



United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Kollsman Inc.
File: B-406990.4; B-406990.5
Date: February 19, 2013

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 Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the reevaluation of the awardee's past performance, following a decision by GAO sustaining a protest concerning this issue, is denied where the reevaluation was reasonable and adequately documented.

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, Naval Surface Warfare Center, Crane, Indiana (NSWC Crane) under request for proposals (RFP) No. N00164-12-R-JQ03 for handheld laser markers. Kollsman argues that the Navy's evaluation, which occurred during corrective action in response to a decision by our Office, was unreasonable.¹

We deny the protest.

¹ As discussed below, our Office issued a decision on October 15, 2012, sustaining Kollsman's protest of the initial award to L-3. Kollsman Inc., B-406990, B-406990.2, Oct. 15, 2012, 2013 CPD ¶ 2.

BACKGROUND

The RFP for the handheld laser marker block II (HLM II) was issued on February 9, 2012, and sought proposals for HLM II units and related supplies and services. The HLM II is a lightweight, short-range laser marker packaged in the shape of a pistol. Agency Report (AR)² at 9; AR, Tab R-1, Re-evaluation of L-3's Past Performance, at 1. As discussed below, the HLM II is the successor contract to the HLM block I (HLM I) contract, which is currently performed by L-3. The solicitation provided for the award of a 5-year indefinite-delivery, indefinite-quantity contract, with fixed unit prices.

The RFP required offerors 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 based on the following factors: technical, past performance, and price. 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 an overall past performance confidence rating.³ For purposes of award, the RFP stated that the technical factor was "significantly more important" than past performance, and that these two factors, when combined, were "more important" than price. Id. at 79. With regard to price, the solicitation also 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." Id.

Initial Award and Protest

The Navy received proposals from Kollsman and L-3 by the April 2 closing date. As relevant here, the Navy's evaluation of L-3's past performance considered two questionnaires regarding L-3's past performance. Agency Motion to Dismiss (July 12, 2012) (MTD), Tab 3, L-3 Past Performance Questionnaires. The agency also considered two Contractor Performance Assessment Reports (CPARs) regarding L-3's performance. One CPAR was for L-3's performance of the HLM I contract and the other CPAR was for L-3's performance of a contract for small tactical optical rifle mounted (STORM) micro laser systems.

² Citations to the AR are for the report provided by the Navy in response to the instant protest, B-406990.4 and B-406990.5, unless otherwise noted.

³ The possible past performance confidence ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence and unknown confidence. RFP at 80.

A primary focus of the prior protest and decision by our Office was the questionnaire that concerned L-3's performance on the predecessor contract for the HLM I.⁴ This contract was administered by the United States Special Operations Command (SOCOM), and technical support was provided by NSWC Crane. The task manager for the HLM I contract was stationed at NSWC Crane and completed the HLM I past performance questionnaire. This questionnaire contained the following discussion regarding the HLM contract:

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]. 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 questionnaire regarding L-3's performance of the HLM I contract contained four "excellent" responses, seven "good" responses and seven "average" responses. 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). Hearing Transcript (Tr.)⁵ at 111. The SSER was prepared by the source selection board chair, 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"

⁴ 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.

⁵ Our Office held a hearing in connection with the protest of the initial award to L-3 on September 11, 2012.

and its report stated that “[t]he references were checked and no negative information was obtained.” AR (B-406990), Tab 5, SSER at 34.

The SSER also included the following discussion:

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] 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.

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.

After the SSER was drafted, the contract specialist received an informal preaward survey for L-3, which was completed by the Defense Contract Management Agency. AR (B-406990), Tab 7, L-3 Preaward Survey; Tr. at 55. This survey concerned an additional performance problem with the HLM I contract, which occurred after 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 (B-406990), Tab 7, L-3 Preaward Survey, at 3. This problem caused L-3 to shut down the HLM I production line until effective corrective action could be taken, and caused an additional delay in performance. Id. The SSER was not updated to address this issue.

The Navy’s final evaluation ratings for the offerors’ proposals were as follows:⁶

⁶ 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.

