



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Jensen Promotional Items, Inc.

File: B-421884; B-421884.2

Date: November 17, 2023

Ruth E. Ganister, Esq., Rosenthal and Ganister, LLC, for the protester.
Gregory Mathews, Esq., Defense Logistics Agency, for the agency.
Michael P. Price, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of proposals and exclusion of the protester's proposal from the competition is denied where the agency's evaluation was reasonable and consistent with the terms of the solicitation, and where patent ambiguities in the solicitation were not challenged prior to the due date for receipt of proposals.

DECISION

Jensen Promotional Items, Inc., a small business of Chesapeake, Virginia, protests the exclusion of its proposal from the competition conducted under request for proposals (RFP) No. SPE1C1-23-R-0063, issued by the Defense Logistics Agency (DLA) for berets for military service member uniforms. The protester contends that the agency improperly eliminated its proposal from further consideration under the procurement.

We deny the protest.

BACKGROUND

On May 17, 2023, DLA issued the RFP pursuant to Federal Acquisition Regulation parts 12 and 15, seeking proposals for military service member berets. Agency Report (AR), Exh. 1, RFP at 1, 64, 70; Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3.¹ The RFP was set aside for small businesses and contemplated

¹ The RFQ was amended two times for minor changes and to extend the deadline for receipt of proposals. COS/MOL at 4. All citations to page numbers refer to the Adobe PDF page numbers unless otherwise indicated.

the award of up to two indefinite-delivery, indefinite-quantity (IDIQ) fixed-price with economic price adjustment contracts for a 48-month period of performance. RFP at 1, 10, 11; COS/MOL at 3. The RFP contained contract line item number pricing for two separate “lots” of berets, and advised that the agency intended to make a separate award for each lot, though the agency reserved the right to award both lots to the same firm if it was determined to be in the government’s best interest. RFP at 11. The agency estimated a contract value of \$13.3 million for beret lot 1, the subject lot of the instant protest. COS/MOL at 4.

The RFP provided that DLA intended to award contract(s) to the responsible firm whose offer, conforming to the solicitation, would be most advantageous to the government, considering price and other evaluation factors. *Id.* at 70. The RFP further advised that the agency would make a best-value tradeoff determination in making its award. *Id.* at 70-71. The RFP stated there would be two non-price evaluation factors: (1) past performance; and (2) product demonstration models (PDMs). *Id.* Past performance was a more important factor than PDMs, and when combined, the non-price factors were significantly more important than price. *Id.*

As relevant to the protest, the RFP provided offerors instructions for submitting PDMs to DLA. Section L of the RFP instructed offerors to submit one PDM, conforming to a particular national stock number and size, for each production facility or place of performance identified in their proposals. *Id.* at 68. The RFP further advised in the same section that PDMs would be evaluated “for conformance to each item’s specification characteristics. Failure of the PDMs to conform to all such characteristics will result in rejection of the entire proposal.” *Id.* at 69.

Section M of the RFP advised that PDMs would be evaluated in accordance with commercial item description (CID) AA 55184A, and for conformance to the beret specifications therein. *Id.* at 71. Further, the PDMs would be evaluated to determine quality workmanship and conformance with design and performance requirements. *Id.* PDMs would receive adjectival ratings of either unacceptable, marginal, acceptable, good, or outstanding. *Id.* at 76. The RFP also advised that a rating of unacceptable for any PDM “will remove the offeror from consideration for award.” *Id.* at 73.

Jensen timely submitted its proposal and a PDM by the June 30 closing date for receipt of proposals. COS/MOL at 12. DLA’s technical team subsequently evaluated all PDMs and documented its evaluation. *Id.* at 13. Each PDM proposal evaluation form contained the following assessment categories: (1) manufacturing operations; (2) visual requirements; and (3) dimensional requirements. *Id.*; AR, Exh. 7, Jensen Evaluation Form at 1. The evaluation form for the protester’s PDM stated that the PDM contained a “[v]isible seam on outside of beret” that did not conform with paragraph 3.1 of the CID. COS/MOL at 14-15; AR, Exh. 7, Jensen Evaluation Form at 1-2. As a result, the agency assigned the protester’s PDM a rating of unacceptable under the visual requirements category, and a rating of unacceptable overall. COS/MOL at 14; AR, Exh. 7, Jensen Evaluation Form at 1.

