

108630

Cohen -  
Proc Law



**DECISION**

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

9199

**FILE:** B-193230 **DATE:** February 16, 1979  
**MATTER OF:** Propper Manufacturing Company

**DIGEST:**

1. Firm that indicates in quotation that it will supply end item that qualifies as "domestic," with result that quotation is evaluated without regard to Buy American Act differential, is obligated to do so. Compliance with obligation is matter for procuring agency's contract administration, not GAO, and has no impact on validity of issuance of purchase order based on quotation. Moreover, fact that firm may have to find alternate source than that originally intended is immaterial.
2. Where issue in protest involving small purchase procurement conducted under DAR is effect of Government's actions on protester's ability to compete, GAO review is limited to cases of fraud or intentional misconduct by procuring officials, or where it appears that they have not made reasonable effort to secure quotations from representative number of responsible firms. GAO review role is not similarly limited where issue is whether Buy American Act was properly applied.

Request for quotations (RFQ) No. DL120-78-QA347 to supply hemacytometer cover glass for microscope slides was issued on July 18, 1978, by the Defense Personnel Support Center (DPSC). The RFQ stated that the procurement was subject to the Buy American Act, 41 U.S.C. § 10a-d (1976), and the implementing regulations at section 6 of the Defense Acquisition Regulation (DAR) (1976 ed.). It further provided that "supplies are of domestic origin unless otherwise indicated by quoter."

In response to the RFQ, Propper Manufacturing Company (Propper) quoted a unit price of \$0.405, and indicated a West German source for the end item.

Hellige, Inc. (Hellige), quoted a unit price of \$0.41, and indicated that the "place of manufacture" would be the firm's facility in Garden City, New York. Pursuant to the terms of the RFQ, DPSC applied to Propper's quotation the added evaluation factor for foreign end products required by the Buy American Act. As a result, Hellige's quotation, to which such factor was not applicable, was evaluated lower. A purchase order for the requirement was issued to Hellige on August 23.

Propper then filed a protest with DPSC, contending that glass for hemacytometer cover glass was available only from foreign sources; presumably, Propper was arguing that the Buy American Act evaluation factor should have been added to Hellige's quotation as well as to Propper's. DPSC subsequently learned from Hellige that its quotation was based on an item to be manufactured in the United States utilizing glass imported from West Germany, and that the cost of the imported glass constituted less than 50 percent of the total cost of the finished item. In this connection, the record indicates that the imported glass was to be cut, ground, polished, beveled, cleaned and tested by Hellige at its facility. On that basis, DPSC advised Propper that in view of Propper's own argument, the Buy American Act factor was still inapplicable to Hellige under DAR § 6-001(d) (1976 ed.), which defines a "United States end product," to which the factor would not apply, in pertinent part as:

" \* \* \* an end product manufactured in the United States if the cost of its components which are \* \* \* manufactured in the United States exceeds 50 percent of the cost of all components. \* \* \* A component shall be considered to have been \* \* \* manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class determined by the Government to be not \* \* \* manufactured in the United States in sufficient and reasonably available commercial quantities \* \* \*." (Emphasis added.)

DPSC essentially agreed with Propper that the imported glass, which is the only "component" of hemacytometer cover glass, is not available domestically, i.e., is not "manufactured in the United States in sufficient and reasonably available commercial quantities." See in this connection the similar definition of "Domestic source end product" at DAR § 6-101(a) (1976 ed.).

Propper then protested the matter to our Office. The basis for the protest is in direct contrast to the basis for the protest to DPSC. Propper now contends that the glass to be imported by Hellige, which Propper describes as "ordinary window glass" to be ground to a required degree of "optical flatness," is available domestically from at least two named sources. Propper thus argues that the "component" does not qualify as a component "manufactured in the United States" under DAR § 6-001(d) (1976 ed.), and therefore Hellige's quotation should be adjusted to reflect application of the subject evaluation factor. The result would be that Propper's quotation would be the lower of the two as evaluated.

