



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Rockhill Industries, Inc.

File: B-278797

Date: March 16, 1998

Martin J. Prenosil and Christopher Zamagias for the protester.

David R. Hazelton, Esq., Latham & Watkins, for Miller-Holzwarth, Inc., an intervenor.

Joshua A. Kranzberg, Esq., and Arthur M. Boley, Esq., U.S. Army Materiel Command, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester alleging bias on the part of agency officials must provide credible evidence clearly demonstrating such bias and that the bias itself translated into action that unfairly affected the protester's competitive position; correspondence that merely repeats the allegations and shows only that contracting officials exercised their discretion, under other contracts, in denying protester's request for progress payments and government-furnished property and in approving awardee's request for waiver of first article requirements does not meet this burden of proof.

2. Where record shows that awardee's performance under prior contracts was generally timely, while protester had difficulty performing whenever it became necessary to order and purchase parts from subcontractors, agency's evaluation of past performance, which concluded that there was a significantly smaller risk in awarding contract to the offeror with the better performance record, was reasonable and consistent with the solicitation.

DECISION

Rockhill Industries, Inc. protests the award of a contract to Miller-Holzwarth Inc., (MHI) under request for proposals (RFP) No. DAAE07-97-R-T011, issued by the Department of the Army for M1 Abrams tank periscopes. Rockhill contends that the Army demonstrated bias in its selection of MHI for award and challenges the agency's evaluation of past performance.

We deny the protest.

On January 27, 1997, the agency issued the solicitation for a fixed-price, indefinite quantity contract for a 3-year period, with two 1-year option periods, for production and delivery of up to 3,015 M1 Abrams tank periscopes, including a first article, with two 1-year options for up to 804 additional periscopes in each of the option years. RFP §§ A(b)(1), B, and L-5. The solicitation provided for consideration of price and past performance as bases of award, with price slightly more important than past performance. RFP § M.1.

The solicitation, § L-16, directed offerors to submit information on any contracts in any way relevant to the instant effort, received or still in performance during the previous 3 years, including commercial contracts, to include, as follows: contract number; procuring contracting officer's name and telephone number, national stock number, and contract value. It warned that the agency would use independent data, in addition to that submitted by the offerors, to evaluate past performance.

The RFP, § M.3, provided that the agency would assess the relative performance risk, in terms of quality and schedule, of each proposal; it distinguished between proposal risk, associated with an offeror's proposed approach and which the agency did not intend to evaluate, and performance risk, which the agency would evaluate based on past performance. The RFP also provided for six potential ratings, as follows: excellent/very low risk ("Essentially no doubt . . . that the offeror will successfully perform . . ."), good/low risk ("[l]ittle doubt"), adequate/moderate risk ("[s]ome doubt"), marginal/high risk ("[s]ubstantial doubt"), and poor/very high risk ("[e]xtremely doubtful"), as well as neutral/unknown risk ("No meaningfully relevant record of past performance."). The assessment would be based on past performance as it related to the probability of successful accomplishment of the required effort, focusing on the offerors' past performance as it related to solicitation requirements, specifically quality and schedule. The agency urged offerors to include all relevant past efforts, including corrective action, to avoid a "neutral/unknown risk" rating, and again warned that the agency might consider data obtained from other sources in its evaluation.

The agency received four proposals on April 18; Rockhill submitted the lowest price, \$1,492,469.72 with first article testing and \$1,472,469.72 without first article testing, versus MHI's second low price of \$1,599,252 with first article testing and \$1,579,257 without first article testing. The evaluators considered MHI's performance under three similar contracts as "good/low risk" overall. The evaluators rated Rockhill's performance "poor" overall, or very high risk. Rockhill had performed well on three purchase orders for similar items, with much smaller quantities (276 altogether, mostly periscopes for the Bradley Fighting Vehicle). Rockhill had received one contract for a similar quantity--approximately 1,800 periscopes--and was delinquent, despite receiving three delivery extensions. There were indications that Rockhill had performed well where the smaller orders did not exceed material already on hand, but that the firm's financial difficulties, which prompted the critical subcontractor for laser filters to insist on cash payment prior

to delivery, seriously hampered the protester's ability to perform on larger contracts, where it had to order parts. After considering this information, the contracting officer/ source selection official determined that there was a significantly heightened probability that MHI would deliver on time, and that, in view of the government's urgent need for the periscopes, that probability warranted the payment of the price premium associated with MHI's offer.

The agency notified the protester of the award on October 21, and Rockhill filed a protest with the contracting agency 6 days later. In this protest, Rockhill contended that, as the low-priced offeror, it should have received the award, and challenged the evaluation. After receiving a debriefing on October 28, Rockhill supplemented its protest to the agency, alleging that the agency should have afforded it a waiver of first article testing, as it had done for MHI. The agency responded by letter of November 26, denying the protest, and Rockhill filed this protest with our Office.

In its protest to our Office, Rockhill asserts that the agency employed ambiguous, selective, and biased factors in selecting an awardee. Specifically, Rockhill asserts that the failure to conduct pre-award surveys, the decision to waive first article testing for MHI, and the refusal to grant Rockhill progress payments or provide it with government-furnished property under its prior contracts, constitute evidence of bias. As explained below, Rockhill has provided our Office with nothing to support its contentions.

