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Decision

Matter of: Colt Defense, LLC

File: B-406696

Date: July 24, 2012

Michael A. Hordell, Esq., Stanley R. Soya, Esq., Michael R. Golden, Esq., Heather Kilgore Weiner, Esq., and Samuel Jack, Esq., Pepper Hamilton LLP, for the protester.

Holly Emrick Svez, Esq., James K. Kearney, Esq., and Steven W. Cave, Esq., Womble Carlyle Sandridge & Rice, LLP, for Remington Arms Company, LLC, the intervenor.

Wade L. Brown, Esq., Kandis C. Gaines, Esq., Department of the Army, for the agency.

Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of offerors' prices is sustained where the agency failed to follow the solicitation criteria with regard to the application of a 5-percent royalty adjustment to the offerors' total evaluated prices.
 2. Protest challenging the evaluation of the awardee's past performance is denied where the source selection authority's decision to change the lower-level source selection evaluation board's initial rating from neutral to satisfactory was reasonable.
 3. Protest challenging the evaluation of the awardee's production capability is denied where the solicitation did not require the agency to assess a higher risk rating for proposals that did not have existing facilities and equipment.
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DECISION

Colt Defense, LLC, of West Hartford, Connecticut, protests the award of a contract to Remington Arms Company, LLC, of Ilion, New York, under request for proposals No. W56HZV-10-R-0593 issued by the Department of the Army for standard M4 carbines and standard M4A1 carbines.

We sustain the protest in part and deny it in part.

BACKGROUND

The solicitation was issued on August 19, 2011, and anticipated the award of a fixed-price 5-year indefinite-delivery/indefinite-quantity contract. The RFP sought proposals for the production of a minimum of 10,000 carbines and a maximum of 120,000 carbines in any combination of multiple M4/M4A1 configurations. RFP at 3.

The RFP advised that award would be made to the offeror whose proposal offered the best value based upon the evaluation of four factors: (1) production capability, (2) price, (3) past performance, and (3) small business participation. RFP at 87. The production capability factor was broken into four considerations: (1) manufacturing facilities, (2) key tooling and equipment, (3) production approach, and (4) quality management system. Id. at 88.

The RFP also explained that the factors of production capability, price, and past performance were approximately equal in importance and each was significantly more important than the small business participation factor. Id. In addition, the RFP stated that the non-price factors, when combined, were significantly more important than price. Id.

As relevant here, the production capability factor stated as follows:

M.5.1 Production Capability Factor (Factor 1)

The information submitted in response to the Production Capability Factor, Section L.4.2. (a-d), will be evaluated to assess the technical merit and risk that the offeror will timely deliver quality supplies meeting the solicitation requirements.

Failure to provide a detailed analysis, rationale, and supporting documentation that satisfies the requirements of Section L and incorporates assumptions may be reflected in the Government[']s risk assessment. Incomplete and unclear proposals may add risk.

Id.

For past performance, the solicitation stated as follows:

M.5.3.1 The Past Performance Factor will assess the risk the offeror will meet contract technical and schedule requirements based on the recent and relevant contract performance as it relates to the offerors proposed solution to meet M4/M4A1 Carbine contract requirements.

M.5.3.2 In evaluating performance history, the Government may review the offerors current and prior performance record of complying with all aspects of its contractual agreement: conformance to technical requirements; timeliness of deliveries/performance; quality of performance.

Id.

For the price evaluation factor, the solicitation notified offerors that the technical data package for the M4/M4A1 carbines includes licensed technology for which the Government is obligated to pay a royalty amount pursuant to a license agreement with Colt Defense, LLC. RFP at 3, 74. The RFP explained that offerors who did not own or have a license for the Colt technology would be evaluated as follows:

M.5.2 Price Factor (Factor 2)

* * * * *

M.5.2.3 The royalty rate is 5%. If the offeror does not indicate that it is the owner or a licensee of the technology/technical data, its offer will be evaluated by adding an amount equal to the royalty to its proposed prices.

Id. at 88.

The Army received five proposals by the closing date of November 10. The Army conducted discussions with three of the offerors, including Colt and Remington. On March 26, the agency received final proposal revisions from the three competitive range offerors.

