



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RMS/NTT, a Joint Venture

File: B-245243.2

Date: September 3, 1992

Richard Snyder for the protester,
David M. Nadler, Esq., John Linarelli, Esq., and Ferhan F. Kiper, Esq., Dickstein, Shapiro & Morin, for Nationwide Glove Co., Inc., an interested party,
Lynne E. Georges, Esq., and Michael Tovarelli, Esq., Defense Logistics Agency, for the agency,
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement for glove inserts, where offerors were informed that "[a]ward may be made on the basis of best delivery," in addition to the evaluation of past performance and price, the procuring agency improperly failed to evaluate the offerors' delivery terms or to inform offerors that delivery would not be evaluated; however, the protester, which offered the best delivery terms, was not prejudiced where the record shows that delivery was no longer an agency concern and does not show that the protester would have changed its proposal in any way if it was aware that the government did not need accelerated delivery, and where the protester's proposal was higher priced and significantly lower technically rated in past performance than the awardee's.

DECISION

RMS/NTT, a Joint Venture,¹ protests the award of a contract to Nationwide Glove Co. under request for proposals (RFP) No. DLA100-91-R-0366A, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), for lightweight, cold weather glove inserts.² RMS/NTT contends

¹RMS/NTT represents that it is a joint venture between RMS Industries and National Torch Tip.

²The glove inserts when used with the appropriate glove comprise a cold/wet glove system designed to meet critical
(continued...)

that, as the offeror proposing the best delivery terms, it is entitled to award, that DLA's evaluation of its and Nationwide's past performance is unreasonable, and that DLA's selection of Nationwide was the result of bias.

We deny the protest.

The RFP, issued as a total small business set-aside, contemplated the award of a fixed-price contract for 320,800 pairs of glove inserts, in various sizes, and included a 100 percent option. The required delivery schedule for various sizes of glove inserts and destinations was set forth, with the earliest delivery being 180 days after award. Offerors were also requested to offer accelerated delivery schedules.

The RFP provided that award would be made, based upon an integrated assessment of proposals, to the responsible offeror whose conforming offer was the most advantageous to the government, price and other factors considered. Technical factors were stated to be more important than price, and past performance was the only factor listed as a technical evaluation factor in section M of the RFP. Offerors were informed that past performance would be assessed to evaluate offerors' proposal credibility and relative performance capability. Specifically, the RFP required:

"A description of the offeror's experience and quality history that demonstrates the ability to manufacture the item under this solicitation in accordance with the [g]overnment specification and delivery requirements. This description should include the offeror's record of adherence to contract schedules, satisfaction and will be evaluated in accordance with the provisions set forth in section M of the solicitation."

Section F of the RFP contained a clause that requested offers of accelerated deliveries from the offerors. Under that clause, the following handwritten language appeared:

"Award may be made on the basis of best delivery. Offerors are encouraged to offer their best delivery."

² (...continued)
performance requirements for environmental protection, waterproofness, durability, and dexterity.

Proposals were received from six offerors, and four offers, including those of Nationwide and RMS/NTT, were found to be in the competitive range.³ Nationwide's offer was evaluated as highly acceptable; RMS/NTT's offer was evaluated as unacceptable because RMS/NTT failed to provide any information concerning its experience or quality history.⁴ Discussions were conducted with the competitive range offerors, and best and final offers (BAFO) received.

Nationwide's BAFO price was \$1.27 per glove insert and its technical proposal was evaluated as highly acceptable; RMS/NTT's BAFO price was \$1.30 per glove insert and its technical proposal was evaluated as marginally acceptable.⁶ The agency determined that Nationwide's offer was the most advantageous to the government, considering its high past performance rating and low price. Award was made to Nationwide, and this protest followed.

RMS/NTT first protests that it is entitled to award as the offeror proposing the best delivery terms. In the protester's view, the RFP provided that award would be based upon best delivery terms. DLA responds that accelerated delivery was not an evaluation factor and thus was not considered by the agency in making its award selection.

³Of the two offers excluded from the competitive range, one offeror failed to submit a technical proposal, while the other withdrew its offer. The protester's proposal was included in the competitive range because of the possibility that the proposal could receive an acceptable rating if the required past performance information were provided.

⁴Under the adjectival evaluation scheme stated in the RFP, "highly acceptable" reflected a past performance record that demonstrated an exceptional commitment to customer satisfaction and timely delivery of quality goods or services; that rating indicated a high probability of successful performance. "Unacceptable" reflected a past performance record that demonstrated a lack of commitment to customer satisfaction and timely delivery of quality goods or services; that rating indicated no probability of successful performance.

