



Comptroller General  
of the United States

Washington, D.C. 20548

.1113

## Decision

**Matter of:** Espey Manufacturing & Electronics Corporation

**File:** B-254733.3

**Date:** March 8, 1994

Lawrence J. Sklute, Esq., for the protester.  
Melissa K. Erny, Esq., Department of the Navy, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency decision not to set aside a procurement for small business concerns, although previously a set-aside, was reasonable where the agency concluded, after consideration of relevant factors, including the procurement history and the relatively complex and technical nature of the item to be procured, and with the concurrence of the agency's small business specialist and the representative from the Small Business Administration, that it could not reasonably expect to receive proposals from at least two responsible small business offerors.

2. Where the solicitation provided that the agency's past quality performance rating, as determined under the agency's contractor evaluation system which rates firms based on past quality performance for specific commodities, is more important than price, but also stated that past quality performance would not be considered in evaluating firms which have no past quality performance rating because they are first-time offerors or have no current, up-to-date past quality performance, and that their offers would be evaluated solely on price, the agency properly awarded to the responsible firm with the lowest price which had no past quality performance rating.

### DECISION

Espey Manufacturing & Electronics Corporation protests the Department of the Navy's award of contract No. N00163-92-C-0186 for power supplies to TAAS Israel Industries Limited

c/o IMI Services USA (TAAS). Espey protests that the award to TAAS was not in accord with the evaluation scheme and that this procurement should have been a set-aside for small business concerns.

We deny the protest.

On June 15, 1993, the request for proposals (RFP) was issued on an unrestricted basis for 65 power supplies, first article and option quantities. The RFP's cover sheet contained a notice to offerors which stated that this procurement was part of the "Contractor Evaluation System, Red/Yellow/Green [R/Y/G] Program." The notice further stated that the award would be based on the contracting officer's decision as to which offer would provide the best value to the Navy, price, past quality performance, and other factors considered. The notice stated that details were contained in sections L and M of the RFP.

As stated in the RFP, the purpose of the R/Y/G program is to assist contracting personnel during source selection to determine the best value for the government, price, past quality performance, and other factors considered. The program uses accumulated contractor quality performance data and classifies performance as either red (high risk), yellow (moderate risk), or green (low risk), based on the degree of risk to the government of receiving poor quality products. First-time offerors, or offerors for which there is no current, up-to-date past quality performance information, are to be classified as "insufficient data" contractors.

Offerors were advised that although price would be of significance in determining the awardee, past quality performance on the proposed commodity, as classified under the R/Y/G program, would be "essentially more important." The R/Y/G classifications were described--a green (low risk) rating was to be given greater weight or value in the evaluation than a red (high risk) or a yellow (moderate risk) rating, and a yellow rating was to be given greater weight than a red rating. First-time offerors, or offerors for which current, up-to-date quality history was unavailable, would receive an insufficient data rating. These offerors were to be evaluated "solely on the basis of price and related factors. Past quality performance shall

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<sup>1</sup>On December 17, 1993, while the protest was pending with our Office, the protester filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief. Espey Manufacturing & Electronics Corporation v. United States, Civil Action 93-2579. The Court requested that our Office provide an advisory opinion on the issues raised by Espey.

not be a consideration in their evaluation." (Emphasis in original.) The price evaluation included both the basic and the option quantity prices.

The Navy previously set aside the procurement of these types of power supplies for small businesses. Specifically, Espey, at the time bidding as Saratoga Industries, a small business, was awarded the previous contract under the set-aside. However, prior to proceeding with this procurement, the Navy dissolved the set-aside because it had no reasonable expectation of finding two or more responsible small businesses capable of furnishing the items. The reasons for the agency's decision were that there was a lack of small business participation under the previous solicitations; the only other known small business firm was not considered capable due to contract performance problems; this current RFP required compliance with a higher-level of quality control under MIL-Q-9858, rather than MIL-I-45208; and other than Espey, there were no other small business firms known to comply with MIL-Q-9858.<sup>2</sup>

The decision to dissolve the set-aside was concurred in by both the agency's small business specialist (on May 13) and the Small Business Administration (SBA) representative (on May 14). On May 21, a notice was published in the Commerce Business Daily (CBD) announcing the issuance of an RFP for the power supplies on an unrestricted basis, that is, the notice stated that "all responsible sources may submit a proposal." From the time the synopsis was published in the CBD, the contract negotiator responded to requests for the RFP. She began preparing a bidder's list which included the firms which requested the RFP. The final list was not compiled until early August 1993. Twenty-seven out of the approximately 50 firms which requested the RFP indicated they were small businesses. Twenty-six of these firms responded prior to the actual issuance of the RFP on June 15. At least two firms stated they were capable of meeting MIL-Q-9858.