On August 8, DLA sent Jensen a notice explaining its evaluation findings, and stated that Jensen's proposal was "not awardable and, [would] not be considered for award under this solicitation." AR, Exh. 11, DLA Notice to Jensen at 1. The protester timely filed its protest with our Office on August 11.

DISCUSSION

Jensen's protest raises three primary challenges: (1) the agency unreasonably evaluated Jensen's PDM; (2) the agency improperly assigned the PDM a rating of unacceptable and eliminated Jensen's proposal from the competition; and (3) the agency exhibited bias against Jensen and acted in bad faith. Comments & Supp. Protest at 2-7.

DLA argues that its technical team properly evaluated Jensen's PDM in accordance with the CID and solicitation. COS/MOL at 22. Further, the agency contends that the rating of unacceptable assigned to the protester's PDM was consistent with the adjectival ratings defined in the solicitation and thus, with a rating of unacceptable properly assigned, the agency reasonably excluded the protester's proposal from the competition. *Id.* at 25-30. Lastly, the agency argues that its evaluation could not have exhibited bias or been the result of bad faith because it evaluated the PDMs blinded to the identities of the PDMs manufacturers, and the protester has not otherwise demonstrated that the agency acted with malicious intent specifically to harm Jensen. *Id.* at 20-21.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor will we substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. *Dyncorp Int'l, LLC*, B-419100, B-419100.2, Dec. 16, 2020, 2021 CPD ¶ 7 at 7. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *AECOM Mgmt. Servs., Inc.*, B-417639.2, B-417639.3, Sept. 16, 2019, 2019 CPD ¶ 322 at 9. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. *Vertex Aerospace, LLC*, B-417065, B-417065.2, Feb. 5, 2019, 2019 CPD ¶ 75 at 8.

For the reasons explained below, we deny the protest.²

Evaluation of Jensen's PDM

Jensen argues that DLA's evaluation of its PDM was unreasonable. In this regard, the protester raises multiple challenges to the conduct of the PDM evaluation. First, the protester alleges that the agency provided "no notice" as to how the agency would

² Jensen raises various collateral arguments in support of its primary protest grounds. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

examine the berets, and that as a result, the agency “effectively made up their method of visual examination” that was contrary to industry standard.³ Comments & Supp. Protest at 4; Supp. Comments at 3. The protester additionally challenges the qualifications, experience, and personal characteristics of the agency’s technical team that conducted the evaluation. In this regard, the protester contends, among other things, that the technical team lacked experience specifically examining berets, failed to indicate whether or not the team members wore glasses, and whether they were wearing glasses at the time of examination, and failed to indicate their level of training and education in the subject area by, for example, indicating whether they had backgrounds in textile sciences.⁴ Comments & Supp. Protest at 4. The protester also challenges the agency’s evaluation of PDMs on the basis that the pictures provided by the agency in response to the protest, one depicting Jensen’s PDM and another depicting an acceptable PDM, appear to be photographed from different distances and with different levels of magnification, which according to the protester demonstrates that the agency unequally evaluated Jensen from other offerors. *Id.* at 6.

DLA contends that the technical team properly and reasonably evaluated Jensen’s PDM in accordance with the CID and the terms of the solicitation. Supp. COS/MOL at 16. The agency argues that its technical team had several years’ experience examining berets and submitted declarations from the two members of the technical team attesting to the evaluation conditions and relevant experience and training of the technical team members. *Id.* at 14-15; see AR, Exh. 8 and 9, DLA Technical Team Decls. The agency further argues that in the absence of examination procedures prescribed by the solicitation, its technical team otherwise examined all PDMs consistently and in

³ In a declaration from the president of the protester, the president describes a “[three]-foot rule” standard for the visual examination of berets. Comments & Supp. Protest exh. 1, Jensen Decl. at 2-3. Under this standard, the protester alleges personnel from DLA previously “determined that the berets should be held [three] feet away from the evaluator. If visual defects were visible at that distance, they would be scored. If no defects were observed at that distance, the beret would pass.” *Id.* at 2. Notably, the solicitation here is silent regarding any distance standard required for the evaluation of PDMs for this procurement.

