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**Comptroller General
of the United States**

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

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Decision

Matter of: Gentex Corporation

File: B-400328; B-400328.2

Date: September 23, 2008

Angela B. Styles, Esq., David Z. Bodenheimer, Esq., and Puja Satiani, Esq., Crowell & Moring LLP, for the protester.

Lynne Georges, Esq., Defense Logistics Agency, for the agency.

William Robinson, Esq., and Todd Bailey, Esq., Department of Justice, for Federal Prison Industries, an intervenor.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where it was apparent, prior to closing time for receipt of proposals, that Federal Prison Industries (FPI)--a federally-owned corporation--was a potential competitor in supply procurement, protest that agency should have provided for cost analysis under Office of Management and Budget Circular A-76, based on notice of award to FPI, is untimely; protest concerns a solicitation impropriety, and therefore should have been filed prior to the closing time for receipt of proposals.

2. Agency reasonably evaluated awardee's proposal as satisfactory, despite catastrophic hardware failure in one ballistics test, where it concluded that correction of deficiency was simple and solicitation defined satisfactory rating as including deficiencies that will require preventative corrective action in production.

3. Agency reasonably evaluated awardee's and protester's past performance/experience as satisfactory where protester had performed more helmet contracts than awardee, including current version, but had never produced required new version of helmet, which included more stringent testing requirements, and awardee had produced similar helmets.

DECISION

Gentex Corporation protests the award of a contract to Federal Prison Industries (FPI) under request for proposals (RFP) No. SPM1C1-07-R-0137, issued by the Defense Supply Center, Philadelphia (DSCP), for lightweight helmets (LWH). Gentex asserts that the agency improperly failed to conduct the procurement under

Office of Management and Budget (OMB) Circular A-76, and challenges the evaluation of its and FPI's proposals.

We deny the protest.

The RFP sought proposals for the supply of LWHs for use by the U.S. Marine Corps and contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a base year, with 3 option years. Estimated helmet quantities ranged from a minimum of 15,000 to a maximum of 60,000 for the base year, and a minimum of 2,754 to a maximum of 13,300 in each of the option years. Successful first article testing is required before any production quantities will be accepted.

Proposals were to be evaluated for "best value" on the basis of five factors (with relevant subfactors), listed in descending order of importance: (1) product demonstration model (PDM); (2) past performance/experience; (3) socioeconomic support; (4) Defense Logistics Agency (DLA) mentoring business agreements; and (5) Javits-Wagner-O'Day (JWOD) Act entity support. Factors 1 and 2 were rated on an adjectival basis--exceptional, very good, satisfactory, marginal, or unsatisfactory--while factors 3 through 5, which were of equal importance, were rated numerically based on a comparison of the proposals. Price was to be evaluated on the basis of a comparison of submitted prices for the base and option requirements; unrealistically low prices were to be considered indicative of a lack of understanding. The non-price factors combined were significantly more important than price.

Three offerors, including Gentex and FPI, submitted proposals with PDMs that were tested and evaluated. The technical evaluation team and contracting officer reached the following consensus technical ratings:

	Gentex	FPI	Offeror 3
PDM	Satisfactory	Satisfactory	Satisfactory
Past Performance	Satisfactory	Satisfactory	Satisfactory
Socioeconomic	2	3	1
DLA Mentoring ¹	2**	2**	1
JWOD Support	2	1	2
Overall	Satisfactory	Satisfactory	Satisfactory
Price	[deleted]	\$23,019,629	\$25,456,870

In his review of the evaluation record, the source selection authority found the proposals of Gentex and FPI to be technically equal in all factors except the PDM. Although he found Gentex's proposal slightly superior to FPI's under the PDM

¹ The rating "2**" represented the fact that neither Gentex nor FPI submitted a proposal for the DLA mentoring business agreement factor.

factor, he noted that this was due only to its helmet's marginally lower weight. He concluded that this slight superiority did not justify paying Gentex's [deleted] percent higher price and made award to FPI. After a debriefing and unsuccessful agency-level protest, Gentex filed this protest with our Office.²

PUBLIC-PRIVATE COMPETITION

Gentex asserts that, once FPI submitted a proposal, DSCP was required to comply with the requirements of OMB Circular A-76 governing public-private competitions by, among other things, conducting a cost analysis and providing notice to other offerors that FPI was competing. See Federal Acquisition Regulation (FAR) § 7.302(b)(2). In related arguments, Gentex alleges that FPI enjoys various competitive advantages over commercial concerns, such as exemption from taxes; is not bound by minimum wage and other regulatory requirements applicable to the private sector; and ultimately is not contractually bound to perform, since an agreement between an agency and FPI is in the form of an intragovernmental transfer. Thus, Gentex asserts, the agency was required to "level the playing field."

