



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Smith of Galeton Gloves, Inc.

File: B-271686

Date: July 24, 1996

Lola Dickerman, Esq., for the protester.

Maria C. Santucci, Esq., Defense Logistics Agency, for the agency.

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DIGEST

1. Agency's evaluation of protester's past performance as marginally acceptable was reasonable where the record shows that the protester was delinquent on two contracts, and did not—in response to direct discussion questions—submit any evidence to explain these delinquencies.
2. Protester's deficient past performance rating was not required to be referred to the Small Business Administration for review as a responsibility matter under certificate of competency proceedings since past performance was a technical evaluation factor that was evaluated on a comparative basis, and therefore did not constitute a finding pertaining to the protester's responsibility.
3. Where the solicitation stated that technical quality was more important than price, an award to a higher-priced offeror was reasonable where the source selection authority reasonably concluded that the awardee's proposal was technically superior to the protester's proposal and was worth its 10-percent higher price.

DECISION

Smith of Galeton Gloves, Inc. protests the award of a contract to Nationwide Glove Company under request for proposals (RFP) No. SPO100-95-R-0244, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), for the manufacture and delivery of chemical protective glove inserts. Smith challenges the award on the ground that the agency improperly downgraded its proposal under the past performance evaluation factor; had this downgrading not occurred, Smith contends, it would have been equally ranked with Nationwide in technical merit, and would have received contract award as the lowest-priced offeror.

We deny the protest.

The RFP was issued as a total small business set-aside on August 11, 1995, and contemplated the award of an indefinite quantity contract for a base year with 2 option years; the RFP set forth minimum/maximum estimates of 144,440/222,600 glove insert pairs per year.

Offerors were to provide a product demonstration model (PDM) which would be evaluated by the agency for compliance with each of the technical criteria set forth in the solicitation's "PURCHASE DESCRIPTION," as well as a past performance "descri[ption] of their experience with producing the same or items of similar complexity, within the past two (2) years." The RFP further advised offerors that the past performance information "should demonstrate the ability to successfully produce the item identified in the solicitation without significant quality or schedule problems" and requested telephone numbers and contact personnel for all contracts referenced in the offerors' technical proposals. With regard to technical evaluations, the RFP provided that an adjectival rating scheme of highly acceptable; acceptable; marginally acceptable; and unacceptable would be used to score each offeror's proposal under the solicitation's two technical evaluation factors--PDM and Past Performance--which were listed in descending order of importance.

For their price proposals, offerors were directed to complete and submit the solicitation's Section B "SUPPLIES/SERVICES" pricing schedule. In this regard, the RFP provided that contract award would be made to the offeror submitting the most advantageous offer, and emphasized that "technical quality is more important than price."

By the September 25 closing time, three proposals--including one submitted by Nationwide and one submitted by the protester--were received. The results of the technical evaluation were as follows:

Offeror	PDM Factor	Past Performance Factor	Overall Rating
Nationwide	Acceptable	Acceptable	Acceptable
Smith	Acceptable	Marginally Acceptable	Marginally Acceptable
Offeror C	Unacceptable	Marginally Acceptable	Marginally Acceptable

Both Nationwide and Smith submitted glove inserts that lacked an identification/size label; Smith's PDM also lacked a required bar-code label. Because the agency viewed these deficiencies as easily correctable, it gave both Nationwide and Smith an "acceptable" rating under the PDM technical evaluation factor. In this regard, the RFP specified that an "acceptable" rating for the PDM factor meant that:

"The PDM meets the stated requirements of the specification/commercial product description, but exhibits deficiencies that are easily correctable during production." (Emphasis added.)

Under the past performance evaluation factor, the agency gave Nationwide's proposal an "acceptable" rating, which according to the RFP's definition meant that the "offeror's record of past performance demonstrates an . . . overall record of timely delivery." Although Nationwide completed 1 of the referenced contracts 1 month late, the remaining 11 had been completed on time or ahead of schedule. The agency's investigation also showed that the sole incident of delinquent contract performance occurred because, in compliance with the contract's warranty provision, Nationwide had been required to replace a small number of delivered gloves because of product defects. Because three other contracts for the same heavy duty glove had been successfully and timely performed without any quality or delinquency problem, the agency evaluators determined that, on balance, Nationwide's past performance record was acceptable.

In contrast, the agency rated Smith's proposal as "marginally acceptable" under the past performance factor. In its proposal, Smith had listed two contracts--neither of which could be considered by the agency since they did not fall within the prior 2 contract years, as required by the RFP. Nevertheless, the agency researched its own files and discovered two glove contracts Smith had performed for DPSC.¹ Smith completed one of the contracts 2 years late. The agency evaluators also noted that minor quality problems occurred throughout Smith's performance of this contract. The second contract was completed 11 weeks late; although 5 of these weeks were deemed partially excusable as a result of a defective specification, the remaining 6 weeks were deemed inexcusable by DPSC since once the proper supplies to manufacture the gloves in accordance with the new specifications were delivered to Smith, it nonetheless delayed commencing production. As a result of these two delinquencies, and because no other contract references were provided, the agency determined--in accordance with the "marginally acceptable" rating definition set forth in the RFP--that Smith's "record of past performance

¹The RFP provided that in evaluating each offeror's past performance, the agency would consider--in addition to what was stated in the offeror's technical proposal--"information available at DPSC."

demonstrate[d] a less than acceptable commitment to customer satisfaction and timely delivery."

