



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Phillips National, Inc.

File: B-253875

Date: November 1, 1993

Dennis E. Jentz, Esq., Anthony J.D. Contri, Esq., and Patrick Allen, Esq., Civerolo, Wolf, Gralow & Hill, for the protester.

Benjamin N. Thompson, Esq., for DTH Contract Services, Inc., an interested party.

Stephen T. Orsino, Esq., Paul M. Fisher, Esq., and Diane D. Hayden, Esq., Department of the Navy, for the agency.

Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a small business set-aside procurement, where an agency fails to give proper preaward notice, but the Small Business Administration ultimately denies the protester's challenge to the awardee's size status, the protester is not prejudiced by the lack of preaward notice.

2. Protest that awardee's proposal contained material misrepresentations is denied where representations in proposal challenged by protester are not inconsistent with representations made by awardee to the Small Business Administration.

DECISION

Phillips National, Inc. protests the Department of the Navy's award of a small business set-aside contract to DTH Contract Services, Inc. (DTHCS) under request for proposals No. N62477-92-D-0652, for the maintenance of military family housing units at the U.S. Naval Complex, Annapolis, Maryland. Phillips protests that the agency failed to give the required preaward notice regarding selection of DTHCS, and that DTHCS' proposal contained representations conflicting with DTHCS' representations to the Small Business Administration (SBA) regarding its size status.

We deny the protest.

BACKGROUND

In February 1993, the Navy issued this RFP as a total small business set-aside, seeking proposals for structural, electrical, and mechanical repairs to military family housing units at the U.S. Naval Complex, Annapolis, Maryland. The solicitation provided that price and technical factors would be considered of equal importance, and that technical proposals would be evaluated in the areas of management capability and technical capability. Regarding management capability, the RFP sought information regarding the offerors' prior contract experience and the qualifications of the personnel proposed to fill certain positions. Specifically, regarding proposed personnel, the RFP required offerors to "[d]iscuss employee qualifications for the project manager, supervisor and any other on-site personnel down to and including first-line supervisors."

On or before the closing date, 11 offerors, including Phillips and DTHCS, submitted proposals. The technical evaluation committee (TEC) assessed both an adjectival rating and a relative, numerical ranking for each technical proposal.¹ DTHCS' and Phillips' technical proposals were both rated "exceptional"; of the 11 proposals, DTHCS' proposal was ranked first and Phillips's proposal was ranked second. Of the four technical proposals determined to be at least "acceptable," DTHCS' proposal offered the lowest price and Phillips's proposal offered the second lowest price.² Based on this evaluation, the agency selected DTHCS for award without conducting discussions and awarded the contract on June 3, 1993.

Although the Federal Acquisition Regulation (FAR) requires that the agency notify Phillips and the other unsuccessful offerors of DTHCS' selection prior to award,³ the agency

¹The TEC assigned adjectival ratings of "exceptional," "acceptable," "marginal," or "unacceptable," and relative, numerical ratings 1 through 11.

²The only proposal offering a price lower than those of DTHCS and Phillips was rated "unacceptable" and ranked 11th of the 11 proposals.

³Section 15.1001(b)(2) of the FAR requires that, in a small business set-aside, the contracting agency must inform each unsuccessful offeror in writing, prior to award, of the name and location of the apparent successful offeror, in order to permit challenges of the small business size status of that offeror. After receiving a timely size protest, the contracting officer must withhold award of the contract

(continued...)

failed to provide the required notice until June 21. Regarding this failure, the contracting officer has submitted a declaration stating: "The failure to give pre-award notification to the unsuccessful offerors was an oversight in my department."

On June 24, Phillips filed a size protest maintaining that DTHCS was not a small business due to its affiliation with other business entities, including DTH Construction Company and DTH Management Company, Ltd. In connection with the size protest, Phillips established, among other things that two of the three corporate directors for both DTH Construction Company and DTH Management Company, Ltd.-- Edward S. Turlington and Oscar N. Harris--collectively own 45 percent of the outstanding stock of DTHCS. In response to the size protest, Mr. Turlington and Mr. Harris each submitted an affidavit containing the following statement:

"I own 22.5 percent of the outstanding shares of stock of [DTHCS], but I am not involved in the day to day operations of that company. Those operations are handled entirely by Rhett A. Raynor, President of [DTHCS]. I do not participate in bid preparations, pre-award matters or the operations of contracts on a daily basis. Management decisions for [DTHCS] are left solely to Rhett A. Raynor."

DTHCS also submitted an affidavit from Rhett Raynor, DTHCS' president, containing the following representations:

"Although Oscar N. Harris and Edward S. Turlington are minority shareholders of [DTHCS], they are not involved in the management of the company. Management decisions are left solely to me.

