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Decision

Matter of: Glock, Inc.

File: B-414401

Date: June 5, 2017

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DIGEST

1. Protest that the solicitation required the agency to make at least two awards after the initial evaluation phase is denied, where the solicitation did not require this outcome. Instead, the agency reasonably determined that a single award was in the best interest of the government, where proposals were technically proximate and the protester's proposed price was substantially higher than the awardee's price.
 2. Protest that the agency failed to complete the second phase evaluation is dismissed as premature, where the record shows that the agency has properly awarded only those portions of the contract awardable under the first phase of the evaluation.
 3. Protest that the agency unequally evaluated proposals by waiving an evaluation subfactor for the awardee's design is denied, where the waiver was not prejudicial to the protester.
 4. Protest that the agency's evaluation of proposals was flawed is denied, where any errors were not prejudicial to the protester.
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DECISION

Glock, Inc., of Smyrna, Georgia, protests the decision by the Department of the Army, Army Contracting Command, not to award it a contract under request for proposals

(RFP) No. W15QKN-15-R-0002, which was issued for the evaluation and purchase of a modular handgun system (MHS). The protester alleges that the RFP did not permit the agency to make fewer than two awards after the first phase of the evaluation, and that the award after that evaluation to only one entity, Sig Sauer, Inc., of Newington, New Hampshire, was therefore improper. Glock also asserts that the Army evaluated proposals unequally by improperly waiving a key subfactor evaluation for Sig Sauer. The protester further challenges the agency's evaluations of its own technical proposal and Sig Sauer's price proposal.

We deny the protest in part and dismiss in part.

BACKGROUND

The Army issued the RFP on August 28, 2015, under Federal Acquisition Regulation part 15, and subsequently amended it six times. RFP at 2; Memorandum of Law (MOL)/Contracting Officer's Statement of Fact (COSF) at 2.¹ The RFP anticipated two evaluations, one under section M and, after initial award, one under section H, prior to award of the MHS production contract line item numbers (CLINs). RFP at 2. In relevant part, the RFP summarized the procurement as follows:

The Government intends to award up to three (3) Firm Fixed Price (FFP), Indefinite Delivery/Indefinite Quantity (IDIQ) contracts based on the results of the initial evaluation of the proposal submission by following the evaluation procedure contained in section M of this RFP. The Government will then make a final down-selection to a single contractor by following the evaluation procedures contained in section H of this RFP.

Id. The solicitation in section M anticipated awards to acquire the weapons component package for further testing under the second phase of the evaluation, set forth in section H of the RFP. After completing the section H evaluation, the Army would select one of the proposals for first article testing and full production. Id. The period of performance is 10 years for the handgun and accessories and 5 years for the ammunition. Id.

Each MHS offeror could propose either a one-handgun solution of a full-size handgun, or a two-handgun solution consisting of a full-size handgun and a compact handgun. Id. Offerors were also required to propose prices for ball, special purpose, blank and dummy drilled inert ammunition, as well prices for accessories and spare parts. Id.

Under section M, the solicitation anticipated "up to three (3) base awards" to the proposals representing the best value to the agency, on the basis of nine initial evaluation factors numbered in descending level of importance, as follows:

¹ Citations to the RFP are to the conformed version of the solicitation included at Tab 2 of the agency report.

Section M	Factor
Factor 1	Bid Sample Test - Technical
Subfactor 1	<i>Initial Reliability (Full size/single gun)²</i>
Subfactor 2	<i>System Accuracy Isolated - No shooter in the loop</i>
Subfactor 3	<i>Characteristics of the Projectile</i>
Subfactor 4	<i>Joint Warfighter Ergonomics</i>
Factor 2	Bid Sample Test - Other
Subfactor 1	<i>Early Warfighter Acceptance</i>
Subfactor 2	<i>Initial Reliability - Compact Handgun</i>
Factor 3	Written Technical
Factor 4	License Rights Ammunition
Factor 5	License Rights Handgun & Accessories
Subfactor 1	<i>Handgun</i>
Subfactor 2	<i>Accessories</i>
Factor 6	Production/Manufacturing
Subfactor 1	<i>Ammunition Production/Manufacturing Plan</i>
Subfactor 2	<i>Handgun Production/Manufacturing Plan</i>
Subfactor 3	<i>Program Management Plan</i>
Subfactor 4	<i>Quality Plan</i>
Factor 7	Price
Factor 8	Past Performance
Factor 9	Small Business Participation

RFP at 387-399, § M. The combination of all non-price factors was significantly more important than price. Id. Awards would be made to “the proposals that are most advantageous and represent the best value to the Government [. . .] giving the appropriate consideration to the nine (9) evaluation factors [. . .] and Sub-Factors and their relative order of importance.” RFP at 387. Proposals with an unacceptable rating for any of the nine factors or any underlying subfactor were ineligible for award. Id. Awardees would “receive an order for the Weapon System Component Package requirements in accordance with CLIN [0]001³ of the base contract and Statement of Work C.3.1[,] which will satisfy the minimum quantity guarantee of each of the ID/IQ [indefinite-delivery, indefinite-quantity] contract[s].” Id.

