

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-206905; B-208223;
B-208034
MATTER OF: PhilCon Corp.

DATE: March 29, 1983

DIGEST:

1. GAO will review protest by a potential subcontractor that subcontractor prequalification procedures are not being reasonably interpreted or fairly applied by the Government, but GAO will not question the technical judgments involved in administering those procedures.
2. Where prequalification procedures require that calcium silicate insulation be tested by submersion in boiling water and it is not clear whether total or partial submersion was intended, agency determination that only partial submersion is required because that is all that is necessary to meet its needs will not be challenged by GAO.
3. Failure of the Government to require some firms to test certain features of their underground heat distribution (UHD) systems during prequalification was not unfair to the protester where the prequalification procedure states only that those features should be tested "wherever feasible," and the protester has not shown that a different standard was applied to similarly situated firms in determining whether testing of those features was feasible.
4. Where prequalification procedures require firms to list "limitations" in their system brochures, but offer no guidance as to what is to be considered a limitation, GAO will not recommend revocation of a firm's letter of acceptability based on its failure to list as a limitation the lowest temperature at which its system will dry out if it becomes wet. GAO does suggest that the prequalification procedures be clarified as to what limitations must be listed in brochures.

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5. GAO will not review an allegation that an agency is concealing information from the protester. The protester's sole recourse is to pursue the disclosure remedies provided for under the Freedom of Information Act.

PhilCon Corp. protests the award of any contracts under invitation for bids (IFB) Nos. N62470-80-B-0102 and N62477-81-B-0163, issued by the Department of the Navy, and IFB No. DACA01-82-B-0038, issued by the U. S. Army Corps of Engineers.¹ The IFBs, respectively, call for construction work at the Marine Corps Base, Camp Lejeune, North Carolina; the National Naval Medical Center, Bethesda, Maryland; and the Cape Canaveral Air Force Station in Florida. The work to be performed includes the installation of underground heat distribution (UHD) systems. PhilCon, a supplier of UHD systems and a potential subcontractor on these projects, contends certain other suppliers have not been fully required to comply with the prequalification procedures applicable to UHD systems supplied on military projects. We deny the protests in part and dismiss them in part.

Background

The acceptability of UHD systems is determined according to the design and performance specifications contained in the Federal Agency Prequalification Procedure. The Prequalification Procedure is administered by the Federal Agency UHD Systems Committee, which is comprised of representatives of the Army, Navy, Air Force and Veterans Administration. The Committee issues a letter of acceptability to a supplier whose system satisfies the prequalification criteria entitling that supplier to furnish its system on projects undertaken by the participating agencies. Once a system has been prequalified, the system's specifications are incorporated in the supplier's approved brochure. This brochure, in effect, becomes the UHD system design specification for any project on which the supplier is selected as the UHD subcontractor.

¹We have been advised by the Navy that award has been made notwithstanding the protest under IFB-0102.

Allegations

PhilCon contends that the Committee has approved the systems of some suppliers without requiring those suppliers to adhere to certain provisions of the Prequalification Procedure. PhilCon alleges three specific deficiencies, all based on its interpretation of what is required by the Prequalification Procedure: (1) the calcium silicate insulation used in certain systems was subjected to less severe testing than prescribed by the Prequalification Procedure; (2) some suppliers were not required to test an expansion loop or a 90-degree elbow when prequalifying their systems, contrary to the terms of the Prequalification Procedure; and (3) other suppliers have not listed all of their systems' limitations in their brochures as directed by the Prequalification Procedure. PhilCon maintains that it is unfair to relax prequalification requirements for suppliers and asks that the firms in question have their letters rescinded until they have complied with every requirement.

Jurisdiction & Standard of Review

While we generally will not consider protests based on subcontract awards under Federal procurements, we have found review of such protests appropriate under limited circumstances. See Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Here, the specification requirements contained in the Prequalification Procedure operate to limit the number of suppliers eligible to furnish their systems on military and Veterans Administration projects; the Committee will not issue a letter of acceptability if a supplier is unable to satisfy the Prequalification Procedure standards. Considerations of fairness require that the Committee hold all suppliers to the same standards in the prequalification process, and we think it is appropriate for our Office to review protests such as PhilCon's which allege that the Committee has not done so. See U.S. Duracon Corporation, B-196760, February 22, 1980, 80-1 CPD 154; U. S. Duracon Corporation, B-194225, B-194673, May 15, 1979, 79-1 CPD 356; B-174521, March 24, 1972.

In reviewing PhilCon's three specific allegations, we will not question the technical judgments involved in interpreting and applying the Prequalification Procedure. Such technical considerations are the province of the Committee and its member agencies. See U. S. Duracon Corporation, B-196760, supra. Rather, we will confine our review

to considering whether the Committee has reasonably interpreted the standards in issue and fairly applied those standards to all suppliers. We conclude that the Committee's interpretation of the standards is reasonable and find no evidence that the standards have not been applied fairly.