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

AR (B-406990) at 18.

The source selection authority (SSA) selected L-3's proposal for award, stating that 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 (B-406990), Tab 4, Source Selection Document, at 4. The source selection decision did not discuss the past performance evaluation except to note that both proposals received the same adjectival rating of substantial confidence. Id. at 3.

Kollsman filed a protest with our Office challenging the award to L-3. On October 15, our Office sustained the protest, finding that the Navy failed to adequately support and document its past performance evaluation of L-3. We found that the agency's post hoc arguments presented at the hearing were contradicted by the record. See Kollsman Inc., supra, at 9. Our Office concluded that, given the lack of documentation and support for the substantial confidence rating, there was no basis to conclude that the agency reasonably evaluated L-3's past performance. We therefore recommended that the agency reevaluate L-3's past performance. Id.⁷

Reevaluation and New Award

The Navy's reevaluation of L-3's past performance considered the following five sources of information: (1) the past performance information retrieval system and the excluded parties list; (2) information from the awardee's proposal; (3) the awardee's CPARs; (4) the awardee's past performance questionnaires; and (5) the preaward survey. AR at 3. Items two through five are relevant to the current protest and are discussed below.

First, the Navy considered contractor past performance data sheets for three L-3 contracts. The first involved the awardee's performance on the STORM contract, which uses laser technology that is similar to that used in the proposed HLM II system. The contract specialist found no adverse past performance issues under this contract. Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 8. The agency also

⁷ The Navy filed a request for reconsideration of the decision, which our Office dismissed. Dept. of the Navy--Recon., B-406990.3, Nov. 15, 2012.

reviewed L-3's performance on a contract to produce coded small lightweight laser marker (CSLLaM) systems that were packaged in the shape of a pistol; this was the predecessor to the HLM I contract. The contract specialist found no adverse performance issues under the CSLLaM contract. AR at 8-9; Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 7. The agency also reviewed L-3's performance on the HLM I contract, which will be discussed in greater detail below.

Next, the Navy reevaluated L-3's past performance under the HLM I contract, as reported in the relevant CPAR.⁸ The agency re-interviewed the task manager for the HLM I contract, and also interviewed the lead engineer for the HLM I procurement. AR, Tab R-3, Memorandum to File (Nov. 1, 2012). The Navy states that, during reevaluation, new information regarding the HLM I CPAR came to light, which showed that the initial conclusions from that CPAR were inaccurate or unreasonable. Id.

As discussed in declarations provided by the Navy, the HLM I CPAR was signed by the current task manager as his capacity as the assessing official; however, the substance of the CPAR was prepared by the current task manager's predecessor. Decl. of Task Manager (Dec. 19, 2012) at ¶ 4. The current task manager assumed the duty of completing the CPAR, when his predecessor left the program during the CPAR review process. Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 6.b. The current task manager states that, during the initial evaluation, he had no reason to question the accuracy the HLM I CPAR and, therefore, assumed that all of the entries on the CPAR were accurate. Id.; Decl. of Task Manager (Dec. 19, 2012) at ¶ 4. The task manager signed the HLM I CPAR and then utilized the information contained in that document as the basis for responding to the questions in the HLM I past performance questionnaire for the initial evaluation. AR at 12; Decl. of Task Manager (Dec. 19, 2012) at ¶ 5.

After interviewing the lead engineer for the HLM I contract during the corrective action, however, the current task manager determined that the HLM I CPAR contained some inaccuracies. Specifically, the current task manager states that HLM I CPAR inaccurately stated that L-3's product initially did not meet the performance specifications, and had as a result provided consideration in return for a modification to the acceptance test plan to allow for a [DELETED]. Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 6.b.

⁸ The other CPAR that the agency received regarding L-3's performance was for the STORM contract. AR (B-406990.4), Tab R-15, STORM CPAR. L-3's performance for this contract was rated "very good" in the areas of quality of product, schedule, business relations and management of key personnel. Id., Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 8.