² This testing, and that in factor 2, subfactor 2, evaluates handgun performance when fired from a ransom rest, i.e., a static mount. RFP at 7 (agency response to offerors’ questions); AR, Tab 10, MHS Purchase Description, at 19, ¶ 4.5.1.1.

³ Section M refers to “CLIN 1001,” but the RFP does not contain a CLIN 1001. CLIN 0001 is the CLIN for the “Modular Handgun System (MHS) Weapons System Comp Pkg [complete package].” RFP at 43.

The weapons system component packages purchased under CLIN 0001 of the previously awarded base contract were then to be tested under the following six section H evaluation factors:

Section H	Description
Factor 1	System Accuracy - Shooter In The Loop ⁴
Factor 2	Reliability and Service Life
Subfactor 1	<i>Reliability⁵</i>
Subfactor 2	<i>Service Life</i>
Factor 3	License Rights - Ammunition
Factor 4	License Rights - Handgun & Accessories
Subfactor 1	<i>Handgun</i>
Subfactor 2	<i>Accessories</i>
Factor 5	Other Characteristics
Subfactor 1	<i>Physical Dimensions (Full Size & Compact)</i>
Subfactor 2	<i>Material Reliability in Extreme Conditions</i>
Subfactor 3	<i>Magazine Characteristics</i>
Subfactor 4	<i>Maintainability - Field Level Maintenance</i>
Subfactor 5	<i>Ammunition Characteristics</i>
Subfactor 6	<i>Joint Concept of Operations</i>
Factor 6	Price

RFP at 296, ¶ H.5.1. The RFP informs offerors that after evaluating proposals under the six section H factors above, the Army would select one representing the best value to the agency, as follows:

The Government will down-select to the Contractor whose proposals represent the best value to the Government using the trade-off method, with the Source Selection Authority (SSA) giving the appropriate consideration to the six (6) evaluation factors: [. . .] The Government will weigh the relative benefits of each proposal and award will be made based on an integrated assessment of the results of the evaluation. In making the integrated assessment of the evaluation results, the SSA will

⁴ The shooter in the loop factor evaluates the handgun’s performance in situations designed to approximate field performance requirements. For example, a standing tester will “[e]ngage [the] target with 2 rounds to the chest and 1 round to the head from the standing position. Move behind barricade and conduct a rapid reload. Engage the target with 2 rounds to the chest and 1 to the head[,]” at a distance of 15 meters from the target. AR, Tab 38, Appx. K, Joint Pistol Qualification Course, at 2.

⁵ Under section H’s reliability subfactor, handguns were to undergo extensive reliability testing, “using up to 35,000 rounds.” RFP at 298, ¶¶ H.5.1, H.5.2.2.1.

give due consideration to all of the Factors and Sub-Factors and their relative order of importance.

RFP at 296, ¶ H.4.1. Factors 1 and 2, the system accuracy shooter in the loop factor and the reliability and service life factor, were equally important, and the other factors are listed in descending importance thereafter. Id., ¶ H.5.1. The solicitation advised that proposals receiving an unacceptable rating under the system accuracy shooter in the loop, reliability and service life, or other characteristics factor, or any subfactor thereof, might not be awarded a full production contract. RFP at 297, ¶ H.5.2. The RFP allowed the agency “to down-select to other than the lowest priced Contractor, or to other than the Contractor with the highest technical rating if the Government determines that to do so would result in the best value to the Government.” Id.

The agency received a total of nine proposals from five offerors by the deadline of February 12, 2016. MOL/COSF at 12.

On August 29, 2016, the agency established a competitive range consisting of the Glock 9mm one-gun proposal and the Sig Sauer 9mm two-gun proposal. Agency Report (AR), Tab 39, Competitive Range Determination, Aug. 29, 2016, at 24-25. After discussions, the Army evaluated the Glock and Sig Sauer proposals under the nine section M factors as follows:

	Factor	Glock	Sig Sauer
Factor 1	Bid Sample Test - Technical	Acceptable	Good
Subfactor 1	<i>Initial Reliability (Full size/one-gun)</i>	<i>Outstanding</i>	<i>Outstanding</i>
Subfactor 2	<i>Sys. Accuracy-Isolated (No shooter in the loop)</i>	<i>Marginal</i>	<i>Marginal</i>
Subfactor 3	<i>Characteristics of the Projectile</i>	<i>Good</i>	<i>Good</i>
Subfactor 4	<i>Joint Warfighter Ergonomics</i>	<i>Acceptable</i>	<i>Good</i>
Factor 2	Bid Sample Test - Other	Good	Acceptable
Subfactor 1	<i>Early Warfighter Acceptance</i>	<i>Good</i>	<i>Acceptable</i>
Subfactor 2	<i>Initial Reliability - Compact Handgun</i>	<i>Not Rated</i>	<i>Not Rated</i>
Factor 3	Written Technical	Good	Good
Factor 4	License Rights - Ammunition	Marginal	Outstanding
Factor 5	License Rights - Handgun & Accessories	Good	Outstanding
Subfactor 1	<i>Handgun</i>	<i>Good</i>	<i>Outstanding</i>
Subfactor 2	<i>Accessories</i>	<i>Good</i>	<i>Outstanding</i>
Factor 6	Production/Manufacturing	Good	Outstanding
Subfactor 1	<i>Ammunition Production/Manufacturing Plan</i>	<i>Good</i>	<i>Outstanding</i>
Subfactor 2	<i>Handgun Production/Manufacturing Plan</i>	<i>Outstanding</i>	<i>Outstanding</i>
Subfactor 3	<i>Program Management Plan</i>	<i>Outstanding</i>	<i>Good</i>
Subfactor 4	<i>Quality Plan</i>	<i>Good</i>	<i>Good</i>
Factor 7	Price	\$272,232,563	\$169,527,169
Factor 8	Past Performance	Relevant / Substantial Confidence	Relevant / Substantial Confidence
Factor 9	Small Business Participation	Good	Good

AR, Tab 3, Source Selection Decision Document (SSDD), at 12-23. As shown above, although initial reliability for the compact gun was an evaluation subfactor under the bid sample test-other factor, the Army did not rate the proposals under this subfactor.

The SSA considered the Glock and Sig Sauer proposals as follows:

Based upon the technical evaluation and my comparative analysis of the proposals, the Sig Sauer proposal has a slight technical advantage over the Glock proposal given that their proposal was rated higher in Factor 1, Bid Sample Test – Technical which is the most important factor. The advantage of the Sig Sauer proposal is increased when the license rights and production manufacturing factors are brought into consideration. [. . .] The price analysis shows that the Sig Sauer total evaluated price is \$102,705,394 less than the Glock total evaluated price, making the Sig Sauer proposal overall the Best Value to the Government.

Sig Sauer’s proposal was slightly superior technically and clearly superior in factors 4 and 5. Since there were so few other discriminators between

the two proposals in most aspects, the least important factor, price, became a significant discriminator. Simply put, when taking the price premium into account, there is no correlating superior performance factor for Glock, as compared to Sig Sauer, to support paying that premium. Consequently, I cannot justify paying a price premium of over 37% for the Glock submission, even as a second award. One (1) award to Sig Sauer on Solicitation Number W15QKN-15-R-0002 represents the overall best value to the Government.

Id. at 24. On this basis, the SSA decided to make only one award. Id. at 25.

On January 19, 2017, Glock was informed that a single award had been made to Sig Sauer. MOL/COSF at 14. Glock timely requested a post-award required debriefing, which was held on February 17. AR, Tab 9, Glock Debriefing, Feb. 17, 2017. This protest followed on February 24.⁶

DISCUSSION

Glock raises several bases of protest. The majority of these arguments contest some aspect of the agency's evaluation, and these are addressed further below. For the reasons therein, these arguments are denied or dismissed. Glock's primary argument, however, challenges the Army's interpretation of the solicitation with regard to the minimum number of awards that must be made under the solicitation. In this regard, Glock asserts that the solicitation, when read as a whole, anticipates more than one base contract award, and the Army has failed to follow the solicitation. We find that the solicitation does not require multiple base contract awards. The protester also asserts that the Army has improperly failed to complete the section H evaluation provided for in the solicitation prior to final award. At this point, given that the Army has only awarded the base contract and CLINs for purchase of items for testing, we find premature the argument that the Army has failed to comply with the solicitation.

The Solicitation Does Not Require More Than One Award Under Section M

Glock contends that the Army was obligated to award at least two base contracts, and was similarly required to complete the section H testing, prior to selecting a single awardee. Glock Comments at 1-11. In contrast, the agency argues that the section M provision allowing award of "up to three" base contracts permitted an award of a single contract at that stage, and that it has the discretion to not conduct the section H testing, evaluation, and final selection. MOL/COSF at 16-17.

⁶ On March 17, in response to the Army's March 10 partial request for dismissal, we dismissed one of Glock's seven protest grounds, in which Glock objected to the extension of the proposal submission due date. GAO Email, Mar. 17, 2017. Our Office declined to dismiss the other protest grounds. Id.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Intelsat Gen. Corp., B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8; C & S Corp., B-411725, Oct. 7, 2015, 2015 CPD ¶ 311 at 3; Alliance Tech. Servs., Inc., B-410307, B-410307.3, Dec. 1, 2014, 2014 CPD ¶ 345 at 3. Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. Intelsat, supra; Point Blank Enters., Inc., B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 3.

