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## Decision

**Matter of:** Phil Howry Company

**File:** B-291402.3; B-291402.4

**Date:** February 6, 2003

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Kathleen C. Little, Esq., and Robert J. Rothwell, Esq., Vinson & Elkins, for the protester.

Keith S. Francis, Esq., Department of the Army, and Laura Mann Eyester, Esq., and John Klein, Esq., Small Business Administration, for the agencies.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest sustained where agency effectively determined small business, which submitted sole proposal on section 8(a) set-aside, to be nonresponsible based solely on what amounted to pass/fail evaluation of the protester's past performance, without referring the matter to the Small Business Administration under certificate of competency procedures.

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### DECISION

Phil Howry Company (PHC) protests the United States Army Corps of Engineers' decision not to award PHC the contract under request for proposals (RFP) No. DACW64-02-R-0008 for construction of a health care facility at the Port Isabel Service Processing Center in Los Fresno, Texas, and the subsequent cancellation of the RFP.

We sustain the protests.

### BACKGROUND

The RFP was issued as a section 8(a) set-aside.<sup>1</sup> It provided for the award of a fixed-price contract to the "responsible bona fide 8(a) Offeror Region 6 whose

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes the Small Business Administration (SBA) to enter into contracts with government

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proposal, conforming to the Solicitation, is fair and reasonable, and has been determined to be the most advantageous to the Government, Past Performance, price, and other factors considered.” RFP § 00120 ¶ 7.0.

The RFP provided for three phases of evaluation: a proposal compliance review (to ensure that proposals met all pro forma requirements of the RFP), a quality evaluation (to evaluate past performance), and a price evaluation. RFP § 00120 ¶ 2.0. Past performance and price were of equal importance. RFP § 00120 ¶ 7.3. The sole “purpose” of the past performance evaluation was “to make an overall risk assessment of the Offeror’s ability to perform the work required by the Solicitation. . . . The assessment represents the evaluation team’s judgment of the probability of an Offeror successfully accomplishing the work required by the solicitation, based on the Offeror’s demonstrated past performance.” RFP § 00120 ¶ 2.2.2.1.1; see RFP § 00110 ¶ 2.2.3.2.

For past performance, offerors were required to “[p]rovide a list of at least five (5), but no more than ten (10), of the most relevant contracts performed for Government or commercial customers within the last 5 years involving construction of a 50-100 bed hospital or large clinic.” “Relevant” contracts were defined as “construction projects that would be considered similar in scope and magnitude to this project; vertical construction consisting of buildings with structural steel frame masonry exteriors and low slope single roofs, and within the range of \$5,000,000 to \$10,000,000.” RFP § 00110 ¶ 2.1.1(a).

Only one offeror, PHC, submitted a proposal. PHC’s proposed price of \$6,332,078 was approximately \$2 million less than the Government estimate of \$8,487,198. Agency Report (AR), Tab R, Memorandum for Record, at 2. However, PHC was not awarded the contract because its past performance was rated as “marginal/little confidence.” By letter dated September 11, 2002, the agency notified PHC that award would not be made to PHC. The letter explained that:

[PHC’s past performance information was for projects that were] significantly below the estimated range of \$5 to \$10 million for the cost of the work as set forth in Sec. 00110, Para. 2.1.1(a), . . . and did not involve medical construction. Based upon the foregoing, the technical evaluation panel determined that there is substantial doubt that your company will successfully perform the required work, and therefore, assessed the overall risk rating of marginal/little confidence. . . . Based

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agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. These subcontracts may be awarded on a competitive or noncompetitive basis.

on the above, the award of this project will not be made to your company.<sup>2</sup>

AR, Tab T, Agency Letter to Howry (Sept. 11, 2002).

On September 25, PHC filed a protest with this Office, primarily asserting that the rejection of its proposal constituted a de facto nonresponsibility determination, which must be referred to the Small Business Administration (SBA) under its certificate of competency (COC) procedures. The agency submitted a report responding to the protest, and the protester filed its comments on the report.<sup>3</sup> Thereafter, the agency canceled the RFP because “[o]nly one proposal was received and it was determined not to have met the technical evaluation factors set out in the [RFP].” Agency’s Cancellation Notice (Nov. 12, 2002). On November 25, PHC filed a timely supplemental protest challenging the cancellation.

By letter dated December 20, the agency provided additional information to “ensure that the General Accounting Office . . . is fully informed regarding the status of the solicitation and project,” although it stated that “the agency’s original decision to cancel the solicitation remains in effect.” This information concerned the agency’s stated intent to re-design and re-solicit the construction project. Agency’s Letter (Dec. 20, 2002) at 1.

