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DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

10,436

FILE: B-193614

DATE: June 13, 1979

MATTER OF: Dictaphone Corporation

[Protest Alleging Written Proposal Was Improperly Evaluated]

DIGEST:

1. Awardee contends that protest is untimely because it was not filed within 10 working days of date that purchase order was issued. Where issuance of purchase order does not in itself establish basis of protest and where record does not disclose when protester first learned of basis of protest, doubt is resolved in protester's favor and GAO considers protest to be timely filed.
2. Where agency issues purchase order which contemplates procuring dictating and transcribing system and not merely collection of components and where more than 50 percent of system's cost was attributable to American-made components, Buy American Act differentials do not apply.
3. Where procuring activity is selecting low-priced dictating and transcribing "system" from acceptable Federal Supply Schedule contractors, price comparison must be based on functionally comparable components of systems. Therefore, selection based on comparison of one vendor's system utilizing existing tele-phones and another vendor's system utilizing attendant phones was improper where record reflects that both systems could have been comparably configured, resulting in protester's system being lower priced than awardee's.

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Dictaphone Corporation protests the issuance of a purchase order under General Services Administration (GSA) contract No. GS-005-66750 with Lanier Business Products, Inc. (Lanier), by the Naval Weapons Support Center, Crane, Indiana, for the rental of a central

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Proposed evaluation protest Buy American Office equipment

dictation and transcribing system. The purchase order, issued September 27, 1978, was in the monthly rental amount of \$1,292.80 for a 6-month period beginning February 2, 1979, thus totalling \$7,756.80.

Since the required system was available on GSA Federal Supply Schedule contracts with three vendors, the Navy determined, relying on DAR § 5-103 (1976 ed.), that the proper method of acquisition was to informally contact the three vendors and request written proposals from the three vendors, select a supplier of acceptable equipment at the low price, and place an order under the supplier's GSA contract. The Navy followed its procurement plan resulting in the award to Lanier.

Dictaphone contends that: (1) it was not treated fairly because it was permitted to "overquote" by including six attendant phones, six machine cabinets, and electronic voice-operated relays in its proposal, which were not required by the Navy; (2) its written proposal was misevaluated by the Navy because (a) the Navy did not credit Dictaphone with an 11-percent discount and instead erroneously used a 6-percent discount and (b) the Navy did not subtract from the rental quote the amount attributed to the "overquoted" equipment; and (3) the Navy should have applied the Buy American Act in evaluating Lanier's proposal because Lanier's portable cassette machines and transcribing units are not American made.

In response, the Navy reports that (1) Dictaphone's system must include the six attendant phones in order to meet the Navy's needs, but the Lanier system does not require attendant phones; thus, Dictaphone is not entitled to an adjustment for this item; (2) Dictaphone's voice-operated relay is a standard feature of its equipment, but is in excess of the Navy's needs; thus, the rental price of the equivalent Lanier optional feature need not be added to Lanier's proposal for a valid comparison of prices; and (3) the Navy did not credit Dictaphone with the 11-percent discount that it should have received and the Navy should have excluded the six machine cabinets proposed by Dictaphone, thus reducing Dictaphone's system monthly rental to \$1,324.02, or \$31.22 per month higher than Lanier's price. Citing our decision in the matter of Dictaphone Corporation, B-191383, May 8, 1978, 78-1 CPD 343, the Navy argues that the Buy American Act is

not applicable to Lanier's system because 59.8 percent of the cost of the system's components was manufactured in America. In sum, the Navy concludes that the award was properly made to the acceptable, low-priced vendor, Lanier.

In reply, Dictaphone states it is inconceivable that anyone would think that a Dictaphone system would need attendant phones when a Lanier system does not; both systems do the same thing and neither requires attendant phones from the vendor or from the telephone company. Thus, Dictaphone concludes that its price should be reduced by the charge for attendant phones in the amount of \$59.16 per month for a total monthly rental price of \$1,264.86 or \$27.94 lower than Lanier's price.

Lanier argues that Dictaphone's protest is untimely because its protest was not filed within 10 working days of the date the purchase order was issued.

