**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Baldt Inc.

File: B-278422

Date: January 28, 1998

Glenn Suplee for the protester.
Michael J. Stobbart for Lister Chain & Forge Inc., the intervenor.
Talbot J. Nicholas II, Esq., United States Coast Guard, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined that the awardee would provide buoy chain of domestic manufacture and the award would therefore comply with 14 U.S.C.A. § 97 (West Supp. 1997), which prohibits the procurement of buoy chain not manufactured in the United States, where the awardee's proposal stated that the chain would be manufactured in the United States; the proposal's reference to Canadian subcontractors that would be available to perform certain tests has no bearing on the determination as to whether the buoy chain will be manufactured in the United States because the tests are not part of the manufacturing process.

DECISION

Baldt Inc. protests the award of a contract to Lister Chain & Forge Inc. under request for proposals (RFP) No. DTCG40-97-R-70029, issued by the United States Coast Guard for buoy chain. Baldt contends that the buoy chain offered by Lister is not manufactured in the United States, and its proposal should therefore have been rejected by the agency in accordance with the terms of the solicitation and a provision in the Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3901, 3984 (1996) (codified at 14 U.S.C.A. § 97(a) (West Supp. 1997)), which prohibit the Coast Guard from procuring buoy chain that is not manufactured in the United States.

We deny the protest.

The RFP provided for the award of a firm, fixed-price contract for buoy chain. The RFP stated that award would be made to the offeror submitting the proposal representing the best value to the government, price and other factors considered. The solicitation listed the following evaluation factors in descending order of importance: technical, price, and past performance. The RFP also informed offerors of the applicability of 14 U.S.C.A. § 97(a) to this procurement and

paraphrased the restriction contained in that provision. Specifically, 14 U.S.C.A. § 97 provides as follows:

> **Procurement of buoy chain**
> (a) Except as provided in subsection (b), the Coast Guard may not procure buoy chain--
> (1) that is not manufactured in the United States; or
> (2) substantially all of the components of which are not produced or manufactured in the United States.
>
> (b) The Coast Guard may procure buoy chain that is not manufactured in the United States if the Secretary [of Transportation] determines that--
> (1) the price of buoy chain manufactured in the United States is unreasonable; or
> (2) emergency circumstances exist.[1]

The agency received proposals from five firms, including Baldt and Lister, by the RFP's closing date. Lister's proposal stated that it was "based on all the quoted products manufactured in our plant in Blaine, Washington," specifying that the chain would be "100 [percent] made in the U.S.A. including all components." Lister also submitted an alternate proposal which was based upon subcontracting "a portion of the chain . . . to our sister company in Canada," for which Lister explained that "[t]he U.S. made components of this proposal make up 83 [percent] of the total bid."

The agency evaluated the proposals, and rejected three of the proposals because the buoy chain to be supplied would be of foreign manufacture. Discussions were held, and best and final offers (BAFO) were requested and received. After receipt of BAFOs, the agency rejected Lister's alternate proposal based on its determination that the proposal's inclusion of buoy chain manufactured in Canada rendered the proposal noncompliant with 14 U.S.C.A. § 97(a).

Lister's primary proposal expressly stated that the contract would be performed in Blaine, Washington. The only indication in this proposal that any work would be performed outside of the United States was the proposal's identification of subcontractors located in Canada that would be available to perform certain testing (if necessary).[2] This proposal was rated at 101.50 out of 125 points for technical

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[1]The Coast Guard does not contend that the exceptions contained in 10 U.S.C.A. § 97(b) apply.

[2]Our discussion of the respective contents and evaluation of Baldt's and Lister's proposals is necessarily general because no protective order was issued, inasmuch as the protester did not employ legal counsel.

merit and past performance at a price of $1,823,839. Baldt's BAFO was rated at 83.75 points at a price of $5,993,636. The agency determined that Lister's proposal represented the best value to the government, and made award to that firm.[3]

Baldt protests that Lister's proposal should have been rejected by the agency because Lister will not, in Baldt's view, manufacture the chain in the United States. Baldt, while recognizing that 14 U.S.C.A. § 97 does not define the term "manufacture," argues that the legislative history of 14 U.S.C.A. § 97(a) indicates that it was intended to be similar to the restrictions applicable to the procurement of anchor and mooring chain by the Department of Defense (DoD). In this regard, Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7012-1 provides, in pertinent part, that:

> DoD appropriations for fiscal years 1991 and after may not be used to acquire welded shipboard anchor and mooring chain, four inches in diameter and under, unless--
>
> > (1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and
> > (2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

[Emphasis added]. Baldt concludes that the DFARS definition of "manufacture," which, as quoted above, includes testing, should be applicable here.

As indicated, the requirement that the Coast Guard procure buoy chain of domestic manufacture was included in the Coast Guard Authorization Act of 1996. The House version of the bill contained a requirement regarding the procurement of buoy chain of domestic manufacture identical to that subsequently included in the Authorization Act as passed into law and codified at 14 U.S.C.A. § 97(a). H.R. 1361, 104th Cong., 141 Cong. Rec. H4559, 4582 (1995). The House version also specified (consistent with DFARS § 225.7012-1) that "the term 'manufacture' includes cutting, heat treating, quality control, welding (including the forging and shot blasting process), and testing." Id. As pointed out by the protester, during general debate of H.R. 1361, Congressman Goodling of Pennsylvania remarked that the above quoted provisions:

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[3]Baldt initially protested that the evaluation of its proposal was unreasonable. Because in its report on the protest the agency responded in detail to this argument, and the protester did not respond to the agency's position in its comments on the agency report, we consider Baldt to have abandoned this aspect of its protest. Ares Corp., B-275321, B-275321.2, Feb. 7, 1997, 97-1 CPD ¶ 82 at 13 n.19.