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2008). Gentex asserts that it could not raise this protest ground until it knew of FPI's participation in the procurement. We do not agree. The acquisition of supplies from FPI is authorized by statute (18 U.S.C. § 4124; 10 U.S.C. § 4210n) and regulation (FAR § 8.602). These authorities make the purchase of FPI supplies mandatory where, after market research, the agency determines that the FPI items are comparable to private sector items in terms of price, quality, and time of delivery.³ FAR § 8.602(a)(3). If the item is not found to be comparable, agencies are to acquire items meeting their needs through competitive procedures and to include FPI in the solicitation process. FAR § 8.602(a)(4)(i), (ii). Based on these statutes, the FAR, and FPI's catalog of

² Gentex challenges the agency's award on numerous bases. We have considered all of Gentex's arguments and find that they have no merit or that the agency's actions did not prejudice the protester. This decision addresses Gentex's most significant arguments.

³ Here, the agency performed market research that disclosed that FPI's catalog included helmets, but not the LWH sought under the RFP. While the agency did not make a determination as to comparability as required by FAR § 8.602(a)(2), this failure did not prejudice the protester. In this regard, a determination of comparability would have made an FPI purchase mandatory absent a proper waiver, and a determination of non-comparability would have resulted in the same competition under which Gentex participated here.

items--which includes helmets--Gentex was on ample notice that FPI was a potential competitor for this requirement.⁴ Gentex also was or should have been aware that the RFP did not make any provision for application of OMB Circular A-76 procedures in the event an FPI proposal was received. Thus, to the extent Gentex believes the A-76 procedures were applicable, it was or should have been aware of this protest ground prior to the closing time for receipt of proposals. Since its protest on this ground was raised after award, it is untimely and we will not consider it.⁵

PDM BALLISTICS EVALUATION

PDMs were evaluated under ballistic, weight, visual, and dimensional requirement subfactors. A satisfactory rating was to be assigned to proposals meeting the stated requirements of the acquisition documentation but containing a deficiency or deficiencies that would require preventative corrective action in production. RFP at 77. An unsatisfactory rating was defined as a PDM that substantially failed to

⁴ Gentex also asserts that, since FPI had not produced the LWH before, FPI was required to provide notice to other vendors of its intent to begin manufacturing these helmets. Gentex Initial Comments at 13-14. In this regard, FPI is required to notify potentially affected private vendors of its plans to produce any new product or to significantly expand production of an existing product. 18 U.S.C. § 4122(b)(4). FPI asserts that its LWH is not a new product; it is simply a new design of an existing product--a helmet--and, thus, did not trigger the notice requirement. FPI Supplemental Comments at 9. We find FPI's position reasonable. In any case, however, potential offerors were put on notice of FPI's presence in the helmet manufacturing marketplace by its catalog, which specifically lists production of Federal Supply Class 8470 items (helmets). Supplemental Agency Report (SAR) at 4. We also note that, under the above statute, provision of notice--if any--is the responsibility of FPI, not the procuring agency. Gentex points to nothing in the applicable statute that requires that an FPI customer determine whether FPI has provided the necessary notice before evaluating a proposal from and awarding a contract to FPI.

⁵ In any event, Gentex's assertions appear to be without merit. We find no statute or regulation, and the protester cites none, that specifically requires an agency to conduct an A-76 study and competition, or otherwise adjust its evaluation to account for any FPI competitive advantages simply because FPI is a potential or actual competitor. For example, neither 18 U.S.C. § 4124 nor 10 U.S.C. § 4210n refers to A-76, and FAR § 7.302(b)(2) does not establish a separate requirement that agencies must meet when FPI is a potential or actual competitor. Likewise, we are aware of no requirement that an agency otherwise notify offerors of FPI's participation in a procurement or to equalize FPI's alleged competitive advantages. Further, while FPI transactions constitute intragovernmental transfers (18 U.S.C. § 4124(c)) and not contracts, there was no solicitation, statutory, or regulatory provision that required the agency to specifically evaluate the impact of this difference.

meet many significant design-related and/or other requirements, indicated a lack of technical understanding, and contained a very significant deficiency or deficiencies determined to render the PDM completely unacceptable for the intended function. Id. PDMs with unsatisfactory ratings under the ballistic subfactor called for rejection of the entire proposal. RFP at 68.

