

**DECISION**

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

**FILE:** B-206641; B-206728; **DATE:** April 12, 1983  
B-207421  
**MATTER OF:** PhilCon Corp.

**DIGEST:**

1. Where several heat distribution system designs have been approved under multi-agency prequalification procedures, solicitation specifications which would exclude one or more of the approved systems are unduly restrictive, and a protest on that ground is sustained, since the agency has not shown that the restrictions are reasonably related to its minimum needs.
2. Agency is not required to use Guide Specification, drafted to be used with the multi-agency prequalification procedure for heat distribution systems, so long as agency can show Guide Specification will not meet its minimum needs.

PhilCon Corporation protests the following solicitations issued by the Department of the Navy for construction work at various military facilities: invitation for bids (IFB) Nos. N62474-78-B-0780 (IFB 0780), Marine Corps Logistics Base, Barstow, California; N62474-79-B-5541 (IFB 5541), Naval Submarine Base, Bangor, Washington; and N62467-81-B-1345 (IFB 1345), Marine Corps Air Station, Cherry Point, North Carolina.

PhilCon is a supplier of underground heat distribution (UHD) systems and a potential subcontractor on these projects. It challenges those portions of the specifications relating to the design and installation of UHD systems, principally claiming that the specifications used by the Navy to define the UHD work were defective and should be changed. We sustain the protests in part and deny them in part.

PhilCon's protests center around the Department of Defense's system of prequalification of UHD systems. The acceptability of UHD systems is determined according to requirements 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 any supplier whose system satisfies the prequalification criteria, entitling that supplier to furnish its system on projects undertaken by the participating agencies. In most instances the supplier of the UHD system is a subcontractor while the overall responsibility for the project belongs to the construction company prime contractor. 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.

Federal Construction Guide Specification 15705 was developed for use in conjunction with the Prequalification Procedure. This Guide Specification consists primarily of performance specifications, reflecting the fact that the necessary design specifications are included in each supplier's brochure. Thus, when selected as a subcontractor on a project, a supplier follows the general requirements in the Guide Specification in installing the UHD system described in its own brochure.

PhilCon's protests are prompted by the Navy's failure to use the Guide Specification in IFB Nos. 0780, 5541, and 1345. Instead, the Navy used design specifications requiring installation in a specified manner using certain materials. PhilCon states that the agencies participating in the Prequalification Procedure are bound to include the Guide Specification in solicitations for all UHD projects. According to PhilCon, suppliers agreed to incur the costs of designing and prequalifying acceptable UHD systems according to the Prequalification Procedure only because they understood that the Guide Specification would be used for all UHD projects. PhilCon also maintains the design specifications actually used by the agency in these projects contained unnecessary requirements which prevented PhilCon from offering its approved UHD system. It thus

asks that the design specifications be removed from the IFBs and be replaced with the Guide Specification.

The Navy does not agree that the Guide Specification must be included in every solicitation which involves a UHD project. It believes that if a design-type specification will meet its needs, it may use it in place of the Guide Specification. The Navy advises that it used design specifications in IFB Nos. 0780 and 5541 because it did not want to waste designs which had been completed prior to the 1980 changeover to the Prequalification Procedure. The agency used a design specification in IFB 1345 because that project called for the replacement of an existing system and did not involve the layout and design work performed by the supplier under the Prequalification Procedure.

We agree with the Navy that it is not bound to incorporate the Guide Specification in all solicitations involving UHD projects. The understanding of the suppliers aside, the Prequalification Procedure contains no representation by the agencies that the Guide Specification would be used for all UHD projects. The contracting activity has, in these instances, determined that it can satisfy its needs using design specifications, and while the Navy's participation on the Committee evidences that it is that agency's policy to use the Guide Specification we find no legal basis for concluding that, in all circumstances, every contracting activity must use the Guide Specification.

We deny this aspect of the protests.

