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**United States Government Accountability Office
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Decision

Matter of: Tennier Industries, Inc.

File: B-403336.2; B-403336.3

Date: October 26, 2010

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Capt. Sean T. Nguyen, and Todd Bailey, Esq., Department of the Army, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was reasonably determined to be technically unacceptable, where the agency's laboratory testing found that the protester's proposed product did not satisfy a material solicitation requirement.

DECISION

Tennier Industries, Inc., of Boca Raton, Florida, protests the rejection of its proposal and the award of a contract to Propper International, Inc., of Mayaguez, Puerto Rico, under request for proposals (RFP) No. W911QY-09-R-0041, issued by the Department of the Army, U.S. Army Research, Development and Engineering Command, for sleeping bag systems.

We deny the protest.

BACKGROUND

The RFP, issued as a commercial item acquisition, provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for 3-season sleep systems for the U.S. Marine Corps. The sleep system consists of four components: a sleeping bag, a bivy,¹ a compression stuff sack, and a mesh storage bag.

¹ A bivy (otherwise known as a bivouac sack) is a small, lightweight shelter that serves as an alternative to a tent. Legal Memorandum at 12.

The RFP identified a specific commercial item for each component (for example, Popper's Adventure Tech series sleeping bag and bivy), and required offerors to propose components that were "like or equal" to these items. Salient characteristics and performance requirements for the components were identified, as well as test methods the agency would employ to assess the proposed sleep systems. See RFP amend. 2, at 10; amend. 5, attach. 1, at 2-23. For example, the RFP required that the sleeping bag have a tapered shape and a hood with two adjustment features (one to tighten the bag around the neck, and one to tighten the bag around the face), that an individual be able to exit the sleeping bag/bivy combination in under 10 seconds, that the sleeping bag and bivy be water repellent, and that the bivy be constructed such that the bivy was off the face of an individual inside the sleeping bag/bivy. In this regard, the RFP required offerors to submit both fabric and product demonstration samples for their sleep systems. Id. at 6.

The RFP provided that the water repellency of the sleeping bag and bivy fabric would be tested to verify that the fabrics met certain "spray ratings," as measured by the American Association of Textile Chemists and Colorists' (AATCC) Test Method 22-2005.² See RFP amend. 5, attach. 1, at 3. The RFP identified the performance results the fabric must satisfy initially and after 20 launderings. In this regard, the solicitation informed offerors that laundering would be conducted in accordance with AATCC 135 and note 2 of solicitation attachment 1.³ Id. at 3-4. Offerors were instructed that, although the agency would perform its own tests, the firms were required to submit their own independent laboratory test results demonstrating that the proposed fabric met the RFP's requirements, including the AATCC spray ratings requirements. RFP at 17.

The RFP provided that award would be made to the firm submitting the lowest priced, technically acceptable proposal and that technical acceptability would be evaluated under two factors: technical (consisting of a written proposal, product demonstration samples, and past performance), and small business participation. A technically acceptable proposal was defined as one that met all of the RFP's test requirements and salient characteristics with no deficiencies, including submission of acceptable product demonstration samples and fabric. RFP at 21.

The Army received proposals from four offerors, including Tennier and Propper. The Army found that Tennier's fabric and product demonstration samples failed to

² This test method consists of spraying water against a taut surface of a test specimen under controlled conditions. The water produces a wetted pattern whose size depends on the repellency of the fabric. The spray ratings are determined by comparing the wetted pattern with pictures on a standard chart. See AATC Technical Manual, Vol. 85, 2010, AATC Test Method 22-2005, at 67.

³ Note 2 specifies how the fabric will be laundered. RFP amend. 5, attach. 1, at 4 n.2.

meet a number of solicitation requirements. Among other things, the Army concluded that Tennier's proposed sleep system did not satisfy the requirement that an individual be able to exit the sleeping bag/bivy combination within 10 seconds, that its sleeping bag did not offer an acceptable taper shape, that the protester's offer of three adjustments on its hood and collar did not satisfy the requirement for two adjustments, and that the firm's sleeping bag and bivy fabric did not satisfy the RFP's water repellency standards. Agency Report (AR), Tab 18, Tennier Technical Evaluation Summary, at 1-3.

Tennier's proposal was rejected as unacceptable, and award was made to Propper, as the only technically acceptable offeror. AR, Tab 20, Source Selection Decision. This protest followed.

