

DECISION

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

FILE: B-208202

DATE: August 23, 1983

MATTER OF: Aesculap Instruments Corporation

DIGEST:

1. Acceptance of a bid containing a blank Buy American certificate and no indication that the product offered is foreign obligates the bidder to supply a domestic source end product; the bidder's ability to do so is a question of responsibility which GAO will not review absent either a showing of fraud or bad faith on the part of the contracting agency or an allegation that definitive responsibility criteria have not been met.
2. A showing of fraud or bad faith requires virtually irrefutable proof of specific and malicious intent to harm the protester, a standard not met in this case.
3. Although compliance with Buy American certificate is a matter of contract administration, GAO recommends that the agency perform a more precise Buy American Act analysis, and take appropriate action regarding the contractor if it determines that a foreign end item was delivered.

Aesculap Instruments Corporation protests the award of a contract to ELMED Incorporated under invitation for bids (IFB) No. 578-49-82, issued by the Veterans Administration (VA) Hospital, Hines, Illinois. The contract was for a container system to be used in sterilizing operating room instruments. The protester contends that although both it and ELMED offered products manufactured in Germany, the VA added a 6 percent Buy American Act (41 U.S.C. §§ 10a-d (1976)) evaluation factor only to its bid, thereby displacing it as the low bidder.

For the reasons discussed below, we cannot question the propriety of the award; therefore we deny the protest. Because several items in the system ultimately delivered were embossed "Martin-Stainless-Germany," however, we are concerned that ELMED may not have complied with its contractual obligation to supply a domestic source end

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product. We reviewed a price breakdown that ELMED submitted to the contracting officer after delivery, and we are unable to understand how the contracting officer could have satisfied himself from this evidence that the system delivered was a domestic source end product. Under these circumstances, we are recommending that the VA perform a more precise Buy American Act analysis of the system delivered and take appropriate action if it determines that ELMED delivered a foreign end product.

The IFB requested bids for a stainless steel container system and specified the Martin Norm--Container System, or equal. A bidder offering an "equal" system was required to provide literature describing the system offered and to indicate the manufacturer's name, the product brand, and the model number. The IFB also contained a Buy American certificate, as required by Federal Procurement Regulations (FPR) § 1-6.104-3, which required bidders to certify that, except as otherwise indicated, each end product offered was a domestic source end product. Foreign end products were to be listed on the certificate together with the country of origin. The regulations provide that, for evaluation purposes, each bid offering a foreign end product is to be adjusted by adding to it a factor of 6 percent of the offered price for the foreign end product. FPR § 1-6.104-4(b).

Two bids were received in response to the IFB. The protester offered the Aesculap Sterile Container System and provided the requisite descriptive literature and other data. ELMED offered the brand name system. Prior to any Buy American Act adjustment, the protester's bid was low; however, because the protester indicated that 19 of the 21 required items in its system were of West German origin, the VA added 6 percent to each foreign item's unit price. Following the adjustment, the protester's bid was no longer low. ELMED left the Buy American certificate blank, no adjustment was made to its bid, and the VA awarded it the contract.

The protester alleges that the brand name system offered by ELMED is manufactured in West Germany, and is, therefore, a foreign end product. The protester states that the contracting officer was aware prior to award that this system was of West German origin and should have questioned ELMED's certification to the contrary. Under

these circumstances, the protester argues that the addition of a 6 percent evaluation factor to its bid, but not to ELMED's bid, improperly displaced it as the low bidder. The contracting officer reports that he knew prior to bid opening that ELMED had a manufacturing plant in Germany. When bids were opened and evaluated, he did not question the foreign content of the brand name system, he says, because ELMED certified that the system to be furnished was a domestic end product. In addition, ELMED represented in its bid that it was the manufacturer of the system and that the principal place of performance of the contract would be Addison, Illinois.

ELMED left blank the Buy American certificate in its bid; therefore, it certified that the product it offered was a domestic end product. See Law Enforcement Associates, Inc., B-205024, April 5, 1982, 82-1 CPD 304. Its bid also did not otherwise indicate that the items to be supplied might be of foreign origin, compare, Airpro Equipment Inc., B-209612, January 31, 1983, 83-1 CPD 105 (bidder left certificate blank, but identified the country of manufacture as "USA/England"); Ampex Corporation, B-203021, February 24, 1982, 82-1 CPD 163 (bidder left certificate blank, but indicated in its bid that approximately 39 percent of its proposed contract price represented foreign content, and furnished information concerning the domestic nature of its products to the agency after bid opening); Trail Equipment Company, B-205026, January 27, 1982, 82-1 CPD 63 (bid indicated that item may be manufactured in either France or the United States), and it does not appear that the contracting officer requested or obtained additional information bearing on this question from ELMED prior to award. Thus, this case is not one where, prior to award, an offeror indicated in some way to a contracting agency that the offered product might not be domestic.

If a bidder does not exclude any end product from the Buy American certificate in its bid, and does not otherwise indicate that it is offering something other than a domestic end product, acceptance of the bid will result in an obligation on the part of the bidder to furnish a domestic end product. Law Enforcement Associates, Inc., supra. Whether the bidder has the ability, however, actually to furnish a domestic end product is another question, which is to be resolved within the context of a responsibility determination. Ammark Corporation, B-192052, December 21, 1978, 78-2 CPD 428.

