



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Phillips Industries, Inc.

File: B-280645

Date: September 17, 1998

Marshall L. Phillips III for the protester.

Philip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency.

Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency selection of slightly higher-priced offeror with excellent performance history instead of lower-priced offeror with no performance history is reasonable and consistent with solicitation's evaluation scheme, which weighed past performance and price equally, and where the item was in backlog status, anticipated demand was high, and agency concluded that the awardee's established excellent record for timely delivery was worth the slightly higher price.

DECISION

Phillips Industries, Inc. protests the Defense Supply Center Richmond's (DSCR) award of a contract for "Combat Quick Kill" insecticide, a commercial item manufactured by Clorox Company, to Amjay Chemicals under request for proposals (RFP) No. SP0450-98-R-0989. The item is a "bait station," commonly referred to as a "roach motel." Contracting Officer (CO) Report, Aug. 12, 1998, at 2. Phillips, the low-priced offeror, alleges that DSCR misapplied the evaluation factor for past performance and made an improper tradeoff decision to award the contract to Amjay, the third lowest-priced offeror.

We deny the protest.

The RFP required delivery of 3,000 packages of this product within 45 days after award. RFP section B, at 2; RFP, DSCR clause 52.211-9G52, at 8. The RFP provided:

The Government will award a contract . . . to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

See Section M of the solicitation

Technical and past performance, when combined, are equal.

RFP, Federal Acquisition Regulation (FAR) clause 52.212-2, "Evaluation - Commercial Items (Oct. 1997)," at 4.

Section M of the RFP contained a DSCR clause, 52.215-9G05,"Automated Best Value Model (Nov 1996)," at 13, which provided that:

(a) Award. The award against this solicitation shall be made based on a comparative assessment of offerors' prices and past quality and delivery performance. Price and past performance are the primary evaluation factors. The award may be made to other than the low-priced, technically acceptable responsible offeror. For this award, price and performance factors will be evaluated equally unless a different order of precedence is indicated below:

- Performance is of greater importance than price.
- Price is of greater importance than performance.

For this award, the performance factor considers quality performance and delivery performance to be of equal value unless otherwise indicated below:

- Quality performance is of greater importance than delivery performance.
- Delivery performance is of greater importance than quality performance.

(b) The Automated Best Value Model (ABVM) Score.

(1) To evaluate each offeror's past performance, each offeror will be assigned an ABVM score based on the offeror's past performance. . . . The ABVM score . . . is a combination of an offeror's delivery and quality scores. The quality score will be comprised of validated contractor caused product and packaging nonconformances and negative lab tests during the rating period The delivery score will be comprised of all lines reflected delinquent during the rating period¹

¹Although not pertinent here, the clause also provides how vendors can obtain their scores and challenge any negative data. RFP, DSCR clause 52.215-9G05(b)(2) and (3), at 13.

Subsection (d) of this clause provided that:

The lack of performance history is not grounds for disqualification for award but may cause the offeror to be considered less favorably than an offeror with favorable performance history. Conversely, new offerors may be considered more favorably than scored offerors with poor performance history. The contracting officer also may consider the need to expand the supplier base and the possibility of enhancing future competition when new offerors are present.

Finally, subsection (f) stated the following:

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:

- Weapons system application/item criticality.
- Delivery schedule/inventory status.
- Historical delivery/quality problems.
- Limitation of supply sources/industrial base concerns.
- Benefits from obtaining new sources.

Nine firms, including Phillips, Amjay, and Landscapers Supply, submitted offers. The contracting officer initiated negotiations with the firms. CO Memorandum for Record, July 21, 1998, at 1-2. The contracting officer then prepared an ABVM evaluation sheet which listed an offeror's unit and total price and ABVM rating. ABVM sheet, July 15, 1998, and CO Report, at 4. Phillips and Landscapers Supply had no performance histories for this product, and therefore no ABVM ratings. Specifically, Phillips was denoted as "unscored." Amjay received an ABVM score of 97.8. Amjay's total price was \$5,820 higher than the Phillips total price, and \$5,760 higher than Landscapers Supply's total price. CO Memorandum for Record, at 2-3. The contracting officer also reviewed the inventory position for the item. She found that there was no current stock, that 52 packages were on "back order," and that anticipated demand was 542 packages per quarter. CO Memorandum for Record, at 2; CO Report, at 4.

