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Decision

Matter of: Electronic Hardware Corporation

File: B-295345

Date: January 28, 2005

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DIGEST

1. Agency reasonably evaluated proposals for price realism by comparing the line item prices proposed by each offeror to the other offerors' proposed prices and the agency's estimates, and requesting verification for each of the line item prices that appeared unrealistically low.
 2. Agency reasonably evaluated the protester's and awardee's proposals under the past performance factor as "good" where the agency considered the protester's more extensive history of relevant past performance, the "good" but not "outstanding" record of the protester's performance, and the positive comments made by the awardee's references regarding its past performance.
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DECISION

Electronic Hardware Corporation (EHC) protests the award of a contract to Grauch Enterprises under request for proposals (RFP) No. SPO500-04-R-0062, issued by the Defense Logistics Agency (DLA), for certain Federal Stock Class (FSC) 5355 items. The protester objects to the agency's evaluation of its and Grauch's proposals and the selection of Grauch's proposal for award.

We deny the protest.

The RFP, issued as a total set-aside for small businesses, provided for the award of one or more indefinite-quantity fixed-price contracts for certain FSC 5355 items. RFP at 3, 14, 20-21. The solicitation requested unit prices and delivery terms for two lots of contract line item numbers (CLIN). Lot I, to which "source inspection

applie[d],” consisted of 355 CLINs of knobs, knob assemblies, knob dials, shafts and shaft assemblies, and Lot II, to which “destination inspection applie[d],” consisted of 194 CLINs for knobs, knob assemblies, and dials, each of which was designated by a national stock number (NSN).¹ RFP at 3, 38-50. The RFP identified the estimated annual demand for each CLIN.

Offerors were informed that awards would be made on an “all or none basis” by lot to the offeror whose proposal was determined to represent the best value to the government for that particular lot, considering past performance and price. RFP at 3, 65. Offerors were also informed that the past performance factor was significantly more important than price, and was comprised of the following three subfactors listed in descending order of importance: delivery, business relations/customer satisfaction, and quality. RFP at 65. The RFP added that the agency would evaluate proposals “to determine cost/price realism,” and that “[c]ost/price realism means that the costs in the offeror’s proposal are realistic for the work to be performed, reflect a clear understanding on the part of the offeror of the solicitation requirements, and are consistent with the various elements of the offeror’s technical proposal.” RFP at 66. The RFP did not, however, require the submission of any cost data.

The offerors’ proposals were required to include a past performance volume and a price volume. With regard to the past performance volume, the RFP explained that “[t]he offeror’s performance record will be assessed to determine if it demonstrates a level of performance that provides a reasonable assurance that the solicitation requirements will be met.” RFP at 67. The RFP requested that offerors provide “pertinent information,” such as that pertaining to the offeror’s “on-time delivery record,” for evaluation under the “delivery” subfactor to the past performance factor. Id. Offerors were also instructed that they were to “include a complete list of contracts that are past due, or were extended for the convenience of the Offeror.” RFP at 61. Offerors were further instructed to provide past performance information “indicating the offeror’s commitment to favorable business relations/customer satisfaction” for consideration under the business relations/customer satisfaction evaluation subfactor, and “applicable quality information” for consideration under the quality subfactor. RFP at 61-62.

The agency received proposals from five offerors, including EHC and Grauch, by the RFP’s closing date. Agency Report (AR), Tab 12, Competitive Range Determination, at 4. EHC’s and Grauch’s proposals received ratings of “good” under each of the subfactors comprising the past performance factor, and the past performance factor

¹ The RFP also included 95 separate CLINs for dials, dial assemblies, pointers, pointer assemblies, and other miscellaneous items, each designated by an NSN, with award being made on an “all or none basis” by CLIN. The agency’s awards for these 95 separate CLINs have not been challenged by EHC, and thus will not be discussed in this decision.

overall.² EHC and Grauch proposed total prices for Lot I (355 CLINs) of \$2,768,716, and \$1,604,456, respectively, and for Lot II (194 CLINs) of \$1,070,876, and \$836,895, respectively. AR at 8; Tab 17, Source Selection Decision, at 2.

Discussions were conducted, during which the agency identified for EHC and Grauch certain CLINs where the “[p]rices offered appear too high,” and “request[ed] price reductions.” AR, Tab 14, Negotiation Letters to EHC and Grauch (Sept. 1, 2004). The agency also requested with respect to other CLINs that EHC and Grauch “[p]lease verify that these prices are correct for price realism.” *Id.* Both EHC and Grauch submitted revisions to their proposals.

EHC’s and Grauch’s revised proposals were evaluated by the agency as “good” under each of the subfactors comprising the past performance factor, and “good” overall under the past performance factor. EHC’s revised proposal offered prices of \$2,315,940 for Lot I and \$985,350 for Lot II, and Grauch’s proposal offered prices of \$1,274,910 for Lot I and \$606,508 for Lot II. AR, Tab 17, Source Selection Decision, at 2. Grauch received award of Lots I and II based upon the agency’s determination that Grauch’s lower-priced proposal represented the best value to the government with regard to these lots.³ After requesting and receiving a debriefing, EHC filed this protest.

² Proposals could be rated as either “outstanding,” “good,” “fair,” “poor,” or “no record” under each of the subfactors to the past performance factor and under the past performance factor overall. AR, Tab 9, Source Selection Plan, at 5-6.

³ According to the protester and agency, much of the reason for EHC’s relatively high proposed unit prices is due to EHC’s proposal of accelerated delivery of the items. As explained by the agency, EHC had previously provided FSC 5355 items to the agency under a Prime Vendor/Direct Vendor Delivery contract, where EHC “in many cases” shipped relatively small quantities of items in a relatively limited amount of time “to satisfy individual Government end user requisitions.” Agency Supplemental Report at 3. Even though the solicitation here generally provided for a delivery period of 90 days to DLA stock depots, EHC apparently chose “[b]ased on its knowledge of [the agency’s] needs for the FSC 5355 class of items,” as well as its erroneous understanding that the delivery subfactor under the past performance factor related to the offerors’s proposed future delivery schedule, to “propose[] relatively short delivery periods,” which caused EHC’s projected costs, and thus its price, to be higher. Protest at 10. In this regard, EHC was informed by the agency that “[i]t is in the best interests of the offer[or] to submit their best offer in relation to the terms of the solicitation” and that “future deliveries are not evaluated in [the] proposal.” Protest at 10; AR, Tab 4, Notes of Agency Communication with EHC (May 5, 2004); Tab 22, Post-Award Debriefing of EHC, at 3.

EHC protests that the agency failed to conduct an adequate price realism analysis. Although agencies are required to perform some sort of price or cost analysis on negotiated contracts to ensure that the agreed-price is fair and reasonable, where, as here, the award of a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. Federal Acquisition Regulation (FAR) § 15.404-1; Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5. However, an agency may, as did DLA here, provide for a price realism analysis in the solicitation for such purposes as measuring an offeror's understanding of the solicitation requirements, or to avoid the risk of poor performance from a contractor who is forced to provide goods or services at little or no profit. The depth of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., supra.

The agency performed its price analysis by first establishing a "minimum objective" price, a "target objective" price, and a "maximum objective" price, for each of the 355 Lot I CLINs and 194 Lot II CLINs. AR, Tab 13, Pre-Negotiation Briefing Memorandum, at 5-6, attach. A. The "minimum objective" price equated to the determined "Fair Market Price less 5 % to allow for negotiation flexibility." Id. at 5. The agency's "target objective" prices were "based on the previous procurement prices" adjusted by a set percentage for inflation and a "learning curve adjustment for quantity," and the agency's "maximum objective" prices equated to the determined fair market price "with 5% added to allow for unknown market conditions." Id.

The agency then identified those CLINs in the offerors' proposals where the total prices proposed (unit price multiplied by the estimated quantity) were at least \$7,000 less than the agency's minimum objective prices, 50 percent or more below the agency's maximum objective prices, and/or "out of line" with the other offerors' proposed prices. AR, Tab 13, Pre-Negotiation Briefing Memorandum, at 5. The agency provided each offeror with a pricing matrix identifying those CLINs where the prices proposed met the above criteria, and, as mentioned previously, requested that the offeror "verify that these prices are correct for price realism." AR, Tab 14, Negotiation Letters to EHC and Grauch (Sept. 1, 2004). The agency received proposal revisions from the offerors, and with regard to Grauch, "was satisfied with the price realism of [its] proposal[]." AR at 13.

EHC challenges the depth of DLA's price analysis, arguing that "there is no discussion in any of [the agency's] final evaluation documents regarding the cost realism of Grauch's offer." Protester's Comments at 12. The protester concludes that the agency "did nothing to investigate Grauch's significantly lower prices or to confirm that Grauch could deliver the requested items at these prices," and therefore "failed to conduct a proper price realism analysis." Protester's Supplemental Comments at 10. The protester notes that Grauch's proposed prices after

negotiations were “still 32% below [the agency’s] Minimum Objective for Lot I and 35% below [the agency’s] Minimum Objective for Lot II.”⁴ Id.

We find from our review of the contemporaneous record that the agency had concerns with the low prices proposed by the offerors for certain CLINs in Lots I and II, and that it handled these concerns in a reasonable manner. That is, the agency’s price negotiation memorandum shows that the agency was aware and accurately calculated the number of CLINs on which Grauch’s and EHC’s proposed prices fell within the agency’s criteria for requiring verification for price realism purposes, that the agency brought these CLINs to the offerors’ attention during negotiations, and was satisfied with the responses it received. There is no requirement that the agency conduct a “cost realism” analysis in evaluating proposals for a fixed-price contract as asserted by the protester, nor is an agency required to “investigate” in the context of a price realism analysis whether Grauch can deliver the items for the prices proposed as required by the resultant contract.⁵ See Citywide Managing Servs. of Port Washington, Inc., supra, at 6.

⁴ The protester argues further that the agency, in defending the protest, misstates the number of CLINs for which the agency requested that Grauch verify its proposed prices for realism, and that the agency report incorrectly represents that the contracting officer addressed price realism during negotiations with Grauch, asserting that “[t]he notes taken during negotiations with both EHC and Grauch indicate that price realism was never discussed, verified or addressed.” Protester’s Supplemental Comments at 10.

It does appear that the agency’s statement—that Grauch was requested to verify 20 out of the 645 CLINs on which it offered for price realism—is incorrect. See AR at 13. From our review of the record, it appears that during negotiations the agency requested that Grauch and EHC verify their prices for realism on 100 and 24 CLINs, respectively. AR, Tab 16, Price Negotiation Memorandum, attach. However, this error in the agency report does not alter our view that, as explained below, the agency’s contemporaneous price realism analysis was reasonable. We also note that in addition to conducting written negotiations with the offerors regarding price realism as discussed above, the agency’s contemporaneous notes do indeed provide that price realism was addressed with Grauch orally, despite the protester’s assertion to the contrary. AR, Tab 14, Agency Handwritten Notes of Negotiation with Grauch (Sept. 8, 2004).

⁵ To extent that EHC’s is challenging the agency’s responsibility determination, our Bid Protest Regulations generally preclude our review of a contracting officer’s affirmative determination of an offeror’s responsibility, absent certain exceptions not alleged here. See Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2004); United Seguranca, Ltda., B-294388, Oct. 21, 2004, 2004 CPD ¶ 207 at 4.

EHC also protests the agency's evaluation of the firms' past performance, raising numerous specific complaints regarding the evaluation of its and Grauch's proposals, and arguing that at a minimum, its proposal should have been evaluated more favorably than Grauch's.

In reviewing an agency's evaluation of past performance, we will not reevaluate proposals, but instead examine an agency's evaluation to ensure that it was reasonable and consistent with the solicitation and applicable statutes and regulations. Servizi Aeroportuali, Srl, B-290863, Oct. 12, 2002, 2002 CPD ¶ 208 at 6.

With regard to the delivery subfactor to the past performance factor, the protester, while not challenging the evaluation of its proposal as "good" under this subfactor, complains that Grauch's proposal (which was also rated as "good" under the delivery subfactor) should have received a less favorable rating. In this regard, the protester points out that EHC's "good" rating under this subfactor was based in large part upon EHC's extensive past performance history as a supplier of FSC 5355 items. Specifically, EHC notes that the evaluators commented that as "prime vendor" for the 5355 class items "for the past 5 years" EHC had "supplied a substantial number of [the] same items, as those solicited [here], on time on almost all occasions." Protester's Comments at 6; AR, Tab 10, Evaluation Report, at 2. The protester states that Grauch's proposal's "good" rating under this subfactor was based on comments received from three of Grauch's commercial customers, and upon the fact that Grauch had performed as a subcontractor under EHC's Prime Vendor contract. The protester argues that the references contacted by the agency regarding Grauch's past performance did not identify the type and volume of items supplied by Grauch, and that the record of Grauch's performance as a subcontractor to EHC reflects certain unfavorable performance, which was reported on a worksheet of the one of the agency evaluators. Protester's Comments at 8; AR, Tab 10, Delivery Subfactor Evaluator Worksheet (Aug. 11, 2004). The protester contends that Grauch's "past performance credentials with regard to delivery are paltry" compared to EHC's, given that, according to EHC, it "had completed over 135,000 delivery orders under the [Prime Vendor] contract." Protester's Comments at 6, 7. The protester notes that the RFP provided that past performance information regarding previous contracts with the agency for the same or similar items would be given "priority" during the evaluation over information regarding commercial contracts. Id. at 6; RFP at 68.

Although the record reflects that, as argued by the protester and recognized by the agency, EHC has more directly relevant past performance as the result of its performance on the Prime Vendor contract, we do not find the agency's rating of both EHC's and Grauch's proposals as "good" under the delivery subfactor to be unreasonable. With regard to the evaluation of Grauch's proposal under the delivery subfactor to the past performance factor, the commercial references contacted by the agency characterized Grauch's performance as generally "excellent" or "great," with each reference adding that it had not had any problems with Grauch as a vendor and would do business with Grauch again. AR, Tab 10, Evaluation Reports,

attach. In this regard, one of the references specifically commented that Grauch's "delivery is on time every month," with another of the references noting that "[d]elivery was great, they delivered . . . right on time when they promised." Id. Although we agree with the protester (and the agency) that, according to the record, Grauch does not have as extensive a performance history as does EHC, we cannot find the agency's evaluation of Grauch's more limited performance history under the delivery subfactor as "good" to be unreasonable, given, for example, the positive remarks made by Grauch's references regarding Grauch's record of deliveries.

Although the protester does not specifically challenge the "good" rating it received under the delivery subfactor, we note that EHC's performance record reflects instances of unfavorable performance as found by the agency and conceded by the protester. For example, the agency reports that despite the RFP's requirement that proposals "include a complete list of contracts that are past due," and the protester's representation in its proposal that it "is currently past due on twenty 20 NSNs," the agency's records reflect that EHC is past due on deliveries regarding "78 distinct NSNs, with still over 700 open orders Past Due."⁶ RFP at 61; AR at 9; Tab 8, EHC Proposal, at A-4; Tab 26, EHC Delinquent Delivery Orders. While noting that this "is still not a significant number when considered with the thousands of NSNs managed under the prime vendor contract," the evaluators, in our view, nevertheless reasonably considered EHC's delinquent deliveries as a "weakness," and evaluated EHC's proposal as "good" under the delivery subfactor.

EHC also protests that its proposal should have been rated as "outstanding" under the business relations/customer satisfaction and quality subfactors to the past performance factor. In support of this position with respect to the business relations/customer satisfaction subfactor, the protester points out that it received DLA's "Innovative Business Performer of the year award" in 2000, and that EHC has provided "the same class of items set forth in the Solicitation . . . to the federal government for over 30 years." Protest at 8; Protester's Comments at 9. With regard to the quality subfactor to the past performance factor, the protester points out that "its items supplied to the Government are rarely returned for defects," and that it "included its ISO 2001 certification in the proposal." Protest at 8.

⁶ The agency report includes a complete list of the NSNs for which the agency had determined that EHC was delinquent. AR, Tab 26, EHC Delinquent Delivery Orders. Although the protester "does not admit that this list is accurate," the protester has not provided any evidence to show that it is inaccurate. Protester's Supplemental Comments at 3. In any event, we note that the protester does not challenge the agency's evaluation of its proposal as "good" under the delivery subfactor to the past performance factor; rather, its protest is that Grauch's proposal should have received a rating less favorable than "good" under this same subfactor, given the protester's position that the offerors' records of past performance regarding delivery are not comparable.

The source selection plan provided that a proposal would receive an “outstanding” rating under the business relations/customer satisfaction subfactor if, for example, “[c]ustomer complaints are nonexistent or negligible,” and receive a “good” rating should the agency find, among other things, that “[c]ustomer complaints are few and relatively minor.” AR, Tab 9, Source Selection Plan, attach., Evaluation Standards. With regard to the quality subfactor, the source selection plan provided that an “outstanding” rating was warranted if, for example, “[c]ustomers report that the offeror provided a quality product in conformance with the requirements without deviation on all or almost all orders,” whereas a “good” rating would be justified should [c]ustomers report that the offeror provided a quality product in conformance with the requirements . . . on most orders.” Id.

With this in mind, the agency notes that in evaluating EHC’s proposal under the business relations/customer satisfaction and quality subfactors, it reviewed “a sizeable group of Customer Depot Complaint System (CDCS) Reports which included complaints ranging from packaging and labeling discrepancies to significant Product Quality Deficiency Reports.” AR at 10; Tab 27, CDCS Reports. The agency states that it found “a group of 33 CDCS complaints considered significant.” Id. The agency adds in this regard that EHC had provided the agency with the same items as being solicited here under “the previous Prime Vendor contract,” and that EHC’s “inability to meet [Uniform Material Movement Issue Priority System] requirements and to establish a positive and productive relationship with FSC 5355 manufacturing community, in terms of Sole Source and other part numbered items, precipitated the change from a Prime Vendor Contract to an Indefinite Quantity Contract for stock requirements.” AR, Tab 13, Pre-Negotiation Briefing Memorandum, at 4. Given this record, we find reasonable the agency’s evaluation of EHC’s past performance under the business relations/customer satisfaction and quality subfactors as “good.” That is, while we agree with the protester (as well as the agency) that the record reflects EHC’s generally favorable performance history, the record also includes, as noted above, certain customer complaints and other incidents of unfavorable performance that were properly considered under these subfactors.

The protester argues that, in any event, its proposal should have received higher evaluation ratings than did Grauch’s under the business relations/customer satisfaction and quality subfactors to the past performance factor.

The record shows that the commercial references contacted by the agency again commented positively regarding Grauch as a contractor, with one vendor noting, for example, that “[t]he quality of the item was great,” and that they had “never had any problems with Grauch” and “definitely would do business with Grauch . . . again.” AR, Tab 10, Evaluation Reports, attach. Another vendor, in addition to commenting that they “would do business with Grauch again,” stated that they “never had a problem with Grauch in any way,” noting that “Grauch’s quality is good” and that

“[n]othing has ever been rejected.” Id. The third commercial reference’s comments echo similar sentiments, providing, for example, that “Grauch’s quality is excellent,” that they have “never had a problem with Grauch” or “had to send anything back,” and that they too would “continue doing business” with Grauch. Id.

Again, although EHC clearly disagrees, we cannot find the agency’s evaluation of Grauch’s proposal as “good” under the business relations/customer satisfaction and quality subfactors to the past performance factor to be unreasonable. The conclusion drawn by the evaluators from the Grauch’s record of past performance, that Grauch’s “[c]ommercial customers are confident with [Grauch’s] quality and reliability and are will[ing] to do business with [Grauch] again,” is consistent with the record and supports the agency’s adjectival rating of Grauch’s proposal as “good” under these subfactors.⁷

In sum, as the above examples and explanation indicate, while we agree with the protester (and agency) that EHC has a more extensive history of relevant past performance than Grauch, we cannot find the agency’s evaluation of the offerors’ proposals as “good” to be unreasonable, given that the agency recognized the disparate levels of past performance and adequately considered them while also considering the comments made by the Grauch past performance references contacted by the agency. Servizi Aeroportuali, Srl, supra, at 10. Consistent with this, we also find the agency’s selection of Grauch’s proposal for award to be reasonable,

⁷ The protester also argues that, in evaluating Grauch’s proposal under the business relations/customer satisfaction and quality subfactors, the agency ignored unfavorable past performance information regarding Grauch’s performance as a subcontractor to EHC under the Prime Vendor contract, and points out specifically with regard to the quality subfactor that it has “received ISO 9000 certification for its manufacturing processes,” and Grauch, while pursuing such certification, has not. Protester’s Comments at 10; AR, Grauch’s Proposal, at 5. Contrary to the protester’s assertion, the record reflects that the agency did not ignore the unfavorable past performance information regarding Grauch’s performance as a subcontractor to EHC, but rather, reasonably considered this information in evaluating Grauch’s proposal under the “delivery” subfactor as discussed previously. Additionally, although the protester does not explain why the fact that its manufacturing process have received ISO 9000 certification and Grauch’s currently has not could properly be considered under the “past performance” factor, we note that the agency considered that EHC was currently ISO 9000 certified and Grauch was not during its evaluation of the offerors’ proposals.

given that the Grauch's proposed price was significantly lower than EHC's, and both proposals received ratings of "good" under the past performance factor and its subfactors.

The protest is denied.

Anthony H. Gamboa
General Counsel