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**Comptroller General
of the United States**

**United States General Accounting Office
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Decision

Matter of: American Recreation Products

File: B-292689; B-292689.2; B-292689.3

Date: November 6, 2003

Ronald K. Henry, Esq., Kaye Scholer, for the protester.

Ruth E. Ganister, Esq., Rosenthal and Ganister, for Tennier Industries, Inc., an intervenor.

Sean P. Bamford, Esq., Defense Logistics Agency, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably determined that awardee's past performance was superior to protester's is denied where awardee had performed a substantial number of contracts of similar complexity ahead of schedule, received high marks for customer satisfaction, and met its subcontracting goals, while protester had performed fewer contracts, those contracts were not of similar complexity, and the protester did not address subcontracting goals in its proposal.

2. Protest that agency unreasonably evaluated protester's production demonstration model (PDM) is denied where record shows agency reasonably concluded that PDM did not meet certain dimensional requirements and specifications.

DECISION

American Recreation Products (ARP) protests the award of a contract to Tennier Industries, Inc. under request for proposals (RFP) No. SPO100-02-R-4024, issued by the Defense Logistics Agency (DLA) for modular sleep systems (MSS).¹ ARP asserts that the agency miscalculated its technical proposal and past performance, and the past performance of Tennier.

¹ The MSS is comprised of four components—patrol and cold weather sleeping bags, a compression stuff sack (storage bag with adjustable straps to compress the sleeping bag) and a bivy cover (a camouflaged, waterproof, vapor permeable outer cover that protects the sleeping bag and occupant from rain and groundwater).

We deny the protest.

The RFP contemplated award of a fixed-price contract on a “best value” basis, applying the following technical evaluation factors (listed in descending order of importance)—product demonstration model (PDM); experience/past performance; industrial mobilization; socio-economic considerations; DLA mentoring business agreements; Javits-Wagner-O’Day Act (JWOD)—and price, which was less important than the technical factors. The results of the evaluation under the first three technical factors were to be expressed in terms of adjectival ratings (exceptional, very good, satisfactory, marginal or unsatisfactory), and proposals were to be assigned numerical rankings under the last three factors.

DLA received eight proposals, including one from ARP and two from Tennier, a small business concern. ARP’s proposal was rated very good for PDM and satisfactory for past performance and industrial mobilization, and was ranked one (the highest ranking) for the socio-economic considerations, DLA mentoring and JWOD factors. Tennier’s proposal was rated very good for PDM, exceptional for past performance, satisfactory for industrial mobilization, and was ranked three for the socio-economic considerations factor and one for the DLA Mentoring and JWOD factors. Tennier’s evaluated price, at \$116,532,250, was lower than ARP’s at [DELETED].

The source selection official (SSO) reviewed the evaluation results and found that Tennier had a slight technical advantage over ARP for the PDM and had superior past performance, while ARP was superior under the industrial mobilization plan and socio-economic considerations factors. Since PDM and past performance/experience were the most important technical factors, the SSA concluded that Tennier’s technical proposal was superior to ARP’s, and that Tennier’s technically superior, lower cost proposal represented the best value to the government.

ARP protests the agency’s evaluation of each technical factor (except DLA mentoring). In reviewing a protest against an agency’s proposal evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation. National Toxicology Labs, Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ¶ 5 at 3. We have reviewed the record and find all of ARP’s argument to be without merit. We discuss ARP’s primary arguments below.

EXPERIENCE/PAST PERFORMANCE

The solicitation required offerors to describe their experience producing the same or similar items within the past 2 years. Offerors were to provide, among other things, a point of contact and a brief description of the item produced. The experience/past performance proposals were rated against five subfactors—ability to meet delivery

schedule, quality, commitment to customer satisfaction, history of manufacturing similar items, and meeting socio-economic goals.

ARP's proposal listed three contracts that were within the designated time period, but the agency found that it did not provide points of contact for those contracts or explain how the items produced were similar to the MSS. DLA located points of contact for two of the contracts—one for Mobiflex tents, and another for cutting and sewing warm weather sleeping bags as a subcontractor. Based on information from those contacts, together with its knowledge of ARP's subcontractors, DLA rated ARP satisfactory overall, with satisfactory ratings under the first four subfactors, and a marginally acceptable rating under the last subfactor, which the agency found ARP had not addressed.² Price Negotiation Memorandum (PNM) at 15-17.