The contracting officer awarded the contract on the following basis:

Based on a comparative assessment of all prices offered, Amjay Chemicals [was] not the lowest offer received nor the highest scored, but [had] a very good ABVM score The low offers from Phillips Ind. & Landscapers Supply reveal that they have never furnished items to DSCR and therefore would be a great risk if an award were finalized with either of these firms considering that this item is already in a backorder situation. It is in the Government's best interest to pay \$5820.00 or 4.5% (Phillips) and \$5760.00 or 3.1% (Landscapers Supply) more for the product to a supplier, to be assured of timely delivery.

CO Memorandum for Record, at 3; Award Justification document, July 21, 1998.

In the agency report, the contracting officer elaborates further on her decision stating:

Consistent with the ABVM Clause, [she] considered the presence of backorders and high demand for the item represented a higher than normal risk of non-performance. The lowest priced offerors, Phillips and [Landscapers Supply], had neutral performance ratings. The third lowest offeror, Amjay, had excellent performance history, rating a 97.8 out [of] 100 ABVM score. Yet, Amjay's price was only around 3% higher than Phillips and [Landscapers Supply]. She concluded that Amjay's price was worth the reduced risk of non-performance, in light of the high-demand for items already in a back-ordered inventory position. Thus, Amjay represented the best value to the Government.

CO Report, at 7.

Phillips argues that it should have been awarded the contract under the evaluation scheme which provided that an "unscored" vendor--one with no performance history--would be given a neutral rating for past performance. Phillips argues that it was penalized for its lack of past performance history based on the contracting officer's statements in the Memorandum for Record (and the Award Justification document) that there would be a "great risk" if an award was made to either of the firms with no contract performance history with DSCR. Phillips asserts that the solicited item is a dealer-supplied item shipped directly from Clorox to the agency warehouse and that Phillips, Amjay or any other dealer could essentially perform the contract by placing an order and invoicing the government. Protester comments, Aug. 21, 1998, at 2-3.

We think the agency's decision to award to Amjay was reasonable and consistent with the RFP. Here, the RFP established that price and past performance would be the factors for award among the technically acceptable firms. The ABVM clause

stated how past performance would be rated based on ABVM scores, that a lack of performance history would not disqualify a firm, but that, among other things, the offeror could be considered less favorably than an offeror with a favorable performance history. The clause further provided for a comparative assessment of offers and stated that "[w]here 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." RFP, DSCR clause 52.215-9G05(f), at 13.

The RFP listed certain factors, including delivery schedule/inventory status, which could affect the tradeoff determination. Here, the contracting officer decided, given the high demand and the backlog status for the item, that award to a slightly higher-priced firm which had an excellent performance history was justified to ensure timely delivery and represented the best value to the government. This was entirely consistent with the RFP evaluation scheme and the discretion afforded the contracting officer in making the tradeoff decision. See Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 at 3.

As we stated in Excalibur, supra, at 3, the use of a neutral rating approach, to avoid penalizing a vendor without prior experience and thereby enhance competition, does not preclude, in a best value procurement, a determination to award to a higher-priced offeror with a good past performance record over a lower-cost vendor with a neutral past performance rating. Indeed, such a determination is inherent in the concept of best value.

We share the protester's concern with the language in the selection decision documentation that Phillips and Landscapers Supply, vendors with no performance histories, pose a "performance risk" or a "great risk" for award. As the protester argues, a company like Phillips which may be new to government contracting should not be disqualified from award merely because it lacks a performance history. As the agency recognizes, such an approach would be inconsistent with the FAR and the RFP. FAR § 15.305(a)(2)(iv) provides that, for past performance evaluations, in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. The RFP ABVM clause also states that lack of performance history is not grounds for disqualification for award. RFP, DSCR clause, 52.215-9G05(d), at 13; CO Report, at 6-7. Nonetheless, as explained above, the contracting officer's decision to award to the slightly higher-priced firm with an established excellent performance history, rather than a lower-priced vendor with no performance history with the agency, was permissible and reasonable.

We deny the protest.

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