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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Ashland Sales and Service Company

File: B-291206

Date: December 5, 2002

Ruth E. Ganister, Esq., Rosenthal & Ganister, for the protester.
Marc Lamer, Esq., Kostos & Lamer, for Valley Apparel, LLC, an intervenor.
Daniel Barry, Esq., and John P. Patkus, Esq., Department of Defense, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's offered product demonstration model of jacket did not comply with unambiguous purchase description requirement that bartack stitches go through all plies of a jacket.
 2. Under a solicitation where technical quality was more important than price, the source selection authority's (SSA) price/technical tradeoff determination selecting a slightly lower-priced proposal over a slightly higher-rated proposal was unreasonable, where the SSA relied on incorrect evaluation information that made the technical superiority of the higher-rated proposal appear significantly smaller than it actually was.
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DECISION

Ashland Sales and Service Company protests an award to Valley Apparel, LLC, under solicitation No. SPO100-00-R-4130, issued by the Defense Logistics Agency (DLA), Defense Supply Center, Philadelphia, Pennsylvania, for Navy shipboard jackets.

We sustain the protest.

The solicitation, issued as a total set-aside for small business concerns on November 2, 2000, contemplated the award of an indefinite-quantity contract for 1 year with 2 option years. Award was to be made to the offeror whose proposal was most advantageous to the government, considering price and technical quality. Technical quality was more important than price. The solicitation listed the technical evaluation factors in descending order of importance: (1) product demonstration model (PDM), (2) experience/past performance, (3) manufacturing

plan, (4) quality assurance plan, and (5) DLA mentoring business agreement. An adjectival rating of either highly acceptable, acceptable, marginally acceptable, or unacceptable was to be assigned each proposal under each factor. RFP at 62, 66-67.

Offerors were required to submit a PDM with their proposals. The PDM was to be evaluated for, among other things, “[c]onformance to the visual, dimensional and manufacturing requirements of the purchase description.” *Id.* at 63. Relevant here is the following requirement for bartack stitching at the zipper:

3.2.11 Seams and stitches. . . . The jacket shall be . . . vertically bartacked at the top and bottom of both sides of the slide fastener, thru all plies including the slide fastener tape.

Agency Report, Tab 22, Purchase Description, June 13, 2000, at 8.

For the evaluation of experience/past performance, the solicitation instructed offerors to “describe their experience with producing the same or items of similar complexity within the past two (2) years.” RFP at 58. The solicitation stated that the agency’s evaluation would consider the information provided in proposals and obtained from other sources, and that the evaluation would be a subjective assessment of the relevant facts and circumstances to determine whether the offeror had consistently demonstrated a commitment to customer satisfaction and timely delivery of quality goods and services at fair and reasonable prices. The solicitation also stated that offerors might be given an opportunity to respond to unfavorable reports of past performance, and the responses, or lack thereof, would be considered in the evaluation. RFP at 63-64.

The closing date for submission of initial proposals was December 27, 2000. The agency received seven proposals, including Ashland’s and Valley’s. Under the PDM factor, the agency evaluation rated both proposals acceptable. Ashland’s PDM had one minor defect and Valley’s had three minor defects. Ashland’s deficiency was the absence of the bartacks required at the top and bottom of the slide fastener. Agency Report, Tab 4, Pre-Negotiation Briefing Memorandum, Apr. 27, 2001, at 3-4. Valley’s three deficiencies were: (1) a larger hook and loop fastener on the inside pocket than was specified, (2) all bartacks were 1/8-inch larger than specified, and (3) the hanger loop was 1/2-inch shorter than specified (+/- 1/4-inch). *Id.* at 6. The agency evaluation determined that all the deficiencies for both of these PDMs would be “easily corrected during production.” *Id.* at 3, 6.

Under the experience/past performance factor, the agency evaluation rated Ashland’s proposal acceptable and Valley’s marginally acceptable. The evaluation determined that both proposals had presented sufficient evidence of producing items of the same or similar complexity. The material aspects of the evaluation for these proposals concerned the offerors’ records of timely performance and the quality of

items produced. The evaluation determined that, while both offerors had completed the majority of their contracts in a timely manner, both also had completed some contract orders behind schedule. *Id.* at 4, 6-7. Valley also had a warranty action invoked against 22 percent of a contract. *Id.* at 6.