The Army's evaluation of offers began with the assessment of a source selection evaluation board (SSEB). As relevant here, the SSEB's review of production capability analyzed the proposed manufacturing facilities, key tooling and equipment, production approach and quality plan. Agency Report (AR), Tab 11-2, SSEB Production Capability Evaluation--Remington, at 1-10. With respect to past performance, the SSEB evaluated the relevance of the past performance references, as well as the offeror's performance on the referenced contracts, to arrive at an overall confidence rating. AR, Tab 11-3, SSEB Past Performance Evaluation--Remington, at 1-10. With respect to price, the SSEB calculated a weighted average unit price to arrive at a total price for each ordering period per contract line item (CLIN). As explained in detail below, the agency's price evaluation also included a royalty calculation for any offeror that did not designate itself as the owner or licensee of Colt's technology/ technical data. AR, Tab 11-1-1, SSEB Price Evaluation, at 1-14.

The results of the SSEB evaluation were then presented to the Source Selection Advisory Council (SSAC) for review. The SSAC agreed with the SSEB's results, except for the SSEB's assignment of an "unknown confidence" rating to Remington's past performance. AR, Tab 12, SSAC Award Recommendation, at 10. In this regard, the SSAC agreed with the SSEB that Remington had two "somewhat relevant" contracts, but disagreed with the SSEB's assessment that "the Government could not base a meaningful performance risk prediction (for Remington) upon these references." *Id.*; AR, Tab 11-3, SSEB Past Performance Evaluation--Remington, at 9-10. Instead, the SSAC concluded that Remington's performance for these somewhat relevant contracts has been excellent and--balancing the excellent performance against the limited relevance of the performance--changed Remington's rating from "unknown confidence" to "satisfactory confidence." AR, Tab 12, SSAC Award Recommendation, at 10, 12.

The final ratings for Colt and Remington, as recommended by the SSAC to the SSA were as follows:

	Production Capability	Past Performance	Small Business Participation	Total Evaluated Price
Colt	Outstanding/ Very low risk	Substantial Confidence	Acceptable/ Moderate risk	\$86,936,476
Remington	Outstanding/ Very low risk	Satisfactory Confidence	Outstanding/ Very low risk	\$85,443,084

AR, Tab 13, Source Selection Decision, at 1.¹

On April 19, the SSEB chair and the SSAC presented the results of their reviews to the Source Selection Authority (SSA). AR, Tab 13, Source Selection Decision, at 1. The SSAC recommended to the SSA that Remington receive the award as the best value offeror concluding that:

¹ The possible ratings for the production capability and small business participation factors were: outstanding/very low risk, good/low risk, acceptable/moderate risk, marginal/high risk, and unacceptable. The possible ratings for the past performance factor were: substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence. AR, Tab 3-1, Source Selection Plan, at 24-26.

Remington's offer with its best Production Capability approach and Small Business Participation, along with its Satisfactory Past Performance rating and the lowest evaluated price is the best value to the government. . . . The price premium of awarding to either Colt or [] is not worth the difference.

AR, Tab 12, SSAC Award Recommendation, at 14.

The SSA reviewed the SSEB's and SSAC's findings and recommendations, and reached the following conclusions: (1) for the production capability factor, "Remington's proposal is slightly better than Colt's"; (2) for the past performance factor, Remington should be rated satisfactory confidence; (3) for the small business participation factor, "Remington is clearly the best"; and (4) for price, "Remington's total evaluated price of \$85.4M inclusive of royalty is the lowest of the three." AR, Tab 13, Source Selection Decision, at 2-3. Thus, the SSA selected Remington as the best value for contract award. *Id.* at 4. On April 20, award was made to Remington. On April 26, Colt filed the current protest with our Office after receiving its debriefing.

DISCUSSION

Colt argues that the Army's evaluation was flawed in three respects: (1) the agency failed to apply the solicitation's 5-percent royalty adjustment to offerors' prices; (2) the agency failed to reasonably evaluate Remington's past performance; and (3) the agency failed to reasonably evaluate Remington's proposal under the production capability evaluation factor. Colt contends that if the agency had conducted a proper evaluation, it would have determined that Colt's proposal offered the lowest price and the best value to the government.

As a general matter, in reviewing protests challenging an agency's evaluation of proposals, our Office will not reevaluate proposals; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *James Constr.*, B-402429, Apr. 21, 2010, 2010 CPD ¶ 98 at 3. A protester's mere disagreement with a procuring agency's judgment is insufficient to establish that the agency acted unreasonably. *Id.*

As discussed below, we agree with Colt that the Army failed to apply the 5-percent royalty adjustment to offerors' prices in accordance with the solicitation's price evaluation instructions, and sustain the protest on this basis. With regard to Colt's

challenges to the agency's evaluation of Remington's past performance and production capability, we disagree with Colt and deny those bases of protest.²

Price Evaluation

Colt argues that the Army did not apply the 5-percent royalty adjustment in the solicitation to the other offerors' total evaluated prices. Instead, Colt contends that the agency improperly applied the royalty adjustment only to certain portions of the proposed prices, based on an undisclosed interpretation of the license agreement between the government and Colt.