In this regard, the Navy's reexamination of L-3's performance of the HLM I contract, concluded that L-3's product initially met the performance specifications; however, confusion arose due to the fact that the initial HLM I contract did not clearly specify a method for testing [DELETED]. AR, Tab R-3, Interviews of Task Manager and Lead Engineer, at 2; Decl. of Lead Engineer (Dec. 20, 2012) at ¶ 11; Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.e; Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 6.b. The agency's reexamination found that that L-3 and the Navy were initially using different test methodologies. Id. Once the ambiguity became apparent, the parties negotiated mutually-acceptable methods for testing, and the contract was modified accordingly. AR, Tab R-3, Interviews of Task Manager and Lead Engineer, at 2, 4; Decl. of Lead Engineer (Dec. 20, 2012) at ¶ 11.

Additionally, the current task manager states that the HLM I CPAR incorrectly cited the following information: that L-3 had not achieved the [DELETED] units per month production schedule stated in L-3's proposal; that L-3 had instead delivered at a rate of [DELETED] units per month; and that L-3 had provided consideration to reduce the rate from [DELETED] to [DELETED]. AR, Tab R-3, Interviews of Task Manager and Lead Engineer, at 2. Based on the Navy's investigation, the current task manager concluded that the HLM I contract did not incorporate L-3's proposed schedule of [DELETED] units per month, and there was no requirement for L-3 to deliver at a [DELETED] units per month rate; rather, delivery schedules were established for each delivery order basis. Id.; Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.a.

During the reevaluation, the Navy found that L-3 had been initially unable to meet the agreed-upon delivery schedule for the HLM I contract because of difficulties in manufacturing the HLM I technology in high yield quantities.⁹ Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.c. The awardee's problems stemmed from the requirement to significantly increase production quantities from the predecessor CSLLaM contract. Decl. of Lead Engineer (Dec. 20, 2012) at ¶ 5. As a result, L-3 was required to hire and train laser engineers to assemble "a complex laser design which was packaged in a smaller form factor than any other laser of its kind in existence." Id. The government modified the delivery orders to relax the delivery schedules, and L-3 provided consideration in the form of [DELETED]. Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.c. Once L-3 overcame these initial ramp-up difficulties, L-3 increased production rates so that it is now producing and delivering [DELETED] units per month, and has been ahead of the delivery order schedules since February 28, 2012. AR, Tab R-3, Interviews of Task

⁹ As the protester notes, the record provided by the agency does not disclose the initial schedule requirements, other than to explain that there was no contractual requirement to meet [DELETED] units per month.

Manager and Lead Engineer, at 3-4; Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.c.

The Navy's reevaluation of the CPAR also found that L-3 faced delivery challenges when it fell behind on delivery order schedules due to the so-called "stray energy" issue in late 2011. AR, Tab R-3, Interviews of Task Manager and Lead Engineer, at 4; Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.d. As discussed above, the preaward survey disclosed that participants in a training exercise in the fall of 2011 noticed that residual amounts of stray energy were exiting the HLM I at high angles. AR, Tab R-1, Re-evaluation of L-3's Past Performance, at 4. L-3 immediately suspended production and assigned a dedicated engineering team to investigate and solve the problem. Id. L-3 agreed to execute a stray energy mitigation program at its own expense, and apply the agreed-upon design changes to more than 350 previously delivered HLM I units.¹⁰ Id. at 4.

In sum, the task manager concluded that although L-3 had issues in meeting the HLM I contract requirements as reflected in the reevaluation, the awardee had been willing to work out issues and was delivering the HLM I systems on time. Decl. of Task Manager (Dec. 19, 2012) at ¶¶ 15-17; see also Decl. of SSA (Dec. 19, 2012) at 2.

