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Decision

Matter of: Ashland Sales & Service Co.

File: B-408010.6; B-408010.7

Date: March 28, 2014

Ruth E. Ganister, Esq., Rosenthal and Ganister LLC, for the protester.
Marc Lamer, Esq., Kostos and Lamer, PC, for Creighton AB, Inc., the intervenor.
Shantay N. Clarke, Esq., and Allison Colsey Eck, Esq., Defense Logistics Agency, for the agency.
Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging deficiencies assigned to protester's jacket samples is denied where agency demonstrates existence of physical characteristics in samples that reasonably constitute defects listed in solicitation specifications.
 2. Protest challenging agency's past performance evaluation is denied where record shows agency's evaluation methodology and findings to be reasonable and consistent with solicitation terms.
 3. Protest alleging agency bias is denied where protester does not support allegations with convincing proof and record does not otherwise reflect bias.
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DECISION

Ashland Sales & Service Co., of Olive Hill, Kentucky, protests the award of a contract to Creighton AB, Inc., of Reidsville, North Carolina, under request for proposals (RFP) No. SPM1C1-11-R-0132, issued by the Defense Logistics Agency, for three types of lightweight Air Force jackets. Ashland asserts that the agency's evaluation of Ashland's product demonstration models (PDM) and past performance was unreasonable and that the agency acted with bias against the firm.

We deny the protest.

BACKGROUND

The solicitation, which was issued on February 23, 2012 as a 100 percent small business set-aside, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract with a base period of one year and four one-year option periods. RFP at 1, 74-75, 77, 103. Award was to be made on a best value basis considering price and the following two factors: technical/PDM; and past performance. Id. at 8, 88. The past performance factor included two subfactors of equal importance: relevancy; and quality and delivery performance. Id. at 88. The technical/PDM factor was stated to be more important than the past performance factor, and the technical/PDM and past performance factors when combined were stated to be significantly more important than price. Id.

The solicitation provided that the agency would assign adjectival ratings to the offerors' proposals under each evaluation factor and subfactor, and it included definitions for each rating. RFP at 89-93. The ratings for the technical/PDM factor were exceptional, very good, satisfactory, marginal, and unsatisfactory. Id. at 89-90. The ratings for the past performance factor were substantial confidence, satisfactory confidence, limited confidence, and no confidence. Id. at 92-93. The ratings for the past performance relevancy subfactor were very relevant, relevant, somewhat relevant, and not relevant. Id. at 91. The ratings for the past performance quality and delivery performance subfactor were exceptional, very good, satisfactory, marginal, unsatisfactory, and neutral. Id. at 91-92.

The solicitation incorporated specifications for three types of jackets: the men's lightweight Air Force jacket; the women's lightweight Air Force jacket; and the general officer's lightweight Air Force jacket. See RFP at 26-63. Offerors were instructed to submit one PDM of each type of jacket. Id. at 86. The solicitation provided that under the technical/PDM factor, the agency would evaluate the PDMs for "compliance with all characteristics" in the specifications. See id.

Offerors were to submit pricing for standard sizes of all three jacket types, as well as pricing for "special measurement"--i.e., custom measurement--versions of each jacket type. RFP at 11-13, 83. For each jacket type, and for the special measurement versions, the solicitation included "annual estimated quantities," as shown in the table below.

| <u>JACKET</u> | <u>ANNUAL ESTIMATED QUANTITY</u> |
|---------------------------------------|----------------------------------|
| Men's Standard Sizes | 55,692 |
| Women's Standard Sizes | 12,936 |
| General Officer's Standard Sizes | 108 |
| Men's Special Measurement | 123 |
| Women's Special Measurement | 94 |
| General Officer's Special Measurement | 25 |

RFP at 11-13.

Ashland is the incumbent contractor for the agency's lightweight Air Force jacket requirement and has held contracts for this requirement for 16 years. Supp. Protest at 6.

