



**G A O**

Accountability \* Integrity \* Reliability

**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** Tiger Truck, LLC

**File:** B-400685

**Date:** January 14, 2009

---

Robert K. Tompkins, Esq., Michael J. Carrato, Esq., and Rory E. Adams, Esq., Patton Boggs LLP, for the protester.

James H. Roberts III, Esq., Van Scoyoc Kelly PLLC, and Nicholas J. Mosich, Esq., Mosich & Associates, for the intervenor.

Erica V. Ordonez, Esq., and Lee W. Crook III, Esq., General Services Administration, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

In a procurement covered by the Trade Agreements Act (TAA), protest of an award to a vendor whose quotation identified products that were not TAA-compliant is sustained, where the agency failed to follow required evaluation procedures for TAA procurements, improperly failed to ascertain whether the products identified by the protester were TAA-compliant, and did not conduct meaningful discussions with the protester even though the agency regarded the protester's quoted price as unreasonably high.

---

### DECISION

Tiger Truck, LLC, of Poteau, Oklahoma, protests the award of a contract to Vantage Vehicle International, Inc., of Corona, California, issued by the General Services Administration (GSA) under request for quotations (RFQ) No. QSDACE-H4-08-2320-N, which included requirements of the Trade Agreements Act (TAA), for "mini-utility" vehicles. Tiger contends that the agency unlawfully awarded the contract to a vendor that did not comply with the TAA, and unreasonably rejected Tiger's quotation.

We sustain the protest.

The RFQ sought 1,126 mini-utility vehicles for use by the Department of the Air Force. These vehicles were to be used for on-base purposes only, not for use on commercial roadways or interstate highways. The trucks, which were to be

delivered within 120 days of “first article” approval, consisted of 262 mini-utility standard cabs, 174 mini-utility crew cabs, 178 mini-utility cargo vans, 356 mini-utility heavy duty standard cabs, and 156 mini-utility heavy duty crew cabs. RFQ at 3, attach. 2. The solicitation required that each type of vehicle meet certain specifications, such as passenger capacity, height and width, and load capacity. The solicitation also required that each vehicle come with certain options, such as air conditioning, an “E85” fuel engine, and an automatic transmission. RFQ attach. 1.

The procurement was to be conducted as a commercial item acquisition in accordance with Federal Acquisition Regulation (FAR) part 12. The RFQ provided for award of a fixed-price contract to the vendor that provided the lowest-price, technically acceptable quotation. Technical acceptability was determined from evaluating technical conformance to government specifications, delivery requirements, past performance references, and manufacturer’s warranty terms. RFQ at 3-4, 36-37.

In addition, the procurement was covered by the TAA, 19 U.S.C. § 2501 *et seq.* (2000), as implemented by FAR part 25.<sup>1</sup> Vendors were asked to certify that each “end product” was made in the United States or a designated country as defined in the RFQ, and list all end products that were not made in the United States or a designated country. RFQ at 27. The RFQ further provided as follows:

The Government will evaluate offers in accordance with the policies and procedures of [FAR part 25]. . . . The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for

---

<sup>1</sup> The TAA authorizes the President to waive all buy-national laws, regulations, or procedures for the acquisition of eligible products from any country designated as a reciprocating, signatory nation to a recognized agreement or as a “least developed country.” 19 U.S.C. § 2511; Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., B-244686 *et al.*, Nov. 7, 1991, 91-2 CPD ¶ 434 at 2-3. In order to encourage trade agreements with additional countries for reciprocal procurement opportunities, the TAA also requires the President to prohibit the procurement of eligible products from foreign countries not designated pursuant to the TAA. 19 U.S.C. § 2512(a). The net effect is that products and supplies of designated countries—that is, TAA-compliant products—receive the same treatment as American products, and products from non-designated countries generally cannot be purchased absent a non-availability determination as discussed below. FAR §§ 25.402(a)(1), 25.502(b)(3); Olympic Container Corp., B-250403, Jan. 29, 1993, 93-1 CPD ¶ 89 at 2.

such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.<sup>2</sup>

RFQ at 28. For an item to be considered an end product of the United States or a designated country, it must be manufactured in that country, or, if some or all of the parts are from a non-designated country, it must be “substantially transformed [in the United States or a designated country] into a new and different article of commerce with a name, character, or use distinct from” the parts from which it was transformed. 19 U.S.C. § 2518(4)(B).