To the extent that a protester alleges that an agency's actions form part of a pattern of bias on the part of agency officials, we do not attribute unfair or prejudicial motives to such officials on the basis of inference or supposition; a protester must provide credible evidence clearly demonstrating such bias and that the bias itself translated into action that unfairly affected the protester's competitive position. Dynamic Aviation--Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 4. As evidence of bias here, Rockhill focuses on agency actions taken in connection with the administration of its prior contracts. For example, the record shows that Rockhill has attempted unsuccessfully to convince the agency to modify its existing contract No. DAAE07-97-C-T439 to provide progress payments and to furnish laser filters as government-furnished property, because the laser filter subcontractor refuses to extend credit to Rockhill. The agency also has refused to waive first article testing under that contract, despite Rockhill's passing first article testing in 1996 under another contract for M1 Abrams periscopes; the agency contends that the specifications have been revised since the earlier test.

Although Rockhill asserts that these actions resulted from bias, the company documents and statements from Rockhill's officers repeating the allegation of bias, supplied in response to our request, simply do not constitute the kind of credible evidence necessary to support the protester's contentions. On the contrary, there is no basis in the record here to conclude that the agency actions complained of were the result of anything but the reasonable exercise of the agency's discretion to

make decisions--such as whether to allow progress payments--during administration of a contract.¹

Rockhill also contends that the agency's failure to conduct pre-award surveys of Rockhill and MHI, and its decision to waive first article testing for MHI, demonstrate bias. This argument is without merit. Contracting officials have broad discretion whether to conduct pre-award surveys, and the decision not to conduct one does not establish an impropriety on the agency's part. Cinpac, Inc., B-243366, July 15, 1991, 91-2 CPD ¶ 57 at 4. With respect to the first article waiver for MHI, the record shows that the waiver was not a factor in the selection decision, which compared MHI's price without first article testing to Rockhill's price without that testing.

Rockhill also challenges the evaluation under this RFP of its and MHI's past performance. In reviewing an agency's evaluation and selection decisions, we examine them to ensure that they were reasonable and consistent with the stated criteria. LTR Training Sys. Inc., B-274996, B-274996.2, Jan. 16, 1997, 97-1 CPD ¶ 71 at 4. The evaluation of proposals is by its nature often subjective; nevertheless, the protester's mere disagreement with the evaluation does not demonstrate that the evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 6-7. Here, we find nothing unreasonable or inconsistent with the solicitation in the agency's evaluation of proposals.

The agency considered three contracts in its evaluation of MHI's past performance. Contract No. DAAE07-96-C-T136 was for production and delivery of 1,404 of the same periscopes as the instant procurement; although the awardee was delinquent on the initial deliveries because of difficulties with a subcontractor for laser filters, MHI was able to develop an alternate source and completed deliveries more than 2 months early. Source selection decision memorandum at 3. Contracts No. DAAE07-92-C-0584 and DAAE07-93-C-0691 were for similar periscopes, in fairly large quantities of 690 and 600 each, respectively. Under the first, MHI made the initial deliveries ahead of schedule and overcame subsequent vendor problems to complete performance within 8 days of schedule. Under the second, MHI was nearly a month late, but evaluators considered the lead time somewhat unrealistic, and even at that, the awardee demonstrated the ability to deliver in accordance with the schedule here. We cannot conclude that the "good" rating for MHI's past performance was either unreasonable or contrary to the solicitation.

¹Moreover, given that most of Rockhill's allegations relate to Contract No. DAAE07-97-C-T439, which the agency did not consider in its evaluation of past performance, Rockhill's arguments lack a clear linkage between the alleged bias and the protester's competitive position under the instant solicitation.

The record shows that Rockhill had four contracts for similar items--periscopes for the Bradley and Abrams vehicles--but three of these were for much smaller quantities than are at issue here. Id. at 2. Under two (Nos. DAAE20-95-P-0790 and DAAE20-96-P-0195) delivery was made on time; under one (No. DAAE20-96-P-0897) delivery was 30 days late. However, the evaluators found that the protester had serious problems with the most relevant contract, No. DAAE20-95-C-0310, for approximately 3,000 Abrams periscopes,² for which Rockhill was delinquent after four delivery extensions and 18 months past the original delivery schedule. Id. at 2-3. The evaluators concluded that whereas Rockhill had parts in-house for the smaller contracts, its financial difficulties hampered its efforts on larger quantities, when it became necessary to purchase parts from suppliers, many of whom declined to deal with the protester on any basis other than cash. Id. at 1, 3. Although Rockhill asserted that it had overcome its financial difficulties, the evaluators found nothing to substantiate the claim. In its initial filing with our Office (December 5 protest letter at 2), the protester conceded these financial difficulties, although it now claims they are resolved. In any event, as long as the assessment of an offeror's past performance is reasonably based and documented, we will not substitute our judgment for the agency's, and the protester's disagreement with that assessment does not itself render the evaluation unreasonable. HLC Indus., Inc., B-274374, Dec. 6, 1996, 96-2 CPD ¶ 214 at 3. Rockhill has submitted nothing to suggest that the agency's evaluation of past performance was unreasonable.

The protest is denied.

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²There are several different national stock numbers for these periscopes, for short and tall periscopes, and periscopes for the Abrams driver and the Abrams commander, for example. There is no dispute, however, that these are "similar" items.