GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: TRS Research

File: B-285514

Date: August 7, 2000

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.
Col. Nicholas P. Retson, and Raymond M. Saunders, Esq., Department of the Army, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that protester's refurbished foreign-made cargo containers were not domestic products eligible for an evaluation preference pursuant to the Buy American Act where the steps the protester takes to refurbish the imported containers in the United States do not constitute "manufacturing" within the meaning of the Act.

DECISION

TRS Research protests the agency's determination under request for quotations (RFQ) No. DAMT01-00-T-0016, issued by the Department of the Army for cargo containers, that TRS's containers are not domestic end products eligible for an evaluation preference pursuant to the Buy American Act, 41 U.S.C. §§ 10a-10d (1994).

We deny the protest.

The RFQ was issued on an unrestricted basis for 18 used ammunition-grade cargo containers under the streamlined commercial acquisition procedures set forth in Subpart 12.6 of the Federal Acquisition Regulation (FAR), using a combined synopsis/solicitation which was posted on the Commerce Business Daily Net on May 10, 2000. See FAR § 12.603(a); Agency Report (AR) exh. 3. The RFQ required that the containers be designed to facilitate the transportation of hazardous/explosive cargo by road, rail, and sea, and contained detailed

specifications including, for instance, dimensions, construction materials, primary structural components (e.g., flooring, corner fittings, corner posts, door sill and header, top and bottom end rails, and forklift pockets), and paint. AR exh. 3, RFQ, at 2. The RFQ also contained FAR § 52.225-3, which implements the Act by providing an evaluation preference for domestic end products.[1]

The agency received quotes from five firms, including two from TRS, by the May 18 due date. In its first quote, TRS stated that the major components of the containers were produced in China, then shipped to the United States and purchased by TRS in scrap condition. AR exh. 6, TRS Quotation, at 1. TRS also stated in that quote that the new product "shall contain more than 51% domestic content and effort," and that, therefore, "this product [is] a newly manufactured US domestic end product." Id. In its second quote, TRS stated that the offered containers were manufactured in China, then shipped to the United States with cargo and purchased by TRS. AR exh.6, TRS Alternate Quotation, at 1.

The contracting officer (CO) concluded that the foreign-made containers TRS offered were not domestic end products eligible for an evaluation preference pursuant to the Act. In fact, the CO determined that none of the vendors offered a domestic end product, and issued a purchase order to CIR-NAV Agencies, Inc. as the low-priced, acceptable vendor. AR exh. 1, CO's Statement, ¶ 5, at 2-3. This protest followed.

TRS argues that the agency improperly determined that the foreign containers it offered were not domestic products since it refurbishes the containers in the United States to make them compliant with the RFQ requirements, thus transforming the containers into domestic end products. In this connection, TRS states that the refurbishing includes replacing top rails and side panels, straightening dents, replacing cross member and/or forklift pockets as required, undercoating bases and undercarriage, and replacing flooring and roof panels. Protest at 2-3. TRS maintains that its refurbishing effort constitutes "manufacturing" in the United States for purposes of applying the Act's evaluation preference.

The Act restricts the purchase of supplies that are not domestic end products. For manufactured products, the DFARS uses a two-part test to define a "domestic end product" for purposes of the Act. Under that test, to qualify as domestic, an end product (1) must be manufactured in the United States, and (2) the cost of its domestic components must exceed 50 percent of the cost of all its components.

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[1] The preference is implemented by adding, for evaluation purposes only, a specified percentage premium to the price of the foreign item--either 6 or 12 percent for civilian agency procurements, FAR § 25.105(a), and 50 percent for Department of Defense procurements, such as the one at issue here. Defense FAR Supplement (DFARS) § 225.105.

DFARS § 225.105(5)(i); see also FAR § 25.101; Computer Hut Int'l, Inc., B-249421 et al., Nov. 23, 1992, 92-2 CPD ¶ 364 at 4. Here, we think that the agency properly determined that the containers TRS proposed were not domestic products. As explained below, the "refurbishing" actions TRS describes do not constitute manufacturing, and are insufficient to render the containers domestic end products for purposes of applying the Act's evaluation preference.

The term "manufacture" means completion of the article in the form required for use by the government. General Kinetics, Inc., Cryptek Div., B-242052.2, May 7, 1991, 91-1 CPD ¶ 445 at 7. We have recognized that minimal operations such as assembly of certain components may constitute manufacturing for purposes of the Act, where they are necessary for the product to meet the operational or performance requirements of the solicitation. See, e.g., Saginaw Machine Sys. Inc., B-238590, June 13, 1990, 90-1 CPD ¶ 554 at 4. We have explained, however, that limited domestic assembly or manufacturing operations which do not alter the essential nature of a component which is the core or essence of the end product being procured may not be used to circumvent the plain requirement of the Act that the end product be manufactured "substantially all" from domestic articles, material or supplies. 41 U.S.C. § 10a; General Kinetics, Inc., Cryptek Div., supra, at 9. In General Kinetics, Inc., Cryptek Div, a case relied upon by TRS, we found that the essential nature of a Japanese commercial fax machine was unchanged by the relatively limited domestic manufacturing operations performed on it. In that case, although the awardee took certain steps to make the machine conform to the solicitation requirements, we found that those steps--the disassembly, removal of a circuit board and replacement of memory chips, and reassembly in the United States--did not change the essential function of the unit as a fax machine, nor did they appear significant with respect to the level of effort and materials required. We thus concluded that the core component of the end product being procured--a fax machine--remained a foreign manufactured component. Id.; see also Ampex Corp., B-203021, Feb. 24, 1982, 82-1 CPD ¶ 163 at 5 (disassembly, substitution of parts, and reassembly of a foreign video recorder base unit did not change the fact the base unit was a foreign-made component of the overall video recorder system being procured by the agency).

We reach a similar conclusion here. Replacing wooden floors, side panels, or straightening dents, as needed for some of the containers, and repainting to comply with the RFQ requirements, do not constitute assembly of components or "manufacturing" operations, as the protester would have us conclude, since these refurbishing measures do not in any way transform or alter the essential nature of the containers being procured here. General Kinetics, Inc., Cryptek Div., supra. Since the refurbishing actions performed in the United States do not constitute

"manufacturing," we conclude that the agency reasonably determined that TRS's containers were not domestic end products eligible for an evaluation preference under the Act.

The protest is denied.

Robert P. Murphy
General Counsel