Prior to the issuance of this solicitation, the government had purchased mini-utility vehicles from vendors, including Tiger, which had not been TAA-compliant, because no vehicles manufactured in the United States or in designated countries were available. In the summer of 2007, Tiger announced plans to build a plant in Oklahoma that it asserted would be able to produce TAA-compliant vehicles responsive to Air Force and GSA requirements. See Protester’s Comments at 3-4; Hearing Transcript (Tr.) at 15-16.<sup>3</sup> Tiger advised GSA that the firm would be “uniquely situated” as the only company that could produce American-made, TAA-compliant vehicles. Tr. at 99.

On July 28, 2008 (the closing date for receipt of quotations), Tiger, Vantage, and [REDACTED] submitted quotations in response to the RFQ. Tiger certified that its vehicles were manufactured in the United States, while the other firms indicated that their vehicles were manufactured in China, which is not a designated country. Contracting Officer’s Statement at 5-6. Tiger quoted the highest price of [REDACTED], [REDACTED] quoted [REDACTED], and Vantage quoted [REDACTED]. Agency Report (AR), Tab 50, Prenegotiation Objectives Memorandum, at 1-2. All three quotations were found to be technically acceptable, although the contracting officer was concerned that Tiger’s quoted price was “exorbitant.” AR, Tab 56, Price Negotiation Memorandum, at 11, 13. According to the agency, because they received only three quotations, and the only vendor that certified TAA compliance provided the highest-priced quotation, the contracting officer placed all three vendors’ quotations in the competitive range. Id. at 13; see also AR, Tab 50, Prenegotiation Objectives Memorandum, at 2.

The contracting officer issued “numerous questions and clarifications” to vendors concerning a variety of issues, after which vendors were invited to submit “best and

---

<sup>2</sup> As discussed below, the contracting officer does not have the authority to make this non-availability determination, which must be made by the head of the contracting activity. FAR §§ 25.103(b)(2), 25.502(b)(3).

<sup>3</sup> Our Office conducted a hearing in this matter to elicit testimony as to how GSA evaluated Tiger’s quotation.

final offers.” Contracting Officer’s Statement at 9; AR, Tab 56, Price Negotiation Memorandum, at 13. Tiger was not advised at any time during these exchanges that its price was considered “exorbitant” or unreasonably high. Tr. at 173-74. After the exchanges, Tiger reduced its price to [REDACTED], [REDACTED] reduced its price to [REDACTED], and Vantage reduced its price to [REDACTED]. Tiger offered to reduce its price by an additional [REDACTED] if the agency would agree to extend the delivery schedule by 60 days. AR, Tab 56, Price Negotiation Memorandum, at 13.

On September 9, the contracting officer and GSA’s “industrial operations analyst” (IOA) conducted a “site visit” of Tiger’s Oklahoma facility to determine whether Tiger’s vehicles were TAA-compliant. During the site visit, Tiger provided GSA with a document that detailed Tiger’s costs for the manufacture and assembly of these vehicles in the United States. On September 15, the IOA submitted a site visit report to the contracting officer. The IOA stated in the report that she “believe[d] the process that Tiger is performing would constitute substantial transformation, even though the majority of components are coming from [REDACTED]”; however, she qualified her opinion by acknowledging that she “lack[ed] a clear definition of the term ‘substantially transformed.’” AR, Tab 46, IOA Report, at 3. Because of the IOA’s qualified statement and the contracting officer’s understanding that many of the parts were coming from [REDACTED], the contracting officer “wasn’t sure” if Tiger’s vehicles were TAA-compliant.<sup>4</sup> Tr. at 63, 75-76. She was able only to conclude that “Tiger may comply with the [TAA] because major components/parts purchased and received from [REDACTED] may be substantially transformed during assembly operations in the manufacturing of these vehicles.” AR, Tab 56, Price Negotiation Memorandum, at 11.

Although the contracting officer found that Tiger’s vehicles “may” be TAA-compliant, she concluded that Tiger’s quoted price was not fair and reasonable and, thus, Tiger could not be awarded the contract. Id. at 13.

