Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HLC Industries, Inc.

File: B-274374

Date: December 6, 1996

Ruth E. Ganister, Esq., and Glenn L. Blackwell, Esq., Rosenthal and Ganister, for the protester.
Jonathan C. Cramer, Esq., Federal Bureau of Prisons, for the agency.
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DIGEST

1. Contracting officer's consideration of protester's late deliveries under prior contracts; determination that protester's performance was poor under those contracts; and evaluation of protester's past performance as marginal were reasonable and consistent with solicitation criteria that stated that agency would consider timeliness of performance, in addition to other factors, in evaluation of past performance.

2. Agency's evaluation of offerors' past performance was reasonable where the prior contracts selected for evaluation were performed in the last 2 years and, like the solicitation at issue, called for the manufacture of cloth meeting the standards of the using agency for physical, shade, and end item testing, and thus involved work similar to that required under the solicitation at issue.

DECISION

HLC Industries, Inc. protests the award of a contract to Coville, Inc. under request for proposals (RFP) No. IPI-R-0502-96, issued by the Bureau of Prisons for brown cotton cloth. HLC contends that the agency did not properly evaluate its proposal.

We deny the protest.

On May 2, 1996, the agency issued the RFP for a firm, fixed-price requirements contract for cloth to supply to the Federal Correctional Institution in Jesup, Georgia. The cloth will be used for the manufacture of clothing (tee shirts) by Federal Prison Industries, a wholly-owned government corporation within the Department of Justice that operates under the trade name "Unicor" at various federal correctional institutions in the federal prison system, and which provides employment, education, and training opportunities to inmates under federal custody.

Unicor operates approximately 100 factories at 53 different locations that manufacture a variety of products for the government. Under the contract here, the awardee would provide fabric to Unicor, which is contracting with the Defense Personnel Support Center (DPSC) for the delivery of finished items of clothing.

The RFP provided for award to the offeror whose proposal represented the best overall expected value and was considered most advantageous based on past performance, "specification,"[1] and price, with past performance being the most important factor. With regard to past performance, the RFP instructed offerors to provide information on the last five contracts performed which were similar to the instant requirement, and advised offerors that the agency would consider this information, along with any other information received regarding past contracts and any additional data obtained in the evaluation. The RFP stated that the contracting officer would consider the following factors:

> "The offeror's records of past performance, and to what extent the performance has been satisfactory. The offeror's cooperative behavior and commitment to customer satisfaction with the [g]overnment, public and private agencies. The timeliness of performance taking into account excusable delays. . . ."

The agency received seven offers on June 3, evaluated them, and requested submission of best and final offers. The protester submitted the lowest price (thus receiving the maximum score available for price, 25 points), with Coville third low (23.71 points); both Coville and HLC received the maximum score (25 points) for the second evaluation factor, "specification." Under the past performance factor, the contracting officer reviewed three contracts--in the case of HLC and Coville, two contracts that each had performed for Unicor and one other contract listed in each offeror's proposal. Coville received three positive reports and a "good" rating (receiving 40 out of 50 points available), while HLC received two negative reports, which along with one positive report, earned the protester a "marginal" rating (30 points). On August 15, the agency awarded a contract to Coville, whose proposal received the highest total point score of any offeror's (89 points), and this protest followed.

The record establishes that, as HLC asserts, the different ratings for past performance, and the resulting 10-point difference in score, were decisive in the selection of Coville over HLC. HLC argues that it should have received at least the same "good" rating that Coville received. To the extent that Unicor viewed HLC as

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[1]The RFP defined this factor as relating to the "offeror's reputation for compliance or non-compliance with" specifications, the quality of supplies and services furnished, and the offeror's financial capability.

delinquent under other contracts, the protester asserts that it has previously addressed the circumstances involved and that the delays incurred were without the fault or negligence of HLC. HLC contends that, if its proposal had received the "good" (40-point) rating it deserved, it would have been entitled to award.

Evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for the agency's, so long as the rating is reasonably based and documented. PMT Servs., Inc., B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98. Mere disagreement with the agency's evaluation does not itself render the evaluation unreasonable. Macon Apparel Corp., B-272162, Sept. 4, 1996, 96-2 CPD ¶ 95. The contracting officer here was the contracting officer under the prior Unicor contracts at issue; she also performed the evaluation under this RFP. Therefore, the reasonableness of the rating here depends here upon the reasonableness of the contracting officer's determination to rate HLC's performance as unfavorable, as supported by the underlying documentation. We conclude that the contracting officer's determination regarding HLC's past performance and her rating of HLC's past performance as "marginal" were both reasonable and consistent with the evaluation criteria that the RFP established.

