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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548



# Decision

**Matter of:** Front Line Apparel Group

**File:** B-295989

**Date:** June 1, 2005

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
James J. McCullough, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, LLP, for Tullahoma Industries, LLC, an intervenor.
John P. Patkus, Esq., Defense Logistics Agency, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protest is sustained where record shows that agency improperly engaged in a second round of discussions with awardees, but not protester; while there is nothing inherently improper in an agency's conducting additional discussions relating to previously-discussed issues with only one or a limited number of offerors where the agency has remaining concerns relating to those issues, where agency conducts multiple rounds of discussions relating to the same issues with one offeror, it must afford other similarly-situated offerors the same benefit of additional discussions.

**DECISION**

Front Line Apparel Group (FLAG) protests the award of several contracts under request for proposals (RFP) No. SP0100-04-R-0135, issued by the Defense Logistics Agency (DLA) to acquire Army combat uniform trousers. FLAG maintains that the agency misevaluated proposals and engaged in unequal discussions among the offerors.

We sustain the protest.

The RFP contemplated the award of multiple indefinite-delivery, indefinite-quantity contracts to supply army combat uniforms. A portion of the requirement was set aside for small businesses and the balance was solicited on an unrestricted basis; FLAG's protest concerns only contract line item numbers (CLIN) 0011 and 0012, which were for trousers and were set aside for competition among small businesses.

The RFP advised that the agency would award one or more contracts on a "best value" basis, considering price and several non-price criteria. The non-price evaluation criteria for the set-aside portion were, in descending order of importance, product demonstration models (PDM), experience/past performance, surge and sustainment, and DLA mentoring business agreement program. For purposes of the evaluation, the agency subdivided the PDM, experience/past performance and surge sustainment criteria into several subfactors.[1] For the PDM criterion, the subfactors were visual, dimensional and manufacturing operations; for the experience/past performance criterion, the subfactors were delivery, quality, customer satisfaction and experience with the item and, if the firm was manufacturing the item for the first time, whether its previous performance demonstrated its ability to successfully produce the item; for the surge and sustainment criterion, the subfactors were production plan, production schedule, equipment and facilities and management plan. Proposals were assigned adjectival ratings of exceptional, very good, satisfactory, marginal, or unsatisfactory for the PDM, experience/past performance and surge sustainment criteria. Under the DLA mentoring business agreement program criterion (not at issue in the protest), the agency assigned numeric rankings based on its assessment of the relative quality of the proposals. The non-price considerations were, collectively, significantly more important than price, but to the extent that proposals were found closer to equal under the non-price considerations, price would become more important.

DLA received numerous proposals in response to the RFP and, after evaluating them, established an initial competitive range for each CLIN for purposes of conducting discussions. The agency then issued discussion letters to the competitive range offerors seeking revisions to the firms' technical proposals. After evaluating these responses, the agency further reduced the competitive range and requested final proposal revisions (FPR) from the remaining competitive range offerors. (Prior to issuing the request for FPRs, the agency sent two of the competitive range offerors a second letter reopening discussions. These interim letters are discussed in detail below.)

After receiving and evaluating the FPRs, the agency assigned the following ratings to the proposals:

[1] The RFP did not outline the subfactors and there is no information elsewhere in the record specifically addressing the relative weights of the subfactors; we conclude that they were equal in importance. SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84 at 4.

| | FLAG | AC Fabricated | Tullahoma | Rutter Rex | Fox |
|---|---|---|---|---|---|
| **PDM** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |
| **Exp./Past Perf.** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |
| **Surge/Sustainment** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |
| **Overall** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |
| **CLIN 0011 Price** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |
| **CLIN 0012 Price** | [deleted] | [deleted] | [deleted] | [deleted] | [deleted] |

Agency Report (AR), exh. 37, at 23, 27-28. On the basis of these evaluation results, the agency awarded contracts under CLIN 0011 to AC Fabricated Products, Tullahoma Industries and Rutter Rex, Inc, and under CLIN 0012 to Fox Apparel, Inc. AR, exh. 43, at 42-50.