⁴ The protester also cites to our Office’s past decisions concerning an agency’s use of undisclosed evaluation criteria. Comments & Supp. Protest at 5. In response, the agency contends that the protester does not identify what undisclosed evaluation criteria the agency allegedly considered when evaluating PDMs. Supp. COS/MOL at 16. The protester offered no meaningful response to the agency in this regard, and we consider this line of argument abandoned. See *PiperCoughlin, LLC*, B-414352.2, Apr. 17, 2018, 2018 CPD ¶ 143 at 4 n.7 (finding protest ground abandoned when agency addressed protester’s argument in agency report, but protester failed to meaningfully address the agency’s response in its comments).

accordance with the terms of the solicitation and the CID.⁵ Finally, the agency argues that the photographs included with the agency report were not taken as part of the evaluation but rather were provided in response to the protest to show the defect in Jensen's PDM. The agency thus asserts that the pictures are not evidence that the agency unequally evaluated PDMs. Supp. COS/MOL at 17.

The RFP provided little detail regarding the conduct of PDM evaluations. As explained above, the RFP stated PDMs would be evaluated for conformance in accordance with the CID for berets. RFP at 71. As amended by the RFP, paragraph 3.1 of the CID provided that berets "shall be constructed from a one piece knitted wool shell with no visible seam on the outside of the finished beret." AR, Exh. 2a, Beret CID at 2; see RFP at 16. The CID also stated that the products shall meet the salient characteristics of this CID, and that "[e]ach beret shall be examined for visual and dimensional defects which affect the appearance, material, workmanship, and marking." AR, Exh. 2a, Beret CID at 9. Finally, the CID stated that each beret "shall be examined for the defects as listed in Table VI." *Id.* Table VI of the CID contained several listed defects by category; among the defects under the "material and workmanship category," was one defined as "[a]ny component not in accordance with [the] specified requirement." *Id.* at 10.

The technical team was comprised of two individuals, a quality assurance specialist and a supervisory quality assurance specialist. The declarations from these two individuals describe their respective experience and qualifications, the PDM examination procedures used by the agency, and the conditions present during the evaluation. The quality assurance specialist explains that he has worked in this position for 9 years, and in the DLA Clothing and Textile Supply Chain in the dress clothing division for 2.5 years, with previous DLA quality assurance experience in the industrial hardware division. AR, Exh. 8, Technical Team Member No. 1 Decl. at 1. *Id.* The quality assurance specialist further explains he has 25 years of private sector manufacturing quality assurance experience and has a Defense Acquisition Workforce Improvement Act (DAWIA) level 2 certification with training in "specifications/standards and quality/technical requirements." AR, Exh 13, Technical Team Member No. 1 Supp. Decl. at 1.

Similarly, the supervisory quality assurance specialist explains that he has worked in this position for 15 years, and in the DLA Clothing and Textile Supply Chain for nearly 2 years, with previous supervisory experience in the industrial hardware division for 4 years. AR, Exh. 9, Technical Team Member No. 2 Decl. at 1; AR, Exh. 14, Technical Team Member No. 2 Supp. Decl. at 1. The supervisory quality assurance specialist further explains he has a DAWIA level 3 certification with training in "specifications/standards and quality/technical requirements." AR, Exh. 14, Technical Team Member No. 2 Supp. Decl. at 1.

⁵ In addition to the agency's argument that the solicitation did not prescribe more specific examination procedures, the agency also states it has no knowledge of the "[three]-foot rule" mentioned by the protester. Supp. COS/MOL at 16.

