



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: U.S. Technology Corporation

File: B-278584

Date: February 17, 1998

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DIGEST

1. Protest challenging agency's evaluation of awardee's past performance is denied where the record shows that the evaluation was reasonable and consistent with the evaluation criteria set forth in the solicitation.

2. Award in best value procurement to firm whose lower-price proposal was rated lower than protester's proposal for past performance is unobjectionable, despite solicitation provision that past performance was to be considered more important than price, where solicitation did not provide for award on the basis of highest past performance rating, and agency reasonably concluded that paying the approximate [deleted]-percent price premium for the protester's higher-rated past performance was not warranted in light of the satisfactory past performance of the awardee and the awardee's substantially lower-proposed price.

DECISION

U.S. Technology Corporation (UST) protests the award of a contract to Composite Leasing Corporation (CLC) under request for proposals (RFP) No. N00140-97-R-1472, issued by the Department of the Navy, Fleet and Industrial Supply Center--Norfolk, Detachment Philadelphia, on behalf of the Naval Aviation Depot, Cherry Point, North Carolina, for the lease and recycling of plastic media blasting mesh, and the recycling of abrasive glass bead dust products, used in the removal of paint from Navy aircraft. UST, the incumbent contractor, protests the propriety of the agency's evaluation of the awardee's past performance, and the source selection authority's

determination that the protester's higher past performance rating was not worth the associated price premium.¹

We deny the protest.

The RFP provided that plastic media and glass bead dust products (containing residue plastic media or glass bead dust, and paint chips containing heavy metals including chromium, lead, and cadmium) are considered hazardous material which must be recycled in accordance with stated regulatory requirements, pursuant to 40 C.F.R. § 261.2(e) (1997). RFP Amendment No. 6 at 3, § C.1. The RFP stated that, in addition to the lease of plastic media meeting stated military specifications (*id.* at 4, § C.5.1), the government expected the contractor to eliminate hazardous waste from the paint removal site by recycling generated dust products. *Id.*, § C.2. The recycling of the dust products was to involve using those products as ingredients in an industrial process to make a new product (rendering inert the hazardous material)--which would exempt the dust products from characterization as hazardous waste. *Id.* at 7, § C.6.3.1. In order to be eligible for award, each offeror was required to submit with its proposal written approval from the cognizant environmental authority for the state of North Carolina (where the blasting media are to be used) and the state in which the recycling will be performed, demonstrating that the states had approved the offeror's recycling process as meeting requisite regulatory qualifications. *Id.* at 7 (definitive responsibility criteria).

The award of a firm, fixed-price, requirements-type contract, for a base year plus 2 option years, was contemplated. RFP at 33; RFP Amendment No. 6 at 2-3, § B. The RFP, as amended, provided that award would be made to the offeror determined to have submitted the most advantageous proposal, price and past performance considered, with past performance being "more important" than price. RFP Amendment No. 5 at 10, § M. Each offeror was to "describe its past performance on similar contracts it has held within the last five (5) years which are of similar scope, magnitude and complexity to that which is detailed in the RFP" *Id.* at 9, § L. Offerors were also advised of the following: that the agency would consider the quality of the past performance to assess the relative

¹An earlier contract awarded to CLC under the RFP was canceled, and the procurement reopened, after the agency amended the terms of the solicitation to provide for the recycling of glass bead dust products. That cancellation followed an agency-level protest filed by UST challenging the initial award to CLC on the basis of the awardee's alleged unfavorable contract performance history. Although CLC had responded in detail to UST's allegations, in light of the cancellation of the award on other grounds, the agency did not resolve UST's agency-level protest challenges to CLC's past performance. CLC's current protest relates to the agency's subsequent award to CLC under the RFP.

capability of the offeror to meet the requirements of the RFP; that the agency could obtain information about the offeror's prior contracts from any source; and that greater consideration was to be given to contracts which "the Government feels are most relevant to the RFP." Id. at 10-11, § M.

