

December 7, 2001

P.S. Protest No. 01-13

SKYLINE CONTAINER CORPORATION

Solicitation No. 475630-01-A-0201

DIGEST

Protest of award of contract for corrugated boxes is denied. Award was properly made on the basis of price when competing offers were evaluated as equal; protester's contentions did not require raising its score or reducing awardee's score; awardee's failure to propose on FOB destination basis did not preclude consideration of its FOB origin offer; other grounds of protest also lacked merit.

DECISION

Skyline Container Corporation protests its failure to receive award of a contract for corrugated boxes under solicitation 475630-01-A-0201.

Solicitation -0201 was issued July 27, 2001, by the Memphis, TN, Purchasing and Materials Service Center (P&MSC), seeking six sizes of boxes to transport parcels and bundles in mail processing operations, on a requirements basis.¹ The total annual estimated quantity was in excess of 5 million boxes. The contract term was to be five years, with an option for an additional five years; during the contract term, the contract price was to be adjusted twice annually based on an index price for linerboard. Delivery points were identified as post offices within the Postal Service's eight geographic areas, and area-by-area estimated quantities were identified.

Paragraph 1.1 of the solicitation included the following:

This solicitation is for Direct Vendor Delivery to individual post offices located in the eight Postal Areas listed in Attachment 2. *Prices will be evaluated on a FOB Destination and FOB Origin basis.* Award will be made on the basis that is most advantageous to the Postal Service. [Emphasis added.]

¹ The boxes shared a common "footprint," 47" by 39"; they differed in height (from 30" to 60") and in construction (most of the boxes were double-walled, but the 32" height was triple-walled).

Paragraph 3.5 of the solicitation included the following:

3.5 EVALUATION – COMMERCIAL ITEMS (Provision 4-2) (January 1997)

The Postal Service will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Postal Service, price and other factors considered. The following factors shall be used to evaluate offers:

<u>Number</u>	<u>Evaluation Factor</u>
1.	PAST PERFORMANCE
2.	ABILITY TO CONDUCT ELECTRONIC BUSINESS

Proposal specific and supplier specific performance evaluation factors, when combined, are slightly more important than price.

Attachment 3, page 1, was entitled “FOB DESTINATION PRICES FOR ALL AREAS.” Attachment 3, page 2, was entitled “FOB ORIGIN PRICES FOR ALL AREAS.” Each provided space for the following entries:

PRICE PER THOUSAND	UNIT PRICE PER THOUSAND	TOTAL EST ANNUAL COST	PRICE PER TL ⁽²⁾	NO. BOXES PER TL	UNIT PRICE PER TL	TOTAL EST ANNUAL COST
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Pages 3 and 4 of Attachment 3 provided space for the identification of a shipping point and a weight per thousand for each box size to be sent to each destination area.

Solicitations were provided to a pre-qualified list of suppliers.³ Offers were due by July 11. Four offerors submitted proposals, including Skyline and Smurfit-Stone Container Corp. (Smurfit).

Each of the two evaluation criteria was scored on a ten point scale. Skyline received 8 points for past performance, while Smurfit received 9 points. Skyline was advised at its debriefing that Smurfit received one more point than Skyline because it had provided boxes to four postal areas under its immediately previous contract, while Skyline had provided boxes to two postal areas.⁴ Both of these offerors received 9 points for their

² “TL “ stands for “truckload.”

³ Purchasing Manual (PM) 3.5.2.b states:

Prequalified suppliers are firms or individuals whose record of performance in the marketplace (commercial or government or both) has demonstrated their ability to perform to consistently high standards of quality and reliability.

⁴ The previous awards were the consequence of solicitation 475630-00-A-0180 which the Memphis P&MSC had issued in the summer of 2000. Various aspects of that purchase are described in *Liberty Diversified Industries*, P.S. Protest No. 00-23, January 22, 2001. Prior to solicitation A-0180, corrugated containers were purchased under local contracts.

ability to conduct electronic business. The contracting officer characterizes the two offerors' technical scores as "essentially equal."

Skyline proposed on both origin and destination bases; as evaluated, its FOB origin prices, plus freight as calculated by the Postal Service, was about \$23.23 million, which was about \$1 million less than its FOB destination prices. Smurfit proposed only on an FOB origin basis; its price, plus freight as calculated by the Postal Service, was about \$22.34 million, almost \$900,000 less than Skyline's price.

