



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Quality Fabricators, Inc.

File: B-271431; B-271431.3

Date: June 25, 1996

Timothy S. Kerr, Esq., Elliott Reihner Siedzikowski & Egan, for the protester.
James J. McCullough, Esq., Joel R. Feidelman, Esq., and Anne B. Perry, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Tri-Way Industries, Inc., an intervenor.
Michael J. Cunningham, Jr., Esq., Department of the Navy, for the agency.
John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Exclusion of the protester's proposal from the competitive range was reasonable where, based on the evaluation of its past performance, which included late deliveries, quality deficiency reports concerning manufacturing defects, and a refusal or inability to manufacture some of the same items under a previous contract, the agency reasonably concluded that the firm had no reasonable chance for award.

DECISION

Quality Fabricators, Inc. (QFI) protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N00140-96-R-D110, issued by the Department of the Navy for various types of lockers for the Navy's habitability program. QFI also protests the award to Tri-Way Industries, Inc. under the solicitation.

We deny the protests.

BACKGROUND

The solicitation contemplated the award of an indefinite delivery, indefinite quantity contract for a base year with 3 option years. Award was to be made to the offeror whose proposal, conforming to the solicitation, was most advantageous to the government, considering two factors: past performance and price. The solicitation stated that past performance would be considered significantly more important than price and that the government could award to other than the lowest-priced offeror.

The solicitation stated that each offeror should describe its past performance on similar contracts it has held within the last 5 years. The solicitation also provided that the agency could obtain information on past performance from any source and stated that offerors lacking past performance history would receive a "neutral" rating for past performance.

Six proposals were submitted, ranging in price from \$12,211,065 to \$15,994,780.24. QFI's price was the second low, at \$12,416,567.28, and Tri-Way's price was third low, at \$12,698,624. In assessing past performance, in addition to reviewing information provided in the proposals, agency officials solicited opinions from the Navy's Fleet Technical Support Center (FTSC), which has responsibility for the Navy's habitability program, government quality assurance representatives, and administrative and procuring contracting officers. Agency officials also reviewed quality deficiency reports. The agency assigned one of the following past performance ratings to each of the proposals:

"Neutral: No relevant past performance available for evaluation. Proposal receives no merit or demerit for this factor.

"Exceptional: Little or no potential exists for disruption of schedule, increases in cost (for cost type contracts) or degradation of performance based on the offeror's past performance.

"Satisfactory: Some potential exists for disruption of schedule, increases in cost (for cost type contracts) or degradation of performance based on the offeror's past performance.

"Marginal: Significant potential exists for disruption of schedule, increases in cost (for cost type contracts) or degradation of performance based on the offeror's past performance."

The agency assigned past performance ratings of marginal to QFI and exceptional to Tri-Way.¹

In rating QFI's past performance, the agency recognized that QFI is a new firm, but gave it credit for the performance of Hampton Roads Metal Systems on previous contracts since, as QFI's proposal explained, QFI will operate in the same facility with the same personnel and management team as Hampton Roads. Using

¹The lowest-priced proposal received a rating of marginal and the three higher-priced proposals received ratings of satisfactory, exceptional, and marginal.

Hampton Roads's performance history as the basis for QFI's rating, the agency found that the firm has had significant delinquent deliveries. The agency also noted that Hampton Roads has had problems with quality, including three quality deficiency reports on an earlier contract.

The contracting officer concluded that Tri-Way had experienced no significant delinquencies and its products were of uniformly high quality and conformed to specifications. The contracting officer reported that the only deficiency report on file for Tri-Way involved improper packaging, not manufacturing defects. According to the contracting officer, FTSC reported that Tri-Way is a very dependable vendor and has frequently demonstrated an ability to resolve complex technical problems and to adapt to demanding and changing requirements.

The contracting officer included only Tri-Way's proposal in the competitive range. In doing so, the contracting officer noted that the RFP established past performance as significantly more important than price, and that Tri-Way's past performance was significantly superior to that of QFI and the firm submitting the lowest-priced proposal. The contracting officer also concluded that, considering the differences in prices between the three lowest-priced proposals, neither QFI's proposal nor the lowest-priced proposal could overcome the superior past performance of Tri-Way and, therefore, neither QFI or the lowest-priced offeror had a reasonable chance for award. After discussions with Tri-Way, the contract was awarded to that firm.

