



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: United Terex, Inc.

File: B-275962.2

Date: May 30, 1997

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

Karl Dix, Jr., Esq., Smith, Currie & Hancock LLP, for Advanced Aerospace Materials Corporation, an intervenor.

Marc Shepler, Esq., Defense Logistics Agency, for the agency.

Robert C. Arsenoff, Esq., Glenn Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of proposals is denied where evaluation was reasonable and in accordance with the evaluation factors set forth in the solicitation.

DECISION

United Terex, Inc. (UTI) protests the award of a contract to Advanced Aerospace Materials Corporation (AAMC) under request for proposals (RFP) No. SPO740-96-R-1702, issued by the Defense Logistics Agency (DLA) for aircraft towbars fabricated from tubing. UTI alleges that the proposals were misevaluated.

We deny the protest.

The RFP was issued on July 29, 1996, for 375 towbars identified as National Stock Number (NSN) 1730-01-101-9061 in Federal Supply Class (FSC) 1730. It was amended once. As amended, the RFP notified offerors that DLA was seeking delivery within 350 days but would evaluate offers of different delivery schedules in accordance with an FSC-specific Delivery Evaluation Factor (DEF). Offerors were advised that the offered price would be adjusted by a formula using the DEF so that shorter-than-required delivery schedules would result in an evaluated price which was lower than the offered price while longer-than-required schedules would result in an evaluated price higher than the offered price. Proposed phased deliveries were to be evaluated using a weighted average.

In addition to the DEF adjustment, the RFP advised offerors that award would be made on the basis of the best value to the government as determined in accordance with an Automated Best Value Model (ABVM), as outlined in relevant part in clause M23 as follows:

"(a) Award against this solicitation shall be made based on a comparative assessment of offerors' prices, quoted delivery, and past performance (quality and delivery). . . .

"(b) Past Performance.

(1) On contracts with the Defense Construction Supply Center, each offeror will be evaluated on the basis of its past quality performance over the last 12 month period (excluding the most recent month) and delivery performance over the last 12 calendar months (excluding the most recent 2 month period). The Government will use the following performance indicators:

Delivery Delinquencies

- Number
- Severity

Quality

- Product nonconformances
- Packaging nonconformances
- Laboratory tests

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(3) An offeror with no performance history in any FSC procured by the Center will be identified as a new offeror, and will not be scored on performance. . . . [T]he desirability of expanding the supplier base and possible competition enhancement in future procurements will be considered in the source selection decision when new offerors are present.

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(5) By accessing the DCSC Electronic Bid Board (EBB), each offeror will be provided the opportunity to review its negative historical performance data:

(i) For instructions on accessing the EBB and for a point of contact (POC) concerning questions/requests for information on data access, refer to DCSC letter, 06 May 94, subject: The DCSC Electronic

Bid Board, which was mailed to all DCSC vendors. For technical assistance or questions on the EBB, contact: [contact person list with phone numbers].

(ii) For questions on negative historical performance data, contact the DCSC ABVM Administrator: [contact office address with phone numbers].

(6) When a discrepancy between offeror and Government data occurs, the Government will make every effort to resolve the discrepancy expeditiously. However, the Government may make an award decision despite the existence of an unresolved challenge. The Government is the final authority for resolution of disputed data and its use in the source selection process.

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"(e) General Basis for Award. Award will be made to the offeror whose proposal conforms to the terms and conditions of the solicitation and which represents the best value to the Government. In making the best value determination, the Government will make a comparative assessment of the proposals. Where the offeror with the best performance history has not also offered the lowest price, the Government will determine the appropriate trade-off of price for past performance. The following considerations may affect the trade-off determination: . . .

- Industrial base
- Benefits from obtaining new sources
- Difference in price."

AAMC proposed a unit price of \$459.00 and offered 180-day delivery. AAMC's total offered price was \$172,125.00. UTI proposed a unit price of \$554.00 and offered the first 60 items delivered in 70 days and the remaining 315 items delivered within 110 days of award. UTI's total offered price was \$207,750.00. Thus, before the application of the DEF, AAMC was the low offeror by \$35,625.00--the actual savings to DLA if AAMC were to receive the entire award.

AAMC, which had not previously delivered FSC 1730 items, did not have an ABVM score for past performance. The agency calculated UTI's ABVM score at 85.5 (the procurement center average being 80). The contracting officer's initial DEF calculation resulted in UTI's being found the low offeror by a margin of \$857.54. The contracting officer determined that UTI had the low evaluated price, offered

faster delivery, and represented a lesser performance risk than AAMC, which was unscored under the ABVM for FSC 1730. Accordingly, award was made to UTI for all 375 towbars.

On January 13, 1997, AAMC protested the award decision to this Office. In preparing to respond to that protest, DLA discovered that it had improperly calculated UTI's evaluated price because it had not used an average weighted delivery as called for in the RFP when phased deliveries were proposed. The corrected evaluated price for UTI resulted in a determination that AAMC was the low evaluated offeror by \$7,951.42. The agency concluded that its best value determination, which had in part been predicated on UTI's submitting the low evaluated price, had been compromised.

DLA reports that it then conducted a reevaluation. In that reevaluation, AAMC was credited with a lower evaluated price; UTI was credited with a better delivery schedule. Thus, the discriminating factor became past performance which was evaluated as follows:

"1. ABVM scores--As a new provider AAMC did not have an ABVM score for past performance in FSC 1730. UTI had an ABVM past performance score of 85.5.

