



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Earth Resources Corporation

**File:** B-248662.5; B-248662.7

**Date:** December 29, 1992

Ronald K. Henry, Esq., Jeffrey A. Stonerock, Esq., and Sue Ann Dilts, Esq., Baker & Botts, for the protester. Cynthia S. Guill, Esq., Howard B. Rein, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the protester. M. Penny Ahearn, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Although proposed hazardous gas cylinder testing equipment theoretically may not be able to deal with all conceivable gases that might be encountered under contract for clean-up of former cylinder disposal site this did not render the proposal unacceptable where (1) RFP did not provide for evaluation of equipment on this basis and generally was geared towards gases most likely to be encountered; and (2) there is no showing that agency unreasonably determined that awardee's equipment was adequate to deal with gases likely to be encountered.

2. Awardee's failure to provide its offered equipment at the time frame proposed in performing the contract does not provide a basis for finding that awardee engaged in "bait-and-switch" tactic, where there is no evidence, other than protester's speculation, that awardee offered the equipment knowing that it would not be available.

### DECISION

Earth Resources Corporation (ERC) protests the award of a contract to Waste Abatement Technology (WATEC) under request for proposals (RFP) No. N62472-92-R-0001, issued by the Department of the Navy for the clean-up of a former cylinder disposal site at the Philadelphia Naval Base in Pennsylvania. ERC primarily argues that the Navy improperly evaluated the awardee's proposal and permitted the awardee to engage in an improper "bait and switch" tactic concerning offered equipment.

We deny the protest.

The RFP requested offers for excavation, testing, and disposal of the cylinders, as well as refilling the excavated area. Performance specifications for the project were provided. Award was to be made to the offeror whose proposal was determined to represent the best value to the government, cost and other factors considered. Technical and price factors were weighted equally. The technical evaluation was based on the following three equally weighted criteria; technical approach, management plan, and corporate experience.

Three firms responded to the RFP, and after evaluation the technical proposals were rated in the following order: WATEC, Offeror A, and ERC. WATEC's and Offeror A's proposals were rated "acceptable" and "essentially the same," due to their similar removal plans and proposed use of the same cylinder treatment subcontractor. Of these two proposals, WATEC's was rated "higher" due to two minor omissions from Offeror A's proposal. ERC's proposal was rated "not acceptable" for failure to satisfy all solicitation requirements. WATEC's total estimated offered price of \$2,613,000 also was the lowest submitted; Offeror A's price was slightly higher than WATEC, and ERC's price was substantially higher.

After reviewing the evaluation, the source selection board (SSB) determined that, even if given the opportunity to upgrade its technical proposal, ERC could not conceivably reduce its proposed price by the \$2 million necessary to become competitive. The SSB agreed that the two remaining proposals were relatively equal technically and concluded that WATEC, with the lowest price, offered the best value to the government. Accordingly, on April 24, 1992, award was made to WATEC on the basis of initial proposals (as the RFP advised the agency might do).<sup>1</sup>

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<sup>1</sup>Previous protests by ERC against the award to WATEC were denied in our decision Earth Resources Corp., B-248662.2 et al., Nov. 5, 1992, 92-2 CPD ¶ \_\_\_\_\_. In that decision, we determined that the evaluation of ERC's proposal as not satisfying all solicitation requirements was reasonable where the solicitation specifically required offerors to propose their own utilities, but the protester proposed tying into the activity's electrical power. We also found that the agency properly rated the awardee's proposal superior to the protester's for proposing to mobilize cylinder testing equipment early in the contract (while ERC did not), even though early mobilization was not required. Finally, we held that the protester's argument that the awardee's offer was noncompliant with alleged solicitation requirements was without merit where the solicitation in

(continued...)

ERC essentially argues that WATEC's offer is technically unacceptable because it failed to comply with the RFP requirement for "no chance for release" of hazardous gases contained in the cylinders.<sup>2</sup> This argument is based on deficiencies alleged in WATEC's offered gas treatment methods and cylinder testing equipment as described below.<sup>1</sup>

First, ERC contends that WATEC failed to meet the RFP standard of "no chance for release" because it allegedly proposed gas treatment which would permit release of hazardous gases into the atmosphere. The protester bases this assertion on the following portion of WATEC's proposal:

"If the results of the sampling indicate that the gas has been sufficiently treated, it will be directed to the reservoirs and vented to the atmosphere. If significant concentrations of gases are still detected after the first treatment, the gases will be directed back through the treatment system for reprocessing. Gases will not be released to the environment until sampling indicates destruction of the target gases."

According to the protester, the second sentence of the quoted portion of WATEC's proposal indicates that WATEC intended to release insignificant amounts of hazardous gas into the atmosphere, thus rendering the firm's proposal unacceptable.

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<sup>1</sup>(...continued)  
fact did not establish firm requirements in the areas alleged, but only established a basis for comparative evaluation of proposals. ERC's arguments here are based on information initially withheld from the firm and thus were not considered in our November 5 decision.

<sup>2</sup>Specifically, the RFP provided that the clean-up work "must be accomplished in such a manner that there shall be no chance for release of the gases to the atmosphere" and identified the gases to be treated as "toxic or hazardous gas(es)."

<sup>3</sup>As we discussed in our November decision, the protester is an interested party to protest the evaluation of WATEC's proposal (and also Offeror A's proposal). This is because where, as here, if a protest were sustained, the appropriate remedy could be termination of the awardee's contract and resolicitation, under which the protester could compete. Automation Mgmt. Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

This argument is without merit. Whether or not the cited sentence is susceptible of ERC's interpretation, WATEC's proposal, read as a whole, was reasonably evaluated by the agency as meeting the "no chance for release" standard. In this regard, the final sentence of the quoted portion of WATEC's proposal clearly stated that "gases will not be released to the environment until sampling data indicates destruction of the target gases," which are the hazardous gases. Additionally, in a portion of WATEC's proposal preceding that cited by ERC, the firm stated that:

"Once treated, gases are directed back to the reservoirs where they can be vented to the atmosphere (if sample analysis indicates the target gas has been adequately treated) or recycled through the treatment system until treatment has successfully removed target constituents from the gas stream."

We find these portions of WATEC's proposal sufficient to indicate that, notwithstanding the protester's reading of the second sentence of the first quote above, gases would not be released into the atmosphere until sample testing indicated that the gases had been adequately treated. Consequently, we have no reason to question the Navy's evaluation of WATEC's proposed gas treatment procedure.

ERC also maintains that one of the specific gas treatment methods proposed by WATEC, the flame treatment system which burns flammable gases, is ambiguous and therefore will not meet the RFP's "no chance for release" standard. The protester again contends that WATEC's proposal is unacceptable on this basis. We disagree.

In connection with this basis of protest, the RFP required excavation and cylinder removal to take place inside a containment structure to be erected over the site, in order to create an environment whereby escaped gases could be contained and appropriately treated. WATEC's proposal stated that the gas burning system in question "can be placed inside the vapor containment structure or at a more remote location, i.e., outside the vapor containment structure." ERC believes that the alternative of burning gases outside of the containment structure is unacceptable because there would be no containment of escaped hazardous gases, and thus would not comply with the RFP's standard of "no chance for release" of hazardous gases.

In its evaluation of WATEC's proposal, the Navy determined that WATEC unequivocally proposed two options for burning gases, i.e., one inside and one outside the containment structure, and that each could be appropriate depending on the gas encountered. Specifically, the Navy determined that

burning of some nonhazardous gases could safely be performed outside of the containment structure, because release of a small amount of unburned gas into the atmosphere would not present any health or safety risk. The protester responds that the Navy's position is illogical, since any nonhazardous gas encountered would not require burning to be treated and instead could simply be vented to the atmosphere.

While it is not entirely clear from the record the circumstances under which the burning of gases could safely take place outside of the containment structure, there is no disagreement between the parties on the acceptability of the other gas burning option proposed by WATEC, i.e., burning inside the containment structure. Since this optional method of thermal destruction was acceptable, the acceptability of WATEC's proposal did not turn on the acceptability of the disputed method. Consequently, even if ERC were correct, it would not affect the evaluation.

ERC further contends that WATEC's proposed cylinder testing equipment contains "apparent deficiencies" in construction which would prevent the firm from safely treating all possible gases, and as a result does not meet the RFP's standard of "no chance for release" of hazardous gases. For example, the protester contends that certain materials used in the construction of WATEC's equipment, such as a Viton seal and fused silica capillary, "would seem to be technically unacceptable" because of their vulnerability to reacting with certain gases.

This argument is without merit. ERC's position is premised on the assumption that the RFP required offerors to propose equipment for every possible gas which could be encountered. This was not the case. The RFP did not provide for an exhaustive evaluation of the effect of every possible gas on every piece of the cylinder treatment equipment. Rather, the solicitation's requirement for the treatment of cylinder contents was geared toward those gases "most likely to be encountered at the site." There is no evidence in the record that WATEC's offered equipment could not meet this standard. Consequently, we have no reason to question the acceptability of WATEC's offered equipment.<sup>4</sup>

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<sup>4</sup>Similarly, we find no basis to question the Navy's evaluation of WATEC's proposal regarding radioactive gases. While ERC contends that WATEC's proposal is technically unacceptable because it did not address treatment of radioactive gases, the RFP contained no requirement in this area.

ERC also argues that WATEC will not be able to meet the contract completion date because the firm's proposed method of treating liquid hazardous material "appears" to be "too slow." There is no evidence in the record that this was the case. The RFP provided for evaluation of an offeror's proposed project schedule for "an ability to complete the project within the allotted time," and WATEC's submitted project schedule indicated that the firm could meet the required performance schedule. The protester's general allegation gives no indication why the treatment method in question is too slow to meet the schedule as alleged. Consequently, we have no basis to question the determination that WATEC could meet the performance schedule.

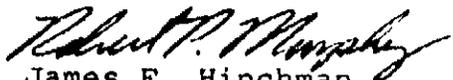
Finally, ERC argues that WATEC engaged in, and the Navy endorsed, an improper "bait-and-switch" tactic concerning the schedule for mobilization of the cylinder testing equipment. According to the protester, although the Navy evaluated WATEC's proposal on the basis of the firm's offer for early mobilization (at the beginning of the contract), during performance the Navy acquiesced to at least a 2-month delay in the arrival of the cylinder testing equipment. The protester claims that WATEC had no intention of using the equipment proposed because that equipment was actually used on another concurrent Navy contract. ERC concludes that WATEC misrepresented the availability of its equipment, and thereby compromised the validity of the technical evaluation.

Due to the adverse affect on the integrity of the competitive procurement system, where it is established that an offeror has made intentional misrepresentations that materially influence the agency's consideration of the firm's proposal, the proposal generally should be disqualified or the contract terminated if award has already been made. Unisys Corp., B-242897, June 18, 1991, 91-1 CPD ¶ 577; Informatics General Corp., B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105. Conversely, however, where an offeror intended to provide that which it proposed, subsequent changes in performance from that proposed as a result of post-award changes in circumstances does not make the award improper. Unisys Corp., supra. For example, we have found substitution of key personnel after award due to changes in the availability of the individuals originally proposed unobjectionable, where the offeror proposed personnel it intended to provide, i.e., names were submitted in good faith with the consent of the respective individuals. Id.

Here, we find no clear evidence in the record that WATEC misrepresented the availability of its proposed equipment. First, the fact that WATEC did not deploy the equipment as proposed does not, by itself, establish an intentional misrepresentation concerning its availability. In this

regard, the Navy has advised our Office that no cylinders were found at the site; thus, as a result of a post-award change in circumstances, there appears to have been no need for the proposed testing equipment. Further, the agency maintains that the equipment WATEC used on the other contract cited by ERC in fact was not the same equipment that WATEC proposed for the contract here, and ERC has furnished no evidence refuting the agency's position. Since there has been no showing that WATEC misrepresented the availability of its proposed equipment, and could not reasonably expect that its offered equipment would be available for performance under the contract here, this issue provides no basis for sustaining the protest. See TeleLink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400.

The protest is denied.

  
for James F. Hinchman  
General Counsel