Section M allows the Army to "make up to three (3) base awards." RFP at 387. Those "base awards" are limited, however, to the purchase of "the Weapons System Component Package requirements in accordance with CLIN [0]001 of the base contract and Statement of Work [SoW] C.3.1"⁷ Id.; id. at 296, ¶ H.3.1. After receiving a base contract award, offerors (now contractors) may downwardly adjust their prices and update their proposed license rights. Id. at 295, ¶¶ H.1.1.1, H.1.1.4. Evaluated prices will consist of all CLINs except CLINs 0001 and 0002, which were previously ordered. Id. at 295. Next, "[t]he Government will then make a final down-selection to a single contractor by following the evaluation procedures contained in section H of this RFP." Id. at 2.

The agency relies on the section M term permitting "up to three (3) base awards" in order to justify the award of a single base contract. MOL/COSF 16-17. The protester contends that awarding fewer than two base contracts is inconsistent with sections H and M, which, it alleges, clearly anticipate further evaluation prior to the selection of a single contractor for MHS production. Glock Comments, Apr. 10, 2017, at 7. We think that the most reasonable interpretation of the solicitation is that the Army is permitted to award only one base contract. Although section M expressed the agency's plan to award one, two or three contracts, this expression cannot reasonably be read as creating a legal requirement for multiple awards. See Canadian Commercial Corp./Liftking Indus., Inc., B-282334 et al., June 30, 1999, 99-2 CPD ¶ 11 at 3, 9 (phrase "up to two contracts" did not obligate the agency to make two awards); Global Readiness Enters., B-284714, May, 30, 2000, 2000 CPD ¶ 97 at 5 (phrase "up to three (3) awards" did not obligate the agency to make three awards). In this regard, giving effect to all provisions of the solicitation, a reasonable reading is that the RFP language regarding multiple awards is permissive and does not exclude award of a single

⁷ Specifically, CLIN 0001 is for the weapons system component package that will be shipped to Aberdeen Test Center, Aberdeen Proving Ground, Maryland, for additional testing. RFP at 43. Paragraph C.3.1 of the SoW lists the items and quantities comprising the weapons system component package. RFP at 233. CLIN 0002 is for electronic pressure, velocity, action time barrels that are "capable of supporting the test requirements for ball and special purpose cartridges." Id. at 249, ¶ C.5.1.2.1.

contract. In sum, the Army was not required to make a second base award to satisfy the terms of the RFP.⁸

The protester also contends that it is unclear whether the Army intends to complete the section H evaluation prior to award of the production CLINs. Glock Supp. Comments, May 9, 2017, at 1-2. The Army asserts that the Sig Sauer handguns “(both compact and full size) will undergo all possible Section H Source Selection testing,” prior to general distribution of the handguns. Supp. AR at 1-2. The base award is limited to the CLINs for the weapon systems component package, as indicated by the specific CLIN and SoW references in section M. RFP at 387, ¶ M.1.1.⁹ The RFP provides that “award [of the “production” CLINs] will be made based on an integrated assessment of the results of the evaluation” of the section H factors. RFP at 296, ¶ H.4.1. The record here shows that the Army has only issued task orders for the weapons system components package. AR, Tab 30, Delivery Orders 1 & 2. Thus, the agency has not yet made award of the section H production CLINs. Protests that merely anticipate improper agency action are speculative and premature and will not be considered by our Office. See Sun Chemical Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13 (dismissing as premature arguments that the agency would not properly evaluate

⁸ The protester also argues that, because section H provides for both further evaluation and selection of one offeror from among several, section H must be read to require at least two base awards. Glock Supp. Comments, May 9, 2017, at 2. Our prior decisions provide that an agency may properly evaluate a single awardee in the second phase of a two-phase competition. See Canadian Commercial Corp./Liftking Indus., Inc., *supra*, at 14 (denying protest as premature where the protester argued that a single award in the first phase of a solicitation would result in an improper sole-source award in the second phase).

⁹ The RFP provides that the each awardee under section M “will receive an order for the Weapon System Component Package requirements in accordance with CLIN [0]001 of the base contract and Statement of Work C.3.1” RFP at 387, ¶ M.1.1. The weapons system component package is in CLINs 0001 for the full-size weapon and 1006 for the compact weapon. RFP at 43, 46. The record reflects that at this time, the Army has ordered CLINs 0001, 0002 (3 barrels for testing), 1006, and 1043. AR, Tab 30, MHS Delivery Orders, at 3-4, 9. To the extent that the RFP provided for an order of the weapons system component package but failed to include the compact handgun in CLIN 1006 and the accuracy barrels in CLIN 1043, this was a patent ambiguity. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8 (a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error). Where a patent ambiguity is not challenged prior to the submission of proposals, any subsequent challenge is untimely. 4 C.F.R. § 21.2(a)(1). The agency’s exercise of CLIN 1006 is therefore not inconsistent with the RFP’s terms, and we have no objection.