Next, as stated in our previous decision, a Navy contract specialist received and reviewed two past performance questionnaires regarding L-3's performance on previous contracts, one of which was for the HLM I contract.¹¹ As discussed above, the current task manager utilized the information contained in the HLM I CPAR as the basis for responding to the questions in the HLM I past performance questionnaire, under the mistaken presumption that the information contained in the CPAR was accurate. AR at 12; Decl. of Task Manager at ¶ 5; AR, Tab R-1, Re-evaluation of L-3's Past Performance, at 8. The task manager reexamined his narrative response to questions 10a and 10b regarding the acceptance test plan for the HLM I contract, and concluded that they were incorrect, for the reasons discussed above. The task manager also clarified question 14 of the past performance questionnaire stating that the resolution of the stray energy issue "was an example of the contractor's providing excellent support/problem resolution to an issue that occurred in the performance of the HLM I contract." AR, Tab R-1, Re-evaluation of L-3's Past Performance, at 8.

¹⁰ The stray energy mitigation program is now underway and L-3 expects to completely retrofit all systems by March 2013. AR, Tab R-1, Re-evaluation of L-3's Past Performance, at 4.

¹¹ The other past performance questionnaire concerned the L-3's performance on the contract to produce CSLLaM systems, for which L-3's was rated "excellent" thirteen times throughout the questionnaire. AR at 12.

Finally, the information contained in the informal preaward survey for L-3 completed by the Defense Contract Management Agency concerned the “[s]tray energy problem” that the agency considered when it examined L-3’s CPARs. The agency states that it “continues to consider the resolution of the stray energy problem as favorable.” Id. at 9; see Decl. of Contract Specialist (Dec. 19, 2012) at ¶ 6. The informal preaward survey also stated that L-3’s on-time delivery rate for all Government contracts is 78.8% for the period of March 1, 2011 to March 31, 2012. Id.

After the Navy completed its reevaluation, the SSA conducted an independent analysis of the information provided in the offerors’ proposals and the reevaluation of L-3’s past performance. AR, Tab R-5, Supp. Source Selection Decision, at 1. The SSA noted that, although there were concerns regarding L-3’s past performance, the rating of “substantial confidence” was nonetheless appropriate. Id. at 4.

Although not discussed in detail in the selection decision, the SSA’s response to the protest further explained that he viewed L-3’s performance on the HLM I contract as neither positive nor negative, but as neutral. In this regard, the SSA acknowledged that while awardee experienced problems during performance, it addressed those problems in a satisfactory manner. The SSA stated the following regarding L-3’s performance of the HLM I contract:

The fact that L-3 encountered problems in producing the HLM I was not ignored and was given due consideration. L-3 had clearly failed to deliver to the required delivery schedule during the performance of the contract. The fact that L-3 had not only corrected their performance issues but also provided adequate consideration, that included a significant lowering of the unit price for the HLM I, left the government (after the problem was resolved) better off due to the lower unit prices on the HLM I. The review of the HLM I contract issues, explanation/clarification of the PPQ and CPARs, and efforts made by and consideration given by L-3 resulted in the conclusion that for the HLM I contract, L-3’s past performance was considered neither positive nor negative but instead neutral.

Decl. of SSA (Dec. 19, 2012) at ¶ 16.

The SSA further explains that he reviewed L-3’s performance on three contracts, and concluded that the STORM and CSLLaM contracts had very positive past performance, while the HLM I contract had neither negative nor positive performance, for the reasons discussed above. Id. at ¶ 17. Additionally, and notwithstanding the overall neutral consideration given to the HLM I contract, the SSA also gave positive consideration to the general trend of L-3’s most recent

performance on the HLM I contract, based on the following: “L-3 is delivering this very similar system ahead of a delivery schedule which requires a monthly delivery rate that exceeds the monthly delivery requirements under N00164-12-R-JQ03 [the HLM II contract].” Id. at ¶ 19. Based on these findings, the SSA had a “high expectation” that L-3 would successfully perform the requirements for the HLM II and assigned L-3 a past performance rating of “substantial confidence.” Id.

In making the new award decision, the SSA again determined that Kollsman’s proposal did not merit selection, in light of the price premium of \$17,948,844 for the protester’s proposal. The agency determined that the proposal of L-3 represented the best value to the government and made award to that firm. This protest to our Office followed.

