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## Decision

**Matter of:** Master Lock Company, LLC

**File:** B-309982.2

**Date:** June 24, 2008

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William M. Weisberg, Esq., Beth L. Jacobson, Esq., and Joyce L. Tong, Esq., Sullivan & Worcester LLP, for the protester.

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Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest is sustained where agency's evaluation of awardee's proposal as "neutral" under two evaluation factors resulted in those factors not being considered in the tradeoff determination, which was inconsistent with solicitation's award criteria.
  2. Protest is denied where agency reasonably relied on awardee's representations regarding compliance with the Trade Agreements Act.
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### DECISION

Master Lock Company, LLC protests the award of a contract to Evergreen Specialty Services under request for proposals (RFP) SPM5L5-07-R-0056, issued by the Defense Logistics Agency (DLA) for low security padlocks. Master Lock contends that the agency improperly evaluated the offerors' technical proposals and the awardee's representations regarding compliance with the Trade Agreements Act (TAA), and that the award determination was inconsistent with the stated evaluation criteria.

We sustain the protest.

### BACKGROUND

The RFP was issued on February 5, 2007, and sought proposals to provide 35 types of low-security padlocks. The RFP anticipated the award of one or more fixed-price, indefinite-quantity contracts, subject to an economic price adjustment clause, with a 1-year base performance period and four 1-year option periods.

The RFP stated that proposals would be evaluated on the basis of the following non-price factors, in descending order of importance: past performance, socio-economic considerations, and Javits-Wagner-O'Day (JWOD) Act considerations.<sup>1</sup> RFP at 64-65. The past performance evaluation factor had three equally-weighted subfactors: delivery, business relations/customer satisfaction, and quality. Id. The non-price factors were of equal important to price. Id. at 66.

Under the socio-economic and JWOD considerations evaluation factors, offerors were instructed to describe the efforts they would take to ensure that small, small disadvantaged, women-owned, veteran-owned and service-disabled veteran-owned small business concerns and JWOD concerns “will have an equitable opportunity to compete for subcontracts in this acquisition.” RFP at 59. Under each of these factors, offerors were required to provide the following information:

Describe any future plans your company has for developing additional subcontracting possibilities for [small business and JWOD concerns].  
... Specify what proportion of your proposal, as a percentage of dollars, will be subcontracted to [small business and JWOD concerns].

Id.

With regard to both evaluation factors, the RFP stated that “[a]n offeror who proposes a higher percentage, complexity level, and variety of participation by” small business and JWOD concerns, “will receive a higher rating.” RFP at 67-68.

The solicitation incorporated the clause at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7021(a)(12), which implements provisions of the Trade Agreements Act (TAA), 19 U.S.C. § 2501 et seq. The TAA clause requires offerors to provide only “U.S.-made, qualifying country, or designated country end products,” absent circumstances not relevant here. DFARS § 252.225-7021(c). DLA received proposals from four offerors: Master Lock, Evergreen, Pacific Lock Co. (PLC), and a fourth offeror. Agency Report<sup>2</sup> (AR) at 3. During the initial

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<sup>1</sup> The JWOD Act establishes the Committee for Purchase From People Who Are Blind or Severely Disabled, and authorizes it to establish and maintain a list of commodities and services provided by qualified nonprofit agencies for the blind or severely handicapped that it has determined are suitable for procurement by the government. 41 U.S.C. §§ 46(a), 47(a) (2000).

<sup>2</sup> DLA submitted a document titled “Report of the Contracting Officer” which was signed by the source selection authority (SSA), instead of the contracting officer (CO). This document comprised the initial agency’s report on the protest and is referred to herein as the Agency Report. The agency also submitted a document titled “Supplemental Report of the Contracting Officer” which was signed by both  
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evaluation of proposals by the technical evaluation team (TET), DLA determined that the fourth offeror's proposal was technically unacceptable, and eliminated it from award consideration. AR at 3. The agency also determined PLC's proposal indicated that the offeror would not comply with the TAA requirements, and eliminated that offeror's proposal from award consideration.<sup>3</sup>

