



Comptroller General  
of the United States

715243

Washington, D.C. 20548

REDACTED VERSION

# Decision

Matter of: Dynatest Consulting, Inc.

File: B-257822.4

Date: March 1, 1995

David B. Dempsey, Esq., and Sheila C. Stark, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P., for the protester. Michael A. Hordell, Esq., Robert S. Brams, Esq., and Laura L. Hoffman, Esq., Gadsby & Hannah, for Engineering Incorporated, an interested party. Lester Edelman, Esq., and Danielle M. Conway, Esq., Office of the Chief Counsel, U.S. Army Corps of Engineers, for the agency. Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Under solicitation for pavement testing equipment and certain other services where the protester offered the product of a nonqualifying country, the agency improperly included the costs for those services to be performed after delivery of the protester's foreign-made equipment in calculating the Buy American Act surcharge applicable to the foreign end product.

## DECISION

Dynatest Consulting, Inc. protests the termination by the U.S. Army Corps of Engineers of Dynatest's contract No. DACA39-94-C-0097 for an automatic loading machine, based on the agency's determination that it had misapplied the Buy American Act in determining Dynatest's evaluated price.

We sustain the protest.

The decision issued on March 1, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

The U.S. Army Engineer Waterways Experiment Station issued request for proposals (RFP) No. DACA39-94-R-0025 to seek offers that:

"PROVIDE ALL PLANT, LABOR, AND MATERIAL FOR THE FURNISHING AND DELIVERY OF ONE (1) AUTOMATIC LOADING MACHINE (ALM) IN ACCORDANCE WITH THE ATTACHED SPECIFICATIONS . . . FOB: DESTINATION [Cold Regions Research & Engineering Laboratory, Hanover, New Hampshire]."

An ALM applies simulated traffic loads, such as truck and aircraft tires, to various types of pavement test sections under different conditions. In addition to the ALM itself, the RFP statement of work (SOW) requires the contractor to supply lists of spare parts and sources; a servicing/maintenance schedule; and sets of schematic and as-built drawings and operational and servicing manuals for the ALM. The SOW also requires the contractor to "provide training on-site . . . on the proper set-up, operation, maintenance, servicing, etc. for the proper use of the machine." The SOW further specifies that a post-award conference will be conducted on-site to discuss tailoring requirements and that "[a]ny costs associated with this required conference should be included in the offeror's proposal."

The RFP stated that award would be made to the responsive and responsible offeror whose proposal was determined to be most advantageous to the government, cost and other criteria considered. Technical approach and capability were said to be of paramount importance, but where competing proposals are determined to be substantially equal, cost would become a controlling factor. The RFP contemplated the award of a firm, fixed-price supply contract and contained only one line item.

The RFP incorporated by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, which implements the Buy American Act and provides for the addition of an evaluation differential to offers proposing to furnish foreign end products when they are in competition with offers of domestic end products. The differential to be applied to a nonqualifying country end product is 50 percent of the offered price inclusive of duty. DFARS § 252.225-7001(d).

The Corps received nine proposals by the closing date for receipt of proposals. After an initial evaluation, the Corps requested best and final offers (BAFO) from the four offerors with the highest technical scores, including Engineering Incorporated and Dynatest. Dynatest proposed its Mark IV Heavy Vehicle Simulator (HVS), which is based on

a South African product and which will be constructed at the facilities of Dynatest's South African partner. South Africa is a nonqualifying country for Buy American Act purposes.<sup>1</sup> Dynatest's BAFO price was \$(DELETED), broken down by Dynatest as follows:

1 Dynatest Mark IV HVS (F.O.B Hanover NH)	\$(DELETED)
U.S. Customs (approx.)	\$(DELETED)
Harbor Maintenance & Broker Fees	\$(DELETED)
<u>Manufacturing &amp; Processing Fees</u>	<u>\$(DELETED)</u>
Total	\$(DELETED)

Dynatest noted in its BAFO that:

"our interpretation of [the Buy American Act] clauses are that they pertain to that portion of the proposed cost directly attributable to construction in South Africa, plus import duties. The following additional price breakdown therefore represents our interpretation of the above penalty totals when applying the 'Buy American' clause:

"[South African]Portion of Design and Construction	\$(DELETED)
U.S. Duties	\$(DELETED)
Dynatest Portion: Design, & Construction plus royalty, shipping, parts, warranty, <u>admin., support/training and travel</u>	<u>\$(DELETED)</u>
Total	\$(DELETED)
Non-qualifying country 50 [percent] penalty:	
Design/Construct	\$(DELETED)
<u>U.S. Duties</u>	<u>\$(DELETED)</u>
Total Bid for Evaluation Purposes	\$(DELETED)"

Dynatest stated that its price "also includes complete setup of the HVS at delivery site, typical HVS training (on site at time of delivery)<sup>2</sup> and delivery." Dynatest certified in

---

<sup>1</sup>To avoid the application of the Buy American Act penalty, an offer must propose either a domestic end product or an end product predominantly manufactured in either the U.S. or a qualifying country. Federal Acquisition Regulation (FAR) § 25.101. The term "qualifying country" is used to describe certain countries with memoranda of understanding or international agreements with the United States. DFARS § 225.000-70(i). South Africa is not listed as a qualifying country in DFARS § 225.872-1.