B-208202

The award of the contract to ELMED constituted the contracting officer's affirmative determination that it was a responsible contractor. R.S. Bowers Construction Company, B-208164, November 29, 1982, 82-2 CPD 482. We review such determinations only if definitive responsibility criteria were allegedly misapplied or upon a showing of possible fraud or bad faith. Delta Elevator Service Corporation, B-208252, March 23, 1983, 83-1 CPD 299. The protester does not allege that definitive responsibility criteria were misapplied. The protester does allege that the contracting officer did or should have known prior to award that the brand name system offered by ELMED was of German origin. The protester appears to suggest that, under these circumstances, the contracting officer's determination that ELMED could supply a domestic source end product, i.e., that ELMED was responsible, was fraudulent or was made in bad faith. We find that the record does not support this conclusion.

Contracting officials are presumed to act in good faith, and in order to show otherwise a protester must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protester. J. F. Barton Contracting Co., B-210663, February 22, 1983, 83-1 CPD 177.

The protester has submitted extensive materials, including product brochures and copies of correspondence, in an effort to demonstrate that the products ELMED offered to supply are, in fact, West German, and that the contracting officer knew this to be the case. The protester places considerable emphasis on a brochure describing the brand name Martin Norm--Container System. The brochure states that it was printed in the Federal Republic of Germany (West Germany) and lists, in German, the name and address of the company that the protester says actually manufactures the system, Gebruder Martin, of Tuttlingen, West Germany. The specifications in the brochure reference various "DIN" numbers, which the protester says are German regulatory designations. Many of the containers pictured in the brochure show no perforations in the bottom sections, which, says the protester, makes them suitable only for European markets. The model numbers listed in the brochure correspond exactly to the model numbers listed in the IFB, presumably indicating that the contracting activity used the brochure to prepare the IFB. The protester also refers to a meeting held before the IFB

was issued and attended by, among others, the contracting officer and representatives of the protester and ELMED. According to the protester, topics discussed at the meeting included the use of German filter material, the adequacy of German testing, and the size of ELMED's United States inventory. There could have been, says the protester, no doubt on the part of anyone in attendance that both sterilizing systems are manufactured in Germany. Finally, the protester cites a number of written and oral statements by third parties to the effect that the brand name system is German.

We reviewed the brochure describing the brand name system, and although it may suggest that the brand name system is manufactured in Germany, we note that nowhere in the brochure does it specifically identify where the system is manufactured. There is also nothing in the brochure that would preclude the possibility that the system is manufactured, either wholly or in part, in the United States. As to the meeting held prior to the issuance of the solicitation at which it was allegedly clear to everyone in attendance that the brand name system was German, the protester offers only its uncorroborated assertion concerning the collective understanding as to the place of manufacture of the brand name system. This falls short of the high standard of proof required to show fraud or bad faith. In short, from the record before us, we cannot conclude with any degree of certainty that the contracting officer knew at the time of award that the brand name system was a foreign end product and that his affirmative determination of ELMED's responsibility was the result of fraud or bad faith. Rather, even if we were to draw the same inferences from the record as does the protester, the worst that can be said is that the contracting officer's determination of ELMED's responsibility was negligent. We have held, however, that the scope of our review of affirmative responsibility determinations does not extend to cases involving negligence. AMF Incorporated, American Athletic Equipment Division--Reconsideration, 59 Comp. Gen. 90 (1979), 79-2 CPD 344.

The protest therefore is denied.

As indicated at the outset, however, we are concerned over what was actually delivered under the contract, since when a major part of the system was delivered, several of the components were embossed with the words

"Martin-Stainless-Germany." In response to an inquiry from the contracting officer, ELMED provided a breakdown of its price for the entire system. Satisfied that this breakdown established that the system was a domestic end product, the contracting officer accepted the system. We recognize that whether ELMED did, in fact, supply a domestic source end product relates to contract administration, a matter that is not cognizable under our Bid Protest Procedures, 4 C.F.R. Part 21 (1983); Central States Associates, B-210549, February 16, 1983, 83-1 CPD 162. Nevertheless, we are concerned as to how the contracting officer could have reasonably satisfied himself from the breakdown that the system delivered was a domestic end product.

In the case of manufactured articles, a determination of compliance with the Buy American Act requires a two-step analysis: first, whether the end product was manufactured in the United States, and second, whether the cost to the contractor of the domestic components of the end product exceeded 50 percent of the cost of all the components of that end product. See Bell Helicopter Textron, 59 Comp. Gen. 158, 161 (1979), 79-2 CPD 431. In this case, the largest item on ELMED's breakdown was \$66,793.82 for "Labor-Machine shop * * * Forwarding, Overhead expenses, Sales commission, Investment and warranty allowance provided by ELMED INCORPORATED." The breakdown did not indicate how much of the \$66,793.82 was attributable to which of the listed subitems, some of which may not properly be considered on the domestic side of the Buy American Act equation. More importantly, there was no indication that ELMED's breakdown was based on cost, which is the only consideration in a proper analysis under the Act. See Ampex Corporation, *supra*. Under these circumstances, we are recommending that the agency perform a more precise Buy American Act analysis, and in the event it is determined that a foreign end item was supplied, that the agency consider taking appropriate action with respect to the contractor.

for *Harry R. Van Cleave*
Comptroller General
of the United States