In reviewing Smurfit's prices, the evaluators noticed that its offered price for one of the line items, the 32" triple-walled container, was higher than the price currently being paid for that container in the area which it was used the most.⁵ This discrepancy was called to Smurfit's attention, and it submitted a revised unit price for the item. Its total estimated price, as revised, including freight, became about \$21.95 million.

Award was made to Smurfit on August 20, and Skyline was advised of the award by letter of that date.⁶ Skyline timely requested a debriefing, which was held on August 27. Skyline's protest was received on September 6.

The protest makes the following contentions:

- The discussions leading to Smurfit's reduction of its price for the triple-walled container constituted an improper auction which caused Smurfit to lower its price to Skyline's prior price.⁷ It was improper to allow Smurfit to lower its price without allowing Skyline to do so.

⁵ The solicitation identified the Southwest Area as requiring 306,611 of the containers annually. Four other areas required a total of only 36,318 containers.

⁶ The letter included the following:

Smurfit Stone has a satisfactory record of past performance, is currently doing business with the Postal Service via EDI and offered the lowest price. The evaluation scheme provided that the performance factors were slightly more important than price.

While the latter sentence is an accurate summary of the solicitation's evaluation scheme, it does not "disclose the actual basis of the award," as PM 4.2.7. b. requires. A description which met that requirement might have been stated: "Award was made on the basis of price to the lowest price offeror, when the two lowest-priced offerors proposals were evaluated as essentially equal."

⁷ The protester supports this contention with the following quotation:

Suppliers may not be told how to correct weaknesses. However, they may be told specifically what the requirements are and what is necessary and desirable to fulfill them. The source selection process is a competition; all suppliers must be treated fairly and objectively. Therefore, purchase teams may not (1) coach a supplier to help it bring its proposal up to the level of competing suppliers' proposals, and (2) give a supplier information from another proposal. In addition, auctioning may not be engaged in. For example,

(Footnote continued on next page.)

- Offers were improperly evaluated on the basis of the lowest published GSA freight rates, instead of on an average of those rates as the Postal Service previously had done. The lowest published rate “is rarely available” and it is improper to calculate delivered costs on artificially low rates.
- The technical evaluation of the offers was improper. Skyline’s score should have been “materially raised,” and Smurfit’s score should have been “materially lowered.”

In support of the contention that its score should have been raised, Skyline points to various circumstances of its past contract performance, such as its “on-time deliveries [being] approximately 99+%” and its “Award of Excellence” from the Small Business Administration “for servicing the US Postal Service,” and a number of instances in which it “bailed out” various postal facilities by supplying them containers when other suppliers were unable to make required deliveries. In five of the cited instances,⁸ the other supplier is identified as Smurfit. The protester contends that it was improper for the evaluators to ignore “the head-on instances where Skyline was asked to resolve . . . failure of Smurfit Stone to deliver.”

- The Postal Service should have considered “evidence of anti-trust violations with respect to assessing the past performance and capability of Smurfit Stone.”⁹ Ac-

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you cannot tell a supplier that a competitor’s price is lower than its price. Let the market-place and competitive pressure run its course. However, suppliers should be told if their pricing is high and why it is considered so.

The protester states, incorrectly, that this text is from 4.3.5 of the Purchasing Manual. Instead, it is from section 4.3.5 of Handbook P-1, General Purchasing Concepts and Practices, March 31, 1999, a document which, by its terms, “is not a policy document, and unlike the Postal Service Purchasing Manual (PM), does not have the force and effect of law.” Handbook P-1, 1.1.2.

⁸ The instances are said to involve the St. Louis Annex in November and December, 2000; Bedford Park, IL (“9 truckloads over the past year”); Carole Stream, IL, (“once over the past year”); Chicago BMC at Christmas, 1999; and Indianapolis, IN, at Christmas, 1999.

⁹ Smurfit’s website includes the following description of the company:

Smurfit-Stone Container Corporation (Nasdaq: SSCC) is the world's largest integrated producer of paperboard and paper-based packaging products. The company was formed November 18, 1998, as a result of the merger between Jefferson Smurfit Corporation (JSC) and Stone Container Corporation.