The agency received a number of proposals by the solicitation's closing date, including proposals from Ashland and Creighton. Agency Report (AR), Tab 3, Price Negotiation Memorandum (PNM), at 1. The agency evaluated the offerors' PDMs and past performance information; established a competitive range, which included the proposals of Ashland and Creighton; and conducted two rounds of negotiations with the competitive range offerors. Id. at 2, 4-5.

During negotiations, the agency conducted a reverse auction in which the competitive range offerors submitted revised pricing. AR, Tab 3, PNM, at 4, 8. Also during negotiations, the agency issued letters to the competitive range offerors informing them of evaluated PDM and past performance deficiencies and providing them opportunities to address the deficiencies. Id. at 4-5. In responding to these letters, Ashland disputed each evaluated deficiency and requested that the agency consider its responses to be agency-level protests. AR, Tab 10, Ashland Response to Negotiation Ltr. (Dec. 6, 2012), at 1-5; AR, Tab 23, Ashland Response to Negotiation Ltr. (Feb. 1, 2013), at 2-11. The agency addressed Ashland's protests by eliminating numerous evaluated deficiencies, but declining to eliminate others. See AR, Tab 15, Contracting Officer Response to Ashland Protest (Jan. 28, 2013), at 1; AR, Tab 24, Contracting Officer Response to Ashland Protest (Feb. 4, 2013), at 1.

Ashland then filed a protest with our Office in which the firm challenged each of the remaining evaluated deficiencies.¹ The agency then decided to conduct an additional round of negotiations, affording the competitive range offerors another

¹ Our Office docketed this protest as B-408010.1.

opportunity to address their evaluated deficiencies. AR, Tab 3, PNM, at 5. Ashland subsequently withdrew its protest.

In response to the negotiation letter that followed, Ashland again disputed each deficiency assigned to its proposal. AR, Tab 30, Ashland Response to Negotiation Ltr. (Mar. 15, 2013), at 1-14. After receiving and reviewing the offerors' final negotiation letter responses, including Ashland's, the agency completed its evaluation. The contracting officer, who also served as the source selection authority (SSA), selected Creighton's proposal for award. See AR, Tab 31, Award to Creighton (Apr. 30, 2013), at 1.

Ashland then filed another protest with our Office, asserting that the agency improperly refused to provide the firm a debriefing. We dismissed the protest because whether or not an agency provides a debriefing is not an issue that our Office will consider. Ashland Sales & Serv. Co., B-408010.2 (May 14, 2013).

Ashland later received a debriefing and subsequently filed a third protest with our Office--as well as a supplemental protest--in which the firm again challenged each deficiency assigned to its proposal. In response, the agency decided to take corrective action consisting of re-evaluating the competitive range offerors' proposals under the past performance factor and making a new source selection decision. AR, Tab 34, Agency Notice of Corrective Action (June 10, 2013). Accordingly, our Office dismissed Ashland's protest and supplemental protest as academic. Ashland Sales & Serv. Co., B-408010.3, B-408010.4 (June 13, 2013).

Thereafter, the agency assigned a new contracting officer and new past performance evaluator to the procurement.² AR at 18 n.10. The agency also re-opened negotiations, affording the competitive range offerors another opportunity to address past performance-related deficiencies. AR, Tab 33, PNM Addendum, at 1. After receiving the offerors' submissions, the agency re-evaluated their proposals under the past performance factor. Id. at 2-6.

Ashland's and Creighton's final ratings under the PDM and past performance factors and subfactors, together with their final evaluated pricing, are shown in the table below.

² The initial contracting officer and past performance evaluator had administered Ashland's incumbent contract, whereas the new contracting officer and new past performance evaluator were not connected with Ashland's incumbent contract. See AR at 17 n.9; Hearing Transcript (Tr.) at 272, 370-71, 381.

| | <u>Ashland</u> | <u>Creighton</u> |
|----------------------------------|-------------------------|------------------------|
| Technical/PDM Overall | Satisfactory | Satisfactory |
| Men's Jacket | Very Good | Very Good |
| Women's Jacket | Satisfactory | Very Good |
| General Officer's Jacket | Satisfactory | Satisfactory |
| Past Performance Overall | Satisfactory Confidence | Substantial Confidence |
| Relevancy | Very Relevant | Relevant |
| Quality and Delivery Performance | Satisfactory | Exceptional |
| Evaluated Price | \$25,235,877.00 | \$25,008,336.37 |

AR, Tab 41, Source Selection Decision Document (SSDD), at 3.