The contracting officer's representative surveyed six of CLC's past performance references regarding some of the firm's other plastic media lease and recycling contracts. Hearing Transcript (Tr.) at 24. Each reference contacted recommended CLC for award. Although three of those references noted a minor performance concern, they also reported that the problem was promptly cured by CLC, and that the firm's performance was in accordance with contract requirements. See Contract Review Board Presentation (Post-negotiation), Oct. 16, 1997 at 13. CLC's overall contract performance was rated as "satisfactory" or "acceptable" on five of the contracts, and "outstanding" on the sixth. Id.

In evaluating CLC's past performance, the contracting officer considered the six reference reports; the discussion of past performance in CLC's proposal; UST's earlier agency-level protest challenges to CLC's past performance; and CLC's attorney's detailed response to those allegations. Tr. at 24-27. With respect to UST's agency-level protest challenging the initial award to CLC, UST had provided letters from the U.S. Environmental Protection Agency (EPA) and a state of Utah environmental authority regarding the dust product processing portion of a blast media contract awarded in 1991 to CLC by Hill Air Force Base (AFB) based on a recycling process approved, at the time, by the state of Utah. These letters (dated in 1994, after completion of CLC's base contract, but prior to the remaining option period under the contract) explained that the EPA, which had recently reviewed the "recycling" process utilized under the Hill contract (which involved exportation of dust products to India for processing), had notified the Utah authority that the EPA considered the processing performed by CLC under the Hill contract to be reclamation, and not approved recycling.² The letter from the state of Utah to Hill AFB explained that due to this new interpretation of the process, Utah could no longer approve the process as recycling, as it had done several years earlier. CLC had addressed this Hill contract information in its proposal, and in its response to UST's agency-level protest, by explaining that, contrary to UST's contention, the contract had not been terminated; rather, CLC explained that the remaining option on that contract was not exercised after 2 years of "excellent performance," due

²Although "recycled" material is generally defined, at 40 C.F.R. § 261.1(c)(7), as including "reclaimed" material, the recycling here is to involve the use of the dust product hazardous materials as ingredients in an industrial process to make a product, so that the resulting materials are not solid waste, pursuant to 40 C.F.R. § 261.2(e)(1)(i). The protester points out that reclamation (processing of the hazardous material to recover a usable product (40 C.F.R. § 261.1(c)(4)) may not eliminate all hazardous waste, since hazardous process residues may remain.

solely to the subsequent EPA/Utah interpretation. See CLC proposal at 42; CLC's response to agency-level protest, Aug. 20, 1997 at 2-3.

The contracting officer took note of the age and scope of the Hill contract and concluded that less relevance would be attributed to that contract compared to more recent CLC contracts for similar services. The Hill contract was considered by the contracting officer to be materially distinguishable in scope from the current requirement because CLC's current recycling process, approved by the states of New York and North Carolina, does not involve the process used in the Hill contract--export of dust products to India for media recovery processing. Tr. at 27, 89, 99.³ In giving the contract less weight, the contracting officer, without contacting the Hill reference listed in the CLC proposal, chose to discount both the alleged strengths (as asserted by CLC in its proposal), and the alleged weaknesses (as asserted by UST) related to that contract in his evaluation of CLC's past performance. Tr. at 27-28.

The contracting officer, noting the quality of CLC's performance on the six contracts surveyed, while recognizing the lower dollar amount of those contracts, rated the CLC proposal satisfactory under the past performance criterion.⁴ UST's proposal received a rating of exceptional for past performance.⁵ Of the four proposals received under the RFP, CLC's proposal offered the lowest total price: \$1,110,550. UST's proposal offered the [deleted] total price: [deleted]. Finding that the [deleted]-percent price differential between the two proposals was "so great," given CLC's satisfactory past performance ratings and the limited risk related to

³CLC's current recycling process, initiated in 1995, involves a teaming arrangement with a tabletop manufacturer in New York State; the dust products are used for pigmentation in the production of tabletops.