As noted above, the RFP advised offerors that the agency would consider the timeliness of the offeror’s performance in evaluating past performance, taking into account excusable delays. Further, the RFP advised offerors that each proposal would receive one of five ratings--"poor," "marginal," "neutral," "good," or "excellent"--and that more unfavorable than favorable reports would result in a rating of "marginal," while more favorable than unfavorable reports would result in a rating of "good." As explained in the contracting officer's evaluation memorandum, "marginal" ratings meant that "many sources . . . make unfavorable reports" while "good" ratings meant that "most sources . . . state that the offeror's performance was good, better than average, etc." For example, HLC's "marginal" rating resulted from two unfavorable reports on the Unicor contracts, versus one favorable one from the Postal Service.

Of the three contracts considered by the agency, HLC's performance under its contract with the Postal Service is not at issue because that agency rated HLC's performance as "excellent." Under the two Unicor contracts, Nos. IPI-C-2357-96 (contract No. -2357) and IPI-C-2130-96 (contract No. -2130), HLC was, as the awardee will be here, providing fabric for manufacture of clothing for delivery to DPSC. DPSC therefore makes the final inspection of cloth when it receives the finished items. DPSC also provides Unicor's contractors, such as HLC, with standard samples of the cloth to be used in manufacturing clothing, for shade evaluation purposes. (As noted below, HLC attributes some of its problems under contract No. -2357 to its failure to receive a standard sample of a flat heather gray material from DPSC for shade evaluation purposes.)

In its initial protest, HLC contended that the delays under contract No. -2130 were caused by DPSC's lack of historical data to create a shade range for a woodland camouflage print, one of three line items under the contract and the only one not delivered in a timely manner. Evaluation material submitted with the agency report indicated, however, that the factory manager at Unicor's Bastrop, Texas facility stated that HLC had provided cloth of the wrong width. In its comments on the agency report, HLC contends that the factory manager was confusing HLC's performance problems under contract No. -2130 with its performance problems under a different contract for the same woodland camouflage print fabric. As explained below, we see no basis for finding the evaluation unreasonable.

Documents submitted by the agency show that HLC had two problems under contract No. -2130, which caused samples to fail inspection, and which resulted in late deliveries. First, some of HLC's responses to cure notices acknowledge delivering cloth of the wrong width; if this problem related to a separate contract, as HLC contends, it appears that Unicor was using both contracts to supply DPSC under the same prime contract. Moreover, inspection records show another problem under contract No. -2130: HLC apparently provided cloth that was the wrong weight--32 ends of yarn per inch, where the contract required 33 ends per inch. HLC furnished the agency a letter from its supplier, admitting the problem with the yarn ends and attributing it to a change in the manufacturer's production facility. Second, there is also evidence that some fabric failed shade testing.

HLC has submitted no contemporaneous documentation in support of its contention that any delays under contract No. -2130 were due to DPSC's lack of historical data. In fact, the record indicates that, at the time, the protester made no such argument; it simply argued chiefly that the nonconformities were not material and that Unicor should waive the defects and use the cloth.[2] Given the documented problems with the deliveries under contract No. -2130, which the protester has not effectively rebutted, we see no basis for concluding that the contracting officer unreasonably determined that HLC's performance under contract No. -2130 was poor.

The protester attributes its problems with contract No. -2357 to Unicor's failure to obtain a shade sample from DPSC. With regard to that contract, the record shows that Unicor issued two delivery orders for the heather gray fabric, one on January 24, 1996 for 5,000 yards, and another on February 6, for 25,000 yards. The protester states that it did not know of the second order until May, when it received a delivery extension under the first order. At that time, Unicor extended the delivery date for the first order from May 1 to June 3, and the delivery date for the second order to July 1. HLC met neither extended delivery date.

[2]The record shows that Unicor did prevail upon DPSC to grant a waiver, but only after agreeing to a price reduction under its prime contract with DPSC.

According to the protester's July 8, 1996 letter responding to a cure notice of July 1 from the agency, HLC had received notice of award at the beginning of November 1995, and requested a shade sample of the heather gray material on November 6. The agency advised HLC that it should obtain the sample from DPSC, and the protester requested a sample from DPSC by letter of November 15. After a month, HLC followed up with a second request to DPSC. HLC apparently took no further action to secure a sample, and ultimately received the sample on January 30, 1996. Thus, HLC's own version of events indicates that it made only limited efforts to obtain the sample during the first 2-1/2 months of the contract.

On March 15, HLC submitted a sample of its cloth to DPSC. DPSC provided the test results a week later.[3] Apparently the protester was confused by a reference to roll number 3285 on the inspection form; the sample received from DPSC had been marked "3565." As a result, HLC deferred further action until April 24, when DPSC advised HLC that the form was incorrect and that the protester should use the sample provided in January. On that date, HLC asked for a delivery extension from May 1 to June 3. On June 27, 3 weeks after the extended due date, HLC delivered the cloth for inspection; it failed. According to HLC, it was then that it realized that, in view of the nature of the cloth, the sample obtained in January was too small, which caused the shade to vary when the dye was applied to larger pieces.