QFI protested that the marginal rating assigned to its proposal was based upon erroneous delivery information. QFI maintained that there were no significant quality or other performance issues in the firm's history and that the contracting officer had relied upon incorrect information.

The contracting officer then reviewed the FTSC data base which had been relied upon to determine the extent of QFI's delinquent deliveries. The contracting officer determined that the data base represented the dates on which the Navy had taken items into delivery, in spite of the fact that some of the contracts listed in the data base were FOB origin. As a result, the contracting officer explains that "for the FOB Origin contracts, the late deliveries shown in the data base did not necessarily represent a delinquent delivery under the contract." Consequently, the contracting officer reassessed that data and reevaluated QFI's past performance.

Based on the reevaluation, the contracting officer again concluded that QFI/Hampton Roads had a significant delivery problem. As the contracting officer explained, there were 1,590 requisitions on file for Hampton Roads in the FTSC data base. Of those 1,590 requisitions, 183 indicated deliveries more than 30 days late; the contracting officer assumed that where the delivery was listed as more than 30 days late, an actual late delivery was indicated, regardless of whether the order was FOB origin or FOB destination. Of the 183, the contracting officer reviewed 99 of the 183 requisitions on which deliveries were made more than 30 days late

and found 69 late requisitions, with an average delinquency of 70 days. According to the contracting officer, these 69 late requisitions represented 1,758 items.

The Navy also found that QFI/Hampton Roads failed to manufacture lockers called for under contract No. N00189-93-D-0138. According to the agency, the firm "requested a deviation, that was subsequently conditionally approved, to change 1/64 inch dimensional tolerances to read 1/32 inch, claiming that 1/64 inch tolerances could not be held on production runs." The deviation apparently was not ultimately approved; Hampton Roads never produced the lockers; and the agency deleted the lockers from the contract. The Navy notes that the protested solicitation requires these same lockers, still with 1/64 inch dimensional tolerances.

The contracting officer noted that she also considered three quality deficiency reports on a Hampton Roads contract for the same or similar lockers as called for here. Those reports indicated problems with cracked welds, paint defects, fit problems, bent corners, scraped doors, units out of square, missing rivets, poor fit, crooked name plate holders, a missing subbase, and minor deficiencies due to deviations from drawings. The contracting officer noted that an official of FTSC characterized Hampton Roads as a poor performer whose performance included problems of delivery and quality as well as an undesirable record of customer satisfaction. Based on this reassessment, the contracting officer affirmed the marginal past performance rating assigned to QFI.

The contracting officer also reviewed the information on which Tri-Way's past performance rating was based and noted that the FTSC data base included information on 898 requisitions for Tri-Way; of that 898, the data base indicated 93 requisitions more than 30 days late. The contracting officer stated that she reviewed those 93 requisitions and found 31 with deliveries actually more than 30 days late, with an average delinquency of only 31.9 days. These 31 delinquencies represented only 115 items. The contracting officer also noted that a report from FTSC rated Tri-Way as a highly satisfactory performer; that four other contracting officers rated Tri-Way as an outstanding performer; and that there have been no quality deficiency reports for manufacturing defects on Tri-Way's products. According to the contracting officer, based on the reassessment, there was no reason to change the exceptional past performance rating on Tri-Way and no reason to include QFI's proposal in the competitive range.

PROTEST ALLEGATIONS

QFI challenges the reassessment of its past performance. QFI argues that there are remaining flaws in the data relied upon in the reassessment. QFI also states that the three quality deficiency reports issued on Hampton Roads's contracts describe only 33 out of some 25,000 items fabricated and delivered by QFI/Hampton Roads over a 5-year period; that all of the reports were issued in the early stages of the firm's fabrication efforts; and that no reports have been issued since May 1993.