DISCUSSION

Kollsman challenges the Navy’s evaluation of L-3’s past performance, and assignment of a substantial confidence rating. Specifically, the protester contends that the agency’s reevaluation of L-3’s past performance constituted a “whitewash” of the record concerning L-3’s performance problems. Protester’s Comments (Dec. 3, 2012) at 3.

The evaluation of an offeror’s past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. MFM Lamey Group, LLC, B-402377, Mar. 25, 2010, 2010 CPD ¶ 81 at 10. Where a solicitation calls for the evaluation of past performance, we will examine the record to ensure that the evaluation was reasonable and consistent with the solicitation’s evaluation criteria and procurement statutes and regulations. Divakar Techs., Inc., B-402026, Dec. 2, 2009, 2009 CPD ¶ 247 at 5. An agency’s evaluation may take into consideration recent trends in performance, as well as actions taken to resolve performance problems. See Federal Acquisition Regulation § 15.305(a)(2)(i)-(ii); Yang Enter., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 6-7. Birdwell Bros. Painting & Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129 at 5.

Here, Kollsman does not meaningfully dispute the details of the Navy’s reevaluation of L-3’s past performance. Instead, the protester primarily argues that the Navy’s evaluation of L-3’s past performance was unreasonable because the agency should have given more weight to the awardee’s problems performing the HLM I contract, and less weight to the awardee’s corrective measures. We disagree.

The record here shows that Navy assigned L-3 a “substantial confidence” past performance rating based on its performance of three contracts: the CSLLaM and STORM contracts, both of which had very positive past performance; and the HLM I contract, which clearly reflected performance problems. Notwithstanding L-3’s

performance problems on the HLM I contract, the agency concluded that L-3's corrective actions and the general trends in L-3's performance mitigated the concerns regarding the performance problems. Supp. AR at 3. The task manager for the HLM I contract stated the following:

Based on my experience, the critical challenge is how companies overcome the difficulties that they experience during a contract. L-3 demonstrated their ability to overcome issues experienced during the HLM I contract. I have witnessed firsthand during my time as the HLM I TM [task manager] L-3's dedication in following their ISO-9001 processes, management leadership, and commitment in instituting effective corrective action in successfully resolving the issues.

Decl. of Task Manager (Dec. 19, 2012) at ¶ 17.

The SSA stated that he had a "high expectation" that L-3 would successfully perform the requirements under the HLM II contract based on L-3's performance on two relevant contracts where L-3's performance was uniformly positive and L-3's performance of the HLM I contract which was rated neutral. The SSA also considered the general trend of L-3's performance of the HLM I contract where L-3 is delivering a very similar system ahead of a delivery schedule which requires a monthly delivery rate that exceeds the monthly delivery requirements under the present solicitation for the HLM II. Decl. of SSA (Dec. 19, 2012) at ¶ 19.

Based on our review, we conclude that the agency meaningfully and reasonably considered relevant past performance information for L-3; that it recognized both positive and negative aspects of the firm's performance record; that it took into consideration L-3's corrective actions in response to prior problems; and that it contemporaneously documented its evaluation. As noted above, it is within an agency's discretion to consider the significance of an offeror's prior performance in the context of, among other things, the contractor's actions to address prior problems. See, e.g., Yang Enters., Inc.; Santa Barbara Applied Research, Inc., supra. To the extent that Kollsman disagrees with the Navy's evaluation and the weight it placed on L-3's remedial actions and trends in performance, we find no basis to sustain the protest.

Finally, Kollsman argues that the Navy did not meaningfully assess L-3's recent performance on the HLM I contract after February 2012. Supp. Comments at 5. As discussed above, the Navy's reevaluation found that L-3 had addressed the difficulties with its initial production efforts, and that it has been ahead of the delivery order schedules since February 28, 2012. AR, Tab R-3, Interviews of Task Manager and Lead Engineer, at 3-4; Decl. of SOCOM Contract Specialist (Dec. 19, 2012) at ¶ 6.c. On this record, we conclude that the Navy reasonably relied on the

input from the relevant past performance sources, and find no basis to sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel