



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Packaging Strategies, Inc.

File: B-280814

Date: November 25, 1998

James H. Roberts, III, Esq., Manatt, Phelps & Phillips, for the protester.
Edward LeCouix for ECS Composites, an intervenor.

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DIGEST

1. A proposal for transit cases is technically acceptable with regard to a requirement that the cases not have sharp metal edges, where the initial proposal did not take exception to the requirement and subsequent proposal revisions stated that there would be no sharp edges.
2. Agency selection of a higher-priced offeror with a reasonably assessed low performance risk rating, instead of a lower-priced offeror with a reasonably assessed high risk rating, based on prior contract delinquencies and quality defects, is reasonable and consistent with the stated evaluation scheme.

DECISION

Packaging Strategies, Inc. protests an award to ECS Composites under request for proposals (RFP) No. N65236-98-R-0457, issued by the Department of the Navy, Space and Naval Warfare Systems Center Charleston, South Carolina, for five types of transit cases for information technology equipment.

We deny the protest.

The RFP was issued on July 9, 1998, as a total small business set-aside, pursuant to the streamlined procedures of Federal Acquisition Regulation (FAR) Subpart 12.6 (June 1997) for the evaluation and solicitation of commercial items. RFP at 1. The procurement was handled as part of the test program using simplified acquisition procedures for commercial items. See FAR Subpart 13.5. The RFP contemplated a fixed-price, indefinite-delivery, indefinite-quantity contract for 3 years with an estimated total quantity of 2,900 cases and a minimum guaranteed value of \$50,000. RFP at 1-2.

The cases will be used to transport Intelligence/Operations Workstation (IOW) equipment in combat and combat-simulated situations. Agency Report, Sept. 15, 1998, Tab 30, RFP at 1. The agency has a critical need for these cases, which are the cornerstone of the entire IOW design; it found that expedited acquisition of the cases is required and acquisition delays will cause a substantial delay in the fielding of the IOW. Agency Report, Tab 30. The RFP stated that meeting the stated delivery schedule was critical. RFP at 3.

The RFP stated that award would be made on a best value basis and listed two evaluation factors of equal importance--past performance and price. RFP at 3. The stated criteria for evaluating past performance were quality of product or service and timeliness of performance/delivery. Id. The RFP instructed offerors to submit data on a maximum of five contracts performed in the past 3 years. Id. The RFP stated that data submitted by offerors and independent data may be used in the evaluation and, since the government may not interview all of the sources provided by the offeror, it was the offeror's responsibility to explain the relevance of the data it provides and to submit thorough and complete past performance information. Id.

Five offerors submitted proposals by the July 16 due date. Ultimately, only the proposals of Packaging Strategies and ECS were determined to be in the competitive range. Agency Report at 3. The agency evaluated the proposals for compliance with the technical requirements stated in the RFP, and for past performance and price under the RFP's best value evaluation plan. Packaging Strategies' proposed price was lower than ECS's. Id.

Packaging Strategies' proposal was evaluated as technically acceptable. Under past performance, the proposal identified 10 prior contracts for evaluation; however, it did not provide all of the contract information requested in the RFP. Although the RFP stated that information on a maximum of five contracts could be submitted, the agency attempted to contact eight of Packaging Strategies' references--all of the points of contacts for which adequate information was given. Of these attempted contacts, the agency successfully reached five references, four of which submitted past performance questionnaires. Of the four responding references, one reported quality deficiencies, a second reported slow delivery, and a third reported deficiencies in both areas. The fourth questionnaire was incomplete and did not provide information to permit evaluation under quality, although it did indicate that Packaging Strategies timely performed under the contract. The agency considered the reported deficiencies in quality and delivery to be more than isolated incidents and evaluated Packaging Strategies as high risk under past performance. Agency Report at 3, Tab 8.

ECS's proposal contained five past performance references. The agency contacted all of these references and received questionnaires from two of them. Both references provided comments which rated ECS's performance as excellent for

quality and timely delivery. The agency evaluated ECS as low risk under past performance. Agency Report at 3, Tab 7.