Five offerors, including Espey and TAAS, a large business, responded to the RFP on the August 13 closing date, and two

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<sup>2</sup>MIL-I-45208 provides for an end product inspection quality system where defective parts are sorted from the satisfactory parts. MIL-Q-9858 envisions a preventative quality system in which the manufacturing operations are controlled to prevent the production of defective parts. Paragraph 1.5 of MIL-Q-9858 states that the system's requirements exceed those of MIL-I-45208 in that "total conformance to contract requirements is obtained best by controlling work operations, manufacturing processes as well as inspections and tests."

other firms besides Espey identified themselves as small businesses. One other firm was rejected for not furnishing a required price.

The contract negotiator obtained the R/Y/G ratings for this item. Espey was rated green (low risk); the agency had no ratings for the remaining offerors. The contract negotiator spoke with the agency coordinator for the program who advised her that these firms had an insufficient data classification. Espey's total price, including option quantities and without first article, was significantly higher than TAAS's price, including option quantities and with first article. The contract negotiator, although aware of TAAS's insufficient data classification, gave TAAS a green rating for past performance and price on the evaluation worksheet. TAAS was ranked first on this worksheet. In contrast, Espey received a green rating for past performance and a red rating for price.

Based on information concerning TAAS provided by another Defense Department activity, TAAS was found responsible. The contract negotiator discussed her evaluation results with the contracting officer. She advised the contracting officer that TAAS and two other offerors had insufficient data classifications, but that TAAS was ranked first based on its price. The contracting officer awarded the contract to TAAS on August 13. He stated in his business clearance memorandum that "[t]he red/yellow/green evaluation factors were applied, but did not displace the low offeror, TAAS Israel. (The other offerors were all rated green for technical and red for price, therefore, the R/Y/G evaluation changed nothing)." This protest followed.

Espey argues that the Navy's decision not to restrict competition to small business concerns was unreasonable and violated applicable regulations. Espey primarily relies on the fact that the majority of the firms which requested solicitations were small businesses and that at least two firms stated they were capable of meeting the more stringent quality requirements of MIL-Q-9858. Espey also points out that the Navy received three small business offers.

An acquisition is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). An agency is also required to continue setting aside acquisitions for a particular product or service where it has previously been the subject of a successful set-aside and where agency regulations so require, unless the contracting officer determines that there is not a reasonable

expectation of receiving offers from at least two responsible small businesses at fair market prices. FAR § 19.501(g); Defense FAR Supplement § 219.501(g). That determination itself must be reasonable. Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 259. In this regard, a contracting officer must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work. Stav, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

Initially, we think that Espey places too much emphasis on the responses to the CBD notice which were received after the set-aside was dissolved. The regulations do not require the contracting officer to amend or cancel the solicitation after subsequently learning of interested, responsible small businesses, provided that he or she conducted a reasonable investigation regarding the possibility of two or more responsible small businesses competing for the procurement. State Mgmt. Servs., Inc., B-252312, June 21, 1993, 93-1 CPD ¶ 474; EKW, Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270. In our view, the critical issue is whether or not the Navy performed a reasonable investigation of the small business availability to perform the contract before dissolving the set-aside. We think the agency acted reasonably.

The record shows that the contracting officer based his decision on the results of the previous procurements for this item, the capabilities of the two known sources, and the increased quality control requirements under this RFP. More specifically, under the most recent procurement for this item during 1990 (which was a set-aside), only one source, Espey, was found capable of actually performing the work required under the contract. The record shows that the agency found seven other small business firms under the previous solicitation technically unacceptable. Further, the only other previous supplier of the power supplies, Associated Aircraft, was not qualified for the new quality control specification. Also, Associated had significant past performance problems, including high item rejection rates under its contract for this item. Under the 1990 solicitation, Associated submitted prices, but no technical proposal to show how it would perform the work.