Attachments to the protest and inquiry disclose that in 1993, a time of depressed prices in the linerboard industry attributed to excess capacity, Stone Container Corp.) engaged in actions which the Federal Trade Commission subsequently charged, in a May, 1998, complaint, “constitute[d] an invitation by Stone Container to its competitors to join a coordinate price increase. The invitation, if accepted, was likely to result in higher prices, reduced output, and injury to customers. The acts and practices of Stone Container were undertaken with anticompetitive intent and without an independent legitimate business rea-

(Footnote continued on next page.)

ording to the protester, the shutdown of facilities as alleged “would impact an assessment of [Smurfit’s] ‘capability’ and ‘past performance’ with respect to [its] ability to deliver.”¹⁰

- “The method of using distribution points does not reveal true costs. . . . For example, in the Rocky Mountain region, . . . shipments from Skyline . . . will result in a lower cost compared to Smurfit Stone, who does not have the same capacity and capability within that region”¹¹
- The evaluation failed “to give proper credit to Skyline as a women-owned small business” or to evaluate as a factor “participation by women-owned or small businesses. . . . [T]he Postal Service did not evaluate . . . Smurfit Stone’s failure to adhere” to the solicitation requirement that large businesses “submit a subcontracting plan that is specific to this contract . . . that . . . addresses subcontracting with small, minority, and woman-owned businesses.”
- “The solicitation and procurement required that an Offeror must use a GSA published freight carrier. Upon information and belief, Smurfit Stone is [improperly]

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son. . . . The acts and practices alleged . . . constitute[d] unfair methods of competition . . . in violation of . . . 15 U.S.C. § 45.” As is not uncommon in FTC antitrust proceedings, Stone Container “executed an agreement containing a consent order, an admission . . . of all the jurisdictional facts . . . , a statement that the . . . agreement is for settlement purposes only and does not constitute an admission . . . that the law has been violated as alleged” and was ordered not to engage in inappropriate action with respect to the raising, fixing, or stabilizing of linerboard prices.

¹⁰ The protester cites *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001) as establishing the standard under which a contracting officer’s determination of an offeror’s capability should be reviewed. *Garufi* discussed the scope of the Court of Federal Claims’ review in a protest arising under the Administrative Dispute Resolution Act of 1996 (“ADRA”). Noting that under ADRA, the standards of 5 U.S.C. § 706 of the Administrative Procedures Act (“APA”) applied to the review, the court rejected the government’s view that “absent allegations of fraud and bad faith by the contracting officer, the responsibility determination of the contracting officer is immune from judicial review” (internal quotation omitted). Instead, the court stated that “the award may be set aside if either: (1) the procurement official’s decision lacked a rational basis or (2) the procurement procedure involved a [clear and prejudicial] violation of regulation or procedure.” Noting that this office’s precedent (citing specifically *W.W. Fry and Son, Inc.*, P.S. Protest No. 99-28, February 1, 2000, which cites an earlier decision describing the standard as “well established”) had applied to determinations of capability (equivalent to determinations of responsibility) a standard similar to that rejected by the *Garufi* court, the protester contends that the APA standard elaborated in *Garufi* must be applied here.

¹¹ The protest recites, correctly, that this ground of protest, “raised after the Offers have gone in, could be considered untimely. . . .” Cf. PM 3.6.4.b., “Protests based upon alleged improprieties in a solicitation that are apparent before the date set for the receipt of initial proposals must be received before the time set for the receipt of proposals.” Since we lack jurisdiction to resolve untimely protests, this ground for protest may be summarily dismissed without further discussion herein.

using an in-house carrier. . . . This also affects their freight costs since it would materially raise the freight cost which was not properly . . . evaluated.”

- Smurfit unfairly utilized its knowledge of the linerboard market (and an impending drop in linerboard prices) in establishing its prices. On July 12, the Postal Service requested pricing information from Skyline with respect to an exercise of an option under Skyline’s existing contracts in two areas. Unaware of an impending decrease in linerboard prices, Skyline did not adjust its prices. About a week later, Skyline learned of the decrease.
- The evaluation of freight costs “was skewed” because Skyline had been told “it should use 48-foot trucks while apparently Stone used 53-foot trucks.” Evaluation based on the differing assumptions of the offerors violates the tenet that the competition be “based on the same premises.”