According to QFI, the decision to eliminate its proposal from the competitive range was based on flawed information and was simply wrong, particularly in light of the firm's competitive pricing. QFI argues that the Navy should be directed to reconsider QFI's past performance, hold discussions with the firm, and request a best and final offer.

ANALYSIS

The Federal Acquisition Regulation (FAR) provides that the competitive range must include all proposals that have a reasonable chance of being selected for award and that any doubt as to whether a proposal is in the competitive range should be resolved by inclusion. FAR § 15.609(a) (FAC 90-31). While the determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency, we closely scrutinize any evaluation that results in only one proposal being included in the competitive range, in view of the importance of achieving full and open competition in government procurement. Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100; Besserman Corp., 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191.

QFI maintains that there are numerous errors in the agency's analysis of QFI's performance history and argues that the firm has not delivered items late as often as the Navy has represented. For instance, according to QFI, the contracting officer's reanalysis did not take into account accelerated deliveries and contract modifications. Our review of the record confirms this contention. For example, while the agency's record of the delivery history under Hampton Roads's contract No. N00189-94-M-MK62 shows 13 deliveries required to be made on June 1, 1995, a contract modification provided by QFI shows that, due to an error in the description of the items to be delivered, the required delivery date was extended to June 9. In addition, as QFI notes, the modification was not signed until June 13, the date on which the items actually were delivered.

QFI also notes that for most of the delivery orders which the agency represents as late, there are unexplained discrepancies between the receipt dates listed in the agency's record of the protester's delivery history and the Material Inspection and Receiving Reports (DD Form 250s) for those delivery orders. For instance, for the 13 delivery orders described above under Hampton Roads's contract No. N00189-94-M-MK62, the agency's record represents that those orders were delivered on June 21, 1995; however, the DD Form 250s list an "ACCEPTANCE" date of June 13, 1995. Taking into consideration both the modified delivery date, as described above, and the discrepancy concerning the actual delivery dates, instead of each of these deliveries being made 20 days late, as the agency has represented, QFI has shown that each of these deliveries was on time.

QFI argues that the cumulative effect of these and other discrepancies in the evaluation is that its delivery history is not as bad as the agency has characterized

it. According to QFI, the effect of the errors in the agency's analysis is that, for the delivery orders listed by the agency, the actual late delivery average is 18 days, not 34 days, as the agency calculated. QFI explains that this average does not include the effect of accelerated deliveries and informal modifications under the contract.

Based on the record in this case, we think it is questionable that under its previous contracts QFI/Hampton Roads delivered items late as often as the Navy represents. Nonetheless, we conclude that the record otherwise reasonably supports the decision to exclude QFI's proposal from the competitive range.

As explained above, aside from late deliveries, the determination of QFI's past performance rating also included consideration of three quality deficiency reports on Hampton Roads's contracts for the same or similar lockers as called for under this contract. Those reports indicated problems with cracked welds, paint defects, fit problems, bent corners, scraped doors, units out of square, missing rivets, poor fit, crooked name plate holders, a missing subbase, and minor deficiencies due to deviations from drawings. QFI's rating also included consideration of the view of an FTSC official that Hampton Roads's performance included problems of quality as well as an undesirable record of customer satisfaction.

QFI argues that we should discount the quality deficiency reports issued on Hampton Roads's contracts. QFI explains that those reports describe only 33 items out of 25,000 items delivered by QFI/Hampton Roads over 5 years. QFI also notes that it promptly repaired and corrected the problems raised in those reports and that two of the three reports were issued for "informational" purposes only. Finally, QFI notes that the quality deficiency reports were issued at the beginning of the firm's efforts to manufacture the items and no reports have been issued since May 1993.

Although QFI attempts to minimize the quality deficiency reports because they were issued in 1993, the protester does not dispute that those reports were issued due to poor product quality. In our view, they are not "stale" and remain part of QFI's recent contract performance history. Further, the record shows that agency officials found that during 1995, QFI/Hampton Roads refused or was unable to manufacture items under contract No. N00189-93-D-0138. QFI maintains it did not refuse to manufacture the lockers in question and that the Navy unilaterally deleted them from the contract. Nonetheless, QFI has not rebutted the Navy's explanation that the items in question had to be deleted because QFI could not, or would not, meet the drawing requirements. Nothing in the record indicates that QFI attempted to establish that the Navy's drawing was defective or the reason it could not manufacture the lockers. We think the firm's failure to manufacture the items is significant both because it is recent--within the past year--and because it involved items which are called for under the protested solicitation.

An agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. See Firm Otto Einhaupl, B-241553 et al., Feb. 20, 1991, 91-1 CPD ¶ 192. This record affords us no basis upon which to object to the Navy's conclusion regarding QFI/Hampton Roads's past performance--that it produced some items of poor quality under prior contracts and could not, or would not, manufacture certain items which are the subject of this solicitation. While QFI offers explanations and interpretations of the record that provide a more favorable picture of its performance history than drawn by the agency, this does not alter the fact that there was sufficient evidence for the agency to conclude that the firm had a series of performance problems under its prior contracts.

We also conclude that QFI's proposal was reasonably excluded from the competitive range. Under the solicitation, past performance was considered significantly more important than price and the agency was permitted to award to other than the lowest-priced offeror. Under this evaluation scheme, which placed paramount importance on past performance, it was a reasonable exercise of the agency's discretion to decide that a firm with an exceptional performance history (based on very favorable references and no deficiency reports) and a relatively low price would be the only firm with a reasonable chance for award when all other offerors had significantly higher prices and/or less attractive performance histories. This is particularly true since the agency's assessment of Tri-Way's past performance as exceptional is unchallenged. Since the agency reasonably concluded that QFI had no reasonable chance for award, the exclusion of its proposal from the competitive range is not legally objectionable. See, e.g., Counter Technology Inc., B-260853, July 20, 1995, 95-2 CPD ¶ 39; Engineering & Computation, Inc., B-258728, Jan. 31, 1995, 95-1 CPD ¶ 155.

In a supplemental protest, QFI argues that Tri-Way's proposal was not eligible for award and should have been rejected. The record shows that, in spite of the solicitation requirement for past performance information, Tri-Way failed to include this information in its initial proposal. Also, while the solicitation required offerors to provide unit prices for all line items, Tri-Way's initial proposal did not include a unit price for line item 0001, the largest line item in the solicitation. QFI argues that due to the failure to include the past performance information and the price, Tri-Way's proposal was unacceptable as submitted and was required to be excluded from the competitive range because it required major revisions to become acceptable.

As the agency explains, line item 0001, which Tri-Way failed to price in its initial proposal, was a composite line item made up of one each of 18 different types of lockers which were priced elsewhere in the proposal as part of other line items. As a result, the agency was able to determine a price for that line item from Tri-Way's initial proposal. Concerning the past performance information omitted from

Tri-Way's proposal, the agency explains that the RFP permitted it to obtain past performance information from any other source and that by contacting FTSC and other sources, such as administrative contracting officers, the agency was able to obtain appropriate information and determine that Tri-Way deserved an exceptional rating for past performance. During discussions, Tri-Way was requested to submit a price for line item 0001 and to submit past performance data; Tri-Way did so in its best and final offer.

The agency's explanation is supported by the record—the missing price was simply determinable from other pricing in the proposal and the RFP did permit the agency to obtain past performance data irrespective of information contained in a proposal. Therefore, we see no merit to the protester's argument that Tri-Way's proposal should have been rejected based on informational deficiencies.

The protester, citing our decisions holding that agencies have the discretion to eliminate from the competitive range proposals which do not include information required by the solicitation, e.g., Panasonic Communications & Sys. Co., B-239917, Oct. 10, 1990, 90-2 CPD ¶ 279, suggests that agencies are required to eliminate such proposals from the competitive range. We disagree. The fact that an agency reasonably may eliminate a proposal from the competitive range for failure to include within the proposal information required by the solicitation does not mean the agency would be acting improperly if it included that proposal in the competitive range. Intermagnetics Gen. Corp.--Recon., 73 Comp. Gen. 333 (1994), 94-2 CPD ¶ 119.

The protests are denied.

Comptroller General
of the United States