The agency had questions concerning ECS's proposal regarding its compliance with the technical requirements for color, placement of connectors (applicable only to case A), and no metal knife-edges. Agency Report at 3-4. On July 17, the agency contacted ECS and advised it of some of its technical concerns. Agency Report at 3-4, Tab 9. ECS responded that same day, by e-mail and fax, providing a sample of the color of its proposed cases and a revised drawing covering all five cases, which identified the proposed color as "forest green" (the color specified in the RFP) and that the metal is "free of knife sharp edges." Agency Report, Tab 9.

By letter of August 3, the agency amended the RFP, clarifying that the evaluation was a two-step process with the first step being a pass/fail technical evaluation and the second step being the best value evaluation of past performance and price. Agency Report, Tabs 13, 14. The amendment also stated that all line-item pricing was to be based on shipping costs for delivery to North Charleston, South Carolina. Id. The agency's letter also advised each offeror of additional information requested as a result of the agency's evaluations. Packaging Strategies received notice of the agency's receipt of adverse past performance information under three of its past contracts. ECS received notice of the evaluated technical concerns which were previously identified. Revised proposals were due by August 5. Id.

Packaging Strategies responded by letter dated August 4. It essentially confirmed that all of the instances of adverse past performance occurred. Packaging Strategies suggested that the late deliveries could have been due either to engineering changes made by the customer's engineering department, which were not communicated to the contracts department, or, in the case of Packaging Strategies' performance as a subcontractor, its failure to inform its prime contractor of replacement parts shipments which Packaging Strategies had made directly to the government, which resulted in a decrease in available parts and caused late delivery on all subsequent orders. Regarding a quality problem which resulted in returned items, Packaging Strategies stated that it promptly fixed the defects. Packaging Strategies also submitted letters of reference from several previous customers with general endorsements of the firm's record of quality and timely performance. Agency Report, Tab 15. Packaging Strategies' total price was \$1,646,350.¹ Agency Report, Tab 24, Attachment 1 at 2.

¹Packaging Strategies' response to the request for revised proposals had not provided revised prices to address the shipping charges added by the amendment. The agency contacted Packaging Strategies for clarification. Packaging Strategies stated that it would provide the shipping under its original price.

ECS's revised proposal stated that the connectors in question on case A had been relocated and provided a revised drawing showing that revision. The revised drawing for case A, and a corresponding statement in its cover letter, stated that there would be no metal knife-edges. Agency Report, Tab 20; Agency Supplemental Document Submission, Oct. 8, 1998. ECS increased its original price to account for the amended shipping requirement; its total price was \$2,385,786. Agency Report, Tab 24, Attachment 1 at 2.

The agency evaluated the additional information and proposal revisions submitted by the offerors. The agency determined that the information submitted by Packaging Strategies, which acknowledged and explained instances of late delivery and quality deficiencies, did not negate the occurrence of these events, nor address how Packaging Strategies would prevent similar events from occurring in the future. Thus, the high risk evaluation for Packaging Strategies did not change. Agency Report at 4, Tab 16.

ECS's revised proposal addressed the identified areas of technical concern and was evaluated as technically acceptable. Also, notwithstanding the positive past performance ratings of ECS, the agency, anticipating a possible award to ECS, requested a pre-award responsibility determination review on August 7 by the Defense Contract Management Command (DCMC). DCMC reported that of the five transit case contracts ECS had with the Department of Defense in the previous 12 months, late delivery occurred under two of the contracts. The agency requested and received information on these late deliveries from ECS that same day. One delay was attributable to the government's adding an unnecessary requirement to the contract, and subsequently delaying the correction of the contract requirements. The other delay was due to ECS recording an incorrect delivery date in its computer system, which ECS subsequently corrected, although an 8-day delay resulted. Agency Report at 5, Tabs 18, 19. The contracting officer determined that this negative information was offset by the explanations and did not warrant a change in ECS's past performance evaluation. Agency Report, Tab 18.

