



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Environmental Technologies Group, Inc.

File: B-235623

Date: August 31, 1989

DIGEST

1. Protest that agency improperly failed to evaluate transportation costs for the option quantity is denied where the protester would not be the low offeror even if such costs were considered.
2. Protest that agency should have considered unstated factors in its evaluation (savings from employee income taxes and corporate taxes to be collected by the government by awarding to a domestic firm) is denied since evaluation is required to be made in accordance with the terms of the solicitation.
3. Protest that an import duty should have been applied to the proposal of the awardee, a British firm, is denied where, pursuant to a Memorandum of Understanding between the government of the United States and the government of Great Britain that waived the restrictions of the Buy American Act, no import duty was applicable.

DECISION

Environmental Technologies Group, Inc. (ETG), protests the award of a contract to Graseby Ionics, Ltd., a British firm, under request for proposals (RFP) No. DAAA09-88-R-0946, issued by the United States Army Armament, Munitions and Chemical Command, Rock Island, Illinois for spare parts for the Chemical Agent Monitor (CAM), used by soldiers to detect the presence of dangerous chemicals. ETG principally argues that the agency failed to evaluate properly transportation costs for the option quantity, and otherwise misevaluated proposals.

We deny the protest.

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The RFP, issued on September 28, 1988, was restricted to ETG and Graseby, the only known producers of the required items, pursuant to 10 U.S.C. § 2304(c)(1) (Supp. IV 1986). The RFP provided that award would be made to the responsible offeror whose offer, conforming to the solicitation, was the most advantageous to the government, price and other factors considered. The RFP contained an option for an additional quantity not to exceed 100 percent of the basic quantity. The RFP provided that the evaluation of offers would be based upon the total price quoted for all items, including basic and option prices, abnormal maintenance, and use of government-owned production and research property (all price-related factors). Offerors were required to quote on all items which would be awarded as a unit. Proposals were requested with and without first article testing.

Amendment No. 0002, issued November 18, added a clause providing that evaluation of transportation costs would be based on f.o.b. origin prices plus government transportation costs from delivery points to one or more of three destinations designated in the RFP. This clause also provided that for evaluation purposes, and for no other reason, transportation costs to three tentative destinations would be evaluated for the option quantity.

Both offerors submitted proposals. ETG subsequently objected to the f.o.b. origin requirement. In response, the Army issued amendment No. 0003 on January 6, 1989, which opened negotiations and added a clause that provided that offers were invited on the basis of both f.o.b. origin and f.o.b. destination, with and without first article testing, and that the government would award on the basis which the contracting officer determined to be most advantageous to the government. Amendment No. 0003 also deleted any specific reference to evaluating transportation costs for the option quantity. (The amendment deleted the 3 tentative destinations for the option quantity.) Best and final offers (BAFOs) were subsequently submitted by both offerors.

In its BAFO, ETG submitted prices with first article testing only. Graseby, eligible for waiver of first article testing, submitted prices both with and without first article testing; for evaluation purposes, Graseby's prices without first article testing were used. The contracting officer evaluated both offerors' basic quantities with transportation costs (f.o.b. origin - the most advantageous to the government considering the prices received) and their option prices without transportation costs. The evaluation results were approximately as follows:

	<u>Graseby</u>	<u>ETG</u>
Basic quantity	\$2,102,782	\$2,187,395
Transportation costs, f.o.b. origin	<u>5,954</u>	<u>2,525</u>
Total basic quantity	\$2,108,736	\$2,189,920
* * *	*	*
Option quantity	\$2,102,782	\$2,208,629
* * *	*	*
Total evaluated price	\$4,211,518	\$4,398,549

The contracting officer determined that it was in the best interests of the government to award an f.o.b. origin contract to Graseby, without first article testing. This protest followed.

ETG protests that the agency failed to evaluate proposals in accordance with the RFP's evaluation scheme, particularly in not evaluating transportation costs for the option quantity. Specifically, ETG argues that amendment No. 0002 provided for evaluation of transportation costs for the option quantity and that the deletion of the tentative destinations for the option quantity by amendment No. 0003 did not make clear the fact that the agency did not intend to evaluate transportation costs for the option quantity. The agency reports that its standard practice is not to evaluate transportation costs for the option quantity because the agency rarely, if ever, knows the destination for the option quantity at the time offers are evaluated.

We need not determine whether the RFP, properly interpreted, required or excluded the evaluation of transportation costs for the option quantity, although we note that unless an agency knows in advance where it may require the option quantity to be sent or which site would result in the lowest transportation costs, possible transportation costs for the option quantity cannot reasonably play a role in determining the low offeror. See Harnischfeger Corp., B-220306, Jan. 24, 1986, 86-1 CPD ¶ 84. Here, ETG has not shown how it was prejudiced by the agency's evaluation of offers without evaluating transportation costs for the option quantity. The agency subsequently performed a transportation evaluation for the option quantity using the same destinations, quantities, and rates as for the basic quantity, added the costs to both offerors' prices, and ETG still was not the low offeror. Thus, the agency's failure

to evaluate transportation costs for the option quantity was inconsequential. Accordingly, we deny this protest ground.

ETG next protests that the agency, in its evaluation of offers, considered only price to the exclusion of "other factors" such as savings accruing from employee income taxes and corporate taxes which the government would collect by awarding to a domestic company.

We point out that evaluation and award are required to be made in accordance with the terms of the solicitation. See Western Publishing Co., Inc., B-224376, Sept. 2, 1986, 86-2 CPD ¶ 249. In this case, the RFP provided that the evaluation would be based upon the total price quoted for all items and that the items would be awarded only as a unit. The RFP did not state that income and corporate taxes would be evaluated. Rather, the RFP provided that the basic and option prices, abnormal maintenance cost, cost for the use of government property, and certain transportation costs were the evaluation criteria. These are all price-related factors, and hence, the award to Graseby, made on the basis of price alone, was consistent with the terms of the RFP.^{1/}

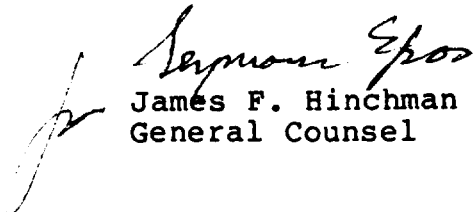
ETG also protests that the agency failed to evaluate Graseby's offer with the applicable import duty pursuant to the Buy American Act, 41 U.S.C. § 10a-d (1982). Graseby, a British firm, offered items from Great Britain. Pursuant to a Memorandum of Understanding (MOU) between the government of the United States and the government of the United Kingdom of Great Britain and Northern Ireland, dated December 1988, in which the restrictions of the Buy American Act were waived, no import duty is applicable to the items offered by Graseby. United Kingdom Memorandum of Understanding, Department of Defense (DOD) Federal Acquisition

^{1/} ETG also argues that the agency improperly waived first article testing for Graseby. We merely note that the record shows that Graseby would have been the low offeror even if first article testing had not been waived for the firm (even with evaluation inclusive of transportation costs for the option quantity). We therefore see no reason to further consider this matter.

Regulation Supplement (DFARS), at Appendix T:23 to T:28 (1988 ed.).^{2/}

Finally, ETG protests that the agency failed to give it timely notice of the award to Graseby, thus preventing it from filing a protest with our Office within 10 calendar days of award, pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. IV 1986), in order to require the agency to suspend contract performance. However, the record shows that the contracting officer verbally informed ETG on May 9 that an award had been made to Graseby on May 5, and therefore ETG had ample time to file a protest within 10 calendar days of award.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel

^{2/} In addition, contrary to the protester's assertions, because the MOU provides a blanket waiver of the Buy American Act, Graseby's failure to complete the certificate in the RFP entitled "Buy American Act--Balance of Payments Program Certificate" was of no consequence in this case. See Technical Sys. Inc., 66 Comp. Gen. 297 (1987), 87-1 CPD ¶ 240.