<sup>2</sup>Dynatest stated that training for government personnel is expected to take [DELETED] and it plans "to have [DELETED] after delivery to assist with any adjustments or repairs."

its proposal that the only foreign end product being offered was the "MARK IV HVS HARDWARE."

After receiving BAFOs, the Corps's evaluation panel rated the Engineering Incorporated and Dynatest proposals as technically equal, with both receiving the highest technical score of [DELETED]. In evaluating Dynatest's price, the agency applied the 50-percent Buy American surcharge only to the foreign portion and customs duty indicated in Dynatest's offer. Dynatest's evaluated price of \$[DELETED] was \$[DELETED] less than Engineering Incorporated's \$[DELETED] price.<sup>3</sup> The Corps determined that Dynatest's technically equal offer with its lower evaluated price was most advantageous to the government, and made award to Dynatest in the amount of \$1,525,000.<sup>4</sup>

When it received notice of the award to Dynatest, Engineering Incorporated protested to our Office that the Corps failed to adequately evaluate Engineering Incorporated's proposal; improperly evaluated Dynatest's proposal; evaluated the offerors unequally; and made an improper cost realism determination. Because of the protest, the Corps issued a stop-work order to Dynatest. Upon reviewing the agency's report on the protest, Engineering Incorporated raised additional grounds for protest, including the Corps's alleged failure to conduct meaningful discussions and the Corps's alleged misapplication of the Buy American Act penalty to Dynatest's offer.

In considering Engineering Incorporated's protest, the Corps agreed that it had misapplied the Buy American Act penalty in evaluating Dynatest's offer. The Corps reasoned that because the RFP consisted of one line item, Dynatest's offer should have been evaluated by applying the 50 percent differential to Dynatest's entire price, rather than only

---

<sup>3</sup>DFARS § 225.105(1)(i) requires evaluation based on the inclusion of duty, whether or not duty is to be exempted. [DELETED].

<sup>4</sup>The RFP included FAR § 52.225-10, Duty-Free Entry, which states that no amount for any duties on supplies specifically identified to be accorded duty-free entry will be included in the contract price. DFARS § 225.105(1)(i) provides that if award is made based on a nonqualifying country offer and duty is to be exempted, award is to be made at the offered price minus duty. Here, award was made at Dynatest's offered price (\$[DELETED]) minus the waivable customs duties (\$[DELETED]) identified by Dynatest in the section of the RFP for Information for Duty-Free Entry Evaluation. DFARS § 252.225-7003.

to the cost of the work attributable to Dynatest's South African manufacturer. The Corps based its reasoning on DFARS § 252.225-7001(d), which states that "[g]enerally, when the Buy American Act is applicable, each nonqualifying country offer is adjusted for the purpose of evaluation by adding 50 percent of the offer, inclusive of duty"; and DFARS § 225.105(1), which instructs the contracting officer to evaluate nonqualifying country offers "by adding a 50 percent factor to the price (including duty) of each nonqualifying country offer."

Applying the 50-percent Buy American Act differential to Dynatest's entire offer (\$[DELETED] plus 50 percent) results in an evaluated price of \$[DELETED] for Dynatest, which exceeds Engineering Incorporated's price by \$[DELETED]. Because the Corps determined that it had improperly evaluated Dynatest's offer, it terminated the contract with Dynatest for the convenience of the government. Award could not be made to Engineering Incorporated because that firm's price of \$[DELETED] exceeded the funds available for the project. As a result, the contracting officer canceled the RFP with the intention of resoliciting the agency's needs at a later date. Based on the Corps's proposed corrective action, our Office dismissed Engineering Incorporated's protest as academic on October 11, 1994.

Dynatest protested to our Office upon receiving notice that its contract was terminated. Dynatest contends that the Buy American Act penalty properly is only applicable to its South African manufactured equipment, not its total price, and that, consequently, Dynatest's offer remains the most advantageous to the government and the contract was improperly terminated.

The Buy American Act requires that only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use, unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a (1988). As implemented by the DFARS, the price of domestic end products is unreasonable if it exceeds the cost of like foreign end products plus a 50 percent differential. DFARS §§ 225.102; 225.105.

The Buy American Act clause incorporated into the RFP, DFARS § 252.225-7001, defines "[e]nd product" as "those articles, materials, and supplies to be acquired for public use under the contract." The clause further provides that:

"[f]or this contract, the end products are the line items to be delivered to the Government (including supplies to be acquired by the Government for public use in connection with service contracts, but excluding installation and other services to be performed after delivery)" (emphasis added).

Here, although the RFP calls for the supply of the ALM as the end product to be delivered under the contract, the SOW also calls for the contractor to perform post-delivery services such as training.