As noted, Packaging Strategies offered the lowest price and ECS had the better past performance evaluation. The contracting officer sought the opinions of the evaluators on whether ECS's advantage under the past performance factor offset the price advantage of Packaging Strategies' proposal. In addition to a general description of the added time and labor which deficiencies in quality performance and late deliveries would cause for the agency, the contracting officer was advised that this procurement was critical to the user activity and the agency had been specifically instructed that it could not be late on this project. Agency Report, Tab 24, Attachment 3 at 1. The contracting officer determined that ECS's proposal represented the best value to the government, stating:

Though their proposal was not the one offering the lowest overall price, it was the one which received the highest past performance

rating and was determined worth the price premium because of their excellent past performance evaluation in the areas of quality and timeliness of delivery.

Agency Report, Tab 24, Attachment 1 at 2.

The agency awarded a contract to ECS on August 7. This protest followed.² The agency has continued performance of the contract based on urgent and compelling circumstances.

The protester first alleges that ECS's revised proposal is technically unacceptable because it states only that it will comply with the no-metal-knife-edge requirement for case A, and does not state that it will comply with this requirement for the other four cases.³ Protester's Comments, Sept. 25, 1998, at 4-5.

A proposal in a negotiated procurement that does not conform to all material terms and conditions should be considered unacceptable and may not form the basis for an award. National Med. Staffing, Inc.; PRS Consultants, Inc., B-238694, B-238694.2, June 4, 1990, 90-1 CPD ¶ 530 at 3.

The pertinent RFP requirement states:

All cases will be engineered and constructed in a manner that will ensure there are no metal knife-edges joining case bases and lids.

ECS's proposal did not take exception to this requirement, nor did it state anything about metal knife-edges. Agency Report, Tab 5. Almost immediately upon receiving the proposal, the Navy asked ECS to address the requirement. Agency Report, Tab 9. ECS responded on July 17 with a revised master drawing for all five case types which stated:

²Packaging Strategies initially protested that the evaluation factors and best value evaluation plan stated in the RFP were ambiguous and that the RFP and/or amended RFP did not allow adequate time for submitting proposals and revisions. The agency report addressed these allegations, including a detailed explanation that these allegations are untimely protests. The protester did not respond to the agency's report or otherwise request a decision on these issues. We thus consider that the protester has abandoned these issues. Akal Sec., Inc., B-261996, Nov. 16, 1995, 96-1 CPD ¶ 33 at 5 n.5.

³The protester withdrew an allegation that ECS's revised proposal was submitted late after receiving documentation evidencing a timely submission. Audio Tape of Conference Call, Oct. 14, 1998.

[Note] 4) Closure frame is made from . . . aluminum extrusion and is free of knife sharp edges (in accordance with MIL-STD-454, Requirement 9 which states to deburr and break all sharp edges).

Agency Report, Tab 9.

Although the agency's request for revised proposals on August 3 stated two technical "deficiencies," one of which was the no-metal-knife-edge requirement, and requested ECS to address this in a revised proposal, Agency Report, Tab 14, the Navy acknowledges that this was unnecessary because the revised drawing submitted on July 17 left no doubt that ECS fully complied with the requirement for all five cases. Agency Supplemental Submission, Oct. 19, 1998, at 2. ECS's final proposal revisions addressed the other identified technical deficiency, which concerned relocation of electrical connectors on case A, and, in reference to the reconfigured case A, ECS stated that there would be no metal knife-edges.

Given ECS's unambiguous July 17 revisions, which addressed this requirement with regard to all five case types, ECS's reference in its final proposal revision to case A only was merely redundant and cannot reasonably be construed as taking exception to its earlier commitment to this requirement with regard to all five cases. Thus, the absence of a statement committing to this requirement for all five cases in the final proposal submission, though requested by the agency, did not create a technical deficiency under this requirement. See RGII Techs., Inc.--Recon. and Protest, B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 at 7 (failure to submit all information requested is a waivable informality or irregularity where the information comprising a proposal is otherwise sufficient).

