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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189380 DATE: February 9, 1978

MATTER OF: Crockett Machine Company

DIGEST:

1. Bid of firm that offered a Defense item to be manufactured largely in the United Kingdom was improperly evaluated by contracting agency which applied the Buy American Act, because Secretary of Defense has excepted such items manufactured in the United Kingdom from application of the Act.

2. Where Secretary of Defense has determined that Buy American Act does not apply to Defense items manufactured in the United Kingdom and where United States and United Kingdom have agreed to apply Memorandum of Understanding to subcontracted Defense item when manufactured by subcontractors of each country, United Kingdom firm does not have to be a prime contractor in order to have its manufactured item excepted from application of Buy American Act.

3. There is no requirement that an agency give notice to all potential competitors that it has determined that all Defense items manufactured in a given foreign country are exempt from application of the Buy American Act.

This protest concerns the scope of a Determination and Finding issued by the Secretary of Defense on November 24, 1976 with regard to the application of the Buy American Act (41 U.S.C. § 10a). The specific issue to be decided is whether or not a product largely fabricated in the United Kingdom (U.K.) should be subject to § 6-104.4 of the Armed Services Procurement Regulation (ASPR) in order to determine whether it may be purchased in lieu of higher priced, American-

made equipment. For the reasons that follow, we conclude that the Determination and Finding of November 24, 1976 effectively excepted the product in question from the application of the Buy American Act, and that, therefore, the procuring activity improperly evaluated the protester's price as being other than the lowest price.

Background

The facts are not disputed. The solicitation (No. DSA120-77-B-1550) was issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania and called for bidders to offer a price to supply 8,928 surgical scissors. The Crockett Machine Company's (Crockett) bid was the lowest received. In its bid Crockett included information to the effect that it intended to ship American-made steel to England for forging and then ship the forgings back to the United States for finishing, assembly, and packing. Crockett also indicated that its unit price of $4.75 included $.45 for duty. Because of the extent of participation of the foreign firm in the scissors' manufacture, DPSC determined that Crockett's bid was for a "foreign end product" (ASPR § 6-101(c)) and concluded that it was required to apply ASPR § 6-104.4 in determining whether Crockett's was the lowest evaluated bid. After applying the evaluation formula contained in ASPR § 6-104.4 to Crockett's bid, DPSC concluded that A+P Surgical Co., Inc.'s (A+P) bid of $5.00 per unit was low, and awarded a contract to A+P on June 13, 1977. Crockett, upon learning of the award to A+P at a price higher than Crockett's, protested to this Office alleging that the Buy American Act should not have been applied to its bid.

Discussion

The Buy American Act at 41 U.S.C. § 10a (1970) states in pertinent part that,

> "* * * unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest * * *."

articles acquired for public use shall have been mined, produced, and manufactured in the United States. On November 24, 1976 the Secretary of Defense determined that with respect to

> " * * * * all items of U.K. produced or manufactured Defense equipment * * *, [with exceptions not relevant here], " * * * it is inconsistent with the public interest to apply the restrictions of the Buy American Act."

DLA urges the view that Crockett's bid must still be evaluated as "foreign" because two other hurdles must be overcome by a firm offering an item that will be fabricated in the U.K. First, the firm offering the item must be a U.K. firm, and it must be bidding as a potential prime contractor. Second, before the Buy American Act can be said to be waived for a given solicitation, the agency issuing the solicitation must itself know of the fact that an item produced in the U.K. may be offered, and the agency must give notice of that fact to all prospective bidders.

Regarding the first hurdle, DLA points to language in a memorandum from the Secretary of Defense which was issued on May 16, 1977 to provide initial guidance to high level procuring activities as to how a Memorandum of Understanding (MOU) between the United States and the United Kingdom dated September 24, 1975 is to be carried out. (It was this MOU in conjunction with section 814(a) of the Department of Defense Appropriation Authorization Act, 1976 (P.L. 94-361) which formed the basis for the determination of November 24, 1976 that application of the Buy American Act restrictions to U.K. produced or manufactured Defense equipment is inconsistent with public interest.) The specific language referred to is as follows:

> " In furtherance of the objectives set forth in the attached MOU and Annex I thereto, it has been determined pursuant to section 2 of title III of the Act of March 3, 1933(47 Stat. 1520; 41 U.S.C. § 10a, Buy American Act) that it would be inconsistent with the public interest to apply the restrictions of that Act with respect to certain items of UK produced or manufactured Defense equipment procured to

> meet US DoD requirements (see * * * [Determination Finding dated November 20, 1976]). Accordingly, bids or proposals submitted by UK sources with respect to these items of Defense equipment shall be evaluated without the application of the price differentials normally applied pursuant to the Buy American Act requirements contained in Section VI of the Armed Services Procurement Regulation (ASPR). In addition, bids and proposals shall be evaluated without the application of the price differential normally applied pursuant to the Balance of Payments requirements contained in Section VI of the ASPR. In those instances susceptible to issuance of a duty-free entry certificate, as provided in Section VI, part 6 of the ASPR, bids or proposals submitted by UK source shall be evaluated without application of duty. If, when evaluated in accordance with the above, a UK source is determined to be the lowest, responsive, responsible bidder or offeror, the cognizant Procurement Office shall normally proceed to make award to that source."

DLA apparently reads the above quoted language as meaning that, if the "U.K. source" of the equipment being purchased is not itself a bidder or offeror, then the equipment must be evaluated with respect to the price differentials specified in ASPR § 6-104.4. In our view such a narrow reading of the quoted provision is unreasonable. We do not believe that guidelines issued to effect interim procedures for carrying out a determination that all "items" of Defense equipment produced in the U.K. are exempt from the Buy American Act limit the exemption to items being offered by U.K. firms as prime contractors. We note for example, that one of the goals of the MOU was to ensure an equitable balance of Defense items purchased by the U.K. from the U.S. and vice versa. To that end counting procedures in section IV C of Annex I to the MOU refer to

> " * * * assure that U.K. sources are not precluded from obtaining subcontracts for reasons that would contravene the MOU."

In view of the language in the MOU indicating its application to U.K. subcontractors; the emphasis on items as opposed to sources in the Secretarial determination of November 24, 1976; and the nature of the Secretarial guidelines of May 16, 1977, we cannot agree with DLA that Defense items manufactured in the U.K. must be offered by U.K. bidders or offerors which intend to perform as prime contractors.

Alternatively, DLA asserts that there is a second hurdle--lack of notice to all prospective bidders of U.K. source competition--which Crockett cannot overcome. We believe that DLA's rationale for its position is fundamentally unsound and directly contravenes the MOU and the Secretarial determination that U.K. Defense equipment is excepted from application of the Buy American differential. DLA stresses the fact that DPSC, Philadelphia, did not anticipate that a U.K.-manufactured item would be offered. As a result, no notice that a U.K. item would be competing for award was placed in the solicitation. Without such notice DLA states that it must apply the Buy American differential to determine whether it is in the public interest not to buy the U.S.-manufactured item. DLA points to the following language in the memorandum dated May 16, 1977 as mandating this result:

> "Where the possibility of competition from U.K. sources exists, notification shall be given to all potential competitors by an inclusion of an appropriate clause in the solicitation document."

There are two infirmities in interpreting the inclusion of notice in the solicitation of possible source competition as being a condition precedent to excepting the U.K. manufactured Defense items from the application of the Buy American differential. They are (1) the U.K. Defense items are already exempted under our previous analysis from such application; and (2) an otherwise unconditional exception to the application of the Buy American differential would be conditioned on a given procuring activity within the Department of Defense first having some reason to suspect that an item manufactured in the U.K. might be offered. Moreover, we have seen no argument or evidence of a statutory or regulatory requirement that notice must be given before an exception to the Buy American Act can be invoked.

Conclusion

It is our view, therefore, that Crockett's bid was improperly evaluated with respect to the Buy American Act. ASPR § 6-104.4 is superfluous in cases such as this where it has been predetermined by the Secretary of Defense that the Buy American Act is inapplicable.

Accordingly, Crockett's protest is sustained. We note that there is no practical relief for Crockett in terms of the instant case, because the contract has been completed. We are, however, recommending by this decision to the Secretary of Defense that he insure that the MOU and Secretarial determinations based thereon are uniformly and equitably applied at all levels of the procurement process.

Deputy Comptroller General
of the United States