

DECISION

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

Pl. 1
~~24803~~
24982

FILE: B-209070

DATE: April 22, 1983

MATTER OF: Cal Capital Exports

DIGEST:

1. Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures.
2. Protester was not prejudiced by classification of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane.
3. Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged non-responsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, GAO does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic.
4. Sole domestic bidder submitted bid for quantity which was less than maximum specified in IFB. Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended.

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Cal Capital Exports (Cal Capital) protests an award by the Department of the Army, Materiel Development and Readiness Command (Army), to ICI Americas Incorporated (ICI) under invitation for bids (IFB) DAAA03-82-B-0039 for 1,413,025 pounds of hexachloroethane. The IFB also provided that bidders could bid on lesser quantities and that the Army reserved the right (unless the bidder specified otherwise) to award for a quantity less than that bid at the same unit price bid for the higher quantity.

Cal Capital protests the application of a Buy American Act evaluation factor to its low bid. Specifically, Cal Capital contends that: (1) there was confusion in classifying Brazil and the United Kingdom for Buy American purposes; (2) the sole domestic bid was not for consideration because the domestic bidder cannot satisfactorily manufacture the product; and (3) a proper Buy American evaluation would have resulted in multiple awards because the sole domestic bidder submitted a partial bid.

The protest is sustained in part and denied in part.

The following bids were submitted at bid opening:

<u>QUANTITIES</u>	<u>BID PRICE</u>	<u>SOURCE</u>
Cal Capital--1,413,025 pounds	\$0.457/lb	Brazil
ICI--1,413,025 pounds	0.60/lb	United Kingdom
Rhone-Poulenc--720,000 pounds	0.60/lb	France
Diamond Shamrock--min. 480,000, max. 960,000	0.67/lb	United States

Defense Acquisition Regulation (DAR) § 6-104(b)(1) (Defense Acquisition Circular (DAC) No. 76-25, October 31, 1980) requires that an evaluation factor be added to a "nonqualifying country offer." The contracting officer determined that Cal Capital's bid was a nonqualifying offer and Diamond Shamrock's bid was a domestic offer. A 50-percent evaluation factor was added to Cal Capital's bid, raising the bid to \$0.0086 per pound higher than Diamond Shamrock's bid. No evaluation factor was added to ICI's bid because it was a "qualifying country offer." ICI therefore became the low, evaluated bidder and was awarded a contract for all 1,413,025 pounds.

The Army contends that the first two grounds of the protest are untimely because they were filed with our Office on September 15, 1982, or more than 10 working days after Cal Capital was advised on August 30 that award would be made to ICI. We disagree. A protest must be filed within 10 working days after the protester knows of the basis of protest. 4 C.F.R § 21.2(b)(2) (1983). Cal Capital insists that the Army did not "clarify" its position on the reasons for the award until September 10. The Army has not questioned this position. The company's September 15 protest, therefore, was timely. As to the final ground of protest, which was filed on December 2, 1982, we find it to raise a significant issue, as discussed below.

Cal Capital states that it undertook to determine if the Army properly evaluated bids. In response to its request for a list of qualifying countries, the Army sent a list of "designated countries under the Trade Agreement Act" (emphasis supplied). Cal Capital argues that the fact that it was provided the wrong list indicates that the contracting officer may have improperly determined that the United Kingdom is a qualifying country and Brazil is a nonqualifying country.

The Army has provided a detailed response to Cal Capital's charge that it was prejudiced by the classification of the countries involved. We cannot question that response, which is:

** * * For evaluation purposes under DAR 6-104.4, a 'qualifying' country is defined by DAR 6-001.5(d) to be any country defined in 6-001.5(a), (b) or (c), to be a Defense Cooperation Country listed in DAR 6-1504, FMS/Offset Arrangement Country, listed in DAR 6-1310.1, or a Participating NATO Country listed in DAR 6-1401, respectively. The inference mandatorily is that all other countries are 'non-qualifying' countries. The United Kingdom is listed in DAR 6-1401 as a Participating NATO Country and thus is a 'qualifying' country per DAR 6-001.5(c) and (d). Brazil is not listed in either DAR 6-1504 as a Defense Cooperation Country, in DAR 6-1310.1 as a FMS/Offset Arrangement Country, or in DAR 6-1401 as a

Participating NATO Country, thus Brazil is a 'nonqualifying' country. The conclusion is that the bid of ICI, which * * * offered a product from England, was correctly evaluated as a 'qualifying' country. On the other hand, the Protester's bid, which * * * offered a product from Brazil, was correctly evaluated as a 'nonqualifying' country.

* * * [T]he Contracting Officer provid[ed] the Protester a list of designated countries under the Trade Agreements Act of 1979 as implemented by DAR 6-1601 and DAR 6-1602. DAR 6-1601 establishes designated countries from which bids on eligible products over \$196,000 are to be evaluated without regard to the restrictions of the Buy American Act. * * *

"It is merely noted that even under the Trade Agreements Act of 1979, Brazil was not a designated country for which waiver of the Buy American Act is authorized. On the other hand, the United Kingdom is [also] entitled to the benefits of being a designated country and bidders offering eligible English products in an amount over \$196,000 would be entitled to waive the provisions of the Buy American Act."

Thus, we deny this ground of protest.

DAR § 6-104.4, supra, requires that in the absence of a domestic bid, foreign bids shall be evaluated on an equal basis. Cal Capital contends that Diamond Shamrock is not currently producing hexachloroethane and cannot satisfactorily manufacture it. Thus, Cal Capital contends that this alleged circumstance should mean that there was no bona fide domestic bid.

