



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Westinghouse Electric Corporation

File: B-227091

Date: August 10, 1987

### DIGEST

1. Award of subcontract by government prime contractor was improper where awardee's proposal took exception to material requirement in solicitation that proposed price include all applicable taxes.

2. Where protest concerning subcontract award by government prime contractor is sustained, Competition in Contracting Act and Bid Protest Regulations authorize recovery by protester of proposal preparation and protest costs.

### DECISION

Westinghouse Electric Corporation protests the award of a subcontract for electrical transformers and capacitors to General Electric Company (GE) under request for proposals (RFP) No. C86-131226, issued by EG&G Idaho, Inc., a prime contractor operating and managing the Idaho National Engineering Laboratory for the Department of Energy (DOE). We sustain the protest based on our finding that GE took exception to the requirement in the RFP that its proposed price include all applicable taxes.

The RFP, issued on November 26, 1986, called for delivery and installation of 100 electrical transformers and 12 capacitors at the U.S. Navy Public Works Center in Pearl Harbor, Hawaii, to replace existing transformers and capacitors containing polychlorinated biphenyl (PCB). DOE selected EG&G to conduct the procurement as part of a pilot program to mitigate the hazards involved with electrical equipment containing PCB. Offerors were to submit a technical proposal and a price proposal giving individual prices for each item and a total price for installation. The RFP required delivery of all items by August 31, 1987, with installation by September 30.

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The RFP set out certain "mandatory requirements" which offerors had to meet, relating to the schedule for performance and environmental impairment liability insurance. The RFP provided that award would be made to the "most responsive, responsible proposer" meeting the mandatory requirements and submitting the lowest price, and reserved EG&G's right to make multiple awards "as the best interests of EG&G Idaho may dictate." The RFP also incorporated EG&G's "Standard Terms and Conditions for Purchase Orders and Subcontracts," part II, article 13(a) of which states that "[e]xcept as may be otherwise provided in this subcontract, the subcontract price includes all applicable Federal, State and local taxes and duties." The RFP had no other provision regarding taxes.

Initial proposals, due January 23, were submitted by Westinghouse and GE. On February 3, EG&G issued an amendment to the RFP changing certain design requirements, and called for best and final offers by February 5. Based on the best and final offers, EG&G found both offerors technically acceptable; GE's total price for delivery and installation (\$2,532,273) was approximately \$80,000 lower than Westinghouse's price (\$2,612,255). In mid-February, EG&G raised several issues in discussions with GE concerning certain terms and conditions in GE's proposal which differed from the provisions in the RFP and EG&G's standard terms and conditions. According to EG&G, holding discussions only with GE, not Westinghouse, was consistent with EG&G's practice of negotiating only with the successful offeror regarding contract terms and conditions which do not affect the award decision. On March 23, EG&G made award to GE.

Westinghouse contends that the award to GE was improper because (1) GE took exception to the requirement in the RFP that an offeror's proposed price include all applicable taxes; (2) EG&G held discussions with GE after best and final offers were submitted without giving Westinghouse the same opportunity; and (3) EG&G should have made multiple awards to Westinghouse and GE instead of a single award to GE. As discussed in detail below, we find that it was improper for EG&G to make award to GE in light of a statement in GE's proposal that, contrary to the requirement in the RFP, its price did not include taxes.

Our Office reviews subcontract awards by government prime contractors where the award is made by or for the government. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1986). In this case, EG&G is a prime contractor operating and managing a DOE facility and has been designated by DOE to conduct the Navy's pilot program to deal with transformers and capacitors containing potentially hazardous PCB. As a result, EG&G in effect is acting on behalf of the

government in awarding the subcontract. See Rohde & Schwarz-Polarad, Inc.--Reconsideration, B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. We therefore will review the procurement to determine whether it was consistent with and achieved the policy objectives of the "federal norm," i.e., the fundamental principles of federal procurement law as set forth in the statutes and regulations that apply to direct federal procurements. BECO Corp., B-219651, Nov. 26, 1985, 85-2 CPD ¶ 601.

As noted above, part II, article 13(a) of EG&G's standard terms and conditions advised offerors that the subcontract price was to include all applicable federal, state and local taxes and duties. In its initial proposal, however, GE included a footnote to its total price stating that the "[p]rice does not include Federal, state and local taxes or duties." Both EG&G and GE argue that the footnote in GE's proposal does not represent an objection to the RFP requirement to include all applicable taxes, but merely reflects GE's belief that no taxes would apply to the subcontract and therefore no amount for taxes was included in GE's proposed price.<sup>1/</sup>

According to EG&G and GE, GE's position that no taxes would apply to the subcontract was first raised in a telephone conversation between EG&G and GE on January 16, before initial proposals were due. EG&G states that it advised GE at that time that under EG&G's standard terms and conditions, each offeror is responsible for paying any applicable tax and should take that responsibility into account in pricing its proposal. Both parties state that they agreed that the standard provision would be included in the subcontract, despite GE's view that no taxes in fact would apply.