⁴The following adjectival ratings were used in the evaluation of past performance: exceptional (little or no potential exists for disruption of schedule, increases in cost, or degradation of performance based on the offeror's past performance), satisfactory (some potential exists for disruption of schedule, increases in cost, or degradation of performance based on the offeror's past performance; marginal (significant potential exists for disruption of schedule, increases in cost, or degradation of performance based on the offeror's past performance); and neutral (no relevant past performance available for evaluation--proposal receives no merit or demerit for this factor). Contract Review Board Presentation (Post-negotiation) at 11-12.

⁵The contracting officer states that the difference in adjectival ratings between the two offers relates to the breadth and depth of experience shown by UST's proposal on larger dollar amount contracts, rather than any overall comparative quality of the performance by the contractors. Tr. at 33, 68.

offeror capability and performance in light of the states' approvals of CLC's recycling efforts, the contracting officer (the source selection authority for the procurement) determined that the protester's higher past performance rating was not worth the substantial price premium associated with it.⁶ Contract Review Board Presentation (Post-negotiation) at 16. CLC was determined to have submitted the most advantageous offer, and the agency awarded a contract to the firm on October 29, 1997. After a post-award debriefing, UST filed this protest.

UST contends that the agency unreasonably rated CLC's past performance as satisfactory; UST contends that CLC's past performance should have been found unacceptable and that the award should have been made to UST. UST specifically protests the agency's evaluation of CLC's past performance proposal regarding two prior CLC contracts: one at North Island Naval Air Station; and the one at Hill AFB, discussed in detail above.

In reviewing whether a proposal was properly evaluated, our Office will not reevaluate the proposal, as the determination of whether a proposal meets the contracting agency's needs is a matter within the agency's discretion. We will examine the record to determine whether the evaluators' judgments were reasonable and consistent with the stated evaluation criteria. Crown Clothing Corp., B-277505.2, Oct. 31, 1997, 97-2 CPD ¶ 127 at 3-4.

Regarding the North Island contract, UST alleges that the contract had been "terminated for cause" for CLC's failure to provide plastic media conforming to certain size and attrition rate specifications (allegedly resulting in additional cost to the agency). UST contends that, even though the contracting officer for the North Island contract reported that the contract had been terminated for the convenience of the government due to a change in specifications, the interview was incomplete and inadequate since that contracting officer, according to UST, should have been questioned about the actions being a no-cost termination. UST contends that the contracting officer here should have concluded that a no-cost termination suggested that a basis for terminating that contract for default could have existed, and that such a default basis (if present) could have served as a basis to lower CLC's past performance rating.

Our review of the record shows that UST's speculation in this regard provides insufficient basis to question the reasonableness of the challenged survey of the past performance reference for the North Island contract. The record shows that the North Island contracting officer reported that the termination for convenience was based upon a change in the agency's needs. That reference was specifically

⁶While the contracting officer used the [deleted]-percent figure, which converts the approximately [deleted] difference as a percentage of UST's price, it is true, as CLC notes, that UST's price is approximately [deleted] percent higher than CLC's.

asked about any performance problems under that contract, and absolutely no performance problem or concern was mentioned by the reference. In fact, the contracting officer on that contract attested that CLC met all contractual requirements and recommended CLC for the current award. Given the North Island contracting officer's clear explanation that the termination was a contract administration matter based on a change in requirements, without any suggestion that the contractor's performance of the contract had been in issue, as well as his unconditional positive recommendation of CLC, we do not find persuasive the protester's contention that the past performance survey of this reference was unreasonable or deficient for failure to ask about the no-cost terms of that termination.⁷

With regard to CLC's contract at Hill AFB, the protester contends that the evaluation of CLC's past performance was flawed because the contracting officer had a duty to contact the Hill contract reference listed in the CLC proposal to further investigate CLC's performance on that contract, since CLC emphasized that contract and its high dollar amount in its proposal. UST principally contends that because the contracting officer did not contact the Hill reference, even though the contracting officer knew that UST had previously challenged CLC's performance on that contract, the past performance evaluation was improper and the award determination cannot stand.