A. Timeliness

Our Bid Protest Procedures provide that protests shall be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2) (1978). Contrary to Lanier's argument, the issuance of a purchase order to a firm other than the protester does not in itself establish that the protester (1) has a basis of protest, (2) knew or should have known of a possible basis of protest, or (3) even knew that the purchase order was issued. The record does not disclose when Dictaphone learned that the purchase order was issued, but the record indicates that Dictaphone did not receive a copy of the purchase order until after it filed the protest. Where doubt exists as to when a protester knew or should have known of the basis for protest, that doubt is resolved in favor of the protester. Memorex Corporation, 57 Comp. Gen. 865 (1978), 78-2 CPD 236. Accordingly, the Dictaphone protest is considered to have been filed in a timely manner.

B. Buy American Act's Applicability

Our first concern must be the applicability of the Buy American Act. Under Executive Order 10582, articles,

materials and supplies shall be considered to be of foreign origin if the cost of foreign products used in them constitutes 50 percent or more of the cost of all component products used in them. Under this order, a Buy American Act differential must be applied if the "end product" to be furnished is not manufactured in the United States or is manufactured in the United States and contains foreign components which make up 50 percent or more of the total component cost. See Blodgett Key-punching Company, 56 Comp. Gen. 18 (1976), 76-2 CPD 331.

In Dictaphone Corporation, supra, cited by the Navy, the Air Force purchased a central dictation system from Lanier and Dictaphone protested contending that the Buy American Act was applicable but not considered by the Air Force in selecting Lanier. We held that since the Air Force purchased a "system" rather than a collection of components and that since the cost of the American-made components was greater than 50 percent of the total cost, Buy American Act differentials were not applicable to Lanier's offer.

We believe that the Dictaphone decision is controlling here because the Navy was procuring a system, not a collection of components, and more than 50 percent of the cost of the system was attributable to American made components.

C. Evaluation of Dictaphone's Proposal

In view of the Navy's desire to purchase the acceptable, low-priced system, and since the Navy recognizes that the 11-percent discount was applicable to Dictaphone's proposal and that the machine cabinets should have been excluded from the evaluation of Dictaphone's proposal, the remaining point of dispute is the necessity to include attendant phones in the evaluation of Dictaphone's proposal but not Lanier's. If the monthly rental of Dictaphone's proposed system could be reduced by the amount attributed to the rental of attendant phones, \$59.16, Dictaphone's proposed system would have been lower priced than Lanier's. Under the Navy's procurement plan, Dictaphone would have been the selected supplier if it would have remained low after any additional charge for other

Dictaphone devices (like Lanier's telephone coupler, see infra) that may be necessary where no attendant phones are utilized.

While the Navy evaluated Lanier's proposal without the attendant phones, the Navy concluded that "without the six attendant phones, Dictaphone's system would not meet the Government's minimum needs." The rationale for that conclusion was not provided by the Navy. Dictaphone argues that the Navy's conclusion is "inconceivable" because both systems do the same thing and should have been evaluated on the same basis. Dictaphone states that its system does not require an attendant phone. Lanier did not elect to comment on this point.

We have examined both vendors' literature which was submitted to the Navy and which formed the basis for the Navy's evaluation. It appears that the Navy selected several Lanier components to satisfy its needs; one component was a telephone coupler interface, from which we conclude that Lanier proposed to utilize the existing telephone system. On the other hand, the Navy selected noncomparable Dictaphone components (attendant phones) when it could have selected a system comparable to Lanier's using the existing phone system. Thus, absent any rationale for the Navy's conclusion--that without attendant phones, Dictaphone's system would not satisfy the Government's needs--we must conclude that Dictaphone's system was not evaluated on the same basis that Lanier's was and this constitutes the breach of a fundamental principle that competitors must be treated equally. Serv-Air, Inc., 57 Comp. Gen. 827 (1978), 78-2 CPD 223.

D. Conclusion and Recommendation

Protest sustained. However, in view of the delivery time and the 6-month term of the rental, we recognize that no corrective action is possible at this time under the existing contract. Therefore, by letter of today to the Secretary of the Navy, we are recommending that the Navy reevaluate Dictaphone's

system on a basis comparable to Lanier's before the Navy takes any further procurement action regarding this dictation system.

R. F. K. Miller
Deputy Comptroller General
of the United States