C. Evans
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jet Research Center, Inc.

File: B-248352

Date: August 20, 1992

James S. Phillips, Esq., Israel & Raley, for the protester.
Jacob B. Pompan, Esq., and Lawrence J. Sklute, Esq., Pompan, Ruffner & Bass, for Israel Military Industries, Ltd., an interested party.
Craig E. Hodge, Esq., and Bridget A. Stengel, Esq., Department of the Army, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Even though agency's evaluation of transportation costs under f.o.b. origin solicitation appears to have been unreasonable in some areas, protest of evaluation is denied where protester would not have been in line for award even assuming corrections most favorable to protester.

2. In evaluating bidders' transportation costs under f.o.b. origin solicitation, agency reasonably applied separate shipment costs for first articles and production lot test items where agency's prior experience indicated that items were likely to be shipped separately.

3. Where solicitation provided for designation of f.o.b. origin shipping point other than place of performance, agency properly evaluated awardee's transportation costs based on seaport designated in bid as shipping point instead of awardee's plant.

4. Protest that agency improperly failed to consider preservation of U.S. defense industrial base before making award to foreign firm is untimely filed after bid opening where protester was aware when the solicitation was issued that the only other qualified producer of items being purchased is a foreign firm, and solicitation did not restrict procurement or accord a preference to domestic firms.

DECISION

Jet Research Center (JRC) protests the award of a contract to Israel Military Industries, Ltd. (IMI) under invitation for bids (IFB) No. DAAA09-92-B-0879, issued by the U.S. Department of the Army Armament, Munitions and Chemical Command (AMCCOM) for flexible linear shaped charges (FLSC). JRC asserts that the agency improperly calculated the transportation costs that were added to the bid prices, and argues that if the agency had properly computed these costs, its bid and not IMI's would have been low.

We deny the protest in part and dismiss it in part.

The IFB contemplated award of a contract for fixed quantities of 11 different sizes of FLSC. The IFB requested a fixed price per unit, with and without first article approval, for delivery f.o.b. origin. The IFB also contained a requirement for delivery of lot acceptance test items. Both JRC and IMI, the only two qualified suppliers of FLSCs, submitted bids. JRC's unit prices included required first articles for testing; IMI, the incumbent contractor, was not required to deliver first articles. IMI submitted the low bid for the items of $896,542.97; Jet's bid price was $1,046,134.15. The Army then added transportation costs to the bid prices to arrive at the total cost to the government--$1,092,556.60 for IMI; $1,096,011.43 for Jet. As IMI's bid represented the low total cost, the Army awarded it the contract. Upon learning of the award, JRC filed this protest.

In the course of responding to JRC's protest, AMCCOM identified various errors in the transportation evaluation. Correction of these errors changed the bidders' total prices, but did not affect their relative standings. JRC's corrected total was $1,105,092.37, while IMI's corrected total was $1,059,406.60, a difference of $45,685.77 in IMI's favor.[1]

JRC alleges that AMCCOM misevaluated the transportation costs for both bids. With regard to its own bid, JRC asserts that the Army improperly applied separate shipping costs to items with common delivery dates instead of

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[1]The corrections included adding first article shipping costs to JRC's bid, and reducing IMI's transportation costs based on the conclusion that fewer seavans were required for overseas shipment. The agency did not provide a corrected total for IMI; we calculated the corrected total based on figures the agency provided showing the reduction in IMI's seavan costs.

treating them as a single shipment. With regard to IMI's bid, JRC contends that the Army miscalculated the overseas shipping costs and failed to include the cost of inland transportation from IMI's plant to the seaport. JRC maintains that, under a proper transportation cost evaluation, its bid would have been low.

As discussed below, we find that the agency did misevaluate IMI's bid; however, as IMI's bid remains low after the errors are corrected, we have no basis to disturb the award.

EVALUATION OF SHIPMENTS WITH COMMON DELIVERY DATES

JRC alleges that AMCCOM misevaluated the shipment costs for first article test (FAT) and lot acceptance test (LAT) items. In this regard, JRC states that the agency improperly treated FAT and LAT items with common delivery dates as separate shipments even though the items would be shipped together. By combining shipments of FAT and LAT items with common delivery dates, JRC maintains, only 5 FAT shipments and 9 LAT shipments would be necessary, instead of the 11 and 18 respective shipments evaluated by AMCCOM. JRC asserts that this error caused its transportation costs to be overstated by $16,205.76. JRC also notes that IMI's LAT shipments were treated the same way, overstating its costs by $15,057; correction of the alleged error therefore would reduce the difference between the two firms' total costs by $1,148.76.[2]

AMCCOM explains that it assumed each FAT and LAT requirement would be shipped separately for purposes of computing the bidders' transportation costs because, in the agency's experience, it is extremely rare for multiple FAT items or LAT items from different production lots to be shipped together, since they are rarely completed at the same time. According to AMCCOM, since production, delivery and payment under the contract depend initially upon the agency's approval of the FAT and LAT items, the contractor normally will ship these items as soon as they are ready, regardless of later actual delivery dates. In this case, AMCCOM notes, the solicitation provided for FAT approval for each of the 11 different FLSC sizes, and LAT for each production lot of 501 to 3200 units; AMCCOM concluded that the contractor would probably ship each of the 11 FAT units and each of the 18 required LAT samples separately.

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[2]JRC initially offered different figures in support of this argument; however, in its final submission for the record, it relied on figures supplied by AMCCOM. Therefore, we have used those figures here.

JRC asserts that the agency's approach is unreasonable because it ignores the IFB delivery schedule. JRC contends that, since bidders are bound to comply with the delivery schedule, they would be required to deliver items with common delivery dates at the same time, and the agency must evaluate the bids accordingly. Moreover, JRC argues, it planned to deliver FAT and LAT items with common delivery dates at the same time, and therefore was entitled to have these items evaluated as combined shipments. JRC notes that AMCCOM's addition of separate shipment costs for each FAT and LAT requirement was particularly prejudicial to it since IMI is not subject to the FAT requirement, and therefore did not have excess FAT shipment costs added to its bid price.

It is axiomatic that an agency's evaluation of transportation costs associated with an f.o.b. origin bid should be as realistic as possible and should bear the closest practicable resemblance to conditions that will most likely prevail at the time of actual performance. See B-167544, Jan. 2, 1970. AMCCOM's approach was reasonably aimed at achieving this end; notwithstanding JRC's alleged intent regarding FAT and LAT shipments, the agency's approach was supported both by logic and its prior experience.[3] In this regard, we agree that the contractor would have an obvious incentive to ship as early as possible to assure timely first article approval, rather than allow a shipment to sit until the most economical quantity, from a transportation cost standpoint, is ready to be shipped. At the same time, since the government, not JRC, would be responsible for paying the transportation costs from JRC's plant (the designated f.o.b. origin point), JRC would have no incentive to hold back a shipment merely to save transportation costs. We see nothing unreasonable in the agency's evaluating costs based on the assumption that the contractor will act in its own best financial interest.

The fact that, as JRC argues, the contractor would be bound by the delivery schedules does not affect the above rationale. As to the FAT items, while the delivery schedule establishes the latest acceptable delivery date, it does not prohibit the contractor from delivering items ahead of schedule. As to the LAT items, the IFB does not set forth any required delivery dates; thus, there is no factual basis for JRC's assertion that the delivery schedule requires the contractor to combine shipments of LAT items with common delivery dates. We conclude that AMCCOM reasonably

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[3] Although the agency has not cited specific contracts to illustrate its prior experience, neither has JRC presented evidence that it or other contractors previously have shipped FAT and LAT items together.

evaluated the FAT and LAT items with common delivery dates as separate shipments.

IMI'S INTRA-ISRAEL TRANSPORTATION COSTS

JRC alleges that the agency's evaluation of IMI's transportation costs was improper because it used the seaport at Haifa, Israel as the f.o.b. origin point instead of IMI's plant. Thus, the evaluation did not include the cost of inland transportation from IMI's plant to Haifa. JRC maintains that the solicitation's f.o.b. origin clause requires the f.o.b. origin point to be the offeror's plant, and that the inland transportation costs therefore should have been evaluated.

The solicitation's f.o.b. origin clause, Federal Acquisition Regulation (FAR) § 52.247-29(a), defines the term "f.o.b. origin" as free of expense to the government delivered--

> "(1) On board the indicated type of conveyance of the carrier (or of the government, if specified) at a designated point in the city, county, and state from which the shipment will be made and from which linehaul transportation service . . . will begin;
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> "(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station. . . ."

In addition to the FAR clause, the solicitation contained an AMCCOM clause entitled "Place of Contract Shipping Point, Rail Information and Electronic Address." This clause instructed offerors to "fill in the 'shipped from' address, if different from 'place of performance' indicated elsewhere in this section." IMI entered "Port of Haifa, Haifa, Israel" in the space provided. JRC, on the other hand, left the space blank, indicating that its "shipped from" address was the same as its place of performance. Accordingly, AMCCOM evaluated IMI's transportation costs from its designated f.o.b. origin shipping point of Haifa, and evaluated JRC's costs from its plant.

Reading the f.o.b. origin and shipping point provisions together, it is clear that the bidder was free to designate an f.o.b. origin shipping point other than its plant (such as a port), and that the bidder would be responsible for any transportation costs up to that point. Since IMI designated the port of Haifa as its shipping point, the agency properly evaluated only those costs it would incur from that point. Accudyne Corp., 69 Comp. Gen. 379 (1990), 90-1 CPD ¶ 356.

CALCULATION OF IMI'S OCEAN TRANSPORTATION COSTS

JRC's final challenge to AMCCOM's transportation cost evaluation concerns the cost of ocean transportation for IMI's production quantities, including the cost of seavans (shipboard containers) and port handling charges. In the initial evaluation, AMCCOM calculated that IMI's shipments would require the equivalent of 12 seavans. This conclusion was based on the assumption that the government would only have to pay for the portion of the seavan used for the shipment; the cost of the remainder of the seavan would be prorated among the other shippers using it. Thus, according to the agency, while the 8 shipments of production FLSCs would actually occupy space in 15 seavans, the cost of that space on a pro rata basis actually would be the same as the cost of only 12 seavans. In support of its position, AMCCOM provided shipping documents for the current IMI contract showing that other shippers have placed cargo in the same seavans with FLSCs, presumably paying a pro rata share of the cost.

After the hearing on this protest, the transportation specialist AMCCOM had relied on for the seavan calculation determined that the calculation was erroneously based on the assumption that the FLSCs would be packaged in drums. Since the solicitation in fact requires the items to be packaged in boxes, the specialist performed a new seavan calculation. This time, the specialist determined that only nine seavans were required. Unlike the previous calculation, the revised calculation did not rely on proration of seavan costs based on the size of the shipment. Instead, it assumed that shipments that were slightly larger than the normal capacity of a single seavan could be "stuffed" into one seavan. In addition, the new calculation assumed that 16 pallets of cargo can be loaded into a seavan regardless of the size of the FLSCs, whereas the previous calculation assumed that a seavan could hold 16, 14 or 12 pallet loads, depending upon the FLSC size. AMCCOM adopted the revised calculation in its post-hearing comments.

JRC argues that, in the revised seavan calculation, the agency has arbitrarily and unreasonably increased the number of pallets that a seavan can carry, thereby improperly reducing the number of seavans required. First, JRC notes that while the initial seavan calculation was based on the assumption that only 12 or 14 pallets of the larger size FLSCs could be loaded into a seavan, presumably due to the heavier weight of the larger items, the revised calculation assumes that a seavan would hold 16 pallet loads regardless of their weight. JRC maintains that the agency improperly failed to account for the weight of the pallet loads in the revised calculation. In addition, JRC maintains that the revised seavan calculation irrationally assumes that up to

19 pallet loads could be placed in a seavan if necessary to avoid using an additional seavan. If the seavans are loaded based on their normal size and weight capacities, JRC asserts, 13 seavans, rather than the agency's estimate of 9, will be required. At a cost per seavan of $11,050 ($550 for rental of the seavan and $10,500 for port handling charges), this change would increase IMI's total price by $44,200; JRC then would have the low evaluated price.

As discussed above, an agency's evaluation of transportation costs should be as realistic as possible and should bear the closest practicable resemblance to conditions that will most likely prevail at the time of performance. B-167544, supra. Where it is not certain how transportation rates should be applied in a particular situation, contracting officials are required to exercise their best judgment. See id. In reviewing a protested evaluation, we will review this judgment to determine whether it resulted in a reasonable and proper evaluation. See generally Fiber Lam, Inc., 69 Comp. Gen. 364 (1990), 90-1 CPD ¶ 351 (transportation evaluation was unreasonable where evaluated costs appeared unrealistically low and agency failed to explain basis for rates or how rate information was applied in computing costs).

We agree with JRC that the agency's revised seavan calculation is in error, although not to the extent JRC alleges. First, the new calculation fails to account for the cost of 1 shipment (the 270 day shipment) that consists of 4 pallet loads, or 1/4 of a seavan. The calculation document states that a seavan probably would not be shipped only 1/4 full, and that these items would either be combined with the next shipment, or airlifted via the Military Airlift Command, depending on the agency's needs. However, combining these four pallets with the next shipment would result in a shipment of 19 pallet loads. While there is some evidence in the record that one extra pallet can be loaded into a seavan, there is no support for the agency's apparent assumption that the same is true for three extra pallets. As to the airlift option, while the calculation document notes that it would be more cost effective to airlift 4 pallet loads than to ship them in a seavan, it did not include any estimated cost for the airlift. Elsewhere in the record, the cost of airlift is stated as $1.90 per pound. Airlift for this particular shipment, at 4,627 pounds, therefore would cost $8,791.30. Since this is less than the cost of a seavan, it is reasonable to assume that the agency would airlift this shipment. We find that this cost therefore should have been added to IMI's transportation costs.

Second, the revised seavan calculation assumes that at least two other shipments will be made by overfilling seavans.

The first of these (the 330 day shipment) consists of 35 pallets, and includes some of the larger FLSC sizes. Assuming that a seavan can hold 1 extra pallet (that is, 17), 18 pallets would have to be shipped in the second seavan. Again, however, the record contains no evidence that more than 1 excess pallet can be successfully loaded into a seavan. Moreover, the agency has not explained why it now assumes that 16 pallet loads of the larger-size FLSCs can be placed in every seavan. As discussed above, under the original calculation, some of the seavans would carry only 14 or 12 pallets, presumably based on size or weight limitations. It thus is not clear that any excess pallet loads will fit in this shipment. A second shipment (the 360 day shipment) consists of 50 pallets of the larger FLSC sizes, which the agency apparently assumes could be shipped in 3 seavans of 17, 17 and 16 pallet loads. As with the 330 day shipment, it is not clear that a seavan can hold even 16 pallet loads of the larger FLSCs. In addition, although a third load (the 390 day shipment) only consists of 14 pallet loads, this load contains some of the largest FLSCs. Since the agency previously had determined that these large FLSCs could only be loaded 12 pallets per seavan, it also is unclear whether this is an acceptable seavan shipment.

Since AMCCOM's eleventh-hour revision of its seavan calculation has left the record unclear as to how many pallet loads of various FLSC sizes can be loaded into a seavan, we cannot determine with certainty whether the agency should have treated the excess pallet loads differently, by adding either airlift costs or additional seavan costs for those items to the evaluation. This being the case, we will assume the scenario most favorable to the protester, that is, that the agency will ship excess pallet loads by seavan.[1] Under this approach, 1 additional seavan would be required for each of the 330, 360, and 390 day shipments. Adding the cost of these three seavans (at $11,050 each) would add $33,150 to IMI's evaluated price.

We also find that AMCCOM improperly failed to add destination discharge costs for the seavans to IMI's bid price. Despite requests before, during and after the hearing on the protest, the agency has failed to explain why these charges, which were evaluated under the prior

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[1]In fact, as noted above, the agency would probably airlift such small overflow quantities because it would be less expensive than shipping them in a separate seavan.

solicitation, are not applicable here.[5] We therefore will assume that the agency improperly failed to include discharge costs for at least 9, and as many as 12, seavans. While the record does not contain current estimates of this cost, the evaluated cost applied under the prior solicitation was $191.76 per seavan. Under the scenario most favorable to the protester (12 seavans), IMI's price should have been increased by $2,301.12.

When the agency's calculations are revised in the manner most favorable to the protester, to include in IMI's price all of the costs discussed above (airlift of the 270 day shipment, 3 additional seavans, and discharge costs for 12 seavans), IMI's evaluated price increases by $43,667.14. This is significantly more than the agency's calculation, but not enough to change the result; IMI's total evaluated cost is still lower than JRC's by $1,443.35. We emphasize, moreover, that this figure represents the most costly alternatives available to the agency. The record indicates that the agency might be able to reduce this cost (to what extent we cannot determine) by airlifting extra pallet loads, by filling seavans beyond their normal pallet capacity without exceeding their weight capacity, or by finding other cargo to ship in the seavan with the excess pallet loads and paying for the seavan on a pro rata basis.

As to the feasibility of the prorating alternative, JRC argues that the agency has no assurance that there will be other available cargo that is suitable for shipment in the same seavan with the FLSCs, and therefore should not assume for evaluation purposes that it will be able to prorate the cost of any seavans. We agree with the protester that the agency has not established that it would be able to prorate seavan costs in all cases. However, as shipping records provided by AMCCOM show that FLSC shipments have been combined in seavans with other shipments in some cases, we think the transportation evaluation reasonably could account for this possibility. Since IMI's total cost under a corrected evaluation thus would be at least $1,443.35, and as much as $35,168.63, lower than JRC's total cost, we conclude that JRC was not prejudiced by the agency's

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[5]In its post-hearing comments, the agency stated in response to this allegation that "the government does not pay internal shipping charges for IMI because clauses F-2 and FAR § 52.247-29 . . . require evaluation from the point of origin loaded on board the aircraft or other conveyance." This statement, however, refers to the cost of IMI's intra-Israel transportation from its plant to its designated FOB origin shipping point, not to seavan discharge costs incurred at the destination port.

defective evaluation. See Fiber Lam, Inc., 69 Comp. Gen. 364 (1990), 90-1 CPD ¶ 351.

OTHER ISSUES

JRC protests AMCCOM's failure to consider the preservation of the U.S. defense industrial base, as required by 10 U.S.C. § 2502(a)(1) (1988) and Department of Defense FAR Supplement (DFARS) § 207.105(b)(17), before making award to IMI, a foreign firm. This protest ground is untimely. Although (1) JRC was aware when the solicitation was issued that IMI, the only other qualified producer of FLSCs, is a foreign firm; and (2) the solicitation was unrestricted and did not accord any preference to domestic firms, JRC did not raise this matter until after award. Under these circumstances, JRC's argument concerns an alleged solicitation defect, and is untimely; under our Bid Protest Regulations, such protests must be filed before the time set for bid opening. 4 C.F.R. § 21.2(a)(1) (1992). We therefore will not consider it. (We note, however, that the DFARS provision applies only to acquisitions with an estimated value of at least $30 million or more over the life of the acquisition program or $15 million for any fiscal year, and therefore does not appear to apply to this procurement).

Finally, JRC argues that the protest should be sustained on the basis that alleged criminal conduct by AMCCOM personnel tainted the procurement. The Army currently is investigating an incident in which AMCCOM personnel who were involved in the transportation evaluation under this IFB and the prior one allegedly destroyed records of the prior evaluation in order to keep JRC from obtaining them through the protest process, presumably because the prior evaluation contained errors. While we are disturbed by such alleged misconduct, especially as it affects the protester's rights under the protest process, we find that our decision would not be affected even if the allegations prove to be true. This is because the alleged destruction of documents did not take place until well after the evaluation and award under this solicitation. Moreover, the documents involved were the evaluation documents for the prior solicitation; there was no alleged attempt to suppress documents concerning the protested evaluation. Thus, the alleged criminal conduct would have no bearing on the propriety of the evaluation

here. We note that JRC eventually obtained the missing documents through a Freedom of Information Act request and, therefore, did not suffer any ultimate prejudice in presenting its case.

The protest is denied.

for James F. Hinchman
General Counsel