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**Comptroller General
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Decision

Matter of: Capps Shoe Company, Inc.

File: B-298196; B-298196.2

Date: July 6, 2006

William S. Foster, Esq., John H. Williamson, Esq., and Anand V. Ramana, Esq., McGuire Woods LLP, for the protester.

David T. Ralston, Jr., Esq., George W. Ash, Esq., Frank S. Murray, Esq., and Philip A. Nacke, Esq., Foley & Lardner LLP, for Wolverine World Wide, Inc., an intervenor.

Maria Ventresca, Esq., Defense Logistics Agency, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's delivery performance, which evidenced significant delinquencies, was reasonably found marginal by the agency.

DECISION

Capps Shoe Company, Inc. protests the award of a contract to Wolverine World Wide, Inc., under request for proposals (RFP) No. SP0100-05-R-0036, issued by the Defense Logistics Agency (DLA) for men's and women's leather dress shoes. The protester argues that the agency improperly evaluated its past performance.

We deny the protest.

The RFP contemplated the award of an indefinite-delivery, indefinite-quantity contract with minimum and maximum quantities for a 1-year base ordering period with four 1-year option periods to the offeror whose proposal was "most advantageous" to the government, price and other factors considered. The RFP specified the following evaluation factors, listed in descending order of importance: past performance, vendor managed program, bill and hold capability, socio-economic considerations, and Javits-Wagner-O'Day Act (JWOD) entity. The solicitation provided that "technical and past performance, when combined, are . . . significantly more important than cost or price." RFP at 74. The RFP provided that the first three non-price factors would be assigned an overall rating of exceptional, very good, satisfactory, marginal, and unsatisfactory, whereas the proposals would be rank-ordered under the two lowest weighted non-price factors.

Past performance, the most important evaluation factor, was divided into the following subfactors: experience, quality of items/delivery performance, and compliance with contractual socioeconomic subcontracting/mentoring goals. With regard to delivery performance, offerors were to indicate in their proposals whether previously supplied items were delivered on time, ahead of or behind schedule. If the items were not delivered on time, the offeror was to provide the number of days delivered ahead of or behind schedule, whether revised delivery schedules were granted, and an explanation for any delivery extensions. For delinquent delivery, the description also was to include an explanation for its occurrence, a clear plan or evidence of measures taken to preclude a recurrence, and whether or not the problem was the offeror's fault, otherwise excusable or subject to mitigating circumstances. RFP at 47.

Six offerors, including Capps and Wolverine, submitted proposals. After evaluating the proposals, the agency decided to make award to Wolverine on the basis of initial proposals without discussions. Capps received a satisfactory rating for the most important factor--past performance--and very good ratings for the vendor managed programs and bill & hold capability factors. Capps' proposal was ranked first for the JWOD entity factor, and second for the socio-economic considerations factor. Capps' proposal was rated satisfactory overall with a price of \$34,902,086. Wolverine's proposal received a rating of very good under the past performance factor, and excellent ratings under the vendor managed programs and bill & hold capability factors. Its proposal was ranked first for the socio-economic considerations factor and second for the JWOD entity factor. Its proposal was the only one to receive an overall very good rating, and its price was \$35,867,494. The agency considered Wolverine's proposal's superiority to Capps' on four of the five factors to be worth the 2.7-percent higher price. Agency Report, Tab 8, Price Negotiation Memorandum.

Capps' overall satisfactory rating was primarily the result of its satisfactory past performance, given that factor's primary importance under the evaluation scheme. Capps' past performance was considered only satisfactory because even though it had experience in making similar items and an exceptional quality record, Capps' delivery performance was considered only marginal because of a number of delinquent orders under the two contracts that it held with the agency. Those two contracts included 18 delivery orders within the 2-year rating period, and of those orders, 12 delivery orders were behind schedule from 5 days to 5 months, 3 delivery orders were on-time or ahead of schedule from 1 to 6 days, and 3 delivery orders were not due as of yet. The agency also considered that Capps submitted two other references, both of which advised that Capps has always had timely deliveries. Id. at 9.