The contracting officer’s statement responding to the protest includes the following points:

- The discussions with Smurfit raised “a legitimate pricing issue” with “the apparently successful offeror.” Such negotiations are allowed by PM 4.2.5.c(3)(d), and did not change the best value rationale nor affect the basis for Smurfit’s selection. That discussions were held with Smurfit did not require discussions with Skyline (citing PM 4.2.5.c(3)(b)); Skyline could have revised its offer at any time prior to contract award.
- Whether the freight evaluation was accomplished in the same manner as in previous solicitations is not material; the manner of the evaluation was not discussed with any offeror, so Skyline could not have been misled. Since both offerors’ freight costs were evaluated in the same manner, it provided no advantage to Smurfit or “in any other way changed the results of the evaluation.”
- The evaluation of Smurfit’s technical capability is an affirmative determination of its capability which is not subject to challenge absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria (citing *W.W. Fry*).¹² Skyline’s list of superior performance “is a one-sided view of overall supplier performance”; Skyline cannot know Smurfit’s overall past performance. The evaluators used the best information available to evaluate performance, but couldn’t track performance prior to the first nationwide contract. In any event, the evaluators “did not find Skyline’s performance to be lacking.” The contracting officer finds the two offers to be “of essentially equal value”: “Even if Skyline had received a cou-

¹² The contracting officer argues that the *Garufi* standard is not relevant because this “office does not review protests under the ADRA, and, therefore, [is] not bound by the standards of review required by that statute.”

ple of more points for its technical proposal, and Smurfit had received a couple fewer points, the technical scores would have been essentially equal and award properly made to Smurfit based on its lower evaluated price.”

- Issues about Stone Container’s antitrust violation “are not relevant to the determination of capability of Smurfit” because they involve a different entity whose activities cannot be attributed to Smurfit, the actions occurred so long ago that they “cannot serve to diminish Smurfit’s [present] capability,” and the settlement of an FTC complaint, in the absence of a conviction or judgment, is not “hard evidence” of an antitrust violation.
- There is no requirement to afford woman-owned businesses a priority in evaluation; postal policy is only to afford them an opportunity to participate. Smurfit, as a large business, was required to submit a satisfactory small, minority, and women-owned business subcontracting plan, and did so.
- The solicitation did not require offerors to use freight carriers with GSA published rates; Smurfit’s use of an “in-house” carrier is permissible, and did not affect its evaluation, which applied published “outside” rates.
- The information about linerboard prices of which Skyline complains was available to it a month before contract award; the solicitation allowed the revision of proposals at any time. Skyline did not inquire about making such a revision or submit one. Smurfit’s knowledge of the linerboard market created no impropriety.
- Neither the contracting officer nor his subordinates advised Skyline that it must use 48’ trailers; its decision to do so was its own responsibility. Calculations suggest, however, that any difference arising out of trailer size would have reduced the difference between the offeror’s prices by about 10%, leaving Smurfit’s price sufficiently lower to warrant its award.

In response to the protester’s specific request for Smurfit’s “as delivered, freight prices, [and] destination charges,” by letter of October 11 the purchasing team leader advised explicitly “Smurfit-Stone Container only provided FOB origin pricing in their proposal,” adding “[t]he solicitation did not require offerors to submit . . . both FOB destination and FOB origin [proposals], but [if Smurfit submitted on only an FOB origin basis], it took the risk that award could be made on the FOB basis on which it did not propose,” and “any protest regarding whether the solicitation required offerors to bid [*sic*] on both [bases] would be untimely”

Following receipt of the October 11 letter, the protester promptly submitted an “amended protest” contending that the solicitation’s statement that prices would be evaluated on both FOB destination and origin bases “requires that an evaluation be made using both prices.” Despite several requests, the contracting officer had failed to provide Skyline with Smurfit’s delivered prices, and upon receipt of the explicit advice

that it had not proposed on that basis this aspect of the protest should be considered timely.¹³

Three days after its amended protest, the protester submitted extensive and poorly organized comments on the contracting officer's report. We summarize the gist of those comments as follows:

- Smurfit's failure to provide destination pricing was "a material omission" which "under the doctrine of responsiveness" requires the rejection of its offer. The solicitation included a mandatory requirement for FOB origin pricing and the Postal Service's contention that there was no prejudice from the omission is illogical; the evaluation of FOB destination prices uses "artificial prices" for the freight; the omission of FOB origin prices precludes the Postal Service from considering a possibly advantageous alternative.
- The prohibition against auctions at PM 4.3.5 (*sic*, see footnote 3, *supra*) was violated when Skyline's price for the triple-walled containers was disclosed. Notwithstanding the Postal Service's contention that it may have discussions with only one offeror, doing so violated the requirement "that 'all suppliers must be treated fairly and equally'" (Handbook P-1 at 4.3.5).
- The raising of Skyline's score or the lowering of Smurfit's score, even one or two points, require a reevaluation of the offers under the solicitation's best value criteria. Smurfit's score should be materially lower because of "multiple documented deficiencies" in its recent past performance.¹⁴ It was unreasonable for the Postal Service not to consider this information about Skyline's past performance which was in the possession of its own personnel. Skyline's score should be increased because in its past performance it "had a larger gross dollar value of [P]ostal [S]ervice orders in terms of quantity, scope different delivery points and dollars, than Smurfit." Skyline improperly received one less point than Smurfit because

¹³ In a separate letter of even date with its amended protest, the protester asserts that its concerns about Smurfit's lack of FOB destination pricing was initially raised at point 8 and the first of two points numbered 9 in its initial submission. Point 8 was its objection that Smurfit was using an in-house, rather than a GSA-published freight carrier; point 9 asserted that "[t]his also affects their [*i.e.*, Smurfit's] freight costs since it would materially raise the freight cost which was not properly then evaluated."

¹⁴ Attachment A-1 to the protester's submission is a listing of instances that postal installations ordered containers from Skyline while on contract with Smurfit or its predecessor, Stone Container (or, in one instance with regard to Denver, CO, said to involve 3 orders (14 truckloads) placed on November 23, 1999, Deline). The list includes eight postal facilities and a total of 91 truckloads delivered in the following years: 1998, 2; 1999, 26; 2000, 53; 2001, 10. The attachment also includes five responses received from postal facilities to a September, 2001, Skyline request to rate it and Smurfit on four factors, and two responses to Skyline's "Customer Satisfaction Surveys" in June, 2001. All rated Skyline highly; those which rated Smurfit rated it less highly than Skyline.

the Postal Service thought it had only two regions and without considering its Menlo contract.¹⁵

- The record accompanying the contracting officer’s report provides no basis for the conclusion that the two offers were essentially equal. In the absence of such evidence, there must either be a new evaluation or a hearing to allow the protest adjudicator to resolve the issue. In making that determination, the contemporaneous record should be afforded more weight than arguments made in the subsequent protest. “Where there is inadequate supporting rationale in the record for a decision to make award to a lower-priced offeror with a lower technical ranking notwithstanding a solicitation’s emphasis on technical factors, we cannot conclude that the agency had a reasonable basis for its decision” (*citing MCR Federal, Inc.*, Comp. Gen. Dec. B-280969, 99-1 CPD ¶ 8, December 14, 1998).
- The antitrust violation of the predecessor firm was appropriate for consideration; that the FTC matter was settled did not prevent the basis for it from being considered, and enough of Stone Container’s assets and personnel were transferred to Smurfit to make the predecessor’s record relevant.
- The solicitation required that a subcontracting plan be submitted with the proposal. There has been no assessment of Smurfit’s plan against the Postal Service’s requirements. A generic pro forma plan is not acceptable; the contracting officer’s evaluation of the plan should be reviewed for acceptability.

Smurfit submitted comments on the contracting officer’s statement as an interested party which generally reiterated contentions advanced in the contracting officer’s report. It also submitted rebuttal to the protester’s comments on the contracting officer’s statement, which included the following:

- “[T]he rationality of the Postal Service’s evaluation methodology is incontestable” because information from the previous year’s contract was highly relevant; the contracting officer has “significant discretion” in evaluations, and the methodology used was not irrational nor precluded from use.
- The cases the protester cites concerning the evaluation of an offeror’s predecessor organizations establish only that such past performance *may* be considered, not that it *has to be* considered. Given the available recent information, no “more attenuated inquiry” into older data is required.

¹⁵ In correspondence with the protester’s counsel subsequent to the debriefing, the contracting officer had described the Menlo contract as “a fixed price FOB destination contract . . . awarded to Skyline by the Hoboken [NJ P&MSC] for a fixed quantity of 54 inch boxes for delivery to 11 [Priority Mail Processing Center] sites located in various Postal Areas [on] a specified delivery schedule.”