EG&G and GE argue that the footnote in GE's proposal, when interpreted in light of the January 16 conversation, indicates that GE did not intend to take exception to EG&G's standard provision requiring inclusion of applicable taxes. We disagree. In our view, the position taken by EG&G and GE is not based on a reasonable interpretation of the footnote in GE's price proposal. The footnote does not state, as EG&G and GE suggest, that GE would accept responsibility for payment in the event that some taxes in fact are applicable; rather, the clear meaning of the language GE used--"[p]rice does not include Federal, state and local taxes or duties"--

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<sup>1/</sup> Although the RFP provision requires the inclusion of all applicable taxes and duties, the parties appear to agree that the only tax which might apply is a Hawaii tax on "lump-sum service contracts."

is that GE, for some unspecified reason, did not consider any taxes in calculating its price and thus by implication would not accept responsibility for payment of any taxes ultimately found applicable, as required by the RFP. In procurements using sealed bidding, a bid submitted on a tax-excluded basis is considered nonresponsive since, absent definite evidence to the contrary, it indicates the bidder's unwillingness to assume payment of applicable taxes at his price. Cornelius Architectural Products, B-224140, Oct. 29, 1986, 86-2 CPD ¶ 492. Similarly here, while the procurement was conducted using negotiated procedures, the requirement to include taxes related directly to price, a material element of the RFP, and the determining factor for award. Based on the qualifying footnote in its proposal, GE, after receiving award, could claim that EG&G should reimburse it for any taxes ultimately found due, since they were not contemplated when the offer was submitted. GE's decision not to consider taxes in pricing its proposal thus defeated the purpose of the requirement, which is to limit the government's payment obligation to the price offered. See Tumpane Services Corp., B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95.

GE argues that even if the footnote is construed as taking exception to the tax inclusion requirement, its best and final offer, on which award was based, in effect withdrew any objection GE had to the requirement since it did not repeat the footnote. We disagree. With regard to its price proposal, GE's best and final offer stated only that except for several items specifically noted, GE's initial prices remained unchanged. There is no indication that GE either explicitly or implicitly had withdrawn the qualifying footnote in its initial proposal.<sup>2/</sup>

The fact that GE believes that no taxes apply to the subcontract does not establish that GE's qualification of its price was without prejudice, since whether any taxes in fact will apply appears at best to be an unsettled question. According to the parties, the applicability of the Hawaii state tax depends on whether the contract is regarded as a services contract or a delivery contract. Contrary to GE's position, Westinghouse estimates that \$100,000 in state taxes will be due; adjusting GE's price based on that

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<sup>2/</sup> The contract as originally awarded to GE incorporated only EG&G's standard terms and conditions, including the tax inclusion provision, without reference to GE's proposal. GE's proposal, however, including the qualifying footnote regarding taxes, later was incorporated into the contract by modification on April 2.

figure, GE's price would be approximately \$20,000 higher than Westinghouse's price.

EG&G also argues that Westinghouse's own proposal may not have included applicable taxes since Westinghouse asked EG&G to consider including in the subcontract Westinghouse's standard "selling policy regarding PCB service," which in part provides that the contract price does not include federal, state or local taxes. We find EG&G's argument to be without merit. In contrast to the language GE used in its proposal, Westinghouse merely requested that EG&G consider deleting the tax inclusion requirement; Westinghouse's request cannot reasonably be interpreted to mean that it took exception to the requirement.

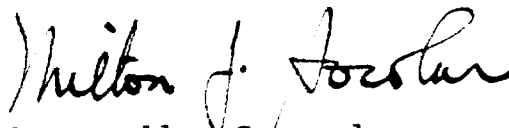
Since in our view GE took exception to the requirement to include all applicable taxes, we find that award to GE was improper. In view of our finding, we need not address the other issues raised by Westinghouse regarding the discussions between GE and EG&G after submission of best and final offers, and the propriety of single instead of multiple awards.

Under these circumstances, it normally would be appropriate for EG&G to reopen negotiations with GE and Westinghouse, and later terminate GE's subcontract if GE ultimately were found not to be in line for award. Here, however, GE began performing soon after the contract was awarded in order to meet the subcontract's schedule of delivery by August 31 and installation by September 30. (Since the protest was not filed until May 1, more than 10 days after award was made on March 23, EG&G was not, in any event, required to suspend performance by GE. See Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (Supp. III 1985)). In view of the status of contract performance, it is impracticable for EG&G to reopen negotiations. Accordingly, we find that Westinghouse is entitled to recover its proposal preparation costs and the costs of filing and pursuing the protest, including attorneys' fees.

In its report on the protest, DOE stated without submitting detailed argumentation that our authority to award proposal preparation and protest costs did not extend to protests against awards of subcontracts by DOE prime contractors such as EG&G. Our Bid Protest Regulations, 4 C.F.R. § 21.6(d), mirroring the language of CICA, 31 U.S.C. § 3554(c)(1), state that we may declare a protester entitled to proposal preparation and protest costs where we determine that the solicitation or award at issue does not comply with a statute or regulation. We believe it is consistent with these provisions to award costs where, as here, we sustain a protest concerning a subcontract award by a DOE prime

contractor because the award was based on a proposal which did not conform to a material provision of the solicitation, since the award thus constituted a failure on the part of the prime contractor to comply with the fundamental principles embodied in the procurement statutes and regulations. In the absence of a convincing argument to the contrary, we see no basis to conclude that our authority to award costs does not apply to protests such as this one.

The protest is sustained.

*for*   
Comptroller General  
of the United States