There is no legal requirement that all past performance references listed in an offeror's proposal be checked or included in a valid review of past performance.⁸ See Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8; Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407 at 3. Rather, what is critical is whether the evaluation is conducted fairly, reasonably, and in accordance with the stated evaluation criteria, and whether it is based upon relevant information sufficient to make a reasonable determination of the offeror's overall past performance rating, including relevant information close at hand or known by the contracting personnel awarding the contract. See, e.g., International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5. Given the circumstances here, discussed further below, especially in light of the substantial information already known to the contracting

⁷The contracting officer points out that the fact that the termination was at no cost to the government does not necessarily indicate that there was any performance problem, since the North Island contract was an indefinite quantity contract, and it is reasonable that, under such a contract, there would be no costs to be paid upon termination, since the agency would have already paid for the work performed to date. Tr. at 93-94, 101-102.

⁸As the agency points out, there is nothing in the current RFP that required the contracting officer to contact all references identified by the offerors in their past performance proposals. Tr. at 37.

officer about the challenged Hill contract, and his reasonable analysis of material differences between that contract and the current contract's dust product processing, we cannot find that the contracting officer acted unreasonably in not contacting the Hill reference.

First, the protester itself had provided to the contracting officer substantial substantive information (from the federal and state environmental authorities involved) regarding the facts surrounding the authorities' subsequent interpretation of the dust product processing method used under that contract. As stated above, those letters, which UST had alleged in its agency-level protest should serve as a basis to find its competitor's past performance unacceptable, convey that the EPA had recently found the material processing in India conducted under the Hill contract to be reclamation rather than recycling. Neither the letters nor UST's agency-level protest reasonably suggests (as UST now contends) that CLC had misrepresented the propriety of its proposed processing at the time it submitted its Hill proposal or performed that contract. Rather, in our view, the letters reasonably informed the contracting officer here that, although CLC had been approved to perform the Hill contract in a certain way, and had performed that contract as approved, the approving authority several years later changed its approval decision. We cannot see how this alone should have advised the contracting officer, as UST contends, that additional investigation of the matter was required.

Moreover, the RFP specifically provided that the contracting officer had the discretion to determine the degree of relevance of past performance information and to assign less weight to those contracts less relevant to the current contract. RFP Amendment No. 5 at 11, § M. Here, the contracting officer determined that the Hill contract warranted less weight in the CLC past performance evaluation because it was less relevant than other past performance information for CLC. The contracting officer's reasoning was based upon the time that had passed since that contract (where more recent contract information was available), as well as the fact that the Hill contract utilized a completely different process from that which has been used by CLC since 1995, and which was proposed and fully approved here. The contracting officer, in our opinion, acted reasonably in considering the substantial information he already had regarding the Hill contract, from which, we believe, he reasonably determined that the Hill contract was less relevant and worth less weight in the overall past performance evaluation. Given these circumstances, and in light of the unanimous recommendation of CLC by all six of the more recent contract references surveyed, we cannot find that the contracting officer acted unreasonably in determining not to contact the Hill reference for additional information.⁹ Tr. at 33. Our review of the record supports the reasonableness of

⁹We are not persuaded by UST's argument that the past performance surveys fail to support the contracting officer's evaluation because no reference specifically
(continued...)

the contracting officer's evaluation of CLC's past performance; the protest provides no basis to question the reasonableness of the satisfactory rating assigned.¹⁰

UST next protests the contracting officer's price/technical trade off that resulted in the selection of CLC for award.¹¹ Source selection officials have broad discretion to determine the manner and extent to which they will make use of the technical and price evaluation results in negotiated procurements. Grey Advertising, Inc., 55 Comp. Gen. 1111, 1119 (1976), 76-1 CPD ¶ 325 at 9. Price/past performance trade offs are permitted provided they are rational and consistent with the stated evaluation criteria. Dragon Servs. Inc., supra, at 12. Here, the source selection decision documentation notes that the CLC proposal received a satisfactory past performance rating, that UST's proposal received an exceptional past performance

⁹(...continued)

mentioned the recycling portion of each of the contracts. Each reference was specifically asked about the contractor's performance on each lease/recycling contract--the fact that no recycling problems were reported during the surveys, we believe, was reasonably interpreted by the contracting officer as indicative of satisfactory performance of the recycling portion of the contract, as well as the product lease portion of the contract.