With respect to Evergreen's TAA certification, DLA concluded that an additional inquiry was required. AR at 8. Evergreen left the TAA certificate blank in its proposal, thereby taking no exception to the blanket statement that none of the products it would supply would fail to meet the requirements of the TAA. AR, Tab 6, Evergreen Proposal, at 79. The agency was aware, however, that in July 2007 Evergreen declined to accept an order from DLA for locks under a different indefinite-delivery/indefinite-quantity (ID/IQ) contract, and did so under circumstances which indicated that the company was doing business with a supplier that had manufacturing facilities in China. AR at 8. Specifically, when the agency issued delivery order No. SPM5L207M2745 (order No. 2745) to Evergreen, the company declined to accept the order because it could not provide a timely sample from its supplier, [deleted], explaining that the supplier's "factory in China is new and is not yet 100% operational." AR, Tab 13, Email from Evergreen to DLA, July 12, 2007.

Because China is not a qualifying or designated country under the TAA, and because Evergreen's proposal for the current solicitation also stated that it would supply locks manufactured by [deleted], DLA requested that Evergreen confirm that the locks supplied in response to the instant solicitation would comply with the TAA. AR at 8. Evergreen responded by email that "[t]he factory where the laminated locks

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the SSA and CO. This document comprised the agency's response to supplemental protest grounds filed by Master Lock and additional questions from our Office, and is referred to herein as the Supplemental Agency Report.

<sup>3</sup> PLC filed a bid protest with our Office, arguing that the agency had not applied the correct standards in evaluating its proposal's compliance with the TAA. We denied the protest, concluding that the agency had reasonably determined that PLC's proposal, which called for the assembly in the United States of parts manufactured in China, did not meet the TAA "substantial transformation" test. See Pacific Lock Co., B-309982, Oct. 25, 2007, 2007 CPD ¶ 191.

are made is located in the city of [deleted],” and stated that [deleted] would allow tours of its facility to demonstrate compliance. AR, Tab 6, Email from Evergreen to DLA, Aug. 2, 2007.

After receiving the additional information from Evergreen, the TET accepted as adequate both offerors’ representations that they would comply with the TAA. Specifically, the agency concluded that both proposed to supply locks manufactured in “designated countries,” see DFARS § 252.225-7021(a)(3)(i), with Master Lock proposing to manufacture its locks in Mexico, and Evergreen proposing to supply locks manufactured by [deleted] in [deleted]. AR, Tab 9, Pre-Negotiation Briefing Memorandum (PBM), at 5.

The TET also determined that Evergreen’s initial proposal did not address the socio-economic or JWOD considerations evaluation factors, and rated the proposal as “poor” under these factors, the lowest rating under the agency’s source selection plan (SSP).<sup>4</sup> AR, Tab 9, PBM, at 2. The agency requested that Evergreen submit a revised proposal that addressed these factors. Although Evergreen submitted a proposal revision detailing its approach, the TET concluded that the proposal still merited a rating of “poor” under those evaluation factors. AR, Tab 11, Price Negotiation Memorandum (PNM), at 2.

The contracting officer (CO) determined, however, that Evergreen’s proposal should instead be rated “neutral” under the socio-economic and JWOD evaluation factors because, as a small business, “Evergreen has fewer opportunities to subcontract to meet the socio-economic and JWOD factors.” Id. at 4. In the selection decision, the source selection authority (SSA) concurred with the CO’s view that Evergreen should be rated “neutral” for these factors. AR, Tab 12, Source Selection Decision (SSD), at 1. The SSA noted that “Evergreen is a small business that has agreed to identify woman-owned and veteran-owned small businesses they work with during contract performance.” Id. at 2.