The new contracting officer performed a comparative analysis of the competitive range proposals. AR, Tab 41, SSDD, at 4-12. In comparing Ashland's and Creighton's proposals under the technical/PDM factor, the contracting officer considered each deficiency identified for Ashland's and Creighton's PDMs for all three jacket types. Id. at 4-6. Based on this comparison, the contracting officer concluded that Ashland's men's PDM was superior to Creighton's, but that Creighton's women's and general officer's PDMs were superior to Ashland's. Id. at 5-6. The contracting officer then found that Creighton's proposal was superior to Ashland under the technical/PDM factor as follows: "Although Creighton's PDM[s have] one more deficiency than Ashland (16 versus 15), Creighton has fewer deficiencies that require preventative corrective action in production (2 versus 4) and therefore, I find Creighton's PDMs superior to Ashland's PDMs." Id. at 6.

Under the past performance relevancy subfactor, the contracting officer compared the evaluation findings for Ashland and Creighton and concluded that for this subfactor, "Ashland is superior[,] having extensive experience producing the same exact [Air Force] Lightweight Jackets and Ashland's contracts involv[ing] essentially the same and similar scope and magnitude of effort and complexities the subject solicitation requires." AR, Tab 41, SSDD, at 6. Under the past performance quality and delivery performance subfactor, the contracting officer compared the number of instances in which relevant Ashland and Creighton delivery orders involved deficiencies and delinquencies. Id. at 6-7. The contracting officer then concluded that "Creighton [is] superior for quality and delivery, having a much lower number of delinquencies (2 versus 28) and a superior record of timely delivery (91% versus 61%) than Ashland, and having no quality issues while Ashland has had two warranty actions on one of its contracts." Id. at 7. Finally, for the past performance factor overall, the contracting officer found that Creighton's proposal was "superior"

to Ashland's. AR, Tab 41, SSDD, at 7. Based on these judgments, and Creighton's slightly lower evaluated price, the contracting officer determined that Creighton's proposal represented the best value to the government. Id. at 11-12.

After being notified that the original award to Creighton would stand, and after receiving a debriefing, Ashland filed the instant protest and supplemental protest with our Office.

DISCUSSION

In its protest and supplemental protest, Ashland challenges each deficiency assigned to its proposal under the technical/PDM factor. Ashland also asserts that the agency's evaluation of its proposal under the past performance factor was unreasonable in numerous respects. Finally, Ashland asserts that the agency acted with bias against the firm. We have considered all of Ashland's arguments, and we conclude, based on the record, that none have merit. Ashland's chief contentions are discussed below.

Technical/PDM Factor Evaluation

As stated above, the agency identified 15 deficiencies with Ashland's PDMs. AR, Tab 41, SSDD, at 6. Ashland asserts that 13 of the deficiencies--including three that were evaluated as requiring preventative corrective action--were unreasonable because, in Ashland's view, its PDMs do not have characteristics that constitute deficiencies under the solicitation's specifications. See Supp. Protest at 27-30; Comments at 3-6; Post-Hearing Comments at 10-20.