On February 5, 1996, the contracting officer issued discussion letters to each offeror. Of significance to this protest, the contracting officer advised Smith that it had received a PDM rating of "acceptable" and that the missing identification and bar-code labels were deemed deficiencies in its offer. In the letter, the contracting officer advised Smith that to correct the label deficiencies, Smith could either submit a new PDM or certify that the firm would correct the deficiencies; the letter further apprised Smith that

"by submitting a new PDM, your rating . . . for this factor may be upgraded or downgraded as necessary. By certifying that the above defects will be corrected, your present evaluation will not change."

Smith also was informed that it had received a "marginally acceptable" rating under the past performance technical factor; to remedy this deficiency, Smith was asked to "address the delinquency and quality problems experienced" on the two DPSC contracts, and to provide "past performance information for your commercial customers." Smith also was advised that the two contracts listed as references in its technical proposal could not be evaluated as they fell outside the RFP's 2-year time frame.

Nationwide received a discussion letter similar to Smith's; as in the case of the protester, Nationwide was apprised of its PDM rating and advised that submitting a new PDM with corrected deficiencies could raise or lower its "acceptable" rating, while certifying correction of the label deficiency would not change the evaluation rating.

Both Nationwide and Smith submitted best and final offers (BAFO) by the February 8 BAFO due date. For its BAFO, Nationwide submitted a new PDM--with all the required labels; since Nationwide's PDM complied with every technical requirement, its PDM score was raised to highly acceptable, in accordance with the terms of the RFP. Nationwide's past performance rating remained unchanged--acceptable. Overall, Nationwide's proposal was rated acceptable.

Smith did not submit a new PDM; instead, as permitted by the agency's instructions, Smith provided a certification that the label deficiencies would be corrected during production. Consequently, its PDM rating of acceptable was not changed. Although the agency had invited Smith to address the identified contract delinquencies and/or submit additional reference information from commercial customers, Smith did not provide any additional information regarding the past performance factor in its BAFO. Therefore, Smith's proposal's past performance rating remained unchanged

as marginally acceptable. Overall, Smith's proposal was rated marginally acceptable.

On March 20, the contracting officer issued an amendment to the RFP which incorporated several new contract clauses; each offeror was advised to submit its acknowledgment of the amendment along with a BAFO by March 22.

The results of the final BAFO evaluation were as follows:

Offeror	Overall Technical Rating	Price
Nationwide	Acceptable	\$794,896.20
Smith	Marginally Acceptable	\$721,418.40

After reviewing the technical evaluation results, by memorandum dated March 28, the source selection authority determined that Nationwide's technical superiority warranted paying the approximately 10-percent price premium. Consequently, on March 29, DLA awarded the contract to Nationwide as the offeror proposing the most advantageous offer.

PROTESTER'S CONTENTIONS

Smith contends that its proposal was improperly downgraded under the past performance evaluation factor, and that but for this downgrading, it would have been equally ranked with Nationwide in technical merit, and would have received contract award because of its lower price. Smith concedes that it was 2 years delinquent on one of the identified DPSC contracts; however, with regard to the second DPSC contract, Smith contends that its delinquent performance should have been classified by the agency as excusable since all production delays resulted from the agency's use of a defective specification. Smith also maintains that the agency's evaluation of its past performance is unreasonable since DLA recently awarded Smith a small purchase contract to provide the same glove item required here. Additionally, Smith contends that it cannot be downgraded under the past performance factor without referral of the matter to the Small Business Administration (SBA) for review under certificate of competency (COC) proceedings as a responsibility matter. Finally, Smith maintains that its submission of a certification that all label deficiencies would be corrected should have caused the agency to raise its proposal's rating from acceptable to highly acceptable under the PDM factor.

DISCUSSION

The evaluation of technical proposals is primarily the responsibility of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any difficulties resulting from a defective evaluation. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115. It is not a function of our Office to reevaluate proposals; rather, we review the agency's evaluation of proposals only to ensure that it was fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. VSE Corp., B-247610.2, Aug. 6, 1992, 92-2 CPD ¶ 81. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124. From our review of the record, there is no basis to object to the agency's evaluation of Smith's past performance.