DISCUSSION

Tennier contends that its fabric and product demonstration samples satisfy the RFP's identified requirements and challenges each of the deficiencies assessed in its proposal. As explained below, we find that the Army reasonably determined that Tennier's sleeping bag did not satisfy the solicitation's material water repellency standards, and that therefore the protester's proposal was properly rejected as technically unacceptable. Because this failure renders Tennier's proposal unacceptable, we do not address the protester's remaining challenges to the agency's evaluation.

Our Office will review an allegedly improper technical evaluation of product samples to determine whether the evaluation was fair and reasonable and consistent with the evaluation criteria. We will not make an independent determination of the merits of an offeror's proposal; rather, we will review the evaluation record, including the results of any test demonstration, to ensure that the agency's technical judgment has a rational basis and is consistent with the stated evaluation criteria. Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 7.

Here, with respect to the water repellency of Tennier's proposed sleeping bag, the Army has provided the evaluators' contemporaneous laboratory notes and worksheets, as well as statements from the evaluators themselves. The Army also provided a statement from the Technical Evaluation Lead, a physical scientist who was responsible for providing instructions to evaluators, coordinating evaluations, and coordinating data collection, among other things. See AR, Tab 16, Laboratory Notes, Tab 17, Tennier Technical Evaluation Worksheet; see also Statement of Laboratory Manager, Textile Materials Evaluation Team, Statement of Textile Technologist, and Statement Technical Evaluation Lead.

The record here shows that Tennier's sleeping bag fabric was tested by two evaluators. The first (the laboratory manager) performed the spray test as prescribed by the RFP (in accordance with AATCC 22) on the fabric after laundering,

and recorded results of 0, 0, 0.⁴ See AR, Tab 16, Laboratory Notes, at A; Statement of Laboratory Manager. The second evaluator (the textile technologist) recorded results of the spray test for the fabric, after laundering, of 50, 50, 50.⁵ The RFP required that the laundered sleeping bag fabric achieve minimum results of 100, 90, 90 (meaning little to no water sticking to the fabric, or little to no fabric wetting). RFP amend. 5, attach. 1, at 3. The technical evaluation lead then requested that the tests be performed on different fabric from Tennier's sleeping bag. Statement of Technical Evaluation Lead at 12. In this second test, both evaluators again found that Tennier's sleeping bag fabric, after laundering, failed to satisfy the solicitation's minimum requirements, recording spray test results of 50, 50, 50.⁶ See Statements of the Laboratory Manager and the Textile Technologist.

Tennier generally challenges the agency's test results, arguing that its own independent testing, which was submitted with its proposal, demonstrates that its sleeping bag fabric satisfies the solicitation's minimum requirements.⁷ In addition, Tennier suggests that the agency may not have properly laundered its sleeping bag fabric, given that the evaluation worksheet refers to note 3c, and not to note 2 as specified by the RFP.

With respect to the reference to note 3c in the evaluators' worksheet, the Army states that the sleeping bags were laundered in accordance with AATC 135 and note 2 and that the reference on the worksheet to note 3c was an error.⁸ The agency explains that note 2 of the solicitation was designated note 3c in the draft solicitation but was later changed to note 2. Legal Memorandum at 11. In this regard, the Army's Technical Evaluation Lead describes the laundering instructions that she

⁴ The spray rating was performed on three separate samples and the individual results were reported. Statement of Technical Evaluator Lead at 11. A score of 0, 0, 0 indicates that for each sample there was "a complete wetting of the entire face of the specimen." AATC Technical Manual, Vol. 85, 2010, AATC Test Method 22-2005, at 67. Id.

⁵ A score of 50, 50, 50 indicates that for each sample there was "complete wetting of the entire specimen face beyond the spray points." AATC Technical Manual, Vol. 85, 2010, AATC Test Method 22-2005, at 67.

⁶ Tennier's bivy fabric received spray test ratings of 80, 80, 80, which failed to satisfy the RFP's minimum requirements of 100, 100, 90. See AR, Tab 16, Laboratory Notes, at 1; RFP amend. 5, attach. 1, at 10.

⁷ Tennier also asserts that, following its debriefing, the firm's fabric suppliers retested the fabric, and recertified their spray test ratings. Protester's Comments at 19; exh. 4, 5.