In effect, Cal Capital is arguing that Diamond Shamrock is not a bona fide domestic bidder because the company is, allegedly, incapable of furnishing the item sought. The contracting officer responds, in effect, that he was not required to make a formal determination of Diamond Shamrock's responsibility since the company's bid was not low and, in any event, he had no reason to question the

company's responsibility. Specifically, the contracting officer states that Diamond Shamrock "does produce [the chemical sought] as a byproduct of other manufacturing" and that the company provided acceptable samples of the chemical to Pine Bluff Arsenal 2 years ago.

In our view, the evaluation scheme contemplated by DAR § 6-104.4, supra, does not require that the responsibility of the sole domestic bidder, who is not low, be assessed for Buy American purposes. Moreover, we do not consider that an assessment need be made absent evidence of collusion or other extraordinary circumstances, which are not present here. Diamond Shamrock submitted a responsive domestic bid because it excluded no end product from its Buy American certificate and did not otherwise indicate that it was bidding a foreign end product. See Fordice Construction Company, B-206633, April 30, 1982, 82-1 CPD 401. Therefore, we cannot question the Army's view that Diamond Shamrock was a bona fide domestic bidder.

Cal Capital's final ground of protest is that the evaluation was improper because Diamond Shamrock submitted a partial bid on less than the entire quantity sought. The Army notes that partial bids were acceptable because they were not prohibited and clause 10 of standard form 33A, as noted above, provided that, "unless otherwise provided in the schedule, offers may be submitted for any quantities less than specified." However, Cal Capital's comments filed on December 2, 1982, on the Army's report reveal that Cal Capital is not disputing that partial bids were acceptable. Rather, Cal Capital is protesting that the evaluation factor should not be applied against Cal Capital on those quantities that Diamond Shamrock did not bid. Diamond Shamrock bid on a minimum of 480,000 pounds and a maximum of 960,000 pounds. Cal Capital concedes that if its first two grounds of protest are without merit, ICI is the low, evaluated bidder on the first 480,000 pounds. However, Cal Capital contends it is unclear whether Diamond Shamrock submitted a "firm offer" on quantities between 480,000 and 960,000 pounds because Diamond Shamrock referred to a "minimum" and "maximum." Cal Capital argues that the Buy American differential, therefore, may be inapplicable on these quantities. Finally, Cal Capital argues that the differential is clearly inapplicable as to quantities in excess of 960,000 pounds on which Diamond Shamrock did not bid.

The Army contends this argument is untimely because it was not clearly raised in Cal Capital's initial protest letter but, rather, filed more than 2 months after the initial protest. Cal Capital's initial protest contained the following statement:

"Diamond-Shamrock neither currently produces Hexachloroethane nor submitted a bid for the total amount. Instead, Diamond-Shamrock could 'implement production if required,' and submitted a partial bid based on their facilities. Therefore, we conclude that there was indeed no domestic commercial producer at the time of bidding, and that our bid should not have been disqualified based on these facts."

While this statement arguably refers to the argument contained in Cal Capital's December 2 comments, we agree with the Army that the argument should have been more clearly raised in the initial protest. However, the evaluation, under DAR § 6-104.4, of nonqualifying offers competing against partial domestic bids, is a novel issue which has not previously been considered by our Office. We consider the Army's interpretation of DAR § 6-104.4 to be erroneous. Our resolution of this issue would be of widespread interest to the procurement community because it would clarify the proper application of DAR § 6-104.4. This issue, therefore, can be considered under the significant issue exception (see 4 C.F.R § 21.2(c) (1983) of our Bid Protest Procedures).

We find no basis for Cal Capital's contention that Diamond Shamrock did not submit a "firm offer" on quantities between 480,000 and 960,000 pounds. Diamond Shamrock's bid was clear; it bid on a minimum of 480,000 and maximum of 960,000 pounds. Partial bids were acceptable. There was, therefore, nothing improper with Diamond Shamrock setting minimum and maximum limitations.

As to the first 960,000 pounds, the contracting officer properly applied the evaluation factor to Cal Capital's bid. The Buy American Act evaluation factor is applied for the benefit of domestic bidders. Diamond Shamrock bid on the first 960,000 pounds and is entitled to the benefit of the evaluation factor. However, it did not bid on quantities in

excess of 960,000 pounds. While DAR § 6-104.4, supra, does not refer to partial bids, it clearly provides in example "G" of that regulation that the evaluation factor is inapplicable when there is no domestic bid. We conclude that the evaluation factor should not have been added to Cal Capital's bid on quantities on which Diamond Shamrock did not bid. If ICI had not bid, the Army would have awarded 960,000 pounds to Diamond Shamrock and 453,025 pounds to Cal Capital. ICI is certainly not entitled to a larger contract than Diamond Shamrock would have received under those circumstances. In this case, the Army should have made a multiple award--the first 960,000 pounds to ICI at \$0.60 per pound and the remaining 453,025 pounds to Cal Capital at \$0.457 per pound. This ground of protest is sustained.

The delivery schedule indicates that a delivery of 240,000 pounds is to be made on June 1, 1983, and a final delivery of 240,000 pounds is to be made on July 1. It is our understanding that ICI will not place orders for these deliveries until about 1 month before the delivery dates. It therefore appears that the expense and impact upon the agency resulting from a partial termination of ICI's contract as to 453,025 of the final 480,000 pounds would be minimal. Accordingly, we recommend a partial termination of the contract for the convenience of the Government. We further recommend that a contract for 453,025 pounds be awarded to Cal Capital if it is still willing to deliver at \$0.457 per pound and if the company is otherwise considered still to be eligible for award. If not, the contract with ICI need not be disturbed.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning action taken with respect to our recommendation.

for *Harry R. Jan Cleve*
Comptroller General
of the United States