Wolverine's very good past performance was based on its very successful experience providing the identical items under government contracts. With regard to its

delivery performance, Wolverine had four completed contracts and five current contracts with the agency, and within the rating period Wolverine performed on and ahead of the required delivery schedules on 41 out of the 60 delivery orders with these orders being completed anywhere from 2 days to 5 months ahead of schedule. Wolverine was behind schedule on 6 delivery orders from 3 to 24 days, and 13 delivery orders were not due as of yet. The agency noted that, to the extent that Wolverine experienced problems with timely deliveries, effective corrective actions had been taken. Id. at 13; Past Performance Evaluation Form for Wolverine at 2.

Capps argues that the agency improperly evaluated its delivery performance under the past performance factor as marginal. The evaluation of past performance, including the agency's determination of the relevance and scope of the offeror's performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation criteria or with procurement statutes or regulations. National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 4. An agency's past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, and the protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. General Dynamics-Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 at 7.

Capps contends that the agency's evaluation of its on-time delivery performance was not accurate. According to Capps, "DLA would count an entire order late if a single pair of shoes was not delivered by the scheduled delivery date." Capps' Comments at 1. However, the agency notes, and the record confirms, that in determining whether a delivery order was delinquent it applied a 2-percent variance provision, which is contained in DLA's shoe and boot contracts, whereby an order was considered complete, once the contractor delivered 98 percent of the ordered quantity. Agency Supplemental Report, Declaration of Contract Specialist at 1. In its protest, Capps asserts that the timeliness of deliveries should be measured in a different way and posits a relative high timely delivery rate if its deliveries were measured on a monthly basis. Notwithstanding Capps' disagreement as to how delivery performance should be measured, we find that the agency reasonably concluded that Capps was delinquent on two-thirds of its delivery orders on the two DLA contracts during this rating period.

Capps also argues that the agency did not properly account for Capps' improved on-time performance to overcome the problems caused by the acceleration of the manufacture of certain shoe sizes at DLA's request as well as the initial start-up problems as it gained experience in producing military footwear. In this regard, Capps references that its proposal explained that its first delivery order was adversely affected because of the need to purchase various items and manufacturing machinery and to train workers, as well as its "unwavering commitment to quality,"

and its refusal to ship shoes that did not meet its quality standards. While Capps reported its on-time delivery during this start-up period was only 7 percent, it states that current delivery orders are being timely delivered between 95 and 100 percent of the time. Capps' proposal also stated that it "makes every effort to accommodate [DLA's] size needs. We are able to make changes for them at their request, such as acceleration of needed sizes versus sizes that are scheduled, but not as critical. This flexibility, done solely at the request of [DLA], however, can have a negative effect on our on-time delivery rate and should be taken into consideration." Capps also noted that "[i]n the past" it had scheduled production within its factory to maintain a smooth work flow, and "[i]f a new delivery order was delayed in being awarded, we in turn had to adjust production to keep the factory operating until a new order was issued. This adjustment resulted in lower production per day which resulted in slower or later shipments." Capps noted that, as a result of a significant increase in its civilian uniform business, it did not anticipate this problem recurring. Agency Report, Tab 4, Capps' Technical Proposal, at 2-3.

The agency did not find the general assurances and explanations in Capps' proposal were sufficient to rate Capps' delivery performance higher than marginal, given the significant delinquencies in its DLA contracts. As noted by the contracting officer, Capps' proposal did not explain which orders were affected by acceleration or provide information showing delinquencies that were considered excusable or that delivery schedules were extended. Contracting Officer's Statement at 10. As noted above, the solicitation requested the offeror to "provide the number of days delivered ahead of or behind schedule, whether revised delivery schedules were granted and an explanation for any delivery extensions." While Capps did address its late deliveries generally, it failed to follow the solicitation instructions and provide information regarding causation and remediation for each late delivery. While the protester also contends that the agency's evaluation of its delivery record gave disproportionate weight to what Capps characterizes as "initial start-up problems," in the context of the firm's record of a large volume of on-time deliveries, see Protest at 5, in our view the agency reasonably focused on patterns of negative performance in Capps' record of timely delivery that had not been adequately addressed, as well as the fact that Capps had not manufactured the exact dress shoes requested by this RFP.¹ In sum, the contracting officer concluded that "[i]n reviewing Capps' overall