Further, as Espey acknowledges, these power supplies are sensitive and complex electronic avionic devices which provide high voltage to charge and to arm bombs and missile fuses, and to activate sensing devices on the Navy's FA-18 fighter plane. Espey states that "manufacture of these power supplies requires a high degree of technical capability" and asserts that "reliability and quality are essential in the power supply. . . ." Espey further

recognizes that the Navy has increased the quality control requirements for this item by including military specification MIL-Q-9858 in this RFP. The Navy's purpose was to ensure that it received a highly reliable item. In light of the complexity and nature of the item, which resulted in the Navy requiring a more demanding quality control military specification, and the agency's past experience with the small businesses competing for this requirement, we think the contracting officer reasonably concluded that there was a need for a contractor with expertise and resources not usually available to small business concerns. State Mgmt. Servs., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 375.

In addition, the contracting officer obtained the concurrence of the agency's small business specialist and the SBA representative that this procurement should not be set aside for small businesses. These officials are charged with the responsibility of representing small business interests. See FAR § 19.402. The SBA's concurrence is generally given weight in determining whether a contracting officer's decision was reasonable. State Mgmt. Servs., Inc., supra.

Based on the procurement history of this item, the capabilities of the known sources, the nature and complexity of the item, including the use of a more demanding quality control specification, and in light of the concurrence of the agency's small business specialist and the SBA representative, we think the contracting officer reasonably determined not to set aside this acquisition.

Espey also argues that the award to TAAS was unreasonable and inconsistent with the RFP evaluation scheme. Specifically, Espey argues that the RFP provided that past quality performance would be considered more important than price. While Espey was higher-priced than TAAS, Espey was rated low risk on past quality performance compared to TAAS's unknown past quality performance. Since past quality performance was to be considered more important than price, Espey argues that under a best value analysis, award to TAAS based solely on price was improper.

The agency argues that its award was consistent with the evaluation scheme and that Espey has selectively cited the RFP evaluation language to support its position that the award was improper.

Evaluation and award in negotiated procurements are required to be made in accordance with the terms of the RFP. NITCO, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212. As stated above, the RFP language controlling the evaluation was contained in the description of the Contractor Evaluation System in section M. While we agree that the RFP stated that past

quality performance would be considered more important than price, it also explained how the past quality performance would be evaluated under the R/Y/G program.<sup>1</sup> In this connection, under the RFP, a green rating was to be given greater weight in the evaluation only when compared to a red or a yellow rating. For firms with insufficient data to ascertain a past quality performance rating, identified as first-time offerors or offerors for which current, up-to-date information was not available, the RFP stated that these offerors would be evaluated "solely on the basis of price," and that past quality performance would not be a consideration in their evaluation.

Since TAAS had an insufficient data classification, under this RFP, the agency was required to compare TAAS's price to Espey's price. Stated differently, Espey's green rating was not to be given greater weight in the evaluation when compared to an offeror like TAAS with the insufficient data rating.<sup>2</sup> While the contract negotiator assigned TAAS a green rating instead of an insufficient data rating for its past quality performance, we think the green rating given to TAAS essentially was irrelevant for evaluation purposes. The comparison between Espey and TAAS was to be based on price and was consistent with the evaluation method. We are

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<sup>1</sup>Past quality performance was the only technical factor under this RFP.

<sup>2</sup>The Navy indicates that the R/Y/G program is not intended to be a bar to competition and so does not penalize new firms or firms with no performance experience with a particular item. Thus, it provides for considering past quality performance only where the competing firm has a green, red, or yellow rating.

aware of nothing in the RFP which prohibited awarding to TAAS based on its lower price. Accordingly, the award to TAAS is not objectionable.

The protest is denied.

*Robert P. Murphy*  
Robert P. Murphy  
for Acting General Counsel

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<sup>3</sup>Espey argues that a best value determination requires that the agency weigh its low risk green rating against an offeror with an insufficient performance history, especially where the item solicited is a complex item important to the aircraft and pilot. The short answer is that the RFP award methodology did not require this type of analysis--award to the low, technically acceptable offeror was consistent with the RFP. The agency has broad discretion in choosing the evaluation factors to apply to the acquisition and the weights that should be applied to those factors. See FAR § 15.605(b); U.S. Defense Sys., B-251544 et al., Mar. 30, 1993, 93-1 CPD ¶ 279.