The final ratings for the offerors were as follows:

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<sup>4</sup> For the past performance evaluation, the agency used an evaluation scheme of outstanding, good, no record, fair and poor. AR, Tab 8, SSP at 4. For the socio-economic and JWOD considerations evaluations, the agency used an evaluation scheme of outstanding, good, fair and poor. Id. at 6-7.

|  | <b>MASTER LOCK</b> | <b>EVERGREEN</b> |
|--|--------------------|------------------|
| <b>PAST PERFORMANCE</b>                      | <b>OUTSTANDING</b> | <b>GOOD</b>      |
| Delivery                                     | Good               | Good             |
| Business relations/<br>customer satisfaction | Outstanding        | Outstanding      |
| Quality                                      | Outstanding        | Good             |
| <b>SOCIO-ECONOMIC<br/>CONSIDERATIONS</b>     | <b>GOOD</b>        | <b>NEUTRAL</b>   |
| <b>JWOD CONSIDERATIONS</b>                   | <b>GOOD</b>        | <b>NEUTRAL</b>   |
| <b>OVERALL RATING</b>                        | <b>OUTSTANDING</b> | <b>GOOD</b>      |

AR, Tab 11, PNM, at 2; Tab 12, SSD, at 1-2.

In the tradeoff determination, the SSA stated that the “evaluation of offerors was completed using price and past performance as evaluation factors, weighted equally.” AR, Tab 12, SSD, at 1. The SSA noted that Master Lock and Evergreen proposed prices that ranged in difference from 1% to 17%, with “the majority of items averaging an 8% or less (+/-) difference.” Id. Based on Master Lock’s higher rating for past performance, the SSA selected Master Lock for award of the 22 lock types where Master Lock’s price was either lower than Evergreen’s, or no more than 8% higher. Id. The SSA selected Evergreen for the award of the remaining 13 lock types, stating that Evergreen “is the lowest priced offeror, and their past performance is rated as overall good.” Id.

DLA advised each offeror of the award decisions, and provided Master Lock a debriefing regarding the portion of the requirements it was not awarded. This protest followed.

#### DISCUSSION

The protester challenges the award of 13 lock types to Evergreen. The protester argues that the agency unreasonably determined that Evergreen’s proposal met the requirements of the TAA, that the agency’s evaluation of the offerors’ proposals under the socio-economic and JWOD considerations evaluation factors was unreasonable, and that the agency’s evaluation of Master Lock’s past performance was unreasonable. As discussed below, we find no merit to these arguments. The protester also argues that the agency failed to consider the socio-economic and JWOD considerations evaluation factors in the selection decision. We agree with the protester regarding this argument, and sustain the protest on this basis.

## TAA Compliance Evaluation

Master Lock contends that the agency unreasonably ignored evidence that Evergreen would not perform the contract in compliance with the TAA. Specifically, the protester argues that the agency did not reasonably consider Evergreen's inability to provide locks under a different contract under circumstances that suggested non-compliance with the TAA. We disagree.

When a bidder or offeror represents that it will furnish end products of designated or qualifying countries (including domestic end products) in accordance with the TAA, it is obligated under the contract to comply with that representation. That is, where a bidder or offeror leaves the certificate blank and does not exclude any end product from the certificate, and does not otherwise indicate that it is offering anything other than a TAA-compliant end product, acceptance of the offer will result in an obligation on the offeror's or bidder's part to furnish a TAA-compliant end product. Wyse Tech., Inc., B-297454, Jan. 24, 2006, 2006 CPD ¶ 23 at 6. If prior to award an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond the firm's representation of compliance with the Act; however, where the agency has no information prior to award that would lead to such a conclusion, the agency may properly rely upon an offeror's representation without further investigation. Leisure-Lift, Inc., B-291878.3; B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8. Where an agency is required to investigate further, we will review the evaluation and resulting determination regarding compliance with the requirements of the Act to ensure that they were reasonable. Pacific Lock Co., B-309982, Oct. 25, 2007, 2007 CPD ¶ 191 at 4.

In its proposal, Evergreen left the TAA certificate blank, thereby indicating that it would provide locks that complied with the TAA. AR, Tab 6, Evergreen Proposal, at 79. As discussed above, however, DLA determined that additional inquiry regarding Evergreen's representation was required, based on the company's prior contracting history. AR at 11. As also explained above, DLA inquired because, in response to an earlier order issued by the agency, Evergreen advised DLA that its supplier, [deleted], could not provide a sample that met the specifications of the order because "[t]heir factory in China is new and is not yet 100% operational," and "[t]herefore, they cannot provide a sample at this time." AR, Tab 13, Email from Evergreen to DLA, July 12, 2007. Evergreen stated that "[a]s we cannot provide a sample that would meet the specifications in the solicitation we have to withdraw our offer." Id.