In response, the Army argues that the terms of the license agreement mandate the application of the royalty only to the portions of the M4/M4A1 carbine that are proprietary to Colt. Additionally, the agency alleges that Colt's interpretation of the solicitation is unreasonable, and is inconsistent with the license agreement the solicitation provision is implementing.

As shown by the Army's response, this dispute requires a review of the license agreement between the government and Colt--which was not a part of this solicitation. During the course of this protest, the Army provided a copy of the license agreement,³ which provides as follows:

[DELETED]

AR, Tab 19, M4 Carbine Addendum to Technical Data Sales and Patent License Agreement, Article VII Royalties, at 13-14.

Our review of the record shows that the Army did not apply a 5-percent royalty adjustment to the total proposed prices for the non-Colt offerors. Instead, as Colt has argued, the agency interpreted the solicitation in conjunction with the license agreement, quoted above. AR, Tab 11-1-1, SSEB Price Evaluation, at 4.

In general terms, the agency identified those parts of the M4/M4A1 carbine that were proprietary to Colt, and applied the 5-percent royalty adjustment only to the costs associated with those parts. Id. Specifically, the agency concluded that [DELETED] of the carbine's parts were proprietary to Colt, or partially proprietary to Colt, and that only the portion of the price related to those parts was therefore

² Colt has raised other collateral arguments concerning the agency's evaluation. We have reviewed all of these issues and find that none provides a basis to sustain the protest.

³ The license agreement is not a publicly available document.

subject to the 5-percent royalty adjustment.⁴ Id. The agency then referenced historical data from a unit price database to assign a price to each M4/M4A1 component.⁵ Using these prices, the agency calculated a royalty base expressed as a percentage of the historical price of the carbine that is proprietary to Colt. Id. at 5. For example, CLIN 0003 was assigned a proprietary percentage of 49.41 percent, meaning 49.41 percent of the carbine's historical price for CLIN 0003 was determined to be for parts that were proprietary to Colt. Id. at 5. As a result of this calculation, the agency multiplied the prices of the other offerors by 49.41 percent, and applied the 5-percent royalty to the result. It was this number that was added to the non-proprietary portion of the other offerors' prices to calculate a total price for each CLIN. Each CLIN, inclusive of royalty, was then added together to arrive at a total evaluated price for each offeror.

In essence, this dispute arises from a blurring of two distinct concepts--a price adjustment provision set out in a solicitation, and a royalty payment provision between the government and Colt designed to compensate Colt for the use of its proprietary technology. While the Army's calculation may (or may not) accurately represent the amount due Colt under the license agreement, the solicitation's price adjustment provision provided no notice to Colt--or other offerors--that the provision would be applied in this way.

In cases where a dispute exists between the parties as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, an interpretation of a solicitation must be consistent with such a reading. The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 34.

The plain language of the RFP stated that "[t]he royalty rate is 5%" and that, for offerors who do not own or have licenses for the Colt technology, their proposed prices "will be evaluated by adding an amount equal to the royalty to [their] proposed prices." RFP at 88. We agree with Colt that the only reasonable interpretation of the RFP would be to apply the 5-percent royalty to an offeror's total evaluated price. The agency's interpretation is simply at odds with the plain meaning of the solicitation language and, as such, is unreasonable. See Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 at 17.

The RFP here did not indicate that the agency would perform an analysis of the proprietary and non-proprietary parts, nor did it provide notice to the offerors that

⁴ All other M4/M4A1 parts were deemed not to be proprietary by the agency, and not subject to the 5-percent royalty.

⁵ A majority of the referenced historical prices came from [DELETED]. AR, Tab 15-3, Royalty Base Calculation, at 1.

the agency would calculate a royalty base expressed as proprietary percentage for each CLIN. Thus, the agency departed from the RFP's price evaluation criteria when it created its own undisclosed formula to apply the 5-percent royalty to only those portions of the M4/M4A1 carbine which it had independently determined were proprietary to Colt. As stated above, we find that the solicitation's price evaluation clause provided no notice that the evaluation would be conducted in such a manner.

To the extent the Army contends that Colt's protest is an untimely challenge to the terms of the solicitation, we disagree. Specifically, the agency contends that Colt was aware that the license agreement between the Army and Colt contained language that was inconsistent with Colt's interpretation of the RFP. In effect, the agency argues that Colt's special knowledge of the license agreement created an ambiguity that obligated the protester to challenge this solicitation prior to the time for submitting proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2012).