With respect to the evaluation, the quality assurance specialist explains that he reviewed the CID prior to evaluating PDMs, and then evaluated PDMs in accordance with the CID and for conformance with the requirements therein. AR, Exh. 8, Technical Team Member No. 1 Decl. at 1. He states that the evaluations took place during daylight hours and were performed indoors under the fluorescent lighting of the agency building, and without ambient light from outdoors. *Id.* at 2. Further, the quality assurance specialist describes evaluating PDMs for visual requirements described in the CID by inspecting the berets in hand “at distances ranging from 1 to 2 feet, under bright fluorescent lighting.” *Id.*

The quality assurance specialist states that during his evaluation of Jensen’s PDM, he identified “one major defect in the PDM – a visible seam on the outside of the beret.” *Id.* As a result, the quality assurance specialist explains that the visible seam constituted a defect and that Jensen’s PDM did not meet the salient characteristic of having no visible seam on the outside of the beret and was therefore unacceptable.⁶ *Id.* at 2-3.

Here, we find no basis to question the technical team’s evaluation of PDMs. In the absence of more detailed or specific procedures for examining PDMs in the solicitation, the agency had broad discretion regarding the conduct of the PDM evaluation, so long as the evaluation was otherwise reasonable and consistent with the terms of the solicitation. As described above, the solicitation and CID provided that the berets “shall be examined for visual and dimensional defects.” AR, Exh. 2a, Beret CID at 9. The technical team’s declarations describe in detail how the berets were examined for such defects, including a description of the environmental conditions and how the evaluators conducted the examination. The declarations also describe the results of the examination, notably explaining the observation of a visible seam on the outside of the protester’s PDM. Further, in response to the protest, the technical team members provided a detailed description of their experience and training, including several years’ experience working at DLA and substantial quality assurance and specification training. On this record, we find no basis to question the agency’s exercise of discretion and the reasonableness of the conduct of the evaluation.⁷

⁶ In his declaration, the supervisory quality assurance specialist confirms the findings of the quality assurance specialist. AR, Exh. 9, Technical Team Member No. 2 Decl. at 1-2.

⁷ Further, our Office generally will not review allegations challenging the fitness or credentials of an agency’s evaluation team. *American Corr. Healthcare, Inc.*, B-415123.3 *et al.*, Jan. 2, 2018, 2018 CPD ¶ 85 at 5 (“[W]e have long recognized that the selection of individuals to serve as evaluators is a matter within the discretion of the agency, and, accordingly, we do not review allegations, such as these, concerning the evaluators’ qualifications or the composition of evaluation panels absent a showing of possible fraud, conflict of interest, or actual bias on the part of evaluation officials”). Though the protester alleges that the agency was biased against Jensen, we find, as discussed below, no basis to sustain the protest on this ground.

We also find the protester's argument that the pictures provided by the agency demonstrate that Jensen's PDM was evaluated with greater scrutiny to be without merit. The agency explains that pictures were provided merely for demonstrative purposes, and they were not taken as part of, or relied on for, the evaluation of PDMs. Supp. COS/MOL at 6. On the record before us, we find no basis to question the agency's actions in this regard. In sum, nothing in the record suggests that the agency's evaluation of PDMs and identification of a visible seam on the protester's PDM was unreasonable, and this protest ground is therefore denied.

Assignment of Unacceptable Rating and Elimination from the Competition

Jensen argues that, in any event, its PDM conformed to both the salient characteristics requirement and visual requirements of the RFP and CID. Protest at 4. In this regard, the protester contends that its PDM was "a one piece knitted wool shell that was one single piece of fabric," and that "seam visibility or lack thereof is not a listed defect" in the CID. *Id.* The protester further maintains that the solicitation did not advise that a defect relating to a seam or closure line would result in the automatic rejection of an offer, and that its PDM as evaluated "does not meet the absolute rejection standard set forth" by the RFP. Comments & Supp. Protest at 2. The protester also argues that the solicitation and CID contain inconsistencies regarding whether a PDM evaluated as containing weaknesses or deficiencies could be acceptable. Supp. Comments at 2.