During DLA's evaluation here, the agency contacted Evergreen by telephone to confirm the site of manufacture for the locks. AR at 11. Evergreen confirmed via email that its supplier was [deleted], and that the "factory where the . . . locks are made is located in the city of [deleted]." AR, Tab 6, Email from Evergreen to DLA, Aug. 2, 2007. Evergreen also stated that "[deleted] would be happy to give a full tour of their production facility in [deleted] to show the fabrication process from start to

finish.” Id. Based on this information, the agency concluded that there was no reason to question Evergreen’s representations concerning TAA compliance.

We think the record shows that the agency considered the available information concerning Evergreen’s supplier, contacted Evergreen to confirm details regarding the TAA representation for this solicitation, and reasonably relied on Evergreen’s confirmation that the locks would be manufactured in [deleted], a TAA-designated country. Further, the record shows that the locks to be provided under the canceled order were not the same models as those to be provided under the award challenged here. AR at 8. On this record, we conclude that DLA reasonably addressed any concerns regarding Evergreen’s representation that it would comply with the requirements of the TAA.<sup>5</sup>

#### Socio-Economic and JWOD Considerations Evaluation

Next, Master Lock contends that Evergreen’s proposal should have been rejected as unacceptable for failing to address the socio-economic and JWOD evaluation factors in its proposal. We disagree because the record shows that the agency reasonably concluded that Evergreen’s proposal merited a rating of “poor” under these factors, but was not unacceptable.

The evaluation of an offeror’s proposal, including past performance, is a matter within the agency’s discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency’s evaluation of proposals, our Office will examine the record to determine whether the agency’s judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester’s mere disagreement with the agency’s judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. C. Lawrence Constr. Co., Inc., B-287066, Mar. 30, 2001, 2001 CPD ¶ 70 at 4.

As discussed above, Evergreen did not address either factor in its initial proposal, and the agency rated Evergreen’s proposal as “poor” under these factors. AR, Tab 9, PBM, at 5. The agency conducted discussions with Evergreen and requested that the offeror revise its proposal to address these factors. The TET evaluated Evergreen’s revised proposal, but concluded that it still merited a “poor” rating under the factors

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<sup>5</sup> Master Lock also argues that the agency should have questioned Evergreen’s compliance with the TAA because its proposal indicated a 15-20 day gap between the date that an order is sent to its supplier, [deleted], and the date the lock enters production. The protester contends that the delay suggests that [deleted] might be obtaining parts from a non-TAA compliant source. This argument is merely speculative, and does not provide a basis to sustain the protest.

because “the information submitted did not justify a change in [the company’s] initial rating.” AR, Tab 11, PNM, at 2.

Master Lock argues that the revised proposal did not meet the RFP requirement that offerors identify the “portion of your proposal, as a percentage of dollars, [that] will be subcontracted” to small business and JWOD concerns, and should therefore have been rejected as technically unacceptable. RFP at 59. On this issue, Evergreen’s proposal stated that [deleted]% of the company’s current subcontracted work is with small, woman-owned, or veteran-owned businesses, and that the company’s goal for the future is to increase this amount to [deleted]%. Supplemental Agency Report (SAR), attach. 9, Evergreen Revised Proposal, at 1. Evergreen did not, however, address what percentage of work or dollar value it proposed to subcontract to small businesses for this contract. See id. With respect to the JWOD considerations evaluation factor, Evergreen stated that it has been in contact with the JWOD program and states that the company and its supplier [deleted] “have expressed interest” in partnering with JWOD concerns in the future. Id. Again, however, Evergreen did not address what percentage of work or dollar value it proposed to subcontract to JWOD concerns for this contract. See id.