"2. Volume of business--UTI had successfully completed one contract for 35 units, NSN 1730-01-101-9061 in October 1996, while AAMC was a new provider for NSN 1730-01-101-9061.

"3. Measure of Confidence--The volume of business on which UTI's ABVM score was based as a measure of confidence in the score as an indication of performance risk. In this case UTI's ABVM score is based on one contract line item for the delivery of 35 NSN 1730-01-101-9061.

"4. Expansion of Supplier Base--Because AAMC is a new offeror the contracting officer considered the desirability of expanding the supplier base for future procurements.

"5. Competition Enhancement--Because AAMC is a new offeror the contracting officer considered possible competition enhancements to be gained from award to a new source."

Based on the reevaluation, the contracting officer "determined that AAMC's lower offered price represented the best value to the government" and concluded that AAMC should be "put in line" for award contingent upon a successful responsibility check. AAMC agreed to accept an award contingent upon the successful check for 315 items, allowing UTI to deliver 60 items. Based on this corrective action agreement, AAMC withdrew its protest, whereupon UTI filed this protest.

The protester's objections to the reevaluation fall into three categories: (1) the agency's newfound reliance on expansion of the supplier base contradicts the agency's earlier position and is nothing more than an "after-the-fact" rationalization to support the settlement with AAMC; (2) the ABVM analysis is incorrect in limiting consideration to FSC 1730; and (3) the agency improperly calculated UTI's ABVM score as 85.5.

Our Office will not question an agency's evaluation of proposals unless the agency deviated from the solicitation criteria or the evaluation was otherwise unreasonable. The fact that a protester disagrees with the agency's judgment does not establish that the evaluation was unreasonable. Porter/Novelli, B-258831, Feb. 21, 1995, 95-1 CPD ¶ 101 at 4. While documents prepared in response to a protest reflecting an evaluation or source selection rationale may be accorded less weight than contemporaneous documentation, we consider the entire record including statements and arguments made in response to a protest in reviewing an agency's evaluation and source selection. Solid Waste Integrated Sys. Corp., B-258544, Jan. 17, 1995, 95-1 CPD ¶ 23 at 5 n.4.

Supplier Base

Pointing to the earlier evaluation record and the post-protest advice of one agency staff member, UTI notes that the subject of improving the supplier base was never considered by the agency until its rationale for the award to AAMC was articulated in the agency report, or if it was considered, the agency believed it to be of little or no importance in comparison to the advantages to be gained by an award to UTI--the only successful supplier of the towbars in question. UTI urges that we not consider the agency's rationale that an award to AAMC would enhance the supplier base.

Enhancement of the supplier base must, by the terms of the RFP, be considered in the evaluation if there are new offerors. The agency in its reevaluation did nothing more than consider the factor as required. This is in strict accord with the evaluation criteria and therefore unobjectionable. The fact that a contracting officer might not have considered the factor in an earlier evaluation, or may have considered it differently, or may disagree with an agency staff member, does not render the reevaluation unreasonable.

Limiting ABVM to FSC 1730

UTI objects to the agency's limiting the ABVM analysis to UTI's record of supplying FSC 1730 items, maintaining that it has provided virtually identical items under another FSC. The applicable ABVM clause in the RFP states at paragraph (b)(2):

"An offeror's past performance is an indicator of performance risk and will be scored on the basis of past performance in the same Federal Supply Class as the supplies being solicited [i.e., FSC 1730]."

Accordingly, the limitation to which UTI now objects is apparent from the face of the solicitation; this aspect of the protest is untimely because our Bid Protest Regulations require that such protests be filed prior to the time set for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1997).

Incorrect ABVM Score

In its comments on the agency report, UTI for the first time disputes its ABVM score, contained on the EBB as of the time of the first evaluation, which was calculated by the agency to be 85.5 by reference to historical data. UTI asserts that the score should be 100.

The RFP explicitly informed offerors that the EBB was established to provide offerors with an opportunity to review historical performance data and provided a way to expeditiously resolve perceived discrepancies. Offerors were also cautioned that awards could be made notwithstanding a pending dispute in this regard. This solicitation scheme paralleled advice given to offerors in writing at the initiation of the ABVM program in 1994 and 1995, which encouraged regular review of the EBB and timely challenges if necessary. The overall purpose of the program is obvious--to give offerors a continuing and timely opportunity to access and seek amendment of the performance records that the agency announced it would rely on in future procurements unless discrepancies were brought to its attention.

In this case, UTI waited until its comments on the agency report--filed well after the proposed award to AAMC--to challenge its ABVM score. Since the protester had ample opportunity to access the disputed information from the EBB and did not do so, the protester failed to diligently pursue the information on which it bases the challenge to its score. USA Elecs., B-275389, Feb. 14, 1997, 97-1 CPD ¶ 75 at 3 n.4. Although UTI states that it had no reason to check the EBB for scores it calculated to be perfect, this line of argument is without merit since it is essentially based on the premise that an offeror is free to ignore the EBB system established by the agency. On the contrary, the reason offerors are advised that ABVM scores will be used in proposal evaluations is to encourage them to regularly access their performance information when participating in a procurement to ensure that their data is accurate or can be amended in a timely manner.

The protest is denied.

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