"[DTHCS] denies any relationship with Oscar N. Harris and Edward S. Turlington, individually, except [in] their roles as minority shareholders of [DTHCS]."

The SBA concluded that DTHCS was not affiliated with either DTH Construction Company or DTH Management Company, Ltd., and that DTHCS qualified as a small business for purposes of

³(...continued)
until the SBA has made a size determination, or until 10 business days have elapsed, whichever occurs first. FAR § 19.302(h)(1).

this procurement. In its decision, the SBA specifically stated:

"[DTHCS] denies affiliation with DTHM and DTHC, . . . [DTHCS] states that it does not have any interest in the management . . . or operations of DTHM or DTHC."

DISCUSSION

Phillips first protests the agency's failure to provide preaward notice of DTHCS' selection, as required by FAR § 15.1001(b)(2). As noted above, the agency acknowledges that it failed to comply with the FAR in this regard. Nonetheless, the agency maintains that, because the SBA ultimately rejected Phillips's size protest, the agency's failure to comply with the FAR provides no basis for sustaining the protest. We agree. Where an agency fails to give the required notice, but the SBA ultimately denies the protester's challenge to the awardee's size status, the protester is not prejudiced by the lack of preaward notice. See, e.g., Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.⁵

Phillips next protests that, while DTHCS disassociated itself from its related companies for purposes of qualifying as a small business, DTHCS' proposal improperly claimed credit for experience gained under contracts performed by those entities.

In its initial response to Phillips's protest, the agency failed to discuss Phillips's allegation that claims made in DTHCS' proposal conflicted with DTHCS' asserted non-affiliation with other entities, including DTH Construction

⁵This decision was subsequently appealed to the SBA Office of Hearings and Appeals; that Office denied the appeal by decision dated August 27, 1993.

⁶To the extent Phillips is challenging the SBA's determination regarding DTHCS' size status, the Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.3(m)(2) (1993); Service Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. Thus, we will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of conducting federal procurements. Service Eng'g Co., supra; Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

Company and DTH Management Company, Ltd. Rather, the Navy merely responded to Phillips's complaint that the agency failed to comply with the FAR preaward notification requirements, asking that the protest be denied for lack of prejudice to Phillips. Upon receipt of the agency report, our Office requested that the agency respond to Phillips' allegations that DTHCS' proposal claimed contract experience based on contracts awarded to related companies with which DTHCS had disclaimed affiliation during the size protest. The agency responded by submitting DTHCS' proposal, the documents supporting the agency's evaluation of that proposal, and DTHCS' submissions under the size protest.⁶

Upon receipt of DTHCS' proposal and the evaluation documents, counsel for Phillips specifically asserted that, in response to the requirement to list contracts demonstrating prior experience, DTHCS' proposal improperly included a contract for maintenance of military housing in San Diego which had been awarded to DTH Management Group, a joint venture.

In response, counsel for DTHCS submitted documentation demonstrating that the joint venture which received award of the San Diego contract is comprised of EPD Enterprises, Inc., DTH Construction Company, Inc. and DTH Management Company, Ltd., and that EPD was responsible for managing that contract. DTHCS further explained that, in 1990, DTHCS entered into a management agreement with EPD under which DTHCS agreed to provide management services for EPD in connection with all of EPD's government contracts.⁷ Accordingly, DTHCS maintains that this contract was properly listed in its proposal as one the agency should consider in assessing DTHCS' experience with regard to its management capability.

The record shows that the agency evaluators contacted the administrative contracting officer responsible for the San Diego contract and discussed DTHCS' performance under that

⁶The documents were provided to counsel for Phillips under a protective order issued by this Office.

⁷DTHCS submitted the management agreement, executed on August 20, 1990, as part of the protest record. This agreement states that, due to the death of EDP's president in an automobile accident in March, 1990, DTHCS agreed to accept responsibility for the management of EDP's government contracts; specifically, the management agreement provided that DTHCS would contract for the purchase of goods, services, and personnel necessary to perform EDP's contracts.

contract. The evaluation worksheets state that DTHCS' management performance was "very good."

