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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Outdoor Venture Corporation

File: B-401351.2; B-401351.3

Date: September 14, 2009

Marc Lamer, Esq., Kostos & Lamer, PC, for the protester.
Jessica C. Abrahams, Esq., and Erin B. Sheppard, Esq., McKenna Long & Aldridge LLP, for Camel Manufacturing Company; and, Richard J. Conway, Esq., and Robert J. Moss, Esq., Dicktejn Shapiro LLP, for RWH Industries, Inc., intervenors.
Elliot S. Avidan, Esq., and David P. Ingold, Esq., United States Marine Corps, for the agency.
Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's proposal was reasonably excluded from the competitive range where several sections of the proposal stated that the offered item exceeded the solicitation's maximum allowable weight.
 2. Where two offerors received a technical rating of unacceptable, and only one is included in the competitive range, there is no unequal treatment if the record supports the agency's judgment that the deficiencies of the excluded proposal were of greater magnitude than the deficiencies of the included proposal.
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DECISION

Outdoor Venture Corporation of Stearns, Kentucky, protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. M67854-09-R-3014, issued by the United States Marine Corps for general purpose medium shelters (GPMS). Outdoor contends that the exclusion of its proposal from the competitive range was unreasonable, and contends that it was treated unequally in the competitive range decision.

We deny the protest.

BACKGROUND

The RFP, issued on April 1, 2009, anticipated award of an indefinite-delivery/indefinite-quantity contract to no more than five offerors submitting the lowest-priced, technically-acceptable proposals. Agency Report (AR), Tab 3, RFP at 62. The RFP advised offerors that the agency intended to evaluate proposals and make award based on initial offers without discussions, but reserved the right to establish a competitive range and hold discussions if it determined that discussions were necessary. Id. at 63.

Under the technical capability evaluation factor, the RFP identified three equally-weighted subfactors: commercial item description (CID), warranty provisions, and monthly manufacturing capacity. Id. at 64. In addition, the RFP identified the following adjectival ratings and definitions for each subfactor:

Rating	Definition
Acceptable	The proposal meets all the requirements identified in the solicitation. Only those proposals determined acceptable, either initially or as a result of discussions, will be considered for award. Once deemed acceptable, all proposals are considered equal.
Reasonably Susceptible of Being Made Acceptable	The proposal does not meet all the requirements in the solicitation based on the initial offer. However, there is reason to believe through minor revisions, an acceptable proposal could result. For award without discussions, these proposals are considered “unacceptable.”
Unacceptable	Fails to meet one or more requirements in the solicitation identified and major revisions would be required to make the proposal acceptable. Proposals with an unacceptable rating will not be considered for award.

AR, Tab 3, RFP at 63.

With regard to subfactor 1, commercial item description, offerors were instructed that their proposed shelters must meet the salient characteristics of the CID for general purpose medium shelters, as well as all other technical requirements set forth in the solicitation. Id. at 58. Of relevance here, the RFP required that offerors must clearly articulate their shelter’s weight. Id.

The CID, an attachment to the solicitation, provided that the weight of the shelter shall not exceed 820 pounds, inclusive of all of the tent’s components.¹ AR, Tab 4,

¹ The tent’s components were defined in section 1.1.2 of the CID as carry bag(s)/transport container(s), exterior covering, support structure, interior liner,
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CID at 2. Further, the CID stated that the test reports and certifications submitted with the proposal “shall CLEARLY DEMONSTRATE that the proposed shelter meets all elements of the requirements.” Id. at 10 (emphasis in original).

Outdoor’s proposal discussed the weight of its proposed shelters in several places. For example, in section 2.1.1.3, System Weight, Outdoor’s proposal stated:

Detailed tracking of the system weight over the production history provides a system weight that ranges from 818 to 847 pounds depending on actual fabric material weight and other material tolerances. The published system weight is 847 pounds[,] which is the maximum system weight. The maximum weight is 3% above the system weight listed in the subject CID. Yet the system meets all other requirements including pack out size and has an impressive under canopy time. . . . As a result of operational and durability testing[,] unnecessary components initially included in the repair kit . . . have been eliminated and the system weight has been reduced for the early system weight.

System weight	847 pounds
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AR, Tab 2, Outdoor Technical Proposal, at 12.

Outdoor also submitted with its proposal several test reports that indicated the weight of its system. For example, in Outdoor’s Safety Assessment Report, dated February 2007, the system weight of the shelter is listed as 869 pounds. AR, Tab 15, Safety Assessment Report, at 2. Similarly, the report of the U.S. Army Aberdeen Test Center lists the weight of Outdoor’s shelter as 870 pounds. AR, Tab 16, Aberdeen Test Center Report, at 7.

