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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tiger Optical Electronics Corporation

File: B-225358

Date: November 13, 1986

DIGEST

1. Protest against rejection of an offer is academic where the agency terminates the protested contract for the convenience of the government because it agrees that evaluation under the Buy American Act was improper.
2. Under Department of Defense Supplement to the Federal Acquisition Regulation, when all offers are for foreign end products, they should be evaluated on an equal basis, without application of a Buy American Act factor.
3. Agency's decision to resolicit after termination of an improperly awarded contract is not objectionable when the agency's needs have changed and the change may have an effect on price. Under these circumstances, a protester is not entitled to an award under the original solicitation.

DECISION

Tiger Optical Electronics Corporation protests the allegedly improper evaluation of its offer for binoculars under request for proposals (RFP) No. DAAA09-85-R-0300, issued by the U.S. Army Armament, Munitions and Chemical Command. The firm also challenges the Army's determination to resolicit.

We dismiss the protest.

On October 1, 1986, the agency awarded a contract to Pioneer & Company. Tiger Optical protested to this Office on October 14, contesting (1) the results of an alleged negative preaward survey and (2) the application of an evaluation factor to its offer under the Buy American Act, 41 U.S.C. § 10a (1982). Tiger Optical alleged that the awardee had offered a German-manufactured product at a price higher than its own.

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Before we had considered whether the Army had properly rejected Tiger Optical's offer, the agency informed us that it had terminated Pioneer's contract for the convenience of the government on October 24 because of an improper evaluation. The agency advises that it will resolicit with the addition of the fiscal year 1987 requirement, which will substantially increase the number of items to be procured. In addition, the agency states, it will make several important changes to the specifications. Tiger Optical now contends that it is entitled to award under the original solicitation.

We note first that Tiger Optical's failure to receive an award was not the result of a negative preaward survey. The record indicates that the Army never made a formal determination as to Tiger Optical's responsibility.^{1/} Second, the agency discovered that the addition of a Buy American Act evaluation factor to Tiger Optical's offered price, which resulted in its displacement as the low offeror, had not been justified. In view of this, the agency determined that the award to Pioneer was improper and that termination of the contract necessary.

We agree that the application of the Buy American Act evaluation factor to Tiger Optical's offer was erroneous. The Act generally provides a preference for domestic goods over those from nonqualifying countries. However, under implementing regulations, when all offers are for foreign end products, the agency must evaluate them on an equal basis. Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. § 225.105 (S-71, 72) (1985). Since both offers here were for foreign end products, but the agency applied an evaluation factor only to Tiger Optical's offer, the evaluation was not on an equal basis. We therefore find that the agency properly terminated Pioneer's contract.



The question for our consideration is whether Tiger Optical should receive an award under the original solicitation or whether resolicitation is justified. While the procurement regulations provide no specific direction or guidance regarding how procuring agencies should proceed after a contract termination, the agency's determination either to resolicit or, if practicable, to make award under the prior

^{1/} Since Tiger is a small business, any negative responsibility determination would have to be referred to the Small Business Administration under the certificate of competency procedures. 15 U.S.C. § 637(b)(7)(A) (1982).

solicitation must be reasonably supported. W.H. Smith Hardware Co., B-222045, May 13, 1986, 86-1 CPD ¶ 455. We find the determination to resolicit reasonable since the agency asserts that award under the original solicitation would no longer meet its needs.

Tiger Optical will have an opportunity to compete for the resolicitation, and its protest concerning the evaluation under the original solicitation is academic. Midwest Holding Corp., B-219926, Sept. 26, 1985, 85-2 CPD ¶ 344; aff'd on reconsideration, B-219926.2, Nov. 13, 1985, 85-2 CPD ¶ 547.

The protest is dismissed.


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