An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. DynCorp International LLC, B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error (e.g., where the solicitation provisions appear inconsistent on their face), while a latent ambiguity is more subtle. Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. Where there is a latent ambiguity, both parties' interpretation of the provision may be reasonable, the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement. Allied Signal, Inc., Elec. Sys., B- 275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136 at 11. Although, as noted above, we conclude that a solicitation's price adjustment clause and the appropriate calculation of a royalty payment are two distinct concepts, if there is any ambiguity here, it was latent, rather than patent. As a result, we find that this protest is timely.

To the extent that the Army argues that Colt's interpretation of the RFP would render ineffective a portion of the license agreement, we again disagree. Clearly Colt was aware of the terms of the license agreement--as the Army argues--and Colt was aware that the agreement stated that the royalty amount due to Colt would be based on parts or components that are produced from the proprietary portions of the carbine. However, the terms of the license agreement are not at issue here. Put differently, the RFP and license agreement need not be read in a manner that puts either in conflict.⁶ See The Boeing Co., supra, at 35.

⁶ Moreover, as the CO concedes, the terms of the license agreement do not preclude the agency from applying a 5-percent royalty to an offeror's total evaluated price in the evaluation of proposals. Supp. CO Statement ¶ 10.

We also find no merit to the Army's contention that Colt should have known that the agency would evaluate the other offerors' prices in the manner employed by the SSEB. As discussed above, the agency unilaterally identified the portions of the carbine that are proprietary to Colt, used historical prices to assign a price to these portions, calculated a percentage of the price that could be considered tied to the proprietary items, and applied that percentage to the offerors' evaluated prices. There is no dispute that the Army and Colt have yet to reach an agreement on a per-weapon value of the non-proprietary portion of the technical data package to be utilized to reduce the royalty base. See Protester's Response to Agency's Dismissal Request, at 6. Thus, Colt could not have known that the agency would apply the 5-percent royalty as it did. We therefore sustain the protest based upon the Army's decision to evaluate prices in a manner different from the approach established in the solicitation.

Past Performance

Next, Colt challenges the agency's evaluation of Remington's past performance, asserting that there was no rational basis for the SSA's decision to accept the SSAC's change in Remington's past performance rating from unknown confidence to satisfactory confidence since the satisfactory confidence rating is unreasonable and unsupported.

The evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a solicitation calls for the evaluation of past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations. Divakar Techs., Inc., B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5. An offeror's mere disagreement with the agency's evaluation judgments does not demonstrate that those judgments are unreasonable. SDV Telecomms., B-279919, July 29, 1998, 98-2 CPD ¶ 34 at 2.

Remington submitted four past performance ratings for the agency's evaluation. The SSEB determined that two references were not relevant, and that two were somewhat relevant. AR, Tab 11-3, SSEB Past Performance Evaluation--Remington, at 9-10. The SSEB assigned an unknown confidence rating because it found the information provided was "so sparse that no meaningful confidence assessment rating can be reasonably assigned." Id.

The SSAC disagreed with the SSEB's assessment of unknown confidence for Remington. AR, Tab 12, SSAC Award Recommendation, at 10. While the SSAC concurred with the SSEB's evaluation that only two of Remington's references were "somewhat relevant," the SSAC did not agree that the performance information for these references was too sparse as to preclude a confidence assessment. Id.

Instead, the SSAC determined that Remington's performance on its somewhat relevant contracts--which met all of the technical and delivery requirements of those contracts with few quality issues and positive comments from the customers--demonstrated "excellent performance." Id. at 12. Based on these findings, the SSAC concluded that there was a reasonable expectation that Remington will successfully perform the required effort, and assigned a satisfactory confidence rating to Remington's past performance. Id.

When the SSEB chair and SSAC presented their evaluations to the SSA, the SSA agreed that Remington's two somewhat relevant references demonstrated a reasonable expectation that it would successfully perform the required effort. Id. at 2-3. Therefore, the SSA concluded that Remington's past performance should receive a Satisfactory Confidence rating. Id. at 3.