The agency's discussions with Ashland identified the PDM deficiency for omitting the bartacks, as well as issues under other evaluation factors; however, the agency did not identify any negative past performance information that the agency was considering. In providing Ashland an opportunity to revise its proposal, the agency stated, "If desired, you may resubmit a [PDM] in an effort to achieve a higher rating." Agency Report, Tab 5, Letter from DLA, June 22, 2001.

Ashland's response disagreed with the PDM evaluation, contending that its PDM did have bartacks at the top and bottom of both sides of the slide fastener that was sewn "through all plies, prior to turning the jacket." Ashland stated that the purchase description does not require placement of the bartack "after turning the jacket," nor that the bartacks be visible on the exterior of the jacket. Ashland's letter explained how the agency might disassemble a portion of the jacket to view the bartacks, and requested notification if the agency could not verify the presence of the bartacks. It also requested that the agency increase the evaluation rating for the offeror's PDM to highly acceptable.¹ Agency Report, Tab 6, Letter from Ashland, June 28, 2001.

In response, the agency reexamined Ashland's PDM. It confirmed that the bartacks were present, though not visible because they did not go through the outer most ply of the jacket. Since the purchase description required that the bartacks must be sewn through all plies, DLA determined that the defect remained. The acceptable rating for Ashland's PDM did not change. Agency Report, Tab 7, Addendum to Pre-Negotiation Briefing Memorandum, Nov. 6, 2001, at 2-3.

On December 20, 2001, DLA amended the solicitation to incorporate revisions to the purchase description. The revisions included the following revision to the bartack requirement at paragraph 3.2.11:

The top and bottom of the slide fastener closure and windflap shall be vertically bartacked on the topstitching, through all plies including the slide fastener tape.

¹ Ashland's letter also requested that the agency notify the offeror if it did not agree with Ashland's position. The agency did not change its rating and did not indicate to Ashland either that the agency would change the rating or that the agency agreed with the offeror's position. Other than extending subsequent opportunities to resubmit a PDM, the agency did not further address this matter with Ashland prior to the post-award debriefing.

RFP amend. 004, at 8. The revisions also changed the type of fabric for the outer shell of the jacket. RFP amend. 004, at 3. Revised proposals were due by January 11, 2002. RFP amend. 005, at 2. The change in outer shell fabric required a more expensive fabric, and the agency contemplated price increases. All offerors revised their proposals to some extent.

Ashland continued to assert that its PDM complied with the bartack requirement as originally issued and that its PDM rating should be increased. Ashland stated that it would not submit a revised PDM, and thus its PDM should be evaluated based on the original requirement. Agency Report, Tab 10, Letter from Ashland, May 24, 2002. Valley also did not submit a revised PDM.

On June 19, DLA requested final revised proposals due by June 20. RFP amend. 0006. Ashland responded with a letter restating its position on the evaluation of its PDM and re-asserting its compliance with the original bartack requirement. Ashland also stated that the revised requirement added that the bartacks are to be “on the topstitching,” which now requires sewing of the bartacks “after turning and topstitching the jacket.” Ashland also submitted sewn examples of the bartack illustrating Ashland’s interpretation of each version of the requirement. Ashland continued to assert that its PDM, as submitted, complied with the original requirement. Agency Report, Tab 13, Letter from Ashland, (June 19, 2002). Ashland did not re-submit a PDM.

The final evaluated prices and technical rating for the three lowest-priced offerors are presented below:

| Factor | Offeror A | Valley | Ashland |
|------------------------------------|-----------------------|-----------------------|----------------|
| PDM | Acceptable | Acceptable | Acceptable |
| Experience/Past Performance | Marginally Acceptable | Marginally Acceptable | Acceptable |
| Manufacturing Plan | Acceptable | Acceptable | Acceptable |
| Quality Assurance Plan | Acceptable | Acceptable | Acceptable |
| Mentoring Agreement | Neutral | Neutral | Neutral |
| Overall Technical | Marginally Acceptable | Marginally Acceptable | Acceptable |
| Evaluated Price | \$(DELETED) | \$15,695,500 | \$(DELETED) |

Agency Report, Tab 14, Price Negotiation Memorandum, Aug. 6, 2002, at 1.

The final evaluation report stated Ashland’s objection to the agency’s evaluation of its PDM, and that the agency had determined that the original evaluation was justified. *Id.* at 4.

Under the experience/past performance factor, the final evaluation summarized updated information on the offerors' performance records. Additional contracts for both Ashland and Valley were considered and all were being performed in a timely manner; there was no new adverse information in either offeror's updated records. The previously evaluated adverse information was summarized for each offeror.