Gentex asserts that FPI's proposal should have been rated unsatisfactory under the ballistic requirements subfactor—and therefore rejected as unacceptable—based on the evaluators' finding of “catastrophic hardware failures.” See Gentex Initial Comments at 31, 33. Gentex asserts that there was no basis to assume that FPI would correct the hardware failure, and concludes that the agency's rating of FPI's proposal as satisfactory thus constituted a waiver of a material requirement.

In reviewing an agency's technical evaluation, we will not reevaluate proposals, but will examine the record to ensure that it was reasonable and in accordance with the stated evaluation criteria and applicable procurement statutes and regulations. Harris Corp., B-299864 et al., Sept. 14, 2007, 2007 CPD ¶ 180 at 5.

There was nothing improper or unreasonable in the evaluation of FPI's PDM as satisfactory under the ballistic subfactor. Three of FPI's tested helmets had catastrophic hardware failures in the 9mm bullet resistance to penetration test and the evaluators expressed their doubts that the proposed hardware system could meet the requirements. Agency Report (AR) Tab 16. However, the evaluators specifically found that “choosing an alternate hardware system (one with a larger screw head diameter) can easily overcome this deficiency without changing the helmet shell design, and with little or no cost difference.” Id. As noted above, correctable deficiencies were expressly contemplated under the satisfactory rating description.⁶ RFP at 77. Requiring the submission of pre-production units for first article testing (FAT) provided a means for the eventual contractor to correct deficiencies identified during the evaluation; FPI will have to correct all deficiencies prior to submitting its FAT units or risk rejection of those units and termination of its contract. See RFP at 11.⁷ We conclude that the evaluation in this area was unobjectionable.

⁶ In fact, only an exceptional rating contemplated “no deficiencies.” A PDM could even be rated very good if it contained deficiencies that were not significant and were “very easily correctable during production.” RFP at 77.

⁷ We note that, while FPI's helmets were the only ones to have a “catastrophic” failure, all three offerors' PDMs experienced some failures under the V50 ballistic limit tests that would have to be corrected in production through retooling. AR, Tabs 16, 17. These failures were not unexpected and the evaluators did not deem them catastrophic because they involved pre-production samples; the manufacturers would have the opportunity to perfect their helmet molds and parameters prior to FAT. Id.

PAST PERFORMANCE EVALUATION

The past performance evaluation included two equally important subfactors--experience and quality of items/delivery performance.⁸ With regard to experience, offerors were required to submit information that described the “extent of experience producing the same or similar item(s)” within 2 years prior to the closing date, and were to include--among other items--the average dollar amount per year, the total contract or order quantity, and the quantity shipped per month. RFP at 71. In evaluating offerors’ past performance information as an indicator of successful contract performance, the evaluators were also to consider the currency and relevance of the information, context of the data, volume of business, and general trends in performance. RFP at 75. The RFP defined past performance as satisfactory where it indicated that contractual requirements were met and indicated an understanding of the technical requirements and ability to provide an acceptable quality product with a reasonable probability of successful contract performance. RFP at 77. In contrast, a very good rating required a showing that an offeror’s past performance met contractual requirements and exceeded some to the government’s benefit, and a rating of exceptional required a showing that past performance exceeded many requirements. *Id.* at 77.

Gentex and FPI received satisfactory ratings for past performance/experience. Gentex asserts that it should have received a higher rating than FPI, and that the agency unreasonably failed to consider its superior experience in producing the current version of the LWH and the advanced combat helmet (ACH); its greater number of contracts/delivery orders; and the higher value of its contracts.

The evaluation of an offeror’s past performance, including the determination of the relevance and scope of the offeror’s performance history, is a matter of agency discretion that we will not question unless shown to be unreasonable, undocumented, or inconsistent with the solicitation criteria or applicable statutes or regulations. *Family Entm’t Servs., Inc., d/b/a/ IMC*, B-291997.4, June 10, 2004, 2004 CPD ¶ 128 at 5.