Discussion

A. Testing of Calcium Silicate Insulation

The Prequalification Procedure requires that insulation used in UHD systems be "resistant to deterioration as a result of being submerged in boiling water." Prequalification Procedure at p. 14. This resistance must be demonstrated during prequalification by submerging the insulation in boiling water (separately or inside a piping assembly) for 96 hours. The insulation will be considered acceptable if, after drying out, it has suffered no significant physical damage, and its heat loss factor increases no more than 10 percent. The National Bureau of Standards (NBS) has conducted boiling tests for several types of calcium silicate insulation, including the two brands about which PhilCon complains here. The results of these tests are reported in NBSIR 81-2324, "Boiling Tests of Non-Asbestos-Based Thermal Insulation Used in Air-Conduit Underground Heat Distribution Systems." This report indicates that all three brands passed boiling tests while inside piping assemblies. PhilCon maintains that the test procedure was defective, and the results thus invalid, because the piping was only half-filled with boiling water during the test; PhilCon interprets the Prequalification Procedure as requiring total submersion of the insulation by completely filling the pipe with boiling water. The Committee and the Navy believe only partial submersion is required.

The agencies' interpretation seems reasonable. The Prequalification Procedure is unclear on the point, and the Committee has determined that the Government's needs do not require insulation which can pass the more severe total submersion boiling test. We will not interfere with this determination. See Cincinnati Bell Telephone Company, B-207177, January 17, 1983, 83-1 CPD 41. Further, there is no evidence that the agencies' interpretation established a more lenient standard for testing calcium silicate

insulation than that applied to the foam glass insulation used in PhilCon's system. Although it appears that PhilCon's insulation recently has passed a more severe test, the record indicates that PhilCon's insulation originally was found acceptable based on a test similar to that in issue here.

B. Failure to Test Expansion Loop or 90-Degree Elbow

The relevant paragraph, at page 13 of the Prequalification Procedure, reads as follows:

"Demonstration tests for all types of conduit and insulating envelope should simulate actual operating conditions and, wherever feasible, should be performed using a full-scale working assembly and includes two field joints, one anchor, two manhole terminals, and one expansion loop (or, if expansion loops are not available with the system, one 90° elbow)." (Emphasis added.)

Based on the language of this provision, the testing of an expansion loop or a 90-degree elbow is not mandatory for every supplier--such tests merely should be performed "wherever feasible." Because the Committee retains discretion to determine when testing of these features is feasible, the mere fact that some suppliers have not been tested does not evidence a failure by the Committee to treat all suppliers equally or fairly. In order to establish such unfairness, PhilCon would have to show that the Committee has been inconsistent in its determinations of feasibility; that is, that different determinations were made for similarly situated suppliers. PhilCon has not even attempted to make such a showing, and thus has not met its burden of affirmatively proving this allegation. See Armidir, Ltd., B-205890, July 27, 1982, 82-2 CPD 83.

C. Failure to List Limitations

PhilCon maintains that certain suppliers have been approved by the Committee despite their failure to include their systems' low temperature limitations in their brochures. To explain briefly, the Prequalification Procedure requires suppliers to demonstrate that their systems can be dried out in the event that, due to structural damage or

some other cause, water enters the conduit. The test set forth in the Prequalification Procedure to measure satisfactory drying capability provides that a system must be dried out within 120 hours using as the drying impetus "the heat of the carrier pipe with the temperature at the low end of the temperature range for which the system is intended to be used * * *." Prequalification Procedure at p. 14. PhilCon argues that the lowest temperature at which a system will pass this test must be listed in the supplier's brochure as a system limitation. This would allow agencies to automatically reject systems which could not be adequately dried using the coolest air to be carried by the system on a given project.²

The Prequalification Procedure, at page 4, requires that the introduction in each supplier's brochure include, along with other information, "a listing of limitations on system applications." The Prequalification Procedure nowhere expressly defines, however, what is to be deemed a limitation for the purposes of this requirement. While PhilCon's interpretation--that this is the type of limitation intended by the Committee--has apparent merit, given the lack of adequate guidance in the Prequalification Procedure, we cannot conclude that suppliers which have not listed their systems' low dry out temperature should have their letters of acceptability revoked. Further, it does not appear that the Committee's position has been unfair to PhilCon. That is, the Committee has not required PhilCon or any other firm to list low dry out temperature as a system limitation, so all firms have been treated equally in this regard. Although PhilCon has listed its low dry out temperature in its brochure, its decision to do so was not the result of any action by the Committee, but was based entirely on its own interpretation of the Prequalification Procedure.

While we deny the relief requested by PhilCon, we do think that the Committee should clarify the Prequalification Procedure to indicate what system limitations must be set forth in suppliers' brochures. We are so suggesting to the Committee.

²For example, a system which will not dry out when the air in the system is 250 degrees would not be acceptable for projects where the air to be carried by the system will be 250 degrees or lower.

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D. Requests for Information

PhilCon finally contends that the Committee improperly has concealed information concerning possible other pre-qualification deficiencies. We dismiss this basis of protest.

If PhilCon desires information concerning the prequalification of other suppliers, it may request it under the Freedom of Information Act (FOIA). Our Office has no authority under FOIA to determine what information Government agencies must disclose. Westec Services, Inc., B-204871, March 19, 1982, 82-1 CPD 257. If the Committee is not disclosing all of the information to which PhilCon believes it is entitled, its sole recourse is to pursue the remedies provided for under FOIA. Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49.

The protests are denied in part and dismissed in part.

for *Sheldon J. Arcola*
Comptroller General
of the United States