FLAG asserts that the agency misevaluated its proposal under the past performance and surge and sustainment criteria, and that the evaluation overall was inconsistent with the criteria weightings under the evaluation scheme announced in the solicitation. In addition, FLAG asserts that the agency improperly engaged in unequal discussions. We have reviewed all of FLAG's arguments and, except for FLAG's argument relating to the conduct of discussions, find them to be without merit. We sustain the protest as to FLAG's discussions argument.

In support of its discussions challenge, FLAG notes that the record shows that two of the offerors, AC Fabricated and Tullahoma, received a second discussion letter, and that these two offerors--but not FLAG--thus were provided a second opportunity to respond to the agency's concerns relating to their proposals. The agency and intervenor, on the other hand, maintain that there was nothing improper in the agency's conducting multiple rounds of discussions with some, but not all of the offerors; they assert that agencies properly may conduct an additional round of discussions relating to issues that remain outstanding after the first round of discussions.

We agree with FLAG that the agency engaged in impermissible discussions. Discussions must be meaningful, equitable, and not misleading. ACS Gov't Solutions Group, Inc., B-282098 et al., June 2, 1999, 99-1 CPD ¶ 106 at 13-14. While the agency and intervenor are correct that there is nothing inherently improper in an agency's conducting additional discussions relating to previously-discussed issues with only one or a limited number of offerors where the agency has remaining concerns relating to those issues, U-Tech Serv's. Corp.; K-Mar Indus., Inc., B-284183.3 B-284183.4, Oct. 6, 2000, 2002 CPD ¶ 78 at 8, agencies may not engage in what amounts to disparate treatment of the competing offerors. Thus, where an agency conducts multiple rounds of discussions relating to the same issues with one offeror, it must afford other similarly-situated offerors the same benefit of additional

discussions. Martin Elec., Inc., B-290846.3, B-290846.4, Dec. 23, 2002, 2003 CPD ¶ 6 at 8-9.

Here, the agency conducted discussions with FLAG in the areas of past performance and surge and sustainment, after which it rated the firm's proposal [deleted] in both areas. Had the agency done nothing further, we would have no basis to object to its actions, since agencies are not required to afford offerors multiple rounds of discussions in areas that have been the subject of prior discussions where the agency's concerns remain unresolved. Portfolio Mgmt. Disposition Group, B-293105.7, Nov. 12, 2004, 2005 CPD ¶ __ at 2. However, as FLAG alleges, the agency afforded two of the competitive range offerors additional discussions in areas that had previously been discussed with those firms, but did not extend the same opportunity to FLAG.

Specifically, the record shows that the agency provided AC Fabricated initial discussion questions in the areas of [deleted], but the firm apparently did not submit a timely reply to the agency's initial questions. Consequently, the agency afforded AC Fabricators a second opportunity to revise its proposal in these areas. AR, exh. 16. This second round of discussions resulted in AC Fabricators' proposal being upgraded from [deleted] to [deleted] under the [deleted] criterion, which in turn resulted in the firm's overall rating being upgraded from [deleted] to [deleted]. AR, exh. 13, at 9-10; AR, exh. 37, at 23. With regard to Tullahoma, the record shows that the agency initially discussed [deleted] with the firm, and then afforded it a second opportunity to provide additional information in the area of [deleted]. AR, exh. 17. While the additional information did not result in a change in the firm's adjectival rating under the [deleted] criterion, the record shows that it did result in the agency's source selection official distinguishing Tullahoma's proposal from FLAG's under that criterion; Tullahoma's proposal ultimately was rated [deleted] to FLAG's based, in part, on the additional information submitted by Tullahoma during the second round of discussions. AR, exh. 43, at 44.

In view of the foregoing considerations, we find that the agency's actions amounted to disparate treatment of the competing offerors. Since there is no way to determine how FLAG's proposal would have been evaluated had the firm been afforded additional discussions in the areas of [deleted], we further find that FLAG was prejudiced by the disparate treatment. We sustain FLAG's protest on this basis.

We recommend that the agency reopen discussions with all competitive range offerors and obtain and evaluate revised proposals. After performing its reevaluation, the agency should make a new source selection, terminate the contracts awarded, if appropriate, and make award to those concerns found to be in line for award. Finally, we recommend that FLAG be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees.

4 C.F.R. § 21.8(d)(1) (2005). FLAG's certified claim for costs, detailing the time spent and the costs incurred must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel