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Decision

Matter of: Kollsman Inc.

File: B-406990; B-406990.2

Date: October 15, 2012

James J. McCullough, Esq., Brian M. Stanford, Esq., and Michael J. Anstett, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

W. Jay DeVecchio, Esq., Kevin C. Dwyer, Esq., and Ethan E. Marsh, Esq., Jenner & Block LLP, for L-3 Communications Corporation, an intervenor.

Marvin D. Rampey, Esq., Department of the Navy, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of the awardee's past performance as providing "substantial confidence" is sustained where the record does not support the reasonableness of this rating.

DECISION

Kollsman Inc., an Elbit Systems of America, LLC company, of McLean, Virginia, protests the award of a contract to L-3 Communications Corporation, of Londonderry, New Hampshire, by the Department of the Navy, Navy Surface Warfare Center, Crane, Indiana (NSWC Crane) under request for proposals (RFP) No. N00164-12-R-JQ03 for handheld laser markers. Kollsman challenges the evaluation of price and L-3's past performance.¹

We sustain the protest.

¹ Kollsman also asserted that the agency failed to properly investigate serious allegations of violations of the Procurement Integrity Act. In its report, the agency responded to this issue, yet Kollsman made no further mention of this issue in its comments filing. Consequently, we deem this protest issue abandoned. See Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 2 n.1.

BACKGROUND

The RFP for the Handheld Laser Marker Block II (HLM II) was issued on February 9, 2012, and provided for the award of an indefinite-delivery/indefinite-quantity (ID/IQ), fixed-price contract for a base year with 4 option years.

The RFP provided for award on a best-value basis. Offerors were first to provide product samples that were evaluated on a “Go/No Go” basis. RFP at 78. The offerors who provided acceptable product samples were then evaluated considering the following factors: technical, past performance and price, with technical being significantly more important than past performance. Each offeror’s past performance was evaluated to determine the relevancy of its referenced prior contracts, and was assessed as “relevant” or “not relevant.” The agency then determined how well the contractor performed on each contract and assigned a past performance confidence rating.² Although price was not a weighted evaluation factor, the RFP stated that price would become increasingly important with “the degree of equality of the proposals in relation to the other factors on which selection [was] to be based, or when the price [was] so significantly high as to diminish the value of the technical superiority to the Government.” RFP at 79.

The agency received proposals from Kollsman and L-3 by the April 2 closing date. The agency evaluated the proposals and held discussions. The agency evaluated the final proposals as follows:³

Offerors	Technical Rating	Past Performance	Total Evaluated Price
Kollsman	Outstanding	Relevant/Substantial Confidence	\$ 53,625,250
L-3	Good	Relevant/Substantial Confidence	\$ 35,676,406

Agency Report (AR) at 18. In determining that L-3’s proposal represented the best value, the source selection authority found that “Kollsman’s evaluated price was so significantly high, \$17,948,844 higher than L-3, it diminished the value of the technical superiority [of Kollsman’s proposal] to the Government.” AR, Tab 4, Source Selection Document, at 4. Consequently, award was made to L-3. This protest followed.

² The possible past performance confidence ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence and unknown confidence. RFP at 80.

³ For the technical factor, the agency used the ratings of outstanding, good, acceptable, marginal and unacceptable; and for past performance the agency used the ratings of substantial confidence, satisfactory confidence, limited confidence, no confidence, and unknown confidence (neutral). RFP at 80-81.

PRICE EVALUATION

The protester first contends that the Navy's price evaluation was irrational in that it was not based on the actual estimated quantities of items the Navy intended to purchase in this procurement.

Offerors were instructed to submit unit prices for certain stepladder quantities of the HLM II for the 5 years of the contract as follows:

Quantity	Year 1	Year 2	Year 3	Year 4	Year 5
1-20					
21-50					
51-100					
101-200					
201+					

RFP at 5. To calculate the total contract price of each proposal, the agency used the maximum quantity of the HLM II units that could be ordered in each year, which the RFP identified as 1,175 units; multiplied this quantity by the unit price offered for the quantity range 1 to 20 for each of the 5 years; and totaled these figures. To this sum, the agency added the not-to-exceed amounts specified in the RFP for the other contract line items for spares; test, teardown and evaluation; and non-warranty repair. Agency Motion to Dismiss (MTD) at 9.