- Skyline’s survey forms are self-serving and insufficient in quantity to warrant consideration; its information does not “pretend to address with reliable evidence” Smurfit’s performance under the nationwide contract. Further, such information, generated after the award has been made, is not part of the agency record, not part of the source selection, and thus irrelevant (citing Court of Federal Claims protest cases).
- The antitrust proceeding involving Smurfit’s predecessor is not probative “because . . . it was a mere allegation that was never proven and ultimately settled.”
- Skyline was not prejudiced by the evaluation. Even if it received two more points (the maximum it could receive), the offers would still be “essentially equal” and award could go to Smurfit on the basis of price. Doing so would not be improper even given the slight preference for technical factors over price. The cases Skyline cites to the contrary are inapposite, since they failed to involve a proper cost/price tradeoffs.
- Any protest arising out of Smurfit’s failure to provide FOB destination prices is untimely; such a protest needed to be raised within ten days of Skyline’s receipt of the contracting officer’s pricing evaluation. On the merits, that contention fails. The solicitation’s advice that “[p]rices will be evaluated on a FOB destination and FOB origin basis” was not a “minimum mandatory requirement to which failure to conform would render a proposal nonresponsive.” By failing to provide FOB destination prices, “Smurfit merely assumed the risk that the contracting officer might choose to make award [to another] on the basis of [its] FOB destination price.” And Skyline was not prejudiced by Smurfit’s omission since its submission of FOB destination prices would not have affected the basis for the award.
- No auction occurred concerning the pricing of the triple-walled box; Smurfit was not advised of Skyline’s price, which was lower than Smurfit’s revised price. The PM explicitly permits discussions with one offeror without discussions with others, so the cases the protester cites to the contrary are inapposite.
- Skyline’s objection to the contracting officer’s evaluation of Smurfit’s subcontracting plan is untimely raised, as it was not identified as a issue in its initial protest. Further, the objection lacks merit; evaluation of the plan is part of the affirmative determination of Smurfit’s capability, which is not subject to challenge absent demonstration of fraud or bad faith, not here alleged.

In response to a request, the contracting officer provided this office with information concerning Skyline’s and Smurfit’s performance under the contract awarded in 2000. That information consisted of “the on-time delivery performance of both suppliers . . . for

Accounting Periods 1-5, . . . September 9, 2000, through January 26, 2001.¹⁶ That data showed the two firms were “very close in on-time delivery performance.” In percentage terms, Smurfit was said to have 99.3% on-time deliveries, while Skyline had 97.2% on-time deliveries.

¹⁶ According to the submission, data concerning the subsequent performance “was not evaluated” because Smurfit changed over from reporting using FTP to EDI reporting, resulting in unreliable data due to startup problems. Further, because Smurfit was using EDI, while Skyline remained on FTP, “actual performance comparison [was] extremely difficult.” However, based on “first hand input from ordering activities, both suppliers maintained high levels of customer service.”

DISCUSSION

The discussions concerning Smurfit's price for the triple-wall containers did not constitute an improper auction and were fully consistent with the applicable PM provisions concerning discussions set out in the margin.¹⁷ We do not read Handbook P-1 4.3.5, cited by the protester, as inconsistent with that standard, but to the extent that it may be, it is not controlling. In any event, the negotiators did not violate it. While it would have been inconsistent with that provision had Smurfit been told "Your price for the triple-wall containers is higher than your competitor's," that is not what it was told. Instead, it was

¹⁷ PM 4.2.5.c Discussions

* * *

2. Purpose. Discussions may be held in order to . . . obtain the best value to the Postal Service and establish final contract terms and conditions. Discussions need not be held with individual suppliers when, after evaluation and comparison of their proposals, it becomes apparent that their proposals do not offer the best value to the Postal Service and could not be improved to do so without extensive and substantial revision. . . . During the conduct of discussions, contracting officers must ensure that no leveling or technical transfusion occurs.

3. Use

* * *

(b) After proposal comparisons have been made, further discussions may be held to address any outstanding matters. These discussions should be made with a sufficient number of suppliers for the purchase team to be confident that it can reasonably determine which supplier or suppliers offers the best value to the Postal Service. *However, the fact that discussions are held with one or more offerors does not require that discussions be held with other offerors if there is no business necessity for additional discussions. Offerors whose offers are not the subject of discussions need not be afforded a specific opportunity to revise their offers.* [Emphasis added.]