We first note that an agency's evaluation is not unreasonable simply because an SSA disagrees with the evaluation ratings and conclusions of lower-level evaluators. Sig Sauer, Inc., B-402339.3, July 23, 2010, 2010 ¶ 184 at 6. Based upon our review, we find nothing unreasonable about the agency's assignment of a satisfactory confidence rating to Remington's past performance and we find that the conclusion is supported by the underlying record. In this case, the SSA reviewed the SSEB's evaluation, the SSAC's analysis and recommendation, as well as the past performance record, and agreed with the SSAC's satisfactory confidence rating; nothing about this review, or the SSA's resolution of this area of conflict between the SSEB and SSAC, was unreasonable. Accordingly, we deny this portion of the protest.⁷

Production Capability

Finally, Colt challenges the agency's evaluation of Remington's production capability, asserting that Remington's rating of outstanding/very low risk was unreasonable. The protester contends that the RFP required the agency to assign more favorable ratings to offerors, such as Colt, who have existing facilities and equipment, and less favorable ratings to offerors, such as Remington, who do not.

The solicitation's production capability section required offerors to identify their proposed plan and schedule to obtain the required manufacturing facilities, and explained that offerors "must distinguish between existing facilities and proposed

⁷ We note for the record that the SSA also conducted a contemporaneously-documented alternative assessment to determine whether the award decision would be different if Remington's past performance rating remained unknown confidence. At the conclusion of this additional exercise, the SSA determined that the superiority of Remington's proposal under the other evaluation criteria would support the same award decision. AR, Tab 13, Source Selection Decision, at 3.

plans to obtain facilities.” RFP at 73. The RFP additionally required offerors to identify the key tooling and equipment required in the production of the M4/M4A1 carbines, and once again explained that offerors “must distinguish between existing tooling and equipment and proposed plans to obtain tooling and equipment.” Id. at 74. The solicitation specified that the information submitted under the production capability section will be evaluated to assess the technical merit and risk that the offeror will timely deliver quality supplies meeting the solicitation requirements. RFP at 88. The solicitation informed offerors that failure to provide a detailed analysis, rationale, and supporting documentation that satisfies the requirements of the solicitation and incorporates assumptions may be reflected in the Government’s risk assessment. Id. The solicitation also cautioned that “[i]ncomplete and unclear proposals may add risk.” Id.

The agency’s evaluation of Remington’s production capability proposal concluded that both Remington (and its critical subcontractor) have:

more than ample facilities to meet the requirement with no additional facilities required. . . . Remington has some, but not all the required key tooling and equipment in place, but its proposal provided a very detailed plan for key tooling and equipment with scheduled completion well before the requirement for [first article test] and subsequent delivery requirements and is considered a very low risk. . . . Remington’s proposed plan for meeting the [first article test] Schedule is specifically tailored to the M4/M4A1 Carbine and the requirements of the current solicitation. Remington’s plan is supported with a comprehensive schedule.

AR, Tab 12, SSAC Award Recommendation, at 8. As a result, the agency assigned an outstanding/very low risk to Remington’s production capability. AR, Tab 13, Source Selection Decision, at 1.

Here, the record shows that the agency reasonably evaluated Remington’s production capability. While we agree with the protester that the manufacturing facilities and key tooling and equipment criteria of the production capability factor required offerors to distinguish between existing facilities/equipment and proposed plans to acquire facilities/equipment, we do not agree that the solicitation mandated a higher risk assessment for offerors without all of the facilities and equipment that will eventually be required. Unlike the case cited by Colt, Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865, et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 7, where the solicitation specifically stated that an offeror “will be considered a lower risk” if it had existing production capacities, the solicitation here simply provided that incomplete and unclear proposals may add risk. In this regard, the RFP here did not expressly state that the agency would necessarily assign

higher ratings for offerors who have existing facilities as compared to offerors who had plans to obtain the required facilities and equipment.⁸ Instead, the agency reasonably determined that Remington's very detailed plan merited an outstanding/very low risk rating. Accordingly, this portion of the protest is denied.

RECOMMENDATION

We recommend that the Army either reevaluate offerors' proposals in accordance with the plain meaning of the solicitation, as discussed above, or amend the solicitation to clearly set forth its intended criteria for the evaluation of price with regard to the 5-percent royalty. In the event the agency revises the solicitation, it should request revised price proposals and reevaluate the proposals in accordance with the amended price evaluation criteria. Following its reevaluation of offerors' price proposals, the agency should make a new selection decision. If Remington is not found to offer the best value to the government, the agency should terminate Remington's contract for the convenience of the government.

We also recommend that Colt be reimbursed the costs of filing and pursuing its successful ground of protest related to its challenge of the agency's price evaluation, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1). Colt should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson
General Counsel

⁸ If Colt believed that the solicitation should have provided for a higher risk rating for those offerors without existing facilities/equipment, Colt was required to submit a protest against the terms of the solicitation before the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).