With regard to subfactor 3, manufacturing capacity, offerors were instructed to discuss in detail their ability to provide, at a minimum, 62 shelters per month, and their current production system. Among other things, offerors were also required to discuss their quality control approach. AR, Tab 3, RFP at 59.

As relevant here, in addressing the requirements of subfactor 3, RWH Industries, another offeror, proposed an outline of its plans to meet the solicitation’s requirements. RWH stated that it did not currently have production capabilities to meet the solicitation’s requirements, but it was in the process of acquiring personnel

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repair kit, flooring, plenums, Tent Extendable Modular Personnel interface, wind lines, stakes, manual, special tools, and any other additional gear needed to complete the general purpose medium shelter system. AR, Tab 4, CID at 1-2.

and equipment to meet the manufacturing capacity requirements. RWH also stated that, while it did not currently have a quality assurance plan, it was developing one.

In its report on the proposals, the technical evaluation board (TEB) evaluated RWH and Outdoor as follows:

	Subfactor 1	Subfactor 2	Subfactor 3	Overall Technical Factor
Outdoor	Unacceptable	Acceptable	Acceptable	Unacceptable
RWH	Reasonably Susceptible	Acceptable	Unacceptable	Unacceptable

AR, Tab 7, TEB Report, at 9.

The TEB explained that it found Outdoor's proposal to be unacceptable under subfactor 1 because the system weight of the shelter proposed by Outdoor exceeded the maximum allowable weight. Id. at 6, 9. The TEB concluded that, because the shelter proposed by Outdoor did not meet the solicitation's requirements, Outdoor's proposal would require a major revision in order to comply with all of the CID requirements. Therefore, the TEB determined that Outdoor's proposal should be excluded from the competitive range.

With regard to RWH, the TEB explained that, while RWH had failed to furnish all of the information required under subfactor 3, the problems with RWH's proposal could be remedied through the provision of additional information about RWH's production capacity and quality assurance plan. Id. at 7, 9. Therefore, the TEB determined that RWH's proposal should remain in the competitive range.

DISCUSSION

Outdoor argues that it was unreasonable for the agency to exclude its proposal from the competitive range for failing to comply with the maximum weight requirement because, it contends, its shelters can meet the 820 pound weight requirement by using different fabrics. Moreover, the protester points out that its proposal contained fabric swatches of such lighter weight fabrics. Outdoor further argues that if the agency had included Outdoor's proposal in the competitive range, it could have clarified any misunderstandings about the weight of its shelters. Finally, Outdoor contends that it was treated unequally because the agency included RWH's proposal in the competitive range despite the fact that its deficiencies were more serious than those in Outdoor's proposal.

System Weight

Outdoor appears to argue that the TEB should have concluded that its proposed shelters met the solicitation's weight restriction, since its proposal stated that the weight of its shelters ranged from 818 to 847 pounds, depending on actual fabric material weight. Protest at 6. Outdoor further argues that its general statement of its intent to comply with all of the CID requirements should have made it clear to the TEB that Outdoor's shelter would meet the weight restriction. Protest at 5. While Outdoor acknowledges that there were several places where its proposal stated a weight above the solicitation's limit, it contends that this issue could have been clarified through discussions. Therefore, the protester argues that its proposal should have been included in the competitive range. Protest at 8.

The decision to establish a competitive range and the determination whether a proposal should be included therein is principally a matter within the sound judgment of the procuring agency. Dismas Charities, Inc., B-284754, May 22, 2000, 2000 CPD ¶ 84 at 3. The significance of the weaknesses and/or deficiencies in an offeror's proposal, within the context of a given competition, is a matter for which the procuring agency is, itself, the most qualified entity to render judgment. Cambridge Sys., Inc., B-400680; B-400680.3, Jan. 8, 2009, 2009 CPD ¶ 12 at 4. Our Office will review that judgment only to ensure it was reasonable and in accord with the solicitation provisions; a protester's mere disagreement with an agency's judgment does not establish that the judgment was unreasonable. Albert Moving & Storage, B-290733, B-290733.2, Sept. 23, 2002, 2003 CPD ¶ 8 at 6; CMC & Maint., Inc., B-290152, June 24, 2002, 2002 CPD ¶ 107 at 2.