The evaluation of offerors' technical proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 12. An agency's evaluation judgments are by their nature often subjective; nevertheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the evaluation criteria announced in the solicitation. Southwest Marine, Inc.; Am. Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10. A protester's mere disagreement with an agency's judgment is insufficient to establish that the agency acted unreasonably. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, the agency's PDM evaluator documented her evaluation of Ashland's PDMs on a set of PDM evaluation forms. AR, Tab 16, Ashland PDM Evaluation Forms. For each deficiency assigned to Ashland's PDMs, the PDM evaluator referenced a section of the jacket specifications that were incorporated into the solicitation. Id. at 2, 4, 6. Because the relationship between the deficiencies and the referenced

specification sections was not always clear based on the documents alone, our Office convened a hearing at which the agency's PDM evaluator testified and provided Ashland's PDMs for examination.³

At the hearing, the agency's PDM evaluator showed the physical characteristics of Ashland's PDMs that led her to assign each of the deficiencies. She also testified as to how each deficiency related to the solicitation specifications. From this testimony and the contemporaneous evaluation documents, we conclude that the evaluated deficiencies were reasonable and that Ashland's allegations amount to mere disagreement with the agency's judgments. Below, for purposes of illustration, we discuss several of the challenged deficiencies.

The PDM evaluator assigned deficiencies to Ashland's women's and general officer's PDMs based on findings that on both PDMs, the "[s]lide fastener covering is bulging."⁴ AR, Tab 16, Ashland PDM Evaluation Forms, at 4, 6. She evaluated these deficiencies as requiring preventative corrective action in production. Id.

In challenging these deficiencies, Ashland points out that on the PDM evaluation forms, the PDM evaluator referenced what Ashland refers to as the "catch-all" provision of the women's and general officer's jacket specifications. Post-Hearing Comments at 13. This provision establishes a defect for "[a]ny defective component or defect of assembly (not classified herein)." AR, Tab 47, Women's Jacket Specification, at 29; AR, Tab 52, General Officer's Jacket Specification, at 28. Ashland argues that no slide fastener covering defect exists on its PDMs and that the deficiency "is nothing more than an overly aggressive inspection of the garment beyond the requirements of the solicitation." Post-Hearing Comments at 14, 18.

At the hearing, the agency's PDM evaluator used Ashland's PDMs to demonstrate that when the slide fasteners of both jackets are zipped up, the slide fastener coverings do not lie flat, but instead create "a V appearance"--or "bulg[e]"--that can

³ Throughout this procurement, Ashland made requests that the agency permit the firm to inspect or see photos of Ashland's PDMs as evaluated so that Ashland could corroborate or further dispute the evaluated deficiencies. See, e.g., AR, Tab 30, Ashland Response to Negotiation Ltr. (Mar. 15, 2013), at 2. The agency declined Ashland's requests. Supp. Protest at 28; Comments at 3. After having an opportunity to examine the evaluated PDMs for the first time at the hearing, Ashland withdrew a number of protest allegations, including challenges against 2 of the 15 deficiencies and allegations that certain deficiencies resulted from the agency's partial deconstruction of the PDMs during the evaluation. See Tr. at 53-54.

⁴ The slide fastener of a jacket commonly is known as a zipper. Tr. at 42. The slide fastener covering is material that extends over each side of the zipper so that the zipper is hidden when the jacket is viewed from the front. Id.

be seen and felt. See Tr. at 41-42, 65-66, 143-45. The PDM evaluator also contrasted the look and feel of the slide fastener coverings on Ashland's women's and general officer's PDMs--i.e., the PDMs that were assigned a deficiency for bulging--with the look and feel of the slide fastener coverings on Ashland's men's PDM--i.e., the PDM that was not assigned a deficiency for bulging. Id. at 143-45.

Additionally, the PDM evaluator showed through testimony that the specifications include "defect tables" and that one of the defects in the tables states: "Slide fastener tape set too loosely or too tightly causing excessive bulging on opening, affecting appearance open or closed." Tr. at 111 (referencing AR, Tab 47, Women's Jacket Specification, at 36).⁵ The PDM evaluator testified that in her view, the amount of bulging on Ashland's PDMs was excessive because it was present and visible on a military dress clothing item, as opposed to, for example, a utility clothing item.⁶ Id. at 113-115.