In evaluating Tiger’s price, the contracting officer compared Tiger’s prices to competitive pricing received from other vendors in response to this RFQ, to the government estimate, to prices obtained from a 2007 open market procurement for the same vehicles, and to commercial prices published on Tiger’s website. Contracting Officer’s Statement at 9; AR, Tab 56, Price Negotiation Memorandum, at 11-13. All of this data, except for possibly some of Tiger’s website prices, involved

---

<sup>4</sup> On September 16, Tiger’s counsel provided the contracting officer with a legal opinion explaining why Tiger’s vehicles should be considered end products of the United States, but the contracting officer found that this letter contained factual information that was “contradictory” to information received during the site visit. Contracting Officer’s Statement at 17; Tr. at 151-52. Although Tiger’s counsel later revised this letter, the revised letter did not resolve the doubt the contracting officer had as to whether Tiger’s vehicles were TAA-compliant.

pricing for non-TAA-compliant vehicles.<sup>5</sup> The contracting officer asserts, and Tiger does not disagree, that other than Tiger's quoted price here and possibly its website prices, no data on American-made vehicles exists. Tr. at 97-99.

Under each of the bases of comparison, the contracting officer found Tiger's prices to be "exorbitantly unreasonable." AR, Tab 56, Price Negotiation Memorandum, at 13. For example, when considering the overall total price, the contracting officer noted that Tiger's initial quoted total price was [REDACTED] percent higher than Vantage's initial price, [REDACTED] percent higher than [REDACTED] initial price, and [REDACTED] percent higher than the government estimate. *Id.* at 11. Similarly, she noted that Tiger's final quoted total price was [REDACTED] percent higher than Vantage's final price, and [REDACTED] percent higher than [REDACTED] final price. *Id.* at 13. Moreover, she found that Tiger's initial quoted price per vehicle ranged from [REDACTED] percent higher than published prices on its website, from [REDACTED] percent higher than its proposed 2007 prices for the same vehicles, and [REDACTED] percent higher than the awardee's prices under the 2007 contract for the same vehicles.<sup>6</sup> *Id.* at 12.

The contracting officer also looked to Tiger's cost information, which the firm provided during the site visit, to see if the information explained why Tiger's quoted prices were so high. Although this analysis is not documented anywhere in the contemporaneous record, the contracting officer explained during the hearing that she used the cost information to compare Tiger's identified costs to Tiger's prices in its quotation and to Tiger's published website prices. Tr. at 51-52, 92-97. She found significant unexplained discrepancies between Tiger's costs and prices; for example, she found that Tiger's prices per vehicle from its quotation ranged from [REDACTED] percent higher than Tiger's costs. *Id.*; Contracting Officer's Statement at 14. As noted above, the contracting officer did not question Tiger about these disparities during discussions. Tr. at 173-74.

Based on her analysis, the contracting officer determined that Tiger's quoted price was not fair and reasonable and, on that basis, she concluded that no TAA-compliant quotations were eligible for award. AR, Tab 56, Price Negotiation Memorandum, at 13. The contracting officer selected Vantage for award based on that firm's lowest-priced quotation, and Tiger protested.

---

<sup>5</sup> On its website, Tiger marketed one of its vehicle types (the heavy duty standard cab) as "Made in America"; the website is silent as to the country of origin for the other vehicle types at issue here. Tr. at 52; Agency Legal Memorandum, at 6 n.3.

<sup>6</sup> For ease of reading, our Office has rounded the percentages to the nearest whole number.

Tiger protests that the agency unlawfully awarded the contract to a non-TAA-compliant vendor (Vantage) and improperly rejected Tiger's quotation. In a procurement covered by the TAA, such as the one here, an agency is prohibited from procuring, or even considering, non-TAA-compliant products unless the head of the contracting activity makes an "[i]ndividual determination" of non-availability, that is, a determination that no TAA-compliant goods are available "in sufficient and reasonably available quantities of a satisfactory quality." FAR §§ 25.103(b)(2), 25.502(b)(1), (3).<sup>7</sup> In this regard, an agency must "[c]onsider only offers of U.S.-made or designated country end products, unless no offers of such end products were received." FAR § 25.502(b)(1); see also 19 U.S.C. § 2512(a)(2)(A). Only if no offer for a TAA-compliant product is received may an agency procure a non-TAA-compliant product, and only after the head of the contracting activity makes an individual non-availability determination. FAR §§ 25.103(b)(2), 25.502(b)(3).

Tiger argues that the agency violated the TAA and its implementing regulations when it considered price before determining TAA compliance, evaluated Vantage's and [REDACTED] quotations even though their vehicles were not TAA-compliant, and awarded the contract to Vantage without obtaining the required non-availability determination from the head of the contracting activity. Tiger also complains that the agency failed to affirmatively determine that Tiger's vehicles complied with the TAA. Tiger's Post-Hearing Comments at 6-8.