The protester contends that the agency should have evaluated prices using the unit price offered for quantities over 201 units. Additionally, the protester notes that the agency would benefit from its volume discount prices if the price evaluation was based on the larger quantity.

While the solicitation instructed offerors to submit unit prices as shown above, the RFP was silent with regard to how the agency would calculate the total evaluated prices. In addition, the RFP says nothing about the rate at which units will be ordered throughout the year. While 1,175 is the maximum quantity that could be ordered in a year, the amount actually ordered could be less; in addition, units could be ordered in small increments. Given that both the agency's and the protester's method to calculate the total evaluated prices are reasonable, the resulting ambiguity was readily apparent from the RFP. Thus, to be timely, any protest on this ground had to be filed prior to the closing time for submission of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2012); Marine Group Boat Works, LLC, B-404277, B-404277.2, Jan. 19, 2011, 2011 CPD ¶ 23 at 4. Under the

circumstances, we have no basis to sustain this protest challenge to the agency's price evaluation.⁴

PAST PERFORMANCE EVALUATION

Kollsman also contends that the agency's evaluation of L-3's past performance was unreasonable and undocumented. Specifically, Kollsman contends that L-3's past performance rating of "substantial confidence" was not warranted given L-3's documented negative past performance on the predecessor HLM I contract.

While, as a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, we will question an agency's evaluation of past performance where it is unreasonable or undocumented. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 13; Clean Harbors Envtl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3.

The contract specialist received and reviewed two past performance questionnaires regarding L-3's performance on previous contracts.⁵ MTD, Tab 3, L-3 Past Performance Questionnaire. Of relevance to this protest is the questionnaire that concerned L-3's performance on the predecessor contract for the HLM I.⁶ This contract was administered by the United States Special Operations Command and technical support was provided by NSWC Crane. The task manager for the HLM I contract was stationed at Crane and completed the HLM I past performance questionnaire. This questionnaire contained the following:

- 10a. Did the contractor request any changes to performance specifications because they could not be met?

Through appropriate consideration provided by L-3/Insight, the acceptance test plan was re-negotiated to allow for a [DELETED].

⁴ The agency also notes that even if the highest-quantity of units (201+) is ordered each time the agency orders units, the price differential between Kollsman's price and L-3 would only decrease from 38.53 percent to 31.14 percent. MTD at 3.

⁵ The contract specialist also received Contractor Performance Assessment Reports and past performance information obtained from Past Performance Information Retrieval System (PPIRS) and Excluded Parties List System (EPLS). Hearing Transcript (Tr.) at 25-26, 70-71. There was no negative information regarding L-3 on the PPIRS or the EPLS. Tr. at 58.

⁶ L-3's other past performance questionnaire involved its performance of a contract for coded small lightweight laser markers. MTD, Tab 3, L-3 Past Performance Questionnaire, at 5. L-3's performance on this contract was considered excellent.

Once this consideration was negotiated, L-3/Insight has consistently provided products that met the acceptance test plan.

10b. If so, what were the areas and what was the ultimate impact on system performance, cost and schedule?

Negotiated areas were beam [DELETED]. Once this consideration was negotiated, L-3/Insight has consistently provided products that met the acceptance test plan. The Gov't asked for and received [DELETED]. Schedule has been revised twice with a major impact on fielding the devices.

MTD, Tab 3, L-3 Past Performance Questionnaire, at 3. The past performance questionnaire regarding L-3's performance of the HLM I contract contained a few "excellent" responses, and the remaining responses were equally divided between "good" and "average." Id. at 2-4

The contract specialist used this information to draft the past performance evaluation section that was included in the Source Selection Evaluation Report (SSER). Tr. at 111.⁷ The SSER was prepared by the source selection board chairperson, who was the same individual who was the task manager for the HLM I contract and who completed L-3's past performance questionnaire regarding that contract. Tr. at 111, 118-19, 121. The SSER rated L-3's past performance as "substantial confidence" and its report stated that "[t]he references were checked and no negative information was obtained." AR, Tab 5, SSER at 34. The SSER also included the following:

Have you requested relief from system specification requirements on any of your [contracts that are the] same or similar to the proposed systems? If yes, please describe the areas and the ultimate impact on system performance, cost and schedule for each request.