It was in response to the agency's July 1 cure notice, 8 months after award (more than 5 months after receiving the first sample and more than a month after the delivery extension requested by HLC), that HLC advised Unicor that DPSC was not cooperating with a request for a larger shade sample and blaming its delinquencies on Unicor's failure to fulfill its obligation as a prime contractor to obtain a shade sample from DPSC. Insofar as Unicor had an obligation to obtain the shade sample, the record shows that it was provided on July 31, 3 weeks after HLC requested Unicor's assistance and, again, 9 months after HLC accepted a contract for production of the cloth.

As a preliminary matter, we know of no contractual provision or regulation that places the burden of obtaining proper samples on Unicor. We have requested that the protester direct our attention to any such provision or regulation, and the protester has not done so. In any event, we do not see a failure of cooperation between Unicor and DPSC as a significant factor in HLC's lateness. Rather, as the chronology of events set out above shows, HLC's actions--and inaction, such as its failure to recognize its need for a larger sample until late June, 6 months after receiving the sample and after failing inspection--at a minimum contributed

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[3]The protester's initial submissions, including its response to the cure notice, imply that the sample passed inspection. Both parties indicate in their final submissions, however, that one of two samples failed shade testing.

significantly to the delay in delivery. Accordingly, based on this record, we find reasonable the contracting officer's determination that HLC's performance under contract No. -2357 was poor.

HLC asserts that the agency evaluated past performance differently for the protester and Coville. HLC argues that in evaluating Coville's proposal, the contracting officer considered only the contracts listed in Coville's proposal, with no indication that the contracts were of similar dollar value or for similar items. By contrast, HLC asserts, the contracting officer did not restrict her evaluation of HLC's past performance to the contracts listed in the proposal, did not "acknowledge" that she was in fact the contracting officer for the two Unicor contracts considered, and failed to consider HLC's responses to the cure notices where it had made late deliveries.

The agency states that in evaluating past performance, it tried to consider similar contracts. "Similar," in this instance, meant that the contract was for cloth; required the contractor to meet DPSC's strict physical, shade, and end item testing; had been performed within the prior 2 years; and were close in dollar amount to the instant solicitation. Of the four Unicor contracts listed by the protester, the agency states that none was recent (performed within the past 2 years). The one contract within the 2-year period was the Postal Service contract, for which HLC got a favorable evaluation. Coville similarly listed five contracts, four of which were Unicor contracts. While not similar in dollar amount, the contracts reviewed were not small purchases, and all met the other three criteria, one being with DPSC and the other two being for cloth delivered to the Jesup facility, both within the past 2 years. Beyond noting that the contracts were for lower dollar amounts, HLC makes no showing that the cloth manufactured was not comparable to the cloth required under the instant solicitation. Under these circumstances, we cannot conclude that the agency's selection of prior contracts as "similar" contracts for purposes of evaluating the offerors' past performance was unreasonable or inconsistent with the RFP.

Similarly, we see nothing improper in the contracting officer's reliance on her own knowledge of HLC's performance on the two prior Unicor contracts. The record indicates that she had, based on her own experience, sufficient information and background to evaluate HLC's performance. Agencies evaluating proposals may properly consider their own experience with an offeror's performance where the solicitation contains past performance as an evaluation factor. <u>George A. and Peter A. Palivos</u>, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286. Particularly where, as here, the solicitation states that the agency may rely upon contracts not referenced, we see nothing improper in the agency's taking such direct knowledge of an offeror's performance problems into account in the evaluation. <u>See</u> <u>Quality Elevator Co., Inc.</u>, B-271899, Aug. 28, 1996, 96-2 CPD ¶ 89. Nor do we consider the evaluation of its past performance improper simply because the agency contacted only one of HLC's references. There is no legal requirement that all references listed in a proposal be checked. Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407.

Finally, to the extent that HLC challenges the evaluation of Coville's proposal under the past performance factor, HLC is not an interested party to raise this issue. The record shows that there are two proposals with total scores higher than HLC's. Under our Bid Protest Regulations, section 21.0(a), 61 Fed. Reg. 39039, 39042 (1996) (to be codified at 4 C.F.R. § 21.0(a)), a party must be interested to raise a protest issue, that is, it must be in line for award if its protest were sustained on the issue raised. Since there are other offerors with higher-rated proposals in line for award even if we sustained HLC's challenge to the evaluation of Coville's proposal, HLC is not an interested party to challenge that evaluation. ASI Personnel Servs., Inc.--Recon., B-258537.8, Oct. 31, 1995, 95-2 CPD ¶ 198.

The protest is denied.

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