Ashland was determined to have two delinquencies, which were the result of two large orders under a single contract being completed behind schedule; those delinquencies were stated to have occurred "very early in the rating period." Id.

Valley was determined to have five delinquencies, four of which were for small quantity, special-measurement items and had limited impact on the overall evaluation. In addition, the agency identified two other contracts with small numbers of delinquent special order items; however, since the regular portion of the contracts and the majority of the special order quantities were delivered on schedule, these contracts were considered to be performed on schedule. The agency thus determined that Valley had one significant delinquency and that it had occurred "at the beginning of the rating period." The evaluation summary also described the warranty action under another of Valley's contracts and stated that it had occurred "at the very beginning of the rating period." Id. at 3.

The report stated that the final ratings under the experience/past performance factor were at "the low end of Acceptable" for Ashland and "at the very high end of Marginally Acceptable" for Valley. The summary stated that the overall technical ratings were "Acceptable" for Ashland and "Marginally Acceptable . . . at the very high end of the range" for Valley. Id. at 4-5.

On August 8, a source selection decision document was prepared selecting Valley for award. In this document, the source selection authority (SSA) first described his comparison of the evaluations of the proposals of Offeror A and Valley, and then between Valley and Ashland. The document identified differences between all three proposals under the PDM and experience/past performance factors and price; the proposals were considered equivalent under the remaining factors.

As between Offeror A's and Valley's PDM, both proposals had a few minor defects that were easily correctable during production. Valley's PDM had fewer defects and, although the SSA considered that Offeror A's and Valley's PDMs were "of comparable quality," he determined that Valley's was "slightly superior" and presented "slightly less risk." Under the experience/past performance factor, Offeror A had a larger number of contracts with delinquencies than did Valley and Offeror A's delinquencies had occurred throughout the rating period, whereas Valley's occurred early and its recent performance was on or ahead of schedule. On the other hand, Valley had the warranty invocation, which affected quality, and Offeror A did not. The SSA determined that, even considering Valley's quality problems, Valley was superior under the experience/past performance factor.

Overall, the SSA determined that “the overall better quality of Valley’s proposal” justified the higher price, which was \$[DELETED] or [DELETED] percent higher than Offeror A’s. Agency Report, Tab 15, Source Selection Decision, at 1-4.

As between Valley’s and Ashland’s proposals, the source selection decision document stated that Ashland’s PDM had only one minor defect and determined that “Valley’s PDM presents a bit more risk to the Government since it is slightly inferior to Ashland’s near perfect submission.” Id. at 5.

Under the experience/past performance factor, the SSA stated that Ashland had two delinquencies under the same contract, both of which occurred “very early in the rating period.” The source selection decision also stated that three orders under that contract “were each extended for six weeks due to inexcusable delay.” Additionally, Ashland had delivered special measurement items behind schedule, although these late items “were not held against Ashland.” Ashland’s “most recent performance [was] satisfactory” and it did not have any “warranty actions or quality deficiencies.” Id.

Valley had the five delinquencies, of which four for small quantities were “given minimal weight” by the SSA. The fifth delinquency, “like Ashland’s two delinquencies, occurred early in the rating period.” The SSA also identified the warranty action charged against Valley. Id.

The source selection document stated that, based on the above, the SSA considered “Valley to have the edge in the area of timely delivery since Ashland had delinquencies under two large orders while Valley had a delinquency under one large and four very small contracts/orders.” However, since Valley had a warranty action and Ashland did not, the SSA determined that Ashland has “the edge in the area of quality.” The SSA determined that the “quality issue somewhat outweighs” the timely delivery issue, and thus “Valley represents slightly more risk to the Government for [the experience/past performance] factor.” Overall, the SSA determined that Ashland’s proposal is “slightly more credible” under the PDM factor, and “somewhat more credible” under the experience/past performance factor. Id. at 6. The SSA then stated the following:

The Contracting Officer has determined that paying \$[DELETED] ([DELETED]%) more to Ashland for a somewhat superior PDM and past performance proposal is neither warranted nor justified. I therefore consider Valley to represent a better value to the Government than Ashland.

Id. at 7.

On August 21, DLA awarded the contract to Valley. Following a debriefing, Ashland filed this protest.

Ashland alleges that its PDM complied with the bartack requirement in the purchase description and therefore it submitted a perfect PDM that deserves the highest rating. It further alleges that the agency unreasonably evaluated Ashland's delivery record. Finally, the protester alleges that the SSA's price/technical tradeoff determination was unreasonable.

