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**Comptroller General
of the United States**

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Decision

Matter of: Wilson Beret Company

File: B-289685

Date: April 9, 2002

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DIGEST

Protest of exclusion of protester's proposal from the competitive range is sustained where evaluation under one factor was unreasonable, and correct evaluation could have resulted in a different competitive range determination.

DECISION

Wilson Beret Company protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. SPO100-01-R-0045, issued as a total small business set-aside by the Defense Supply Center Philadelphia (DSCP), Defense Logistics Agency (DLA) for military berets. Wilson asserts that the agency improperly evaluated its proposal.

We sustain the protest.

The RFP sought proposals to supply the Army and Air Force with berets of various colors, including black. With regard to black berets, the RFP contemplated the award of a fixed-price contract for a 2-year base period, with three 1-year options, encompassing 3,643,488 units. Proposals were to be evaluated on the basis of five factors, listed in descending order of importance: experience/past performance;

manufacturing plan; quality control plan; DLA mentoring business agreements program; and price.¹ Non-price factors were significantly more important than price. Award was to be made to the offeror whose proposal was most advantageous to the government.

Thirteen offerors, including Wilson, submitted written proposals to supply black berets, which were evaluated as follows:

	Past Performance	Mfg. Plan	Quality Plan	DLA Mentor	Overall	Price (millions)
Offeror 1	A (low end)	MA	A	N	A	[deleted]
Offeror 2	MA	UA	UA	6	UA	[deleted]
Offeror 3	A	MA	A	N	A	[deleted]
Offeror 4	MA (high end)	MA	A	N	MA	[deleted]
Offeror 5	MA	A	MA	3	MA	[deleted]
Offeror 6	HA	A	A	N	A	[deleted]
Offeror 7	MA (high end)	MA	MA	1	MA	[deleted]
Wilson	MA (low end)	MA	HA	4	MA	[deleted]
Offeror 9	A	MA	HA	2	A	[deleted]
Offeror 10	MA	A	HA	N	A	[deleted]
Offeror 11	MA (high end)	MA	HA	5	MA (high end)	[deleted]
Offeror 12	MA (low end)	MA	MA	N	MA	[deleted]
Offeror 13	MA (high end)	MA	A	N	MA	[deleted]

Agency Report (AR), Tab 6. Based on these evaluation results and prices, the contracting officer eliminated Wilson and offerors 2, 7, and 9-13 from the competitive range due to their technical ratings and their higher proposed prices, all of which exceeded the agency's price objective for black berets. AR, Tab 7, ¶ 5. In eliminating Wilson's proposal, the contracting officer noted that it had been rated marginally acceptable under both the experience/past performance and manufacturing plan factors, resulting in an overall marginally acceptable rating. Specifically, she found:

The Manufacturing Plan rated Marginally Acceptable contains deficiencies in the manufacturing procedures, production scheduling and production equipment subfactors Wilson's offered prices exceed the Government's negotiation objectives and the offered prices of the highest technically rated offeror in the competitive range,

¹ With the exception of the DLA mentoring factor, non-price factors were rated on an adjectival basis as highly acceptable (HA), acceptable (A), marginally acceptable (MA), or unacceptable (UA). RFP § M, at 52.215-9P17. The DLA mentoring factor was evaluated on the basis of numerical ranking among the offerors or neutral (N).

[offeror 6]. Its technical proposal is considered inferior to [Offerors 1, 3, and 6] and although it is essentially equal to that of [Offerors 4 and 5] from a technical standpoint, it is not superior to them and does not contain features which warrant retaining it in the competitive range.

AR, Tab 7, ¶ 7(h). After receiving notice of its elimination from the competitive range and a debriefing, Wilson filed this protest challenging the evaluation of its proposal under the experience/past performance and manufacturing plan factors, and the resulting elimination of its proposal from the competitive range.

The determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. Dismas Charities, Inc., B-284754, May 22, 2000, 2000 CPD ¶ 84 at 3. Federal Acquisition Regulation (FAR) § 15.306(c) allows an agency to establish a competitive range consisting of only the most highly-rated proposals. Our Office will review an agency's evaluation of proposals and determination to exclude a proposal from the competitive range for reasonableness and consistency with the RFP and applicable statutes and regulations. Novavax, Inc., B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202 at 13; SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4.

We find that the evaluation of Wilson's proposal under the experience/past performance factor was reasonable, but that the evaluation under the manufacturing plan factor was not.