DLA rated Tennier exceptional for past performance overall and for each element of past performance. This rating was based on 16 contracts performed during the rating period,³ under which the references reported Tennier had delivered substantial quantities of similar items, performed ahead of schedule, had only one quality issue (that resulted from receiving a bad batch of tape from a supplier and was promptly corrected) and was substantially committed to customer satisfaction. PNM at 9-11.

The SSO, in comparing the past performance of ARP and Tennier during the best value analysis, looked beyond the adjectival ratings to substantive differences. Thus, in considering the delivery subfactor, the SSO was aware that ARP's references stated that its delivery was excellent and that there were no quality problems, but concluded that Tennier's nevertheless was superior to ARP's because Tennier had performed significantly more contracts than ARP and its deliveries had been generally ahead of schedule. Source Selection Decision (SSD) at 8. Regarding the quality subfactor, the SSO found Tennier and ARP equal, since ARP had no quality problems, and Tennier had only one, which the agency considered offset by the fact that Tennier had produced more items, and more complex items. Id.

² Throughout ARP's protest of its past performance evaluation, it raises various arguments related to the agency's consideration of the past performance of its subcontractors, including arguments that DLA did not consider the past performance of its subcontractors. These arguments are without merit. Since the solicitation did not provide that the agency would evaluate the past performance of proposed subcontractors, DLA was not required to do so. Systems Mgmt., Inc.; Qualimetrics, Inc., B-287032.5, B-287032.6, Nov. 19, 2001, 2002 CPD ¶ 29 at 5. In any case, the record shows that DLA did consider the past performance of ARP's proposed subcontractors in evaluating ARP's past performance. Supplemental Agency Report (SAR) at 7.

³ One of the 16 contracts was terminated for the convenience of the government.

With respect to the commitment to customer satisfaction subfactor, the SSO found Tennier's record superior to ARP's. Although the past performance information indicated that ARP had met its obligations and satisfied its clients, it showed that Tennier had generally exceeded customer expectations and contractual obligations. SSD at 8. With respect to the history of manufacturing items of similar kind and complexity subfactor, the SSO found that Tennier, which designed the modular sleep system and had manufactured a substantial quantity of them, was superior to ARP, which had produced warm and cold weather sleeping bags not as complex as the MSS. In addition, the agency considered that, while ARP intended to subcontract for the bivy and stuff sack, and the proposed subcontractors had very good experience and performance records, none had experience manufacturing items as complex as the MSS. Id. at 9. Finally, with respect to the meeting socio-economic goals on previous contracts subfactor, the agency found that Tennier's proposal, which indicated success in meeting past goals, was superior to ARP's, which did not address this issue. Id.

ARP maintains that, since its references contacted by DLA indicated that ARP's quality and delivery were excellent, it should have received the same exceptional rating as Tennier for past performance. Specifically, ARP challenges the SSO's conclusions under the quality, experience and meeting subcontracting goals subfactors. With respect to the quality subfactor, ARP asserts that the agency improperly failed to consider instances of negative past performance information regarding 30 of Tennier's contracts. This argument is without merit. DLA explains that, of those 30 contracts, only 10 fell within the 2-year period of consideration. With respect to these 10, DLA explains that two of ARP's own subcontractors had the same defective performance, which involved material from a single source of supply. The contracting officer found these defects immaterial. SAR at 9. While ARP disagrees with DLA, asserting generally that Tennier experienced different deficiencies, and a larger number of them than ARP, it has not identified those deficiencies and has not established that any additional deficiencies were other than de minimis. Consequently, we have no basis to question the evaluation in this regard.

With respect to the history of manufacturing similar items subfactor, ARP asserts that DLA failed to credit its subcontractor with having manufactured the bivy component, and improperly concluded that the sleeping bags produced by ARP are not as complex as the MSS. However, we find nothing unreasonable in DLA's concluding that manufacturing components of the MSS is not as complex as producing the entire MSS. ARP also complains that the agency improperly failed to consider that its subcontractor has produced parkas and trousers that, according to ARP, are as complex as the MSS. DLA agrees that there are similarities between some of the parka/trousers and the MSS manufacturing processes, but does not consider the items overall to be similar in type or complexity to the MSS. ARP's disagreement with this conclusion, without some more detailed explanation as to

why the agency's position is unreasonable, does not provide a basis for us to question the agency's judgment in this regard. See American Med. Depot, B-285060 et al., July 12, 2000, 2002 CPD ¶ 7 at 6. In any case, the primary reason for the SSO's finding that Tennier was superior under this subfactor was Tennier's experience in producing the MSS itself. In this regard, even ARP acknowledges that Tennier has produced the MSS and thus has at least some advantage with respect to experience.