⁵Nationwide's pricing ranged from \$1.223 to \$1.299 per glove insert; we calculated Nationwide's average price per glove insert, including the option, to be \$1.27.

⁶"Marginally acceptable" was defined in the RFP as reflecting a past performance record that demonstrated less than acceptable commitment to customer satisfaction and timely delivery of quality goods or services; that rating indicated a low probability of successful performance.

We do not agree with either party's interpretation of the solicitation's evaluation scheme. Reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation, see Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379, we find that the only reasonable interpretation of the solicitation is that accelerated delivery would be evaluated along with price and past performance, as a part of the agency's integrated best value assessment.

We note that the solicitation provided for an award "to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the [g]overnment, cost or price and other factors, specified elsewhere in this solicitation, considered." (Emphasis added.) While price and past performance were specifically identified in section M as evaluation factors, offerors were also informed, as noted above, that "[a]ward may be made on the basis of best delivery." The plain language of the solicitation provided that delivery terms would be considered by the agency in its award selection, and the solicitation's award clause specifically incorporated this factor when it provided that factors "specified elsewhere" would be considered.⁷

Contrary to DLA's argument, the fact that the delivery factor was not identified in section M, as it should have been (see Federal Acquisition Regulation § 15.406-5 (FAC 90-2)), is not dispositive of whether this factor could and should be considered in the agency's award selection. See, e.g., Consulting and Program Mgmt., 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. While solicitations must state all significant evaluation factors and subfactors and their relative importance, 10 U.S.C. § 2305(a)(2)(A) (Supp. III 1991), procuring agencies are not bound to any particular manner of presentation, provided the factors and their relative weights are disclosed so as to ensure equal and intelligent competition. Serv-Air, Inc., B-194717, Sept. 4, 1979, 79-2 CPD ¶ 176.

⁷DLA's contemporaneous evaluation documentation also supports our conclusion; specifically, DLA describes the "acquisition situation" in a pre-negotiation briefing document, prepared prior to discussions, by stating that "[t]his is the initial buy for this item. The evaluation factor is [p]ast [p]erformance. Also to be considered, although not formally designated as evaluation factors, are the issues of [b]est [d]elivery and [p]rice." This same documentation also indicates, however, that the agency concluded, based upon its review of the anticipated deliveries of the gloves, with which the inserts would be used, that it did not need accelerated delivery.

Although the RFP informed offerors that delivery terms would be considered in the award selection,⁸ the agency did not consider the offerors' respective delivery terms in making the award selection. While we are mindful of the agency's statements to us, as well as in the contemporaneous evaluation documentation, that the agency ultimately did not need or want accelerated deliveries, the record does not indicate that offerors were so informed of this change.⁹

We do not find, however, that RMS/NTT was prejudiced by this deficiency.¹⁰ First, RMS/NTT does not assert that it would have proposed lower prices if it had been aware that accelerated deliveries would not be evaluated.¹¹ Second, RMS/NTT's proposal was evaluated as significantly inferior to Nationwide's under the past performance evaluation factor, primarily because RMS/NTT did not provide the experience information required by the RFP, despite the agency's specific request for this information during discussions.¹² Consequently, we see no reasonable possibility that the protester's proposal could have been determined to be the most advantageous to the government and

⁸Although the RFP stated that delivery terms would be considered in the award selection, the solicitation was defective because it failed to identify the relative weight to be accorded delivery vis-a-vis the other evaluation factors. See H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 and B-246139.3, Aug. 21, 1992, 92-2 CPD ¶ ____.

⁹DLA asserts that its request for BAFOs stated a new delivery date of 150 days after award that reasonably apprised offerors that accelerated delivery was no longer desired. DLA failed to provide any documentation of this alleged amended delivery schedule, despite our specific request. Consequently, we conclude, based upon the record, that offerors were not reasonably notified that the agency did not desire offers of accelerated deliveries.

¹⁰Prejudice is an essential element of every viable protest. 51 Comp. Gen. 678 (1972); American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. While the reasonable possibility of prejudice is a sufficient basis for sustaining a protest of an agency's violation of procurement regulations, we will not sustain a protest where no prejudice is evident from the record. See Lithos Restoration, Ltd., supra.

¹¹Nationwide's proposed pricing was lower than RMS/NTT's.

¹²As discussed below, we find this aspect of the evaluation to be reasonable.

selected for award, even if RMS/NTT had been informed that accelerated deliveries would not be considered in the award selection.