At the hearing, Ashland's quality control manager--who oversaw the construction of Ashland's PDMs, Tr. at 161-62--also provided testimony. In her testimony, she outlined her disagreement with the agency's findings. See id. at 175-76, 188-89. However, as discussed above, the agency demonstrated the existence of physical characteristics that reasonably related to a defect listed in the solicitation's specifications. Ashland's disagreement with the agency's judgments provides no basis on which to sustain this ground of protest.

Ashland also challenges six deficiencies assigned to its PDMs for a defect that the agency characterized as "puckering." Ashland's position, in essence, is that there is no puckering in its PDMs that would constitute a defect under the solicitation's specifications. Post-Hearing Comments at 11, 15-16, 19-20. According to Ashland, the puckering-related deficiencies also are representative of an "overly zealous" evaluation by the agency. Id. at 11, 15, 20.

At the hearing, the PDM evaluator testified that the term puckering describes material that, as a result of stitching, does not lie smooth and flat, but instead has alternating raised and lowered areas or ridges that give the appearance of "bubbling" or "roping." Tr. at 45, 48-49, 69-70, 72-73, 129, 156. Additionally, the PDM evaluator showed through testimony that the jacket specifications' defect tables include a defect under the heading "seams and stitching" that states: "Seam

⁵ The general officer's jacket specification includes a table that lists an identical defect. AR, Tab 52, General Officer's Jacket Specification, at 32.

⁶ The PDM evaluator also testified that although Ashland's PDM evaluation forms referenced the specifications' "catch-all" defect, the forms specifically characterized the defect as a bulging slide fastener covering, which, as discussed above, is a stand-alone defect under the specifications. See Tr. at 110-11.

irregular, twisted, puckered, or pleated.” Tr. at 23, 104 (referencing AR, Tab 51, Men’s Jacket Specification, at 30), 129, 155 (referencing AR, Tab 52, General Officer’s Jacket Specification, at 29), 146-47 (referencing AR, Tab 47, Women’s Jacket Specification, at 29); see also Tr. at 120 (referencing AR, Tab 47, Women’s Jacket Specification, at 34 (“Jacket bottom puckered, twisted, or pleated by stitching”). For each of the six puckering-related deficiencies, the PDM evaluator showed how Ashland’s PDMs exhibited puckering. Id. at 22, 43, 46-48, 52, 64, 69-70, 74. She also testified that although in some instances she evaluated the puckering as “slight,” in every case the level of puckering was a defect in her opinion because it was visible. See id. at 26-27, 46, 50, 129-30.

Ashland’s quality control manager also provided testimony regarding the puckering-related deficiencies. She testified that puckering is “something sort of gathered up, not like smooth.” Tr. at 202-03. She also testified that she “disagreed” with each of the deficiencies. See, e.g., id. at 165, 178, 180, 195. For some of the deficiencies, she testified that puckering existed, but that in her opinion it was “less than slight.” Id. at 163, 178, 205-06. For one of the deficiencies, she testified that “I can see some . . . ‘slight’ puckering, but not . . . enough for a defect.” Id. at 195.

Again, Ashland’s disagreement with the agency’s evaluation judgments provides no basis on which to sustain this ground of protest. Here, as with the slide fastener covering-related deficiencies, the agency demonstrated the existence of physical characteristics that constituted a defect under the solicitation’s specifications. Ashland’s challenges against the puckering-related deficiencies are denied.

Past Performance Factor Evaluation

Ashland challenges the agency’s evaluation of the firm’s past performance on a number of grounds. We have considered all of Ashland’s arguments, and we conclude, based on the record, that none has merit. Below we discuss Ashland’s three primary contentions.

Ashland points out that in evaluating the firm’s past performance, the agency did not consider orders delivered by Ashland under the incumbent contract for special measurement or general officer’s jackets. Supp. Protest at 40; Comments at 10-12. Ashland argues that this was unreasonable because the solicitation requires the successful offeror to construct and deliver these types of jackets. Supp. Protest at 40-41; Comments at 10-12; Post-Hearing Comments at 21-22. Ashland maintains that if the agency had considered its past deliveries of these types of jackets, Ashland’s evaluated timely delivery percentage would have increased considerably, thereby elevating Ashland’s proposal rating under the past performance factor. See Supp. Protest at 34; Comments at 13-14; Post-Hearing Comments at 23-24.