First, while the RFP limited offerors to submitting past performance references for the preceding 2 years, the record shows that Smith disregarded these instructions and submitted two references for contracts performed prior to the 2-year time limit set forth in the RFP. Next, although the agency identified and asked Smith to address its delinquent contract performance on the two DPSC contracts, Smith failed to provide any additional discussion or alternate contract references to alleviate the agency's concerns. In this regard, although Smith now maintains that its delinquent performance under one of the DPSC contracts should be classified as excusable, and that the agency should have realized this by virtue of the fact that an equitable adjustment claim was pending regarding that contract during the agency's evaluation on this contract, Smith never apprised the agency of this fact in its BAFO. Further, while Smith contends that its receipt of a DPSC contract for the same glove item 10 days prior to the award of this contract demonstrates its ability to successfully perform this requirement, the agency reports that the contract award to which Smith refers was made as an urgent small purchase in response to a request for quotations which did not require a past performance evaluation, and which solicited a much smaller number of glove inserts--30,000 pairs--than the number required here.

Given the agency's discussion letter, which clearly placed Smith on notice that the firm needed to furnish additional evidence to improve its past performance rating, and Smith's failure to respond--in any fashion--to the agency's past performance concerns, we think the agency reasonably found Smith's proposal marginally acceptable under the past performance factor.

Smith contends that it cannot be downgraded under the past performance factor without referral of the matter to the SBA for consideration under that agency's COC proceedings. Referral to the SBA is not required here. It is true that where an agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for consideration under the COC procedures. Flight Int'l Group, Inc., 69 Comp. Gen. 741 (1990), 90-2 CPD ¶ 257. In a negotiated procurement, SBA referral is mandatory where the solicitation includes, as a matter to be evaluated on a pass/fail basis, a criterion that is traditionally a responsibility-type factor, and the contracting agency has determined that a small business's proposal should be rejected for failure to "pass" that criterion; this is so because the agency is viewed as having made a nonresponsibility determination notwithstanding its use of and reliance on a technical evaluation criterion. Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

The requirement for referral does not apply here. While the past performance criterion is a responsibility-type factor, it was not applied on a pass/fail basis. Rather, each proposal—including Smith's—was comparatively evaluated under this factor, and assigned a comparative adjectival rating. That means that the agency did not in essence make a responsibility determination, but simply integrated its relative assessment of past performance into its overall determination of which proposal was most advantageous to the government. In such circumstances, there was no need for referral to the SBA. Tri-Servs., Inc., B-256196.4, Sept. 30, 1994, 94-2 CPD ¶ 121.

As a final matter, to the extent Smith argues that the agency should have raised its PDM rating to highly acceptable as a result of its certification (promising that all label deficiencies would be corrected during production), its protest is untimely. As noted above, the contracting officer's February 5 discussion letter advised Smith that certifying correction of the label defects would not change its initial PDM evaluation rating. If Smith objected to this evaluation scheme, it was required to challenge this factor prior to the next solicitation closing time. Since it did not raise this issue until after award, this aspect of its protest is untimely. See 4 C.F.R. § 21.2(a)(1) (1996); NASCO Aircraft Brake, Inc., B-237860, Mar. 26, 1990, 90-1 CPD ¶ 330.

In sum, we conclude that the agency's evaluation of Smith's proposal as marginally acceptable under the past performance factor, and acceptable under the PDM factor, is unobjectionable. Further, we see no basis to question the agency's evaluation of Nationwide's proposal. Both Nationwide and Smith were given the same choice for remedying virtually identical PDM label defects. Nationwide—as a result of its decision to submit a new, fully compliant PDM—reasonably earned a highly acceptable rating, and fully demonstrated its commitment to providing a quality glove insert. In contrast, Smith, instead of producing a new PDM, chose to certify that the label deficiencies would be remedied in the production stage—

resulting in no change to its acceptable rating. With regard to past performance, Nationwide also demonstrated its technical superiority; a detailed list of 12 contracts was provided, demonstrating timely--and even expedited--compliance with all quality and delivery terms for 11 of the references.² Smith, on the other hand, made no attempt to alleviate the agency's reasonable concerns about its performance under its two prior contracts .

Where, as here, a solicitation emphasizes that technical quality is more important than price, an agency may reasonably decide to award to a technically superior awardee for a slightly higher price premium. See Macon Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93. Given that the record supports the agency's conclusion that Nationwide's offer represented a superior demonstration of product quality and commitment to timely delivery, we see no basis to object to the agency's decision that Nationwide's offer represented the best value to the government and warranted payment of a 10-percent price premium.

The protest is denied.

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²Smith objects to the agency's decision not to rate Nationwide's performance marginally acceptable based on the twelfth contract reference--which, as noted above, was completed 1 month late. We think the agency reasonably concluded that Nationwide's proposal warranted a rating of acceptable rather than marginally acceptable given that the sole instance of delinquency occurred on the earliest contract for the production of the glove item, and since that one delinquency, three additional contracts for the same item were successfully and timely performed without incident. Smith's mere disagreement with the agency's evaluation rating does not render the evaluation unreasonable. Wind Gap Knitwear, Inc., *supra*.