In this respect, however, RMS/NTT protests that DLA's evaluation of its past performance as marginally unacceptable was unreasonable. It contends that "[i]f the contracting officer had any doubts about RMS/NTT's . . . capability in performance . . . [t]he contracting officer could have performed a [p]re-[a]ward [s]urvey." This contention is meritless. It is an offeror's responsibility to affirmatively demonstrate the merits of its proposal. Vista Videocassette Servs., Inc., B-230699, July 15, 1988, 88-2 CPD ¶ 55. The RFP identified the past experience information that offerors were required to provide to permit the agency to evaluate their proposals; that is, offerors were required to provide information concerning their past contract performance and in particular their quality and delivery history. Despite this admonition, and the agency's subsequent request for this information during discussions, RMS/NTT provided virtually no past experience information other than that RMS has had no government contracts and that NTT has not in recent years been a prime contractor, but has been a subcontractor to unidentified prime contractors. Given the sparsity of information provided in RMS/NTT's BAFO relevant to RMS/NTT's past performance, we have no basis to find unreasonable DLA's assessment of the protester's proposal as no better than marginally acceptable for this factor.¹³

RMS/NTT also protests DLA's evaluation of Nationwide's proposal as highly acceptable under the past performance evaluation factor. RMS/NTT contends that Nationwide had delivered nonconforming leather work gloves to DLA under a prior, unrelated contract and argues that therefore Nationwide's superior evaluation rating for past performance is unreasonable.¹⁴ DLA and Nationwide respond that Nationwide

¹³Indeed, given RMS/NTT's near complete failure to address its past performance in its BAFO, we are unsure how the agency could reasonably upgrade RMS/NTT's technical score from unacceptable to marginally acceptable.

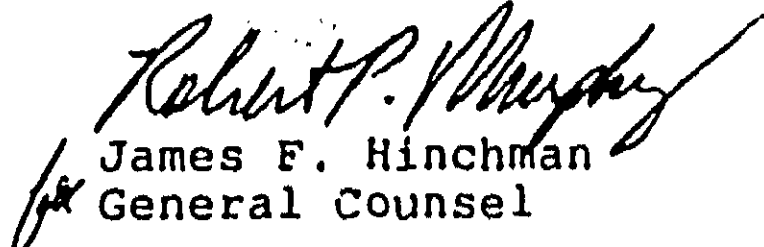
¹⁴RMS/NTT also speculates that Nationwide delivered nonconforming gloves under an emergency buy DLA made for the glove inserts that are sought by this RFP because these glove inserts were purchased under an item description that included a yarn blend that allegedly was available only from a manufacturer that was no longer in business. Nationwide responds that the yarn blend in question was available from two other manufacturers and that its delivered glove inserts
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successfully performed the leather work glove contract and received superior ratings for its performance. While the parties disagree over the interpretation of the prior contract's specifications, we find no basis in this record to conclude that Nationwide did not successfully perform that contract. In this regard, we note that Nationwide completed its contract and its delivered gloves were accepted.

Finally, RMS/NTT protests that the award to Nationwide is the result of bias in favor of Nationwide. The protester's only evidence of this bias is that, as documented in the agency's pre-negotiation briefing document, DLA discussed the anticipated delivery schedule for the gloves, with which the inserts will be used, with Illinois Glove Company, the contractor for the gloves. RMS/NTT alleges that Illinois Glove is Nationwide's subsidiary and that this indicates that, prior to DLA's discussions with offerors and request for BAFOs, the agency had decided to make award to Nationwide. Nationwide responds that Illinois Glove is not a subsidiary of or in any way affiliated with Nationwide, but is a competitor.

We will not attribute unfair or prejudicial motives to a contracting activity on the basis of unsupported allegations, inference, or supposition. Admiral Towing and Barge Co., B-245600; B-245602, Jan. 16, 1992, 92-1 CPD ¶ 83. Here, the record shows that DLA only contacted Illinois Glove to determine its requirement for accelerated deliveries of the glove inserts to match anticipated deliveries of the gloves. In any case, there is no evidence that Illinois Gloves and Nationwide are affiliates. In sum, there is no evidence in the record to support RMS/NTT's allegations of bias.

The protest is denied.


for James F. Hinchman
General Counsel

¹⁴ (...continued)
satisfied the required specifications. Since RMS/NTT does not respond to or otherwise refute Nationwide's explanation, we conclude that Nationwide did not deliver nonconforming goods. In any event, the yarn blend requirement, to which RMS/NTT points, is not in this RFP.