The evaluation of past performance, including an agency’s determination of the relevance and scope of the offeror’s performance history to be considered, is a

matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation criteria or with procurement statutes or regulations. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4; Command Enters., Inc., B-293754, June 7, 2004, 2004 CPD ¶ 166 at 4.

As discussed above, the contracting officer concluded that Creighton's proposal was superior to Ashland's under the quality and delivery performance subfactor in part because Creighton's evaluated timely delivery percentage was 91 percent versus Ashland's 61 percent. AR, Tab 41, SSDD, at 7. During the evaluation, the agency documented its reason for not considering special measurement orders for any offeror under the quality and delivery performance subfactor as follows:

Special measurement orders were not considered because the government does not consider such orders to be representative of an offeror's ability to meet large production orders under the contract. Moreover, demand for special measurement orders is unpredictable, often representing less than one percent of a contract's requirements, and are, thus, not reflective of the volume and production operations required for the resultant contract for the subject solicitation.

Tab 39, Creighton Past Performance Re-Evaluation Forms, at 3; Tab 40, Ashland Past Performance Re-Evaluation Forms, at 4. The agency also documented its calculation that under Ashland's incumbent contract, orders for special measurement jackets constituted three tenths of one percent of all orders. AR, Tab 40, Ashland Past Performance Re-Evaluation Forms, at 4.

At the hearing, the agency's past performance evaluator testified that it is the agency's practice not to consider special measurement or general officer's jacket orders when evaluating an offeror's delivery performance because such orders do not indicate how an offeror will perform "depot orders," which are orders for standard sized men's and women's jackets. Tr. at 281, 287-89, 332-333, 349-51. In this regard, she testified that special measurement and general officer's jacket orders are sporadic and usually for one or two jackets for an individual service member, whereas depot orders are regularly scheduled and usually involve quantities in the thousands. Id. at 281, 284, 288-89, 351-52.

The past performance evaluator also testified that a delayed depot order has a significantly more adverse effect than a delayed special measurement or general officer's jacket order because hundreds of service members may be affected by the former, whereas usually only one service member would be affected by the latter. Tr. at 285-86, 352-55. Finally, the past performance evaluator testified that she considered Ashland's production of special measurement and general officer's jackets under the past performance relevancy subfactor, and that Ashland's production of these types of jackets contributed to her decision to assign the highest available rating to Ashland's proposal under the relevancy subfactor. Id. at 323-24.

The agency's rationale for not considering special measurement and general officer's jackets under the quality and delivery performance subfactor is consistent with the annual estimated quantities in the solicitation. Specifically, and as shown in the table in the background section of this decision, the annual estimated quantities for men's and women's jackets was 55,692 and 12,936, respectively, whereas the annual estimated quantities for special measurement and general officer's jackets ranged from 123 to 25. RFP at 11-13.

On this record, we see no reason to question the agency's determination not to consider special measurement and general officer's jacket orders under the quality and delivery performance subfactor. The agency has articulated a reasonable basis to support its evaluation methodology, and its methodology is not inconsistent with the solicitation's evaluation criteria. This ground of protest is denied.

Next, Ashland challenges the agency's findings under the quality and delivery performance subfactor that three delivery orders under the incumbent contract were inexcusably late. Supp. Protest at 34; Comments at 14-16. These findings had the effect of lowering Ashland's evaluated timely delivery percentage. See AR, Tab 40, Ashland Past Performance Re-Evaluation Forms, at 5, 8. As discussed above, Ashland's lower evaluated timely delivery percentage contributed to the contracting officer's finding that Creighton's proposal was superior to Ashland's under the quality and delivery performance subfactor. AR, Tab 41, SSDD, at 7. Ashland argues that although the delivery orders in question were delayed, the delays were excusable for reasons that include severe snow and ice storms, an agency change to the color of the jackets' knit cuff material, and agency changes to the "size mix" of jackets to be delivered within orders. Supp. Protest at 33-34; Comments, exh. 10, Ashland President Decl., ¶¶ 9-14.