The Buy American Act and its implementing regulations have been consistently viewed as exempting post-delivery services such as installation, testing, and training from the surcharge applicable to foreign end products. See Allis-Chalmers Corp.; Hydro-Turbine Div. v. Friedkin, 635 F.2d 248 (3d Cir. 1980); Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶ 431; 53 Comp. Gen. 259 (1973); Allis-Chalmers Corp., B-195311, Dec. 7, 1979, 79-2 CPD ¶ 397; see also STD Research Corp., 72 Comp. Gen. 211 (1993), 93-1 CPD ¶ 406 (note 5) (agency should not apply the surcharge to an offeror's total evaluated price for a high technology power generator, which included not only the price of foreign hardware, but also numerous post-delivery services related to testing and modification of the equipment).

Here, the agency erroneously based its recalculation of Dynatest's evaluated price on its total price, including the services that were to be performed after delivery of the ALM. Services such as "support/training and travel" should have been excluded from the Buy American surcharge. See 53 Comp. Gen. at 263; Allis-Chalmers Corp., supra. Likewise, costs associated with producing instruction manuals and providing the warranty should have been excluded. See Ampex Corp., B-203021, Feb. 24, 1982, 82-1 CPD ¶ 163; Bell Helicopter Textron, supra.

On the other hand, while Dynatest provided a breakdown of its bid price between its cost for its South African manufacturer of the ALM and its other costs, we think this breakdown is insufficient to determine the portion of its price to which the surcharge should be applied. For example, costs associated with Dynatest's portion of "Design & Construction," and "admin."--which Dynatest did not include in its manufacturer's costs--may either be

post-delivery services or be related to the cost of the ALM end product and thus subject to the Buy American surcharge. Likewise, the royalty, shipping, and parts costs may be attributable to the cost of the ALM end product. See Lyntronics, Inc., B-247431, June 8, 1992, 92-1 CPD ¶ 498.

Since individual prices were neither requested of nor provided by Dynatest for the ALM itself and post-delivery items, it cannot be determined from the price breakdown in Dynatest's BAFO what costs should have been excluded from the Buy American Act surcharge. The difficulty in determining which of Dynatest's costs is attributable to the end product could have been avoided if the Corps, who knew of Dynatest's intent to offer a foreign end item, had included separate line items in the RFP's schedule.<sup>5</sup> The Corps's decision to issue an RFP for supplies with post-delivery services combined into one lump-sum line item does not modify the implementing regulation's distinction between the cost of the ALM end product, which was manufactured in South Africa and is subject to the Buy American Act's surcharge, and post-delivery set-up, training and other services, which clearly are not.<sup>6</sup>

---

<sup>5</sup>Indeed, solicitations in many Buy American Act cases contain line items that allow end products to be differentiated from services and other items to which the surcharge would not be applicable. See, e.g., STD Research Corp., supra; Ampex Corp., supra; Bell Helicopter Textron, supra. Solicitations containing line items are useful for identifying what parts of the offer are subject to the Buy American Act surcharge and what parts, such as post-delivery services, are not, and we have advised agencies whose solicitations did not provide separate line items in such circumstances that they should do so. See 53 Comp. Gen. at 261-262.

<sup>6</sup>We find no merit to Engineering Incorporated's contention that excluding the applicability of the Buy American surcharge to post-delivery costs in a single line item procurement will encourage unbalanced bidding by providing an incentive to bidders to reduce the amount of their bids subject to the surcharge. The rule that materially unbalanced offers must be rejected, in combination with the ability of the agency to detect a materially unbalanced offer by comparing the offeror's cost data (in the absence of line items) with other offers and the agency's own estimates is sufficient to deter unbalanced bidding. See Allis-Chalmers Corp., supra.

We recommend that the Corps obtain clarification from Dynatest as to the costs associated with the foreign end product from the costs not so associated, consistent with this decision. In so doing, the Corps should request and obtain from Dynatest any supporting documentation it considers necessary to properly evaluate Dynatest's price. Based on this information, the Corps should reevaluate Dynatest's price under the Buy American Act, applying the surcharge only to the foreign end-item. If Dynatest's evaluated price exceeds Engineering Incorporated's price, the termination of Dynatest's contract is unexceptionable and the solicitation was properly canceled due to insufficient funds. See AT&T, B-251177; B-251177.2, Mar. 16, 1993, 93-1 CPD ¶ 236. If Dynatest's evaluated price remains lower than Engineering Incorporated's, the Corps should reinstate the award to Dynatest, if funds remain available. If the agency determines that it no longer requires the ALM, Dynatest is entitled to recover its proposal preparation costs if it is determined that Dynatest would have retained the award under a proper evaluation. 4 C.F.R. § 21.6(d)(2). In any case, Dynatest is entitled to recover the costs incurred in filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Dynatest should submit its certified claim directly to the agency within 60 working days of receipt of the decision. 4 C.F.R. § 21.6(f)(1).<sup>7</sup>

The protest is sustained.

Comptroller General  
of the United States

---

<sup>7</sup>The protest grounds raised by Engineering Incorporated in its prior protests cannot be resolved at this time, inasmuch as the agency took corrective action in response to those protests, resulting in their dismissal by our Office, and therefore the agency did not otherwise substantively respond to Engineering Incorporated's supplemental protest. If the Corps reinstates award to Dynatest, Engineering Incorporated may reinstate its original protest grounds in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).