In this portion of its protest, Phillips is essentially arguing that the only entity that may properly list a prior contract for purposes of a past performance evaluation is the actual awardee. We disagree. Subcontractors and joint venturers perform various portions of contracts and, accordingly, may obtain experience useful in predicting success in future contract performance. George A. and Peter A. Palivos, B 245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286 (experience of a proposed subcontractor may be considered in determining whether an offeror meets a past performance requirement in a solicitation); see also Commercial Bldg. Serv., Inc., B-237865.2; B-237865.3, May 16, 1990, 90-1 CPD ¶ 473. Where an offeror was involved as a subcontractor or joint venturer in performing work under a prior contract similar to work to be included under another contract, such experience may properly be considered in assessing that offeror's past performance. Id. DTHCS was responsible for managing the performance of the San Diego contract. On this record, we find no basis to question the agency's consideration of DTHCS' prior performance under that contract in the evaluation of DTHCS' management capability.

After reviewing DTHCS' proposal, counsel for Phillips also asserts that the proposal contained representations regarding Mr. Harris' and Mr. Turlington's availability to assist in contract performance which conflict with the representations DTHCS made in defending against Phillips' size protest. Specifically, Phillips refers to the following statement in DTHCS' proposal:

"DTH Contract Services, Inc. possesses a wealth of experience through the corporate officers and staff. [DTHCS] is solely owned by five individuals; Rhett Raynor, Oscar N. Harris, Ed Turlington, Michael Hartley and H.F. Lauer. All of the owners possess in-depth experience in the field of Government Service Contracting. Our owners are fully dedicated to the successful operation of our contracts and the provision of superior service to the Government."

This statement was followed by a listing of various corporate personnel with descriptions of each one's qualifications, including the following:

"Mr. Oscar N. Harris, Stockholder, has been involved in Government Service Contracting for the past 20 years. Mr. Harris has extensive financial management and fiscal control expertise. He is a

Certified Public Accountant and is also involved in the construction, management and operation of residential apartment complexes.

"Mr. Edward Turlington, Stockholder, has extensive experience in the fields of development, construction and real estate. Mr. Turlington has been involved in the construction of over 1,000 homes and 21 apartment complexes. He has a wide range of knowledge and resources for all construction, maintenance, and repair related areas."

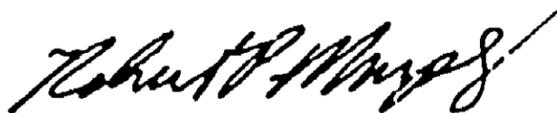
Phillips interprets this portion of DTHCS' proposal as a representation that Mr. Harris and Mr. Turlington would be substantially involved in contract performance; accordingly, Phillips asserts that DTHCS' proposal conflicts with the statements of Mr. Harris and Mr. Turlington, quoted above, that they are not involved in the day-to-day operations of DTHCS, and with the statement of DTHCS' president that "DTHCS denies any relationship with Oscar N. Harris and Edward S. Turlington, individually, except [in] their roles as minority shareholders of [DTHCS]." Phillips further notes that the agency evaluation of DTHCS' proposal refers to DTHCS' "highly qualified proposed on-site personnel," and concludes that the agency relied on DTHCS' alleged representations regarding Mr. Harris' and Mr. Turlington's involvement in contract performance during its evaluation of DTHCS' proposal.

We do not view the portions of DTHCS' proposal quoted above as inconsistent with the statements DTHCS made in response to Phillips' size protest. DTHCS' proposal made no representations regarding Mr. Harris' and Mr. Turlington's availability to actively participate in contract performance; rather, the proposal simply stated that, as stockholders, they are "fully dedicated to the successful operation of [DTHCS] contracts and the provision of superior service to the Government." One reasonable interpretation of this language is that the two stockholders, in exercising their roles as stockholders and, if they are also on the board of directors, as directors of the company, would act in ways beneficial to successful completion of the contract. Also, presumably, the two stockholders would be available as consultants to the management of the company if necessary. Thus, the proposal language does not conflict with either Mr. Harris' and Mr. Turlington's statements that they "[are] not involved in the day to day operations of [DTHCS]," or with Mr. Raynor's statement that "[DTHCS has no] relationship with Oscar N. Harris and Edward S. Turlington, individually, except [in] their roles as minority shareholders." On the contrary, DTHCS' proposal specifically identifies each individual as "Stockholder,"

thereby tracking Mr. Raynor's statement acknowledging that Mr. Harris and Mr. Turlington have a limited relationship with DTHCS as minority stockholders.

Further, it is clear that the agency's reference to DTHCS' highly qualified "on-site personnel" referred only to the particular personnel that were proposed as "on-site" management and supervisory personnel, and DTHCS' proposal certainly did not represent that Mr. Harris or Mr. Turlington would be performing in one of those positions. Accordingly, Phillips' assertion that DTHCS' proposal contained material misrepresentations regarding the availability of Mr. Harris and Mr. Turlington to assist in contract performance is unsupported by the record.

The protest is denied.



JFH James F. Hinchman
General Counsel