The evaluation was reasonable. In evaluating Gentex’s past performance/experience as satisfactory, the agency noted the firm’s experience in producing the previous LWH, as well as two types of flyer’s helmets, and the ACH, but also considered the fact that Gentex had never produced the new LWH with its more stringent testing requirements. AR, Tab 17. In evaluating FPI’s experience as satisfactory, the evaluators noted that FPI had never produced the LWH, but

⁸ Gentex has not challenged the past performance evaluation under the third, less important subfactor covering compliance with contractual socioeconomic subcontracting/mentoring goals.

considered the fact that it had successfully manufactured or was currently producing similar helmets (personnel armor system for ground troops (PASGT)) under nine contracts or delivery orders. AR, Tab 16. The agency's satisfactory ratings reflected the conclusion that, although both offerors' combat helmet experience was based on different helmet designs than the one required here, their experience was probative of their ability to perform the contract because all combat helmets are similar in that they are designed to protect the wearer's head from bullet penetration. SAR at 8. The agency's conclusions appear reasonable and we see nothing in the agency's findings that is inconsistent with the RFP's description of a satisfactory rating.

Contrary to Gentex's assertions, nothing in the RFP required the agency to rate its proposal higher than FPI's under the past performance/experience factor solely due to its greater number of contracts, prior production of more helmets, or higher contract values. In this regard, while the RFP called for consideration of an offeror's "business volume," it did not provide that one proposal would be rated higher than another based solely on a higher business volume.⁹ RFP at 71, 75. For example, the record shows that Gentex had produced [deleted] helmets per month ([deleted] the base year requirement); proposed to increase its rate to [deleted]; and had produced 450,000 helmets over 2 years demonstrating its ability to meet the maximum requirement of 99,900 helmets over 4 years. See Gentex Initial Comments at 29. However, although it has produced fewer helmets than Gentex, FPI's past performance record [deleted] showed a capability to produce more than 5,000 helmets per month and meet the contractual maximum. In this regard, in 2 years, FPI produced over 120,000 PASGT helmets under four contracts/delivery orders, including one under which it produced more than 19,000 helmets per month for a total of 99,250 units over 6 months. FPI Proposal at 4-5. In addition, the agency's market research showed that FPI had a history of producing between 30,000 and 40,000 helmets per month compared with Gentex's history of [deleted]. AR, Tab 1. Under these circumstances, the agency could reasonably conclude that the offerors' past performance warranted the same satisfactory rating in this area.

⁹ This case thus is distinguishable from cases cited by Gentex, such as Beneco Enters., Inc., B-283512, Dec. 3, 1999, 2000 CPD ¶ 175 at 8. Gentex Initial Comments at 27-30. In Beneco, the RFP provided that offerors' past performance would be based on their record of performing similar work, with a focus on information demonstrating quality of performance relative to the size and complexity of the procurement under consideration. We sustained the protest because the record did not establish that there was a reasonable basis for finding the awardee's past performance superior to the protester's; the protester had an extensive record of successful performance of contracts comparable in value to that contemplated by the RFP, while the awardee's past performance covered significantly smaller contracts.

While the agency did not assign specific ratings based on each offeror's number of contracts, item quantity, or dollar values, the record shows that it considered this information in the past performance evaluations. SAR at 8; AR, Tabs 16, 17. In this regard, under the quality/delivery subfactor, the evaluators considered that Gentex had performed some 50 contracts/delivery orders worth approximately \$114 million and encompassing more than 450,000 helmets, including ACHs and current LHWs. AR, Tab 17. The evaluators also considered the firm's specific delivery record--ahead of schedule for 1 contract; on-time for 35; 1 to 5 months behind schedule based on excusable delays for 2; late, based on inexcusable delays/revised schedules for 11; and one not yet scheduled to ship. AR, Tabs 17 and 19, at 4. Gentex's rating also reflected its satisfactory quality record, as evidenced by one rejected lot of ACHs for ballistics (later corrected) and three corrective actions involving failed coating adhesive, illegible identification markings, and ladder-buckles breaking during non-ballistic testing. AR, Tab 17. In evaluating FPI's past performance, the evaluators considered its nine contracts/delivery orders valued at \$46 million, four of which called for production of more than 120,000 PASGT helmets. AR, Tab 16; FPI Proposal at 4-5. The evaluators rated FPI's delivery record marginal, noting that the firm had four orders that were on-time, but five that were 1 to 4 months late based on inexcusable delays. AR, Tab 16. They rated FPI's record for quality as very good, noting the absence of any quality issues for the nine contracts/delivery orders and rated its proposal overall satisfactory under this subfactor. Id.

Since the record shows that both offerors are capable of meeting the production requirements, but neither has a perfect delivery or quality record, and the RFP did not specifically provide for higher ratings due to higher business volume, we find nothing objectionable in the evaluation and conclude that the evaluators reasonably concluded that both offerors' past performance records were satisfactory.

The protest is denied.

Gary L. Kepplinger
General Counsel