awardee's proposal). On this basis, any challenge to the award of the production CLINs is premature. This protest ground is denied in part and dismissed in part.¹⁰

Section M Evaluation Challenges

Glock also challenges several aspects of the Army's evaluation under the section M factors. As discussed below, the protester contends that the agency improperly failed to complete reliability testing on Sig Sauer's compact handgun. Glock also asserts that the agency's evaluations under the price, license rights, manual safety, and penetration factors and subfactors were flawed. As discussed below, although the agency's evaluation contained some errors, whether singly or in concert, they did not result in prejudice to the protester.

Waiver

Glock challenges the agency's decision to forego evaluation of the compact gun reliability subfactor, alleging that the agency failed to follow the evaluation provided for in the RFP. The protester also asserts that eliminating this subfactor benefits Sig Sauer alone. We agree with the protester but, for the reasons below, conclude that the agency's actions nevertheless resulted in no prejudice to Glock.

The RFP required offerors proposing a two-gun solution to submit compact guns for evaluation under the bid sample test-other factor. RFP at 370, ¶ L.4.1.2. Under the initial reliability-compact handgun subfactor, the RFP provided that the Army "will evaluate the function of the Offerors Modular Handgun System compact candidate design for Mean Rounds Between Stoppages (MRBS)." RFP at 391, ¶ M.3.2.3.2. Reliability testing of the compact handgun was not included in the testing of the full-size gun under factor 1.¹¹ Unlike the full-size reliability evaluation, which used 12,500 rounds to achieve a 90 percent confidence level of 2,000 MRBS, the compact gun

¹⁰ Glock also contends that the solicitation structure shows that the section M evaluation was designed to be an "initial evaluation of all MHS proposals that were received in order to eliminate those that did not meet the requirements" Glock Comments, Apr. 10, 2017, at 2. The protester argues that "if there are two proposals in the competitive range after the BST conducted pursuant to Section M [. . .], then the Solicitation unequivocally requires both of them to proceed to the Section H" evaluation. *Id.* at 3. Although the solicitation provides that section M is an "initial evaluation," we do not find support for the position that a minimum of two technically acceptable proposals must receive an award under section M. RFP at 2.

¹¹ Although the initial reliability-compact handgun subfactor also provided for a second evaluation of the full-size handgun, the protester asserts, and the agency does not contest, that Glock's full-size handgun could have been evaluated under this subfactor with the data obtained under the factor 1 full-size handgun reliability evaluation. Protest at 8; Supp. Agency Report, May 5, 2017, at 3.

reliability evaluation was limited to a total of 1,500 rounds, and affirmed that the 90 percent confidence level did not apply. RFP at 389, 391, ¶¶ M.3.2.2.1, M.3.2.3.2.¹²

The Army “evaluated the function of the Offeror’s Modular Handgun System compact candidate design for Mean Rounds Between Stoppages (MRBS).”¹³ MOL/COSF at 9. Only after testing the compact weapons did the Army realize that firing 1,500 rounds on three compact handguns would not provide an MRBS at a 90 percent confidence level. Id. at 20. The Army decided that the RFP did not reflect the intended evaluation and, despite the clear language of the solicitation, imposed a 90 percent confidence level on the evaluation. Id. at 19 (“Although the solicitation indicated paragraph 4.8.1.4 would not apply, which includes the 90% confidence level language, the Government’s intent was only to decrease the number of rounds shot [. . .] to [. . .] 1,500, and not to remove the 90% confidence level threshold.”); id. at 20. Although the RFP expressly provided that a 90 percent confidence level was inapplicable to this subfactor, the Army nevertheless applied it because “the Government obviously had to base its evaluation on some threshold.” Id. n.8. Then, because the Army “could not mathematically achieve statistically significant results [at the 90 percent confidence level] with the amount of rounds fired,” it “determined the best solution was to non-rate the subfactor” for both offerors. Supp. MOL at 8; MOL/COSF at 20.

It is a fundamental principle of government procurement that competitions must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. Contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals on that basis. Fintrac, Inc., B-311462.2, B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191 at 6. An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency’s actual needs without prejudice to other offerors. Lockheed Martin Corp., B-411365.2, Aug. 26, 2015, 2015 CPD ¶ 294 at 14; Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Our Office will sustain a protest that an agency improperly

¹² Paragraph 4.8.1.4 of the MHS purchase description provides thresholds for accepting or rejecting weapons at a 90 percent confidence level for MRBS. AR, Tab 10, MHS Purchase Description, at 30-31. The RFP explicitly states that “paragraph 4.8.1.4 will not apply [to the compact reliability evaluation] due to the limited firing.” RFP at 391, ¶ M.3.2.3.2. The only reasonable interpretation of the RFP provision that “paragraph 4.8.1.4 will not apply” is that the compact handgun will not be evaluated at a 90 percent confidence level for MRBS in the initial reliability testing.