EXPERIENCE/PAST PERFORMANCE

DLA rated Wilson's experience/past performance marginally acceptable based in part on Wilson's performance on a prior contract with Bancroft Cap [deleted], and its proposal to rely on Bancroft for assistance and consultation in various areas of contract performance. Wilson asserts that it was improper for the agency to take Bancroft's poor past performance into account because Wilson did not propose to subcontract or otherwise team with that firm. In Wilson's view, it is a "start-up" company with no past performance record, and therefore should have been rated neutral for experience/past performance.

Wilson is correct that, where an offeror has no record of past performance, it may not be evaluated favorably or unfavorably on past performance. FAR § 15.305(a)(2)(iv); Boland Well Sys., Inc., B-287030, Mar. 7, 2001, 2001 CPD ¶ 51 at 2, n.1. However, the record shows that Wilson did have a past performance record concerning beret manufacture. According to its proposal, "Wilson Beret employees (including the owner) have past experience producing the black berets for DSCP through Bancroft Cap" and "assisted Bancroft Cap establish a finishing operation" in a building rented to Bancroft by Wilson (the "Osceola facility"). Wilson Proposal at 2. With regard to Wilson's president and majority owner, the proposal noted her training "on all aspects of the beret production and processes," her status as a

licensed ISO 9000:2000 instructor, her engineering degree, and work “as a process engineer and as a quality engineer in local industry.” Wilson Proposal at 2-3, 10. In addition, an August 2001 letter from Bancroft to the agency identified the “finishing operation” referred to in Wilson’s proposal as including “attaching the leather sweatband onto the beret,” and identified Wilson’s president as the “manager of the new facility.” Supplemental AR, attach. 1.

Where a proposed employee will have a significant role in contract performance, an agency reasonably may consider that employee’s past performance in evaluating the offeror’s proposal. Lynwood Mach. & Eng’g, Inc., B-287652, Aug. 2, 2001, 2001 CPD ¶ 138 at 4. Notwithstanding Wilson’s claimed status as a startup company, its proposal representations provided DLA with a reasonable basis for concluding that Wilson, through its owner, possessed past performance history with beret production that warranted assigning Wilson’s proposal other than a neutral past performance rating.

Wilson asserts that its connection to the Bancroft contract was limited. Specifically, the protester avers that its president was not hired as a Bancroft employee and did not receive compensation from Bancroft; spent only 2 to 4 hours per week at the facility; never entered into a contract to manage the facility; and only agreed to the limited role at the request of the local mayor and chamber of commerce to “create jobs for the community.” Protester’s Supplemental Comments at 7. Whether or not Wilson’s characterization is correct, however, the fact remains that its proposal, evidently designed to obtain maximum evaluation credit, specifically identified its own past experience producing berets with Bancroft, and stated that it assisted Bancroft in establishing the Osceola facility. Further, as the August 2001 letter shows, Bancroft understood that the facility was being managed by Wilson’s owner. To the extent that its connection to Bancroft’s contract in fact was very limited, it was incumbent upon Wilson to make this clear in its proposal. Offerors are responsible for submitting an adequately written proposal. Carlson Wagonlit Travel, B-287016, Mar. 6, 2001, 2001 CPD ¶ 49 at 3.

In addition to Wilson’s own relevant past performance, the agency considered Bancroft’s past performance in evaluating Wilson under the past performance factor. In determining whether one company’s performance should be attributed to another, an agency must consider the nature and extent of the relationship between the two companies—in particular, whether the workforce, management, facilities, or other resources of one may affect contract performance by the other. Lynwood Mach. & Eng’g, Inc., B-285696, Sept. 18, 2001, 2001 CPD ¶ 113 at 4. Wilson proposed extensive use of Bancroft facilities, expertise, and certain former employees to perform this contract. For example, its proposal stated under the title “Experience/Past Performance” that the firm “can demonstrate the ability to successfully produce the berets” due to: Bancroft’s past mentoring of Wilson, including training of Wilson Beret owners and employees “on all aspects of the beret production and processes”; Bancroft’s offer to train additional employees “on all aspects of the production and

quality assurance, particularly the felting, dyeing and/or blocking operations”; Bancroft’s agreement to consult with Wilson in areas including “manufacturing, sale and distribution of berets, assistance and advice in establishing the manufacturing facility/equipment layout, establishing an accounting system, purchasing of equipment, inventory/supplies, and production shipping and distribution”; and Wilson’s intention, if awarded the contract, to possibly assume Bancroft’s Osceola facility, “including its equipment, staff and system.” Wilson Proposal at 2-3. Wilson also proposed to hire two of Bancroft’s current supervisors, *id.* at 10, and proposed to use Bancroft’s facilities for 150 days for felting, until Wilson’s own machines were delivered. *Id.* at 6. While Wilson states that it has no formal teaming arrangement with Bancroft, its proposed reliance on that firm for virtually all aspects of contract performance made Bancroft’s past performance relevant and appropriate for the agency to consider.