* * *

(d) The final stage of discussions is reaching agreement on the contract's terms and conditions with the apparently successful supplier. The goal of this stage is to reach the best business arrangement for the Postal Service, and during this stage any remaining issues should be addressed and revised. However, if the extent of these issues may reasonably be viewed as changing the rationale for determining the best value to the Postal Service, the contracting officer must consider reopening discussions with other suppliers. In no event may changes be made to the Postal Service's requirements or the supplier's proposal which, if made before supplier selection, would have affected the basis for that selection.

See also *Madonia Electric, Inc.*, P.S. Protest No. 99-22, July 9, 1999.

told, “Your price is more than we are currently paying.”¹⁸ That statement was consistent with Handbook P-1’s guidance that “suppliers should be told if their pricing is high and why it is considered so.”

The use of the lowest published GSA freight rates was not improper. “Since the government must pay for the transportation of goods purchased on an f.o.b. origin basis, contracting officers must add the lowest available freight rates and related charges to f.o.b. origin bids in order to compare them with bids that included transportation to the government facility.” *Isometrics, Inc. -- Reconsideration*, Comp. Gen. Dec. B-219057.4, May 21, 1986, 86-1 Comp. Gen. Proc. Dec. ¶ 474. The protester’s contention that the lowest published GSA rate “is rarely available” is unsupported on this record.

Skyline contends that its proposal should have received a higher score, and Smurfit should have received a lower one.

[O]ur review of the merits of technical evaluations is limited: We will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action. The protester bears the burden of proving its case affirmatively. This burden must take into account the ‘presumption of correctness’ which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer’s position.

Pharmchem Laboratories, Inc., P.S. Protest No. 99-19, December 17, 1999 (internal quotation and citation omitted).

In the instant case, the contracting officer concluded that Skyline and Smurfit were “essentially equal.”¹⁹ Because they were so considered, the contracting officer could award on the basis of price even though the performance evaluation factors were “slightly more important than price.” *Timeplex Federal Systems, Inc., Sprint Communications*

¹⁸ “[C]ontract prices generally are available to the public, since the disclosure of prices charged the government ordinarily is a cost of doing business with the government.” *Grant’s Janitorial and Food Service, Inc.*, Comp. Gen. Dec. B-244170, May 28, 1991, 91-1 Comp. Gen. Proc. Dec. ¶ 512.

¹⁹ “Whether a given point spread between offerors indicates the actual superiority of one proposal over another depends on the facts and circumstances of each procurement. While technical point scores, when used, must be considered by selection officials in arriving at their conclusion, they are not bound thereby; rather selection officials must decide whether the point scores show technical superiority and what the difference may mean in terms of contract performance. Thus, our analysis of the selection decision . . . focuses on the significance that the . . . selection official gave to the scores received by [the awardee and the protester] and to the actual differences between the proposals. We do not rely on a mechanistic view of the numbers themselves.” *JJH, Inc.*, Comp. Gen. Dec. B-247535.2, September 17, 1992, 92-2 CPD ¶ 185 (citation omitted).

Company, P.S. Protest Nos. 93-22; 93-24, February 2, 1994; *accord*, *Kelly Services, Inc.*, P.S. Protest No. 95-17, October 27, 1995.

The anecdotal performance data which Skyline cites in support of a higher rating for itself is not sufficient to sustain its burden, but it need not be discussed in detail because, as the contracting officer and Smurfit suggest, any likely increase in Skyline's evaluated score would not, by itself, affect the result. In order for Skyline to prevail at its higher price, it would be necessary for Smurfit's evaluated score to be substantially reduced.

The grounds on which Skyline contends that Smurfit's evaluation should be lowered are two. The first, instances of its poor prior past performance, are insubstantial and inadequately documented. The instances are isolated and inconsistent with the more current information arising out of the contract awarded last year. As such, they do not require the reevaluation of Smurfit's score.

The second ground is Smurfit's predecessor's settlement of an antitrust complaint with the Federal Trade Commission. of Smurfit's predecessor. Unlike the contracting officer and the interested party, we do not believe that the fact that the complaint was the subject of a settlement precludes the consideration of the circumstances giving rise to the complaint. We agree with the contracting officer and the interested party that the fact that the incident giving rise to the complaint occurred some nine years ago, makes it so remote that it need not be considered given the availability of more recent evidence of the offeror's current capability.