In reviewing a protest of an agency's evaluation and source selection decision, we will not re-evaluate proposals, but will review the record to determine whether the evaluation and selection decision are reasonable and consistent with the stated evaluation criteria, and with applicable procurement laws and regulations. M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 at 6. A source selection decision based on inconsistent or inaccurate information concerning the technical evaluation or the relative merits and contents of the offerors' technical proposals is not reasonable. OneSource Energy Servs., Inc., B-283445, Nov. 19, 1999, 2000 CPD ¶ 109 at 10; New Breed Leasing Corp., B-259328, Mar. 24, 1995, 96-2 CPD ¶ 84 at 4.

Here, as discussed below, the SSA made his source selection based on erroneous information about the evaluated difference between Valley and Ashland under the experience/past performance factor. The selection decision was very close and the SSA was not aware of the errors at the time of his decision. Hearing Transcript (Tr.) at 11-15, 23-25 (testimony of the SSA). We sustain the protest on this basis, but we first address the protest of the agency's PDM evaluation.

Ashland's PDM does not comply with the initial bartack requirement. The initial version of the purchase description required that bartacks be sewn through "all plies" of the jacket at the top and bottom of both sides of the slide fastener. Agency Report, Tab 22, Purchase Description (June 13, 2000), at 8. By definition, a ply is one thickness or layer of a material. The Random House College Dictionary 1022 (rev. ed. 1980). As Ashland states, its PDM has bartacks sewn at the top and bottom of the slide fastener before it is turned. This means that during the assembly of the jacket, Ashland sewed the outer shell fabric to the slide fastener tape before the shell fabric was folded over on itself, or "turned." The shell fabric, when turned, covers the raw edge of the shell fabric and a portion of the slide fastener tape. The folded outer shell fabric is then topstitched in place, creating a double layer of outer shell fabric on top of the slide fastener tape. If the bartacks are sewn before the outer shell fabric is turned, as is the case with Ashland's PDM, the bartacks go through only one layer of outer shell fabric at a location where that fabric has two layers. Thus, on Ashland's PDM, the bartacks on the slide fastener tape do not go through all plies as required.

Ashland essentially alleges that, either the purchase description did not require that the bartacks be sewn through all plies after the material was turned, or the requirement is latently ambiguous with Ashland's interpretation representing one of two reasonable interpretations. We disagree. The requirement unambiguously

stated that the bartacks had to go through all plies without qualification. Since Ashland's PDM is constructed with two plies of outer shell fabric at the location of the bartacks and the bartacks go through only one of them, Ashland's PDM does not comply with the requirement.²

In any event, the defect in Ashland's PDM is minor. It did not raise any material concern with the agency because it is easily corrected during production.³ In fact, all of the PDM defects for all offerors considered for award were similarly minor in nature. The SSA recognized this and considered these PDMs to be very close;⁴ although Ashland maintained a slight evaluated advantage, it was not significant and did not translate into value to the government for purposes of awarding at a higher price. Tr. at 11-13, 16 (SSA); Agency Report, Tab 15, Source Selection Decision, at 5. We find reasonable the SSA's assessment of the evaluated PDM differences between these proposals.

Given the minor differences in PDMs and the equivalence of proposals under other factors, the tradeoff determinations were based on past performance and price. Tr. at 16 (SSA). The evaluated difference in past performance, as stated in the source selection decision, was that Valley had a slight advantage in the area of timely delivery, but Ashland had the advantage under the area of quality of items delivered because Valley had a significant warranty claim and Ashland had none. Overall, the SSA determined the evaluated difference in quality of performance "somewhat outweighed" the evaluated difference in timely performance, and he gave a slight

² To the extent the requirement was subsequently revised to require that the bartacks be on the topstitching, the revision more specifically identified where at the top and bottom of the slide fastener tape the bartacks are to be located. RFP amend. 004, at 8. Contrary to the protester's argument, the revision did not alter the meaning of the requirement that the bartacks go "through all plies."

³ The example of a bartack that did comply with the requirement, which Ashland submitted just prior to the closing date for final proposal revisions, served to confirm the agency's determination that this was a minor, easily correctable defect. Since the example--a portion of a slide fastener with a swatch of outer shell material sewn to it--consisted of only a portion of the entire jacket, it did not constitute a PDM, and thus the agency did not alter the evaluation of Ashland's PDM. Tr. at 86-87 (testimony of the contracting officer).

