



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** CORVAC, Inc.  
**File:** B-244766  
**Date:** November 13, 1991

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M.W. Meredith, Jr., Esq., Meredith, Donnell & Abernathy, P.C., for the protester.  
Jewel L. Miller, Esq., Defense Logistics Agency, for the agency.  
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Contracting agency reasonably evaluated protester's past performance as marginally acceptable based on protester's performance as incumbent contractor during which the protester's work was repeatedly cited for recurring problems in areas which the agency considered particularly sensitive because of an environmental consent decree under which the agency operates.
2. Agency properly awarded contract to higher-priced offeror which had a better rated past performance record where the price/technical tradeoff was reasonably based and consistent with the solicitation's evaluation scheme.

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### DECISION

CORVAC, Inc. protests the award of a contract to U.S. Pollution Control, Inc. (USPCI) under request for proposals (RFP) No. DLA200-91-R-0068, issued by the Defense Logistics Agency (DLA) for the removal, transportation and disposal of miscellaneous hazardous items located at installations in and around the Naval Air Force Base at Corpus Christi, Texas. CORVAC protests the agency's evaluation of its performance history and the agency's determination to make award on the basis of a higher-priced, higher rated proposal.

We deny the protest.

The solicitation, issued March 29, 1991, provided for award of an indefinite quantity contract covering the removal and disposal of hazardous waste generated at military installations in and around Corpus Christi. The RFP

explained that proposals would be evaluated on the basis of price and past performance, with price being more important, and that award would be made to the offeror representing the "best value" to the government. With respect to past performance, the RFP stated:

"(1) The Government will evaluate the quality of the offeror's past performance. The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical and management proposals.

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"(3) Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The Government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services at fair and reasonable prices. This is a matter of judgement. Offeror's will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response--or lack thereof--will be taken into consideration. . . .

"(4) Past performance will not be scored, but the Government's conclusions about overall quality of the offeror's past performance will be highly influential in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the Government.

"(5) By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer."

Six offerors responded to the solicitation by the May 29 closing date, five of which were considered technically acceptable and included in the competitive range. Discussions were conducted with these offerors and each was provided with the opportunity to respond to any unfavorable past performance reports. Best and final offers were received by June 21.

CORVAC was the second low offeror, with a price of \$3,646,855.40, and its price was considered realistic.<sup>1</sup> The contracting officer rated CORVAC's past performance as marginally acceptable due to the numerous problems experienced by DLA during CORVAC's performance as the incumbent on the Corpus Christi contract. The contracting officer based his conclusions in this regard on, among other things, incorrect weights entered by CORVAC on hazardous waste manifests, CORVAC's loss of a hazardous waste manifest, CORVAC's unauthorized and improper waste transfers, and improper mixing of hazardous waste which exposed generating activities to potential liability for Resource, Conservation, and Recovery Act (RCRA) violations. In making this determination, the contracting officer considered a June 22 letter from CORVAC which "explained" these performance problems.

USPCI was the third low offeror, with a price of \$4,292,871.68. The contracting officer determined that its price was realistic, and that its performance history was good.

The contracting officer evaluated CORVAC's and USPCI's offers to determine if CORVAC's lower overall price represented the best value to the government despite its past performance.<sup>2</sup> The contracting officer concluded that USPCI's better assurance of quality disposal services outweighed CORVAC's lower price. In assessing the significance of CORVAC's performance problems, the agency took into consideration the environmental sensitivity of the

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<sup>1</sup>The low offeror was determined to be unacceptable because of its unrealistic price which reflected a lack of understanding as to the full scope of the contract, as well as a marginal performance history.

<sup>2</sup>Due to CORVAC's status as a small disadvantaged business (SDB), it received a 10 percent price preference which increased the 19 percent price difference to 29 percent. Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007.

Corpus Christi Naval Air Station which has been operating under an environmental compliance consent decree since 1986, and the government's potential liability for the improper actions of its hazardous waste contractors. The contracting officer stated:

"I believe that USPCI's proposal represents the optimal combination of performance and cost. The type of past performance problems experienced by CORVAC could potentially cost the Government a lot more financially and otherwise than the price difference between the two offers. It is reasonable to expect from USPCI's very good past performance that these types of problems will not occur if USPCI is awarded the contract. . . it is sometimes a false economy to make decisions based solely on low initial price. . . . Some of the same problem areas cited by TWC (Texas Water Commission), i.e., improper manifesting, improper storage, are problem areas Corvac's performance problems impact. . . . To pay 29 percent more for a contractor rated very good on past performance over one rated marginally acceptable on past performance is a reasonable investment for the Government on a contract dealing with HW (hazardous waste) removal and disposal and all the environmental risks and potential liabilities such a contract entails."

Accordingly, on July 2, the contracting officer awarded the contract to USPCI as the offeror demonstrating the best value to the government.<sup>3</sup>

CORVAC disputes its past performance assessment, asserting that its past performance problems were not severe, and that "most problems were beyond our control and without fault or negligence on our part." The protester argues that, of 81 pick-up orders under the previous contract, there were only five or six incidents upon which complaints were based, that at least three of those were beyond CORVAC's control, and that "[t]he other incidents did not result in any damage to anyone." CORVAC also alleges that its failure to receive this contract constitutes retaliatory action by the agency which, CORVAC asserts, did not want to award the predecessor contract to CORVAC, but was forced to do so when the Small

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<sup>3</sup>In the protester's comments, for the first time, it challenged the agency's conclusions that USPCI's past performance is good. We dismiss this allegation as untimely since it was not raised within 10 working days after CORVAC knew the underlying factual grounds which provided the basis for this issue. 4 C.F.R. § 21.2(a)(2) 1991.