That Skyline is a woman-owned business does not require that it be given any particular credit in the evaluation process. "While the Postal Service does encourage award to [more accurately, "participation of"²⁰] small, minority, and woman-owned businesses, nothing in the PM or in the solicitation indicated that a business belonging to one of these classes would receive an advantage or preference in the evaluation of offers." *Rhode Island Control Equipment Co.*, P.S. Protest No. 92-21, August 27, 1992. Any issue concerning the contracting officer's evaluation of Smurfit's subcontracting plan arises in the context of the affirmative determination of Smurfit's capability, and is not for our review. *W.W. Fry, supra.*²¹

²⁰ See, e.g., PM 3.2.1.b, Supplier Diversity:

Supplier Diversity is the proactive business process that seeks to provide suppliers with equal access to purchasing opportunities. It promotes supplier participation reflective of the American supplier community and encourages economic development. Effective supplier diversity ensures that no suppliers are excluded from competition on the basis of race, color, religion, sex, age or national origin.

²¹ The contention that we must adopt the different standard recently stated by the Federal Circuit in *Garuffi* is incorrect. We note that the General Accounting Office, which declines to review affirmative determinations of responsibility absent "a showing either that government officials have acted in bad faith, or that definitive responsibility criteria have not been followed," 4 C.F.R. § 21.5.c, continues to apply that stan-

(Footnote continued on next page.)

Skyline's complaint that Smurfit was using an in-house freight carrier is moot; Smurfit's offer was evaluated only the basis of its origin prices.

Whatever knowledge Smurfit possessed with respect to the linerboard market, that knowledge was neither improper nor prejudicial to Skyline. There is "no requirement for equalizing competition by taking into consideration advantages [gained via incumbency or the offeror's particular circumstances,] nor do we know of any possible way in which such equalization could be effected." *Aerospace Engineering Services Corp.*, Comp. Gen. Dec. B-184850, March 9, 1976, 76-1 CPD ¶ 164, cited with approval in *Pitney-Bowes Inc.*, P.S. Protest No. 89-22, July 7, 1989.

Skyline's choice to use 48-foot trucks was not directed by the Postal Service, and it must bear any resulting consequence; as the contracting officer has demonstrated, however, the consequences were minimal.

The concept of "responsiveness" is not applicable to offers in negotiated procurements,²² and Smurfit's failure to submit FOB destination prices does not require the rejection of its offer. The cases the protester cites are not to the contrary. One is *Bell Atlantic Systems, Inc.*, Comp. Gen. Dec. B-216855, March 29, 1985, 85-1 COD ¶ 377, which involved an invitation for bids to which the principle of responsiveness was applicable. The other, *Coleman Research Corporation*, Comp. Gen. Dec. B-278793, March 16, 1998, 1998 U.S. Comp. Gen. LEXIS 162, involved a negotiated cost reimbursement contract, and the propriety of the agency's cost-realism analysis of the protester's offered overhead rate. While the protester cites *Coleman* following the proposition that "a material omission under the doctrine of responsiveness mandates that [an] offer must be rejected," *Coleman*'s proposal was not rejected for a material omission and the decision does not reference the concept of responsiveness. The decision stands for the unexceptional proposition that when discussions are not required, a protester may not claim entitlement to them to resolve proposal weaknesses which are the result of its

(Continued from previous page.)

dard *post-Garuffi* (see, e.g., *Johnson Controls World Services, Inc.*, Comp. Gen. Dec. B-286714.3, August 20, 2001, Comp. Gen. Proc. Dec. ¶ 145) and has not found it necessary to cite or discuss *Garuffi* in that (or any other) context.

22 "The term 'responsiveness' is properly applied only to advertised procurements and not to negotiated procurements The 'responsiveness' of a proposal made pursuant to a request for negotiation proposals is not critical to its consideration. *Sea-Land Service, Inc.*, P.S. Protest No. 80-18, June 30, 1980. "[T]he contract requirements in a negotiated procurement are not mandatory." *Sea-Land Service, Inc., On Reconsideration*, P.S. Protest 80-18, August 6, 1980. "In negotiated procurements . . . , it was not required that the contracting officer reject [an offeror's] proposal as 'nonresponsive' because it did not offer specific award fees [as contemplated by the solicitation]." *Cordant, Inc.*, P.S. Protest 94-08, June 23, 1994.

own omissions. Because responsiveness is not at issue here, the contracting officer was not required to reject Smurfit's proposal for its lack of FOB destination pricing.²³

The protest is denied.

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²³ Since there is clearly no merit to the contention, we pretermitted the issue of the contention's timeliness.