We conclude that the agency’s evaluation was reasonable. The RFP did not require offerors to propose a minimum level of subcontract participation for small business or JWOD concerns. See RFP at 59. Rather, the RFP merely required offerors to identify the efforts offerors would make to encourage subcontracting opportunities. The record here indicates that the agency considered Evergreen’s proposal to merit a “poor” rating under both subfactors. The SSP states that a “poor” rating indicates that the offeror “either does not address [socio-economic or JWOD subcontracting] plans or states that it has no plans to subcontract” with either small business or JWOD concerns. AR, Tab 8, SSP, at 6. The “poor” rating appears to show that the agency concluded that Evergreen did not make a specific commitment for subcontracting—a conclusion we think is consistent with Evergreen’s proposal. In effect, we think the record shows that the agency rated Evergreen as proposing \$0 for small business and JWOD concern subcontracts. As discussed above, the RFP did not prohibit offerors from proposing a \$0 level of subcontracting participation.

On this record, we find no basis to sustain the protest. As discussed below, however, we conclude that the SSA’s subsequent consideration of Evergreen’s evaluation under these factors in the selection decision was not reasonable.

#### Past Performance Evaluation

The protester argues that the agency unreasonably evaluated its past performance under the delivery subfactor as “good,” rather than applying the higher rating of “outstanding.” We disagree.

The agency received seven past performance references for Master Lock. AR, Tab 8, Master Lock Past Performance References. Four references rated Master Lock’s

delivery as “outstanding,” two as “good,” and one did not provide a rating. Id. Three of the references stated that they had never experienced any delivery problems with Master Lock, with the other four stating that while deliveries were generally on time, problems were always addressed to the customers’ satisfaction. Id. The agency also considered Master Lock’s score on the Automated Best Value System (ABVS), which indicated an on-time delivery rate of 93.5%.<sup>6</sup> AR, Tab 12, SSD, at 1. The agency determined that Master Lock “has provided DLA with almost seamless on-time delivery through a previous Long-Term contract,” and that “[c]ommercial and other government agencies have reported the same responsiveness to the few problems which arose in meeting contractual commitments.” AR, Tab 8, Evergreen Past Performance Delivery Evaluation, at 1. On this basis, DLA rated Master Lock’s past performance under the delivery subfactor as “good.” Id.

Master Lock argues that the survey forms all state that the company had no delays in delivery, and that the agency’s evaluation of the company’s performance as having problems with delivery was unreasonable. We agree that the survey forms all state “yes” in response to the question “Was/were deliveries on time?” AR, Tab 8, Master Lock Past Performance Evaluations. However, for four of those references, the surveys stated the delivery was on time, but also that delays were adequately addressed. Furthermore, those four references each described some degree of delay or error with delivery, but stated that Master Lock had always adequately addressed the problems. Id.

To the extent there is a contradiction between the references stating on the survey form that Master Lock’s deliveries were on time, but also that delays were adequately addressed, we think that the agency reasonably interpreted these responses as indicating less than perfect delivery at all times. Additionally, the agency’s assessment of Master Lock’s delivery record is consistent with the ABVS rating, which does not show 100% on-time delivery. On this record, we conclude that the agency’s evaluation of Master Lock’s past performance was reasonable and consistent with the evaluation criteria.

#### Tradeoff and Selection Decision

Master Lock argues that the selection decision was flawed for two reasons: (1) the selection decision relied on a mechanical comparison of offerors’ proposed prices, and (2) the selection decision excluded consideration of Evergreen’s evaluation under the socio-economic and JWOD considerations evaluation factors. We disagree with the first argument, but agree with the second one.

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<sup>6</sup> The ABVS is an automated system which collects and analyzes vendors’ past performance history for a specific period and translates it into a numeric score; it is based on considerations of delivery and quality.

First, the protester argues that the selection decision was based solely on a mechanical comparison of the offerors' proposed price, rather than a tradeoff between price and non-price factors, as required by the solicitation. Specifically, the protester contends that the selection decision was made based on an arbitrary price evaluation that "split the difference" between the offerors' prices.

Where a price/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, including the benefits associated with additional costs. Federal Acquisition Regulation (FAR) § 15.308. It is improper for an agency to rely on a purely mathematical price/technical tradeoff methodology. Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 4-5.