An agency's past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, and the protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. General Dynamics--Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 7; Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 5.

The record reflects that during its evaluation, the agency considered Ashland's assertions that the delivery orders in question were excusable.⁷ AR, Tab 33, PNM Addendum, at 4. The agency, however, disagreed and documented its basis for finding the delays inexcusable. Id. In this regard, the agency found that there was no record of Ashland having requested a revised or extended delivery schedule for

⁷ Ashland made these assertions in responses to the agency's negotiation letters. E.g., AR, Tab 30, Ashland Response to Negotiation Ltr. (Mar. 15, 2013), at 8-10.

the deliveries. See AR, Tab 33, PNM Addendum, at 4; see also Agency Pre-Hearing Submission at 5-6. As relevant to this finding, prior to the delivery dates for the orders in question, the agency sent Ashland a letter advising the firm of its “obligation” under the incumbent contract to “notify the contracting officer as soon as you become aware that you will not meet the requirements of the contract, including . . . the required delivery schedule.” AR, Tab 54, Cure Notice Correspondence, at 4.

Additionally, the agency’s past performance evaluator testified that she discussed eleven of Ashland’s delayed deliveries under the incumbent contract with the acquisition specialist assigned to the contract. Tr. at 279, 304-05. She testified that based on these discussions, as well as information she found in the agency’s electronic contract file, she concluded that eight of Ashland’s delayed deliveries were excusable, but that the three in question here were not excusable. Id.

Our Office afforded Ashland an opportunity to submit any requests it made for extensions to the delivery dates for the orders in question. Confirmation of Hearing Notice at 2. In response, Ashland submitted a considerable amount of correspondence between the firm and the agency regarding the incumbent contract. Ashland Pre-Hearing Submission, exhs. A and B, Documents Pertaining to Incumbent Contract. Some of this correspondence apparently factored into the agency’s determination that eight delayed deliveries were excusable. See Agency Post-Hearing Comments at 9. However, Ashland did not provide documents to show that it specifically requested extensions for the three delivery orders in question, much less documents to show that the agency approved any such request.

Under these circumstances, we view the agency’s evaluation findings to be reasonable. Ashland’s allegations amount to disagreement with the agency’s judgments regarding Ashland’s past performance and provide no basis on which to sustain the protest. See Capps Shoe Co., Inc., B-298196, B-298196.2, July 6, 2006, 2006 CPD ¶ 139 at 3-5; KELO, Inc., B-284601.2, June 7, 2000, 2000 CPD ¶ 110 at 6.

Finally, Ashland argues that under the quality and delivery performance subfactor the agency improperly considered orders delivered under contracts performed by a joint venture (JV) consisting of Ashland and Macon Garment, Inc. Supp. Protest at 36; Comments at 16-19; Post-Hearing Comments at 25-26. As relevant to this argument, the record reflects that in its evaluation, the agency considered five contracts performed by the Ashland/Macon JV. AR, Tab 40, Ashland Past Performance Re-Evaluation Form, at 2. For these contracts, the agency noted numerous timely deliveries, but it also noted a number of delayed deliveries and two “warranty actions.” Id. at 4-8. Ashland argues that the agency’s consideration of these contracts was improper for three reasons: Ashland would not subcontract with Macon if awarded a contract under this solicitation; the five contracts were not

awarded to Ashland but to a separate entity, the Ashland/Macon JV⁸; and Macon, not Ashland, was responsible for “actual production” under the five contracts. Supp. Protest at 36; Comments at 17-19; Post-Hearing Comments at 25-26.