Finally, ARP asserts that it did not address the meeting socio-economic goals subfactor only because none of its prior contracts included subcontracting goals. However, ARP did not include this information in its proposal. Moreover, even if ARP's proposal were rated neutral for this element (based on its lack of past performance in this area) rather than marginally acceptable, Tennier's proposal, which showed successful past performance in meeting subcontracting goals, would still be superior to ARP's under this subfactor. We conclude that the evaluation under the experience/past performance factor was reasonable.

PDM

The solicitation required offerors to submit a PDM of the MSS to be evaluated for, among other things, construction/component compatibility, visual examination, and dimensional examination. In evaluating ARP's PDM, the agency found three dimensional defects and the following nine visual defects: (1) barrel lock shows signs of slippage on patrol bag; (2) slide fastener on the patrol bag not properly set, causing distortion; (3) loose thread end not removed at the draw cord on the compression sack; (4) and (5) on the two bivy covers submitted, one from each proposed subcontractor, the slide fastener was missing a thong on the double pull at the bottom; (6) and (7) for each of the bivy covers submitted, one from each proposed subcontractor, the slide fastener had only a single slider at top when a double slider was required; (8) there was a removable stain on the inside; and (9) on the compression sack there were loose threads at the bottom that were not removed—and three dimensional defects. Notwithstanding these defects, ARP was rated very good for its PDM.

ARP disputes each of DLA's findings. We find that DLA's conclusions were reasonable. We discuss several examples.⁴

ARP maintains that DLA improperly double-counted defects for the bivy cover by twice listing the missing thong on the double pull and the single slider at the top. We disagree. ARP proposed to have the bivy produced by two subcontractors with separate production facilities. Consistent with the requirement in the solicitation

⁴ Our conclusion does not include the removable stain on the inside, which DLA agrees should not have been listed as a major defect, or the loose threads on the bottom of the compression sack, as DLA waived such a defect for Tennier.

that the PDM be produced at the same facility as the production quantity, ARP submitted a bivy from each subcontractor production facility. RFP at 60; SAR at 5. Since each bivy had the same defect, we find nothing unreasonable in the agency's decision to consider the defect for each.

ARP argues that DLA should not have considered the barrel lock slippage as a defect, noting that the solicitation allowed offerors to submit a letter noting a deviation where it could not obtain a specified part in time to produce the PDM. ARP explains that, while it utilized a standard barrel lock on its PDM, it submitted a letter indicating that it was using a non-standard draw cord with the barrel lock. According to ARP, the barrel lock slipped because it was designed to work with the standard draw cord, and the alternate draw cord it used was thinner than the standard draw cord. ARP asserts that, since it submitted a deviation letter for the draw cord, it should not have been penalized for the barrel lock slippage. This argument is without merit. ARP's deviation letter explained neither the difference between the draw cord it utilized on the PDM and the standard draw cord, nor the effect this would have on the barrel lock. Consequently, DLA reasonably considered the barrel lock slippage a defect.

ARP asserts that DLA should not have assessed defects for dimensions against any offeror because the evaluators themselves could not agree on how to measure the items. However, while the evaluators initially disagreed as to how the products should be measured, the disagreement was ultimately resolved and the PDMs submitted by all offerors were uniformly measured. We therefore have no basis to find that it was unreasonable for the agency to downgrade PDMs based on dimensional defects.

WAIVER OF CONTRACT REQUIREMENTS

ARP protests that, immediately after the contract was awarded, Tennier requested, and was granted, a waiver of performance requirements related to sampling and testing, based on the fact that the same waivers had been granted under a prior contract. ARP argues that the timing and rationale for the waiver demonstrate that Tennier planned to request the waivers, and that the agency improperly planned to grant them, before the contract was awarded. This argument is without merit. DLA reports that there were no discussions between it and Tennier prior to award with respect to modifying any performance requirements, and ARP has provided no evidence to the contrary or otherwise supporting its position. This ground of protest, based on nothing but inference and supposition, therefore provides no basis for sustaining the protest.

The protest is denied.

Anthony H. Gamboa
General Counsel