Here, the record shows that the SSA used the average of the offerors' prices as a starting point for the tradeoff determination, but also considered the non-price factors. The SSA noted that offerors prices ranged in difference from 1% to 17% from each other, with the average difference being approximately 8%. AR, Tab 12, SSD, at 1. The SSA determined that, based on Master Lock's superior past performance, award would be made to Master Lock for all lock types where that offeror's price was either lower, or was no more than 8% higher than Evergreen's price. Id. The SSA determined that, based on Evergreen's lower-rated past performance, award would be made to Evergreen for the balance of the lock types, i.e., where that offeror's price represented a greater than 8% price savings as compared to Master Lock. Id.

We think this evaluation was reasonable because the non-price evaluation for each offeror was to be based on factors that did not depend on which lock was being offered—i.e., past performance, socio-economic considerations, and JWOD considerations. Consequently, price was the only difference between the offerors regarding each of the distinct lock types offered. The SSA's determination was for each lock type, in essence, that an 8% difference represented a reasonable price premium for Master Lock's advantage on the non-price evaluation. In sum, we conclude that this tradeoff decision was not merely a mechanical comparison of price, but instead represented a reasonable exercise of business judgment by the SSA.

Finally, Master Lock argues that the SSA's decision to rate Evergreen's proposal "neutral" under the socio-economic and JWOD evaluation factors was inconsistent with the solicitation. DLA contends that its selection decision did take these factors into consideration, and that the "neutral" ratings were consistent with the solicitation. We agree with the protester that the agency's assignment of "neutral" evaluation ratings was unreasonable, and further conclude that the evaluation was inconsistent with the solicitation's stated award scheme because it resulted in a selection decision that ignored the socio-economic and JWOD evaluation factors.

The record here shows that the tradeoff decision considered only one of the non-price evaluation factors, past performance. For the 22 lock types awarded to Master Lock, the SSA concluded that the protester's "outstanding rating for past performance demonstrated the best overall value to the government, with price and past performance weighted equally." AR, Tab 12, SSD, at 1. For the 13 lock types awarded to Evergreen and challenged by the protester, the record also shows that the agency did not consider the socio-economic or JWOD considerations evaluation factors. The SSA concluded that "[f]or the remaining 13 items . . . award is recommended to Evergreen," because "Evergreen is the lowest priced offeror, and their past performance is rated overall as good." Id.

Thus, the record shows, the tradeoff decision did not consider the socio-economic or JWOD considerations evaluation factors. The solicitation stated, however, that price would be considered along with three non-price factors: past performance, socio-economic considerations, and JWOD considerations. RFP at 66. Furthermore, the RFP specifically advised offerors that "[a]n offeror who proposes a higher percentage, complexity level, and variety of participation by" small business and JWOD concerns, "will receive a higher rating." RFP at 67-68. On this record, we conclude that the selection decision was inconsistent with the solicitation's award scheme.

DLA contends that, notwithstanding the solicitation's identification of three non-price factors, the agency had a reasonable basis for rating Evergreen's proposal as "neutral" under these factors, and thus not factoring them into the award determination.<sup>7</sup> The agency contends that the "neutral" ratings were reasonable because Evergreen was itself a small business offeror, and thus "has fewer opportunities to subcontract to meet the socio-economic and JWOD factors." AR, Tab 11, PNM, at 4; Tab 12, SSD, at 1. The agency also argues that a "neutral" rating for a small business was reasonable because it furthered the agency's goal of promoting opportunities for small businesses. SAR at 13.<sup>8</sup>

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<sup>7</sup> In the supplemental AR, DLA states that the SSA rated Evergreen's proposal as "neutral" under the socio-economic evaluation factor, but did not change the "poor" rating for the JWOD evaluation factor. SAR at 11. We do not think the record supports this view. The selection decision states "Evergreen was rated as poor in two factors—socio-economic and JWOD. . . . The contracting officer considers these factors to be neutral, since they are a small business themselves." AR, Tab 12, SSD, at 1 (emphasis added). Thus, the selection decision was based on an evaluation of Evergreen's proposal as "neutral" under both evaluation factors.