⁸ Note 3 of the solicitation concerns testing sleeping fabric for anti-microbial activity.

provided to the physical science technician that performed the laundering of the sleeping bag fabric, see Statement of Technical Evaluation Lead at 10, and the technician describes how he laundered the sleeping bags in accordance with her instructions. Statement of Physical Science Technician.

Although Tennier continues to argue that the agency may not have laundered the sleeping bag fabric in accordance with the RFP's instructions, the protester does not show that the agency did not properly launder the fabric prior to spray testing. We find persuasive the statements provided for the agency personnel involved in testing and the agency's explanation as to how the evaluation worksheet erroneously referred to note 3c, rather than note 2.

We also find no merit to Tennier's argument that its own independent test results show that the agency's evaluation must be incorrect. Here, the record details the tests conducted by the agency, and Tennier has not shown that these tests were defective, improperly conducted, or that the results were otherwise erroneously reported.⁹ Although Tennier can point to its own conflicting test results, this does not establish that the agency's test results are unreasonable, absent a showing that the agency's tests were defective or improperly conducted, or that the results were erroneously reported. See Himolene Inc.; B-244760.2, Dec. 27, 1991, 91-2 CPD ¶ 584 at 4; ATD-Am. Co., B-231794, Oct. 18, 1988, 88-2 CPD ¶ 364 at 2.

In sum, the record shows that the agency reasonably determined that Tennier's sleeping bag fabric failed to meet the RFP's water repellency standard and therefore its proposal was properly determined to be technically unacceptable

Tennier also protests that Propper has an impermissible "conflict of interest." Tennier asserts generally that Propper has "recently hired several former government employees who were active in procurement matters while employed by the government," and thus "conflict of interest provisions may have been violated." See Protester's Comments at 27. Tennier only identifies, however, one individual hired by Propper, who recently retired from the Army.

We find no merit to this argument. The record shows that the individual identified by Tennier had no role in this procurement,¹⁰ and Tennier has provided nothing more than supposition and innuendo to support its claimed conflict of interest. These

⁹ Tennier also complains that the agency failed to perform other required testing on the fabric samples, which the agency admits. This does not change the fact that Tennier's sleeping bag fabric did not satisfy the spray test, which the agency did perform.

¹⁰ Tennier did not rebut the Army's statement that the identified individual had no role in this procurement.

claims are not sufficient to support an allegation of conflict of interest. Robert Clay, Inc., B-292443, Aug. 14, 2003, 2003 CPD ¶ 152 at 4-5.

Moreover, to the extent Tennier is arguing that Propper's recently hired government employees--although Tennier has identified only one--may have provided the firm with improper procurement-related information, this allegation concerns violations of statutory procurement integrity provisions, codified at 41 U.S.C. § 423(a) (2006). Both our Bid Protest Regulations and the statute require--as a condition precedent to our consideration of an alleged procurement integrity violation--that a protester have reported the matter to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation. 41 U.S.C. § 423(g); 4 C.F.R. § 21.5(d) (2010); SRS Techs., July 30, 1997, 97-2 CPD ¶ 42 at 2. Here, there is nothing in the record to indicate, nor has the protester asserted, that Tennier timely referred this matter to the agency.

Finally, Tennier complains that Propper's proposed price was unreasonably high, given that it was approximately 28 percent higher than Tennier's. Where, as here, a fixed-price contract is contemplated, the agency may use various price analysis techniques and procedures to ensure a fair and reasonable price, including the comparison of proposed prices received in response to the solicitation; adequate price competition can establish price reasonableness, as can a comparison of proposed prices with an independent government estimate. See FAR § 15.404-1(b); MVM, Inc., B-290726 et al., Sept. 23, 2002, 2002 CPD ¶ 167 at 6. Here, the Army found that Propper's price was in line with that of the other offerors and was lower than the agency's independent estimate. See AR, Tab 19, Price Analysis. We find no basis to question the agency's price evaluation judgment.

We deny the protest.¹¹

Lynn H. Gibson
Acting General Counsel

¹¹ Tennier also complains that the procuring activity here did not have authority to conduct this procurement and that, although the RFP required firms to propose components that were "equal or like" to the specific Propper sleeping bag and bivy identified in the RFP, Tennier has not been able to obtain Propper's sleeping bag or bivy in the commercial marketplace, suggesting that the agency's identification of the Propper sleeping bag and bivy may have been improper. These arguments concern alleged apparent solicitation improprieties, which Tennier did not timely raise before the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).