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Decision

Matter of: KELO, Inc.

File: B-284601.2

Date: June 7, 2000

James A. Calderwood, Esq., and Heather J. LoPresti, Esq., Zuckert Scoutt & Rasenberger, for the protester.
Robert L. Duecaster, Esq., for Coville, Inc., an intervenor.
Christine S. Trafford, Esq., Federal Prison Industries, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of the protester's past performance is denied where the record establishes the reasonableness of the agency's evaluation and the protester merely disagrees with the agency's determination.

DECISION

KELO, Inc. protests the award of a contract to Coville, Inc., under request for proposals (RFP) No. 1PI-R-1474-00/PFU, issued by Federal Prison Industries for fabric to be used to manufacture T-shirts. The protester contends that the agency's evaluation of KELO's past performance was unreasonable.

We deny the protest.

Federal Prison Industries is a wholly-owned government corporation within the Department of Justice that operates at various locations within the federal prison system under the trade name UNICOR. RFP amend. 3, at 12. UNICOR operates factories at 70 locations providing employment, education, and training to inmates in federal custody. *Id.* In so doing, UNICOR ensures the safety and security of operations at federal correctional facilities while producing and selling market-priced, quality goods in a self-sustaining manner. UNICOR states that it achieves this mission by manufacturing the products it sells. *Warvel Prods., Inc.*, B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 2.

On November 12, 1999, the agency issued the RFP for a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract to supply nine line items of 100% polyester Jersey, heather gray fabric for a base year, with four 1-year option periods to the Federal Correctional Institution (FCI) at Jesup, Georgia. RFP amend. 3, at 3-11. UNICOR will use the fabric to manufacture and deliver the shirts for use as part of a physical fitness uniform for the military. RFP amend. 3, at 12.

The RFP basically stated that the contracting officer would make award to the offeror whose proposal represented the best overall value and was considered most advantageous to the government based on the criteria of past performance, specification, and price, in that order of importance.¹ RFP at 51-52. The RFP provided for scoring on a 100-point basis, with past performance worth 60 points, specification worth 25 points, and price worth 15 points. RFP at 52. The RFP stated that factors other than price, when combined, would be significantly more important than price. Id.

The RFP provided for past performance ratings of “poor,” defined as “unfavorable”; “marginal,” defined as “more unfavorable than favorable”; “good,” defined as “more favorable than unfavorable”; and “excellent,” defined as “entirely favorable.” RFP at 52. For the evaluation of past performance, the RFP directed offerors to identify at least three and no more than five completed contracts, similar to the one being evaluated. RFP at 48. A questionnaire was included that requested specific information concerning the contracts, including contract number, contractor name, address and telephone number, the type of contract, contract amount and the status of any uncompleted contracts. RFP at 48-49. The RFP asked offerors to list UNICOR contracts first. RFP at 48. The RFP further stated that, in the evaluation of past performance, the agency would be considering the offeror’s record of adherence to contract schedules, cooperative behavior, and commitment to customer satisfaction. RFP at 51. The RFP stated that offerors had the opportunity to submit information on problems with past customers and to address the resolution of those problems, and that FPI would examine recent contracts to ensure that the offeror had implemented any corrective measures taken in response to such problems. Id.

The agency received six offers and determined one of them technically unacceptable. Debriefing Memorandum 2 (Feb. 23, 2000). The protester submitted the lowest price, for which it received a perfect score (15 points); the agency awarded Coville a price score (KELO’s price divided by Coville’s price, multiplied by 15) of 14.35 points. Undated Memorandum, Subject: Best Value Evaluation/Consignment. Both offerors received a perfect score, 25 points, for the specification factor. Debriefing Memorandum 1 (Feb. 23, 2000). Based on a review

¹ The specification factor called for evaluation of the “offeror’s reputation for compliance or non-compliance with [specifications,] . . . [the] quality of supplies delivered,” and financial capability. RFP at 52.

of each offeror's past performance, Coville received a perfect past performance score, 60 points ("excellent" or "entirely favorable"). Coville's Past Performance Evaluation at 1-2.