DLA argues that the RFP included the material solicitation requirement that PDMs conform to all characteristics of the item specification, including having no visible seam on the outside of the finished beret. Supp. COS/MOL at 11. The agency contends that the solicitation also "unequivocally state[d] that failure of a PDM to conform to all characteristics contained in the item specification will result in the rejection of an offeror's entire proposal." *Id.* at 12 (*citing* RFP at 69). Because its technical team found a visible seam on the protester's PDM, the agency maintains that the protester's PDM was "rejected in its entirety as required by the [s]olicitation and therefore reasonably eliminated from the competitive range." *Id.* at 13. Lastly, the agency asserts that any alleged conflicting provisions in the solicitation were patent ambiguities, which the protester should have challenged prior to the due date for receipt of proposals. Agency Supp. Filing at 1-2.

As previously stated, in reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals; rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. *AECOM Mgmt. Servs., Inc., supra* at 9.

As mentioned above, section L of the RFP provided as follows with respect to the submission and evaluation of PDMs: "[t]he PDMs will be evaluated for conformance to each item's specification characteristics. Failure of the PDMs to conform to all such characteristics will result in rejection of the entire proposal." RFP at 69. Section M of the RFP stated that the PDMs would be evaluated for conformance to the CID, which in

turn required the PDMs to be examined for visual defects and any defects identified in Table VI. *Id.* at 71; AR, Exh. 2a, Beret CID at 9. One of the defects included in Table VI was whether any component of the PDM was not in accordance with a specified requirement. AR, Exh. 2a, Beret CID at 10. The agency rejected Jensen's PDM because it had a visible seam on the outside, which failed to conform to the CID requirement that the beret "be constructed from a one piece knitted wool shell with no visible seams." AR, Exh. 7, Jensen Eval. at 1; Exh. 2a, Beret CID at 2.

On this record, we find the agency's evaluation to be reasonable and consistent with the solicitation. As mentioned above, the RFP explained that a PDM's failure to conform to all item specification characteristics would result in rejection of the entire proposal. The agency found a visible seam on the protester's PDM, which resulted in a finding of nonconformance with paragraph 3.1 of the CID. Thus, we find the agency's conclusion that the PDM failed to conform to all item specifications was reasonable.⁸

Jensen argues that "[t]here is no defect listed on Table VI [of the CID] relating to the closure of the knitted shell," or otherwise relating to seams, and that therefore the agency erroneously identified the visible seam as a visual defect. Comments & Supp. Protest at 2. This reading of the CID, however, is incomplete, and fails to consider the examination requirements established by the solicitation. Table VI included as a defect any component of the PDM that did not comply with a specified requirement, and a lack of a visible seam was one such requirement. Moreover, paragraph 5.1 of the CID provided that the products "shall meet the salient characteristics of this [CID]" and again, lack of a visible seam was a salient requirement. AR, Exh. 2a, Beret CID at 9. Accordingly, we find the agency acted reasonably in concluding this CID language, read together with the RFP's statement that failure to conform to item specification characteristics will result in rejection of the entire proposal, afforded a basis on which to assign the protester's PDM a rating of unacceptable.

Jensen also contends that conflicting language in the solicitation reserved the right for the agency to keep an offeror in the competitive range even if the PDM contained one or more weaknesses or deficiencies. Supp. Comments at 2. In this regard, the protester notes that section M of the solicitation defined the term "weakness" as a "deviation[] from the requirements as specified in the specification, [CID], purchase description, etc. The terms weakness and deficiency are synonymous and interchangeable." *Id.* (*citing* RFP at 76). Jensen further contends that under the

⁸ The agency also argues that it reasonably found the protester's PDM unacceptable because the existence of a visible seam constituted a deficiency, and that the PDM was "unacceptable for its intended function because it could not be worn as part of the service members' uniforms." COS/MOL at 26-27. In this regard, the agency contends that the item description for the berets establishes the characteristics of the beret required to satisfy the government's needs, and a beret that does not conform to the visual requirements established would not "meet the [U.S. military's] needs and satisfy military uniform standards." Supp. COS/MOL at 11. We also find no basis to disturb the agency's judgment in this regard.

adjectival rating evaluation scheme, both the “acceptable” and “good” ratings allowed acceptance of a PDM that contained a weakness.⁹ See *id.* (citing RFP at 76 (defining a rating of “acceptable” as “[t]he PDM contains a weakness or weaknesses that require preventative corrective action in production” and a rating of “good” as “[t]he PDM contains a weakness or weaknesses that are not significant and are very easily correctable during production”)). Jensen thus maintains that these “inconsistencies” in the solicitation provide the agency with discretion to keep an offeror in the competitive range even if its PDM had deficiencies. *Id.* at 2-3.