On December 23, PHC challenged the reasonableness of this “new” apparent basis for the cancellation, which we docketed as a supplemental protest.<sup>4</sup> The agency filed a report on January 9, 2003, explaining that its December 20 letter was only an “informational letter” on the project status and that “the agency’s decision to cancel

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<sup>2</sup> During the course of evaluations, the agency held discussions with PHC and requested additional information concerning PHC’s proposed subcontractors. The “intent of requesting this additional information was to give the [evaluators] more confidence in [PHC’s] ability to construct a 50-100 bed hospital . . . to allow the offeror every opportunity to provide evidence of subcontracting capability.” PHC provided the requested information, as well as additional explanation concerning its experience (see AR, Tabs O-R), but the evaluators still remained doubtful over PHC’s ability to successfully perform the contract. Contracting Officer’s Statement ¶ 8.

<sup>3</sup> At the request of this Office, the SBA provided a number of submissions on the issues presented in the protests.

<sup>4</sup> In addition, we dismissed the initial protest and first supplemental protest because this “second cancellation notice may render these protests academic,” although we stated that “[a]ny issues raised during the preceding protests will be resolved as necessary to render a decision on this new protest.” B-291402, B-291402.2, Dec. 27, 2002. PHC has also filed a third supplemental protest asserting, for a different reason, that PHC was improperly being deprived of the award under the RFP.

the solicitation, as communicated in the Corps' 12 November 2002 letter, remained unchanged." Agency Supplemental Report (Jan. 9, 2003) at 2. The agency's report further confirmed that:

[t]he solicitation was cancelled in November 2002 solely for the reason stated in the 12 November 2002 letter from the Contracting Officer to [PHC]. His stated reason was "[o]nly one proposal was received and it was determined not to have met the technical evaluation factors set out in the Request for Proposals (RFP)." No further reason for the cancellation was being proffered in the 20 December letter.

Id. at 3.; see also id. at 4 ("agency did not offer the 20 December letter to the GAO as evidence in support of the cancellation"); id. at 5 ("sole basis for cancellation of the solicitation was that '[o]nly one proposal was received and it was determined not to have met the technical evaluation factors set out in the [RFP]"). Finally, the Corps explained the purpose of the December 20 "informational letter" was so that this Office could consider the project status issues in fashioning any "recommendation" in resolving the protests.<sup>5</sup> Id. at 3.

## ANALYSIS

As noted, PHC argues that the agency's decision not to award the contract to PHC, based solely on its evaluation of past performance, constitutes a de facto nonresponsibility determination, which must be referred to the SBA under its COC procedures.<sup>6</sup> The agency contends that it was merely performing a comparative "best value" evaluation and that PHC's proposal was not selected for award because it failed to meet the past performance requirements of the RFP, which is a "matter of relative merit, not nonresponsibility."<sup>7</sup> Contracting Officer's Statement ¶¶ 17, 18.

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<sup>5</sup> In its comments to the agency report on its supplemental protests, PHC also requested reconsideration of our earlier dismissal.

<sup>6</sup> PHC also challenges the agency's substantive analysis of its past performance, as well as that of its subcontractors, and contends that discussions concerning past performance were misleading and inadequate. Because these contentions are intertwined with the issue of responsibility, the determination of which rests with the SBA, we do not decide these remaining protest issues.

<sup>7</sup> The agency seeks dismissal of the protests because neither the SBA nor the protester took action under Federal Acquisition Regulation (FAR) § 19.602-2 to obtain a COC within 15 days of receiving notice from the agency, which the SBA and the protester interpret as a determination that PHC was not responsible. According to the agency, the SBA and protester were required to seek a COC regardless of whether the contracting officer referred the matter to the SBA and, because they failed to do so, the protester now lacks standing to raise this issue as a ground of

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Under the Small Business Act, agencies may not find a small business nonresponsible without referring the matter to the SBA, which has the ultimate authority to determine the responsibility of small businesses under its COC procedures. 15 U.S.C. § 637(b)(7) (2000); FAR Subpart 19.6; Federal Support Corp., B-245573, Jan. 16, 1992, 92-1 CPD ¶ 81 at 4. Past performance traditionally is considered a responsibility factor, that is, a matter relating to the offeror's ability to perform the contract. See FAR § 9.104-1(c); Sanford and Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266 at 2. Traditional responsibility factors may be used as technical evaluation factors in a negotiated procurement, but only when a comparative evaluation of those areas is to be made. See, e.g., Medical Info. Servs., B-287824, July 10, 2002, 2001 CPD ¶ 122 at 5; Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148 at 3. Comparative evaluation in this context means that competing proposals will be rated on a scale, relative to each other, as opposed to a pass/fail basis. Ducosort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38 at 6. We have cautioned that an agency may not find a small business nonresponsible under the guise of a relative assessment of responsibility-based technical factors in an attempt to avoid referral to the SBA. Federal Support Corp., *supra*, at 4; Sanford and Sons Co., *supra*, at 3. That appears to be what occurred here.

Here, the agency did not, and could not, perform a "comparative evaluation." The only technical evaluation factor, past performance, a traditional responsibility factor, was evaluated for the sole "purpose" of making an "assessment of the Offeror's ability to perform."<sup>8</sup> RFP § 00120 ¶ 2.2.2.1.1. As essentially conceded by the agency, PHC's proposal was rejected because PHC allegedly failed to meet the RFP requirements that the offeror have past performance experience in medical

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protest. We disagree. As noted by the SBA, FAR § 19.602-2 contemplates the agency first determine that a small business is not responsible before the COC procedures are invoked. Nothing in FAR Subpart 19.6 or the SBA's COC regulations require that the SBA or small business contractor seek a COC, where, as here, the agency denies that it is making a nonresponsibility determination. Nor do these provisions obviate the agency's absolute requirement to refer a determination of nonresponsibility to the SBA. See FAR § 19.602-1(a)(2) (upon determining that small business lacks elements of responsibility, contracting officer "shall" refer the matter to the SBA); 13 C.F.R. §§ 125.5(a)(2) and (c) (2002) (contracting officer "must" refer responsibility matters to SBA). Also, contrary to the agency's assertion, a small business contractor "may" file an application for a COC, but is not required to do so. 13 C.F.R. § 125.5(a)(3).

<sup>8</sup> In a supplemental brief, the agency argues that it compared PHC's proposal to the "examples of relevant experience and capabilities set forth in the RFP." Agency Supplemental Brief (Nov. 20, 2002) at 2. This argument is not supported by the RFP or any other aspect of the record.

construction on projects of 50 to 100 bed hospitals or large clinics valued at between \$5 and \$10 million. Because of this, past performance was clearly evaluated on a “pass/fail” basis. Under the circumstances, the agency’s rejection of PHC’s proposal amounted to a determination of nonresponsibility, which required referral to the SBA for a possible COC. See Federal Support Corp., *supra*, at 4 (protest sustained where “regardless of how the evaluation criteria was characterized in either the RFP or in the evaluation,” determination of technical unacceptability was nonresponsibility determination); Modern Sanitation Sys. Corp., B-245469, Jan. 2, 1992, 92-1 CPD ¶ 9 at 3 (technical unacceptability based on “go-no go” evaluation of responsibility criteria, without regard to how the rest of the proposal was judged, constitutes nonresponsibility determination that must be referred to the SBA); Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145 at 3 (same).

We also find unreasonable the agency’s basis for canceling the RFP, given that the November 12 cancellation notice provides the same reason as why the agency rejected PHC’s proposal.<sup>9</sup> Moreover, given the timing of the cancellation, which occurred only after receipt of the agency report and comments, it would appear that the agency may have canceled the solicitation in order to avoid referring this matter to the SBA. See Griffin Servs. Inc., B-237268.2 *et al.*, June 14, 1990, 90-1 CPD ¶ 558 at 3 (protest sustained where protester alleged cancellation was pretext to avoid SBA referral and there was no reasonable basis for agency’s cancellation of solicitation).

In light of the foregoing, we recommend that the agency rescind the cancellation and refer the matter to the SBA, in accordance with the SBA’s COC procedures, for a determination as to whether PHC is responsible to perform the contract. FAR Subpart 19.6. If the SBA issues a COC, we recommend that the agency award PHC the contract; or, if award of the contract is not appropriate (in light of the agency’s project status concerns<sup>10</sup>), then we recommend that the agency award PHC its

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<sup>9</sup> As set out above, the agency has repeatedly stated that it did not cancel the solicitation on the basis of the December 20 letter. Rather, the November 12 letter was the sole basis for cancellation.

<sup>10</sup> The agency’s concerns, as described in its December 20 letter, are that the work must be re-designed (to combine phases of construction) and re-solicited due to the delay occasioned by this protest. As noted by the SBA, there appears to be reason to question the validity of these concerns. Specifically, the agency has not provided any schedule analysis to support its allegations of delay, or to demonstrate how re-design will eliminate delay, rather than increase it. Indeed, the record reveals that, for the agency to re-design and re-solicit the project, it must still complete a number of time-consuming steps, including: (1) identify funding sources and obtain funding for the re-designed project; (2) obtain written approval from INS to proceed; (3) obtain (through competition) architectural and engineering services to re-design the project and have that work performed; (4) procure temporary facilities to relocate existing facilities; (5) develop, negotiate, and award a contract for the

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proposal preparation costs. Additionally, we find that PHC is entitled to its costs incurred in pursuing all four of its protests, including attorneys' fees. PHC should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Anthony H. Gamboa  
General Counsel

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demolition work to occur in advance of construction; and (6) develop, negotiate, and award a contract for the construction work. Agency Supplemental Report (Jan. 9, 2003), Tab N, Informational Paper, at 2. On the other hand, the SBA has indicated that it will probably require only a few weeks to decide on issuance of a COC. Thus, it is not clear how a re-design effort will save the agency time or lessen the cost impact of proceeding as originally anticipated, considering that PHC could immediately commence work if the SBA decides to issue a COC. Furthermore, the project and program documents provided by the agency appear inconsistent with the agency's arguments and reveal that phasing may still be contemplated under any new design, at least insofar as construction of the health care facility is concerned. See, e.g., id., Tab M, Architect/Engineer Memo Re: Construction Phases; id., Tab H, Dept. of Justice "Revised Program" Report Concerning Construction of INS Facilities, at 5.4 ("The Administration and Processing Facility will be constructed in phases following the Health Care Facility").