In a report on the protest, DPSC states that "ordinary window glass" as proposed by Propper for use in hemacytometer cover glass would be unacceptable for a number of reasons. DPSC also states that it has contacted the sources named by Propper in the protest and that none of them can supply glass material suitable for manufacturing the requirement. However, DPSC further states that Hellige is now reviewing sample glass supplied by a domestic company, and that if such glass is determined suitable for use in the manufacture of cover glass, Hellige will use it to complete the order; if it is unsuitable, the contracting officer will consider the component unavailable domestically within the meaning of DAR § 6-001(d) (1976 ed.), and Hellige will be permitted to use imported glass. In either case, Hellige will be bound to its quoted unit price of \$0.41.

In response, in addition to urging that suitable glass is clearly available in the United States, Propper argues:

\* \* \* The Contracting Officer may be correct in his assertion that Hellige has a contractual obligation to furnish a domestic item, in accordance with its representation that it would do so; however, this response begs the issue raised by Propper. Hellige has stated that it intended to utilize foreign produced glass in filling the cover glass purchase order. Propper also has offered a nondomestic end product. At the time of bid evaluation, both Propper and Hellige's bids should have been evaluated as offering foreign items. But only Propper's offer was so evaluated and, as a consequence, it lost the order.

"By allowing Hellige to now substitute a domestic end product, the Agency is in effect giving Hellige two bites at the apple. Hellige was not low in the first round of offers, but it is being allowed to make its offer low by correcting its original offer.  
\* \* \*

"It is the correction of this initial improper evaluation of bids and issuance of the cover glass purchase order to other than the lowest responsive offeror which should be the focus in resolving this protest. Hellige's ability or inability to offer a domestic end product is irrelevant to the issue presented here, i.e., that there has been an improper procurement action. \* \* \*"

Propper adds that it appears from the DPSC report that the Agency's finding under DAR § 6-001(d) (1976 ed.) will be based on the results of Hellige's review referenced above. Propper contends that it is DPSC's

obligation to make its own nonavailability finding, "and that reliance on information and conclusions provided by Hellige will not satisfy this burden."

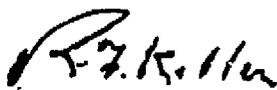
We do not agree that the initial evaluation of quotations was improper. It is not disputed that Proper's quotation, which was based on a foreign-source item, was subject to the Buy American Act differential. In contrast, under the terms of the RFQ Hellige has offered to supply an item that qualifies as a domestic end product, since Hellige did not indicate otherwise, and Hellige therefore is obligated to do so. Our Office will not investigate the intended method of compliance with that obligation except in circumstances not applicable here, since that is a matter of contract administration and as such has no impact on the validity of the issuance of the purchase order. Lanier Business Products, Inc., B-193204, December 12, 1978, 78-2 CPD 407; Thorsen Tool Company, B-188271, March 1, 1977, 77-1 CPD 154; 50 Comp. Gen. 697 (1971).

As indicated above, in response to Proper's protests DPSC has taken steps to ensure Hellige's compliance. The fact that the firm might have to change the source of the subject component to comply is immaterial. See Arizona Industrial Machinery Company, B-191178, July 25, 1978, 78-2 CPD 68. In this connection, we see no impropriety in DPSC considering Hellige's position on the availability of suitable glass for purposes of a determination under DAR § 6-001(d) (1976 ed.), as long as the ultimate determination is made by the Government.

The protest is denied.

In its report DPSC states that the procurement was conducted under the small purchase procedures set forth at DAR § 3, part 6 (1976 ed.). DPSC points out that in two recent decisions our Office has declined to consider protests involving small purchases where, as here, there has been no allegation

of fraud or bad faith on the part of procuring officials. See Ikard Manufacturing Company, B-192308, October 29, 1978, 78-2 CPD 301, and Tagg Associates, B-191677, July 27, 1978, 78-2 CPD 76. However, the earlier of the two decisions involved a protest that a solicitation requirement unduly restricted competition; the other concerned the rejection of a late quotation. In each case, the issue for our consideration was the effect of the Government's actions on the protester's ability to compete. We stated that since the small purchase procedures afford a contracting officer broad discretion to determine how to meet the Government's needs, and permit purchases to be made without the need to maximize competition, our review of such cases is limited to instances of fraud or intentional misconduct by procuring officials, or where there is evidence that a reasonable effort was not made to secure price quotations from a representative number of responsible firms as required by DAR § 3-604.2 (1976 ed.). Our review role is not similarly limited where the issue raised is the proper application of the Buy American Act.

  
Deputy Comptroller General  
of the United States