We disagree with Jensen’s argument. Although the ratings of acceptable and good both contemplated a PDM potentially having a weakness, that weakness had to be either not significant and very easily correctible or require only preventative corrective action. RFP at 76. Jensen has not demonstrated that the deficiency identified by the agency should have been characterized as not significant, very easily correctible, or requiring only preventative corrective action. Rather, the agency found that the visible seam was a deficiency, which meant that Jensen’s PDM “could not become acceptable without extensive corrective action or Jensen submitting a new PDM.” AR, Exh. 8, Technical Team Member No. 1 Decl. at 3. This finding required the assignment of a rating of unacceptable, which was defined in part as “[t]he PDM cannot become acceptable without extensive corrective action or remedy that would be tantamount to a new PDM.” RFP at 76. On this record, we do not agree that the agency’s evaluation was inconsistent with the RFP’s ratings scheme or that the agency abused its discretion in eliminating Jensen from the competitive range.

To the extent Jensen argues that the “inconsistencies” in the solicitation rendered the agency’s evaluation improper, we find this to be an untimely challenge to a patent ambiguity in the solicitation that we will not consider. An ambiguity exists when two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Eagle Technologies, Inc.*, B-420135.2 *et al.*, Jun. 22, 2022, 2022 CPD ¶ 198 at 9. A party’s interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation is reasonable and susceptible of the understanding that it reached. *The HP Grp., LLC*, B-415285, Dec. 14, 2017, 2017 CPD ¶ 385 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for proposal submission. When a patent ambiguity exists but is not challenged prior to the proposal submission deadline, we will not consider subsequent untimely arguments asserting the protester’s own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10. Further, an offeror may not simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the

⁹ The RFP defined the rating of “unacceptable” as “[p]roposal does not meet requirements of the solicitation, and thus, contains one or more deficiencies, and/or risk of unsuccessful performance is unacceptable. Proposal is unawardable.” RFP at 76.

RFP and then expect relief when the agency does not act in the manner assumed. *Envtl. Sys. Research Inst., Inc.*, B-408847.2, Jan. 17, 2014, 2014 CPD ¶ 53 at 5.

According to section M of the solicitation, a PDM could receive a rating of good or acceptable--and be eligible for award--while still containing weaknesses, which the solicitation stated were synonymous with deficiencies. This provision contradicts the language in section L, which provided that the failure of a PDM to conform to all item specification characteristics would result in rejection of the entire proposal. In this regard, section L of the RFP suggests that any deviation from the specification would render a proposal unawardable, whereas section M advises that a PDM could contain a weakness--defined as a "deviation from the requirements as specified" in the CID--and result in an offeror being permitted to remain in the competition, depending on the degree or nature of the deviation. From the face of the solicitation, it was therefore unclear whether a particular deviation from the specification resulting in a weakness or a deficiency would render a PDM unawardable. We find that any argument that this conflicting solicitation language required the agency to keep Jensen's PDM in the competitive range is a challenge to a patent solicitation ambiguity that needed to be filed prior to the due date for receipt of proposals in order to be timely.¹⁰

The Agency Acted with Bias in its Evaluation of Jensen's PDM

Jensen argues that DLA was biased in its evaluation of the protester's PDM, due to alleged issues stemming from the protester's performance under a previous contract. Comments & Supp. Protest at 7. As background, in response to the protest, the agency noted that under a previous contract the protester allegedly delivered berets that contained a visible seam on the outside shell and that these berets were rejected because the visible seam was identified as a major defect. COS/MOL at 16. Jensen contends that the agency's reference to this alleged issue is evidence that the agency must have been biased in its evaluation of Jensen's PDM because the technical team