¹³ Under the factor 1 reliability evaluation, Sig Sauer’s full-sized handgun had a higher stoppage rate than Glock’s handgun, and there may have been other problems with the weapon’s accuracy. AR, Tab 3, SSDD, at 12. Due to the Army’s redactions of the agency report, the results of Sig Sauer’s compact handgun test are unknown.

waived or relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. Datastream Sys., Inc., B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6.

Here, the Army ignored the evaluation provided for in the RFP and applied an unstated evaluation criterion by requiring the MRBS test results to achieve a 90 percent confidence level. Application of this unstated evaluation criterion rendered the results of the compact weapon reliability unusable. Then, the Army waived the evaluation criterion on the basis that it lacked usable data. The Army denies that it waived the subfactor, claiming that the subfactor was merely "non-rate[ed]." Supp. MOL at 7-8 ("the Army did not waive the requirement of compact reliability," and instead "decided to non-rate the factor for all Offerors."). The Army does not define the term "non-rate" nor explain how, in substance, it differs from a waiver. We find no difference here. The record shows that the Army waived the evaluation of the compact handgun reliability testing subfactor after applying an unstated evaluation criterion. As a result, the Army did not evaluate the reliability test results of Sig Sauer's compact weapon in accordance with the solicitation. Nevertheless, we find no prejudice to Glock.

Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the agency's evaluation of proposals are found. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 13. Similarly, where there is no basis for finding competitive prejudice to the protester, we will not sustain a protest challenging the waiver of a solicitation requirement. Phoebe Putney Mem. Hosp., B-311385, June 19, 2008, 2008 CPD ¶ 128 at 4. Thus, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver, *i.e.*, that the protester would have submitted a different proposal or quotation or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. See Technology & Telecomms Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 14; Vocus Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 6. Here, Glock does not explain how it was prejudiced by the waiver of this requirement, that is, what it would have done differently had it known that the agency would waive the reliability testing requirement. We therefore find no basis to sustain the protest.

Evaluation of Proposed Prices

Glock argues that the Army improperly calculated Sig Sauer's total evaluated price in two respects, and that the awardee's price should be upwardly adjusted and the award decision revisited. Protest at 11.

First, the protester asserts that the agency miscalculated Sig Sauer's price by undercounting the number of spare parts required in a two-gun solution. Protest at 13. Paragraph L.4.1.7.3 of the solicitation required that pricing for spare parts be evaluated

based on up to 550,000 spare parts common to the full size and compact MHS pistols, and an additional 100,000 spare parts unique to the compact MHS pistol. RFP at 375. The Army admits that it miscalculated Sig Sauer's pricing. MOL/COSF at 27 ("spare parts for the compact [handgun] were not counted."). The agency argues that this undercounting error of \$1,634,250 did not result in prejudice to the protester, whose total evaluated price was \$102,705,394 higher than that of the awardee. MOL/COSF at 28, AR, Tab 14, Spare Parts Pricing Recalculation, at 9. We agree.

In not making an award to Glock, the source selection authority (SSA) found that Sig Sauer held a "slight technical advantage." AR, Tab 3, SSDD, at 24. However, in deciding to make only one award, when "up to three" were permitted, the SSA found "no correlating superior performance factor for Glock, as compared to Sig Sauer, to support paying that premium." Id. Our Office will not sustain protest, even if deficiencies in the procurement are found, where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award. IAP World Servs., Inc.; Jones Lang LaSalle Ams., Inc., B-411659 et al., Sept. 23, 2015, 2015 CPD ¶ 302 at 13. There is no reasonable support for the conclusion that Glock's chances at award would have been substantially increased if its price had been \$101,071,144 more than Sig Sauer's price, instead of \$102,705,394 more.¹⁴

Second, Glock asserts that the Army significantly undercounted the total number of weapons that would be purchased in a two-gun solution, and thereby improperly understated the price of Sig Sauer's proposal. Protest at 12. In this regard, the protester contends that the RFP provided that proposals would be evaluated on the same number of full-size handguns, and that the agency should have added Sig Sauer's compact handguns to this base quantity, resulting in a higher evaluated price for Sig Sauer. Id. Thus, at issue is whether the solicitation stated that compact handguns would supplement or replace full-size handguns.

The solicitation's pricing worksheet for a one-gun solution provided for up to 550,000 full size MHS pistols, while the pricing worksheet for a two-gun solution provided for up to 550,000 full size MHS pistols and up to an additional 150,000 compact MHS pistols. AR, Tab 12, One-Gun Pricing Worksheet; Tab 13, Two-Gun Pricing Worksheet. The RFP provides that "[i]f a one-gun solution is proposed, any CLINs related to the compact MHS are not applicable." RFP at 396, ¶ M.3.2.8.4.2.