Regarding KELO's past performance, in its proposal, KELO provided specific information on one contract--a current one for delivery of similar fabric to FCI Jesup. Letter from KELO to Contracting Officer (Jan. 5, 2000). KELO also referred to a contract with the State of Michigan, but provided no reference for this contract. Id. The contracting officer subsequently obtained a reference to contact from KELO, and KELO received an "excellent" rating (60 points) for the Michigan contract. KELO's Past Performance Evaluation at 2. The contracting officer rated KELO as "marginal" (40 points) for the ongoing contract with FCI Jesup. Id. As administrative contracting officer on that contract, she had issued KELO a cure notice for delinquent deliveries; in addition, the contracting officer's technical representative (COTR) reported continued delinquencies. Letter from Contracting Officer to KELO (Aug. 26, 1999); E-mail Message from COTR to Contracting Officer (Jan. 18, 2000). As a result, FCI Jesup was responsible for "\$545,057.28 in delinquencies [in deliveries to its primarily military customer] directly attributable to this vendor." Id. The contracting officer obtained information from the agency's database on a third contract, which had been terminated for default because KELO had failed to deliver heather gray material timely under that contract. Contracting Officer's Statement at 1; KELO's Past Performance Evaluation at 2. Although the termination had subsequently been converted to a no-cost termination for convenience, she rated KELO as "marginal" for that contract. KELO's Past Performance Evaluation at 2. KELO thus received two "marginal" ratings (40 points each) and an "excellent" rating (60 points). Id. The points for each of these contracts were averaged and KELO received an overall rating of 46.66 points. Id. at 1. Coville's total score was 99.35 and KELO's score was 86.66. Undated Memorandum, Subject: Best Value Evaluation, at 1.

On January 28, the contracting officer awarded a contract to Coville because she concluded that based on past performance, Coville's higher priced proposal represented the "best value" to the agency. KELO's protest challenging the marginal ratings it received for the two UNICOR contracts followed.

In reviewing an agency's evaluation of proposals, our Office will question the agency's evaluation only where it violates a procurement statute or regulation, lacks a reasonable basis, or is inconsistent with the stated evaluation criteria for award. See B. Diaz Sanitation, Inc., B-283827, B-283828, Dec. 27, 1999, 2000 CPD ¶ 4 at 6. An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. Quality Fabricators, Inc., B-271431, B-271431.3, June 25, 1996, 96-2 CPD ¶ 22 at 7. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Coffman Specialties, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ ___ at 5. We have no basis to conclude that the evaluation here was unreasonable.

Initially, we note that KELO in its protest attempts to explain or excuse its past performance record. For example, it now claims that the government specifications under the terminated contract were “commercially impracticable to meet.” Protest at 5. However, as the agency points out, the RFP clearly provided offerors an opportunity to submit information on problems with past customers and to address the resolution of those problems. RFP at 51. The RFP further advised that recent contracts would be examined to ensure corrective measures had been taken in response to problems. *Id.* KELO did not address its performance problems and failed to even list the terminated contract. KELO appears to argue that it was not obligated to provide information in its proposal because, at least with respect to some of the orders, it was “unaware of any reports concerning delivery problems until [this] contract was awarded.” Protester Comments at 5. Based on the record, we simply do not find it credible that KELO did not realize until after award of this contract that its performance was an issue with the agency. We agree with the agency that, in light of these RFP provisions, KELO’s attempts in this protest to introduce information into the record that should reasonably have been submitted with its proposal does not invalidate the contracting officer’s contemporaneous decision. As discussed more fully below, in any event, we are not persuaded by the protester’s submissions that the marginal ratings under these contracts were unreasonable.²

The record shows that the agency had awarded KELO contract No. 1PI-C-3670-98 for 50/50 poly/cotton, heather gray, flat material. On September 10, 1998, the agency issued a cure notice for KELO’s failure to make any delivery of material due on July 27, 1998 under delivery order No. 232-PID-0427-98-CS-01, as well as deliveries under a number of other orders under the contract. Letter from Agency to KELO (Sept. 10, 1998). The contracting officer sent a “show cause” letter on September 18, rejecting KELO’s offer in response to the cure notice to provide a substitute, tubular material because the KELO contract specified “flat fabric, no substitutions.” Letter from Agency to KELO (Sept. 18, 1998). The agency also warned that it was considering terminating the contract for default. *Id.* The protester’s response, dated September 30, 1998, promised to “begin to correct the delivery deficiencies.” Letter from KELO to Agency (Sept. 30, 1998). KELO referred to problems with its fabric dyers but stated that it had found a new dyer, and that this dyer “[was] confident that [its lots would] pass shade evaluation and we [would] be on our way to getting the

² For example, the protester contends, in its protest, that the specifications were commercially impracticable to meet, although in its September 30 response to the show cause order, KELO was representing that it had found a dye supplier capable of meeting the specification. Letter from KELO to Agency (Sept. 30, 1998). Further, the agency advises our Office that Coville has successfully produced material meeting the specifications at issue. Letter from Agency to GAO 3 (May 17, 2000).