> would subject the Coast Guard to the same procurement policies as [DoD], therefore restricting the purchase of chain not manufactured in the United States. In addition, all of the components of the buoy chain must be procured or manufactured in the United States.

141 Cong. Rec. H4587 (1995). The Senate version of the bill (S. 1004), which was ultimately enacted, did not contain any provision regarding the procurement of buoy chain. Rather, the provision that was ultimately passed into law, and codified at 14 U.S.C.A. § 97, was added to the Senate version of the bill in conference. However, as indicated, it was added without the definition of the term "manufacture" as set forth in H.R. 1361. The Conference Report does not provide any explanation for the deletion of the provision defining manufacture, noting only that "[t]he Senate bill does not contain a comparable provision," and that the "Conference substitute adopts the House provision with an amendment." H.R. Conf. Rep. No. 104-854, at 137 (1996), reprinted in 1996 U.S.C.C.A.N. 4292, 4332.

Because the definition of the term "manufacture" set forth in H.R. 1361 was deleted in conference, we disagree with the protester that the legislative history of the Act--specifically, the deleted definition of "manufacture" and Representative Goodling's remarks--indicates that the term "manufacture" should be defined in accordance with the DFARS provision. Although it is unclear from the legislative history why the definition of "manufacture" included in H.R. 1361 was deleted in conference, the fact remains that it was, and we therefore have no basis to infer that the nearly identical DFARS definition is applicable here. Accordingly, we conclude that neither the language nor the legislative history of 14 U.S.C.A. § 97 provides any specific guidance as to the definition of the term "manufacture" or the stages in the production processes that should be considered part of manufacturing.

We have discussed the meaning of the term "manufacture" in numerous cases in relation to the Buy American Act, 41 U.S.C. § 10a-10d (1994). Under a restriction in the Buy American Act similar to that in 14 U.S.C.A. § 97, the term "manufacture" has been found to mean completion of an article in the form required for use by the government.[4] See 46 Comp. Gen. 784, 791 (1967); Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468 at 4. Specifically, with regard to testing, we have found that the costs of testing a model of the product prior to its manufacture, or of testing the product itself after manufacture to determine whether it met the relevant specification requirements, could not be considered manufacturing costs because

[4]The Buy American Act does not specifically define the term "manufacture."

such testing was not part of the manufacturing process. 48 Comp. Gen. 727, 730 (1969); Patterson Pump Co.; Allison Chalmers Corp., B-200165, B-200165.2, Dec. 31, 1980, 80-2 CPD ¶ 453 at 6. Absent any evidence that Congress intended a different meaning, we adopt the rationale from the Buy American Act cases, see A & D Mach. Co., B-242546, B-242547, May 16, 1991, 91-1 CPD ¶ 473 at 3-4 (Buy American Act cases referred to in determining whether machine tools were manufactured in the United States in accordance with a restriction contained in the 1989 National Defense Authorization Act, 10 U.S.C. § 2507 (1988)); see also Marbex, Inc., supra, at 4 (Buy American Act cases referred to in determining where surgical gloves were manufactured to determine a bid's compliance with the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2581 (1994)), and conclude that the fact that Lister's proposal identified firms located in Canada that may perform certain testing either before or after the actual manufacture of the chain has no bearing on the determination as to whether the buoy chain offered will be manufactured in the United States, because the testing would not be part of the manufacturing process.[5]

Baldt also contends that "Lister, Canada . . . serves as Lister, U.S.'s home office," and that because "[g]enerally accepted accounting principles require that general and administrative and other home office functions to be included in the cost of the product . . . the chain Lister, U.S. manufactures cannot be considered as manufactured in the United States." We disagree.

The restriction on the procurement of buoy chain set forth at 14 U.S.C.A. § 97(a), in contrast with either the DFARS restriction on the procurement of anchor chain, or the restrictions set forth in the Buy American Act, does not mention costs. Rather, it expressly requires that the buoy chain or substantially all of its components be produced or manufactured in the United States. As such, the statute, by its express terms, is primarily concerned with the place of manufacture. Because as specified in Lister's proposal, and reiterated by Lister during the course of this protest, all manufacturing processes will be carried out at Lister's facility in Washington, we find no merit in the protester's contention that Lister's proposal must be rejected

[5]Baldt also argues that "[s]ection L.11 set forth the criteria that should have been relied upon by the Contracting Officer for making the determination as to whether the items would be manufactured in the United States." This argument is without merit. Section L.11 of the RFP was clearly identified as the "proposal submission requirements," and in no way purported to define the term "manufacture[]" as used in the section of the RFP which referenced and paraphrased 14 U.S.C.A. § 97(a).

because certain of the indirect costs associated with the manufacture of the buoy chain may be allocable to Lister's "home office" in Canada.[6]

The protest is denied.

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[6]In cases involving the calculation of costs to determine whether an end product is domestic or foreign under the Buy American Act, we have found that an offeror which manufactures components "may" include in the costs of those components its indirect costs. However, the inclusion of these costs is only appropriate because the costs of individual components should be calculated in a consistent manner insofar as possible, and the price paid for other components purchased in final form from, for example, a foreign firm, would also include indirect costs. General Kinetics, Inc., Cryptek Secure Communications Div., B-243078.2, Jan. 22, 1992, 92-1 CPD ¶ 95 at 5. That is, the inclusion of indirect costs in Buy American Act component cost calculations is driven by the need to calculate the costs of components obtained from different sources in a consistent manner, and not by any requirement that indirect costs, such as those associated with a "home office," be considered part of manufacturing.