The protester next alleges that the agency unreasonably failed to consider explanations about adverse past performance to negate evaluated risk for Packaging Strategies, but unfairly did so for ECS. The record does not support this contention. To the contrary, the record shows that the agency reevaluated Packaging Strategies under this factor considering the additional information provided and determined that the information did not mitigate the high risk associated with Packaging Strategies' recurring and recent instances of delivery delays or delivery of items with quality deficiencies. Agency Report at 4-5, Tab 16.

For example, in the case of Packaging Strategies' record as a subcontractor under a Navy contract, the prime contractor reported both delay and quality problems attributable to Packaging Strategies. According to Packaging Strategies, the delays to the prime contractor resulted because Packaging Strategies was responding directly to the Navy and sending parts from its production inventory to replace lost or missing parts reported by the Navy. This resulted in Packaging Strategies being short of parts to supply its prime contractor. Packaging Strategies' letter to the agency suggested that the Navy's parts shortage was possibly the Navy's fault due to a recent relocation of Navy operations. Agency Report, Tab 15 at 1-2. The

protester's comments re-assert this as the cause and provide other explanations which it did not state in its August 4 response to the adverse information. Protester's Comments, Sept. 25, 1998, Attachment at 3-4.

However, the agency's record of the communications regarding this contract/subcontract, both within the agency and between the agency and Packaging Strategies, provides no support for the allegation that the missing parts were caused by a relocation of Navy operations. Rather, this documentation shows that replacement parts were needed to correct deficiencies which were attributable entirely to Packaging Strategies. Examples of this include a number of parts sets which contained duplicate left keyboard tray brackets but no right brackets, "TCIM brackets" with captive screws which were too short, and case lids without handles. Agency Report, Tabs 28, 29. These are not shortages due to lost parts which could have resulted in the agency's move, but rather quality deficiencies which are solely attributable to Packaging Strategies.

Thus, we find the agency's determination that Packaging Strategies' additional information about this adverse performance information did not mitigate the associated past performance risk is reasonable. The additional information which the protester has provided in its comments, even if of a nature that might mitigate the risk, cannot render the agency's determination unreasonable since it was not offered at the time of the evaluation. See Creative Sys. Elecs., Inc., B-235388.2, Aug. 24, 1989, 89-2 CPD ¶ 175 at 2-3.

With regard to the other two contracts where Packaging Strategies' performance was considered deficient, the protester contends that its delays in delivery and quality deficiencies were minor, and the quality deficiencies were promptly corrected. Protester's Comments, September 25, 1998, at 6, Attachment at 1-2. However, since timely performance in this procurement is critical, we believe that it was reasonable for the agency to conclude that any delay, whether due to late deliveries or correction of quality deficiencies, could have significant adverse impact on the implementation of the IOW project. See Agency Report, Tab 30. Therefore, it was reasonable for the agency to consider this adverse information as indicative of high risk for Packaging Strategies.

In contrast, the past performance information upon which ECS was evaluated indicated a marked superiority in past performance over that of Packaging Strategies. The questionnaires returned from ECS's references stated that ECS was an "excellent contractor all around," its products "were manufactured promptly and with obvious attention to detail," they meet the agency's demands "even when [the agency is] asking the impossible," and all items were delivered within the original contract schedule, even where design changes occurred. Agency Report, Tab 7.

The only negative information for ECS appeared during the responsibility determination review, during which DCMC identified two late deliveries. ECS

responded to this information with documentation to show that the one instance was entirely the fault of the government. For that contract, ECS provided an agency letter from the administrative contracting officer prior to the delivery date stating that all of the items were ready for source inspection and acceptance by the government. The administrative contracting officer recommended that an unnecessary requirement not stated in the solicitation be deleted. Additional documents evidence that the resulting delay in acceptance was due to delay within the agency in deleting the unnecessary requirement. Agency Report, Tab 19. Thus, unlike Packaging Strategies, ECS provided substantiating evidence to support its explanation that the late delivery was attributable to the government. ECS accepted responsibility for the other instance of late delivery, explaining that an 8-day delay resulted from ECS's incorrect entry of the delivery date into its records. This was the only reported ECS contract problem and was attributable to a clerical mistake; there is no evidence of such mistakes recurring. Thus, even with the information from the responsibility determination review, ECS's record of past performance reasonably supports a low risk evaluation rating.