On a previous contract for a similar system L-3 requested relief from system specification [DELETED] for the HLM I. Delivery schedule was [a]ffected. However, L-3 provided adequate consideration ([DELETED] at no cost to the Government) and [is] currently ahead of the revised delivery schedule. L-3's past performance clearly demonstrated the contractors' ability to work with the customer needs to ensure minor technical issues were resolved and deliver[y] schedule was met without sacrificing a quality product.

⁷ As explained more fully below, our Office convened a hearing on this matter.

Id. The SSER did not otherwise discuss the schedule delays on the HLM I contract reported in the questionnaire or further explain why a significant confidence past performance rating was warranted.

The contract specialist later received the informal preaward survey for L-3 completed by the Defense Contract Management Agency (DCMA). AR, Tab 7, L-3 Preaward Survey; Tr. at 55. This survey concerned an additional performance problem, which occurred later in time than the acceptance test plan issue discussed in the questionnaire. This problem was based on the complaint of a customer, who found that a “secondary beam was being transmitted off to one side creating a possible safety hazard of laser radiation to the personnel using the product in the field.” AR, Tab 7, L-3 Preaward Survey, at 3. This problem caused the HLM I line to be shut down until effective corrective action could be taken and caused an additional delay in performance. Id. The SSER was not updated to consider this problem and there is no contemporaneous evidence as to how this affected L-3’s substantial confidence past performance rating.

The source selection decision did not discuss the past performance evaluation except to report the substantial confidence ratings and report that both proposals received the same adjectival rating. AR, Tab 4, Source Selection Decision, at 3.

Because the contemporaneous record did not explain why L-3’s substantial confidence rating was warranted in view of the reported problems under the HLM I contract, we called a hearing to more fully consider this matter.

During the hearing, the contract specialist testified that, after the SSER was prepared and after he reviewed the preaward survey, he contacted the task manager for the HLM I contract who answered the questionnaire to discuss “inconsistencies with his written comments and the actual questions that we asked.” Tr. at 45. As a result of these discussions, the contract specialist determined that the questionnaire responses of the task manager for the HLM I contracts concerning problems with L-3’s acceptance test plan were erroneously reported. Specifically, the contract specialist concluded that the questionnaire asked whether the performance specifications had been revised during the course of the HLM I contract, and the task manager’s responses concerned problems with L-3’s proposed acceptance test plan. The contract specialist testified that this disconnect created an impression that the performance specifications had been revised for L-3 during the course of the HLM I contract. Tr. at 122. The SSER was not amended to memorialize these discussions or to mention the preaward survey.⁸ Id. The

⁸ There is no other documentation in the record that memorializes the contracting specialist’s conversations with the task manager or explains how this affected L-3’s substantial confidence past performance rating, despite the fact that the task manager of the HLM I contract was heavily involved in this procurement as the

(continued...)

contract specialist stated that additional documentation in the SSER was not warranted because L-3's ultimate past performance rating of "substantial confidence" remained the same.⁹ Id.

The contract specialist also testified that the concerns of the task manager did not specifically concern modifications to the performance specifications, but dealt with the fact that the acceptance test plan had been modified. Tr. at 45-47. However, he does not explain why these modifications and concerns are not material. Indeed, we fail to see, and the agency has not explained, the distinction between modifications to the acceptance test plan and the performance specifications.¹⁰

The contract specialist testified that schedule delay was "[i]rrelevant" in evaluating past performance under this RFP, and that schedule relief for adequate consideration was appropriate. Tr. at 125. The contract specialist also testified that L-3 was not late in making deliveries after the schedule changed. Tr. at 127. We find that this testimony, which does not include any detailed explanation of the reported problems under the HLM I contract, does not reasonably support the "substantial confidence" past performance rating.¹¹

(...continued)

source selection board's chairperson. The task manager was not offered by the agency as a witness at the hearing.

