "improper forecasting and planning," which Ashland states was the responsibility of Vanderbilt as the prime contractor in formulating its offer. The post-protest reevaluation, and subsequent submissions provided by DPSC, contain no analysis as to why the agency attributes "improper forecasting and planning" to Ashland, which was the production subcontractor to Vanderbilt.

In Vanderbilt's second letter, dated June 27, 1991, Vanderbilt again did not mention Ashland; it attributed the delays to, among other things, the impact of two recently awarded DPSC contracts on its production capacity and quality problems which necessitated remedial pocket repairs. In the contract file on -0376, the agency at the time found the reasons for the delays to be "improper forecasting," underestimating the complexity of the item to be supplied, and inexperience working with the fiber-fill fabric called for by the specifications; no mention of Ashland is contained in the contemporaneous DPSC findings.

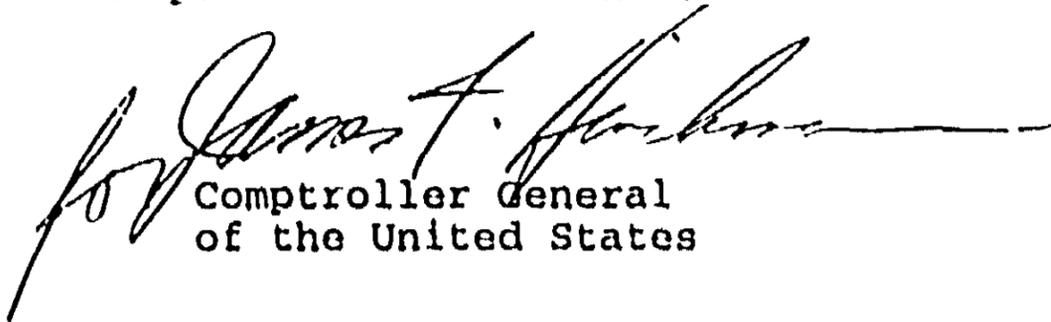
Because Ashland was a subcontractor under contract -0376, in evaluating Ashland's performance, DPSC must distinguish between the relative responsibility for delays in deliveries between the prime contractor, the government, and Ashland. In responding to the agency report about its reevaluation of Ashland's performance, the protester offered a list of specific reasons why the delays were not its responsibility, such as defects in the specification patterns and delays in government testing of cloth. DPSC does not address any of the specific contentions, but states generally that in its reevaluation the agency took into account the written contract files, Ashland's responses to questions about contract -0376 in negotiations under another solicitation, and Ashland's protest contentions.

Evaluation of the protester's past performance is a matter within the discretion of the contracting agency, and we would not substitute our judgment for a reasonable conclusion that Ashland's past performance was marginally acceptable. The problem with the record in this case is not

that DPSC's reevaluation was unreasonable, but that the description of the reevaluation is almost entirely summary in nature. We cannot tell from the record whether or not the reevaluation was a reasonable one. The contracting officer refers specifically to the Vanderbilt letters discussed above, which do not clarify the relative responsibility of the subcontractor and contractor, and generally to what was reviewed in the determination. While the agency's discretion in this area is broad, the record does not foreclose the possibility that the protester's rating would have changed if Ashland had been given the opportunity to address the agency's views during discussions. Accordingly, we conclude that there was prejudice to Ashland as a result of the agency's failure to hold meaningful discussions with the firm in this area.

Contract performance has been stayed pending the outcome of this protest. We recommend that the agency give Ashland an opportunity to submit a new women's PDM, conduct discussions with Ashland concerning its past performance as required by the RFP, reevaluate and rescore its proposal in accordance with the results of those discussions, and reconsider its source selection decision accordingly. If, as a result of this process, Ashland is in line for award, we recommend that Centre's contract be terminated and award be made to Ashland. We also find that Ashland is entitled to be reimbursed for its costs of pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1993). Ashland should submit its claim for such costs, detailing and certifying the time expended and the costs incurred, directly to DPSC within 60 working days of its receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.



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