While we believe the Navy may use design specifications where it deems them the best means for meeting its needs, we find that IFB Nos. 0780 and 5541 contain unduly restrictive specification provisions, and thus sustain the protests under these two solicitations.<sup>1</sup>

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<sup>1</sup>We have not sustained the protest under IFB 1345 since PhilCon has not specifically alleged that any portions of that solicitation are unduly restrictive.

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IFB 5541 requires that the system to be furnished be covered by a Tri-Service letter of acceptability,<sup>2</sup> and that calcium silicate insulation be used. IFB 0780 requires that the protective casing (conduit) surrounding the piping be metallic, and also that calcium silicate insulation be used. PhilCon's system has been approved under the Prequalification Procedure for Class A site conditions (the type involved in these projects), but is constructed with plastic conduit and does not include calcium silicate insulation. Also, PhilCon's system is covered by a Federal Agency letter of acceptability, not a Tri-Service letter. The protester contends that these requirements for calcium silicate insulation and a metallic conduit are restrictive because they render its system unacceptable.

We will object to restrictive solicitation requirements where they are not reasonably related to the agency's legitimate needs. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. In view of the fact that Tri-Service letters of acceptability were superseded in 1980 by the Federal agency letter of acceptability, the requirement for such a letter in IFB 5541 cannot reflect the agency's need under this procurement. The Navy does not attempt to justify the requirement in IFB Nos. 0780 and 5541 for calcium silicate insulation, to the exclusion of any other type. Absent such justification, since PhilCon's system has been approved under the Prequalification Procedure without using calcium silicate insulation, we see no reason why PhilCon's insulation should not be considered acceptable for these projects. We thus conclude that the requirement in these IFBs for a specific type of insulation overstates the Navy's legitimate needs.

The Navy justifies the requirement for metallic conduit in IFB 0780 on the ground that metallic conduit has successfully protected the existing UHD system from flash floods and earth movement. The agency considered it good

<sup>2</sup>The Tri-Service letters of acceptability were issued to suppliers whose systems were found acceptable under the Tri-Service Procedures for Establishing Acceptability of Underground Conduit Systems. The Tri-Service Procedures were superseded by the current Prequalification Procedure in 1980.

engineering practice to continue using this proven conduit. While we do not question the Navy's engineering determination that metallic conduit has been effective, we find no basis for the Navy's implicit conclusion that only metallic conduit can be effective under these site conditions; there is no indication, in fact, that the Navy ever made such a determination. The only evidence in the record at all germane to the capabilities of PhilCon's plastic conduit is the fact that it has been approved under the Prequalification Procedure as a Class A system. This classification denotes suitability for sites with the most severe groundwater conditions. Given this evidence and the absence of any statement by the Navy that plastic conduit cannot perform satisfactorily on this project, we conclude that the Navy has overstated its minimum needs. The requirement for metallic conduit thus is unduly restrictive.

PhilCon contends that its system and the approved systems of other suppliers are unacceptable under other provisions of the design specifications, and claims that such restrictions can be avoided only by using the Guide Specification. PhilCon does not specify these additional portions of the specifications it believes are unduly restrictive, so we have no basis for reviewing this allegation. We agree with PhilCon, however, that the Guide Specification is the best means available for assuring that specifications for UHD systems are not unduly restrictive. On projects where the Navy considers a design specification appropriate, and thus does not use the Guide Specification, the design specification used must encompass the approved features of all systems approved under the Prequalification Procedure absent a reasonable justification for excluding a feature of one or more of those systems.

By letter of today, we are recommending to the Secretary of the Navy that IFB Nos. 0780 and 5541 here be canceled and that the Navy's needs be resolicited in accordance with this decision.

The protests are sustained in part and denied in part.

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This decision contains a recommendation that corrective action be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U. S. C. § 720, as adopted by Public Law 97-258 (formerly 31 U. S. C. § 1176 (1976)), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

*for* *Milton J. Acosta*  
Comptroller General  
of the United States