¹ Capps also contends that the agency focused solely on the two DLA contracts that it performed, and that the agency, in conducting its evaluation, failed to give sufficient consideration to contracts that it performed in the private sector. As noted above, the agency in fact did consider Capps' delivery performance outside of its contracts with DLA. To the extent that Capps argues that its delivery performance on these contracts should have been given greater weight in the evaluation, this amounts to a simple disagreement with the agency's evaluation, which is not sufficient to establish that the agency acted unreasonably. Nicholson/Soletanche Joint Venture, B-297011.3, B-297011.4, Apr. 20, 2006, 2006 CPD ¶ 71 at 8.

delivery record, clearly Capps has failed to take effective corrective actions to deal with its continuing trend of delinquencies on its delivery orders,” including its first delivery on its most recent contract with DLA.² Contracting Officer Statement at 23. Based on our review, we find the agency’s evaluation of Capps delivery performance to be reasonable and consistent with the solicitation.

The protester contends that Wolverine’s contracts demonstrated a similar on-time delivery record that did not justify an award over Capps at a significant higher price, asserting that 40 percent of Wolverine’s delivery orders were late. As noted above, in evaluating proposals the agency considered delivery orders to be timely if 98 percent of the items were timely delivered. When this variance is applied to the delivery orders that Wolverine had listed as late in its proposal, the agency found that only 10 percent of Wolverine’s delivery orders were late. Agency Supplemental Report at 2, n.1; Declaration of Contract Specialist at 1. Thus, we have no basis to find the agency’s evaluation of Wolverine’s delivery performance was unreasonable, inconsistent with the solicitation or evidenced unequal or unfair evaluation.

Finally, the protester notes, in a supplemental protest, that the solicitation included the standard “Preference for Certain Domestic Commodities” clause, Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7012, which implements the Berry Amendment, 10 U.S.C. § 2533(a) (2000), which generally restricts the Department of Defense’s expenditure of funds for certain articles and items, to domestically produced products. Because Wolverine operates one factory in the Dominican Republic in addition to its factories in the United States and because Wolverine has both foreign and domestic suppliers, the protester speculates that Wolverine will obtain some of its materials, or manufacturing services, from foreign sources in violation of the Berry Amendment.

In response, the agency noted that Wolverine, in its proposal, identified the location for each stage of production of the shoes, and provided a list of its clothing and textile suppliers, in addition to other suppliers, that it was using in the performance of this contract. Based on the information Wolverine provided in its offer, the agency concluded that there was no basis for stating that Wolverine was not in compliance with the requirements of DFARS § 252.225-7012, or that it was taking an exception to that provision. Also, the agency stated that it obtained an additional certification from Wolverine regarding its compliance with the new revisions of the Berry Amendment regarding this solicitation. Agency Supplemental Report at 5.

² To the extent that Capps argues that its on-time delivery was more favorably evaluated in procurements with other agencies, we note that each federal procurement stands on its own, so that evaluation ratings under another solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the present RFP. Parmatic Filter Corp., B-285288, B-285288.2, Aug. 14, 2000, 2000 CPD ¶ 185 at 7.

While Capps contends that the agency should have investigated Wolverine's compliance with the Berry Amendment more thoroughly, our review of the record, including Wolverine's proposal, does not indicate that the agency could not reasonably accept Wolverine's proposal and subsequent assurances that it would comply with the RFP requirements, including those deriving from the Berry Amendment.

The protest is denied.

Gary L. Kepplinger
General Counsel