Glock interprets this provision to mean that Sig Sauer's compact handguns should have been supplemental to the base quantity of full-size handguns, and that the Army erred

¹⁴ The protester also argues that the agency erred by comparing the totals prices, rather than only CLINs 0001 and 0002, as the solicitation anticipated the possibility of offerors reducing their prices during the second phase of the evaluation. Glock Comments, at 17. The record shows that, regardless of the limited number of CLINs to be awarded after the first phase of the solicitation, the RFP nevertheless provided for evaluation of the total proposed price at that stage. RFP at 395.

by evaluating both proposals at a total number of 550,000 handguns. Protest at 12. The Army argues that “although the Government is silent about the quantities associated with the compact gun in paragraph M.3.2.8.4.2 of the Solicitation, the Government requirement is for 550,000 guns.” MOL/COSF at 26. The protester’s reading (that compact guns must be supplemental) and the agency’s reading (that compact guns replace full-sized guns) are both reasonable. Nevertheless, the lack of clarity as to how the quantity of compact handguns should be treated is evident from the face of the solicitation. Therefore, we find that the number of compact guns to be evaluated presented a patent ambiguity, which the protester was required to protest prior to the closing time for receipt of proposals. Where a patent ambiguity is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the term. 4 C.F.R. § 21.2(a)(1); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10. This protest ground is dismissed.

License Rights

Glock challenges the Army’s rating of its proposal as marginal for the ammunition license rights factor. Protest at 16. The protester contends that the negative rating, relating solely to the blank ammunition, lacked a rational basis. Id.

In considering a challenge to a technical evaluation, our Office recognizes the discretion afforded an agency in conducting a technical evaluation, so we will not reevaluate technical proposals; rather, we will review a challenge to an agency’s evaluation to determine whether the agency acted reasonably and in accord with the solicitation’s evaluation criteria and applicable procurement statutes and regulations. Phoenix Air Grp., Inc., B-412796.2, B-412796.3, Sept. 26, 2016, 2016 CPD ¶ 308 at 11; Innovative Test Asset Sols., LLC, B-411687, B-411687.2, Oct. 2, 2015, 2016 CPD ¶ 68 at 5. We will not substitute our judgment for that of the evaluators, but we will sustain a protest where the agency’s conclusions are inconsistent with the solicitation’s evaluation criteria, are undocumented, or are not reasonably based. Id.

For the ammunition license rights factor, the RFP provides for a rating of marginal when the proposed terms are “unfavorable to the Government.” RFP at 392. A rating of marginal may also be assigned if “[t]he proposal does not grant sufficient technical data rights and background patent rights necessary to allow the Government to compete the design, potentially secure additional sources for the ball, SP [special purpose], blank and Dummy ammunition [. . . .]” Id. at 393.

The Army found several aspects of Glock’s proposed rights to be favorable, including low royalty requirements for some types of ammunition. AR, Tab 3, SSDD, at 16. However, the agency found royalty payments for the blank ammunition to be high and disliked that the ammunition license was limited to those entities in the national

technology and industrial base (NTSB).¹⁵ Id. The agency concluded that these terms were unfavorable because foreign suppliers outside the NTSB might quote lower prices for the blank ammunition. Id.

The RFP required offerors to allow the agency to “potentially secure additional sources” for the ammunition. RFP at 392-393. Thus, license rights that included the possibility of obtaining the ammunition from a manufacturer not listed in an offeror’s proposal would satisfy this solicitation term. Glock’s proposed license rights permit the agency to identify a potential source for blank ammunition in any of the NTSB countries, and the agency has not shown that the royalty payments would preclude such manufacture. Therefore the agency’s marginal rating for the ammunition license rights factor, assigned on the basis of the blank ammunition license rights and royalty payments evaluations, is inconsistent with the terms of the solicitation. Although Glock’s terms may be “inferior . . . when compared to Sig Sauer’s[,]” that comparison does not render them marginal under the terms of the solicitation. AR, Tab 3, SSDD, at 17. Nevertheless, for the reasons below, we deny this protest ground because we find that the agency’s error did not result in prejudice to the protester.

Here, even had Glock’s proposal received a rating of acceptable or very good for the ammunition license rights factor, it would have a lower rating than the awardee’s for this factor. Our Office has consistently explained that to prevail, a protester must demonstrate that it has been prejudiced by the agency’s errors. Where the protester fails to demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. IAP World Servs., Inc.; Jones Lang LaSalle Ams., Inc., supra; HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; Booz Allen Hamilton Eng’g Servs., LLC, B-411065, May 1, 2015, 2015 CPD ¶ 138 at 10 n.16. The record shows that the agency considered the two proposals to be competitively close, with Sig Sauer’s proposal “slightly superior technically.” AR, Tab 3, SSDD, at 24. The agency then declined to make a second award because of Glock’s substantially higher price. Id. at 24-25. Here, Glock has failed to demonstrate that it was prejudiced, i.e., that with a higher rating for the ammunition rights factor it would have a substantial chance of receiving an award. This protest ground is denied.