The record reflects that the agency considered Ashland’s position on this issue during its evaluation. In this regard, because Macon “did 100% of the manufacturing” on the contract where warranty actions occurred,” the agency’s past performance evaluator found that “Ashland’s responsibility in these quality issues is mitigated and, thereby, limited.” AR, Tab 40, Ashland Past Performance Re-Evaluation Forms, at 4. Further, regarding the delayed deliveries that occurred under the contracts, the past performance evaluator documented her finding that “Ashland has a better positive delivery performance record on contracts in which it participates as a manufacturer.” *Id.* at 8. The record also reflects that “in large part” because of these findings, the agency changed Ashland’s initial--i.e., pre-corrective action--rating under the quality and delivery performance subfactor from marginal to satisfactory. AR, Tab 33, PNM Addendum, at 5. Finally, the record reflects that the SSA reviewed the past performance evaluator’s findings regarding this issue prior to making his source selection decision. See AR, Tab 41, SSDD, at 1; Tr. at 402-06.

Our Office previously has found reasonable an agency’s consideration of an offeror’s past performance under a joint venture in which the offeror was a 50 percent partner. M. Erdal Kamisli Co. Ltd. (ERKA Co., Ltd.), B-403909.2, B-403909.4, Feb. 14, 2011, 2011 CPD ¶ 63 at 6-7. We view the agency’s actions here as similarly reasonable. In this regard, we observe that although Ashland did not manufacture garments under the JV, the record reflects that Ashland nevertheless was a participating member of the JV and that Ashland had a role in the performance of the JV contracts. See Ashland Pre-Hearing Submission, exh. E, Ashland/Macon JV Contract Correspondence (Ashland/agency correspondence evincing Ashland’s management of Ashland/Macon JV contract), exh. F, Ashland/Macon JV Contract Correspondence (same). Further, given that the agency here recognized that Ashland was not the manufacturer under the JV contracts and elevated Ashland’s rating under the quality and delivery performance subfactor accordingly, we see nothing unreasonable about the agency’s consideration of the contracts. This ground of protest is denied.

Allegations of Bias

Ashland also alleges that the evaluation results and certain communications from the contracting officer assigned to Ashland’s incumbent contract reflect agency bias

⁸ Notwithstanding this assertion, Ashland states that for “reasons unknown,” two of the five contracts were awarded in the name of Ashland, rather than the Ashland/Macon JV. Comments at 17.

against the firm. Supp. Protest at 43-48; Comments at 21-24; Post-Hearing Comments at 27-28, 35.

As stated above, following Ashland's prior protests, the agency replaced the initial contracting officer and past performance evaluator, both of whom had administered Ashland's incumbent contract, with a new contracting officer and past performance evaluator, neither of whom were connected with Ashland's incumbent contract. See AR at 17 n.9; Tr. at 272, 370-71, 381. As also stated above, the agency also conducted re-evaluations of Ashland's proposal under both the technical/PDM factor and the past performance factor, and these re-evaluations resulted in the elimination of numerous evaluated deficiencies under the technical/PDM factor and the upward adjustment of Ashland's rating under the quality and delivery performance subfactor. See AR, Tab 15 Contracting Officer Response to Ashland Protest (Jan. 28, 2013), at 1; AR, Tab 33, PNM Addendum, at 5. In our view, these circumstances demonstrate that Ashland's arguments regarding bias have no basis.⁹

In any event, government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Ashland's allegations fail to meet these threshold requirements, and we will not further consider them. See Shinwha Elecs., supra.

The protest is denied.

Susan A. Poling
General Counsel

⁹ To the extent that Ashland asserts that discussions between the new past performance evaluator and the initial past performance evaluator regarding the delayed deliveries under Ashland's incumbent contract were somehow improper, see Post-Hearing Comments at 27-28, 35, we disagree. The initial past performance evaluator was the acquisition specialist assigned to Ashland's incumbent contract. AR at 19 n.9; Tr. at 301. Accordingly, it is logical that she would have first-hand knowledge of the circumstances. Further, the record reflects that the new past performance evaluator contacted the initial past performance evaluator to obtain more detail regarding information that the new past performance evaluator found in the agency's electronic contract file. See Tr. at 277-79, 304-05.