As demonstrated by the above discussion, there is no evidence suggesting that the agency treated the offerors unequally in evaluating their records of past performance. Packaging Strategies allegation that the agency "cherry picked" the contracts in a manner unfairly prejudicial to Packaging Strategies is unsupported by the record. The agency attempted to contact 8 and successfully contacted 5 of the 10 contract references stated in Packaging Strategies' proposal. The agency considered all of the information received. For ECS, the agency contacted all five of the references stated in ECS's proposal and similarly considered all of the information received. Thus, the agency did not select reference contracts in a manner which was either unfairly favorable to ECS or unfairly prejudicial to Packaging Strategies. There is no legal requirement that all contracts identified in a proposal must be evaluated in a past performance evaluation. Braswell Servs. Group, Inc., B-278921.2, June 17, 1998, 98-2 CPD ¶ 10 at 6.

The protester next alleges that the difference in evaluated past performance risk cannot reasonably have a value to the agency of \$739,436, the difference in price between the two proposals. We disagree.

In a best value procurement, price is not necessarily controlling in determining the offer that represents the best value to the government. Rather, that determination is made on the basis of whatever evaluation factors are set forth in the RFP, with the source selection official often required to make a tradeoff to determine if one proposal's superiority under the non-price factors is worth a higher price. Such tradeoffs are permitted where they are consistent with the RFP evaluation scheme. Where, as here, the RFP identifies past performance and price as the evaluation criteria, proposals must be evaluated on that basis and ultimately the selection official must decide whether or not a higher-priced proposal submitted by an offeror with a better past performance rating represents the best value to the

government. We will review an evaluation and selection decision to ensure that it was reasonable and consistent with the stated evaluation criteria. H.F. Henderson Indus., B-275017, Jan. 17, 1997, 97-1 CPD ¶ 27 at 2-3.

Here, in making the past performance/price tradeoff, the Navy found that the price premium associated with making award to ECS, instead of to Packaging Strategies, was reasonable, given ECS's lower performance risk. This was based on ECS's consistent record of timely delivery of transit cases without quality problems, compared to Packaging Strategies recurring history of late deliveries and/or quality deficiencies. As indicated, the RFP stated that past performance would be evaluated on the basis of timeliness of delivery or performance and quality of product or service, and that the best value decision would be based only on past performance and price, both of equal importance. Since the record shows that timeliness of performance is critical to successful implementation of this project, and any delay could jeopardize the project, even if Packaging Strategies' record of delivery and performance problems resulted in only minor delays under the referenced contracts, such minor delays would be significant here. Therefore, we find the tradeoff reasonable and consistent with the stated evaluation scheme.

The protester alleges that the selection decision was also based on an unstated evaluation factor of technical quality. This is also not supported by the record. It is true that in response to the contracting officer's request for input from the evaluators regarding whether an award to ECS at a higher price was justified or not, an evaluator did state that, based on her experience with both offerors' transit cases, she considered ECS's cases to be of higher quality than Packaging Strategies' cases. However, the majority of the input given otherwise supported an award to ECS based on past performance differences between the two offerors. The contracting officer was not bound by the isolated statement of the evaluator, and indeed she based her selection decision entirely on the stated factors of price and past performance. See Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213 at 8-9 (source selection official not bound by recommendations or judgments of lower-level evaluators).

In sum, we find that the award, based on ECS's technically acceptable, higher-rated, higher-priced proposal, was reasonable and in accordance with the solicitation's evaluation scheme.

The protest is denied.

Comptroller General
of the United States