The agency contends that the TAA requirements are not applicable here because there were no TAA-compliant quotations that were eligible for award, since Tiger (whose vehicles were the only arguably TAA-compliant ones) quoted a price that was not fair and reasonable. Contracting Officer's Statement at 18.

As an initial matter, we note that it is not clear from the record that Tiger's vehicles are, in fact, TAA-compliant. Consistent with this record, the contracting officer's determination was only that Tiger's vehicles "may" be TAA-compliant. AR, Tab 56, Price Negotiation Memorandum, at 11. Nonetheless, as noted above, the FAR requires that the agency consider only TAA-compliant products, which necessarily requires that the agency first determine whether Tiger's vehicles were TAA-compliant in order to ascertain whether any TAA-compliant products were available. If the agency had determined here that Tiger's vehicles were TAA-compliant, then the remaining vendors' quotations for non-TAA-compliant vehicles should have been eliminated from consideration and the agency should have evaluated only Tiger's quotation against the RFQ's evaluation criteria, including evaluating Tiger's price for reasonableness as further discussed below. If, however, the agency had determined that Tiger's vehicles, like the other vendors' vehicles,

---

<sup>7</sup> There is also the possibility of a "class determination" of non-availability for identified items. FAR § 25.103(b)(1). There is no indication in the record that such a determination was made here.

were not TAA-compliant, the head of the contracting activity would have been required to issue a non-availability determination, if he or she found it was warranted, before the agency could have selected a quotation for non-TAA-compliant vehicles for award. None of these events occurred here. Instead, in violation of FAR § 25.502, the agency failed to determine whether Tiger's vehicles complied with the TAA and made award based on a quotation for non-TAA-compliant vehicles without first obtaining a non-availability determination from the head of the contracting activity. We sustain the protest on these bases.

The agency asserts that "Tiger was not prejudiced by any potential error in the evaluation, including TAA compliance, because it was not eligible for award due to its unreasonable price." Agency's Post-Hearing Comments at 14. It is a fundamental requirement that a government agency cannot award a contract at more than a fair and reasonable price, and there is nothing in the TAA or its implementing regulations that indicates that TAA-compliant products can be acquired for an amount greater than a fair and reasonable price. In this regard, FAR § 15.402(a) states that a contracting officer "must" purchase supplies and services "at a fair and reasonable price."<sup>8</sup>

As noted above, if the agency in accordance with FAR § 25.502 determines that Tiger's vehicles are TAA-compliant, then the agency must evaluate Tiger's quotation, including whether Tiger's quoted price is fair and reasonable. We recognize that the agency determined that Tiger's price was "exorbitantly unreasonable" and found Tiger ineligible for award on this basis. AR, Tab 56, Price Negotiation Memorandum, at 13. However, the record also confirms that the agency failed to raise this issue during discussions, even though it held numerous rounds of discussions with the vendors and requested revised quotations inviting vendors to reduce their price.<sup>9</sup>

---

<sup>8</sup> Although this was a commercial item acquisition conducted under FAR part 12, that part expressly provides that an agency must determine the reasonableness of a vendor's price in accordance with FAR subpart 15.4. FAR § 12.209.

<sup>9</sup> We recognize that Tiger's challenge of the adequacy of discussions may be untimely under our Bid Protest Regulations because it was not specifically raised in the initial protest. See 4 C.F.R. § 21.2(a)(2) (2008). To the extent that this issue can be considered untimely, we consider the issue raised to be a significant one that should be treated on the merits. Accordingly, we find that the issue is appropriate for consideration under the "significant issue" exception to our timeliness rules. 4 C.F.R. § 21.2(c). What constitutes a significant issue is to be decided on a case-by-case basis. Celadon Labs., Inc., B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 at 4. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided. Id. The issue here--the interplay between the obligation to conduct meaningful discussions and the rules governing TAA procurements--is not one that we have previously decided and is one that can be expected to arise in future TAA procurements.