¹⁰ The protester further argues that section M of the RFP permitted a proposal containing a weakness or deficiency to move forward in the competitive range. Resp. to Agency Supp. Filing at 2. In this regard, the protester argues that provisions of section M were the "controlling provision[s]," and that these were the provisions set forth by the agency that told offerors how the agency would evaluate PDMs. *Id.* Our Office has found, however, that patent ambiguities between section L and section M of the RFP should be challenged prior to the due date for receipt of proposals. See *Spatial Front, Inc.*, B-417985, B-417985.2, Dec. 18, 2019, 2020 CPD ¶ 8 at 13 (finding that solicitation containing conflicting language in sections L and M constituted a patent ambiguity that required the protester to raise arguments concerning the ambiguity or the proper interpretation of the solicitation prior to the time set for receipt of proposals); see also *Superior Gov't Sols.*, B-409475.4, B-409475.5, Sept. 25, 2014, 2014 CPD ¶ 292 at 6 (finding that when there are conflicting provisions in sections L and M of the solicitation, an offeror may not "simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the RFP and then expect relief when the agency does not act in the manner assumed").

was aware of Jensen's performance under the prior contract and because of this, the agency did not conduct a fair evaluation of Jensen's bid. Comments & Supp. Protest at 8.

DLA maintains that its conduct of the procurement was proper and that it did not act in bad faith, and that in any event, the protester has failed to meet the standard required to establish the agency acted in bad faith. Supp. COS/MOL at 17-20.

Our decisions have consistently explained that government officials are presumed to act in good faith, and a contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials based upon mere inference, supposition, or unsupported speculation. *Lawson Envtl. Servs. LLC*, B-416892, B-416892.2, Jan. 8, 2019, 2019 CPD ¶ 17 at 5 n.5. The burden of establishing bad faith is a heavy one. A protester must present facts reasonably indicating, beyond mere inference and suspicion, that the agency acted with specific and malicious intent to harm the protester. *Id.* Based on our review of the record, we find no basis to conclude that the agency acted with bias in its evaluation of Jensen's PDM.

DLA explained that its evaluation of PDMs was conducted on a blind basis. The technical team explained that the contracting officer, prior to providing the technical team with the PDMs for evaluation, "obscured all portions of the labels affixed to offerors' PDMs that indicated offerors' identities." Supp. COS/MOL at 17-18. Thus, the technical team stated that it had no way of knowing which PDM belonged to which offeror on its evaluation of PDMs, as identifying information had been "blacked out." AR, Exh. 14, Technical Team Member No. 2 Supp. Decl. at 1.

We find no basis to sustain the protest on the ground that DLA was biased against Jensen. The agency described the reasonable procedures it employed to ensure a blind, neutral evaluation of PDMs.

The protester has provided no reason for us to question the agency's statements concerning the nature of evaluations in this respect, nor has it identified any reason for

us to believe that the technical team was aware that it was evaluating Jensen's PDM at the time of its contemporaneous evaluation.¹¹ We therefore deny this protest ground.¹²

The protest is denied.

Edda Emmanuelli Perez
General Counsel

¹¹ The protester also maintains that the label of its PDM contained the contract number of the previous contract and that the contract number would have revealed to the technical team that it was evaluating Jensen's PDM. Supp. Comments at 5. As noted above, the technical team stated that it did not know the identity of the offeror whose beret they were evaluating. The protester's argument suggesting the technical team could have identified the Jensen PDMs based on their contract number represent mere inference and speculation, and we will not attribute unfair motives to procurement officials in this regard absent convincing proof.

¹² The protester also asserts that the agency's discussion in the agency report of the alleged performance issues on the previous contract constituted bad faith on the part of the agency, because it was an incomplete representation of the facts and an effort to paint a picture to our Office of "a contractor who had a history of manufacturing 'defective' berets." Supp. Comments at 7. As explained above, the discussion of the protester's alleged issues on a prior contract was first introduced in the agency report and was not considered as part of the evaluation. This argument thus does not implicate the conduct of procurement officials or the evaluation of PDMs, but rather, centers on arguments made during the adversarial bid protest process. The argument therefore fails to meet the standard for proving bad faith required by our Office and is denied.