We find no merit in Outdoor's argument that the agency improperly excluded its proposal from the competitive range. At least three different places in Outdoor's proposal listed the shelter's weight as being in excess of the maximum allowable weight. Moreover, Outdoor's proposal, on its face, indicated that its shelter exceeded the weight limit when it stated, "The maximum weight is 3% above the system weight listed in the subject CID. Yet the system meets all other requirements." AR, Tab 2, Outdoor Technical Proposal, at 12 (emphasis added). Moreover, the test reports submitted as part of the proposal indicated that the system was too heavy. See AR, Tab 15, Safety Assessment Report, at 2; AR, Tab 16, Aberdeen Test Center Report, at 6.

Faced with this information, we think the TEB reasonably concluded that Outdoor would need to completely restructure or revise its shelter in order to bring it within the allowable weight range. AR, Tab 7, TEB Report, at 9 ("addressing their deficiency would involve not merely providing additional information, but completely restructuring/ revising their proposed shelter"). While the protester argues that the weight issue could have been resolved through a simple clarification, it is not clear from the face of the proposal that the shelter could have easily been made compliant with the solicitation's terms. Therefore, we find the TEB's

exclusion of Outdoor's proposal from the competitive range to be reasonable and supported by the record.

Unequal Treatment

Outdoor also alleges that it was treated unequally when the agency considered which proposals to include in the competitive range. Specifically, Outdoor contends that the agency allowed RWH to remedy informational deficiencies in its proposal through discussions, while denying Outdoor the ability to do the same thing, even though both proposals received an overall technical rating of unacceptable. Outdoor further argues that its proposal actually received a higher technical rating than RWH's proposal because Outdoor received two subfactor ratings of acceptable and one rating of unacceptable, while RWH received one acceptable, one unacceptable, and one rating of reasonably susceptible of being made acceptable. Supplemental Protest at 6. While Outdoor is correct about its standing versus the standing of RWH, as set forth below, we think the distinctions made between these proposals were within the agency's discretion.

While agencies may properly exclude from the competitive range proposals that are deemed to have no realistic prospect for award, SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 5, judgments regarding which proposals are included in a competitive range must be made in a relatively equal manner. Columbia Research Corp., B-284157, Feb. 28, 2000, 2000 CPD ¶ 158 at 4. Accordingly, an agency cannot reasonably exclude a proposal from the competitive range where the strengths and weaknesses found in that proposal are similar to those found in proposals in the competitive range. Nations, Inc., B-280048, Aug. 24, 1998, 99-2 CPD ¶ 94 at 4-5. Further, adjectival ratings are no more than guidelines for intelligent decision making to assist source selection officials in evaluating proposals. See SDS Int'l Inc., B-291183.4; B-291183.5, Apr. 28, 2003, 2003 CPD ¶ 127 at 9. The question ultimately is whether the record supports the agency's conclusions regarding the relative merits of proposals. Id.; see Research for Better Schools, Inc., B-270774.3, June 17, 1996, 96-2 CPD ¶ 41 at 8-9.

Here, while Outdoor correctly asserts that both proposals contained deficiencies resulting in a subfactor rating of unacceptable, Outdoor has not demonstrated that the deficiencies in RWH's proposal were comparable in overall significance to the deficiencies in its own proposal. In fact, the contemporaneous record shows that the opposite was true. While the TEB assigned a technical rating of unacceptable to both offerors, the TEB's narrative makes clear that it believed the deficiencies in Outdoor's proposal were of greater significance than the deficiencies in RWH's proposal. In this regard, the TEB stated that, while RWH and Outdoor both received ratings of unacceptable due to failures in meeting requirements spelled out in the solicitation, the weight of Outdoor's system could not be changed without a major revision of its proposal. AR, Tab 7, TEB Report, at 9.

While the protester now argues that its shelter easily could have been modified to meet the weight requirement by using lighter fabric, Protester's Comments at 8, this fact was not clear in the proposal. Indeed, the record supports the TEB's conclusion that Outdoor's proposal would require major revisions in order to meet the weight requirement. Likewise, the record supports the TEB's conclusion that the deficiencies in RWH's proposal would not require a major change to the proposal, but rather, could be remedied through the provision of additional information regarding its manufacturing capacity and quality assurance plan. Although both proposals received a technical rating of unacceptable, we think the agency reasonably concluded that the deficiencies in the two proposals were not similar in magnitude. Accordingly, we think that the competitive range decisions here were reasonable and supported by the record.

The protest is denied.

Daniel I. Gordon
Acting General Counsel