Business Administration (SBA) issued CORVAC a certificate of competency (COC) following the agency's nonresponsibility determination. CORVAC also contends that the agency's determination concerning CORVAC's past performance is really a finding of nonresponsibility since it pertains to the firm's capability to perform and, therefore, must be referred to the SBA for a COC review. We find these allegations without merit.

CORVAC was not awarded the contract primarily because of its relatively low rating in the area of past performance, which was specifically set forth as an evaluation factor in the solicitation. Where an offeror is found deficient under criteria specified in the RFP, the matter is one of technical acceptability, not responsibility. Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292. While past performance may traditionally be considered a responsibility factor, such factors may be used as technical evaluation criteria in negotiated procurements where the circumstances warrant a comparative assessment of those areas. Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 70 Comp. Gen. \_\_\_\_\_, 91-2 CPD ¶ 145. Where a small business is found deficient in one of these areas, referral to the SBA is not required. Pacific Computer Corp., supra.

With respect to CORVAC's allegation that the contracting officer's evaluation of CORVAC's past performance is faulty, the record indicates otherwise. The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115. Our Office does not make an independent determination of the merits of technical proposals, but examines the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Id. Mere disagreement with the agency does not render the evaluation unreasonable particularly where, as here, highly technical judgments are involved and the procurement is for potentially hazardous services. Chemical Waste Management, Inc., B-232276, Dec. 13, 1988, 88-2 CPD ¶ 590.

CORVAC argues that its extensive regulatory experience enables it to certify that none of the actions cited by the contracting officer's report constitutes a violation of RCRA, and none exposed the government to actual or potential liability. The protester argues that "[w]here breaches of military protocol occurred, they were generally the result of miscommunication between CORVAC and government personnel," and that such problems decreased during the contract term. CORVAC explains in some detail how the types

of problems cited by the contracting officer were either trivial in nature or not CORVAC's fault.<sup>4</sup> While a single instance of noncompliance alone might not constitute poor performance, the contracting officer's determination was not based on just a single event, but rather on a number of problems experienced by the government during CORVAC's performance. Our review of the collection summary reports prepared after each pick-up by CORVAC indicate that on at least 34 of the 81 delivery orders which were issued, the contracting officer's representative (COR) documented performance problems. For example, on different occasions CORVAC failed to obtain the required authority to utilize government employees to perform certain tasks; left drums of hazardous waste behind by accident<sup>5</sup>; mixed certain liquid wastes together without prior approval; and failed to bring the correct manifests with it to the pick-up. Additionally, the summaries show a pattern of CORVAC's employees disregarding the COR's instructions. It is this pattern of performance problems, in areas specifically delineated in the RFP as components of an offeror's past performance, that led the contracting officer to reasonably conclude that CORVAC's past performance was marginally acceptable.

While the protester also argues that some of its problems were caused by a subcontractor who is not staffed on this new contract, it was not unreasonable for the agency to attribute CORVAC's subcontractor's performance problems to CORVAC, since it is CORVAC's obligation to assign only responsible subcontractors to complete the work, and to oversee and manage them during performance. In view of these numerous problems, we consider the contracting officer's rating of CORVAC's past performance as marginally acceptable to be reasonable.

The record also provides no basis to conclude that the contracting officer's determination in this regard was motivated by bias or bad faith. The protester must submit convincing evidence that the contracting officer had a specific and malicious intent to harm the protester in order

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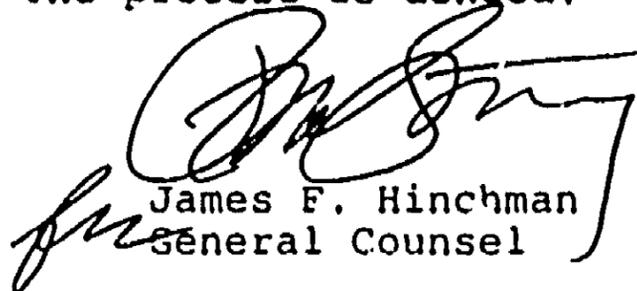
<sup>4</sup>For example, CORVAC explains that it did not lose a manifest, rather, one was never made due to last minute changes as to where the material could be received for disposal.

<sup>5</sup>CORVAC states that although it admits leaving behind some drums of hazardous substances by mistake, it picked them up later free of charge. We note that the reason CORVAC could not charge the government for the additional pick-up is because it had already charged and been paid for the work in question during the first pick up.

for us to question the award on this basis, since contracting officer's are presumed to act in good faith. Parameter, Inc., B-241652, Feb. 28, 1991, 91-1 CPD ¶ 229. Here, there is no evidence to support CORVAC's allegation; the mere fact that the agency had previously found CORVAC to be nonresponsible and that this determination was overturned by the SBA does not substantiate CORVAC's essentially speculative surmise.

To the extent that CORVAC is challenging the agency's price/technical tradeoff, we note that agencies have discretion in determining the manner and extent to which they will make use of the technical and price evaluation results. Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93. Technical and price tradeoffs are permitted and the extent that one may be sacrificed for the other is governed by the test of rationality and consistency with the stated evaluation criteria. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. We will accord due weight to the agency's judgment concerning the significance of the difference in technical merit of offers and whether the difference is sufficiently significant to outweigh the price difference. Litton Sys., Inc., supra.

The protest is denied.

  
James F. Hinchman  
General Counsel