Manual Safety

Glock also alleges that the Army deviated from the solicitation by assigning extra weight to the manual safety in the joint warfighter ergonomics subfactor and the early warfighter acceptance subfactor. Protest at 9. The Army contends that evaluation of

¹⁵ “The term ‘national technology and industrial base’ means the persons and organizations that are engaged in [. . .] development, production, [. . .] or information technology activities conducted within the United States, the United Kingdom of Great Britain and Northern Ireland, Australia, and Canada.” 10 U.S.C. § 2500.

the safety was reasonably part of the RFP's stated evaluation criteria. MOL/COSF at 24-25.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals or substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Computer World Servs. Corp., B-410513, B-410513.2, Dec. 31, 2014, 2015 CPD ¶ 21 at 6. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id. In evaluating proposals, an agency may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. MINACT, Inc., B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 4; Independence Constr., Inc., B-292052, May 19, 2003, 2003 CPD ¶ 105 at 4.

With regard to the joint warfighter ergonomics subfactor, the Army assigned Glock's proposal a weakness after "[DELETED]" which could result in an "[DELETED]." AR, Tab 3, SSDD, at 14. In addition, during testing under the early warfighter acceptance subfactor, the Glock handgun [DELETED] was "[DELETED]." Id. Offerors were informed that the Army would evaluate the ability of the user to operate the safety as part of the joint warfighter ergonomics subfactor. RFP at 390, ¶ M.3.2.2.4. The solicitation also highlighted that overall safety was a priority, noting that proposals could be disqualified for "safety issues," as determined by the agency testers. RFP at 6. The [DELETED] on the handgun was reasonably encompassed by the factors disclosed to Glock. MINACT, Inc., supra. Furthermore, [DELETED], we do not think that the Army placed undue emphasis on the safety in the evaluation. This protest ground is denied.

Penetration of Special Purpose Ammunition

The protester asserts that the agency failed to properly credit it with the highest score for achieving the optimum penetration depth--neither too deep nor too shallow--with the special purpose ammunition. Protest at 14. The Army acknowledges the error but contends that the protester's rating for the characteristics of the projectile subfactor would not change, even if the evaluation error were corrected. MOL/COSF at 28. The agency argues that the protester has therefore not been prejudiced by the error. Considering that the Army evaluated six ammunition types, and given Glock's generally positive ratings, the small improvement in Glock's rating for the special purpose ammunition, from good to excellent, does not appear likely to provide Glock with a substantial chance of receiving the award. This protest ground is denied. HP Enter. Servs., LLC, supra.

Prejudice

Glock's section M challenges have each been considered individually as to whether any agency error resulted in prejudice to the protester. Given that we found that the agency erred in the ammunition license factor rating, and that the agency acknowledged flaws

in the price evaluation and special purpose ammunition penetration evaluation, we also consider the collective impact of these errors in the context of prejudice to the offeror.

As described above, competitive prejudice is an essential element of a viable protest, and we will not sustain a protest unless there is a determination that Glock was prejudiced by the procurement error. See Intelsat Gen. Corp., supra, at 19-20. Furthermore, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis to sustain a protest. Id. Nevertheless, on this record, we conclude that the protester has not shown a reasonable possibility of prejudice as a result of the errors considered together.

Here, the Army is not conducting a tradeoff analysis between two offerors, but instead is considering only whether making a second award to Glock offered the “best value” to the Army or would be “advantageous” to the Army. RFP at 387. In this context, the agency considered the impact of Glock’s substantially higher price and decided not to make a second award. AR, Tab 3, SSDD, at 24 (“[T]here is no correlating superior performance factor for Glock, as compared to Sig Sauer, to support paying that premium. Consequently, I cannot justify paying a price premium of over 37% for the Glock submission, even as a second award. One (1) award to Sig Sauer on Solicitation Number W15QKN-15-R-0002 represents the overall best value to the Government.”). In essence, the agency concluded that the protester was not likely to propose a competitive price during the second phase. This is a reasonable presumption, as the solicitation made clear that price would be evaluated during the first phase. Canadian Commercial Corp./Liftking Indus., Inc., supra, at 13 (finding reasonable the agency’s decision to make only one award under phase 1, when more were permitted, after determining that the protester’s proposal did not have a reasonable chance at winning the phase 2 production contract). Overall, despite the evaluation errors uncovered in the course of this protest, we have no basis to conclude that Glock would have a substantial chance at an award. Even when the errors are considered together, we find no prejudice to Glock.

The protest is denied in part and dismissed in part.

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General Counsel