Although the agency asserts that “discussions were not intended” and were not held, we find that the “numerous questions and clarifications” issued to vendors followed by the agency’s request for “best and final offers,” which included revisions to vendor’s prices, constitutes discussions as contemplated by the FAR.<sup>10</sup> AR, Tab 56, Price Negotiation Memorandum, at 12; Contracting Officer’s Statement at 9; Tr. at 173; see FAR § 15.306(d).<sup>11</sup>

Although the solicitation here did not require the agency to hold discussions with vendors, once an agency chooses to do so, as occurred here, the discussions are required to be meaningful; that is, the agency is required to raise with a vendor significant weaknesses and deficiencies identified in the vendor’s quotation. FAR § 15.306(d)(3). Discussions cannot be meaningful if a vendor is not advised of the significant weaknesses or deficiencies that must be addressed in order for its quotation to be in line for award. DevTech Sys., Inc., B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11 at 4. There is no doubt that Tiger’s quoted price was viewed by the agency as a deficiency, as Tiger’s price was the sole basis for the agency’s finding that the quotation was ineligible for award. In holding discussions with Tiger, but not raising with the firm the concern that Tiger’s price was unreasonable, the agency did not provide Tiger with meaningful discussions. DevTech Sys., Inc., supra, at 4-5.

We find a reasonable possibility that Tiger was prejudiced by the agency’s failure to hold discussions concerning the reasonableness of the firm’s price. Had the agency raised its concern with Tiger, then Tiger would have had the opportunity to explain why its price was fair and reasonable or to reduce it, such that the agency may have ultimately found the price to be fair and reasonable and, thus, Tiger’s quotation would have been in line for award. Coupled with the agency’s failure to properly evaluate TAA eligibility, we find that the agency’s failure to hold meaningful discussions prejudiced the protester, and we sustain the protest on these bases.<sup>12</sup> See Cogent Sys., Inc., B-295990.4, B-295990.5, Oct. 6, 2005, 2005 CPD ¶ 179 at 10-11.

---

<sup>10</sup> The acid test of whether discussions have occurred is whether the agency has provided an opportunity for submissions to be revised or modified. In this regard, it is the actions of the parties, and not the characterization by the agency, that determines whether discussions have occurred. Computer Sci. Corp. et al., B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 9-10.

<sup>11</sup> With regard to FAR part 12 procurements conducted under negotiated procedures, as here, contracting officers are required to adhere to the policies and procedures for solicitation, evaluation, and award prescribed in FAR part 15. FAR § 12.203. It is not clear why the agency issued a request for quotations, rather than a request for proposals.

<sup>12</sup> Tiger also complains that the agency miscalculated price by considering Chinese-made vehicles as a basis of price comparison. We find nothing in the TAA or its implementing regulations that prohibits the consideration of these prices as

(continued...)



We recommend that the agency reevaluate the quotations in a manner consistent with FAR § 25.502, and first determine if the vehicles identified in Tiger's quotation are TAA-compliant. If so, the agency should re-open discussions with Tiger that would include the reasonableness of its price and then request a revised quotation from that firm. If the agency determines that Tiger's vehicles are TAA-compliant and that its final quoted price is fair and reasonable, we recommend that the contract awarded to Vantage be terminated and award be made to Tiger. If the agency determines that no TAA-compliant quotations have been submitted under this solicitation or if, after discussions, Tiger's price is determined to be not fair and reasonable, then the head of the contracting activity should consider whether it is appropriate to make a non-availability determination and if such a determination is made, the contract awarded to Vantage, the low-priced vendor with non-TAA-compliant vehicles, should not be disturbed. We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing its protest, including the reasonable costs of attorneys' fees. 4 C.F.R. § 21.8(d). The protester should submit a certified claim for costs to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger  
General Counsel

---

(...continued)

one aspect of determining whether a quoted price is fair and reasonable. We note that in analogous situations, agencies are permitted to use the prices of ineligible offerors as a basis of comparison when determining price reasonableness. See American Imaging Servs., B-238969, B-238971, July 19, 1990, 90-2 CPD ¶ 51 at 3 (in a procurement set aside for small business, prices from ineligible large businesses may be considered in evaluating the reasonableness of a small business' price); see also FAR § 25.105 (in Buy American Act procurements, domestic product prices may be compared to foreign prices, albeit, unlike with TAA procurements, domestic prices in Buy American Act procurements are considered reasonable only if they do not exceed certain identified percentages). Furthermore, the FAR broadly provides that an agency may use a variety of techniques or procedures in determining price reasonableness, including, but not limited to, comparing prices received in response to a solicitation; comparing prices previously proposed for the same or similar items; comparing published market prices; and comparing proposed prices to an independent government estimate. FAR § 15.404-1(b). In addition, it may be appropriate to solicit and analyze pricing information provided by Tiger supporting its proposed price. FAR § 15.404-1(b)(vii).