<sup>8</sup> The FAR states that small business offerors without a record of relevant past performance "may not be evaluated favorably or unfavorably on past performance." FAR § 15.305(a)(2)(iv). The socio-economic and JWOD consideration evaluation factors did not, however, address past performance; rather they addressed offerors'

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The clear effect of these neutral ratings, as discussed above, was that the agency only considered one non-price factor: past performance. Nothing in the RFP stated that small business offerors were exempt from evaluation under these factors, or that an offeror's status as a small business could offset an otherwise negative rating under these factors. For the same reason, we think the agency unreasonably concluded that Evergreen's status as a small business and its "poor" ratings made that offeror equal to Master Lock's "good" ratings for these evaluation factors. Furthermore, DLA's rationale for rating Evergreen as "neutral" under the socio-economic considerations factor because the offeror was itself a small business has no rational relevance to the evaluation of the offeror under the JWOD considerations factor.

In sum, we conclude that DLA's tradeoff decision for the 13 lock types awarded to Evergreen relied on a tradeoff that only considered past performance and price, based on the agency's unreasonable determination that Evergreen's proposal should be rated "neutral" under the socio-economic and JWOD considerations evaluation factors. We further conclude that because Master Lock had a higher rating than Evergreen for these factors, the protester was prejudiced by this error, and sustain the protest because of the flawed tradeoff decision. See McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

#### Additional Past Performance Evaluation Concern

During the course of this protest, Master Lock also argued that the agency's evaluation of Evergreen's past performance was unreasonable. As discussed above, Evergreen declined to accept order No. 2745, which was issued under a different contract. DLA acknowledges that it did not consider these events in its evaluation of Evergreen's past performance. AR at 8. The agency contends, however, that it was not required to do so because the submission of a quote by a vendor under an ID/IQ contract does not result in a binding obligation.<sup>9</sup> Thus, the agency argues, because Evergreen did not accept the order, there was no contract performance for the agency to evaluate.

The agency is correct that neither the submission of a quote by a vendor nor the issuance of an order by an agency results in a binding contractual obligation. Rather,

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proposals to subcontract to small business and JWOD concerns during contract performance.

<sup>9</sup> "Vendor" is the common term for a contractor who has received an ID/IQ contract, and to whom task and delivery orders are "issued" under such a contract.

the government's order represents an offer that the vendor may accept either through performance or by a formal acceptance document. M. Braun, Inc., B-298935.2, May 21, 2007, 2007 CPD ¶ 96 at 3.

We disagree, however, with DLA's view as to the relevance of a vendor's rejection of an order to a past performance evaluation. A vendor who has been awarded an ID/IQ contract has a contractual relationship with the agency that awarded the underlying contract. Although the work required under any task or delivery order will only become a binding obligation on the parties if the vendor accepts the order, the underlying ID/IQ contract may itself have obligations. For example, a contract may require a vendor to accept orders placed by the agency within certain parameters. If a vendor were required to accept certain orders placed against the contract, but was unable to do so, this could be a matter relevant to the evaluation of that vendor's past performance.

Our Office requested that the agency address "whether under the terms of the contract against which orders could be placed with Evergreen, vendors were required to fill orders, or whether [Evergreen] was free to decline to accept the order based on an inability to fill the order." GAO Request for SAR, Apr. 29, 2008, at 3. The agency did not address our question, but instead argued that the matter was not appropriate for review under the past performance evaluation factor. SAR at 6. On this record, we are unable to determine whether the agency's conclusion regarding the relevance of order No. 2745 to Evergreen's past performance was reasonable.

## RECOMMENDATION

We recommend that the agency conduct a new selection decision for the 13 lock types awarded to Evergreen that follows the award scheme identified in the solicitation, consistent with this decision. As part of this new selection decision, the agency should reevaluate Evergreen's past performance, consistent with this decision. If Evergreen's proposal is not found to offer the best value to the government for any of these lock types, the agency should terminate or modify Evergreen's contract for the convenience of the government consistent with the new selection decision.

We also recommend that Master Lock be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2008). Master Lock should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger  
General Counsel