⁴ One of the PDM defects evaluated for Valley's PDM was eliminated as a result of discussions. Agency Report, Tab 7, Addendum to the Pre-Negotiation Briefing Memorandum, Nov. 6, 2001, at 7. Therefore, Valley had two PDM defects. Nevertheless, the source selection decision stated that Valley's PDM had three defects. However, these minor defects did not affect value to the government and were thus not material in differentiating between the proposals.

advantage to Ashland under the experience/past performance factor. Agency Report, Tab 15, Source Selection Decision, at 6.

The SSA stated that the selection of Valley over Ashland was extremely close--“a tough call”--given the slight evaluated technical advantage for Ashland and the slight price advantage for Valley. Tr. at 11-13 (SSA). His decision selecting Valley was based on the evaluation results as stated in the source selection decision document. Tr. at 23 (SSA). The SSA did not prepare the written source selection decision,⁵ although, at the time he approved the selection decision, he relied on the statement of facts in it. Tr. at 9, 23-25, 30-33 (SSA). However, the record shows that material facts in the source selection decision were incorrect.

The most significant error was that the selection decision incorrectly stated that Ashland’s two delinquencies and Valley’s one significant delinquency all occurred early in the rating period. The rating period was a 2-year period used by the agency to determine which contracts would be considered in evaluating the experience and past performance of offerors.⁶ Here, the rating period was from December 27, 1998 to December 27, 2000. Tr. at 24-25 (SSA), 50-52 (contracting officer). Ashland’s two delinquencies occurred prior to December 1998.⁷ Tr. at 52 (contracting officer). Valley’s delinquency occurred in April 2000. Agency Report, Tab 25, Evaluation Documentation for Valley, at 5. Thus, rather than both offerors’ delinquencies occurring early in the rating period, Ashland’s occurred prior to the rating period, and Valley’s occurred well into the last year of the rating period. There is no evidence that the SSA was aware of this discrepancy when he made his source selection decision.

This problem was further compounded by the incorrect statement in the source selection decision that three orders (under the same contract with the two delinquencies) were each extended “6 weeks due to inexcusable delay.” Agency Report, Tab 15, Source Selection Decision, at 5. In fact, this was an excusable delivery extension granted for all three orders. Agency Report, Tab 23, Letter from

⁵ The contracting officer prepared it. Tr. at 9 (SSA), 38 (contracting officer).

⁶ As noted, the proposal preparation instruction directed that offerors describe their relevant contract experience for the past 2 years. RFP at 58. In such circumstances, we have held that it is proper for evaluators to consider only the record of past performance histories during the period stated in the RFP proposal instructions. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124 at 3.

⁷ Ashland’s delinquencies occurred under two delivery orders under the same contract. The first one was completed late on July 21, 1998, and the second on November 24, 1998. Agency Report, Tab 24, Summary of Ashland’s Delivery Orders, at 1-2.

Agency, July 9, 1998, at 2; Tr. at 39 (contracting officer). While the agency contends that if the source selection decision is carefully read, it is apparent that this was an obvious error that did not affect the decision, the SSA testified that, at the time of the source selection decision, he did not know that this was an error.⁸ Tr. at 23, 30-31 (SSA).

Thus, the record is clear that the SSA's tradeoff decision was based on incorrect information concerning the relative timing of Ashland's and Valley's delinquencies and a misstatement that a contract was extended due to inexcusable rather than excusable delay. Because of this, the decision's conclusion that Valley had a superior timely record was unsupported by the record. Moreover, the decision cast Ashland's proposal in a more negative light than would be the case if the facts were correctly stated, so that the evaluated advantage of Ashland should be greater than what the SSA believed to be the case when making the price/technical tradeoff. Since the SSA's price/technical tradeoff decision favoring Valley's small price advantage over Ashland's narrow technical advantage was extremely close, correction of these errors could quite possibly tip the tradeoff in favor of Ashland's higher-rated proposal. In this regard, we note that as between Offeror A and Valley that the SSA found a difference under the experience/past performance factor that warranted payment of an even larger price premium than existed between the proposals of Ashland and Valley.

We recommend that the agency review its evaluation of proposals, and make a new source selection decision with appropriate documentation. If an offeror other than Valley is selected for award, the agency should terminate the contract previously awarded to that firm. We also recommend that the agency reimburse the protester its cost of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2002). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁸ The SSA's testimony at the hearing was fully credible as to what he recalled doing or thinking at the time of the source selection decision and what happened afterward. When further questioned on the errors in the source selection document, he speculated as to how he could have recognized the errors in the document, but still stated that he was not aware of the errors at the time he made the source selection decision. Tr. at 30-31 (SSA).