DLA’s past performance evaluation conclusions based on both Wilson’s own and Bancroft’s past performance were reasonable. Bancroft had experienced delivery problems on its beret contract, and the Osceola facility, ostensibly managed by Wilson’s president, was brought in to supplement Bancroft’s production capacity. AR, Tab 5. Wilson apparently was unable to resolve the problem, because Bancroft subsequently requested a revision/extension of its already delinquent delivery order. *Id.* Under these circumstances, the agency could reasonably conclude that Wilson’s past performance was marginally acceptable.

MANUFACTURING PLAN

Wilson asserts that the agency improperly evaluated its proposal as marginally acceptable under the manufacturing plan factor. The proposal was rated marginally acceptable under the first, second and fourth subfactors based on the agency’s finding that it lacked information, including training details and certain written commitments. Wilson maintains that these ratings were unreasonable because the information was either included in its proposal, or was not required by the RFP. We find that the downgrading of Wilson’s proposal under the first and fourth subfactors was unreasonable.²

² We find nothing improper in the evaluation of Wilson’s proposal as marginally acceptable under the second subfactor, production scheduling (offerors’ control and surveillance over subcontractors to ensure that the delivery schedule is met). RFP § L, at 130. The downgrading was based on the absence of an agreement defining the duration and extent of Bancroft’s involvement in the contract. AR, Tab 11. Wilson asserts that this was improper because there was no requirement that such an agreement be provided (Protester’s Comments at 9). However, in light of Wilson’s proposed reliance on Bancroft, we believe the agency reasonably could expect such documentation of Bancroft’s role to be furnished; Wilson’s failure to furnish the information thus provided a reasonable basis for downgrading its proposal.

First Subfactor

Under the first subfactor, offerors were to describe manufacturing procedures to produce the berets, including a list of operations and proposed standard allowed minutes, standard allowed hours, and number of operators. RFP § L, at 130. In its evaluation, the agency downgraded Wilson's proposal on the basis that it did not include sufficient information on manufacturing operations, operators, and proposed training. However, the agency now concedes that Wilson's proposal did in fact contain sufficient information regarding manufacturing operations and operators, and now maintains that Wilson's marginally acceptable rating was justified because "the firm still failed to indicate how much training (and its duration) it anticipated was necessary."³ AR at 8-9. Wilson maintains that this conclusion is unreasonable because its proposal included detailed training information.

Even ignoring the fact that DLA essentially has re-evaluated this aspect of Wilson's proposal in response to the protest, the evaluation conclusion is unsupported.⁴ Wilson's proposal included a Gantt chart containing entries for five different training activities, with durations of from 12 to 22 weeks. Wilson Proposal at 16. Even though the protester specifically called attention to, and included a copy of, this chart in its comments on the agency report, the agency ignored this argument in its supplemental report, and has not undertaken to explain why the chart did not satisfy the informational requirement. Given this failure to address the matter, the fact that the chart, on its face, seems to provide precisely the information requested, and the fact that the agency has abandoned the other bases for downgrading Wilson's proposal in this area, there appears to be no basis for Wilson's receiving any rating lower than acceptable for this subfactor.

³ We note that the agency also commented negatively on Wilson's proposal to use a [deleted] instead of a true linking machine to perform one of the manufacturing operations. DLA does not rely on this aspect of the evaluation to support the marginally acceptable rating.

⁴ Although our Office considers the entire record in determining the reasonableness of an agency's evaluation, including statements and arguments made in response to a protest, we accord greater weight to contemporaneous materials rather than judgments made in response to protest contentions, such as the agency's new judgment here that the training information deficiency alone warranted a marginally acceptable rating for the subfactor. This reflects the concern that, because it was prepared in the heat of an adversarial process, it may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Fourth Subfactor

Under the fourth subfactor, offerors were to provide a profile of the major plant equipment proposed for use on the contract. RFP § L, at 131. The agency rated Wilson's proposal marginally acceptable based on the absence of letters of commitment (LOCs) for any of the equipment it proposed to obtain. AR, Tab 11. Wilson maintains that the downgrading of its proposal on this basis was unreasonable because the RFP made no mention of a requirement for LOCs in this area; Wilson states that it would have provided LOCs had it been aware that its proposal otherwise would be downgraded. The agency responds that it was permissible for it to determine the need for LOCs on a case-by-case basis, even absent an RFP requirement for them.