⁹ The contract specialist also testified that he considered but did not revise the past performance evaluation of L-3 based on the DCMA preaward survey that indicated a second delay in L-3's performance on the HLM I contract. Tr. at 55-56.

¹⁰ In fact, it appears that if L-3 failed to produce an acceptance test plan for demonstrating how its item can meet minimum performance specifications requirements, and the agency did not accept the contractor's test plan, the end result was an inability to demonstrate that the product complied with the applicable specifications. This matter appears to have had schedule and cost implications, and appears to have caused delays that required a contract modification.

¹¹ The rating of substantial confidence is defined as:

Based on the offeror's recent/relevant performance record, the Government has a high expectation that the offeror will successfully perform the required effort.

AR at 19. In contrast, the rating of satisfactory confidence is defined as:

Based on the offeror's recent/relevant performance record, the Government has a reasonable expectation that the offeror will successfully perform the required effort.

Id.

Moreover, the past performance ratings on the L-3 questionnaire do not support a substantial confidence rating. As stated above, the past performance questionnaire regarding L-3's performance of the HLM I contract contained a few "excellent" answers, and the remaining responses were equally divided between "good" and "average." MTD, Tab 3, L-3 Past Performance Questionnaires, at 3. The average rating was not a favorable one, and was defined on the front of the questionnaire as follows:

AVERAGE-The contractor's performance was acceptable as expected from a qualified source. Although there is a possibility of doing business with this contractor again, time might be spent looking for a better source.

MTD, Tab 3, L-3 Past Performance Questionnaire, at 1. Thus, without further explanation, we think that average ratings on the past performance questionnaire do not support a substantial confidence past performance ratings. At the hearing, the contract specialist testified with regard to this matter as follows:

Q. Did you note that there were numerous instances of average responses given?

A. Yes.

Q. And how did you interpret those average responses?

A. Talking with the task manager regarding this past performance questionnaire, I believe that his rating of the word average was inconsistent with his written and verbal discussion.

Q. You believe they were inconsistent with his verbal discussions?

A. Yes

Q. In what way?

A. I don't think he looked at the average definition as being a negative rating.

Tr. at 96-97. Considering the referenced problems under the HLM I contract, it seems more likely that the task manager intended to respond with the "average" rating, as defined in the questionnaire. Given the fact that the same individual prepared the past performance questionnaire and prepared the SSER, it seems that if any of these documents had not reflected his true intentions that he would have

noticed any discrepancies and rectified the situation.¹² We find that the agency's post hoc arguments presented at the hearing are contradicted by the record. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

We note that the agency and intervenor argue that the contract specialist's undocumented analysis of L-3's past performance by the contract specialist was reviewed by the contracting officer and the source selection official, who acquiesced in his analysis in making the source selection decision. However, the agency can produce no documentary evidence of the review by the contracting officer and the source selection official, except the source selection decision document prepared by the source selection decision, which states that "[t]he remaining subfactors of the technical factor and past performance all received the same adjectival rating." Tr. at 42. Given the lack of documentation and support for the substantial confidence rating, we find no basis to conclude that the agency reasonably evaluated L-3's past performance.¹³

¹² The contract specialist testified that the task manager did not notice any such inconsistencies because this was his first experience as chairperson of the source selection evaluation. Tr. at 121-22.

¹³ We also find that the contract specialist's testimony does not otherwise support the substantial confidence rating. The questionnaire response from the HLM I task manager clearly indicated a significant performance problem:

The Gov't asked for and received [DELETED]. Schedule has been revised twice with a major impact on fielding the devices.

MTD, Tab 3, L-3 Past Performance Questionnaire, at 3. However, when reporting this issue in the SSER the contract specialist characterized the problems as "minor technical issues" that did not impact the contract schedule. AR, Tab 5, SSER, at 34. Except for the testimony discussed above, the record, including the hearing testimony, does not specifically indicate why the contracting specialist regarded these problems as "minor."

RECOMMENDATION

Because we find that the agency failed to adequately support and document its past performance evaluation of L-3, we recommend that the agency reevaluate L-3's past performance. We also recommend that Kollsman be reimbursed the costs of filing and pursuing this protest, including reasonable attorney fees. 4 C.F.R. § 21.8(d)(1). Kollsman should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
General Counsel