KELO Inc. deliveries back on track.” Id. KELO indicated that it would “continue to catch-up on deliveries” as it received more yarn, that when it received enough yarn it would take 8-10 weeks to get back on schedule, but that once on schedule, it would be able to supply UNICOR’s needs. Id. Finding this response unsatisfactory, by notice of October 15, the agency terminated the contract for default. Letter from Agency to KELO (Oct. 15, 1998). This termination for default subsequently was converted into a no-cost convenience termination, because the FPI attorneys believed KELO might have a good case because it was “a small business [who] tried to meet the requirements.” E-mail Message from Agency Official (Dec. 8, 1998). The contracting officer here, who was the administrative contracting officer for the terminated contract, rated KELO “marginal” for performance of this contract. KELO Past Performance Evaluation at 2.

KELO argues that, in agreeing to a no-cost termination for convenience, it understood that the agency would not hold its failure to deliver against the protester. Statement dated April 28, 2000, at 1. The protester provides no written documentation in support of this understanding and we will not infer a condition to a settlement that is not clearly set out in the language of the settlement agreement. Wilderness Mountain Catering, B-280767.2, Dec. 28, 1998, 99-1 CPD ¶ 4 at 3-4. The fact that KELO appealed the termination does not mean that it was unreasonable for the agency to rely upon the underlying basis for the termination as evidence of past performance. Here, the record shows that KELO simply did not meet its delivery obligation--as acknowledged by KELO in response to the agency's “show cause” letter. Thus, we think the contracting officer had a reasonable basis for her “marginal” rating.

With regard to the “marginal” rating assigned for KELO’s performance of its current contract with FCI Jesup, the record shows that the contracting officer had issued KELO a cure notice on August 26, 1999. Letter from Agency to KELO (Aug. 26, 1999). To check the current status of the contract, she contacted the COTR on January 18, 2000. E-mail Message from COTR to Contracting Officer (Jan. 18, 2000). The COTR described KELO’s performance as “marginal” and advised the contracting officer that KELO was delinquent more than 30 days for nearly 40,000 yards of material, creating delinquencies in the amount of \$545,057.28 because FCI could not deliver the finished product to the military customer. Id. On February 9, he provided a list of purchase orders issued to KELO in the past year, none of which the protester had delivered on time. COTR Memorandum to the Contracting Officer (Feb. 9, 2000). He noted that deliveries under one order, No. 232-PIC-0171-00-CS-00, were due the next day, February 10. Id. He also reported that KELO had not provided test results, as required by the contract, which prevented the agency from using the material that had been delivered previously. Id. On the basis of this information, the contracting officer rated KELO as “marginal” for this ongoing contract. KELO Past Performance Evaluation at 2.

KELO correctly points out that the agency had accepted its response to the cure notice. Contract Administration Report, Sept. 17, 1999, at 2. KELO generally contends that many of the delivery orders issued under the contract, which were identified as delinquent, were in excess of the maximum order limitation and that it was therefore not obligated to meet the delivery terms of the contract. Protester Comments at 4-5. Further, KELO contends that, in many cases, it agreed upon alternate schedules, not reflected in the written orders, with the COTR and the factory manager at FCI Jesup. *Id.* at 3-4. In addition, KELO objects to the agency's speculation, on February 9, that KELO's delivery scheduled for February 10 would be late. *Id.* at 3.

KELO's contention that it was not bound by the contract delivery schedule is clearly specious. Paragraph I.56, Order Limitations, specifically provides that, where a contractor receives an order in excess of the maximum order limitation, it has 5 days to accept or reject the order. This allows the agency to locate another source if the contractor is unable or unwilling to perform orders in excess of the limitation. Contract No. 1PI-C-3779-98, at 22-23. Here, KELO accepted the orders under the terms of the contract. Regarding KELO's assertion that FCI Jesup agreed to alternate delivery schedules, there is no indication in the record of the agency's acceptance of any alternate schedules. KELO has provided no evidence that the COTR or factory manager agreed to a modified delivery schedule under these purchase orders listed as delinquent. The contract itself provides that only the contracting officer--and specifically not the COTR--can modify the contract delivery terms, and that even the contracting officer must execute the modification in writing and sign it. Contract No. 1PI-C-3779-98, at 15. We further note that for order No. 232-PIC-0171-00-CS, due on February 10, which was included in the February 9 list, the agency advises us that, in fact, KELO did not deliver until April 26, more than 10 weeks late. The agency's February 9 judgment regarding that order, speculative or not, was not unreasonable. We find no basis for concluding that the "marginal" rating for KELO's performance under this contract was unreasonable.

In short, we have no basis to object to the contracting officer's evaluation of KELO's past performance and therefore no basis to question the selection decision.³

The protest is denied.

Comptroller General
of the United States

³ KELO also asserts that the agency incorrectly calculated prices and that Coville's price score should be .9 point lower. However, given our finding that the agency reasonably evaluated past performance, worth a 14-point advantage to Coville in the selection tradeoff, this miscalculation would not have prejudiced KELO.