While we would agree with the agency that it generally may consider LOCs in an evaluation even where they are not expressly required by the RFP, it was unreasonable for the agency to do so here because the RFP was misleading. In this regard, the production equipment subfactor stated:

The offeror shall provide a profile of the major plant equipment proposed for use on any resultant contract. At a minimum, the offeror shall provide a listing that specifies the manufacturer, model number, age, general condition, and quantity of each item listed. If this equipment will not be on hand at the time of solicitation closing, identify the equipment you plan to acquire and describe your method of obtaining the equipment in sufficient time to meet the production requirements. Please note that for equipment procured outside the United States, documentation must be provided for the mode of transportation and the time frame for shipping.

RFP § L, at 131. This description provided specific informational guidelines for offerors to follow with regard to equipment to be obtained after the time of solicitation closing. While it called for identification of the equipment and the method of timely obtaining it, and required other specific documentation for non-domestic equipment, it did not require LOCs. In contrast, the immediately preceding third manufacturing plan subfactor, materials, informed offerors—in all upper case, underlined text—that they must submit LOCs from material suppliers for all components with lead times. RFP § L, at 131. Wilson provided the required LOCs for materials. The agency did not find (and does not now assert) that Wilson's proposal did not meet the informational requirements for the fourth subfactor; rather, the sole reason for the marginal acceptability rating provided by the agency was the failure to provide LOCs. Under the circumstances, we think Wilson reasonably read the list of required information as exclusive, and thus could reasonably assume that it would not be penalized for failing to provide information that was not specified. We conclude that it was unreasonable for the agency to downgrade Wilson's proposal for failure to include LOCs.

Prejudice

We will sustain a protest where there is a reasonable possibility that the protester was prejudiced by the agency's actions, that is, that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). This standard is met here. Absent the flaws discussed above, Wilson's proposal would have been evaluated as acceptable under both the manufacturing procedures and production equipment subfactors. Wilson thus would have had acceptable ratings under three of the four subfactors (only the production scheduling subfactor would remain marginally acceptable), and since the four subfactors were of equal weight (RFP amend. 0001, § M, at 147), it is reasonable to assume that Wilson's proposal may have been rated overall acceptable under the manufacturing plan factor. This added acceptable rating, combined with Wilson's ratings under the other factors, reasonably could have resulted in an overall acceptable technical rating; however, even if Wilson's proposal remained marginally acceptable overall, its individual factor scores would be similar to those of other offerors included in the competitive range.⁵

DLA asserts that, even if all of Wilson's disputed ratings were raised, its proposal still would be eliminated from the competitive range due to its higher price. Supplemental Report at 7. However, the record does not support this position.⁶ While Wilson's price exceeded the agency's "negotiation objectives," Offeror 6 was included in the competitive range despite the fact that its price also exceeded those objectives. Further, although the agency eliminated Offerors 9 and 10 due to their higher proposed prices notwithstanding their overall acceptable ratings, Wilson's price was lower than those offerors' prices. Finally, it is clear from the contracting officer's explanation of her decision to eliminate Wilson's proposal that her decision was based on technical and price factors combined. AR, Tab 7, ¶ 7(h). We conclude that it is not clear whether Wilson's proposal would have been eliminated from the

⁵ Offeror 4 was marginally acceptable (high end), marginally acceptable and acceptable under the three factors, while Offeror 5 [deleted] was marginally acceptable, acceptable and marginally acceptable. Wilson's ratings, as adjusted in accordance with our conclusions, could be marginally acceptable (low end), acceptable and highly acceptable.

⁶ Further, the agency's position in this regard represents, at best, a post hoc price/technical tradeoff. As discussed above, it is our view that such post-protest judgments made in the heat of the adversarial process may not reflect the fair and considered judgment of the agency. Boeing Sikorsky Aircraft Support, supra.

competitive range had the evaluation been conducted properly. Accordingly, we sustain the protest.⁷

RECOMMENDATION

We recommend that the agency re-evaluate Wilson's proposal on the basis of the flaws discussed above and make a new competitive range determination with appropriate supporting documentation. We also recommend that Wilson be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁷ Wilson also asserts that the agency improperly failed to provide it an opportunity to respond to the negative past performance information referenced in the evaluation. Protest at 11. Under FAR § 15.306(b)(1), agencies must conduct discussions with offerors "whose past performance information is the determining factor preventing them from being placed in the competitive range." The agency asserts that Wilson's past performance rating was not the "determining factor"; rather, it was Wilson's overall technically marginal proposal, coupled with its higher proposed price, that resulted in its proposal's elimination. In view of our conclusion that the evaluation and the resulting competitive range determination were deficient, this issue is academic and not for consideration. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.