¹⁰UST also protests that the contracting officer improperly failed to lower CLC's past performance rating based upon the [deleted]. UST, however, does not rebut the following reasonable bases put forth by the agency supporting the contracting officer's decision not to downgrade the CLC proposal in this area: two positive pre-award surveys had been conducted for CLC and its subcontractor since that time; and the [deleted] should not have an adverse effect on the award of other contracts to the firm.

¹¹In its protest, UST also challenges the adequacy of the agency's price analysis of the CLC proposal. Specifically, UST contends that, since the contracting officer knew that CLC is currently [deleted], the agency was required to adjust CLC's evaluated price to reflect a more realistic cost to the agency. CLC, however, did not take exception to the RFP specifications (including required product size and attrition rate), and the RFP did not require the type of cost realism analysis sought by UST. Rather, as appropriate for award of the fixed-price contract here, CLC's proposed price was determined to be reasonable after a comparison with the other offers received; two other offerors' prices were closer to CLC's low price than to UST's [deleted] price. See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366 at 6. [deleted] Tr. at 70-71, 81.

rating, and that past performance was more important than price. The source selection authority specifically determined that:

it is most advantageous to the Government to award this contract to [CLC]. [CLC] has performed satisfactorily on previous contracts and has offered a lower price than [UST]. Further, although [UST] has been rated higher on past performance, the price differential is so great ([deleted] %) that it would not be in the Government's best interest to displace the low offeror.

Contract Review Board Presentation (Post-negotiation) at 16. UST contends that the source selection decision language (particularly the use of the term "displace," which UST believes shows a predilection to award on the basis of low price) indicates that the agency failed to follow the stated evaluation scheme, which gave more importance to past performance, and did not conduct a proper price/technical trade off.

We cannot agree with the protester that the use of the term "displace" shows an improper application of the stated evaluation scheme or an improper trade off analysis. The contracting officer has explained that, despite his adoption of the contract negotiator's use of the "displace" language, the award was made on the basis of the contracting officer's determination of the proposal determined to offer the best overall value.¹² Tr. at 7, 77. Our review of the record supports the reasonableness of the contracting officer's position that, given the satisfactory past performance rating assigned to the CLC proposal, and a reasonable expectation of less performance risk in light of the RFP's requirements for state approval of the proposed recycling process, the agency could not justify spending approximately

¹²The contracting officer correctly points out that the RFP only provided that past performance was "more important" (rather than substantially or significantly more important). Tr. at 40. Here, given the large price difference and the contracting officer's determination of CLC's satisfactory past performance and demonstrated capability, the contracting officer chose not to award on the basis of the protester's higher past performance rating. For purposes of comparison, the contracting officer testified that on a recent procurement for similar services, where past performance was more important than price, the agency in fact awarded the contract to UST on the basis of its higher past performance rating, since in that case, the price differential between UST and CLC was only approximately [deleted] percent, much less than the significant price premium involved here. Tr. at 14-15.

[deleted] percent more for UST's exceptional past performance rating.¹³ Tr. at 32-33, 62. The protester's disagreement with the award determination does not show it to be unreasonable.

The protest is denied.

Comptroller General
of the United States

¹³We recognize, as the protester points out, that CLC's prior "recycling" process under the Hill contract was also "state-approved," and that the state approval was withdrawn several years after it was granted. We agree that this indicates that state approval at the time of award may not eliminate all performance risk. However, as with licensing requirements, in general, we believe it is reasonable to conclude, as the contracting officer has done here, that the state approval requirements of the RFP are directly related to lessening the performance risk associated with an award to the state-approved contractor.